GIBSON DUNN

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2018 YEAR-END GOVERNMENT CONTRACTS LITIGATION 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 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 last six months of 2018 yielded five government contracts-related opinions of note from the Federal Circuit. From July 1 through December 31, 2018, the U.S. Court of Federal Claims issued 23 notable non-bid protest government contracts-related decisions, and the ASBCA and CBCA published 62 and 37 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 1,444 cases pending before the Federal Circuit as of December 31, 2018, 13 were appeals from the boards of contract appeals and 117 were appeals from the Court of Federal Claims—cumulatively comprising just over 9% of the appellate court's docket. Only 4% of the appeals filed at the Federal Circuit in FY 2018 were Contracts cases. Nevertheless, the Federal Circuit is the court of review for most government contracts disputes.

In our 2018 Mid-Year Government Contracts Update, we reported the appointment of Judge Lis B. Young to the ASBCA. Joining her on the bench in the latter half of 2018 was Judge Stephanie Cates-Harman, who was appointed to the ASBCA in June. Judge Cates-Hartman served as a Trial Attorney and the Assistant Director Government Contracts in the Department of the Navy, Office of the General Counsel, Naval Litigation Office before her appointment to the ASBCA in 2018.

Judge Margaret M. Sweeney, who has served as a Judge of the Court of Federal Claims since 2005, was designated Chief Judge of the Court on July 12, 2018.

The CBCA issued new rules of procedure, which are published at 83 Fed. Reg. 41009 (Aug. 17, 2018), and became effective on September 17, 2018. The final rules establish a preference for electronic filing, increase conformity between the Board's rules and the Federal Rules of Civil Procedure, and clarify current rules and practices. Under the new rules, the time for filing is amended from 4:30 p.m. to midnight Eastern Time.

II. COST ALLOWABILITY

The ASBCA issued several important decisions during the second half of 2018 addressing 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.

A. Cost Allowability in Termination Settlements

Phoenix Data Solutions LLC f/k/a Aetna Government Health Plans, ASBCA No. 60207 (Oct. 2, 2018)

The Defense Health Agency ("DHA") awarded a TRICARE managed care support contract to Aetna Government Health Plans ("AGHP") in 2009. Six months after the GAO sustained the incumbent contractor's protest of the award to AGHP, DHA terminated AGHP's contract for the convenience of the government. Pursuant to FAR 49.201, when the government terminates a contract for convenience, the contracting officer should negotiate a settlement with the contractor that fairly compensates the contractor for the work performed, including profit. DHA refused to negotiate, and instead, as observed by the ASBCA, "slow-rolled" AGHP for over five years, and then refused to compensate AGHP for any amount. AGHP appealed from a deemed denial of its termination settlement claim.

The ASBCA (D'Alessandris, A.J.) held that AGHP was entitled to almost all of its claimed costs. Most notably, the ASBCA found that AGHP was entitled to its pre-contract costs under FAR 31.205-32, rejecting the government's argument that pre-contract costs are unallowable unless agreed to by the government. Moreover, the ASBCA rejected the government's argument that AGHP's claim should be reduced because AGHP was responsible for the circumstances leading to the protest and termination. However, the ASBCA did find that a loss ratio applied, discussing in a case of first impression the language in FAR 52.249-2(g)(iii), which provides that "if it appears that the Contractor would have sustained a loss on the *entire contract* had it been completed" (emphasis added), profit is unallowable and the termination settlement should be reduced accordingly. The ASBCA held that the reference to "entire contract" includes all of the awarded line items, including those that have not been performed, but does not include unexercised option years. Therefore, because the record showed that AGHP would not have earned a profit until the unexercised option years, the ASBCA applied a loss ratio.

B. Cost Reasonableness

***Parsons Evergreene, LLC*, ASBCA No. 58634 (Sept. 5, 2018)**

In a lengthy decision, the ASBCA (Clarke, A.J.) clarified the parties' respective burdens when the government challenges the reasonableness of costs under FAR 31.201-3(a). The dispute arose under a "design-build plus" contract between Parsons Evergreene, LLC ("PE") and the Air Force. PE submitted a $28.8 million claim for Air Force-caused delay, disruption, and constructive changes. In a decision written by Judge Clarke, the ASBCA sustained in part and denied in part PE's appeal, and awarded PE

$10.5 million. Most notably, Administrative Judge Craig Clarke found that FAR 31.201-3(a) "unambiguous" in that it "requires two actions by the government: (1) it must perform an 'initial review of the facts,' and (2) that review results in a 'challenge' to 'specific costs.' It is the contractor's burden to prove the reasonableness of the challenged specific costs." Judge Clarke discussed the holding in *Kellogg Brown & Root*, ASBCA No. 58081, 17-1 BCA ¶ 36,595, that the government's general or blanket assertion that all costs are unreasonable is insufficient to require the contractor to do more to prove reasonableness. Judge Clarke then held that in this case, the Air Force had not satisfied FAR 31.201-3(a) because although the Defense Contract Audit Agency's ("DCAA") audit satisfied the requirement for an "initial review of the facts," neither DCAA nor the Air Force challenged the reasonableness of any "specific costs" in the claims. Concluding that "[s]uch a blanket challenge to all costs is insufficient to satisfy FAR 31.201-3(a)," Judge Clarke held that PE satisfied its burden to prove that its claimed costs were reasonable.

