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 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 Pay and Intellectual Property practice areas.

As always, feel free to share any ideas or comments. You may reach us at Sgrigsby@bsfllp.com, Amanda.Tantum@usdoj.gov, or Colleen.Hartley@usdoj.gov. Thank you.

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COURT PROCEDURE

Court Declines to Supplement Bid Protest Administrative Record with Expert Report. *Voith Hydro, Inc. v. United States and Alstom Renewable US LLC*, Fed. Cl. 18-1907C, 142 Fed. Cl. 233 (Feb. 26, 2019) [Campbell-Smith, J.]

The Court denied a protester's motion to supplement the administrative record with an expert report, finding that the report was unnecessary to provide effective judicial review or to decide the protester's request for injunctive relief.

Plaintiff, Voith Hydro, Inc. ("Voith") filed a bid protest challenging the evaluation and award of a U.S. Army Corps of Engineers ("Corps") contract to design, supply, and install turbines in hydroelectric generators. After the Court denied Voith's expert consultant, Lloyd C. Reed, access to confidential information filed under seal in the case, a dispute arose as to whether to supplement the administrative record with Mr. Reed's expert report.

Noting that it was bound by the "restrictive" standard for supplementation of the administrative record in *Axiom Resource Management, Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009), the Court denied Voith's motion to add Mr. Reed's report to the record.

Under *Axiom*, supplementation of the administrative record in a bid protest should be limited to cases in which "omission of extra-record evidence precludes effective judicial review." *Id.* The Court found that the Reed Report does not satisfy this standard. Noting that Mr. Reed's evaluation methodology was not outlined in the agency's request for proposals ("RFP"), the Court found that, if it considered Mr. Reed's opinions, it would be "introducing a new requirement, rewriting the RFP, and impermissibly substituting its judgment for that of the agency as to how to measure the relative merits of the submitted proposals." The Court also rejected Voith's contentions that, even if Mr. Reed's expert report was not added to the administrative record, it could be considered when evaluating the "public interest" factor of a request for injunctive relief. The Court found, however, that this argument was raised in a "cursory manner" and were unsupported, noting that Voith had not shown how Mr. Reed's report was relevant to the Court's weighing of the public interest injunctive relief factor. Although Voith also argued that Mr. Reed's expert report was relevant to the consideration of competitive prejudice allegedly suffered by Voith, the Court concluded that this was "yet another attempt by plaintiff to critique the rationality of the evaluation scheme set forth in the solicitation and used by the agency to compare proposals."

Further, the Court rejected Voith's argument that the technical aspects of the procurement could not be understood unless Mr. Reed's report was considered. The Court noted that the "parties are represented by able counsel and the briefing schedule permits the crafting of well-reasoned, informative briefs" without the need for supplemental expert analysis.

Following the Court's decision denying Voith's motion to supplement, the Court sustained the Corps' contract award and dismissed Voith's protest.

Read the decision here.

Court Holds That Protestor Whose Offer Was Fifth In Line For Award Was Not "Interested Party" With Standing To Challenge Army Award. *Eskridge & Associates v. United States and Ansible Government Solutions, LLC*, Fed. Cl. 18-2001C, 142 Fed.Cl. 410 (Mar. 19, 2019) [Lettow, S.J.], on appeal, No. 19-1862 (Fed. Cir.)

The Court dismissed a post-award bid protest brought by an offeror that was fifth in line for a contract awarded on a Lowest Price Technically Acceptable basis, holding that the protestor lacked "interested party" status and, thus, did not have standing.

The plaintiff, Eskridge & Associates ("Eskridge"), was among five offerors in a Department of the Army procurement of a $21 million firm, fixed-price contract to provide certified nurse anesthetists at the Womack Army Medical Center, located at Fort Bragg, North Carolina. After corrective action and proceedings before the Government Accountability Office ("GAO"), the Army awarded the contract to Ansible Government Solutions LLC ("Ansible"), finding that Ansible's price was the lowest priced technically acceptable proposal, and that its price was fair and reasonable. Although both offers were found technically acceptable, Eskridge's price was significantly higher and put it fifth in line for an award. Eskridge filed a post-award protest before GAO, which was dismissed on grounds that Eskridge was not an interested party. Eskridge then filed suit.

