GIBSON DUNN

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2017 YEAR-END GOVERNMENT CONTRACTS UPDATE

To Our Clients and Friends:

In this year-end analysis of government contracts litigation, Gibson Dunn examines trends and summarizes key decisions of interest to government contractors from the second half of 2017. This publication covers the waterfront of the opinions most important to this audience issued by the U.S. Court of Appeals for the Federal Circuit, U.S. Court of Federal Claims, Armed Services Board of Contract Appeals ("ASBCA"), and Civilian Board of Contract Appeals ("CBCA").

The last six months of 2017 yielded 3 government contracts-related opinions of note from the Federal Circuit, excluding decisions related to bid protests. From July 1 through December 31, 2017, the U.S. Court of Federal Claims issued 7 notable non-bid protest government contracts-related decisions, and the ASBCA and CBCA published 48 and 40 substantive government contracts decisions, respectively. As discussed herein, these cases address a wide range of issues with which government contractors should be familiar, including matters of cost allowability, jurisdictional requirements, contract interpretation, terminations, and the various topics of federal common law that have developed in the government contracts arena. Before addressing each of these areas, we briefly provide background concerning the tribunals that adjudicate government contracts disputes.

I. THE TRIBUNALS THAT ADJUDICATE GOVERNMENT CONTRACT DISPUTES

Under the doctrine of sovereign immunity, the United States generally is immune from liability unless it waives its immunity and consents to suit. Pursuant to statute, the government has waived immunity over certain claims arising under or related to federal contracts through the Contract Disputes Act ("CDA"), 41 U.S.C. §§ 7101 - 7109, and through the Tucker Act, 28 U.S.C. § 1491. Under the CDA, any claim arising out of or relating to a government contract must be decided first by a contracting officer. A contractor may contest the contracting officer's final decision by either filing a complaint in the U.S. Court of Federal Claims or appealing to a board of contract appeals. The Tucker Act, in turn, waives the government's sovereign immunity with respect to certain claims arising under statute, regulation, or express or implied contract, and grants jurisdiction to the Court of Federal Claims to hear such claims.

The Court of Federal Claims thus has jurisdiction over a wide range of monetary claims brought against the U.S. government including, but not limited to, contract disputes and bid protests pursuant to both the CDA and the Tucker Act. If a contractor's claim is founded on the Constitution or a statute instead of a contract, there is no CDA jurisdiction in any tribunal, but the Court of Federal Claims would have jurisdiction under the Tucker Act as long as the substantive source of law grants the right to recover damages. Thus, the Court of Federal Claims' jurisdiction is broader than that of the boards of contract appeals.

In addition to establishing jurisdiction for certain causes of action in the Court of Federal Claims, the CDA establishes four administrative boards of contract appeals: the Armed Services Board, the Civilian Board, the Tennessee Valley Authority Board, and the Postal Service Board. *See* 41 U.S.C. § 7105. The ASBCA hears and decides post-award contract disputes between contractors and the Department of Defense and its military departments, as well as the National Aeronautics and Space Administration ("NASA"). In addition, the ASBCA adjudicates contract disputes for other departments and agencies by agreement. For example, the U.S. Agency for International Development has designated the ASBCA to decide disputes arising under USAID contracts. The ASBCA has jurisdiction pursuant to the CDA, its Charter, and certain remedy-granting contract provisions. The CBCA hears and decides contract disputes between contractors and civilian executive agencies under the provisions of the CDA. The CBCA's authority extends to all agencies of the federal government except the Department of Defense and its constituent agencies, NASA, the U.S. Postal Service, the Postal Regulatory Commission, and the Tennessee Valley Authority. In addition, the CBCA has jurisdiction, along with federal district courts, over Indian Self-Determination Act contracts.

The U.S. Court of Appeals for the Federal Circuit hears and decides appeals from decisions of the Court of Federal Claims, the ASBCA, and the CBCA, among numerous other tribunals outside the area of government contract disputes. Significantly, the Federal Circuit has a substantial patent and trademark docket, hearing appeals from the U.S. Patent and Trademark Office and federal district courts that by volume of cases greatly exceeds its government contracts litigation docket. Of 1,542 cases pending before the Federal Circuit as of September 30, 2017, 11 were appeals from the boards of contract appeals and 144 were appeals from the Court of Federal Claims—cumulatively comprising just over 10% of the appellate court's docket. Only 4% of the appeals filed at the Federal Circuit in FY 2017 were Contracts cases. Nevertheless, the Federal Circuit is the court of review for most government contracts disputes.

On September 30, 2017, the founding, and longtime, Chairman of the CBCA, Judge Stephen M. Daniels, retired from the bench after 51 years of federal service, including 30 years as a judge. Following Judge Daniels' retirement, Judge Jeri K. Somers was appointed to be the new Chair of the CBCA and Judge Erica Beardsley was appointed the new Vice Chair.

Two new judges were appointed to the ASBCA during the summer of 2017. Prior to his appointment in June, Judge Christopher M. McNulty was a Senior Trial Attorney with the Air Force, where he had served since 2009 after spending decades in private practice. Judge Heidi L. Osterhout was appointed to the Board in July 2017 after serving three years as a Trial Attorney in DOJ's Commercial Litigation Branch and twenty years in the Air Force before that.

On September 28, 2017, President Trump nominated Ryan T. Holte for one of the four remaining vacancies on the Court of Federal Claims. If confirmed, Mr. Holte will fill the seat left vacant when Judge Nancy B. Firestone assumed senior status in October 2013. Mr. Holte is currently an Associate Professor of Law at the University of Akron School of Law. He is also the General Counsel of Counter Echo Solutions, an electrical engineering technology company, and previously served as an attorney with the Federal Trade Commission, and as a law firm associate. President Trump's first two nominees to the Court of Federal Claims, Damien Schiff and Stephen Schwartz, were not on the list of nominations

re-submitted by the White House to Congress last week, after their initial nominations were not carried over into the new year under Senate rules.

II. COST ALLOWABILITY

The ASBCA issued several important decisions during the second half of 2017 addressing the merits of cost allowability issues under the Federal Acquisition Regulation ("FAR"). Pursuant to FAR 31.202, a cost is allowable if it (1) is reasonable; (2) is allocable; (3) complies with applicable accounting principles; (4) complies with the terms of the contract; and (5) complies with any express limitations set out in FAR Subpart 31.

