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

WHAT'S INSIDE

MESSAGE FROM THE EDITORS-IN-CHIEF

We want to thank all our contributors!

If you are ever interested in joining the editorial board, please let us know. In particular, we could use additional contributors for the Takings practice area and Indian Claims.

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 Denies Protestor's Motion to Amend Complaint to Add Counts Against The Small Business Administration, Finding That It Lacks Jurisdiction To Review The SBA's Determinations

Sonoran Technology and Professional Services, LLC v. United States, Fed. Cl. No. 17-711, __ Fed. Cl. __ (Aug. 9, 2017) [Wheeler, J.]

In this bid protest arising out of a contract to train aircrew to fly B-52 and B-51 aircrafts, the Court denied a motion to amend the complaint of plaintiff Sonoran Technology and Professional Services, LLC (Sonoran) to add counts against the Small Business Administration (SBA).

In its motion, Sonoran sought to add two counts, challenging the SBA's issuance of a Certificate of Competency (COC) to an allegedly non-responsible bidder, the awardee, Spectre Pursuit Group, LLC (Spectre), as well as SBA's re-opening of a COC referral.

The Court held that it lacked jurisdiction to review the SBA's issuance of a COC to Spectre, citing Federal Circuit case law for the proposition that while the SBA's refusal to grant a COC is reviewable, SBA's determination to certify a contractor as responsible is not reviewable. The Court further found that Sonoran had not justified its delay in seeking to amend its complaint, noting that Sonoran had failed to raise the SBA's determination during earlier stages of the case and that the Court had "twice informed Sonoran that the SBA's independent reasoning was irrelevant to" the protest. The Court ordered expedited briefing on the merits. Read the decision here.

Court Allows Joinder Of Plaintiff's Subsidiary And Denies Motion To Dismiss Plaintiff As A Party, Citing The Court's Discretion To Resolve Procedural Issues To Avoid Delay

Tetra Tech, Inc. v. United States, Fed. Cl. No. 14-619, __ Fed. Cl. __ (Aug. 28, 2017) [Hodges, S.J.]

The Court granted a motion to join the subsidiary of plaintiff Tetra Tech, Inc. (Tetra Tech), while denying a motion to dismiss the parent as a party, rejecting defendant's argument that the parent-company plaintiff should not remain in the case because it was not in privity of contract with the Government.

Tetra Tech sued the United States for breach of a construction contract and subsequent task order for work to be performed at a government facility in North Dakota. After the government determined that the entity with which it had contracted was not the named plaintiff, but its wholly owned subsidiary, Tetra Tech EC, Inc., the Government moved to dismiss Tetra Tech as a party, arguing that the subsidiary should be substituted as the only plaintiff because the parent company was not in privity of contract with the government.

Citing the Court's discretion to resolve procedural issues in a way that avoids excessive delay and controversy, the Court granted Tetra Tech's motion to join its subsidiary as a named party and denied the government's motion. The Court reasoned that it was unnecessary to dismiss the parent company or substitute it for the subsidiary at this stage of the case and that doing so could lead to "substantial additional and duplicative litigation." Read the decision here.

Court Grants Summary Judgment In Government's Favor In Suit Challenging Contracting Officer's Denial Of A Bidder's Request To Correct An Error In Its Bid

Baldi Bros. v. United States, Fed. Cl. No. 15-1300, ___ Fed. Cl. __ (Sept. 13, 2017) [Campbell-Smith, J.]

The Court granted summary judgment in the government's favor in this Contract Disputes Act suit contesting a contracting officer's denial of the plaintiff's request for a contract modification to correct an error in its bid discovered after it was submitted to the government.

