GIBSON DUNN

July 30, 2018

2018 MID-YEAR GOVERNMENT CONTRACTS LITIGATION UPDATE

To Our Clients and Friends:

In this mid-year analysis of government contracts litigation, Gibson Dunn examines trends and summarizes key decisions of interest to government contractors from the first half of 2018. 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 first six months of 2018 yielded 4 government contracts-related opinions of note from the Federal Circuit, excluding decisions related to bid protests. From January 1 through July 30, 2018, the U.S. Court of Federal Claims issued 7 notable non-bid protest government contracts-related decisions (and one bid-protest decision with wider-reaching implications we address here), and the ASBCA and CBCA published 54 and 64 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, terminations, contract interpretation, remedies, and the various topics of federal common law that have developed in the government contracts arena. For background on the tribunals that adjudicate government contracts disputes, please see our 2017 Year-End Update.

Of 1,502 cases pending before the Federal Circuit as of June 30, 2018, 12 were appeals from the boards of contract appeals and 132 were appeals from the Court of Federal Claims ("COFC")—cumulatively comprising just under 10% of the appellate court's docket. Only 4% of the appeals filed at the Federal Circuit in FY 2017 were governments contracts cases, which is consistent with previous years.

On May 13, 2018, Judge Lis B. Young was appointed to the ASBCA after over 25 years of public service with the Federal Government, holding various positions with the former General Services Board of Contract Appeals and the Department of the Navy, including most recently as Associate Counsel, Navy Acquisition Integrity Office, where she worked on suspension and debarment actions.

On March 28, 2018, the CBCA proposed to amend its rules of procedure for cases arising under the CDA. The Board's current rules were issued in 2008, and were last amended in 2011. The proposed revisions establish a preference for electronic filing, are designed to "increase[e] conformity" between the Board's rules and the Federal Rules of Civil Procedure by cross-referencing and incorporating the FRCP standards, and streamlines and clarifies the Board's current rules and practices. Notably, a proposed change to CBCA Rule 6, which governs pleadings, would require the opposing party's consent to amend a pleading once without permission of the Board. Comments on the Proposed Rule were due on May 29, 2018.

I. COST ALLOWABILITY & COST ACCOUNTING STANDARDS

The Court of Federal Claims issued one decision during the first half of 2018 addressing the merits of cost allowability issues under the Federal Acquisition Regulation ("FAR"). Pursuant to FAR 31.201-2, a cost is allowable only if it (1) is reasonable; (2) is allocable; (3) complies with any applicable Cost Accounting Standards, or otherwise with generally accepted accounting principles appropriate in the circumstances; (4) complies with the terms of the contract; and (5) complies with any limitations in FAR subpart 31.2.

***Bechtel Nat'l, Inc. v. United States*, No. 17-757C (Fed. Cl. Apr. 3, 2018)**

In *Bechtel*, the Court of Federal Claims considered whether the Department of Energy's disallowance of litigation costs breached Bechtel's contract. Two former employees of Bechtel sued Bechtel for sexual and racial harassment and discrimination. Bechtel ultimately settled both suits and sought reimbursement of litigation costs from the government for each suit, which the contracting officer denied in a final decision. In disallowing the costs, the contracting officer relied in part on the Federal Circuit's decision in *Geren v. Tecom, Inc.*, 566 F.3d 1037 (Fed. Cir. 2009), which held that costs incurred in the defense of an employment discrimination suit settled before trial are unallowable unless the contracting officer determines that the plaintiff had "very little likelihood of success on the merits."

Bechtel argued that *Tecom* had no bearing on the allowability of its litigation costs because, unlike in *Tecom*, the contract here included a Department of Energy Acquisition Regulation ("DEAR") clause that "explicitly allocat[ed] the risk of third party claims to the Government." The Court (Kaplan, J.) rejected this argument, finding that an exception in the DEAR clause prohibiting reimbursement of liabilities "otherwise unallowable by law or the visions of this contract" applied. Employing the principles in *Tecom*, the COFC found the "provisions of the contract," including the contract's anti-discrimination provision, rendered Bechtel's costs of defending against and settling the discrimination complaints unallowable. However, the COFC stated that the holding in T*ecom* "was a limited one" that did not necessarily extend to breaches of contractual obligations other than anti-discrimination provisions. Bechtel's appeal to the Federal Circuit is pending.

The COFC also considered two questions relating to the allocation of pension assets and liabilities for the purpose of a segment closing under Cost Accounting Standard ("CAS") 413.

***United States Enrichment Corp. v. United States*, No. 15-68C (Fed. Cl. Jan. 16, 2018)**

United States Enrichment Corporation ("USEC") became a private entity in 1998 pursuant to the 1996 USEC Privatization Act. Post-privatization, USEC continued to operate uranium enrichment facilities for the government at Portsmouth, Ohio and Paducah, Kentucky. In 2010, DOE wound down all enrichment work at USEC's Portsmouth facility, and on January 1, 2011, USEC divided what had been a single cost accounting segment for Paducah and Portsmouth into two separate segments. USEC announced it would close the Portsmouth segment on September 30, 2011, which triggered its obligation to perform a segment closing adjustment under CAS 413-50(c)(12).

First, rejecting USEC's argument that CAS 413-50(c)(5) requires the use of historical "data *of the segment*," the COFC (Firestone, J.) determined that USEC had applied CAS 413 incorrectly when it failed to use data from the earliest date that USEC had data for employees associated with Portsmouth to allocate pension assets and liabilities to the new segment. Instead, the Court agreed with the Government's argument that the allocation must be based on historic data for the workers employed at the closed segment from the earliest period when that data is available and readily determinable – including the period before USEC became a private enterprise.

Second, the COFC considered whether USEC could recover any deficit for under-funded post-retirement benefit obligations ("PRB") from the Government in the CAS 413 segment closing adjustment, or whether the PRB obligations at issue should be excluded from the closing adjustment. Applying the holding from *Raytheon Co. v. United States*, 92 Fed. Cl. 549 (2012), the COFC found that while some of the PRBs at issue were not vested or integral because USEC's Plan provided that USEC could terminate or modify its obligation to pay PRBs, others were protected by the Privatization Act such that they should be factored into the segment closing adjustment, and granted-in-part and denied-in-part both parties' cross motions for summary judgment on the issue.

II. JURISDICTIONAL ISSUES

As is frequently the case, jurisdictional issues dominated the landscape of key government contracts decisions during the first half of 2018.

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). Additionally, claims under the Contract Disputes Act must be brought by a contractor in privity of contract with the government. The Federal Circuit and the ASBCA addressed these issues in the first half of 2018.

