FEDERAL CLAIMS BAR ASSOCIATION

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Summarizing recent rulings from the United States Court of Federal Claims and United States Court of Appeals for the Federal Circuit at 717 Madison Place, NW

WHAT'S INSIDE

MESSAGE FROM THE EDITORS-IN-CHIEF

We would like to thank all the Inside 717 editors and for your contributions to the current issue. Without you, this publication would not be possible.

If you are ever interested in joining the editorial board, please let us know. And, as always, feel free to share any ideas or comments. You may reach us at Amanda.Tantum@usdoj.gov or Sgrigsby@bsfllp.com. Thank you.

COURT PROCEDURE

Court Declines to Dismiss Breach of Contract and Breach of Implied Duty of Good Faith and Fair Dealing Claims In NASA Patent Licensing Dispute, Citing Remaining Factual Questions

Spectre Corp. v. United States, No. 16-932C, ___ Fed. Cl. ___ (June 30, 2017) [Smith, S.J.]

In this case arising under two National Aeronautics and Space Administration ("NASA") contracts related to certain silicon-carbide sensor technology, the Court declined to dismiss plaintiff's allegations of breach of contract and breach of the implied covenant of good faith and fair dealing, concluding that further factual development was necessary.

Spectre alleged that NASA breached two contracts to support the commercialization of NASA's patented silicon-carbide sensor technology, one of which granted Spectre an exclusive license to practice the patents. The Court found that it lacked sufficient facts, on a Rule 12(b)(6) motion, to resolve the government's arguments that Spectre had failed to meet a condition precedent to NASA's performance under one of the agreements and that express disclaimers in the licensing agreement precluded Spectre's claims. The Court also determined that there were a number of questions of fact regarding Spectre's allegation that NASA had breached the implied duty of good faith and fair dealing, and that discovery was therefore warranted.

Read the decision here.

Court Awards Enhanced Equal Access to Justice Act ("EAJA") Fees on Account of Agency's "Highly Irregular" Conduct

Starry Associates, Inc. v. United States, 131 Fed. Cl. 208 (2017) [Bruggink, J.].

In July 2016, the Court sustained a post-award bid protest, enjoining the Department of Health and Human Services ("HHS") from cancelling a solicitation for financial management services. After Starry, the incumbent, prevailed in multiple GAO protests, HHS opted to cancel the solicitation. Although the Court noted that agencies typically have broad discretion to cancel solicitations, the Court enjoined the cancelation on the ground that the agency's stated rationale for cancellation was "completely illusory" and was "devoid of any documentation" of the agency's needs. The court, additionally, barred three procurement officials, including a former employee of the awardee, from "any subsequent agency actions regarding this solicitation." This opinion was highlighted in a previous edition of Inside 717, and is available here.

After prevailing on the merits, Starry moved for award of attorney fees and costs. Under ordinary circumstances, EAJA provides for a recovery of attorney fees at a statutory rate of $125, which can be adjusted upward only under two circumstances: (1) if the court finds that a cost of living adjustment ("COLA") is warranted, and (2) if some other "special factor" warrants a higher rate. Plaintiff sought both the COLA and enhanced fees, arguing that HHS misconduct qualified as a "special factor" for EAJA purposes. The Court agreed. Finding that the agency's conduct "constitute[d] an egregious example of intransigence and deception," the Court concluded that "plaintiff is entitled to a special factor adjustment of the fees recovered at the rates actually billed." The Government has appealed this decision to the United States Court of Appeals for the Federal Circuit (Case No. 17-2148).

Read the decision here.

BID PROTEST

Court Denies Motion To Enjoin Award of Contract To Provide Computer Hardware Security to the United States Marine Corps

Iron Bow Technologies, LLC v. United States et al., No. 17-603C, ___ Fed. Cl. ___ (June 1, 2017) [Firestone, S.J.]

The Court denied a motion for a temporary restraining order and preliminary injunction in a post-award bid protest challenging the United States Marine Corps Systems Command's ("Marine Corps") award of a contract to provide computer security hardware and related services.

Plaintiff sought to enjoin the Marine Corps' award to defendant-intervenor, Alamo City Engineering Services, Inc., pending resolution of its protest, in which it contested the Marine Corps' technical and price evaluations of its proposal. Applying the four-factor test governing requests for preliminary injunctions, the Court held that plaintiff was not likely to succeed on the merits of its claims, citing plaintiff's failure to provide sufficient information regarding changes made to its technical proposal. The Court also found that plaintiff would not suffer irreparable harm because the protest could be resolved before it would lose the opportunity to perform the contract. Also, citing the statutory requirement to "give due regard to the interests of national defense and national security" under 28 U.S.C. § 1491(b)(3), the Court found that national security concerns raised by the government outweighed the limited harm to plaintiff. The Court relied on declarations submitted by the government asserting that delaying performance would result in a significant risk to the integrity of the Marine Corps' computer network to the detriment of national security. The Court scheduled briefing on the merits.

