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THE GOVERNMENT CONTRACTOR®

Information and Analysis on Legal Aspects of Procurement

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¶ 199 FEATURE COMMENT: The Tortured Claimants Department—A Swifty Summary Of CDA Case Law Developments In The First Half Of 2024—Part II

Last week's edition of THE GOVERNMENT CONTRACTOR included the first half of our ninth biannual case law update, in which we harnessed the lyrical mastery of a certain pop superstar to cast a "*Lavender Haze*" over Contract Disputes Act case law developments from the U.S. Court of Appeals for the Federal Circuit, Court of Federal Claims, Armed Services Board of Contract Appeals, and Civilian Board of Contract Appeals in the first half of 2024. In part I, we discussed decisions dealing with contract interpretation, the difference between requirements contracts and indefinite-delivery, indefinite-quantity contracts, and continuing impacts of the covid-19 pandemic. In this part II, we summarize termination-related decisions, several cases dealing with jurisdictional questions, and finally, a compendium of shorter summaries of don't-miss decisions. We hope this content gives you some reprieve from the "*Cruel Summer*" heat, while not giving us "*some regrets*" to bury in "*Florida!!!*"

Terminations (*"How Did It End?"*)—Even if post-termination, the parties are *"never, ever getting back together,"* the variety of terminations-related case law is a testament to the difficulty of just "*shaking off*" the early end of a contract. Three noteworthy cases addressed atypical termination scenarios in the first half of 2024.

A T4D "Ricochets" (and Moots an Ongoing Declaratory Judgment Action): In *North Wind Construction Servs., LLC*, ASBCA 63548 et al., 2024 WL 900839 (Feb. 13, 2024), the Board held that a default termination by the Government moots ongoing actions seeking contract interpretations. The contractor had filed a non-monetary claim for contract interpretation to the contracting officer seeking confirmation that its proposal was part of the contract. After the CO denied those claims, and while an appeal of those decisions was before the Board, the Government terminated the contract for default. The Government then moved to dismiss the declaratory judgment appeal as moot. The Board granted the Government's motion as there were no future performance costs to be avoided once the Government terminated for default: "Actions seeking only a declaration of a contract's terms are potentially proper when additional contract performance remains to be accomplished, the costs of which might be affected by the ruling." The Board noted that dismissal of the declaratory actions did not prevent the contractor from separately pursuing other appeals concerning the default termination or other delay and monetary damages claim; to the extent the contract interpretation issues may be relevant to those matters, the Board would decide that issue then.

"Tell Me that It's Not My Fault": In *Williams Bldg. Co., Inc. v. Dep't of State*, the Board clarified that the Government cannot allege breach as a defense to a termination for convenience. CBCA 7147, 2024 WL 1099788 (Mar. 8, 2024). This case arose from the termination for convenience of a construction contract for the consulate in Wuhan, China in February 2020 due to the outbreak of the covid-19 pandemic. The contractor appealed the Government's non-response to its termination settlement proposal to the CBCA, where the Government asserted prior breach as a defense justifying its refusal to pay certain termination costs (namely that the contractor "falsely certified" that it had paid certain amounts of money to its subcontractors that the Government had reimbursed).

The contractor moved for partial summary judgment, arguing the defense effectively asserted a counterclaim for fraud, over which the Board lacks jurisdiction. The Board held that the Government cannot legally assert the contractor's failure to pay three subcontractors amounts to a breach of contract barring recovery of any termination settlement costs: "Once [the Department of State Office of Overseas Building Operations (OBO)] terminated the contract for convenience, [Williams Building Co. (WBC)] became entitled to recover the allowable costs that it can show it incurred in performing the contract." That is, "[i]f OBO had wanted to hold WBC responsible for prior breaches of that contract, it should have terminated the contract for default." The Government's "decision to terminate for convenience, rather than default, effectively precludes OBO from treating past contractor improprieties as material breaches of contract for which it can obtain relief." The Board clarified that the contractor will have to present evidence that it incurred these costs (i.e., that it paid its subcontractors) in order to succeed in its appeal, but "there will be no need for the Board to make findings about fraud" because there is no need to evaluate the contractor's "subjective intent" in determining incurrence. Thus, the Board denied the contractor's motion for summary judgment and declined to prevent consideration of evidence regarding the Government's "allegations of past overpayment."