***Agility Logistics Servs. Co. KSC v. Mattis*, No. 2015-1555 (Fed. Cir. Apr. 16, 2018)**

In *Agility*, the Federal Circuit affirmed the Armed Services Board of Contract Appeals' dismissal for lack of jurisdiction of Agility's claim arising from a contract originally awarded by the Coalition Provisional Authority ("CPA") in Iraq. The COFC (Prost, C.J.) found that the CPA did not constitute an "executive agency" so as to invoke jurisdiction under the Contracts Disputes Act. The court relied primarily on the plain language of the agreement, which made clear that the CPA, which was not an executive agency, awarded the contract. The COFC also rejected Agility's argument that the government became the contracting party after the CPA dissolved because the Iraqi Interim Government's Minister of Finance had properly taken responsibility for the contract after the dissolution of the CPA. The COFC also rejected Agility's argument that each individual task order issued was a discrete contract, finding that

"even if an executive agency issued the Task Orders, it did so as a contract administrator and not as a contracting party." The COFC additionally found that it had no jurisdiction to review the Board's decision regarding jurisdiction under the Board's charter.

***Cooper/Ports America, LLC*, ASBCA No. 61461 (May 2, 2018)**

After Cooper/Ports America LLC ("CPA") entered into a novation agreement with the government and the original contractor, Shippers, CPA filed a claim for unilateral mistake based, in part, on the fact that Shippers' bid was 63% below that of the next lowest bidder and contained mistakes that should have been apparent to the government. The government moved to dismiss, claiming that CPA lacked the required privity of contract to qualify as a "contractor" with standing to pursue a claim that accrued when it was not a party to the contract *(i.e.*, pre-novation). More specifically, the government asserted that there must have been an express assignment of that claim to which the government consented in order for the Board to find a valid government waiver of the statutory prohibition against assignment of claims.

The ASBCA (O'Sullivan, A.J.) denied the government's motion to dismiss because the government expressly recognized CPA as the "contractor" in the novation agreement. Moreover, the novation agreement recognized CPA as "entitled to all rights, titles and interests of the Transferor in and to the contracts as if the Transferee were the original party to the contracts," and the Board found that a narrow interpretation of the novation would fly in the face of the plain language of the agreement.

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 first half of 2018, the boards considered the elements of an adequate claim under the CDA.

***Meridian Eng'g Co. v. United States*, 2017-1584 (Fed. Cir. Mar. 20, 2018)**

Meridian Engineering Company appealed the Court of Federal Claims' dismissal of its claims arising from its 2007 contract to build flood control structures. Meridian's initial suit in the COFC alleged breach of contract, breach of the duty of good faith and fair dealing, and violation of the CDA as an independent claim. Meridian argued that the COFC erred when it "reasoned that only Meridian's breach of contract and breach of good faith and fair dealing claims presented a viable cause of action" because its claims should have been "analyzed under the framework contemplated by the CDA, and not under the rubric of a 'breach' claim." The Federal Circuit (Wallach, J.) affirmed the dismissal, finding that Meridian had not submitted a valid claim because the CDA did not itself provide a cause of action. Rather, "it is the claim asserted pursuant to the CDA that is the source of potential damages and review by the trier of fact." The court concluded that the COFC had not erred in finding jurisdiction under the CDA to evaluate the breach of contract claims, but found that the COFC had erred with respect to the substantive merits of certain claims.

1. Claim Accrual

Under the CDA, a claim must be submitted within six years after the claim accrues. FAR 33.201 defines accrual of a claim as the date when all events that fix alleged liability and permit assertion of the claim are known or should be known.

***Green Valley Co.*, ASBCA No. 61275 (Feb. 13, 2018)**

Green Valley held a blanket purchase agreement to supply life support services to the Army. In 2006, Green Valley began invoicing the government for services it performed under the BPA, but it did not submit a certified claim for those unpaid invoices until 2017. The contracting officer denied the claim, and Green Valley appealed. The government sought to dismiss the claim because it had not been submitted within six years of accrual of the claim, as required by the CDA's statute of limitations. The ASBCA (Melnick, A.J.) found that Green Valley's claim accrued in 2006 after it submitted its invoices for payment, and that the ten-year delay in submitting the claim rendered it time-barred. The Board explained that while an invoice is not necessarily a claim, it can be converted into one within a reasonable time if it is not acted upon or paid. The Board considered Green Valley's argument that the statute of limitations should be equitably tolled, noting that tolling might be appropriate if a litigant has been pursuing its rights diligently, and some extraordinary circumstance stood in its way and prevented the timely filing of the claim. However, the Board found that Green Valley had not proven such circumstances, and dismissed the appeal as untimely.

2. Sum Certain

***Fluor Fed. Sols., LLC*, ASBCA No. 61353 (May 30, 2018)**

Fluor submitted a certified claim to the Navy for the estimated additional cost of performing work under a unilateral modification to the contract. The Navy argued that the claim was complex and, thus, refused to issue a final decision until it received an audit report from the Defense Contract Audit Agency ("DCAA"). Fluor notified the Navy that it would treat the claim as a deemed denial and subsequently appealed to the ASBCA on this basis. The Board asked the parties to respond whether the claimed amount qualified as a sum certain since it was based on estimated costs. Both parties agreed that Fluor's claim satisfied the sum certain requirement. The Navy argued, however, that the claim was complex and required a DCAA audit before the CO could issue a final decision. Without a final decision, the Navy argued, the claim was premature and the Board lacked jurisdiction. The Board (Clarke, A.J.) denied the Navy's motion to dismiss for lack of jurisdiction, holding that the desired DCAA audit does not change the status of a contractor's claim because it is not needed to assess entitlement, only quantum. The Board affirmed previous decisions that the use of estimated or approximate costs in determining the value of a claim is permissible so long as the total overall demand is for a sum certain.

3. Claim Certification

***Horton Constr. Co., Inc.*, ASBCA No. 61085 (Feb. 14, 2018)**

Horton requested an equitable adjustment to its contract for the crushing of a concrete stockpile because the amount of concrete stockpile was smaller than originally anticipated. When Horton appealed from the contracting officer's denial of its equitable adjustment claim, the government moved to dismiss for lack of jurisdiction, claiming Horton had not shown that it possessed the legal capacity to initiate or continue the appeal because the company's status had been administratively terminated by the state of Louisiana, and that any attempt to ratify the appeal was too late.

The ASBCA (Osterhout, A.J.) rejected the government's first argument that Horton did not have the capacity to continue the appeal because Louisiana had subsequently reinstated the company. The Board also rejected the government's argument that the signatory to the claim was not authorized to certify the claim. The CDA requires that a certified claim be executed by an individual authorized to bind the contractor with respect to the claim. The test is one of authorization, and the signatory here was appointed as executrix to the estate of Mr. Horton Sr., who owned the company, and thus had power to bind the company. Moreover, the Board held, even if the executrix had not been authorized to bind the company, a defective certification under the CDA may be corrected prior to the entry of final judgment by the Board. Accordingly, because the appeal was timely filed and the claim was properly certified and prosecuted, the Board denied the government's motion to dismiss.