Read the decision here.

Court Rules that Commencement of Corrective Action by Agency Does Not Moot Bid Protest Suit

Continental Service Group, Inc., et al. v. United States, No. 17-449, 2017 WL 2590531, at *1 (Fed. Cl. June 14, 2017) [Braden, C.J.].

In December 2015, the Department of Education ("DOE") issued a solicitation for the award of multiple IDIQ contracts for the collection of defaulted student loans. The agency awarded contracts to seven awardees. Plaintiff was not an awardee. After a series of GAO bid protests, plaintiffs filed post-award bid protests in March and April 2017 in this Court, challenging DOE's determination that they were not responsible contractors. The Court granted a temporary restraining order shortly thereafter. In May 2017, DOE filed a notice of corrective action, informing the Court that it would afford offerors the opportunity to submit new proposal materials. The government then moved to dismiss the protests as moot.

Plaintiffs opposed the motion to dismiss, expressing concern that the agency planned to transfer work originally allocated to the solicitation to other contracting vehicles, thus diluting the value of any potential award. The government, in response, argued that a case becomes moot if the questions originally in controversy between the parties are no longer at issue. According to the government, this case was moot because the non-responsibility determinations were no longer in controversy.

The Court ultimately denied the motion to dismiss, rejecting the government's proposed standard as overly narrow. According to the Court, a case is not moot unless the corrective action "completely and irrevocably eradicate[s] the effects of the violation[s]" alleged by plaintiffs.

Read the decision here.

GOVERNMENT CONTRACTS

Court of Federal Claims Relies Upon Kingdomware Technologies To Conclude That VA Must Conduct A Rule of Two Analysis Before Entering Into New Contracts For Products And Services On The AbilityOne List

PDS Consultants, Inc. v. United States, No. 16-1063C, 132 Fed. Cl. 117 (May 30, 2017) [Firestone, J.].

In this bid protest, the Court of Federal Claims considered which of two procurement priorities takes precedence for procurements by the Department of Veteran's Affairs (VA): The "Rule of Two" requirement in the Veterans Benefits Act of 2006 that VA determine whether two or more veteran-owned businesses are capable of performing the work, and, if so, restricting competition to such businesses; or the requirement of the Javits-Wagner-O'Day Act that federal agencies purchase goods and services from non-profits employing blind or severely disabled people when those goods or services are on the "AbilityOne List."

The Court of Federal Claims held that VA's first priority is the preference for veteran-owned small businesses, citing the Supreme Court's holding in *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016), that the Rule of Two is mandatory, not discretionary. Drawing a parallel to the Supreme Court's conclusion in Kingdomware that there was no exception to the Rule of Two for the Federal Supply Schedule system, the Court found that the Rule of Two did not have an exception for the AbilityOne program. Finally, the Court reasoned that because the Veterans Benefits Act specifically applies only to the VA for all VA procurements, the Veterans Benefits Act took precedence over the Javits-Wagner-O'Day Act, which is a more general procurement statute. The Court thus enjoined VA from entering into new AbilityOne eyewear contracts unless it performs a Rule of Two analysis.
Read the decision here.

Court Rejects Protest Challenging Scope of Corrective Action; Concludes that Agency Reasonably Revised Solicitation Criteria After Protest

Harmonia Holdings Group, LLC v. United States, No. 17-86C, 132 Fed. Cl. 129 (May 23, 2017) [Williams, J.]

In this pre-award protest, the Court turned away a challenge to agency corrective action and in the process illuminated the contours of an agency's ability to correct its own mistakes. In 2016, the Small Business Administration ("SBA") sought to acquire services related to its Disaster Credit Management System, which "handles custom report requests initiated by the U.S. Congress, the White House, and other stakeholders within SBA" about loan-processing operations for home and business loans to rebuild

property damaged by qualifying disaster events. After evaluation, the agency selected Java Productions, which prompted Harmonia Holdings to file a protest at the Government Accountability Office ("GAO"). While rejecting the allegations in part, the agency agreed to take corrective action by, among other things, amending the Request for Quotations ("RFQ") to clarify requirements for Key Personnel. Accordingly, GAO dismissed the protest as academic and the agency re-issued the RFQ with additional requirements and detail. But shortly before submissions in response to the revised RFQ were due, Harmonia filed a protest in the Court, arguing that the corrective action was problematic in two ways: (1) it amended the RFQ rather than simply reevaluating proposals against the original RFQ and (2) it showed bias in favor of Java.