"Is It Over Now?" (Not yet …): We have written about the dispute in *JKB Solutions & Servs., LLC v. U.S.* on several occasions as it has bounced from the COFC to the Federal Circuit and back to the COFC on remand. The contractor sought damages, alleging that the Government prevented it from performing instructor services and refused to pay for services. The Government countered that even if it had breached the agreement, any such breach would convert to convenience termination, which limited the plaintiff's damages. The contractor refuted that position, contending that the Army acted in bad faith and abused its discretion, thereby preventing reliance on the termination for convenience clause. Earlier this year, the Court found genuine issues of material fact precluded summary judgment on whether the Army breached the contract, and whether the Army acted in bad faith. 170 Fed. Cl. 241, 249 (2024).

First, the Court rejected the contractor's argument that because the Government had raised the defense of a constructive termination it had conceded any breach. The Court observed, as discussed in the prior COFC decision, that the contract contained a latent ambiguity about the number of classes the Army ordered, and thus the issue of whether the Government had breached was "not amenable to summary judgment." Id. at 250.

Second, with regard to the constructive termination, the Court began by noting that this doctrine is a "legal fiction which imposes the standard limitations of the termination clause upon a plaintiff even though the termination was never actually ordered by the [CO]." Id. at 250 (citing *Kalvar Corp., Inc. v. U.S.*, 543 F.2d 1298, 1306 (Ct. Cl. 1976)). The COFC found that the contract, which used standard form 1449 and incorporated Federal Acquisition Regulation 52.212-4 and FAR 52.212-5, was a commercial services contract, and agreed with the Government that the Government could use the termination for convenience clause found in FAR 52.214-4(l) to support its constructive termination defense. Id. at 252. Although the contractor argued that the CO made an incorrect determination of commerciality, the Court found that the contractor waived this argument by not previously protesting or otherwise objecting to the solicitation terms which on their face evidenced it was commercial services buy. Id. at 252–53. Alternatively, the Court found that FAR 52.249-2,

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a mandatory clause for a fixed price contract, was applicable under the Christian Doctrine "if the Contract were to be treated as a non-commercial contract." Id. at 255.

Finally, recognizing that even with a proper termination for convenience clause, the Government could not avail itself of the constructive termination defense if the Army acted in bad faith or abused its discretion by not assigning cases, the Court found that genuine issues of material fact precluded summary judgment. The Court explained:

> If it is determined that the Army was required under each task order to assign fourteen classes to JKB and failed to do so without a reasonable basis, this would constitute an abuse of discretion. If the Army issued each task order intending to purchase fourteen classes from JKB while knowing that it would not assign the classes to JKB and that it would instead use its own instructors to meet its requirements, this would constitute bad faith. In both circumstances, the government would not be able to resort to the constructive termination for convenience doctrine to avoid liability for breach of contract.

Id. at 256–57.

"Who's Afraid of Little Ol' [Jurisdictional Questions]?"—The constantly evolving landscape of jurisdictional quandaries can leave the most experienced (or "*22*" year-old-at-heart) practitioner "*happy, free, confused, and lonely at the same time*." Tribunals made several important jurisdictional rulings in the first half of 2024 that simplified some issues but might leave an observer with the impression that the only unifying principle is "*Every time you call me crazy, I get more crazy.*"

"Close Enough to Hope You Couldn't See" [Who I Was Contracting with]: In another claims dispute that we have discussed previously, *Avue Techs. Corp. v. Sec'y of Health & Human Servs.*, the Federal Circuit reversed a CBCA decision holding that it lacked jurisdiction because the contract under which the plaintiff, a third-party software reseller, sought recovery was a license agreement and not a procurement contract. 96 F.4th 1340 (Fed. Cir. 2024); 66 GC ¶ 72. Based on an oral argument in which both the licensor and the Government agreed that the licensor argued alternatively to the Board that the license agreement was part of a Federal Supply Schedule (FSS) contract that the software licensor's reseller had with the Government, and the Government conceded that the FSS contract was a procurement contract, the Federal Circuit vacated the Board's decision and remanded. The Court held that Avue's allegation that it is a party to a procurement contract (i.e., the FSS contract or a task order issued thereunder) with the Federal Government that incorporates its license agreement is a nonfrivolous allegation of a procurement contract sufficient to establish the Board's jurisdiction. Id. at 1346 (citing *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011); 53 GC ¶ 346). The mandate required the Board to treat "as a merits issue the matter of whether Avue is a party to—or otherwise has enforceable rights pursuant to, for example by being in privity with Carahsoft—the conceded procurement contract (i.e., the [master subscription agreement (MSA)] plus the FSS or the Task Order)." Id.

