



FEDERAL CLAIMS BAR ASSOCIATION

Inside 717

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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

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MESSAGE FROM THE EDITORS-IN-CHIEF

We would like to thank all the Inside 717 contributors! Without you, this publication would not be possible. We'd also like to thank Wojciech Kornacki, an attorney at Watson and Associates LLC, for his contribution to the pay section of Inside 717.

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 James.Connor@usdoj.gov or Allison.Kidd-Miller@usdoj.gov. Thank you.

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COURT PROCEDURE

Court Allows Pension Fund to Intervene as of Right Where Fund was Third-Party Beneficiary of Contract With a Company the Government Allegedly Controlled

Anchor Tank Lines, LLC v. United States, 127 Fed. Cl. 484 (July 15, 2016) [Lettow, J.].

In this contract dispute action, plaintiffs brought a claim against the United States for breach of an asset purchase agreement through which plaintiffs acquired assets of “Old Anchor,” whose shares were forfeited to the Government following indictment of its principals. Plaintiffs alleged that the United States failed to indemnify them against the liabilities of Old Anchor, which had failed to make required pension fund contributions under the Employee Retirement Income Security Act. The Government filed a motion to dismiss the action for lack of jurisdiction because plaintiffs’ contract was with Old Anchor, not the Government, who was the sole shareholder. The Court rejected this argument because plaintiffs alleged that the United States was more than the sole shareholder; they alleged the United States operated Old Anchor as part of an ongoing criminal investigation. According to the Court, the capacity in which the Government signed the asset purchase agreement is a disputed fact rather than a matter of law determined by the text of the agreement.

The Government also argued that, even if the asset purchase agreement were a contract with the Government, the Contract Disputes Act (CDA) would apply because it was for the disposal of personal property. As a result, the Government argued that plaintiffs failed to follow the requirements in the CDA for the submission of a claim and thus their claims are barred. The Court rejected the Government’s CDA-related argument, finding that the purchase agreement did not fall within the class of contracts intended to be covered under the CDA, noting that the sale of Old Anchor’s assets was not conducted competitively, and was intended to transfer the assets to plaintiffs so that they could continue to carry out the business. This arrangement, the Court concluded, was more akin to a collaborative agreement than a procurement.

In addition, pension fund New York Oil Heating Fund (the Fund), sought to intervene as a plaintiff in this case, asserting that it shared a common question of law and fact with the main action. The Court granted the Fund’s motion to intervene, finding that it met the requirements of Rule 24(a) of the Rules of the Court of Federal Claims to intervene by right. Specifically, the Court found that the Fund claimed a legally protected interest when it asserted that the United States was a fiduciary to assets that were the Fund’s property. The Court also found that the case could impair the Fund’s ability to pursue its claims against the United States in the future. Finally, the Court determined that the Fund plausibly alleged that its interests were not fully represented by the plaintiffs because the Fund’s right to recovery differs from the plaintiffs’ breach of contract theory of recovery. Read the decision [here](#).

Court Rejects Rigid Deadline for Filing a Pre-Award Bid Protest, as Long as the Complaint is Filed within a Reasonable Time, and Before Close of Bidding

Palantir USG, Inc., et al., v. United States, No. 16-784, ___ Fed. Cl. ___ (Aug. 26, 2016) [Horn, J.].

In this pre-award bid protest, a prospective offeror, Palantir, pursued an unsuccessful protest at the Government Accountability Office (GAO). Then, 29 days after GAO’s denial, Palantir notified the Government of its intention to file suit in the Court of Federal Claims; several weeks later (and 43 days after the GAO denial), Palantir filed its complaint at the Court. By that time, offerors for the contract at issue had submitted proposals, but no award had been made.

The Government moved to dismiss the complaint, asserting that the protest was untimely because the challenge to the solicitation was not filed at the Court before proposals were due to be submitted. The Court rejected the argument that *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007), requires protesters to file suit before the deadline to submit proposals, and held that Palantir had preserved its rights by filing at GAO prior to that deadline.

The Court also held that Palantir did not waive its right to protest the solicitation by waiting too long after GAO denied its protest before filing its complaint at the Court. Although the Court pointed out that the Federal Circuit has held that waiting almost three months after GAO denied a pre-award protest (and filing at the Court only after award of the contract) constituted a waiver, the Federal Circuit has also held that waiting three days after the GAO denied a pre-award protest (and filing before award of the contract) was sufficiently prompt and resulted in no waiver. In this case, Palantir waited 43 days after the GAO denied its protest to file its complaint at the Court, and the agency had not yet awarded the contract. Under these circumstances, the Court found that Palantir had not waived its protest rights.