In a brief concurring opinion joined by Administrative Judge J. Reid Prouty, ASBCA Vice Chairman Richard Shackleford concurred in the result, but not in the analysis of Judge Clarke's opinion. The concurring judges agreed with the amounts awarded but took "great issue with that portion of the damages analysis which leads up to the conclusion that PE has satisfied its burden to prove its claimed costs were reasonable when the government challenged all costs but failed to challenge the reasonableness of any specific cost in the claim." The concurring opinion reasoned, "[o]nce a CO's final decision is appealed to this Board, the parties start with a clean slate and the contractor bears the burden of proving liability and damages *de novo*," and "'[t]he claimant bears the burden of proving the fact of loss with certainty, as well as the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation.'" However, the concurring opinion found that "[n]otwithstanding FAR 31.201-2 and -3, which direct[] how COs and the DCAA should evaluate costs, our review of the record leads us to conclude that for the damages awarded by Judge Clarke, appellant proved liability on the part of the government, proved the costs were incurred and were reasonable with 'sufficient certainty' such that the amount of damages awarded is 'more than mere speculation.'"

***Kellogg Brown & Root Services, Inc.*, ASBCA Nos. 57530, 58161 (Nov. 19, 2018)**

In another decision discussing cost reasonableness, the ASBCA (Melnick, A.J.) held that Kellogg Brown & Root Services, Inc. ("KBR") failed to show that its subcontractor costs were reasonable. The disputed costs involved the settlement of requests for equitable adjustment ("REA") submitted by a subcontractor for providing housing for military personnel in Iraq under the LOGCAP III contract. The subcontract was fixed price, but entitled the subcontractor to an equitable adjustment in the event of delays caused by the government's failure to perform the prime contract. The subcontractor alleged that U.S. military-imposed convoy schedules caused delays in transporting materials from Kuwait into Iraq, creating delay costs for the subcontractor (such as storage, double-handling, repairs, and idle-truck time). After some negotiation on the REAs, KBR settled with the subcontractor for approximately $50 million, then sought reimbursement from the government, which the government eventually denied in a final decision.

The ASBCA denied recovery because KBR had not established the reasonableness of the costs, explaining that: (1) the subcontract allowed delay costs only if the government failed to perform the

prime contract, and KBR did not make that determination before settling the REAs; (2) the delay model employed by the subcontractor was based on an unrealistic assumption that trailers arriving at the Iraqi border would be placed in convoys the next day; and (3) KBR awarded the REAs based on market prices without requesting evidence of actual costs, despite requirements in the FAR and DFARS (and incorporated into the subcontract) requiring such cost data to support equitable adjustments. With regard to the lack of cost data, the ASBCA rejected KBR's argument that the subcontract was for commercial items, and therefore in accordance with FAR subpart 15.4 (pertaining to contract pricing), KBR was prohibited from seeking information about its subcontractor's costs.

C. Applicability of Cost Principles to Fixed-Price Level-of-Effort Contracts

***Tolliver Grp., Inc. v. United States*, 140 Fed. Cl. 520 (Oct. 26, 2018)**

Tolliver Group, Inc. ("Tolliver") had an Army contract to produce technical manuals, and it filed suit at the Court of Federal Claims ("COFC") seeking reimbursement of legal fees totaling $195,889.78. Tolliver incurred the legal fees in successfully defending its contract performance against a *qui tam* relator who alleged that Tolliver violated the False Claims Act ("FCA"). The government declined to intervene in the FCA case, and Tolliver succeeded in having the case dismissed, which was affirmed on appeal. Tolliver then submitted a claim for reimbursement of 80% of its attorneys' fees, the maximum allowed by FAR 31.205-47 for a successful defense of an FCA suit. The contracting officer denied the claim because the contract was firm fixed price. However, the contract was initially awarded as a fixed-price level-of-effort, and was not converted to firm-fixed price until modification 8. The government moved to dismiss Tolliver's complaint for failure to state a claim upon which relief could be granted.