The Court rejected both arguments. Citing the broad discretion granted to agency corrective action and rejecting the notion that the agency must "admit an error" before deciding to undertake corrective action, the Court concluded that it was reasonable for the agency here to amend the solicitation "to ensure that it could obtain key personnel with sufficient education and experience for successful task order performance." This revision was justified because of the agency's "stated objective" to "obtain the highest technical quality for the agency's highly unpredictable workload." The Court likewise rejected Harmonia's argument that "in taking corrective action, the agency intended to direct the award to [Java]" because, according to the Court, Harmonia offered nothing but "specula[tion]" not the requisite "almost irrefragable proof" required to sustain a bad-faith claim. Read the decision here.

PAY

Court Dismisses *Pro Se* Claim For Increased Combat-Related Special Compensation Because Monetary Relief Is Unavailable

Porter v. United States, 131 Fed. Cl. 552 (Apr. 18, 2017) [Kaplan, J.].

In this military pay claim, a former United States Navy servicemember raised, among other claims, a challenge to a Board for Correction of Naval Records decision, which declined to correct his service records to reverse the reduction of plaintiff's rating for combat-related special compensation ("CRSC") from 50 to 40 percent. Following a remand, the government renewed its motion to dismiss the complaint, or, in the alternative, for judgment upon the administrative record.

The Court granted the government's motion to dismiss the CRSC challenge, finding that plaintiff failed to meet his burden of establishing the Court's jurisdiction because he did not identify a money-mandating source of law. The Court noted that that the military disability retirement statute, 10 U.S.C. § 1201, is money-mandating, but explained that plaintiff did not request monetary relief. The Court added that, even if plaintiff had sought money damages, such relief would be unavailable. The Court explained that, although plaintiff had executed a waiver of disability retirement in order to receive Department of Veterans Affairs ("VA") disability compensation, pursuant to 10 U.S.C. § 1413a, a veteran may receive such compensation in addition to VA disability compensation. The Court, however, found that plaintiff was already receiving the statutory maximum in CRSC payments for a veteran of his rank and years of service. Thus, plaintiff's CRSC payments would not increase even if he received a higher disability rating.

In a footnote, the Court noted that the government also moved to miss plaintiff's CRSC claim because the Court does not possess jurisdiction to entertain challenges to VA's disability benefits decisions. The Court noted that, to the extent that this claim could be construed as a challenge to the VA ratings that form the basis for calculating CRSC, it did not possess jurisdiction to adjudicate the issue. Plaintiff has appealed this decision to the United States Court of Appeals for the Federal Circuit (Case No. 17-2298).

Read the decision here.

TAX

U.S.-Ireland Tax Treaty: Gambling Winnings Not Tax-Exempt for Nonresident

McManus v. United States, 130 Fed. Cl. 613 (Mar. 3, 2017) [Firestone, J.].

Plaintiff sought a refund of $5.2 million of tax withheld on gambling winnings that he earned in the United States in 2012 during a three-day backgammon match. Plaintiff argued that his gambling winnings were exempt from tax under the U.S.-Ireland Tax Treaty, based on a claim that he qualified as a "resident of a Contracting State" under Article 4 of the Treaty. Plaintiff argued that, even though he was not a resident of Ireland under local Irish tax law and did not pay Irish income taxes in 2012, he was a "resident of a Contracting State" because he had paid an Irish domicile levy of €200,000 in the year at issue. Resolving cross-motions for summary judgment in the Government's favor, the Court rejected plaintiff's argument. In interpreting Article 4, the Court consulted the Commentary on the Organization for Economic Co-operation and Development (OECD) Model on which the U.S.-Ireland Tax Treaty was based. Based on the OECD Commentary, the Court held that a person must be subject to "comprehensive" or "full" liability to tax in order to qualify as a "resident of a Contracting State," and that the Irish domicile levy was not a full or comprehensive tax. The Court also recognized that it must consider the "shared understanding of treaty parties when construing a tax treaty." In a letter responding to a query by the U.S. Competent Authority, Ireland Revenue had stated its view that the payment of the domicile levy alone does not make an individual a resident of Ireland under Article 4 of the Treaty. The Court relied on that letter as further support for its interpretation of the tax treaty.

Read the decision here.