***Mayberry Enters., LLC v. Department of Energy*, CBCA No. 5961 (Mar. 13, 2018)**

The Western Area Power Administration ("WAPA"), acting through the Department of Energy, filed a motion to dismiss Mayberry's appeal from a contracting officer's decision denying its monetary claims because Mayberry's claim letter was uncertified. Under the CDA, while a defective certification can be corrected, a complete failure to certify may not and the Board must dismiss for lack of jurisdiction. In light of the Federal Circuit's caution that tribunals should be wary of automatically applying claim certification to a single claim letter containing multiple claims that do not arise out of the same operative facts, *Placeway Construction v. United States*, 920 F.2d 903 (Fed. Cir. 1990), the CBCA reviewed the letter to determine whether the "claims" should be interpreted as a single claim or multiple claims. Because the Board (Lester, A.J.)found that each claim arose from different and unrelated problems during contract performance, each claim was analyzed for certification independently. The Board dismissed one of the three claims for lack of jurisdiction because it was in excess of $100,000 and had not been certified.

***Areyana Grp. of Constr. Co.*, ASBCA No. 60648 (May 11, 2018)**

Areyana Group of Construction Co. ("AGCC") timely appealed a CO's final decision denying a request for a time extension and the return of liquidated damages withheld by the government. The government filed a motion to dismiss, contending that AGCC failed to certify its request and that, accordingly, the ASBCA lacked jurisdiction to review its allegations. The Board (Paul, A.J.) agreed with the government and dismissed the AGCC's claim, affirming prior holdings that absence of a certification bars the Board's

exercise of jurisdiction and is not considered a "defect." Additionally, the Board noted that the CO's purported issuance of a final decision does not remedy this problem.

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."

***Hejran Hejrat Co.*, ASBCA No. 61234 (Apr. 23, 2018)**

After HHL's contract was suspended pending a bid protest, HHL informed the contracting officer that it incurred additional costs due to the time necessary for the government's corrective action and delay in the issuance of the notice to proceed. There was no evidence that the government considered HHL's concerns regarding additional costs. Instead, the government issued a unilateral modification that lifted the prior award suspension; decreased the contract price; revised the performance work statement to reflect delays in government furnished equipment; and declared that an equitable adjustment due to the suspension was not required and the government was absolved of any claims due to that suspension. The ASBCA (Kinner, A.J.) dismissed HHL's appeal for lack of jurisdiction because HHL's purported claim was not certified and failed to request a final decision from the contracting officer. The Board noted that the CO's statements promising to send a final decision and, in fact, sending a document labeled final decision did not cure HHL's failure to *request* a final decision. The Board stated: "There can be no contracting officer's final decision on a claim if the contractor has not requested that decision from the contracting officer."

***H2Ll-CSC, JV*, ASBCA No. 61404 (June 14, 2018)**

H2Ll-CSC, JV ("HCJ") appealed a CO's decision denying HCJ's claim arising from an indefinite-delivery, indefinite-quantity type contract with firm-fixed-price task orders for design/build construction, and incidental service projects. The ASBCA *sua sponte* directed the parties to brief the issue of the Board's jurisdiction. Specifically, the Board noted that HCJ had requested telephonically, but not in writing, that its request for an equitable adjustment be treated as a claim under the CDA. The Board (Paul, A.J.) dismissed the appeal for lack of jurisdiction, holding that a request for a final decision, like the totality of a claim submission, must be in writing and the CO cannot waive this requirement by issuing a final decision.

***OCCI, Inc.*, ASBCA No. 61279 (May 29, 2018)**

OCCI sought remission of liquidated damages that the government claimed for late completion of contract work, arguing that it was entitled to time extensions for government-caused and/or concurrent delay and that its failure to timely complete work under the contract was excusable.

The ASBCA (Shackleford, A.J.) dismissed the appeal, holding that OCCI was precluded from raising the issue that its delay was excusable and that it was entitled to time extensions because OCCI never filed a proper CDA claim asserting entitlement to the time extensions as required by *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010), which held that "a contractor seeking

an adjustment of contract terms [such as an extension of time] must meet the jurisdictional requirements and procedural prerequisites of the CDA, *whether asserting the claim against the government as an affirmative claim or as a defense to a government action*" (emphasis added).

***Walker Dev. & Trading Grp., Inc.*, CBCA No. 5907 (June 6, 2018)**

The Department of Veterans Affairs ("VA") moved to strike certain counts of Walker Development & Trading Group Inc.'s complaint, asserting that the CBCA lacks jurisdiction to decide those portions of the complaint because they were not included in its claims submitted to the contracting officer. The Board (Beardsley, A.J.) observed that, while it may not consider new claims that a contractor failed to present to the contracting officer, a claim before the Board is not required to rigidly adhere to the exact language or structure of the original administrative CDA claim presented to the contracting officer. The Board denied the motion to dismiss, finding that "the allegations in the complaint arise from the same operative facts and are not materially different."

D. Filing Deadlines

The boards of contract appeals heard cases concerning two different types of timing deadlines – the CDA's six-year statute of limitations, and the requirement that a claim for equitable adjustment be filed before final payment is made on the contract.

***Khenj Logistics Grp.*, ASBCA No. 61178 (Feb. 15, 2018)**

In 2009, the government awarded KLG a contract to construct a facility in Afghanistan. After commencing work on the contract, the government issued a stop-work order. Shortly thereafter, the parties executed a bilateral contract modification which terminated the contract for convenience, and the government agreed to reimburse KLG for the cost of maintaining insurance, while KLG in turn released further claims against the government. KLG finally submitted a termination claim in 2017. After KLG appealed, the government filed a motion for summary judgment based on KLG's release and on the basis that KLG's claim was untimely. The ASBCA (Kinner, A.J.) held that KLG's claim was time-barred due to the six-year CDA statute of limitations, concluding that KLG should have known that the government's payment would not be forthcoming when the government failed to make a last payment in accordance with promises made by the contracting officer. The Board also found there was no basis for equitable tolling because KLG had not diligently pursued its rights and there were no extraordinary circumstances that would have prevented the timely filing of the claim.

***Merrick Constr., LLC*, ASBCA No. 60906 (Mar. 22, 2018)**

Merrick appealed a contracting officer's decision denying its claim for rental costs on a bypass pumping system installed pursuant to a government change order. The government moved for summary judgment, arguing that Merrick's claim was precluded by the general release, and that there was an accord and satisfaction based upon a modification to the contract.