To demonstrate standing under 28 U.S.C. § 1491(b)(1), a plaintiff must show that it is an "interested party" that suffered prejudice from a significant procurement error. As the Court explained, interested parties are "actual or prospective bidders or offerors whose direct economic interest would be affected by the award of a contract or by the failure to award the contract" (citing *Weeks Marine, Inc. v. United States*, 572 F.3d 1352, 1359 (Fed. Cir. 2009)). As the Court noted, although a "party can have a substantial chance at award and still not be prejudiced where, *e.g.*, the error is minor and affects all parties equally[,]" a "party cannot be prejudiced unless it has a substantial chance of award."

The Court held that, although Eskridge was an actual bidder, it did not have a "substantial chance" of winning the contract because it did "not make a credible challenge to the technically acceptability of [the] four lower bids." The Court rejected Eskridge's argument that the other four offerors were ineligible for award because their prices "cannot survive" a compensation realism analysis under FAR 52.222-46, finding that such an error, if it existed, would apply to Eskridge's own proposal as well. The Court observed that there was nothing "facially wrong with the four lower bids." The Court noted that "the only procurement error alleged by Eskridge would apply to every bidder including itself, not just those with a lower price, and the other prices are so close to Eskridge's so as to make its protest problematic." The Court also rejected Eskridge's arguments based on a previous solicitation – and its attempt to impose on the Army the terms of that cancelled solicitation – as "immaterial" and an "attempt to re-litigate" GAO protests.

This decision is currently on appeal at the Federal Circuit (Case No. 19-1862).

Read the decision here.

GOVERNMENT CONTRACTS

Court Sustains Bid Protest Challenging Agency Stay Override Decision, Finding Agency's "Best Interest" Rationale Legally Insufficient. *Technica LLC v. United States*, Fed. Cl. 18-2003C, 142 Fed. Cl. 149 (Feb. 4, 2019, reissued Feb. 22, 2019) [Smith, S.J.]

In this action, protester Technica LLC challenged the decision of the Transportation Security Administration (TSA) to override a stay in the performance of a contract for airport security and screening services at an airport in Florida. In its Determinations and Findings authorizing the stay override, the contracting officer cited "urgent and compelling circumstances" because the peak travel time would likely coincide with the 100-day protest period, and because a sufficient number of federal staff from other airport were not available to perform the work.

The Court applied the four-factor test set forth in *Reilly's Wholesale Produce v. United States*, 73 Fed. Cl. 705, 710 (2006), and concluded that the override decision was arbitrary and capricious. Among other things, the Court questioned whether performance by the awardee would be significantly superior to continued performance by the incumbent, given the fact that regulations required awardee was required to offer employment on a right of first refusal to the incumbent's staff. The Court also questioned whether the transfer of federal staff from other locations would be necessary, given the fact that the incumbent is currently working with more full-time staff than the number provided under the Task Order. Finally, the Court found that the agency had failed to consider the potential cost of an override in the event of a successful protest, and stressed the impact of an override on competition and the integrity of the procurement system.

Read the decision here.

Federal Circuit Reverses and Orders Dismissal of Contract Dispute Claim on Ground That Contractor Lacked Privity of Contract with the Procuring Agency. *Park Properties Assocs., L.P., et al. v. United States*, Fed. Cl. 15-554, Fed. Cir. No. 2017-2279, 2017-2344, 916 F.3d 998 (Fed. Cir. Feb. 19, 2019) [J. Stoll], *pet. cert.*, No. 19-268.

In this case brought under the Contract Disputes Act, landlords argued that their renewal housing assistance payments with the Department of Housing and Urban Development should be reformed to reflect higher rent costs. As background, under this housing assistance program, HUD enters into housing assistance renewal contracts with state and local public housing agencies, which in turn enter into contracts with private landlords to subsidize low income housing.

Although the Tucker Act only confers jurisdiction on contractors that are in privity of contract with the United States, the Court of Federal Claims concluded that the requisite privity existed because the contracts provided that HUD is party to the provisions of the renewal contract. The Federal Circuit disagreed with the analysis of the trial court, and found that although regulations allow HUD to be a party to renewal housing assistance contracts with landlords, HUD was not a party in these particular contracts.

A petition for certiorari was docketed on August 29, 2019 (Case No. 19-268).

Read the decision here.