Plaintiff Baldi Bros, Inc. (Baldi) submitted what was initially understood to be the lowest of four technically acceptable bids for a contract for repairs and improvements of a "Combat Aircraft Loading Apron" at the Marine Corps Air Station in Yuma, Arizona. Shortly after receiving the award, Baldi realized that its bid had inadvertently omitted an applicable state transaction privilege tax and sought a contract modification. The government denied the modification. After the work on the contract was complete, Baldi submitted a certified claim that sought an adjustment to its bid price to account for state taxes, as well as county transaction privilege taxes, that were not in its original request for modification. In both its modification request and certified claim, Baldi argued that it was entitled to an adjustment of its contract price under FAR 14.407-4, which applies in cases involving mistakes discovered after an award. The contracting officer denied Baldi's claim, in part, because the FAR prohibits reformation of a contract, where, as would be the case for Baldi, the corrected bid price would no longer be the lowest acceptable price.

Baldi filed suit in the Court of Federal Claims under the Contract Disputes Act. The government moved for summary judgment, arguing that Baldi's corrected price would not be the lowest price, and for that reason, Baldi was entitled to no relief. Baldi countered that the Court could consider Baldi's modification request (rather than its certified claim) and that there was a scenario in which that corrected price would still be the lowest. Rejecting Baldi's argument, the Court noted that it could only consider the corrected price submitted in its certified claim. Because Baldi's revised bid price was higher than other bidders' prices, it had failed to prove that its price "does not exceed that of the next lowest acceptable bid," as required by FAR 14.407-4(b)(2)(ii). The Court thus entered judgment for the Government, finding that any other disputes of fact were immaterial. Read the decision here.

BID PROTEST

Court Rejects Untimely Protest Challenges To VA's Price Benchmark, Discussions, And Price Reasonableness Methodology

QTC Medical Services, Inc. v. United States, Fed. Cl. No. 17-80C, __ Fed. Cl. __ (July 12, 2017) [Griggsby, J.]

Good things come to those who wait, but maybe not to offerors in Government procurements. QTC Medical Services and Veterans Evaluation Services (VES) protested VA's award of several indefinite delivery, indefinite quantity (IDIQ) contracts for medical-disability examinations. In addition to upholding VA's trade-off analysis and rejecting plaintiffs' organizational conflict of interest (OCI) challenges, the Court applied *Blue & Gold Fleet, L.P. v United States*, 492 F.3d 1308 (Fed Cir. 2007), and *Bannum, Inc. v. United States*, 779 F.3d 1376 (Fed. Cir. 2015) to hold that several of plaintiffs' claims

were untimely because the claims should have been addressed before plaintiffs submitted their final proposal revisions.

Specifically, the Court held that plaintiffs could not challenge VA's calculation of price benchmarks that, according to plaintiffs, included high and non-competitive prices from other offerors. Well before they submitted their final proposal revisions, plaintiffs were aware that VA would consider all offerors' pricing in establishing the benchmarks and that, as a result, the median price could be skewed by very high or very low prices. The also Court rejected plaintiffs' argument that VA's discussions about pricing were misleading. The Court concluded that this claim was untimely because plaintiffs had not challenged the discussions regarding pricing before submitting final proposal revisions. Finally, the Court rejected VES's argument that VA's methodology for evaluating price reasonableness was improper. The RFP provided that VA would consider base-year and option-year pricing to assess price reasonableness, but an amendment required VA to use a sample task order that included only base-year pricing. The Court determined, however, that this was a patent ambiguity that VES waived because VES failed to raise the issue before submitting final proposal revisions. Read the decision here.

GOVERNMENT CONTRACTS

Court Dismisses Challenge to Past-Performance Rating Because Contractor's Counsel's "Dialogue" With Agency Was Not A Demand for Relief

Vanquish Worldwide LLC v. United States, Fed. Cl. No. 17-335C, __ Fed. Cl. __ (Sept. 19, 2017) [Kaplan, J.]