The Court also rejected the Government's standing argument. Although the Court usually applies the more lenient "non-trivial competitive injury" standard for pre-award bid protests, the Government argued that, because the challenge was "post-bid," the "substantial chance" standard should be applied to the prejudice issue. The Court disagreed, and held that the "non-trivial competitive injury" standard applies to all pre-award bid protests, regardless of whether they are pre-bid or post-bid.

The Court did dismiss the claims by Palantir's parent company, which "took no steps to place the Army on notice of the patent defects it believes are contained in the solicitation"; it did not respond to Requests for Information, submit a proposal, or participate in the GAO protest. Read the decision [here](#).

GOVERNMENT CONTRACTS

Federal Circuit Affirms Grant of Summary Judgment in Favor of Government in Construction Delay Case Arising from Acts by Foreign Government

Zafer Taahhut Insaat ve Ticaret A.S. v. United States, Fed. Cir. No. 2015-5083, ___ Fed. Cir. No. ___ (August 17, 2016) [*Lourie, Dyk, Stoll, JJ.*].

Appellant Zafer, an experienced Government construction contractor based in Turkey, brought an equitable adjustment claim for delays related to its construction of a support facility at the Bagram Air Force Field in Afghanistan. The construction delays were caused by a November 2011 combat incident involving the United States and the North Atlantic Treaty Organization that allegedly resulted in the killing of 24 Pakistani citizens. As a result, the government of Pakistan closed its borders and blocked goods from being shipped between the port at Karachi and Afghanistan for eight months, allegedly affecting Zafer's ability to ship building materials.

Zafer brought a claim for equitable adjustment in the Court of Federal Claims, seeking increased costs incurred during the border closure. The trial court granted summary judgment in favor of the Government because: (1) Zafer's claimed costs only arose from shipping and storage, not construction; (2) the contract did not specify the use of the Karachi/Afghan route; and (3) the Government did not deny any request for additional time to complete the project. The trial court also held that the United

States was not responsible for the delays because another sovereign, Pakistan, closed the Karachi/Afghan route, and the United States was not acting in its contractual capacity when it negotiated with Pakistan to reopen the route.

The Federal Circuit agreed with the trial court, holding that Zafer failed to demonstrate that its contract had been constructively changed. In doing so, the Federal Circuit held that the contracting officer's statement for Zafer to deliver materials by "whatever means necessary" did not amount to a constructive acceleration because Zafer had not been denied a request for a time extension. The Federal Circuit also rejected Zafer's argument that the United States was responsible for the border closure as a result of the combat incident, because Pakistan closed the border unilaterally and the United States is not responsible for the sovereign acts of a foreign nation. Finally, the Federal Circuit agreed that, pursuant to the Sovereign Acts Doctrine, the United States was not liable for contract damages for allegedly prolonging the closure through ineffective negotiations with Pakistan. Read the decision [here](#).

Court Sustains Protest of Cancellation of Solicitation; Concludes Agency's Decision was "Unsupported," and Bars Certain Agency Personnel from Any Re-Evaluation

Starry Assocs., Inc. v. United States, 127 Fed. Cl. 539 (July 27, 2016) [Bruggink, J.].

The Court sustained this post-award protest, after nearly two years of litigation and four protests. In November 2014, the Department of Health and Human Services (HHS) issued a solicitation for financial management services, services that had been performed in large part by Starry, the incumbent. Three companies, including Starry, submitted quotations. Starry did not receive the award. Starry protested at the Government Accountability Office (GAO), arguing that the awardee was unable to meet the statement-of-work requirements and lacked key personnel. HHS took voluntary corrective action to "thoroughly review the contract file and ensure that the evaluation is complete, accurate, and fully consistent" with solicitation requirements. That action mooted the first protest, but after what the Court described as "little additional effort at evaluation," HHS again awarded to the same awardee, and Starry again protested at GAO. GAO rejected bias allegations, but sustained allegations that HHS failed to evaluate the proposal in accordance with the solicitation's requirements. Rather than re-evaluate, HHS decided to cancel the "solicitation, redraft the statement of work to better match its current needs, and re-solicit" in 2016. Starry protested a third time at GAO, which denied the protest, and Starry brought another protest—its fourth—at the Court.