Court Sustains $370 Million Contract Award, Rejecting Claims Of Flawed Past Performance Evaluations And Disparate Treatment. *Voith Hydro, Inc. v. United States*, No. 18-1907C, 143 Fed. Cl. 201 (Apr. 30, 2019) [Campbell-Smith, J.].

In a second decision in the *Voith Hydro* protest, the Court sustained a $370 million contract award by the U.S. Army Corps of Engineers ("Corps"), Walla Walla District, for the design, manufacture, and installation of 14 new hydroelectric turbine generator units and other infrastructure improvements at the McNary Lock and Dam Powerhouse on the lower Columbia River.

Voith Hydro, Inc. (Voith) challenged the contract award to Alstom Renewable US LLC, arguing that the Corps had conducted flawed proposal evaluations and engaged in disparate treatment. Voith challenged the Corps' consideration of phone interviews of Alstom's customers, who Voith alleged provided unfavorable feedback. The Court deferred to the agency's rational consideration of that customer feedback. The Court also rejected Voith's assertion that Alstom's Canadian projects were subjected to a less probing analysis than were Voith's American projects. The Court concluded that, even though the Corps had more robust feedback about Voith's American projects from the Contractor Performance Assessment Report System (CPARS), the record shows that the offerors were treated fairly and impartially, even though they were not treated exactly the same. Further, the Court determined that, to resolve an uncertainty about Alstom's past performance, the Corps rationally relied on a written assurance from Alstom that its management team remained the same after its ownership changed, without violating the evaluation scheme set forth in the solicitation. Finally, the Court determined that the Source Selection Advisory Council (SSAC) and the Source Selection Authority (SSA) could rationally modify the Performance Confidence Assessments (PCAs) – metrics used to evaluate past performance – which were assigned by the Source Selection Evaluation Board (SSEB), and could do so without violating the terms of the solicitation.

Read the decision here.

TAKINGS

Court Finds New Individual Plaintiffs' Takings Claims, Pled After Original Plaintiffs Amend Complaint to Remove Class Allegations, Do Not Relate Back to Original Complaint and Are Time-Barred. *Big Oak Farms, Inc. v. United States*, No. 11-275L, 141 Fed. Cl. 482 (Jan. 11, 2019) [Firestone, J.]

The plaintiffs in this takings case filed a complaint in May 2011 on behalf of themselves and a putative class of landowners that incurred damages from a flood in Missouri. According to the plaintiffs, the Army Corps of Engineers ("Corps") intentionally breached the Birds Point levee, inundating nearly 130,000 acres with flood waters from the Mississippi River. Some of the original plaintiffs granted easements to the Corps and claimed that, to the extent the easements were enforceable, the Corps exceeded their scope. The plaintiffs sought just compensation under the Fifth Amendment for the government's temporary taking of their property.

The Court initially granted the government's RCFC 12(b)(6) motion to dismiss the plaintiffs' takings claims. Following the United States Supreme Court's decision in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012), the Court reinstated the plaintiffs' takings claims. At the close of discovery, the parties filed cross-motions for summary judgment, which the Court denied. Thereafter, the plaintiffs informed the court that they decided not to seek class certification and planned to amend their complaint to name additional individual plaintiffs.

In March 2018, the plaintiffs filed their third amended complaint, which did not plead claims to support a class action but added the claims of over 120 additional parties asserting takings claims. The government moved to dismiss the additional plaintiffs' claims for lack of subject matter jurisdiction under RCFC 12(b)(1), arguing that these claims were filed more than six years after the Corps breached the levee and, thus, were barred by the six-year statute of limitations set forth in 28 U.S.C. § 2501. The plaintiffs, however, contended that the additional plaintiffs' claims related back to the original complaint under RCFC 15(c)(1)(B). The plaintiffs also argued that the statute of limitations was tolled during the period of time the plaintiffs maintained a class certification claim.

The Court granted the government's RCFC 12(b)(1) motion to dismiss the additional plaintiffs' claims. Applying the four-factor test for relation back articulated in *Holland v. United States*, 62 Fed. Cl. 395 (2004), the Court concluded that the additional plaintiffs' claims did not relate back to the original complaint. The Court determined that the first factor – whether the claim arose out of the same conduct, transaction, or occurrence as the original complaint – weighed in the additional plaintiffs' favor, explaining that "the fact that the takings claims of each property owner is different and that each will have to establish their own taking claim . . . does not mean that the underlying government action giving rise to the taking is different for each plaintiff in this case." Slip op. at 14.

