A FEW REMINDERS ABOUT CONTRACT CLAIMS AND APPEALS

A recent Armed Services Board of Contract Appeals ("ASBCA") case, *Shavers-Whittle Const., LLC,* ASBCA No. 60025, Feb. 9, 2016, demonstrates all the *wrong* ways to file an appeal based on a claim. Before going through the significant mistakes, here are a dozen reminders, based on the Contract Disputes Act, 41 U.S.C. Chapter 71, §§7101-7109, and FAR 2.101 (definition of "claim") for all federal contractors.

1) A claim must be submitted to a Contracting Officer for a decision.
2) A claim must be in writing.
3) A claim must include a "sum certain" (exact amount) sought by the claimant.
4) A claim must be submitted within 6 years of the accrual of the claim.
5) A claim must be certified if it is for more than $100,000.
6) A claim must be certified by an individual who is authorized to bind the contractor.
7) A Contracting Officer's decision on a claim is final unless the contractor appeals the decision.
8) Failure of a Contracting Officer to issue a final decision within the statutory time frame (60 days, with certain exceptions) is a "deemed denial" of the claim.
9) A contractor may appeal the Contracting Officer's decision (or deemed denial) within 90 days to the agency Board of Contract Appeals or within 12 months to the Court of Federal Claims.
10) Although there are limited exceptions (such as with sponsorship by a prime contractor), subcontractors have no right of appeal.
11) The Contract Disputes Act applies only to express or implied-in-fact contracts, and does not extend to contracts implied-in-law.
12) The Court of Federal Claims and the Boards of Contract Appeals do not have power to grant equitable (injunctive) relieve against the U.S. government or its officers, *except* in bid protest cases at the Court of Federal Claims

Shavers-Whittle had a subcontract to DQSI, LLC, a prime contractor with the U.S. Army Corps of Engineers. The subcontract was for work on hurricane storm damage risk protection systems in New Orleans, LA. In October 2013, Shavers-Whittle wrote to the Contracting Officer informing her that DQSI owed it $499,753.60 under its subcontract, but the letter did not demand payment from the government, nor did it state any particular dollar amount that the government would pay. Nor was the letter accompanied by any certification as required by the Contract Disputes Act. According to the decision, the purpose of the letter was to ask the Corps of Engineers to prevent DQSI from assessing liquidated damages against Shavers-Whittle.

A year an a half later, Shavers-Whittle wrote to the Contracting Officer stating that DQSI and it were in litigation involving "division of the remaining contract dollars" and asserting that DQSI had obtained the contract by fraud, because it was not a certified 8(a) contractor. The letter further stated that under FAR 49.108-8, the Corps had authority to terminate the prime contract,

and settle with the subcontractors. However, once again, Shavers-Whittle did not demand that the government pay any money, or state any particular amount, or include a certification.

One month later, the Contracting Officer wrote to Shavers-Whittle and stated that the project was physically complete, and termination at that time was not in the government's best interest. She encouraged Shavers-Whittle to pursue remedies through Federal or State Courts to enforce the subcontract.

Shavers-Whittle filed an appeal at the ASBCA 60 days later, requesting "voiding of the prime contract and payment of all monies due". The ASBCA dismissed the appeal for lack of jurisdiction, noting the many things in the appeal that did not comply with law:

- An appeal must be filed by a contractor who is a party to a government contract. Shavers-Whittle did not have a contract with the government, was a subcontractor, and invoked no exception to the rule that a subcontractor cannot bring a direct appeal against the government.
- Shavers-Whittle sought injunctive relief to void or terminate a contract, but the Board has no power to issue injunctive relief.
- Shavers-Whittle sought Board jurisdiction over an implied-in-law contract between itself and the government, (asserting that FAR 49.108-8(b), which allows the government to "settle and pay any settlement proposal arising out of the termination of subcontracts," created such an implied-in-law contract) However, the Contract Disputes Act does not cover implied-in-law contracts
- Shavers-Whittle failed to seek a "sum certain" in its letter to the Contracting Officer
- Although over $100,000, Shavers-Whittle never certified its letter as required by the Contract Disputes Act.

It was an unfortunate day for Shavers-Whittle, which, at this point, can only look to state courts to enforce its subcontract with DQSI. And one can only guess if there is a liquidated damages clause in the subcontract, that may be enforced as well.