The ASBCA (D'Alessandris, A.J.) explained that a release is a type of contract that grants the release of any claim or right that could be asserted against the other. After interpreting the plain language of the

release, the Board found that as a rule, a general release which is not qualified on its face bars any claims based upon events occurring before the execution of the release, and thus the government had met its burden of establishing that the general release applied. The Board went on to note that there can be exceptions to a release, such as fraud, mutual mistake, economic duress, or consideration of a claim after release. In this instance, the Board found that there was no mistake because Merrick's argument was entirely speculative and no evidence was presented that would have shown that there was mistake. The Board also held that Merrick's claim was barred because it was submitted after final payment. Pursuant to the Changes clause, FAR 52.243-4(f), no proposal by a contractor for an equitable adjustment can be allowed if asserted after final payment under the contract. Because Merrick could not establish that the contracting officer knew or should have known of Merrick's claim prior to the final payment, the Board held that Merrick's claim was barred by final payment. Accordingly, the Board granted the government summary judgment.

***Michaelson, Connor & Boul,* CBCA 6021 (May 29, 2018)**

In February 2010, HUD awarded MCB a contract to serve as HUD's mortgagee compliance manager to ensure lender compliance with the property conveyance requirements of HUD's real-estate portfolio. After the contract ended, MCB submitted a claim to the contracting officer requesting payment in the amount of $661,312.81, which MCB stated was incurred "in connection to" "extra-contractual work" allegedly requested by HUD. The contracting officer denied MCB's claim and MCB timely appealed to the CBCA. HUD challenged the Board's jurisdiction over the claim, alleging that because MCB's claim arose after the contract ended, it did not arise out of the same operating facts as the contract and thus precluded the Board's jurisdiction over the matter.

The Board (Russell, A.J.) raised concerns about whether the claim presented to the contracting officer is the same claim that MCB presented on appeal, and ordered MCB to clarify whether it was seeking relief (1) under the contract identified in the notice of appeal, (2) under no contract, or (3) under a different contract. The Board held that it did have jurisdiction to hear MCB's appeal because MCB's appeal filings were "fundamentally the same" as those asserted in its claim to the contracting officer. Judge Chadwick dissented, noting that while the case presented the "closest 'same claim/new claim' issue" he had come across, the controlling question is whether MCB intends to litigate the operative facts of its certified claim, which according to Judge Chadwick MCB had abandoned because while the appeal sounded in contract, the certified claim was not based on any "provision, clause, or even a single word of the written contract."

E. Amending the Complaint

***John C. Grimberg Co., Inc.*, ASBCA No. 60371 (Feb. 15, 2018)**

Grimberg held a contract to construct an advanced analytical chemistry wing for work with toxic agents. After a dispute arose regarding contract terms, Grimberg filed a claim and an appeal of the contracting officer's deemed denial when a year passed without a final decision on the claim. Three weeks prior to the scheduled hearing date, Grimberg filed an amended complaint adding a new count based on the government's failure to disclose superior knowledge of contract requirements. The hearing

was subsequently rescheduled by the Board to a date several months after the original hearing date. Grimberg filed a motion for reconsideration after the Board rejected the amended complaint due to the absence of a motion for leave to amend.

The ASBCA (Woodrow, A.J.) held that it had jurisdiction to hear the new count in the amended complaint because a new legal theory of recovery asserted in an amended complaint does not constitute a new claim if based upon the same operative facts as the original claim, and the new count would require review of the same evidence as the original counts. Therefore, the Board concluded that it possessed jurisdiction to hear the new count. The Board then determined that the proposed amendment to the complaint would be fair to both parties, as required by Board Rule 6, because the rescheduling of the hearing allowed the government additional time to address concerns raised by the new count. Thus, the Board granted Grimberg leave to file its amended complaint.

F. Availability of Declaratory Relief

The Federal Circuit and boards of contract appeals considered the availability of declaratory relief in an action brought pursuit to the CDA.

***Securiforce Int'l Am., LLC v. United States*, Nos. 2016-2589, 2016-2633 (Fed. Cir. Jan. 17, 2018)**

Securiforce International America, LLC ("Securiforce") supplied fuel to eight locations in Iraq under a contract with the Defense Logistics Agency ("DLA"). DLA partially terminated the contract for convenience with respect to two of the sites, but subsequently placed oral orders for small deliveries to those sites. When Securiforce's deliveries to the remaining sites were late, the government sent a show cause notice, in response to which Securiforce claimed the delays were due in part to the allegedly improper termination for convenience. The government terminated the remainder of the contract for default. In 2012, Securiforce filed a complaint in the COFC claiming that the termination for default was improper, and then requested a final decision from the contracting officer ("CO") that the termination for convenience had been improper. After the CO denied the request for final decision, Securiforce amended its COFC complaint to include a request for declaratory judgment that the government's termination for convenience had been improper. The COFC found jurisdiction over both claims and held that the partial termination for convenience of the contract had been an abuse of discretion and thus a breach of the contract, but found the termination for default proper and rejected Securiforce's claim that its nonperformance was excused by the improper termination for convenience.

On appeal, the Federal Circuit (Dyk, J.) found that the COFC lacked jurisdiction to adjudicate the declaratory relief claim regarding the validity of the government's termination for convenience. While contractors may seek declaratory relief in some cases, the Federal Circuit stated they may not "circumvent the general rule requiring a sum certain by reframing monetary claims as nonmonetary." The Federal Circuit characterized Securiforce's declaratory relief claim as a claim for monetary relief because the default remedy for a breach of contract would be damages, and that Securiforce had failed to state a sum certain as required by the CDA. The court further held that there would have been no jurisdictional impediment to Securiforce invoking the improper termination for

convenience as an affirmative defense for its default without presenting the defense to the CO because Securiforce was neither seeking the payment of money nor attempting to change the terms of the contract. However, under the facts at hand, the Federal Circuit concluded that the termination for convenience did not, in fact, amount to an abuse of discretion or breach of the contract.

***Duke University*, CBCA No. 5992 (Apr. 6, 2018)**

Duke University appealed a contracting officer's final decision on what Duke referred to as a "non-monetary claim" that it had submitted to the National Institute of Allergy and Infectious Diseases ("NIAID"). Duke did not specify a sum of monetary payment in its claim, instead seeking a declaratory judgment regarding the parties' rights and obligations under the contract. Applying the Federal Circuit's recent decision in *Securiforce*, and upon a joint motion by the parties to dismiss the appeal without prejudice, the CBCA (Lester, A.J.) dismissed the appeal for lack of jurisdiction on the ground that Duke's claim was one contemplated by *Securiforce*, requiring Duke to state a sum certain.

***Mare Solutions, Inc.*, CBCA Nos. 5540, 5541, 6037 (May 16, 2018)**

Mare Solutions, Inc. ("Mare") was awarded a contract from the Department of Veterans Affairs ("VA") for the construction of a two-story parking garage at the VA Medical Center in Erie, Pennsylvania. When the project was nearly complete, two disputes arose – one involving bucked metal conduit on the first floor ceiling of the garage and the other regarding which party was responsible for purchasing "head-end" equipment for the video surveillance system. Mare appealed the contracting officer's final decisions and sought declaratory relief absolving it of liability for the buckled conduit and for the purchase of head-end equipment.