"Back into the Hedge Maze …": On July 1, 2024, the CBCA issued its decision on remand, CBCA 8087, finding that Avue had no enforceable rights under its reseller's FSS contract, and thus because the license agreement is not a procurement contract, the CBCA held again that it lacked statutory jurisdiction to address the subject matter of Avue's appeals, or if not a jurisdictional issue, the Board "denied relief on the merits because the MSA is not a procurement contract under which the CDA authorizes us to grant relief." CBCA 8087(6360)-REM, 8088(6627)-REM, 2024 WL 3311722 (July 1, 2024). The CBCA observed that Avue was not a contractor named in its reseller's contract nor did Avue sign a contract with General Services Administration or the ordering agency, the Food and Drug Administration. Nor did the Board find any evidence, nor apparently did Avue present any, showing "mutual intent between relevant parties to make Avue a joint or several contractor under either Carahsoft contract." Rejecting Avue's argument that the Board had jurisdiction because the license agreement was incorporated into the FSS contract, the CBCA repeated the same refrain from its earlier decision: "No court or board of which we are aware has held that a party other than the prime contractor can establish

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CDA jurisdiction by relying on a separate agreement that relates to a CDA procurement contract. We will not be the first." This is not the "*The Last Time*" we expect to write on this dispute; a Federal Circuit appeal is likely to "*Begin Again,*" so watch this space.

"Washed up and Ranting about the Same Old Bitter Things …": The Federal Circuit has deemed a number of baseline Government contracts concepts non-jurisdictional in recent years, See, e.g., *ECC Int'l Constructors, LLC v. Sec'y of Army*, 79 F.4th 1364 (Fed. Cir. 2023) (finding the sum certain requirement to be non-jurisdictional); 65 GC ¶ 239; *CACI, Inc.-Fed. v. U.S.*, 67 F.4th 1145, 1151 (Fed. Cir. 2023) (holding whether a protester is an "interested party" for standing purposes under the Tucker Act is non-jurisdictional); 65 GC ¶ 138; *M.R. Pittman Grp., LLC v. U.S.*, 68 F.4th 1275, 1280 (Fed. Cir. 2023) (finding the *Blue & Gold* waiver rule to be non-jurisdictional); 65 GC ¶ 165. But in *Avant Assessment, LLC v. U.S.*, the COFC declined to declare the presentment requirement non-jurisdictional. 171 Fed. Cl. 212 (2024). After the Court declined to dismiss a contractor's appeal on res judicata grounds (as the issues litigated at the ASBCA had a different factual basis than the contractor's COFC complaint), *Avant Assessment, LLC, v. U.S.,* 159 Fed. Cl. 632, 639 (2022); 64 GC ¶ 145, the Government again moved to dismiss, asserting that if the issues were sufficiently different to avoid res judicata, then they were so distinct as to not have been presented to the CO for decision, depriving the Court of jurisdiction. 171 Fed. Cl. at 214. The Court agreed. The Court observed that the CDA requires "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision," id. at 216 (citing 41 USCA § 7103(a)(1)), and that the "Federal Circuit has confirmed numerous times that this provision is jurisdictional." Id. While the Court also noted "the Federal Circuit has taken a fresh look at a number of its prior jurisdictional holdings and determined that those cases are now properly considered under Rule 12(b)(6) for failure to state a claim upon which relief may be granted," the Court held that the CDA's presentment requirement remained jurisdictional until the Circuit ruled otherwise. Id. at 216. Which the Federal Circuit will have occasion to do; Avant filed a notice of appeal on July 3, 2024.

"You Need to Calm Down": In *Sikorsky Aircraft Corp. v. U.S.*, the Court held that the Government cannot expand the scope of its claim against the contractor by way of broad discovery requests. 170 Fed. Cl. 257 (2024). When the Government requested production of documents related to 155 separate independent research and development projects, the contractor objected, stating that this request went "beyond the operative facts of the 2020 [CO's final decision]" and therefore, was "beyond the scope of the claim at issue in this action," which dealt with one or at most two such projects. Id. at 260. The contractor attempted to counter this overreach by moving to dismiss unasserted, future Government claims "anticipated and understood by reference to the government's discovery request." Id. at 261. The Court denied the contractor's motion, explaining it could not dismiss claims that were not presently before it, but that did not leave the contractor without relief. Instead, the Court construed the contractor's request as one for a protective order, which given the breadth of the Government's requests, the Court deemed appropriate given that permitting the requests would allow "the government to make a 'profound alteration" in the scope of its claims." Id. at 265. The Court reasoned that the Government could not expect "conclusory assertions regarding general alleged non-compliance" in an underlying CO's final decision to "expand[] the scope of claims at issue in the discovery context from a few projects to 155, based solely on vague and ambiguous references included in the COFC." Id. at 265–66. Doing so would "impermissibly deprive the contracting officer of the opportunity to make an initial independent assessment of compliance for each distinct project, as the statutory purpose of the CDA requires." Id. at 266.