The COFC (Lettow, J.) found as an initial matter that the FAR cost principles applied to the contract before Modification 8. The COFC observed that "unlike other fixed-price contracts, a firm-fixed-price, level-of-effort contract requires (a) the contractor to provide a specified level of effort, over a stated period of time, on work that can be stated only in general terms and (b) the [g]overnment to pay the contractor a fixed dollar amount. FAR § 16.207-1. The government pays the contractor for effort expended, akin to actual costs incurred." Curiously, the COFC further found that the FAR cost principles applied to the contract by operation of law under the *Christian* doctrine. The COFC concluded that Tolliver had "pled sufficient facts to satisfy the requirements of FAR § 31.205-47, and the remainder of FAR Subpart 31.2 does not otherwise prohibit reimbursement of the costs sought by Tolliver." Having concluded that Tolliver thus "sufficiently pleads the requirements for allowability," the COFC denied the government's motion to dismiss.

D. Penalties for Expressly Unallowable Costs

***Energy Matter Conversion Corp.*, ASBCA No. 61583 (Dec. 18, 2018)**

Energy Matter Conversion Corp. ("EMC2") entered into settlements with the government regarding alleged mischarges under its government contracts. Following the settlement, EMC2 included the legal costs it incurred in connection with the government's investigations in its final indirect cost rate proposals. The contracting officer assessed a penalty for claiming expressly unallowable legal costs,

and denied EMC2's request to waive the penalty. Following EMC2's appeal, the ASBCA (Sweet, A.J.) held that the government was entitled to summary judgment, because there was no genuine issue of material fact that the legal costs were incurred in connection with "proceedings [that] could have led to debarment" making them unallowable under FAR 31.205-47. The ASBCA rejected EMC2's argument that it would have prevailed on the merits had it not settled, explaining that "the government merely must show that the investigations 'could have led to debarment' not that it would have done so." Thus, the government met its burden to show that it was unreasonable under all circumstances for a person in the contractor's position to conclude that the cost was allowable. Likewise, the ASBCA upheld the denial of waiver because EMC2 did not have established accounting policies at the time it claimed the expressly unallowable costs; the contracting officer's decision to waive similar costs in prior years is not binding on future waiver decisions; and the waiver cannot be apportioned to the legal costs attributable to the "successful" portion of the proceeding (i.e., the amount by which the settlements reduced EMC2's liability).

III. JURISDICTIONAL ISSUES

As is frequently the case, jurisdictional issues accounted for a substantial portion of the key government contracts decisions issued during the second 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).

The Federal Circuit, COFC, and ASBCA considered issues relating to whether valid implied-in-fact contracts existed to confer CDA or Tucker Act jurisdiction.

Lee v. United States, 895 F.3d 1363 (Fed. Cir. 2018)

Individuals who entered into individual purchase order vendor ("POV") contracts with the Broadcasting Board of Governors ("BBG"), a U.S. government-funded broadcast service that oversees Voice of America, filed a putative class action suit against the United States seeking additional compensation they would have received if their contracts had been classified as personal services contracts or if they had been appointed to civil service positions. The Federal Circuit (Bryson, J.) affirmed the Court of Federal Clams' dismissal of plaintiffs' first amended complaint. The court concluded that the POV contracts did not violate the prohibition against personal services contracts at FAR 37.104. Thus, failing to void the express contracts, plaintiffs could not recover under implied-in-fact contracts that dealt with the same subject matter. The court held that even if a contract was inconsistent with a statutory or regulatory requirement—such as a high degree of government supervision making the contract closer to a prohibited personal services contract—such inconsistency does not *ipso facto* render the contract void. Instead, the court stressed, invalidation of a contract must be considered in light of the statutory or regulatory

purpose, "with recognition of the strong policy of supporting the integrity of contracts made by and with the United States." *Am. Tel & Tel. Co. v. United States*, 177 F.3d 1368, 1374 (Fed. Cir. 1999) (en banc). Moreover, the court noted, because of the disruptive effect of retroactively invalidating a government contract, the "invalidation of a contract after it has been fully performed is not favored." *Id.* at 1375.

***Interaction Research Institute, Inc.*, ASBCA No. 61505 (Nov. 5, 2018)**

Interaction Research Institute, Inc. ("IRI") claimed to have performed training services for the I Marine Expeditionary Force without receiving payment. The government investigated and concluded that there was no such express or implied contract for the alleged training, although the government did ratify some services as "unauthorized commitments," leaving the remaining services in dispute. The ASBCA (Woodrow, A.J.) held that IRI had sufficiently made a non-frivolous allegation that an implied-in-fact contract existed and that, while the government could not locate any contract with IRI or documentation supporting an implied-in-fact contract, the existence of a contract goes to the merits of the appeal, and did not affect jurisdiction.