At the time the appeals were filed, the ASBCA found its jurisdiction was proper because both appeals involved live performance disputes that could be resolved by declaration of the Board. At the hearing, however, the Board learned that, in addition to seeking declaratory relief, Mare had procured and installed the head-end equipment and was seeking reimbursement for those costs. Accordingly, Mare submitted a related monetary claim to the CO, which was also denied and which Mare appealed. While there were no jurisdictional issues with the first appeal for declaratory relief relating to the metal conduit, the ASBCA (O'Rourke, A.J.) found that it no longer had jurisdiction over the head-end equipment claim for declaratory relief because the issues had been subsumed within the monetary claim. Thus, the Board's jurisdiction to issue declaratory relief can be obviated by the filing of a related monetary claim. Based on its interpretation of the contract, the Board ruled that Mare was not liable for the buckled conduit, but denied Mare's monetary claim.

G. Election Doctrine

A decision from the COFC highlights the issues that can arise from bringing proceedings before more than one tribunal that hear government contracts disputes.

***ACI-SCC JV et al v. United States*, No. 17-1749C (Fed. Cl. Mar. 12, 2018)**

In what it described as a "conundrum of a case," the COFC dismissed a suit against the Army Corps of Engineers brought by Plaintiff Arwand Road and Construction Company ("Arwand"), acting as Trustee for Plaintiff-Intervenors ACI-SCC JV, ACI-SCC JV LLC (together, "the JV"), and Plaintiff Advance Constructors International LLC ("ACI"). Arwand was a subcontractor to the JV, which held a number of construction contracts in Afghanistan. However, the JV did not pay Arwand on time for its work, claiming it had not yet been paid by the government. The contracting officer terminated the government's contracts with the JV, and the JV and ACI appealed the terminations separately to the ASBCA. Both parties settled their claims and the ASBCA dismissed their appeals with prejudice.

Arwand sued both the JV and ACI in the United States District Court for the District of Delaware for damages due under its subcontract with the JV, and the court awarded judgment in Arwand's favor later that year. Arwand then filed a "petition" before the ASBCA asserting breach of contract claims against the government, which Arwand later voluntarily dismissed without prejudice. After the Delaware Court of Chancery appointed Arwand as trustee for the JV and ACI, Arwand filed suit against the Corps before the COFC in its capacity as trustee to recover unpaid fees on the JV's contracts. The JV intervened and filed a motion to dismiss. The COFC (Wheeler, J.) dismissed the case as moot as a result of the settled ASBCA cases that had been dismissed with prejudice, at which time Arwand was merely a subcontractor with no rights, privity, or standing to sue the Government over the prime contract. Second, the COFC also held that by first filing suit at the ASBCA, Arwand lost its right to file in the COFC because courts have interpreted the CDA to impose an "either-or choice" of forum, meaning that a contractor is barred from filing in one forum if it chooses to file in the other forum first. Even though Arwand may not have had standing to file a "petition" before the ASBCA and voluntarily dismissed the suit, he was precluded from litigating the same claim in the COFC under the CDA.

III. TERMINATIONS

In two noteworthy decisions during the first half of 2018 arising from contract terminations, the ASBCA strictly construed the one-year time limit to submit a termination settlement proposal in accordance with the FAR's termination for convenience clause.

***Am. Boys Constr. Co.*, ASBCA No. 61163 (Jan. 9, 2018)**

In 2013, the government awarded a contract for the construction of a prime power overhead cover to American Boys Construction Company ("American Boys"). More than three and a half years after receiving notice of the government's termination of the contract for convenience, American Boys submitted a termination settlement agreement proposal as a certified claim to the contracting officer. The contracting officer denied the claim because American Boys did not file a settlement proposal within one year of the termination. American Boys timely appealed the CO's final decision and the government filed a motion for summary judgment requesting that the Board deny the appeal. The Board (Osterhout, A.J.) granted the government's motion and denied the appeal because American Boys did not file its termination settlement claim until 2017 – nearly four years after the contract termination – in violation of FAR 52.249-2.

***Abdul Khabir Constr. Co.*, ASBCA No. 61155 (Apr. 6, 2018)**

Abdul Khabir Construction Co. appealed a contracting officer's denial of a claim seeking settlement costs resulting from the government's termination for convenience of its construction contract. The government filed a motion for summary judgment, arguing that Abdul failed to submit its termination settlement proposal within a year of the effective date of termination, and did not submit its certified claim until more than seven years after termination. Abdul countered that the government never asked for a settlement proposal, and never told it where to file a claim. The Board (Osterhout, A.J.) found no evidence that the contracting officer extended the FAR's one-year time period to file a termination claim. Because no extension was granted and the parties did not dispute that Abdul Khabir did not submit a proposal or contact the government until over 18 months after the due date, the Board found the claim untimely and denied the appeal.

IV. CONTRACT INTERPRETATION

A number of noteworthy decisions from the first half of 2018 articulate broadly applicable contract interpretation principles that should be considered by government contractors.

***CB&I AREVA MOX Servs., LLC v. United States*, No. 16-950C, 17-2017C, 18-80C, 18-522C, 18-677C, 18-691C, 18-701C (Fed. Cl. June 11, 2018)**

In 1999, the Department of Energy awarded a cost reimbursement contract to the predecessor in interest of CB&I AREVA MOX Services, LLC ("MOX Services") to construct a Mixed Oxide Fuel Fabrication Facility ("MFFF") at a site in South Carolina. The original target completion date was in 2016, but was extended until 2029 and the estimated cost more than doubled. Under the contract, MOX Services was eligible to receive quarterly incentive fees pursuant to a vesting schedule for making progress towards completion of the construction of the MFFF beginning in 2008. Although the entire fee was provisional for at least the first year after it was invoiced, the incentive fee became 50% vested if MOX Services' performance remained within the schedule and cost parameters for the subsequent four quarters. The government paid MOX incentive fees, of which a portion was provisional. The government suspended further incentive fee payments in 2011 when it determined that MOX Services was no longer performing within the applicable cost and schedule parameters.

In 2016, MOX Services submitted a certified claim to the government for the suspended incentive fees that the company did not receive from 2011 through 2015. In response, the contracting officer not only denied the certified claim suspended payments, but also demanded that MOX Services refund the provisional incentive fee payments already made. The government argued that MOX Services has no hope of meeting the project's parameters on cost and schedule and thus will not be entitled to retain any incentive fees at project completion. The Court of Federal Claims (Wheeler, J.) rejected this position, noting that "the contract provisions taken together unambiguously provide that the incentive fee [paid] to MOX Services is to remain in the custody of MOX Services until the MFFF construction is completed." The court also criticized the CO's demand for a refund of $21.6 million "as a way to gain leverage over MOX Services through baseless retaliation." The court granted plaintiff's partial motion

for summary judgment, effectively requiring the government to return the provisional incentive fees to MOX Services until the project is completed.