Although allegations of bias and a conflict of interest permeated the protest, the Court determined that it need not reach those issues because it was "satisfied that the agency was arbitrary and capricious in its cancellation of the solicitation." The Court observed that agencies typically have broad discretion to determine their own needs and to maintain their own judgment about what bidders have offered, but that a cancellation decision still must reflect the agency's examination of the relevant data and articulate a satisfactory explanation. The Court found that the "record now contains a lengthy history of agency personnel being indifferent to the fidelity of the procurement process" and that once procurement officials had made the original award, that "any other result was unwelcome and not seriously considered." The Court determined that the agency's stated rationale for cancellation was "completely illusory," and was "devoid of any documentation" of the agency's needs. The Court set aside HHS's cancellation of the solicitation, returning the procurement to the posture it was in after the second GAO protest. The Court also barred three procurement officials from "any subsequent agency actions regarding this solicitation." Read the decision [here](#).

PAY

Court Awards \$3.8 Million in Attorney Fees and Costs in Military Pay Class Action Settlement

Sabo, et al. v. United States, No. 08-899C, ___ Fed. Cl. ___ (July 26, 2016) [Sweeney, J.].

On July 26, 2016, the Court of Federal Claims rejected all of the Government's arguments and awarded plaintiffs' counsel \$3.8 million in costs and attorney fees in this long-running military pay dispute, pursuant to the Equal Access to Justice Act. The trial court found, among other things, that "the Government's overall position was not substantially justified." The case, which was filed in 2008, was settled in 2011 after the Court approved a settlement agreement between the parties where the Government agreed to correct each plaintiff's military service record to reflect an agreed upon final disability rating.

The plaintiffs are a class of 2,161 combat-veterans who were discharged from the military after they were determined unfit for continued service due, at least in part, to Post Traumatic Stress Disorder (PTSD) and assigned a disability rating for PTSD of less than 50 percent by the military. Plaintiffs alleged that they were improperly separated from active duty because the military services failed to properly apply disability rating guidance when rating their PTSD condition. Read the decision [here](#).

Court Denies Challenge to Navy's Discharge of Service Member for Violating a Military Protective Order Following a Domestic Violence Charge

Parks v. United States, No. 15-1275C, ___ Fed. Cl. ___ (Aug. 1, 2016) [Wheeler, J.].

In 2011, plaintiff was arrested for domestic battery against his wife, and later he violated a military protective order prohibiting him from contacting her. With the domestic battery matter still pending in state court, the Navy separated plaintiff for multiple violations of the military protective order. After the State Attorney dismissed the battery charge, plaintiff petitioned the Navy Discharge Review Board to upgrade his characterization of service to "honorable." The review board denied plaintiff's request because the Navy separated him for violating the military protective order, and not the domestic violence charge. Plaintiff then petitioned the Board for Correction of Naval Records for relief. The corrections board agreed with the review board and declined plaintiff's request to correct his military records.

Plaintiff filed a complaint with the Court of Federal Claims alleging wrongful separation and lost pay, and requesting that the Court require the Navy to upgrade his discharge to "honorable." After the parties each filed motions for judgment on the administrative record, the Court granted the Government's motion, concluding that the Navy's decision to separate plaintiff from service was supported by substantial evidence, lawful, and not an abuse of discretion. Specifically, the Court noted that the administrative record showed that plaintiff knowingly and repeatedly violated the military protective order, a serious offense warranting his separation. The Court also rejected plaintiff's allegation that the military protective order violated his parental rights, as plaintiff had waived the argument by failing to raise it with Navy review board or corrections board. Read the decision [here](#).

TAKINGS

Court Finds Physical Taking Because Government Claim of Ownership Interfered With Sale of Property
Katzin v. United States, 127 Fed. Cl. 440 (July 15, 2016) [Lettow, J.], *appeal docketed* No. 16-2636 (Sept. 14, 2016).

Three plaintiffs owned a parcel of land overlooking the Atlantic Ocean on Culebra Island, Puerto Rico. In 2006, plaintiffs entered into an agreement to sell the property to a buyer, but a representative of the United States Fish and Wildlife Service informed the buyer that the Wildlife Service owned a strip of land along the coast and a 2.25-acre gun mount site on a peninsula within the parcel. After learning of the Wildlife Service's claim of ownership, the buyer rescinded the offer to purchase the property.

Following trial, the Court held that plaintiffs – not the Wildlife Service – owned the property and that the Wildlife Service's claim of ownership amounted to a permanent physical taking of the plaintiffs' property rights. The Court found that the taking was permanent, as opposed to temporary, because "there is no indication . . . the [G]overnment intends to renounce its claim of ownership" to plaintiffs' property. The Court awarded plaintiffs \$610,962.97 for the taking of the 10-acre peninsula, along with interest based on the rate of the Moody's Long-Term AAA Corporate Bond Index. This amount was based upon the price that the buyer offered to purchase the property in 2006, before the offer was rescinded, and was approximately 10 percent of the over \$6 million in compensation that plaintiffs sought at trial.