***C & L Grp., LLC, et al. v. United States*, No. 18-536 C (Fed. Cl. Nov. 28, 2018)**

Plaintiffs entered into contracts with Hospital Santa Rosa, Inc. ("HSR"), a private party, for the construction of various portions of a hospital in Puerto Rico. The contracts required approval from the U.S. Department of Agriculture ("USDA") in the form of "Concurrences," as HSR expected that construction would be funded in part by USDA. USDA signed the Concurrences, and ultimately issued five payments to HSR to pay for work completed by the plaintiffs. HSR sometime thereafter filed for Chapter 11 bankruptcy, and plaintiffs filed a complaint seeking payment from USDA for the work it performed under its contracts with HSR.

The government filed a motion to dismiss on the basis that the court had no jurisdiction under the Tucker Act, and the court (Braden, J.) granted the motion. The court found that plaintiffs had failed to allege any facts indicating that they were in privity of contract with USDA. USDA was not a party to the plaintiffs' contracts with HSR, and the contracts expressly stated that neither the United States nor any agency was a party to the contract. The court also found that the USDA Concurrences could not establish privity, "because they d[id] not displace the . . . Contracts' express language to the contrary that plainly state[d] [the government] assumed no liability nor guaranteed any payment." The court also found that plaintiffs had failed to allege the existence of an implied-in-fact contract, because they had failed to allege any facts "to support a 'meeting of minds.'" To the contrary, the court found that the "express language" of the parties' contracts with HSR and the Concurrences "affirmatively state[d] that [USDA] did not intend to contract with Plaintiffs."

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 2018, the boards considered whether a valid claim had been presented to and decided upon the contracting officer to confer CDA jurisdiction.

***Hartchrom, Inc.*, ASBCA No. 59726 (July 26, 2018)**

Hartchrom, Inc. had a lease with a private party allowing Hartchrom to use space at an Army manufacturing facility (the "Arsenal"). The government was not a party to the lease. Hartchrom later entered into a contract with the Army for chrome electroplating services, which Hartchrom performed at the Arsenal. The lessor directed Hartchrom to remove hazardous waste that Hartchrom had discharged into the industrial wastewater treatment plant while performing its Army contract. Hartchrom submitted a claim to the Army contracting officer for the hazardous waste removal costs, which the contracting officer denied in a final decision. The ASBCA (Osterhout, A.J.) held that it had jurisdiction over the appeal because the claim was made pursuant to the Army contract and appealing a valid final decision. However, the ASBCA dismissed the appeal for failure to state a claim upon which relief may be granted, because any relief to which Hartchrom could be entitled would have been under the terms of its lease with the private party. Indeed, the clause Hartchrom relied upon was a provision in the lease, not in the Army contract. Thus, the ASBCA had no way to grant Hartchrom any relief, even if it was so entitled under the lease.

***Parsons Evergreene, LLC*, ASBCA No. 58634 (Sept. 5, 2018)**,

In a decision issued separately from the *Parsons Evergreene* decision discussed in Section II.B, *supra*, the ASBCA (Clarke, A.J.) denied the Air Force's motion to dismiss Claim V of PE's complaint for lack of jurisdiction because the modified total cost claim lacked sufficient information and detail for the contracting officer to consider. The contracting officer's final decision denied Claim V of PE's complaint in its entirety on the ground that "PE has not established that it has met the prerequisites for use of the modified total cost method." The ASBCA began its analysis by noting that the central issue was whether PE gave "adequate notice of the basis and amount of the claim" when it was submitted. Although agreeing that a contracting officer cannot waive a jurisdictional requirement, the ASBCA found that the contracting officer apparently believed he had adequate notice because he requested and received a detailed technical analysis, and then issued a detailed 142-page final decision. Stating that it was "exercising [its] discretion and applying common sense to the facts of this case," the ASBCA found that the contracting officer was given sufficient information to engage in a "meaningful review" of the claim, which, in fact, the contracting officer did.

***Centerra Grp., LLC f/k/a The Wackenhut Services, Inc.*, ASBCA No. 61267 (Nov. 16, 2018)**

Centerra Group, LLC ("Centerra") had a cost-reimbursement contract to provide fire protection services for NASA. The contract required compliance with the Service Contract Act, 41 U.S.C. §§ 6701-6707, and incorporated a collective bargaining agreement ("CBA") with the unionized firefighters. After the finalization of an arbitration over the union's grievance involving back pay of overtime and related costs, Centerra sought reimbursement from NASA for the arbitration award, which NASA denied. NASA then

moved to dismiss Centerra's appeal on the ground that the Department of Labor has exclusive jurisdiction over labor standards requirements disputes under the Service Contract Act, in accordance with FAR 52.222-41(t).