Dialogue has its virtues, but the Court recently underscored that too much dialogue is inconsistent with the jurisdictional requirements of the Contract Disputes Act. The Army contracted with Vanquish to provide trucking services in Afghanistan. When 12 loads of freight went undelivered, the Army terminated Vanquish for default and rated Vanquish as "marginal" in CPARS. The parties agreed that the freight went undelivered; they disputed why. The Army concluded the non-performance was because of Vanquish's failure to pay its subcontractors; Vanquish argued that the freight had been hijacked. Vanquish then sought a declaratory judgement in the Court, arguing that the agency's past-performance rating was arbitrary and capricious.

The Government moved to dismiss, and the Court granted the motion without prejudice, explaining that Vanquish had failed to first submit to the contracting officer a claim, that is, a "clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." Vanquish, through counsel, had submitted several e-mail messages to the contracting officer before filing suit. In that correspondence, Vanquish requested, among other things, that the "CPARS review and rating should be rescinded or suspended" until Vanquish could provide a supplemental response to the Army's investigation findings. But this was not enough, the Court explained, because this correspondence "did not reflect that Vanquish was requesting a final decision from the CO or that it was demanding a permanent withdrawal of the performance rating." The correspondence reflected instead "a continuing dialogue about Vanquish's performance rating that never ripened into a request for a final decision." Read the decision here.

PAY

After Trial, Court Rules Merit System Explains Pay Differential Between Female Employee And Male Comparators

Kaplan v. United States, Fed. Cl. No. 14-67C, __ Fed. Cl. __ (June 30, 2017) [Bruggink, S. J.]

After a three-day trial, the Court ruled in favor of the government on a female employee's claim that the Air Force Research Lab compensated her less than comparable male employees in violation of the Equal Pay Act, 29 U.S.C. § 206(d)(1). Generally, the Equal Pay Act prohibits paying wages "to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions" except where the difference in pay is due to "i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex .... [.]" 29 U.S.C. § 206(d)(1).

The Court found that it undisputed that the plaintiff, Dr. Kaplan, was paid less than certain male colleagues. However, the Court held that the government presented evidence that any pay disparities were due to the Air Force Research Lab's merit system, known as the Laboratory Personnel Demonstration Project. Thus, the difference in pay between Dr. Kaplan and male comparators was permissible under the merit system defense. Read the decision here.

TAX

Scrivener's Error In Assessments Do Not Entitle Taxpayers To Refund

Habenicht v. United States, 132 Fed. Cl. 565 (June 7, 2017) [Bruggink, S.J.]

The Court held that plaintiffs were not entitled to a refund of taxes that were assessed for the wrong year. Plaintiffs had entered into a closing agreement with the IRS that disallowed partnership losses and resulted in deficiencies for their tax years 1985 and 1986. When the separate "Prompt Assessments Billing Assembly" documents were processed, both packages contained the entry "1986" as the tax year, resulting in two assessments for that year and none for 1985. Plaintiffs nonetheless voluntarily paid both assessments and then waited two years to file a refund claim challenging the validity of the mistaken 1986 assessment.

The Court held that the mistaken assessment was "nothing more than a clerical error" and deemed it corrected. Plaintiffs were not misled by the error and had never disputed that they in fact owed the additional taxes for both years. In addition, the Court concluded that, even if the assessment were not held to be valid, plaintiffs would not be entitled to a refund "because they have not demonstrated that they either paid more than the amount legally due or made the payment at issue outside the assessment period for 1985." Read the decision here.

Hedge Fund Manager's Partnership Distribution Recharacterized As A Payment To A Non-Partner

Herrmann v. United States, 132 Fed. Cl. 459 (June 21, 2017) [Lettow, J.]

In this case of first impression, the Court held that Ms. Herrmann's $18.7 million partnership distribution from a foreign partnership should be classified as a payment to her in a non-partner capacity under I.R.C. § 707(a)(2), which is generally considered to be an anti-abuse tool for the government. The Court held that the payment to Ms. Herrmann should be treated as a payment to a non-partner because: (1) Ms. Herrmann previously provided similar services as an *employee* of a related U.S. corporation; (2) the distribution was tied to hedge fund risk and not the risk of the relevant partnership; (3) the provisions of the partnership agreement were not always followed; and (4) Ms. Herrmann's share in the profits of the partnership was higher than her capital interest. The consequence of the Court's holding is that the payment at issue was properly reportable in 2009, which benefitted plaintiffs for foreign tax credit purposes, and entitled them to a refund of $7.8 million. Read the decision here.