The United States appealed to the Federal Circuit. Read the decision [here](#).

Court Grants Summary Judgment to Government in Takings Case Stemming From Libyan Terrorist Bombing

Aviation & General Insurance Co. v. United States, 127 Fed. Cl. 316 (July 7, 2016) [Wheeler, J.], *appeal docketed* No. 16-2389 (July 27, 2016).

Plaintiffs sued Libya in Federal district court for the Libyan-sponsored terrorist hijacking of EgyptAir Flight 648 in 1985, and the bombing of Pan Am Flight 103 in 1988. The Foreign Sovereign Immunities Act has historically prohibited plaintiffs from suing Libya (and other countries) in United States courts, unless certain exceptions applied. One exception, which has since been repealed, stripped a foreign state of immunity in any suit arising out of certain acts of terrorism when the state was designated as a sponsor of terrorism. In January 2008, Congress designated Libya as a sponsor of terror, permitting plaintiffs to file their lawsuits in district court.

In August 2008, while plaintiffs' lawsuits were pending, Congress passed the Libyan Claims Resolution Act, which restored Libya's sovereign immunity, stripped the district court of subject matter jurisdiction over plaintiffs' claims, and resulted in the United States settling plaintiffs' claims. Plaintiffs alleged that this legislation effected a taking of their legal claims against Libya.

Applying the factors set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Court concluded that no taking occurred. The Court held that plaintiffs lacked any investment-backed expectation in their causes of action given that the Executive has long settled claims against foreign nations on behalf of its citizens. Similarly, the Court concluded that restoration of Libya's sovereign immunity "reflects current political realities and relationships" and parties may not rely upon the availability of sovereign immunity, or lack thereof. The Court also held that the fact that the United

States did not provide an alternative forum (such as the Claims Commission) is not sufficient to establish a taking. Finally, the Court concluded that the value of plaintiffs' lost causes of action is "speculative," given the unlikely possibility that plaintiffs could ever collect on any judgment against Libya.

Plaintiffs appealed to the Federal Circuit. Read the decision [here](#).

TAX

Court Dismisses Trust Fund Recovery Suit for Lack of Jurisdiction

Byrne v. United States, 127 Fed. Cl. 284 (June 30, 2016) [Braden, J.].

The Court dismissed plaintiff's trust fund recovery suit for lack of subject matter jurisdiction under Rule 12(b)(1) of the Rules of the Court of Federal Claims. In March 2008, the Internal Revenue Service (IRS) assessed a \$154,998 Trust Fund Recovery Penalty against plaintiff under I.R.C. § 6672 because he was responsible for collecting unpaid employment taxes for Sundance Systems, Inc. Several months later, in October 2008, plaintiff sought a refund and abatement of the penalty, contending that he was not the person responsible for collecting, accounting for, and paying taxes for Sundance Systems. The IRS disallowed plaintiff's refund and abatement claim several months later, in March 2009.

Plaintiff filed suit in the Court of Federal Claims in May 2014, arguing again that he was not responsible for Sundance System's unpaid taxes and seeking a refund and abatement of the Trust Fund Recovery Penalty. The Government moved to dismiss for lack of jurisdiction because the complaint was filed more than 2 years after the statute of limitations for filing suit under I.R.C. § 6532(a)(1) had expired. Plaintiff contended that his lawsuit was timely because he had filed a second set of refund and abatement claims in 2013.

The Court agreed with the Government, finding that plaintiff's 2013 refund claims were merely a request for reconsideration of the IRS's denial of plaintiff's 2008 refund claims. The Court further found that such a request for such reconsideration does not toll the statute of limitations. Moreover, the Court held that, even if it were persuaded that the grounds for the alleged 2013 refund claims were different from those in the refund claims filed in 2008, plaintiff failed to establish that he filed the alleged 2013 claims with the IRS prior to filing suit. The Court rejected plaintiff's other claims that the IRS's notice of disallowance was invalid or defective, and also rejected plaintiff's contention that purported IRS errors during his Collection Due Process hearing provided the Court with jurisdiction over his complaint. Read the decision [here](#).

Court Holds That Social Security Disability Payments Are Not Earned Income for Purposes of the Earned Income Credit

Vellai-Palotay v. United States, 118 A.F.T.R.2d 2016-5139 (Fed. Cl. July 13, 2016) [Bruggink, J.], *appeal docketed* No. 16-2612 (Sept. 7, 2016).