The ASBCA (Woodrow, A.J.) denied the motion to dismiss, agreeing with Centerra that the Service Contract Act did not apply to the underlying union's grievance, which was based instead on an alleged violation of the Fair Labor Standards Act. In any event, even if the SCA applied, the ASBCA still had jurisdiction because the appeal concerned NASA's contractual obligation to reimburse Centerra for costs incurred pursuant to the arbitration award. Although the underlying labor dispute formed part of the "factual predicate" for Centerra's claim, the instant dispute did not concern labor standards requirements under the SCA and as such, the Department of Labor did not have jurisdiction.

1. Defective Certification

For claims seeking more than $100,000, the contractor must certify that: (a) the claim is made in good faith; (b) the supporting data are accurate and complete to the best of the contractor's knowledge and belief; (c) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal government is liable; and (d) the certifier is authorized to certify the claim on behalf of the contractor. 41 U.S.C. § 7103(b)(1); FAR 52.233-1. A defective certification that is not correctable deprives the Boards of jurisdiction.

***Development Alternatives, Inc. v. United States Agency for International Development,* CBCA 5942 *et al*. (Sept. 27, 2018)**

Development Alternatives, Inc. ("DAI") appealed the deemed denial by the Agency for International Development ("USAID") of claims submitted on behalf of its subcontractor for reimbursement of fines paid to the Afghanistan Government. The CBCA (Somers, A.J.) dismissed DAI's appeal for lack of jurisdiction for failure to properly certify the claims. The CBCA analyzed whether the purported certification was correctable by first discussing whether the defect was only technical in nature. The CBCA held that the defect was more than technical because it bore "no resemblance to a CDA certification." Specifically, instead of certifying that "the claim is made in good faith" as required by the CDA, DAI stated only that it "believes there is sound basis for these claims," and none of the other prerequisites for proper certification were present. The CBCA then discussed whether the purported certification was made with intentional, reckless, or negligent disregard for the CDA's certification requirements, therefore making it not correctable. The CBCA concluded that DAI's submission was "reckless" because the contracting officer informed DAI on two separate occasions that its certifications did not comply with CDA requirements, thus putting DAI on notice that its certification had substantial defects prior to filing the appeal. Finally, although DAI submitted a properly certified claim after initiating the instant appeals, the CBCA concluded that the later certification had no legal bearing on the CBCA's jurisdiction over the case, nor could it cure a lack of jurisdiction.

***WIT Assocs., Inc.*, ASBCA No. 61547 (Dec. 19, 2018)**

The contractor certified its claim by identifying its parent company instead of the contractor. On the government's motion to dismiss for defective certification, the ASBCA (McIlmail, A.J.) held that such an error was correctable and did not deprive the ASBCA of jurisdiction.

2. Requirement for a Sum Certain

For jurisdiction under the CDA, the claim must either assert a "sum certain" or be a nonmonetary claim seeking the interpretation of a contractual provision.

***Hensel Phelps Constr. Co.* ASBCA No. 61517 (July 18, 2018)**

In a construction contract, the government revoked its prior acceptance of a portion of the contractor's work, and issued a final decision directing the contractor to replace the allegedly defective work. The final decision stated that the government intended to assert a demand for the costs to replace the work, "currently estimated at" $2.9 million, if the contractor did not comply. The contractor appealed, seeking a declaratory judgment that it had already fulfilled its contractual obligations. The ASBCA (McIlmail, A.J.) held that the final decision lacked a sum certain because it was contingent on future events, and merely "an effort to motivate [the contractor] to get back to work." However, the ASBCA held that it had jurisdiction over the contractor's request for a non-monetary declaratory judgment.

***Elkton UCCC, LLC v. Gen. Servs. Admin.*, CBCA 6158 (July 25, 2018)**

Elkton UCCC, LCC ("Elkton") leased space to the General Services Administration ("GSA") for a Social Security Administration office. In 2017, the parties began to dispute whether Elkton was fulfilling its duties as the landlord, and GSA began partially withholding rent. In response to a letter from Elkton about the disagreement, the GSA contracting officer sent Elkton a letter itemizing Elkton's lease violations and threatened to—but did not state that he actually did or would—deduct $21,000 from GSA's rent payment. The letter concluded that it was "the final decision of the Contracting Officer" and advised Elkton of its appeal rights. The CBCA (Chadwick, A.J.) dismissed the appeal for lack of jurisdiction, noting that even when, as here, the contracting officer has issued a document styled as a final decision, it lacks CDA jurisdiction without a qualifying CDA claim. Neither Elkton's initial letter nor GSA's response quantified a dollar amount then in dispute, thus lacking a sum certain necessary to satisfy the CDA's requirements for a claim. The CBCA further held that neither letter constituted a nonmonetary claim seeking interpretation of a contractual provision, because neither letter identified any specific provisions for interpretation. Notably, the CBCA dismissed the appeal despite neither party asking it to do so.