Section 6621(d) Interest Netting: A Parent-Corporation's Foreign Sales Corporation Subsidiary Is Not the "Same Taxpayer" as the Parent-Corporation for Interest-Netting Purposes

Ford Motor Co. v United States, -- Fed. Cl. --, 2017 WL 2334432 (May 30, 2017) [Lettow, J.].

Ford sought over $20 million based on a claim that it is entitled to "net" overpayment interest on one of its tax accounts with underpayment interest on eight tax accounts of a subsidiary, Ford Export Corporation, a foreign sales corporation ("FSC"). Ford argued that it is the "same taxpayer" as Ford Export Corporation because the FSC lacked economic substance and, as a result, its separate existence should be disregarded. The Court rejected Ford's arguments, holding that "Ford and Export are separate entities that should be treated accordingly." The Court held that the activities performed by the FSC "demonstrate that it maintained substance and engaged in business functions." The Court further held that, because the conduct performed by the FSC "fell squarely within the [FSC] scheme intended by Congress," the FSC's existence was "not analogous to a 'sham' entity that is organized to impermissibly avoid tax obligations and undermine congressional intent."

Read the decision here.

IRS Levies: Complaint Dismissed for Lack of Subject Matter Jurisdiction and Mootness

Kiselis v. United States, 131 Fed. Cl. 54 (Mar. 20, 2017) [Williams, J.].

Plaintiff sought a refund of over $500,000 relating to two IRS levies of assets from his retirement accounts after he failed to file a tax return for tax year 2000 and failed to pay the taxes assessed by the IRS via a substitute federal income tax return. The Court dismissed plaintiff's claim as to one of the two levies for lack of subject matter jurisdiction because he had not filed a valid tax return representing an "honest and genuine endeavor" to provide tax information where he had failed to provide, in the form of a Schedule D, information known to him regarding third-party financial distributions. The Court further noted that even had the claim been valid, recovery of the sums at issue would have been barred by the "look-back" provision of § 6511(b)(2)(A). In addition, the Court found that his claim was moot as to the second levy because those monies had already been refunded to him. Finally, the Court held that to the extent plaintiff's claim included a sum sought as damages, the Court of Federal Claims lacked jurisdiction.

Read the decision here.

VACCINE

Court Finds That Special Master Did Not Err In Citing A Factual Finding From A Different Test Case In The Omnibus Autism Proceedings

Bruce Anderson and Donna Anderson, as Parents of R.A., a Minor v. Secretary of Health and Human Services, No. 02-1314V, 2017 WL 1787975, (Fed. Cl. May 5, 2017) [Braden, C.J.].

Petitioners in this case moved for review of Special Master Brian H. Corcoran's decision denying entitlement to compensation under the Vaccine Act, 42 U.S.C §§ 300aa -1 to – 34. The underlying matter contains extensive procedural history and dates back to 2002, when the petitioners filed a short-form petition on behalf of R.A. in the Omnibus Autism Proceedings ("OAP").

During the course of the OAP, this case was selected as a "test case" for the third of three theories of "general causation" between vaccines and autism spectrum disorder that the Petitioners' Steering Committee ("PSC") pursued. However, by 2008, the PSC abandoned the third theory of causation, and petitioners elected to remain in the OAP and proceed under the first theory. In 2009, three decisions were issued rejecting the first theory of general causation. In 2010, the second theory of general causation was also rejected. Ultimately, petitioners pursued this matter as an individual case. Petitioners' expert testified that R.A. suffered from an underlying secondary mitochondrial disease or "mitochondrial dysfunction" that was aggravated by an MMR vaccination and that aggravation, caused developmental regression manifesting as autism spectrum disorder. The government countered petitioners' theory by presenting expert testimony that R.A.'s medical history did not evidence any form of mitochondrial disease. Following a two-day entitlement hearing in December 2015, Special Master

Corcoran held that petitioners failed to meet their burden of proof to establish entitlement to compensation.

In their motion for review, petitioners advanced seven separate arguments of alleged error in the Special Master's decision. In particular, petitioners argued that the Special Master improperly relied on a factual finding from a prior OAP test case. The government responded, in part, by noting that the petitioners were rearguing the same evidence that was considered and found unpersuasive by the Special Master and were improperly requesting that the Court reweigh the evidence. The Court rejected each of petitioners' arguments and held that Special Master Corcoran did not commit legal error by citing a factual finding from the OAP because, by participating in the OAP, petitioners agreed to allow the Office of Special Masters to apply conclusions reached in a test case to individual cases.

Read the decision here.