The Court then turned to the second factor: whether the new plaintiff shared an "identity of interest" with the original plaintiff. *Id.* Although this factor presented "a more difficult issue," *id.*, the Court concluded that identification of a potential class of plaintiffs with property that was flooded by the same event was "not enough" to satisfy the "identity of interest" test. Relying upon *Creppel v. United States*, 33 Fed. Cl. 590 (1995), wherein the determined that geographic proximity of a discrete parcel of land to property owned by a plaintiff asserting a takings claim was not enough to satisfy the identity of interest factor under RCFC 15(c), the Court reasoned that the additional plaintiffs did not show that their claims for a taking were sufficiently similar to the takings claims brought by the original plaintiffs such that those claims "were effectively before the court." *Id.* at 16.

Next, the Court determined that the third *Holland* factor – whether the defendant had fair notice of the additional plaintiffs' claims – weighed in the government's favor. Although the government was on notice that the original plaintiffs sought to certify a class consisting of potentially "'thousands of other landowners who had property flooded by the breach of the Birds Pointe Levee,'" *id*. at 16-17, the Court concluded that RCFC 15(c) required more than notice of a potential class to establish notice of individual plaintiff claims. The Court explained that the plaintiffs merely alleged that many property owners were affected by flooding, but they failed to identify with some precision the facts giving rise to the temporary takings claims for various categories of landowners. Consequently, the Court concluded that the government lacked fair notice of the additional plaintiffs' claims prior to expiration of the statute of limitations.

Finally, the Court determined that the fourth *Holland* factor – whether the additional claims will cause prejudice – weighed in the government's favor. Permitting relation back to include 123 additional plaintiffs, the Court observed, would increase the number of plaintiffs by over 100, creating a "clear litigation burden[,] particularly given the years that have passed and the proof required to prove impacts to property more than seven years after the flooding in 2011." *Id.* at 18. Since the majority of *Holland* factors weighed against relation back, the Court held that the additional plaintiffs' claims were time-barred.

The Court then addressed the plaintiffs' argument that the statute of limitations was tolled when the original plaintiffs filed their class action complaint. Distinguishing these circumstances from *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010), wherein the United States Court of Appeals for the Federal Circuit permitted tolling for class members in a takings case who did not have the opportunity to opt into the class until after the statute of limitations expired, the Court observed that the Federal Circuit did not address whether tolling is permitted where, as here, the original plaintiffs never sought class certification and later removed the class certification request after the statute of limitations ran. The Court concluded that *Bright* did not authorize tolling where the plaintiffs merely had a class action complaint pending before the court.

The decision is currently on appeal at the Federal Circuit (No. 19-1748).

Read the decision here.

TAX

I.R.C. § 7422: Court Holds that an Unsigned Refund Claim Is Not an "Informal" Refund Claim. *Wilson v. United States*, Fed. Cl. No. 18-408 T, 2019 WL 988600 (February 27, 2019) [Hodges, S.J.]

In this tax matter, the Court dismissed the suit for a refund of a $3.2 million penalty imposed under I.R.C. § 6677(a) (failure to file information with respect to certain foreign trusts) for lack of subject matter jurisdiction. The Court agreed with the Government that plaintiff's purported refund claim (Form 843) was not valid for purposes of § 7422 where it was not signed by the plaintiff under penalty of perjury, as required by Treas. Reg. § 301.6404-2(b), but was signed by plaintiff's counsel, who did not have the authority to sign refund claims on plaintiff's behalf. The Court rejected plaintiff's argument that the unsigned claim nevertheless satisfied § 7422 because it was an "informal" claim. The Court reasoned that the "informal" claim doctrine addresses the issue of timeliness, not validity. The Court noted that because plaintiff filed a new, signed, refund claim in January 2019, plaintiff could re-file suit after waiting the statutory six-month period prescribed in § 6532.

Read the decision here.