"I Did Something Bad …": Lastly, the Court held it lacked jurisdiction to enter an injunction against a contractor's debarment in *ASG Sols. Corp. v. U.S.*, COFC No. 23-1029, 2024 WL 3084021 (June 18, 2024). After the Navy terminated the contract for default, the contractor appealed the termination to the COFC, which granted the Navy's motion for summary judgment and held the termination complied with law.

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170 Fed. Cl. 485 (2024). The contractor appealed to the Federal Circuit, and while the appeal remained pending, the Navy proposed to debar the contractor from all federal contracts, citing the decision of the Court in the litigation as a basis. The contractor then requested the COFC stay its judgment (which had been entered) denying and dismissing the challenge to the default and enjoin the debarment until the Federal Circuit resolved the appeal. The Court denied the contractor's request, reasoning that even were it to stay its judgment, the fact of the judgment would remain, and the Navy could still rely on it in seeking debarment. That is: "A stay of the judgment would be ineffective in granting ASG the relief it seeks, and the Court will not indulge a nullity." 2024 WL 3084021 at *1. Moreover, the Court cited Federal Circuit precedent that Tucker Act jurisdiction does not permit review of the "propriety of an agency's decision to debar a contractor ... ; such a challenge must be brought in district court under the Administrative Procedure Act." Id. at *1 (quoting *IMCO, Inc. v. U.S.*, 97 F.3d 1422, 1425 (Fed. Cir. 1996); 38 GC ¶ 521). This is because the "connection between the breached contract and future procurement contracts [is] merely tangential." Id. at *3 (quoting *Schickler v. Davis*, 10 F. App'x 944, 945 (Fed. Cir. 2001)). Consequently, the Court "only has jurisdiction over claims brought under FAR 9.4 'to the extent that claims arose under the court's bid protest jurisdiction.' " Id. at 2 (citing *Allen v. U.S.*, 140 Fed. Cl. 550, 563 (2018).) The plaintiff, however, filed a CDA claim without presenting any such claim to the CO (indeed, it could not have included a post hoc debarment in the claim that formed the basis for the original CDA action). The Court thus lacked jurisdiction to provide the contractor's requested relief.

"Dear Reader … Make Sure You Don't Miss"—Even if "*time slows down, whenever [claims case law is] around*," at the risk of exhausting even the most dedicated fans, we conclude this article with a few shorter summaries that will hopefully take closer to "*twenty seconds*" to digest than "*twenty years*."

- *"Your time is running out, and they said, 'Speak Now.'* " In *Strategic Tech. Inst., Inc. v. Sec'y of Def.*, the Federal Circuit held that the Government's claim for repayment based on overstated indirect costs accrued when the contractor submitted an indirect cost rate proposal, not when the contractor initially failed to submit a rate proposal. 91 F.4th 1140 (Fed. Cir. 2024); 66 GC ¶ 55. "The event that fixed STI's liability is the submission of inadequate cost proposals, not STI's failure to submit proposals on time." Id. at 1144. Only upon review of these proposals did the Government have a basis to assert that the costs contained therein were not allowable.

- *"I can fix [the lack of notice] (No really I can).*" In *Reliability and Performance Techs., LLC v. U.S.*, the Court denied the Government's motion for summary judgment against a contractor's claim for payment of indirect costs due to noncompliance with the Limitation of Funds clause (FAR 52.232-22). COFC No. 22-13, 2024 WL 2478320 (May 23, 2024). The Court held the contractor's failure to provide notice under the Limitation of Funds clause was not an absolute bar to the contractor's claim, distinguishing case law where the contractor controlled the scope and costs of work. The Court reasoned that the nature of the particular contract—which the Government repeatedly modified, both as to scope of work and funding ceiling—potentially excused the contractor's non-compliance with the Limitation of Funds clause's notice requirement, and that the Government potentially breached the Allowable Cost and Payment (FAR 52.216-7) clause by not promptly negotiating indirect rates, which could have contributed to the lack of notice.