***Luna Innovations, Inc.*, ASBCA No. 60086 (Nov. 29, 2017)**

As a public company, Luna is required to account for employee stock options exercisable in future years at the time the options are awarded. Luna used the "Black-Scholes" method of estimating the value of those stock options, which the contracting officer determined was expressly unallowable because one of the five variables used by the model is stock price variance among comparable companies, and FAR 31.205-6(i) does not allow for reimbursement of compensation calculated based on variances in stock price. Luna argued that because stock volatility is only one of five variables in the Black-Scholes model, it is not "based on" the underlying stock volatility.

The Board (D'Alessandris, A.J.) found that the Black-Scholes method did result in unallowable costs under the "plain language" of the FAR provision, because stock volatility is a primary factor in determining the value of the employee stock options. Importantly, however, the Board found that Luna's cost claims were not expressly unallowable. Noting "the complexity of the circumstances, the fact that the use of the Black-Scholes model is a question of first impression, the need to review the differential equations comprising the Black-Scholes model, and the fact that there could be a reasonable difference of opinion regarding the costs," the Board concluded that "it was not 'unreasonable under all the circumstances' for Luna to claim the employee stock option costs." Thus, the costs were only unallowable and not expressly unallowable and subject to penalties.

***Access Personnel Servs., Inc.*, ASBCA No. 59900 (Sept. 7, 2017)**

The dispute in this case arose under a contract incorporating the pre-2007 version of FAR 52.232-7, Payments Under Time-And-Materials And Labor-Hour Contracts. APS subcontracted a portion of the work, and instructed the subcontractor to bill APS at the fixed hourly rates specified in the prime contract. But the subcontractor failed to follow this instruction and submitted two separate sets of invoices—one for work hours and a second set for vacation time. Because the total of the invoices was the same as APS's combined rates, APS submitted the entire cost to the Navy. The Navy focused on only the first set of invoices relating to the work year and disallowed the difference between APS's and the subcontractor's rates, claiming that APS was billing the government a rate higher than the rate billed to it by its subcontractor and that the subcontractor's vacation and holiday pay should have been included in its direct labor rate.

Relying on the plain language of FAR 52.232-7, the Board (McNulty, A.J.) held that APS was entitled to the payment of costs, not the fixed hourly rates specified in the prime contract, for subcontract labor. Because the Navy paid APS less than the full amount of costs that APS incurred in paying its subcontractor, the Board sustained the appeal on entitlement and remanded to the parties to validate APS's contention that the total of the subcontractor invoices was the same.

***Am. Boys Constr. Co.*, ASBCA No. 60515 (Sept. 13, 2017)**

The government awarded ABC a contract for the installation of a "sniper screen" at a base in Afghanistan. After ABC had purchased materials for the contract, but before ABC otherwise commenced work, the government issued a stop-work order and terminated the contract for convenience. ABC sought to recover the cost of the materials it purchased and stand-by costs.

The Board (Prouty, A.J.) denied ABC's appeal. Although the contract allowed for payment for costs of work that would be performed prior to contract termination, the Board agreed with the government that it was premature to purchase materials prior to receiving approval of the purchase. The Board also found that because the government had not issued a notice to proceed, there was no time pressure driving the need to purchase the materials when ABC did. Finally, the Board found that while reasonable stand-by costs incurred prior to a notice to proceed may be recoverable, ABC failed to provide evidence of its incurred stand-by costs.

III. JURISDICTIONAL ISSUES

As is frequently the case, jurisdictional issues dominated the landscape of key government contracts decisions during the second half of 2017.

A. Requirement for a Valid Contract

In order for there to be Contract Disputes Act jurisdiction over a claim, there must be a *contract* from which that claim arises. *See* FAR 33.201 (defining a "claim" as "a written demand or written assertion by one of the contracting parties seeking . . . relief arising under or relating to *this contract*"). The CDA applies to contracts made by an executive agency for: (1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair, or maintenance of real property; and (4) the disposal of personal property. 41 U.S.C. § 7102(a)(1)-(4).

***Safeco Ins. Co. of Am.*, ASBCA No. 60952 (July 25, 2017)**

Safeco issued payment and performance bonds as surety for a contract between the U.S. Army Corps of Engineers and I.L. Fleming, Inc. Safeco requested that the Corp not release funds to Fleming without Safeco's written consent. Nevertheless, the Corps made final payment directly to Fleming. Subsequently, Safeco filed a certified claim for the amount of the final payment plus a contract balance, which the contracting officer denied. In its appeal, Safeco characterized its allegations as an equitable subrogation claim or, secondarily, an implied-in-fact contract.

The Board (Clarke, A.J.) held that it did not have jurisdiction to hear a subrogation claim under the CDA, notwithstanding case law concerning the Court of Federal Claims' jurisdiction to hear such cases under the latter tribunal's Tucker Act jurisdiction. The Board also rejected Safeco's arguments of an implied-in-fact contract because Safeco failed to allege the existence of such a contract in its complaint or claim. Further, even if such a claim had been alleged, the Board would still reject Safeco's position because there was no plausible evidence of an implied-in-fact contract. Therefore, the Board dismissed Safeco's appeal.

***Ikhana, LLC*, ASBCA Nos. 60462 *et al.* (Oct. 18, 2017)**

The government awarded a contract to Ikhana to construct secured access lanes and remote screening facilities at the Pentagon. Ikhana executed performance and payment bonds with its surety. As part of an indemnity agreement for these bonds, Ikhana agreed that in the event of a default, it would assign to the surety a possessory right to collateral, including "contract rights." After performance issues arose, the government terminated the contract for default and Ikhana appealed to the ASBCA seeking: (1) to convert the termination to one of convenience; and (2) damages for breach of contract. The government moved to dismiss, or in the alternative for summary judgment, arguing that Ikhana lacked standing because the surety was the real party in interest. The surety also moved to intervene and to withdraw the appeals.