***ABB Enter. Software, Inc., f/k/a/ Ventyx*, ASBCA No. 60314 (Jan. 9, 2018)**

Tech-Assist, the corporate predecessor to ABB Enterprise Software, Inc., provided software and licenses to support naval maintenance requirements. Pursuant to a master license agreement, the Navy was only allowed to install one copy of ABB's software on ships and Navy bases, but ABB alleged that the Navy breached its licensing agreement by allowing two copies of the software to be installed on certain aircraft carriers. After the Board granted the Navy's motion to amend its answer to include an affirmative defense for equitable estoppel, ABB moved for summary judgment on its claim for entitlement based on its contention that the licensing agreement's plain language only allowed for one copy of the software to be installed.

The ASBCA (Kinner, A.J.) determined that the plain language of the licensing agreement controlled, and was explicitly clear that only one installation of software for each location would be allowed. The Board also found that the Navy had not shouldered its burden to establish equitable estoppel by demonstrating that (1) the party to be stopped knew the facts; (2) the government intended that the conduct alleged to have induced continued performance will be acted on, or the contract must have a right to believe the conduct in question was intended to induce continued performance; (3) the contract must not be aware of the true facts; and (4) the contractor must rely on the government's conduct to its detriment. Thus, the Board granted ABB's motion for summary judgment.

***Name Redacted*, ASBCA No. 60783 (Feb. 8, 2018)**

In 2016, the government awarded a firm-fixed-price contract to Appellant for enhanced force protection and facility upgrades in Afghanistan. The contract provided for a certain exchange rate between Afghani currency and U.S. dollars. Following the contract's termination for default, the contractor submitted a certified claim for additional costs, which the CO denied and the contractor appealed. In a subsequent modification converting the termination to one for convenience, the government agreed to pay over $93,000 to settle the pending appeal at the agreed upon exchange rate. After some delay, the government paid Appellant, but Appellant countered that due to the delay there had been a change in the exchange rate, and that it was entitled to an additional $4,300. The government moved to dismiss on the ground that the claim had been settled and Appellant had agreed to its dismissal. The Board (Melnick, A.J.) found that Appellant was not entitled to any additional costs because nothing in the modification allowed for additional compensation if the exchange rate fluctuated, and Appellant had released its claim when it agreed to the modification. Accordingly, the Board dismissed the appeal.

***UNIT Co.*, ASBCA No. 60581 (Feb. 12, 2018)**

The government awarded a contract for the construction of a battle command training center to UNIT. During the course of the contract, UNIT subcontracted with other companies to perform certain mechanical work. Due to various interpretations of design requirements, one of the subcontractors, Klebs Mechanical ("Klebs") submitted "request for information" ("RFI") forms to UNIT to pose questions to the government. After some disagreement, UNIT submitted a claim for damages and costs

for defective specifications, which the contracting officer denied. The CO found that UNIT did not provide contractually required notice of the defective specifications and that its recovery was therefore barred. UNIT appealed the CO's final decision and the government moved for summary judgment.

The ASBCA (Newsom, A.J.) relied on FAR 52.236-21(a), Specifications and Drawings for Construction (Feb 1997) to find that UNIT had provided sufficient notice to the government in its RFI forms, or at the very least, that UNIT had created a disputed issue of material fact on whether or not sufficient notice was provided, and the Board accordingly denied summary judgment.

***MW Builders, Inc. v. United States*, No. 13-1023C (Fed. Cl. Mar. 5, 2018)**

In our 2017 Year-End Update, we covered the Court of Federal Claims' grant of partial judgment in favor of MW Builders, Inc. ("MW Builders") on its claims that the Army Corps of Engineers breached its contract for electrical utility services and violated the duty of good faith and fair dealing. In a portion of the decision not covered in our Year-End Update, the COFC (Braden, C.J.) also determined that the claims of MW Builders' subcontractor, Bergelectric, were waived as the result of a lien waiver in its subcontract providing that Bergelectric waived "any other claim whatsoever in connection with this Contract…" MW Builders moved for reconsideration of Bergelectric's pass-through claims, arguing that the precedent relied upon in the initial decision was inapplicable because that case was about a settlement *dispute*, whereas Bergelectric and MW *agree* that the contract does not evidence their intent. In the alternative, MW Builders claimed that the court should reform the release language.

The court rejected both arguments. First, it held that the terms of the contractual release were unambiguous and that the court was therefore precluded from considering the extrinsic evidence regarding the parties' intent even though the scope of the release included in the contract was unintentionally broad. Second, the COFC held that it does not have jurisdiction to reform an agreement between a contractor and its subcontractor, citing the S*everin* doctrine. Accordingly, the court denied the motion for reconsideration.

V. DAMAGES

***John Shaw LLC d/b/a/ Shaw Bldg. Maint.*, ASBCA No. 61379 (Mar. 8, 2018)**

In 2010, John Shaw LLC was awarded a contract to provide janitorial services at an Air Force base. After the contract expired, Shaw presented a claim for "punitive damages" to the contracting officer, which was denied. Shaw appealed, and requested punitive damages and "missed opportunities" damages stemming from contracts allegedly not obtained due to the government's handling of its contract. The government moved to dismiss the claims for punitive and "missed opportunities" damages. The ASBCA (McIlmail, A.J.) dismissed Shaw's damages claims, finding the connection between the government's administration of the contract and the allegedly lost contracts with third parties was a claim for consequential damages, which were too remote and speculative to be recovered. The Board further noted that it has no authority to award punitive damages, and dismissed both claims.

***Green Bay Logistic Servs. Co.*, ASBCA No. 61063 (Apr. 12, 2018)**

Green Bay appealed the Defense Contract Management Agency ("DCMA")'s termination for convenience of its lease of two stakebed or flatbed trucks. Green Bay argued that it was owed twice the value of the contract because it attempted to deliver the vehicles twice. The ASBCA (Osterhout, A.J.) denied Green Bay's appeal, finding that Green Bay failed to prove that it was entitled to any amount it presented to the government in its termination settlement proposal. Upon a termination for convenience of a commercial item contract, FAR 52.212-4(1) directs the government to pay the contractor: (1) a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination; and (2) reasonable charges the contractor can demonstrate to the satisfaction of the government using its standard record keeping system, have resulted from the termination. The Board concluded that because Green Bay delivered non-compliant vehicles, it did not complete any percentage of the contract, and that Green Bay did not present any reasonable charges that imposed upon the government a requirement to pay.