- *"I laugh in your face and say you're not [a covered price increase], I'm not [paying].*" In a matter of first impression, in *Didlake, Inc. v. Gen. Servs. Admin.*, the CBCA found that a contractor was not entitled to a price increase for a local county minimum wage increase under the terms of its contract. CBCA 7769, 7911, 2024 WL 1814717 (April 23, 2024). The CBCA reasoned that under the Service Contract Act and now the Service Contract Labor Standards, contractors must pay service workers prevailing wage rates

set forth in either a Department of Labor wage determination or an applicable collective bargaining agreement. In the event either type of wage rate increases during a contract performance period, FAR 52.222-43 entitles the contractor to a corresponding price increase. However, the CBCA found this FAR clause inapplicable when the increase arose from an increase in the county's minimum wage, and rejected the contractor's argument that the standard "compliance with laws" provision rendered payment of local minimum wages a requirement. The contractor's "obligation to abide by the county minimum wage—or any number of other Federal, State, or local requirements—exists by virtue of its choice to conduct business in a particular field of business and in geographic areas subject to a local minimum wage," and not by virtue of its contract with the U.S. Government.

- "*That's nice, I'm sure that's what's suitable.*" In *Peraton Inc. v. U.S.*, the Court rejected the Government's dismissal argument that the contractor failed to state a claim because its breach of express and implied-in-fact contract counts did not identify a Government representative having actual authority. COFC No. 23-1539, 2024 WL 2106412 (May 10, 2024). The Court reasoned that the Government sought "an additional pleading requirement" beyond a nonfrivolous allegation of contract contrary to Federal Circuit law; "the existence of a binding implied-in-fact contract, like an express contract, is a non-jurisdictional issue to be decided on the merits." Id. at *2. The Court likewise rejected the Government's motion to dismiss the count seeking quantum meruit relief under an implied-in-fact contract theory, finding that it had jurisdiction to "compensate a contractor on a quantum valebant or quantum meruit basis '[w]here a benefit has been conferred by the contractor on the Government in the form of goods or services, which it accepted.' '' (quoting *United Pac. Ins. Co. v. U.S.*, 464 F.3d 1325, 1329–30 (Fed. Cir. 2006); 48 GC ¶ 348).

- *"Now we have Bad Blood."* In *Red Bobtail Transp.*, the Board invalidated a contractual deduction scheme as unenforceable penalties. ASBCA 63771, 2024 WL 2873960 (May 23, 2024). The Government argued the deductions were negative performance incentives permitted by FAR 37.102 and FAR 16.402-2(b) and were not liquidated damages "intended to compensate the government for losses." The Board disagreed, observing that "[p]erformance incentives, when used, must correspond to the performance standards [] in the contract." Because the challenged deductions bore no relation to the stated performance standards, and the Government failed to provide any other support for its negative incentives, the Board held they constituted unenforceable penalties.

- *"It was all by design, 'cause I'm a mastermind."* In a longstanding dispute arising out of a contract to furnish and deliver food in Afghanistan, the Board found in *Supreme Foodservice GmbH* that a release in False Claims Act settlement prevented the Government from downwardly adjusting a contractor performance assessment report (CPAR). ASBCA 61370 (Mar. 25, 2024), available at *www.asbca.mil/Portals/143/Decisions/2024/61370%20Supreme%20Foodservice%20GmbH%203.25.24%20Decision%20%20Published%20PO%20Decision.pdf?ver=8JjA9TDhNYUwRx6MJAoLvA%3D%3D*. In 2014, the contractor pled guilty to fraud and agreed to settle a related FCA case. The settlement agreement contained a broad release from "any civil or administrative monetary claim the United States has for the Covered Conduct under … the Contract Disputes Act." Nearly three years later, the Government changed the CPAR ratings the contractor received for its work under the contract to "would not award" as part of a final decision (that also sought to recoup additional purported overpayments). When the contractor appealed, the Board found that the Government had released any claims arising from the fraud covered by the FCA settlement agreement—to include both its monetary claim and the CPAR change: "the CO made it very clear in her deci-

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> sion that she was changing the CPAR ratings due to the Covered Conduct."

We were "*Enchanted*" to provide this case law summary. Even if it doesn't leave you "*Say[ing] Don't Go*", we hope it didn't ruin our "*Reputation*." Yours, "*Forever and Always*"….

This Feature Comment was written for The Government Contractor by* Amanda Sherwood *and* Kara Daniels*. Amanda is counsel and Kara is a partner in the Government contracts practice at Arnold & Porter. They specialize in counseling, litigating and resolving disputes, and provide thought leadership to federal and state government contractors and grantees. The authors thank associate Kyung Liu-Katz and summer associate Adrienne Jackson for "making the friendship bracelets," or, more accurately, their research assistance.