The Armed Services Board of Contract Appeals (ASBCA) is one of two fora to hear appeals of Contracting Officer Final Decisions (COFDs) (the other being the U.S. Court of Federal Claims). Two recent decisions issued by ASBCA Administrative Judges offer lessons to contractors considering litigation. We thought we'd share them with you.

The first decision involves United Healthcare Partners, Inc. (**ASBCA No. 58123** , April 2, 2013). UHP appealed a Termination for Default (T4D0. UHP was awarded a contract by the Air Force to provide telephonic "Nurse Triage Answering Service" for personnel seeking medical attention. The contract was a firm, fixed-price type valued at $254,259, with an estimated quantity of 19,710 and a unit price of $12.90 per call. The original dispute involved the amount of supporting documentation that UHP was required to provide with its invoices. The Government was concerned that UHP's invoiced call volume did not match governmental records, and demanded that UHP provide a "monthly clinical statistics report" that supported UHP's invoiced call volume. For its part, UHP disputed that such a report was necessary or required by contract terms.

The government began to issue CARs (Corrective Action Requests) and refused to pay submitted invoices. When three months had passed without payment, UHP "suspended" its services. The government responded to that action by issuing a Default Termination, characterizing the T4D as a COFD, which could be appealed. UHP appealed that T4D and demanded that its past due invoices, worth about $71,000, be paid.

But while UHP was free to appeal the T4D, it could not appeal the unpaid invoices. Why? Because it had not filed a certified claim for the unpaid invoices to the Contracting Officer (CO),

and it had not received a COFD. There was nothing to appeal, according to the Judge Page. She wrote—

There is no proof that UHP's demand was properly submitted to the CO for decision, and appellant cannot first assert a claim as part of its complaint. It is 'the claim, and not the complaint, [that] determines the scope of our jurisdiction in this appeal' as a '"CDA claim cannot properly be raised for the first time in a party's pleadings before the Board."' [Citing *American General Trading & Contracting*
.] ... Appellant [UHP] did not submit a $71,659.30 or other CDA claim to the CO for payment of its invoices in question and did not seek a COFD. Neither UHP's 'Request for Fair Compensation' attached to its complaint nor its routine invoices meet the requirements for a cognizable CDA claim.

What lessons can be learned?

First, we noticed that UHP was represented by its CEO. We have railed **in the past** against contractors who do not hire expert attorneys when litigating against the government. Suffice to say, we don't think very highly of them.

Second, let's talk about UHP's tactics. It chose to stop work when its invoices went unpaid. It chose not to file a claim for its unpaid invoices to the Contracting Officer. We consider those choices to have been … *unwise*. If you have a dispute with the government, you are pretty much always going to have to keep working (and paying your staff and your overhead) while the dispute is being resolved. There may be exceptions to that general rule but they aren't worth knowing. (Remember we are not attorneys.) If you want to get your dispute resolved, you don't stop work; instead, you file a certified claim and get a COFD that you can appeal. The faster you do that, the faster you get paid. It's really just about that simple. The path UHP followed was essentially the opposite of the correct course of action.

Finally, let's look at the dispute itself. The government wanted UHP to support the amount of phone calls it was billing for. UHP said such support was not required by the contract. UHP may well have been correct that the contract was silent regarding additional reporting requirements associated with its invoices but, once again, it chose an *unwise* path from a contracting point of view. Another, perhaps wiser, contractor would have generated the reports—especially if it got the invoices paid faster. To the extent that there were additional costs associated with the reports, a savvy contractor could have submitted a Request for Equitable Adjustment (REA) for the cost difference. Had UHP chosen that path, it could have gotten paid and it might have been able to get its contract value increased. Instead, UHP's

course of action led to unpaid invoices, sour customer relationships … and a Termination for Default.

The second recent decision involves Servicios y Obras Isetan S.L. (**ASBCA No. 57584** , April 5, 2013). Servicios y Obras Isetan (SOI) also found its contract terminated, and it also represented itself in litigation. And it also claimed "funds for overhead costs and the return of retained amounts."

The interesting thing here is the nature of the dispute. SOI's dispute did not involve insufficient invoice support. Instead, the CO terminated the contract because SOI allegedly "submitted falsified documentation in order to secure the contract." The allegations were substantiated by the Air Force Office of Special Investigations (AFOSI). Although the word "forgery" was used, Judge Wilson simply found that SOI "misrepresented" key facts "in order to obtain a more favorable evaluation of its proposal."

As was the case with UHP, SOI found its claims for monetary compensation denied because the company had never submitted a certified claim to the Contracting Officer in order to receive a COFD. Further, Judge Wilson found that the contract was "*void ab initio*" because of SOL's misrepresentations. The government argued that SOL's misrepresentations amounted to "fraud in the inducement," but Judge Wilson simply found that SOL "materially misrepresented" key facts, that the government relied on the misrepresentation when deciding to award the contract, and that the government's reliance on the misrepresentation was reasonable. Thus, the contract was voidable and it was voided.

We have dealt before with contractors that have "enhanced" their proposals by making misleading and possibly flat-out untrue statements. It is never---*ever*—a good idea to make demonstrably false statements to government officials. Proposals are not an exception to that rule. We suspect that SOL was lucky to receive the outcome that it did.

Small business contractors often receive contract award opportunities not available to other contractors. However, with respect to contract compliance and contract breaches, they are held to the same standards as are the largest and most experienced contractors. These two contractors learned their lessons the hard way; we trust our readers will learn from the mistakes of UHP and SOL.