The Board (Sweet, A.J.) explained that the fundamental issues underlying the pending motions were whether Ikhana assigned the claims underlying these appeals to the surety, and if so, whether that assignment precluded Ikhana from bringing the appeals. The Board held that assuming, without deciding, that there was an assignment, that assignment would not preclude Ikhana from bringing these appeals. Relying on *Burnside-Ott Aviation Training Ctr. v. Dalton*, 107 F.3d 854 (Fed. Cir. 1997), the Board held that the indemnification agreement and settlement agreement between the Government and surety "impermissibly attempt to deprive us of our power to hear these appeals, which otherwise fall under the CDA."

***Eng'g Solutions & Prods.*, ASBCA No. 58633 (Aug. 4, 2017)**

ESP leased a warehouse and then subleased it to the Army. After the Army suggested that it would be interested in leasing more warehouse space from ESP, ESP entered into a 10-year lease for the warehouse. After five years, the Army vacated the warehouse. ESP submitted a claim for an early termination fee, the sixth year of rent, and other costs. After the claim was denied, ESP appealed arguing that there was an implied-in-fact contract with the Army.

The Board (D'Alessandris, A.J.) held that there was no implied-in-fact contract. First, the Board noted that to establish such a contract, ESP would have to prove that there was mutuality of intent to contract, consideration, unambiguous offer and acceptance, and actual authority on the part of the government. The Board focused only on the issue of mutuality of intent to contract, which it found dispositive. It found that ESP had not established that anyone with authority to bind the Army was a party to the alleged implied-in-fact contract. The Board also found that there was no ratification with respect to contracting authority. Lastly, ESP failed to establish entitlement for the services provided

since there was no implied-in-fact contract, and the government had already paid for any benefits it received. Accordingly, ESP's appeal was denied.

***Scott v. United States*, No. 17-471 (Fed. Cl. Oct. 24, 2017)**

Brian X. Scott brought a *pro se* claim in the Court of Federal Claims seeking monetary and injunctive relief for alleged harms arising from the Air Force's handling of his unsolicited proposal for contractual work. Scott was an Air Force employee who submitted a proposal for countering the threat of a drone strike at the base where he was stationed. The proposal was rejected, but Scott alleged that portions of the proposal were later partially implemented. Scott sued, claiming that the Air Force failed properly to review his proposal and that his intellectual property was being misappropriated. Scott argued that jurisdiction was proper under the Tucker Act because an implied-in-fact contract arose that prohibited the Air Force from using any data, concept, or idea from his proposal, which was submitted to a contracting officer with a restrictive legend consistent with FAR § 15.608.

The Court of Federal Claims (Lettow, J.) found that it had jurisdiction under the Tucker Act because an implied-in-fact contract was formed when the Air Force became obligated to follow the FAR's regulatory constraints with regard to Scott's proposal. Nevertheless, the Court granted the government's motion to dismiss because Scott's factual allegations, even taken in the light most favorable to him, did not plausibly establish that the government acted unreasonably or failed to properly evaluate his unsolicited proposal by using concepts from the proposal where Scott's proposal addressed a previously published agency requirement.

***Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361 (Fed. Cir. 2017)**

LFD operated a marina on land leased from the Army Corps of Engineers at Lake Cumberland, Kentucky. In the lease, the Corps retained the right to manipulate the water levels on the lake as necessary. During the term of the lease, the Corps drew down the lake's level while it worked on repairs to a dam in the area. LFD submitted a certified claim to the contracting officer seeking equitable reformation of the contract, which the contracting officer denied. LFD appealed to the ASBCA and subsequently raised the new argument that the Corps breached its lease contract by failing to disclose its superior knowledge of the dam's state of repair and corresponding need to draw down the lake's water level. The Board in 2016 granted summary judgment to the Corps. LFD appealed to the Federal Circuit.

The Federal Circuit (Schall, J.) first rejected the government's jurisdictional argument that lease claims are not subject to the CDA, holding that the lease was a contract for the disposal of personal property under the CDA. Turning to the merits of the Board's decision, however, the Court held that both it and the Board lacked jurisdiction over the "misrepresentation by silence" claim because it was never submitted to the contracting officer as part of LFD's certified claim. Further, the Federal Circuit affirmed the Board's grant of summary judgment to the Corps on the breach of contract claim because the lease provided the Corps with the clear right to manipulate water levels and even if reasonableness was a requirement, there was no evidence the Corps acted unreasonably.

***Coast to Coast Computer Prods. v. Dep't of Agric.*, CBCA Nos. 3516 *et al.* (Aug. 14, 2017)**

Coast to Coast was awarded a blanket purchase agreement ("BPA") by the U.S. Forest Service to provide and install printers and plotters. Coast to Coast subsequently requested an equitable adjustment based on constructive changes that arose from requests to create or modify a related web portal. This request was denied by the contracting officer and Coast to Coast appealed to the CBCA.

The Board (Zischkau, A.J.) held that a BPA is not a contract under the CDA, but rather "a framework for future contracts, which come into being when orders are placed and accepted under it." However, the Board further held that CDA jurisdiction can arise from individual orders placed under the BPA, which do create contractual obligations. The Board therefore determined it had jurisdiction over claims arising from individual call orders issued by the Forest Service to the contractor under the blanket purchase agreement, though not over claims arising from the BPA itself. After denying the claims premised only on the BPA for lack of jurisdiction, the Board denied Coast to Coast's claims arising from the calls orders on the merits, thus denying the appeals in their entirety.

B. Adequacy of the Claim

Another common issue arising before the tribunals that hear government contracts disputes is whether the contractor appealed a valid CDA claim. FAR 33.201 defines a "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract." Under the CDA, a claim for more than $100,000 must be certified. In the second half of 2017, the boards considered what constitutes a "claim," including when a contracting officer's final decision adequately states a government claim under the CDA.

***Magwood Servs., Inc. v. Gen. Servs. Admin.*, CBCA No. 5869 (Oct. 30, 2017)**

On September 22, 2016, a GSA contracting officer issued a notice of termination for default to Magwood. The notice stated in plain terms that it was the "final decision of the contracting officer." Magwood subsequently submitted to the contracting officer a "formal request to amend this determination to reflect a Termination for Convenience," as well as a request for $12,153.78 for unpaid "reimbursement." The contracting officer responded that the prior letter was the final decision and that "no request for appeal or reconsideration should be directed" to GSA. On October 2, 2017, Magwood filed a notice of appeal with the CBCA, asserting that the second letter from the contracting officer (from December 2016) was the final decision.