***ECC CENTCOM Constructors, LLC*, ASBCA No. 60647 (Sept. 4, 2018)**

ECC CENTCOM Constructors ("ECC") appealed the default termination of its construction contract. The ASBCA (O'Connell, A.J.) found that the government met its burden of proof that the default was justified because ECC did not perform in a timely manner. The burden then shifted to ECC to show excusable delay. However, the ASBCA held that it lacked jurisdiction to sustain any alleged

excusable delays, because ECC never submitted a certified claim as required for CDA jurisdiction. The ASBCA explained that "consideration of these delays would be contrary to the statutory purpose of encouraging resolution of disputes at the contracting officer level and beyond the limited waiver of sovereign immunity in the CDA, citing to *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010), as recently upheld by *Securiforce International America, LLC v. United States*, 879 F.3d 1354 (Fed. Cir. 2018). The ASBCA also rejected ECC's argument that the ASBCA had jurisdiction because the contracting officer had actual knowledge of the alleged delays based on ECC's extension requests. Actual knowledge is insufficient to confer jurisdiction, and in any event, the extension requests were "estimated" delays lacking a sum certain and were not certified as required by the CDA.

***Northrop Grumman Sys. Corp. v. United States*, 12-286C (Fed. Cl. Oct. 31, 2018)**

In a case involving numerous claims and counterclaims in connection with a contract for the provision of mail-processing machines, the court (Bruggink, J.) dismissed one of the contractor's claims and one of the government's claims. The court dismissed the contractor's claim for reformation of the contract based on a cardinal change, because the claim lacked the requisite sum certain. In so doing, the court rejected the contractor's argument that its claim was nonmonetary and therefore required no sum certain. The court held that the claim was principally a monetary claim, because the ultimate remedy to the contractor for the alleged cardinal change would be to grant contractual damages, explaining that parties "may not circumvent the requirement to state a sum certain in its claim by camouflaging a monetary claim as one seeking only declaratory relief."

The court also partially dismissed one of the government's counterclaims that exceeded the scope of the contracting officer's final decision. The final decision had identified a number of spare parts that the contractor allegedly failed to provide. The counterclaim, however, identified entirely different parts, quantities, and prices than what the final decision identified. The court held that although the legal theories and type of relief requested were "identical," the counterclaim went beyond a mere correction of specifics or adjustment to quantum; it would require the government to prove up an entirely different set of facts. Thus, the court dismissed the counterclaim to the extent the same parts did not appear in the final decision.

3. Premature Claims

The ASBCA and the CBCA each issued decisions declining to dismiss appeals in the face of government allegations that the appeals were premature.

***Delta Indus., Inc., ASBCA* No. 61670 (Dec. 17, 2018)**

Delta Industries Inc. ("Delta") filed a notice of appeal of a deemed denial of its claim only 20 days after submission of the claim to the contracting officer—well before any final decision was due under the CDA. The government moved to dismiss the appeal for lack of jurisdiction, contending that Delta's notice was premature. The ASBCA (D'Alessandris, A.J.) disagreed, explaining that it can retain jurisdiction if, at the time it considers a motion to dismiss, no useful purpose would be served by dismissing an appeal and requiring an appellant to refile. In this case, the ASBCA determined that dismissing the appeal for prematurity would be inefficient and "an elevation of form over

substance." The ASBCA also rejected the government's contention that the ASBCA lacked jurisdiction for the additional reason that the claim involved the withdrawal of a unilateral purchase order, because the contractor had sufficiently alleged the existence of a bilateral contract. Accordingly, the ASBCA refused to dismiss the appeal for lack of jurisdiction.

***Eagle Peak Rock & Paving, Inc. v. Dep't of Transp.*, CBCA No. 6198 (Oct. 23, 2018)**

At the time Eagle Peak Rock & Paving, Inc. ("Eagle Peak") filed the instant appeal of the deemed denial of its claim for termination for convenience costs, Eagle Peak's appeal of the termination for default of its contract was still pending. The government therefore moved to dismiss the termination for convenience appeal, arguing that it was premature because the CBCA had not decided whether to convert the default termination into one for the convenience of the government. The CBCA (Russel, A.J.) departed from ASBCA precedent and held that the termination for convenience claim (on the issue of quantum) may proceed concurrently with the termination for default claim (on the issue of entitlement). The CBCA explained that neither its own rules nor the Federal Rules of Civil Procedure required dismissal in these circumstances, and that it would not dismiss an appeal solely for the purpose of judicial efficiency. Rather, efficiency is better addressed through proper case management.