***Entergy Nuclear Generation Co. v. United States*, No. 14-1248C (Fed. Cl. June 19, 2018)**

Entergy Nuclear Generation Company ("Entergy") operates a nuclear power station. In 1983, Entergy's predecessor, Boston Edison Company entered into a contract authorized by the Nuclear Waste Policy Act of 1982 for the disposal of spent nuclear fuel generated at the station to begin by January 31, 1998, but the Department of Energy ("DOE") breached the contract and did not dispose of the spent fuel. In 2012, Entergy was awarded damages for the additional costs incurred in operating the plant due to the breach through December 31, 2008.

In this second lawsuit, Entergy sought to recover damages allegedly incurred between December 31, 2008 and June 30, 2015 because Entergy could not recover future damages in the first suit. Because the government did not contest two-thirds of the damages sought by Entergy, Entergy sought partial summary judgment on liability and entry of partial final judgment on the uncontested amount. The court granted Entergy's motion for partial summary judgment on liability for the uncontested amount, but found that the entry of partial final judgment as to the uncontested amount was improper under COFC Rule 54(b), which allows the court to direct final judgment "as to one or more, but fewer than all, claims" in an action. Here, where the COFC determined that Entergy is only alleging one "claim"—partial breach of contract—granting partial final judgment on some but not all of the harms arising out of a single claim "would be to enter judgment on less than one claim, violating Rule 54(b)."

The government cross-moved for summary judgment as to Entergy's claim for storage fees paid to the Nuclear Regulatory Commission ("NRC"). The court rejected the government's argument that Entergy was foreclosed from proving causation between the breach and the increased fees because it had already presented such evidence, and the government's argument had been rejected in a prior Federal Circuit case. The COFC denied the Government's motion, finding that Entergy's intent to present substantially different evidence from that considered in the prior Federal Circuit case created genuine dispute as to causation. Although not briefed by the parties, the court also found that because the COFC determined in a prior suit for damages brought by the Boston Edison Company that DOE's breach was a but-for cause of the NRC fee change at the Pilgrim Nuclear Power Station, and the causation issue was not raised

on appeal, issue preclusion may have provided an alternate basis to deny the Government's motion. But the COFC had an opportunity to prohibit re-litigation of this same issue based on collateral estoppel in another case, discussed *infra* in Section VI(C).

VI. COMMON LAW PRINCIPLES

The boards of contract appeals and COFC addressed a number of issues during the first half of 2018 arising out of the body of federal common law that has developed in the context of government contracts.

A. Application of Common Law in Government Contracts Cases

***Assessment and Training Solutions Consulting Corp.*, ASBCA No. 61047 (Mar. 6, 2018)**

ATSCC sought reconsideration of the ASBCA's earlier decision sustaining ATSCC's appeal, arguing that the Board erroneously applied a common law of bailment presumption of negligence and that the written contract should be enforced over the common law. The Board (Clarke, A.J.) explained that the common law of bailment imposes upon the bailee the duty to protect property by exercising ordinary care and to return said property in substantially the same condition. Thus, when the government receives property in good condition and returns it in damaged condition, there is a presumption that the cause of the damage was due to the government's failure to exercise ordinary care. The government argued that the presumption did not apply, and that where there was a written bailment contract, the contract should apply, not common law. However, the Board noted that this was only true if the written contract and the common law differed. Because the written contract and common law were the same in this instance, the Board concluded that the common law bailment presumption would apply. Accordingly, the Board held, the prior decision's reliance on the common law presumption was not legal error.

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 of fraud. In the first half of 2018, the ASBCA considered one case addressing the impact of *Laguna* on its jurisdiction, and another that evaluated the validity of a contracting officer's final decision based *partially* on a decision of fraud.

***Int'l Oil Trading Co.*, ASBCA Nos. 57491, 57492, 57493 (Jan. 12, 2018)**

IOTC sought partial judgment on the pleadings or, alternatively, renewed its motion to strike the Government's affirmative defense that IOTC obtained its contracts for fuel delivery to the government in Iraq through fraud or bribery, claiming that the Federal Circuit's decision in *Laguna* abrogated the Board's previous ruling denying IOTC's initial motion to strike by preventing the Board from hearing

the fraud-based affirmative defense. Citing *ABS Development Corp.*, which we discussed in our 2017 Year-End Government Contracts Litigation Update, the ASBCA (Melnick, A.J.) held that *Laguna* did not impact its prior ruling that it was not precluded from considering fraud related claims based because the CDA's statutory bar did not apply to an affirmative defense that a contract is void under the common law for fraud or bribery in its formation. The Board noted that the Federal Circuit's decision did not restrict the Board's power to determine the validity of a contract when the government has lodged an affirmative defense that the contract is void *ab initio* due to fraud or bribery, as opposed to when the government is asserting a fraud claim (such as a claim under the False Claims Act) that the Board does not have jurisdiction to entertain. Accordingly, the Board denied IOTC's motion.

***PROTEC GmbH*, ASBCA Nos. 61161, 61162, 61185 (Mar. 20, 2018)**

The government moved to dismiss for lack of jurisdiction PROTEC's appeals from the Army's denials of its claims for unpaid invoices, arguing that the contracting officers' final decisions were invalid because denials were based on suspicion of fraud. None of the final decisions mentioned any suspicion of fraud; however, the U.S. Army Criminal Investigation Command was conducting an investigation into allegations of fraud at the time the final decisions were issued and at the time of the appeal.

Under the FAR, a contracting officer's authority to decide or resolve claims does not extend to settlement, compromise, payment, or adjustment of any claim involving fraud. The COFC and CBCA have held that a final decision is therefore invalid if it is based upon a suspicion of fraud. However, the Federal Circuit has clarified that a final decision is invalid only if the decision rests *solely* upon a suspicion of fraud. Because the decisions issued to PROTEC were not based upon a suspicion of fraud and the decisions also relied upon other rationales, it did not matter for jurisdictional purposes that there was an ongoing criminal investigation into fraud allegations. The Board (Sweet, A.J.) therefore denied the motion to dismiss.

C. Good Faith & Fair Dealing

***Ala. Power Co. v. United States, No. 17-1480, Ga. Power Co. v. United States, Nos. 17-1492C, 17-1481C* (Fed. Cl. Mar. 26, 2018)**

In a pair of cases arising from ongoing litigation regarding the government's failure to collect spent nuclear fuel ("SNF") from the plaintiffs' facilities pursuant to its contracts, the Government sought to dismiss two claims—the first relating to the recovery of certain fees levied by the Nuclear Regulatory Commission ("NRC"), and the second to plaintiffs' claim for breach of the covenant of good faith and fair dealing. In 2004, the COFC granted summary judgment in plaintiffs' favor on their initial breach of contract suit. The plaintiffs sued again in 2010 to recover the damages accrued from the government's continued breach by failing to remove the material between 2005 and 2010, including fees collected by the NRC. During that second phase of litigation, the COFC held that although the plaintiffs were entitled to recovery, they could not recover the additional NRC fees because they did not sufficiently prove the breach of contract caused the increase in the fees. The plaintiffs sued a third time to recover all costs incurred after 2011, at which point the COFC granted partial summary judgment for the government on the issue of the NRC fees as barred by the doctrine of collateral estoppel. This fourth case, based upon

nearly identical facts, is framed as both a breach of contract claim and a breach of the implied covenant of good faith and fair dealing. The Government moved dismiss the breach claims related to the recovery of the NRC fees based on collateral estoppel and to dismiss the good faith and fair dealing claim as duplicative of the breach of contract claim for which liability had been established in the 1998 case.