VACCINE

Special Master Denies Entitlement to Compensation in Petition alleging that the Influenza Vaccine Caused Bilateral Sudden Sensorineural Hearing Loss. *Inamdar v. HHS*, No. 15-1173V, 2019 WL 1160341 (Feb. 8, 2019). [S.M. Corcoran]

The Court of Federal Claims, in an decision by Special Master Corcoran, denied a petition filed under the Vaccine Act 42 U.S.C § 300aa-1 *et seq.*, alleging that an influenza vaccine caused petitioner to develop bilateral sudden sensorineural hearing loss ("SNHL").

Petitioner alleged that he developed SNHL within 24 hours of receiving the flu vaccine. The record showed—and the special master held a hearing and found—that, at the time of vaccination, petitioner was taking the medication Azithromycin. Petitioner submitted two expert reports from Dr. David Axelrod, arguing that the flu vaccine can cause SNHL by inducing "proinflammatory cytokines" that could damage neurons in the ear, or via molecular mimicry. The government submitted an expert report from Dr. Douglas Bigelow, opining that the petitioner's proposed mechanisms could not support an onset of less

than 24 hours. Dr. Bigelow, moreover, opined that petitioners SNHL was caused by his Azithromycin, a medication known to be associated with hearing loss.

At the conclusion of the expert reports, petitioner moved for a ruling on the record. The special master denied entitlement to compensation, concluding that petitioner had failed to establish preponderant evidence that the flu vaccine can cause SNHL. First, the special master cited six similar previous cases where petitioners failed to show that vaccines (including the flu vaccine) could cause hearing loss. The special master next determined that Dr. Axelrod's opinion was not persuasive. Specifically, Dr. Axelrod had not shown how cytokine upregulation leads to hearing loss or supported his argument that components of the flu vaccine could cross-react with the inner ear through molecular mimicry. Moreover, the special master found that the government had presented reliable evidence that petitioner's medication was the cause of his hearing loss, undermining petitioner's ability to state a prima facie case. Finally, the special master denied petitioner's request for reconsideration of the factual finding that petitioner had been taking Azithromycin. In doing so, the special master noted the great weight afforded to contemporaneous medical records in Vaccine Act cases.

Read the decision here.

The Court of Federal Claims Upholds The Chief Special Master's Onset Determination of SIRVA Within 48 Hours Notwithstanding Delay In Seeking Treatment. *Tenneson v. HHS*, No. 16-1664V, 2019 WL 1235644, 142 Fed.Cl. 329 (Feb. 28, 2019, reissued March 18, 2019). [J. Kaplan]

In this Vaccine Act case, petitioner alleged that she suffered a shoulder injury related to vaccine administration ("SIRVA") within 48 hours of a flu vaccination. The petitioner did not report her SIRVA to a physician for nearly six months post-vaccination. In support of onset, petitioner submitted affidavit testimony as well as medical records from when she sought care, which noted her SIRVA beginning within 48 hours of her vaccination. Former Chief Special Master Dorsey held the onset of petitioner's SIRVA occurred within 48 hours of the vaccine. The respondent subsequently sought review, arguing the Chief Special Master erred in finding petitioner entitled to compensation "based on the claims of petitioner alone, unsubstantiated by medical records or medical opinion." Similarly, the respondent alleged the Chief Special Master's factual findings regarding onset were arbitrary and capricious as they were inconsistent with the contemporaneous medical records.

The Court of Federal Claims denied respondent's motion for review, holding that petitioner's claim relied, not only on her affidavit and those of family members, but also on numerous medical records. The Court reasoned that, petitioner's "delay in seeking treatment for her shoulder injury does not deprive the records of probative value[,]" even though they were not contemporaneous with the alleged onset. In addition, the Court held the Chief Special Master's factual findings were not arbitrary and capricious, as "the Chief Special master provided an entirely reasonable explanation for crediting [petitioner's] testimony. . .regarding the onset date of her shoulder injury, notwithstanding her delay in seeking treatment." In addition to appropriately using her accumulated expertise adjudicating Vaccine Act claims, the Chief Special Master found, "[p]etitioner's account [to be] detailed, cogent and corroborates the statements she made to her health care providers."

Read the decision here.

INTELLECTUAL PROPERTY

The Court Awards Attorneys' Fees and Costs Under 28 U.S.C. § 1498(a) In A Patent Infringement Suit, Concluding That A Fee Award Twenty Times Greater Than The Damages Award Was Reasonable.
Hitkansut LLC, et al., v. United States, Fed. Cl. No. 12-303C, 142 Fed. Cl. 341 (March 15, 2019) [Lettow, J.]