C. Requirement for a Contracting Officer's Final Decision

The tribunals that hear government contracts disputes dealt with two cases addressing the CDA's requirement that a claim have been "the subject of a contracting officer's final decision."

***Planate Mgmt. Grp., LLC v. United States*, 139 Fed. Cl. 61 (2018)**

Planate Management Group, LLC ("Planate") brought action against United States, alleging that the Department of the Army Expeditionary Contracting Command breached a contract for Planate to provide professional support services throughout Afghanistan. Planate alleged that the Army failed to reimburse it for the cost of arming its in-theater personnel in the face of increasing security threats to its personnel performing the contract. The government moved to dismiss two counts for lack of subject-matter jurisdiction, arguing that the two counts were not first presented to the contracting officer for decision.

For one count, Planate alleged that the government breached the implied duty of good faith and fair dealing. The government argued that the count involved an "entirely distinct" legal theory than the constructive change and mutual mistake claims the contractor had presented to the contracting officer. The court (Sweeney, J.) disagreed, finding that although Planate "did not specifically articulate a breach of the covenant of good faith and fair dealing in its certified claim, the factual recitations therein described the Army's alleged failure to engage in reasonable contract administration." In a separate count, Planate alleged that the dramatically deteriorated security situation in Afghanistan amounted to a cardinal change to the contract. Although the claim before the contracting officer did not include the term "cardinal change," the court determined that the issue was properly before the officer, as the contractor "discussed the change in risk posture; noted that, at the beginning of contract performance, the [government] advised plaintiff to arm its personnel; and described the increased costs it incurred to arm its personnel."

***Charles F. Day & Associates LLC*, ASBCA Nos. 60211, 60212, 60213 (Nov. 29, 2018)**

Charles F. Day & Associates LLC ("CFD") contracted to perform services for the Army in Iraq. The personnel supplied by CFD performed work outside the scope of the written requirements of CFD's contract in support of their customer, and later sought additional compensation for those efforts. CFD submitted a Request for Equitable Adjustment delineating three separate requests for payment, which the Board characterized as "claims,"observing in a footnote that a request for equitable adjustment can be considered a claim under the CDA, regardless of its title, if it otherwise meets the requirements of a claim. The contracting officer denied CFD's claims, arguing that there had been no constructive change to the contract and that CFD thus had no entitlement to additional compensation.

The government argued that the Board lacked jurisdiction to consider a portion of the case presented by CFD at the hearing, alleging that the basis of that claim (essentially a superior knowledge claim) was so different from that presented to the contracting officer that it should be dismissed. The Board granted the government's request to dismiss the additional issue raised at the hearing, noting that while the board is "relatively liberal in permitting appellants to present additional evidence and arguments not presented to the CO and to alter the legal bases for claims on the amount of damages," "a claim on one matter does not support jurisdiction over an appeal on another" and "a claim must be specific enough and provide enough detail to permit the CO to enter into dialogue with the contractor." Although the Board agreed with CFD that the legal theory for the claim presented at trial was the same as in its claim—seeking recovery for out of scope work—the Board nevertheless found that the claim did not arise from the same underlying facts, and thus the factual basis for the claim presented at trial was not brought before the CO in CFD's written claims.

D. Jurisdictional Filing Deadlines

The CDA mandates that an appeal of a contracting officer's final decision must be filed at the Boards of Contract Appeals within 90 days of the contractor's receipt of the decision, or must be filed at the Court of Federal Claims within 12 months. 41 U.S.C. § 7104. These deadlines are jurisdictional, and a number of Board decisions during the last half of 2018 serve as cautionary tales to would-be appellants.

***Aerospace Facilities Grp.*, ASBCA No. 61026 (July 19, 2018)**

The government terminated Aerospace Facilities Group ("AFG")'s contract for cause, and AFG filed its notice of appeal at the ASBCA 91 days after receipt of the termination decision by email. However, following its termination decision, the government engaged in numerous communications with AFG inviting the contractor to discuss proposals to resolve the termination, including the potential delivery of items under the contract that the government had purported to terminate. The ASBCA (Shackleford, A.J.) denied the government's motion to dismiss for lack of jurisdiction based on the alleged untimeliness of the notice of appeal (which the ASBCA also questioned *sua sponte*). The ASBCA held that the government's post-termination actions "created a cloud of uncertainty as to the status of the … termination." As such, the government led AFG to reasonably believe that it was reconsidering the termination decision, thereby vitiating the finality of the "final" decision.