The CBCA (Chadwick, A.J.) dismissed the appeal for lack of jurisdiction. The Board held that the letter from Magwood, despite seeking a sum certain, was styled as a "formal request to amend the default termination." Because Magwood was seeking a response and not prompt payment, the CBCA determined that a contracting officer could not have been expected to understand the request as a CDA claim. Therefore, Magwood could not treat the contracting officer's alleged failure to respond as a deemed denial and the operative final decision was the September 2016 letter, for which the appeal period has already run.

***L-3 Commc'ns Integrated Sys., L.P.*, ASBCA Nos. 60713 *et al.* (Sept. 27, 2017)**

L-3 appealed from multiple final decisions asserting government claims for the recovery of purportedly unallowable airfare costs. Rather than audit and challenge specific airfare costs, the Defense Contract Audit Agency simply applied a 79% "decrement factor" to all of L-3's international airfare costs over a specified dollar amount, claiming that this was justified based on prior-year audits. After filing the appeals, L-3 moved to dismiss for lack of jurisdiction on the grounds that the government had failed to provide adequate notice of its claims by failing to identify which specific airfare costs were alleged to be unallowable, as well as the basis for those allegations.

The Board (D'Alessandris, A.J.) denied the motion to dismiss, holding that the contracting officer's final decisions sufficiently stated a claim in that they set forth a sum certain and a basis for such a claim. The Board held that L-3 had enough information to understand how the government reached its claim, and its contention that this was not a valid basis for the disallowance of costs for the year in dispute went to the merits and not the sufficiency of the final decisions.

C. Requirement for a Contracting Officer's Final Decision

A number of decisions from the tribunals that hear government contracts disputes dealt with the CDA's requirement that a claim have been "the subject of a contracting officer's final decision."

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***Kings Bay Support Servs.*, ASBCA Nos. 59213 *et al.* (July 10, 2017)**

KBSS held a Navy contract for base operating support. After KBSS sought additional compensation for maintenance work, which the government denied, KBSS appealed and the government subsequently filed a motion for summary judgment.

The Board (Kinner, A.J.) denied the government's motion. In addition to finding a genuine dispute of material fact, the Board rejected the government's argument that the Board was without jurisdiction because KBSS used terminology in its briefing that differed from that in its certified claim. The Board held that KBSS's arguments were materially the same as those presented to the contracting officer and that the use of different terminology in its briefing did not change the operative facts or claims.

***Emiabata v. United States*, No. 17-44C (Fed. Cl. Nov. 17, 2017)**

Philip Emiabata was awarded a U.S. Postal Service delivery contract. The contracting officer thereafter terminated the contract for default, citing a number of alleged deficiencies. Emiabata waited 364 days and filed a complaint *pro se* in the Court of Federal Claims alleging wrongful termination and a variety of breach of contract claims. The government moved to dismiss.

The Court of Federal Claims (Campbell-Smith, J.) granted the government's motion to dismiss the breach of contract claims because Emiabata failed to present them to the contracting officer, thus depriving the

Court of jurisdiction pursuant to the CDA. With respect to the wrongful termination claim, the Court directed the government to submit a new motion for summary judgment.

***Vanquish Worldwide, LLC v. United States*, No. 17-335 (Fed. Cl. Sept. 19, 2017)**

Vanquish Worldwide held a contract to provide shipping and logistics services for the U.S. Army in Afghanistan. After 12 of the contractor's shipments disappeared, the CO posted a "Marginal" performance evaluation in the Contractor Performance Assessment Reporting System ("CPARS"). Vanquish Worldwide timely disputed the rating through CPARS and requested that the evaluation be raised to "Satisfactory," but the reviewing official concurred with the rating and rejected the explanations for the disappearance of the shipments. Vanquish Worldwide filed suit in the Court of Federal Claims seeking a declaratory judgment vacating the evaluation and remanding the matter to the agency.

The Court of Federal Claims (Kaplan, J.) granted the government's motion to dismiss Vanquish Worldwide's complaint, holding that the continuing correspondence with the agency about the evaluation never ripened into a claim before the contracting officer. The Court noted that the correspondence not only failed to request a final decision, but it also seemed to contemplate further dialogue.

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Under the CDA, if a contracting officer does not within 60 days issue a decision on a certified claim, or provide a date by which a decision will be issued, the contractor may appeal from a "deemed" denial of its claim or may petition a Board to direct the contracting officer to issue a decision. 41 U.S.C. § 7103(f). In a recent case, the CBCA issued guidance concerning the ability to petition for a directed decision.

***CTA I, LLC v. Dep't of Veteran Affairs*, CBCA 5800 (Aug. 22, 2017)**

On February 15, 2017, CTA submitted a certified claim to the VA for labor inefficiencies, delay, and other costs that arose from its contract to construct a dialysis center in Virginia. The contracting officer stated he would respond to CTA's claims by July 10, 2017. Rather than wait, CTA petitioned the CBCA for an order directing the contracting officer to issue a decision "no later than June 1, 2017," which the Board denied because there was insufficient time to resolve the matter by June 1. When July 10 arrived, the VA stated that a commercial claims consultant was needed to evaluate CTA's claim, and informed CTA it would issue a final decision by September 8, 2017. CTA filed this case on July 25, 2017, alleging that the VA engaged in "bad faith delaying tactics" and asking the Board to direct the VA to issue a final decision by the September 8 deadline. In its brief, the VA indicated that no consultant had been retained and that it did not anticipate meeting the September 8 deadline.

The Board (Chadwick, A.J.) held that the VA had failed to adhere to its CDA deadlines, but CTA's only relief was to treat this failure as a deemed denial and file an appeal from the same with the Board. The Board noted that the government does not have a right to a second extension set outside the initial 60 days, and that any deadline for a decision that the contracting officer establishes at the end of the 60-day period is firm. But if a contracting officer does not act on the claim within 60 days, or misses his own

extended deadline, the contractor's options are to exercise its immediate right to appeal, or await a tardy contracting officer decision on the claim.