Plaintiff sought a tax refund of \$12,000 based upon claimed earned income credits for tax years 2006-2008, and 2010. The only income that plaintiff reported for each of the years at issue, however, was Social Security disability payments. The Government moved to dismiss plaintiff's complaint for failure to state a claim. The Government argued that, under I.R.C. § 32(c)(2)(A), "earned income," for purposes of the credit, is limited to wages, salaries, tips, and other employee compensation, and does not include

welfare or Social Security disability benefits. Thus, the Government argued, plaintiff failed to allege that she had received “earned income.” The Court agreed and dismissed the complaint with prejudice.

Plaintiff appealed to the Federal Circuit.

VACCINE

Chief Special Master Makes Award of Interim Damages

Day v. Sec’y of Health and Human Services, No. 12-630V (Fed. Cl. Spec. Mstr. May 31, 2016).

Petitioners filed a petition for compensation under the National Vaccine Injury Compensation Program in 2012 alleging that their 12-year-old daughter, “B.K.D.,” suffered from a rare autoimmune disorder known as neuromyelitis optica (NMO), as a result of her Human papillomavirus (HPV) and Flu vaccinations. In November 2015, the Chief Special Master found that petitioners were entitled to compensation and the damages phase of this case commenced.

In early 2016, the petitioners filed a Motion for Ruling on Entitlement to Interim Damages, requesting compensation for past pain and suffering and future lost wages. The petitioners argued that B.K.D. had an urgent need for services, including a wheelchair van and ADA-compliant housing that petitioners could not presently afford. They further argued that the process of resolving damages could take more than a year, resulting in harm to B.K.D. The Government opposed an award for interim damages, arguing that the Vaccine Act does not authorize more than one decision on damages.

The Chief Special Master concluded that an interim award for B.K.D.’s past pain and suffering was appropriate, but an interim award for her future lost wages was not appropriate. Relying on two decisions from the Court of Appeals for the Federal Circuit, the Court held that the Vaccine Act does permit multiple decisions on damages. The Chief Special Master noted that an interim award was appropriate in this case due to petitioners’ extreme family and financial hardships, as well as B.K.D.’s urgent medical needs. The Chief Special Master further pointed out that the decision “does not contemplate that interim damages would be routinely, or even frequently awarded,” but that the petitioners in this case “have made a persuasive case that there is extreme hardship” and that the purpose of the Vaccine Act would be fulfilled through an interim damages award.

The Government filed a motion for review of the Chief Special Master’s decision with the Court of Federal Claims. Read the Chief Special Master’s decision [here](#).

Special Master Denies Petitioner’s Request for Attorney Fees and Costs

Mounts ex. rel. M.M. v. Sec’y of Health and Human Services, No. 14-1219V (Fed. Cl. Spec. Mstr. July 27, 2016).

This Vaccine Act decision involves the application of the attorney fee provision of 42 U.S.C. 300aa-15(e)(1). Under that provision, a special master may award reasonable attorneys’ fees and costs to an unsuccessful petitioner, so long as the petitioner: (1) filed the petition in good faith; and (2) had a reasonable basis for the claim.

In this case, petitioner claimed that the Varicella, Diphtheria, Tetanus, and Pertussis (DTap), and Meningococcal vaccines administered to her daughter in May 2012 caused her to suffer from chronic urticaria (hives). Petitioner submitted medical records approximately four months after the petition was filed, but ultimately was unable to obtain an expert medical opinion to support her causation-in-fact claim. Petitioner eventually filed an unopposed motion to dismiss her petition. Petitioner then sought approximately \$8,750 in attorneys' fees and costs, asserting that she had a reasonable basis for the claim as evidenced by statements from petitioner and her husband that the hives began the night their daughter received the vaccines. The Government challenged the award of attorneys' fees and costs under the circumstances, contending, among other things, that the medical records did not document any symptoms of the alleged vaccine injury prior to January 2013, over six months after the administration of the vaccines at issue.

Upon reviewing the entire record, the special master determined that petitioner lacked a reasonable basis and denied all attorneys' fees and costs. In particular, the special master determined that the medical records reflected that the onset of the symptoms was in either January 2013 or July 2013 (in either case months after administration of the vaccines at issue), and reasoned that counsel should have reviewed those records before the petition was filed in the Vaccine Program. The Special Master was similarly not persuaded by petitioner's other arguments, including: (1) there was an impending statute of limitations deadline; (2) an allergist had opined that the urticaria in this case was "idiopathic"; and (3) counsel had recently been involved in a different Vaccine Act case alleging urticaria where petitioners were found to be entitled to compensation.

The petitioner filed a motion for review of the Special Master's decision with the Court of Federal Claims. Read the Special Master's decision [here](#).