Plaintiffs Hitkansut LLC and Acceledyne Technologies, Ltd. LLC (collectively, "Hitkansut") brought suit against the United States for patent infringement. After a lengthy litigation culminating in a post-trial decision, Hitkansut prevailed on the merits and the court awarded it $200,000 plus interest as reasonable and entire compensation for the infringement. This judgment was affirmed on appeal. Following the appeal, Hitkansut moved for an award of approximately $4.51 million in attorneys' fees and expenses pursuant to 28 U.S.C. § 1498(a). The Court granted the motion, but decreased the award for fees to $4.39 million.

In addressing the motion, the Court noted first that it possessed jurisdiction to make an award of fees and expenses separate from an award of compensation regarding infringement, rejecting the government's assertion that the statute required that fees be awarded prior to final judgment because the fees and costs are included in the definition of the "reasonable compensation" to be awarded under § 1498(a). In so holding, the Court found persuasive the statutory language of the Equal Access to Justice Act ("EAJA") and the Uniform Relocation Act along with the Supreme Court's reasoning in *Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 158 (1990) and the legislative history of the 1999 amendments to § 1498.

The Court then rejected the government's argument that § 1498(a) limits recovery to "fees incurred by the owner" of a patent and that the nature of the fee arrangements between Hitkansut and its attorneys meant Hitkansut did not incur any fees within the meaning of the statute. Pursuant to the retention agreements between Hitkansut and its attorneys, Hitkansut would have had no obligation to its attorneys in the event its infringement claim did not prevail, but Hitkansut and its attorneys would split recovery on a successful claim, and their shares would vary based on whether the Court awarded attorneys' fees and costs. The Court held that, under § 1498(a), the costs to which the patent owner is entitled consist of attorneys' fees that the owner may not be legally obligated to pay, such as those fees contingent on the amount of recovery, when the fees were incurred by the owner's attorney in representation of the owner, or where the owner would be contractually obligated to pay such fees if awarded by the court.

Moving to the merits of the motion, the Court stated that because Hitkansut had prevailed on its infringement claim, it was entitled to reasonable fees under the statute unless "the position of the United States was substantially justified or [] special circumstances make an award unjust." 28 U.S.C. § 1498(a). Relying on the EAJA and legislative history of § 1498(a), the Court held that evaluating substantial justification required examination of all facts surrounding the government's conduct that were material to infringement of Hitkansut's patent, regardless of whether the conduct occurred pre- or post-litigation.

Next, the Court examined whether the government's position was substantially justified, focusing on (1) the pre-litigation activities of the governmental agency and (2) the government's attempts to invalidate the patent-in-suit. Although the government prevailed with respect to certain of its litigation positions and, therefore, Hitkansut was awarded only 5% of the damages that it sought, the Court held that these arguments related to secondary issues, while the issue of infringement and validity, on which Hitkansut prevailed, were the primary issues. The Court concluded that the government's position was not substantially justified when considering the totality of the circumstances and, thus, Hitkansut was entitled to fees.

In addressing the amount of the award of fees, the Court found that the AIPLA surveys provide an appropriate starting point for hourly rates and approved deviations above the mean AIPLA survey rates for the appropriate region based on prior patent litigation experience. The Court rejected Hitkansut's requests for fees related to two failed district court suits filed before the Court of Federal Claims suit was filed.

Lastly, the Court rejected the government's contention that a fee award over 20 times the value of the damage award was unreasonable. The Court stated that the claim was vigorously contested, involved highly-technical subject matter, and spanned six years and a lengthy appeal process. Highlighting fee awards under the Uniform Relocation Act and EAJA that exceeded the amount of damages, the Court concluded that determining what is "reasonable" in the § 1498(a) context requires examining whether the costs were necessary to the litigation and incurred at prevailing market rates, not whether the costs would have made litigation unprofitable in the absence of a fee-shifting provision. The Court rejected the government's position as improperly focusing on the final damages award in contrast to the potential damages award at the time the litigation expenses were incurred.

The decision is currently on appeal at the Federal Circuit (No. 19-1884).

Read the opinion here.