Court Finds Underwriter Commissions Are Characterized As A Reduction In Capital Gain

Hann v. United States, Fed. Cl. No. 15-20T, --- Fed. Cl. ---, (Aug. 16, 2017) [Williams, J.]

In 2009, plaintiff Gregory Hann, a high-ranking employee of Wesco Aircraft, was awarded compensatory stock options. In 2011, in connection with Wesco's Initial Public Offering, Mr. Hann: (1) exercised the options; and (2) sold the acquired shares to the IPO underwriters. Both sides moved for summary judgment and focused on whether the underwriters' commissions paid in connection with the IPO were a reduction in the amount realized on Mr. Hann's sale of stock to the underwriters, as the government contended, or, as a deduction against the ordinary (compensation) income plaintiff was recognizing on the exercise of the options, as plaintiff contended.

The Court held that the underwriters' commissions are properly characterized as a reduction in the amount of gain on the sale because they was paid for the purpose of facilitating the sale of the stock (a capital asset) Mr. Hann acquired in exercising his stock options. The Court determined that plaintiff's exercise of his stock options, on the one hand, and his sale of the stock to the underwriters, on the other, were two separate transactions. Focusing on the second of these transactions, the Court held that the underwriters' commissions had to be treated as a reduction in capital gain. The Court also rejected plaintiffs' assertion that because Mr. Hann was *required* to sell the stock as a condition of participating in the IPO, the transaction had to be treated as a single step. Read the decision here.

Court Rules That A Tax Court Decision Does Not Establish A Tax Overpayment

Zhou v. United States, Fed. Cl. No. 16-884T, --- Fed. Cl. --- (Aug. 16, 2017) [Wheeler, J.]

The Court held that the plaintiffs did not overpay their taxes for 2006 and 2007, dismissed their claims that the IRS's levy of plaintiffs' brokerage account violated their due process rights, and denied their request for discovery under RCFC 56(d).

Plaintiffs overstated the amounts of their income tax withholdings for tax years 2006 and 2007. They then argued that they were entitled to a refund because the parties had stipulated in the United States Tax Court for those years that the plaintiffs had a zero deficiency for 2006 and a $319 deficiency for 2007. The Court rejected this argument, explaining that "deficiency" is a statutorily defined term that focuses on the difference between the correct amount of tax and the amount of tax reported on the return. Therefore, the Court further held, the Tax Court stipulation did not address whether plaintiffs in fact *paid* the full amounts of their 2006 and 2007 income taxes that they reported were due; in fact, they had not. In addition, plaintiffs' tax transcript showed that plaintiffs had not paid their liabilities for

interest and penalties associated with their overstatement of the amounts of their income tax withholding. Read the decision here.

VACCINE

Court Upholds Special Master's Determination That The Recipient Of Hepatitis A and Hepatitis B Vaccination Is Not Entitled To Compensation Under the Vaccine Act

Finnettia Garner v. Secretary of Health and Human Services, No. 15-63V, 133 Fed. Cl. 140 (2017) [Wheeler, J.]

In this vaccine litigation, the Court denied the petitioner's motion 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 petitioner had alleged that Hepatitis A and B vaccinations she received in 2011 caused her to develop Parsonage-Turner Syndrome ("PTS"), a neurological disorder of the shoulder, approximately 45 days following vaccination. Relying on expert testimony, the government disputed petitioner's diagnosis of PTS and posited that even if petitioner had PTS, the 45-day onset period was too long to associate with the vaccination. Furthermore, the government's expert opined that no reliable medical evidence showed that hepatitis vaccinations cause PTS. Following submission of the expert reports, Special Master Corcoran ruled on the record that petitioner failed to meet her burden of proof to establish entitlement to compensation.