IV. TERMINATIONS

The ASBCA issued three noteworthy decisions during the second half of 2017 arising from contract terminations. In the first, the Board strictly construed the one-year time limit to submit a termination settlement proposal in accordance with the FAR's termination for convenience clause.

***Black Bear Construction Co.*, ASBCA 61181 (Nov. 14, 2017)**

Black Bear appealed a contracting officer's denial of a claim seeking settlement costs resulting from the government's termination for convenience of its contract for runway improvement construction in Afghanistan. The government filed a motion for summary judgment, arguing that Black Bear waited more than the required one year to file its settlement proposal. FAR 52.249-2 provides: "After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer . . . promptly, but not later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 1-year period." The government terminated the contract on August 12, 2012, and Black Bear did not submit its termination settlement claim until March 25, 2017.

The Board (Osterhout, A.J.) found no evidence that Black Bear had requested an extension of time from the contracting officer. Because no extension of time was ever sought, much less granted, the claim was untimely. Therefore, the appeal was denied.

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In two cases, the ASBCA addressed when the government's waiver of a delivery schedule fails to justify converting a termination for default into once for convenience.

***Avant Assessment, LLC*, ASBCA Nos. 58903 *et al.* (Aug. 21, 2017)**

Avant held several contracts for the development and delivery of foreign-language test items for the Defense Language Institute. For one contract, the parties implemented a new delivery schedule, but the government nevertheless terminated the contract for default based on Avant's failure to meet the original schedule.

The Board (McIlmail, A.J.) held that the government must justify the termination for default. By implementing a new delivery schedule, the government effectively waived the prior delivery schedule. Accordingly, there could not be a default termination, and the government failed to justify the termination. The Board therefore sustained the appeal.

***Asia Commerce Network*, ASBCA No. 58623 (Oct. 4, 2017)**

Similarly, a termination for default was converted into one for convenience where the Defense Logistics Agency waived default in delivery. DLA awarded a contract to ACN for the delivery of jet fuel to Bagram Air Field, Afghanistan. ACN had six months to achieve operational status and begin delivering fuel. ACN did not meet the six-month deadline, and DLA issued a cure notice requesting an explanation for the delay and additional information. ACN continued working on its pipeline and, when DLA subsequently terminated the contract for default, was within a few days of completion.

The Board (O'Sullivan, A.J.) held that under these facts, the termination for default was not justified because the government is deemed to have waived default in delivery if "the contractor relies on the government's failure to terminate and continues to perform under the contract, with government knowledge and implied or express consent." The Board found that ACN relied on the government's failure to terminate and continued to perform the contract up until the day it received the termination notice. As a result, the Board converted the default termination to a termination for convenience.

V. CONTRACT INTERPRETATION

A number of noteworthy decisions from the second half of 2017 articulate broadly applicable contract interpretation principles that should be considered by government contractors.

***James M. Fogg Farms, Inc., et al. v. United States*, No. 17-188C (Fed. Cl. Sept. 27, 2017)**

The key question presented in this case was whether a federal statute may be read into a government contract as a contractual term that may give rise to breach. Plaintiffs alleged that the government underpaid them pursuant to their Conservation Security Program contracts and that the regulation the National Resources Conservation Service implemented, laying out payment formulas for program participants, was contrary to the 2002 Farm Bill, 16 U.S.C. § 3838a *et seq*., which created the conservation program.

The Court of Federal Claims (Wheeler, J.) granted the government's motion to dismiss, holding that where the contract expressly incorporated regulations, but did not incorporate not the statutory provision on which the plaintiff relied, there was no contractual term entitling plaintiffs to relief.

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A number of cases before the ASBCA and CBCA addressed whether a constructive change had occurred that justified an equitable adjustment of the contract price. In order to recover for a constructive change, the contractor must prove that (1) the contracting officer compelled the contractor to perform work not required under the contract; (2) the person directing the change had contractual authority unilaterally to alter the contractor's duties; (3) the performance requirements were enlarged; and (4) the added work was not volunteered, but rather was at the direction of the contracting officer.

***Innoventor, Inc.*, ASBCA No. 59903 (July 11, 2017)**

In 2011, the government entered into a fixed-price contract with Innoventor for the design and manufacture of a dynamic brake test stand. As part of the contract's purchase specifications, the new design had to undergo and pass certain testing. After problems arose in the testing process, Innoventor submitted a proposal to modify certain design components and applied for an equitable adjustment due to "instability of expectations." The contracting officer denied Innoventor's request for an equitable adjustment, stating that the government had not issued a modification directing a change that would give rise to such an adjustment. Innoventor submitted a claim, which the contracting officer denied, and Innoventor appealed.

The Board (Sweet, A.J.) held that the government was entitled to judgment as a matter of law because there was no evidence that the government changed Innoventor's performance requirements, let alone that anyone with authority directed any constructive changes. Here, the contract was clear that Innoventor's design had to pass certain tests, and because it failed some of them, and did not perform pursuant to the contract terms, there was no change in the original contract terms that would give rise to a constructive change. The Board also found that there was no evidence that any person beyond the contracting officer had authority to direct a change because the contract expressly provided that only the contracting officer has authority to change a contract. Accordingly, the Board denied Innoventor's appeal.

***Indus. Maint. Servs., Inc. v. Dep't of Veterans Affairs*, CBCA No. 5618 (Sept. 15, 2017)**

After IMS was awarded a contract to provide labor, materials, equipment, and supervision of an upgrade to a medical center, IMS and the VA entered into a bilateral modification that changed the contract work and increased the contract price, but without changing the completion date. Correspondence exchanged when entering into the modification suggested that any concerns as to the impact on the schedule would be addressed separately, and IMS reserved its right to be compensated for additional days. When IMS later submitted a request for equitable adjustment based on the additional time and expense incurred as a result of the modification, the VA denied it and IMS appealed.

The Board (Vergilio, A.J.) determined IMS was entitled to its additional costs, as the bilateral modification did not foreclose additional time or costs that followed the change. Further, the VA had failed to value the cost of the modification properly by omitting a cost for the value of impacted work to be performed. The Board granted in part IMS's request, requiring the VA to correct its calculations and for the contractor to prove its actual costs and the value of impacted work.