The COFC (Campbell-Smith, J.) granted the motion to dismiss the NRC fees because the allegations in the complaint were virtually identical to those in the previous complaint and there had been no change in the law between the two suits. The COFC also found that the good faith and fair dealing claim was duplicative of the breach of contract claim. To state a separate claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must allege some kind of subterfuge—evasion that goes against the spirit of the bargain, lack of diligence, willful rendering of imperfect performance, abuse of power, or interference with performance—founded upon *different allegations* than the breach of contract claim. The COFC found no alleged facts that even arguably support plaintiff's conclusion that defendant was attempting to avoid its obligations, and therefore granted the motion to dismiss.

***Raytheon Co.*, ASBCA Nos. 60448, 60785 (Apr. 9, 2018)**

Raytheon appealed from the CO's denial of two claims relating to additional services rendered under its "Lot 27" contract with the Air Force. About two months before the hearing, the government moved to amend its answer to add an additional "unclean hands" affirmative defense based on the latest round of government depositions of Raytheon personnel, which the government claimed revealed that Raytheon had an undisclosed pre-award plan to complete the Lot 27 contract work with future appropriated funds siphoned away from future missile production contracts that Raytheon hoped to obtain on an annual basis. Raytheon moved to dismiss the additional defense, arguing the ASBCA did not have jurisdiction to entertain the defense because it had not been submitted as claim to the CO, and that the government did not justify the defense or the delay in raising it.

The ASBCA (Scott, A.J.) granted the government's motion to amend its answer. Although the Board recognized that the government's amendment was filed only shortly before the hearing, there was insufficient information for the Board to conclude that the government delayed unduly in raising the defense. The Board also concluded that there was insufficient evidence to establish bad faith on the part of the government or for the Board to decide the futility of the amendment. The ASBCA did, however, allow Raytheon additional discovery and/or submissions both before and after the scheduled hearing.

VII. CASES TO WATCH

While the Government Contracts Litigation Update does not typically analyze bid protest cases from the GAO or the Court of Federal Claims, two recent cases—a decision from the Court of Federal Claims, and a case still pending before the Federal Circuit— have wide-reaching implications of which government contractors should be aware.

A. Trade Agreements Act

***Acetris Health, LLC v. United States*, No. 18-433C (Fed. Cl. May 8, 2018)**

The Court of Federal Claims considered Acetris Health, LLC's challenge to the Department of Veterans Affairs' reliance on a determination by Customs and Border Patrol that the pharmaceuticals Acetris provided under contract to the VA and the Department of Defense were considered a product of India because the active ingredient in the drug was not "substantially transformed" in the United States. The VA determined that Acetris was required to supply "only U.S.-made or designated country end products" under the contract because it was subject to the Trade Agreements Act of 1979 ("TAA"). Acetris claimed that the pharmaceuticals it provide were TAA compliant because the foreign ingredients were processed into the final product in the U.S. Acetris challenged CBP's country of origin determination at the Court of International Trade ("CIT") in March 2018.

Before the COFC, Acetris lodged a pre-award bid protest challenge to the VA's reliance on CBP's determination in interpreting its solicitation. After receiving the CBP determination, the VA notified Acetris that it could no longer fulfill the relevant contract using the existing pharmaceutical supply, and solicited new proposals to supply a TAA-compliant version of the product. Acetris submitted a proposal that was rejected by the VA. The VA expressed its intention to "rely entirely" on the findings of CBP for the purpose of country of origin determinations for TAA compliance. Acetris challenged both the VA's substantive interpretation of the TAA and its reliance on CBP to make the country of origin determination.

The COFC (Sweeney, J.) denied the government's motion to dismiss, finding that "all of plaintiff's claims are aimed at the actions (or inaction) of the VA" and thus are "properly the subject of a preaward bid protest." The COFC also determined that 28 U.S.C. §1500 does not divest the COFC of jurisdiction because the court determined that the challenge to CBP's country-of-origin determination pending before the CIT was not based on substantially the same operative facts, and that Acetris' claims were ripe for review and stated claims upon which relief could be granted. After oral argument earlier this month, the COFC granted declaratory judgment in favor of Acetris. The COFC found that the VA misconstrued the Trade Agreements clause included in the solicitation as preventing the purchase of products that qualify as domestic end products under relevant FAR provisions. The COFC also held that the VA's reliance on CBP's country of origin determination, rather than independently assessing TAA compliance, was arbitrary and capricious.

B. Commercial Item Contracting

***Palantir USG Inc. v. United States*, No. 17-1465 (Fed. Cir. Feb. 8, 2018)**

In February, Gibson Dunn argued before the Federal Circuit on behalf of its client Palantir Technologies to uphold a 2016 Court of Federal Claims ruling (Horn, J.) that the Army violated the Federal Acquisition Streamlining Act ("FASA") when it decided to develop a new data-management platform from scratch without undertaking market research to determine whether its needs could be met by a commercially available product. The COFC found that Palantir was wrongly excluded from a $206 million intelligence software procurement when the Army refused to consider procuring its platform on a firm fixed price,

commercial item basis, and instead issued a solicitation calling for developmental solutions on a cost-plus basis.

On appeal, the Government argued that the COFC erroneously added a requirement to FASA that government market research must "fully investigate" whether commercial items could meet all or part of the agency's requirements, and that the COFC wrongly substituted its judgment in determining that the Army's market research was inadequate. Palantir argued that reversal of the COFC decision would "flout" the FASA procedures requiring that agencies acquire commercial items "to the maximum extent possible," which were designed to prevent federal agencies from "wasting taxpayer funds by developing products that are already available in the commercial marketplace." The Federal Circuit's impending decision in this case will have wide reaching impacts on the procurement community and the deference afforded the Government's market research in developing its solicitation requirements.

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, Lindsay M. Paulin, Melinda Biancuzzo, Jessica Altman, Sydney Sherman, 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)
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)
Ella Alves Capone (+1 202-887-3511, ecapone@gibsondunn.com)
Michael R. Dziuban (+1 202-887-8252, mdziuban@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)

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)