Holding that the Special Master set forth a reasonable basis for his decision, the Court rejected petitioner's arguments—namely that the Special Master required a heightened standard of scientific certainty to establish the acceptable timeframe for developing PTS, that more weight should have been given to her treating physician records, and that the Special Master should have conducted an evidentiary hearing. Specifically, the Court noted that the petitioner's argument regarding the failure to conduct an evidentiary hearing was unpersuasive given the Special Master's authority in the Vaccine Rules to decide a case on the written record and that petitioner did not challenge the process when she filed a motion for ruling on the record. The Court also declined to consider the additional medical literature pursuant to Vaccine Rule 8(f)(1) prohibiting the same. Read the decision here.

INDIAN CLAIMS

Court Grants Motion To Dismiss Tribe's Suit For Fifth Amendment Taking Of Reserved Water Rights

Crow Creek Sioux Tribe v. United States, Fed. Cl. No. 16-760 C (June 1, 2017) [Hodges, S.J.]

The Crow Creek Sioux Tribe alleged that construction of the Fort Randall and Big Bend Dams on the Missouri River resulted in a Fifth Amendment taking in the form of a reduction of its rights to water under the *Winters* doctrine. The *Winters* doctrine establishes a right to sufficient water for the needs of Tribes' reservations. *Winters v. United States*, 207 U.S. 564, 576-78 (1908). In 1962 Congress authorized $4.4 million to compensate the Crow Creek Sioux Tribe for the loss of reservation land inundated following the construction of these dams. The Court concluded that the Tribe's claims were not ripe in that the Tribe was unable to identify an injury that has yet occurred, that is that water diverted from the Missouri River has resulted in a reduction of the water to be made available to the Tribe under the *Winters* doctrine. Read the decision here.

Federal Circuit Affirms Dismissal Of Breach Of Trust Claims By Tribe Not Federally Recognized

Wyandot Nation of Kansas v. United States, Fed. Cir. No. 2016-1654 (June 8, 2017)
Appeal from Fed. Cl. No. 1:15-cv-00560-TCW

The Court of Federal Claims dismissal of the claims of the Wyandot Nation of Kansas was summarized in Vol. 8, No. 1 of Inside 717 covering December 2015-February 2016. The Nation's breach of trust and fiduciary duty claims were dismissed because the Wyandot Nation of Kansas is not a federally-recognized Indian tribe and therefore is not entitled to an accounting under the 1994 Indian Trust Reform Act. The Court also found that the Nation lacks standing to pursue breach of trust claims related to the Huron Cemetery because it is not a federally-recognized Indian tribe and is not the owner of the Cemetery. The Federal Circuit affirmed the Court of Federal Claims' decision, invoking the doctrine of primary jurisdiction and noted that the Wyandot, as a threshold matter, would need to pursue federal recognition through the Department of Interior. Circuit Judge O'Malley, concurring in the result, would have affirmed based on failure to state a claim on which relief can be granted. Read the decision here.

Federal Circuit Vacates CFC Prior Ruling That The Native American Housing Assistance And Self-Determination Act Of 1996 ("NAHASDA") Is Money Mandating

Lummi Tribe et al. v. United States, Fed. Cir. No. 2016-2196, September 12, 2017
Appeal from Fed. Cl. No. 1:08-cv-00848-EGB

The Department of Housing and Urban Development (HUD) recovered amounts overfunded to tribes by deducting the amount overfunded from subsequent grant allocations. The Tribes attempted to bring suit under Tucker Act and the Indian Tucker Act. The Federal Circuit confirmed that the remedy for the tribes' claim that HUD improperly deprived them of grant funds is equitable relief in district court, not money damages in the Court of Federal Claims. The appellate court also held that the tribes' illegal exaction claim in the alternative fails because it "must be based on property taken from the claimant, not property left unawarded." Read the decision here.