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The ASBCA and Federal Circuit each considered whether contractor claims were foreclosed by a prior release clause.

***Cent. Tex. Express Metalwork LLC*, ASBCA No. 61109 (Sept. 7, 2017)**

CTEM held a contract for the repair and replacement of various ventilation, heating, and air conditioning systems at Lackland Air Force Base. After various payment disputes arose, CTEM entered into a release with the Air Force for a specific amount to be delivered to CTEM. However, CTEM then opted not to receive the payment, and instead certified a claim for a greater amount, which the government denied on the grounds that CTEM had already released its claim. CTEM appealed and the government filed a motion for summary judgment.

The Board (Sweet, A.J.) first found that CTEM could not genuinely dispute that it agreed to release its claims. A release followed by final payment generally bars a contractor from seeking recovery of its claims. Here, CTEM had signed a final release, and the government had tendered payment. Second, the Board rejected CTEM's argument that the release was not binding because it had refused to accept the government's payment. The Board noted that the release was a binding contract with CTEM and once it was signed, which triggered the government's obligation to tender payment, CTEM's refusal to accept payment was an interference of the government's obligation. Third, the Board rejected CTEM's argument that there was no consideration for the release. In support, the Board found that when a contract called for a release at the time of final payment, the contract itself becomes the consideration. Accordingly, the Board denied the appeal and granted summary judgment in favor of the government.

***Ingham Reg'l Med. Ctr. v. United States*, No. 874 F.3d 1341 (Fed. Cir. 2017)**

In our 2016 Mid-Year Government Contracts Litigation Update, we covered the decision by the Court of Federal Claims (Horn, J.) that plaintiff hospital operators participating in the military TRICARE program failed to establish CDA jurisdiction over alleged underpayments that were predicated on certain non-contractual documents. In this decision, the Federal Circuit considered an appeal from a different part of the lower court's decision finding that Ingham's breach of contract claims were barred by a release clause.

The Federal Circuit (Hughes, J.) found that the release in question did not bar the claims because the release the government relied upon was in the very same contract it was accused of breaching. The Court found that DoD's promise to follow an agreed-upon methodology was part of the consideration for Ingham's agreement to provide the release, and that DoD could not therefore use the release to bar Ingham's claim that DoD breached its obligations under the same contract. However, the Court affirmed the Court of Federal Claims' dismissal of Ingham's money mandating claims for failure to state a claim in light of the deference due to DoD's interpretation of the statute underlying the dispute.

VI. COMMON LAW PRINCIPLES

The boards of contract appeals and Court of Federal Claims addressed a number of issues during the second half of 2017 arising out of the body of federal common law that has developed in the context of government contracts.

A. *Christian* Doctrine

Under the *Christian* doctrine, a mandatory contract clause that expresses a significant or deeply ingrained strand of procurement policy is considered to be included in a contract by operation of law. *G.L. Christian & Assocs. v. United States*, 312 F.2d 418 (Ct. Cl. 1963).

***Atlas Sahil Construction Co.*, ASBCA No. 58951 (Nov. 9, 2017)**

Atlas Sahil appealed the denial of a certified claim seeking to recover costs resulting from the Army's termination for convenience of a contract to expand a forward operating base in Afghanistan. The government did not substantially contest the contractor's entitlement to recover termination costs. Rather, the dispute arose over Atlas Sahil's argument that it was entitled to recover amounts based on the contract's line item prices, rather than on the cost of construction performed. Atlas argued that the termination for convenience clause applicable to supply and service contracts, FAR 52.249-2, should be read into the contract under the *Christian* doctrine. The government responded that the governing provision was that expressly incorporated into the contract, the termination for convenience clause applicable to construction contracts, FAR 52.249-2, Alt. I.

The Board (Younger, A.J.) agreed with the government and denied the appeal. The Board found that the *Christian* doctrine did not require the insertion of a different termination clause, since the parties agreed on the one incorporated into the contract.

B. Fraud

We have been following in our recent publications developments in the law of whether and to what extent the boards of contract appeals may exercise jurisdiction over claims and defenses sounding in fraud when the alleged fraud affects the administration of government contracts. For example, in our 2016 Year-End Government Contracts Litigation Update, we covered the Federal Circuit's decision in *Laguna Construction Company, Inc. v. Carter*, 828 F.3d 1364 (Fed. Cir. 2016), which held that as long as the ASBCA can rely upon prior factual determinations from other tribunals (such as through a guilty plea), the Board has jurisdiction to adjudicate legal defenses based upon those prior determinations. We also covered the ASBCA's decision in *Kellogg Brown & Root Services, Inc.*, ASBCA Nos. 57530 *et al.* (Nov. 8, 2016), where the Board interpreted *Laguna* to hold that nothing mandates that the Board "suspend appeals indefinitely [where] the government has merely filed a fraud cause elsewhere that might establish an affirmative defense of prior material breach if and whenever proven."

***ABS Dev. Corp.*, ASBCA Nos. 60022 *et al.* (Aug. 30, 2017)**

The government sought to amend its answers in two appeals to assert the defense that the contract at issue was *void ab initio* due to fraud. The Board (McIlmail, A.J.) permitted the amendments, rejecting ABS's argument that the Board lacked jurisdiction because no third party had made factual determinations regarding any alleged fraud and reasserting that the Board possesses jurisdiction to determine for itself whether a contract is void because of fraud. The Board stated that there is a "big difference" between whether the government is asserting an affirmative fraud claim over which the

Board does not possess jurisdiction, as the Federal Circuit discussed in *Laguna Construction Co.*, and whether a contractor can establish that it has a contract with the government in the first place.

***Yates-Desbuild Joint Ventures v. Dep't of State*, CBCA Nos. 3350-R *et al.* (Dec. 8, 2017)**

Yates alleged that it incurred delay damages on its contract with the State Department to construct a nine-building consulate compound in Mumbai, and that the State Department withheld superior knowledge that the Government of India would not act upon construction permits in an effort to strong arm the State Department into helping it recoup unpaid taxes from the U.S. government. In the initial decision on the matter, the CBCA agreed that the State Department had superior knowledge that Indian officials would withhold permits, but by the time those government-caused delays began, Yates was itself nearly a year behind schedule. Yates moved for reconsideration, arguing that under a theory of first material breach, it was entitled to recover damages "that would place it in the position it would have occupied had it never entered the contract in the first place."

The Board (Lester, A.J.) denied Yates's motion for reconsideration, finding that Yates waived its prior material breach argument. The CBCA noted that Yates had not squarely placed the first material breach argument in dispute, thereby preventing the State Department from developing a record on this issue. The Board also found that Yates's prior material breach defense was without merit. Though a prior material breach *may* discharge a party from future performance, not all breaches do so. Where a party can show fraud on the part of the government, the breach is per se material and the prior material breach doctrine is triggered. However, the Board found that this appeal did not involve fraud, and it was not the State Department's withholding of information that caused the first material performance failures on the project.

C. Good Faith & Fair Dealing

***K2 Solutions, Inc.*, ASBCA No. 60907 (July 13, 2017)**

K2 held a Navy contract to provide improvised explosive device detector dogs and related services. K2 alleged that the Navy failed to exercise full delivery of the services contemplated in the base year, and that the government's notice to exercise the first option year suggested a reduction in requirements from the original contract. K2 brought numerous claims against the government, which the government moved to dismiss for failure to state a claim.

The Board (Sweet, A.J.) held that the claims for breach of contract and improper exercise of the option year failed to state a claim because the attempted option exercise was ineffective, so there was no option exercise that could have violated the contract. An option in a contract is to keep an offer open for a set period of time, which conferred upon the government the right to accept or reject the offer. A notice of acceptance that is not an entire acceptance of the option is not acceptance at all. Thus, since the government did not actually accept the option year as set out in the contract, the government could not have breached the option year contract. With K2's claim for breach of the duty of good faith, however, the Board held that this survived the government's motion to dismiss. A typical "bait and switch," such as when the government awards a contract only to eliminate the benefit shortly thereafter, breaches the

duty of good faith and fair dealing. The Board found that while the modification was an ineffective exercise of the option, it could also plausibly be considered a new offer that K2 accepted by continuing to perform. Thus, because the claim alleged that the government breached the duty after the modification reduced the scope of the work, the Board denied the government's motion to dismiss this claim.

***Michael Johnson Logging v. Dep't of Agric.*, CBCA No. 5089 (Dec. 22, 2017)**

After the Department of Agriculture awarded the Big Shrew South timber sale to Michael Johnson Logging, a dispute arose concerning "skid trails" that allow access to the timber. Rather than the straight and wide corridors proposed by the plaintiff, the Department of Agriculture insisted on "zigzagging" skid trails to avoid "cutting legacy trees or damaging the forest." This allegedly led to project delays and Michael Johnson Logging filed a claim for damages. The Department of Agriculture denied the claim, Michael Johnson Logging filed the instant appeal, and the Department of Agriculture moved for summary judgment.

The CBCA (O'Rourke, A.J.) denied the motion for summary judgment as to the breach claim. The Board noted that although plaintiff's claim and its complaint did not include a reference to a violation of the duty of good faith and fair dealing, and plaintiff raised it for the first time in response to the Department of Agriculture's motion for summary relief, there was enough in the complaint to support the claim for breach of implied terms of the contract and the claim was therefore not new. However, the Board sided with the Department of Agriculture in awarding summary judgment on the contractor's claim for "business devastation," a claim that arises where "a contractor asserts that the Government's actions caused the destruction" of a contractor's business. The Board found that claims for business devastation are granted sparingly due to the difficulty of showing a nexus between government action and the failure of the business of the whole. Finding here that the record did not support a nexus between the government's actions and the failure of Michael Johnson Logging's business, the Board granted summary judgment in favor of the Department of Agriculture on that claim.

***MW Builders, Inc. v. United States*, No. 13-1023 (Fed. Cl. Oct. 18, 2017)**

MW Builders held an Army Corps of Engineers contract for electrical utility services necessary to build an Army Reserve Center in Sloan, Nevada. The contract was silent as to who was responsible for securing easements for this work. But when delays arose because of difficulties relating to these easements, the Army claimed MW Builders was responsible and refused to pay on a cost claim associated with the delay. When MW Builders brought suit in the Court of Federal Claims, the Army counterclaimed in fraud because the contractor submitted costs based on estimates, rather than actual costs.

The Court of Federal Claims (Braden, J.) determined that the Corps breached its contract with MW Builders and violated the duty of good faith and fair dealing. In reaching its decision, the Court noted that MW Builders had a "reasonable expectation," consistent with industry practice, that the Corps was obligated to make arrangements for the easements. The Court further dismissed the government's counterclaims for fraud stating that, "[t]he fact that MW Builders should have used actual costs, instead

of estimated costs, does not evidence that MW Builders acted with a specific intent to defraud the Government."

D. Sovereign Acts Doctrine

Another important common law limitation on a contractor's ability to obtain damages from the government is the sovereign acts doctrine, which insulates the government from liability for acts taken in its sovereign (not contractual) capacity.

***ANHAM FZCO, LLC*, ASBCA No. 59283 (July 20, 2017)**

ANHAM held a contract for the procurement, storage, and distribution of food and non-food items to the military and other federal customers in the Middle East. ANHAM was responsible for maintaining proper inventory and forecasting monthly demand. Shortly before the government finalized the decision to pull many of its troops from the region, ANHAM became concerned about proper inventory in light of that expected decision. Instead of supporting ANHAM's decision to reduce supply, the government advised ANHAM that it had to maintain a full inventory in order to fulfill performance of the contract. Although delivery orders declined as troops were withdrawn, ANHAM had already renewed the lease for its largest warehouse. Due to the number of troops being withdrawn, ANHAM submitted a claim to the contracting officer for the costs it incurred for the lease of the warehouse. ANHAM argued that the government actively misled it regarding the impending departure of U.S. forces from Iraq by insisting throughout 2011 that it possessed no information about the withdrawal of U.S. troops, when the government had established a military departure date in a classified operational order, OPORD 11-01, issued January 6, 2011, which directed the removal of all U.S. troops from Iraq by the middle of December 2011. The contracting officer denied ANHMA's claim. ANHAM appealed, and the government subsequently filed a motion for summary judgment.

The Board (Kinner, A.J.) held that the government was not entitled to summary judgment because there were numerous disputes of material fact. For one, the government did not address ANHAM's allegations that it had been actively misled regarding the impending departure of the troops. The Board also noted that whether the government knew about the withdrawal of troops was material to the government's representations to ANHAM, and the timing of the order removing the troops from the Middle East was material as well. The Board also found that there was a prima facie case of breach of the duty of good faith and fair dealing in that the government's plan to withdraw troops was vital information for ANHAM and that ANHAM did not assume the risk that the government would withhold or falsify information regarding the amount of supplies needed. Second, the Board found that the decision to renew the warehouse lease was dictated by the government's representation of the numbers of troops, thus obligating ANHAM to lease the space to continue its performance obligations. The Board also rejected the government's argument that the sovereign acts doctrine precluded ANHAM's breach claims because the decision to withdraw troops from the Middle East was a sovereign act. Here, the withdrawal of troops did not prevent the government from acting in good faith and fair dealing. Noting that all contracts implicitly contain a covenant of good faith and fair dealing, the Board stated: "Good faith in contractual relations means 'honesty in fact in the conduct or transaction concerned.'" The Board found that "[t]he

government's alleged actions fail that standard even if it could offer a legitimate legal basis for withholding or misrepresenting the information."

VII. DAMAGES

The Court of Federal Claims issued two decisions addressing the proper calculation of damages.

***Omran Holding Grp., Inc. v. United States*, No. 16-446C *et al.* (Fed. Cl. Oct. 20, 2017)**

Omran is an Afghan construction and engineering firm providing services to the U.S. Army Corps of Engineers in Afghanistan. Upon performance, the Corps was obligated to pay Omran in Afghani (AFN), the local Afghan currency. Omran contended that the government did not use the appropriate rate of pay and sought damages totaling $1,418,925.22.

The Court of Federal Claims (Williams, J.) held that, while the Corps paid Omran using the wrong currency conversion rate, Omran could not recover damages because the incorrect rate used was higher than what Omran was entitled to receive under the contract. There can be no damages where Omran was "in at least as good, if not better, a position as it expected . . ., and it has not shown any particular harm to itself flowing from the alleged breach."

***Agility Def. & Gov't Servs. Inc. v. United States*, Nos. 13-55C *et al.* (Fed. Cl. Oct. 18, 2017)**

We covered the Federal Circuit's decision in *Agility Defense*, 847 F.3d 1345 (Fed. Circ. 2017), in our 2017 Mid-Year Government Contracts Litigation Update. There the Federal Circuit (Moore, J.) reversed a decision of the Court of Federal Claims and held that the government failed to provide Agility with a realistic workload estimate in violation of FAR 16.503, and thus Agility could claim additional costs under its fixed price surplus military property contract due to a "surge of equipment and material" known to the government but not Agility.

On remand, the Court of Federal Claims (Wheeler, J.) found that Agility was entitled to a total equitable adjustment of $6,906,339.20, plus interest, under the actual cost method. The Court based this conclusion on a finding that this calculation accurately captures the cost of additional, unanticipated work Agility had to perform on the contract as a result of the government's negligent estimates. The Court noted that: "When the Government provides a negligent estimate and a contractor reasonably relies on that estimate to its financial detriment, an equitable adjustment is the proper remedy."

VIII. CONCLUSION

We will continue to keep you informed on these and other related issues as they develop.

The following Gibson Dunn lawyers assisted in preparing this client update: Karen L. Manos, John W.F. Chesley, Lindsay M. Paulin, Melinda Biancuzzo, Lauren M. Assaf, Matthew P. O'Sullivan, Pooja R. Patel and Casper J. Yen.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding the issues discussed above. Please contact the Gibson Dunn lawyer with whom you usually work, or any of the following:

Washington, D.C.
Karen L. Manos (+1 202-955-8536, kmanos@gibsondunn.com)
Joseph D. West (+1 202-955-8658, jwest@gibsondunn.com)
John W.F. Chesley (+1 202-887-3788, jchesley@gibsondunn.com)
David P. Burns (+1 202-887-3786, dburns@gibsondunn.com)
Michael Diamant (+1 202-887-3604, mdiamant@gibsondunn.com)
Caroline Krass (+1 202-887-3784, ckrass@gibsondunn.com)
Michael K. Murphy(+1 202-995-8238, mmurphy@gibsondunn.com)
Jonathan M. Phillips (+1 202-887-3546, jphillips@gibsondunn.com)>
Melinda R. Biancuzzo (+1 202-887-3724, mbiancuzzo@gibsondunn.com)
Michael R. Dziuban (+1 202-887-8252, mdziuban@gibsondunn.com)
Ella Alves Capone (+1 202-887-3511, ecapone@gibsondunn.com)
Melissa L. Farrar (+1 202-887-3579, mfarrar@gibsondunn.com)
Lindsay M. Paulin (+1 202-887-3701, lpaulin@gibsondunn.com)
Laura J. Plack (+1 202-887-3678, lplack@gibsondunn.com)
Erin N. Rankin (+1 202-955-8246, erankin@gibsondunn.com)
Jeffrey S. Rosenberg (+1 202-955-8297, jrosenberg@gibsondunn.com)
Jin I. Yoo (+1 202-887-3797, jyoo@gibsondunn.com)

Denver
Robert C. Blume (+1 303-298-5758, rblume@gibsondunn.com)
Jeremy S. Ochsenbein (+1 303-298-5773, jochsenbein@gibsondunn.com)

Los Angeles
Marcellus McRae (+1 213-229-7675, mmcrae@gibsondunn.com)
Maurice M. Suh (+1 213-229-7260, msuh@gibsondunn.com)
James L. Zelenay, Jr. (+1 213-229-7449, jzelenay@gibsondunn.com)
Dhananjay S. Manthripragada (+1 213-229-7366, dmanthripragada@gibsondunn.com)
Sean S. Twomey (+1 213-229-7284, stwomey@gibsondunn.com)