***Piedmont-Independence Square, LLC v. Gen. Servs. Admin.*, CBCA 5605 (Aug. 6, 2018)**

Piedmont-Independence Square, LLC ("Piedmont") filed an appeal arising from Piedmont's claim for costs incurred in its work to refurbish space leased to the General Services Administration ("GSA"). Piedmont had submitted an uncertified Request for Equitable Adjustment ("REA") to the contracting officer in February 2015. In response, the contracting officer issued a final decision in August 2016 determining that GSA owed Piedmont a portion of the amount requested in the REA, but offset that amount for costs for IT equipment that GSA alleged Piedmont was responsible to provide under the terms of the lease. Instead of appealing the final decision, Piedmont asserted it was invalid because the underlying REA was not certified. In October 2016, Piedmont submitted a certified claim that included the IT equipment costs offset by GSA in its August 2016 final decision. Piedmont then appealed the deemed denial of its certified claim on January 18, 2017. GSA sought summary relief arguing, *inter alia*, that the portion Piedmont's appeal relating to the offset costs was filed more than 90 days after GSA's August 2016 final decision. The CBCA (Sullivan, A.J.) held that GSA's August 2016 final decision triggered the 90 day statutory filing deadline, notwithstanding the fact that the decision was in response to Piedmont's uncertified REA. The CBCA explained that the contractor could not appeal the portion of the decision addressing the uncertified REA, but the offset amount was a Government claim asserted in a final decision with a sum certain that sufficiently notified Piedmont of its appeal rights.

***Eur-Pac Corp., ASBCA* Nos. 61647, 61648 (Nov. 13, 2018)**

The contractor filed its notice of appeal of the government's termination decision more than 90 days after receipt of the final decision. The ASBCA (Wilson, A.J.) raised *sua sponte* the question of jurisdiction, and ultimately dismissed the appeal as untimely filed. Although in certain limited circumstances, written correspondence to the contracting officer may satisfy the ASBCA's notice requirement, those circumstances were not present here, because the contractor did not clearly express its intent to appeal the final decision in its emails to the contracting officer. Moreover, the ASBCA noted that the contractor had numerous other appeals pending before the ASBCA, and therefore was familiar with ASBCA procedure.

***Hof Constr., Inc. v. Gen. Servs. Admin.*, CBCA No. 6306 (Dec. 12, 2018)**

The General Services Administration ("GSA") terminated the contract for default in a contracting officer's final decision, and HOF Construction, Inc. ("HOF") filed its notice of appeal at the CBCA 11 months later. HOF argued that its appeal was timely because the final decision failed to include the notice of appeal rights required by FAR 33.211(a)(4)(v). Noting that government's claim of termination for default was "imperfect" because it did not include the statement of appeal rights that FAR 33.211(a)(4)(v) says "shall" accompany a contracting officer's decision on a claim, the CBCA (Chadwick, A.J.) held that where the notice of appeal rights in a contracting officer's final decision is defective – but not completely lacking – the contractor must show detrimental reliance on the defective notice of appeal rights to preclude the start of the jurisdictional timeline to appeal the decision. The CBCA identified conflicting precedent between two of its predecessor boards regarding whether a

contractor is required to show detrimental reliance upon receipt of a defective notice of appeal rights. Notably, the CBCA held, for the first time, how it would reconcile such conflicting precedent: "the panel will apply what it deems our better precedent and the panel decision will be the Board's precedent on the issue." The CBCA found that GSA's communications were not unclear or misleading and that Hof could not show it reasonably relied on the defective notice to its detriment. Thus, the CBCA ruled that Hof's appeal was untimely.

E. Contract Disputes Act Statute Of Limitations

Under the Contract Disputes Act, "[e]ach claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A). Failure to meet the CDA's six year statute of limitations is an affirmative defense, and, unlike the 90 day window to appeal a final decision at the appropriate board of contract appeals, it does not impact the Boards' of jurisdiction over an appeal. The CBCA and ASBCA each issued a notable decision discussing when a claim accrues.

***United Liquid Gas Co. d/b/a United Pacific Energy*, CBCA No. 5846 (July 12, 2018)**

United Pacific Energy ("UPE") had a multiple award schedule ("MAS") contract with the General Services Administration ("GSA") to provide propane gas at prices set forth in the schedule. The Fort Irwin Contracting Command ("Ft. Irwin") issued four task orders against the MAS contract for propane gas during fiscal years 2011, 2012, 2013 and 2014, which UPE fulfilled. In 2016, GSA determined that UPE overbilled and Ft. Irwin overpaid on the task orders. UPE moved for partial summary relief with respect to $279,029.64 in overpayments that allegedly occurred prior to 2011, arguing that this portion of the claim was untimely under the CDA six year statute of limitations. The CBCA granted partial summary relief, concluding that the claim began to accrue on January 5, 2011, when Ft. Irwin overpaid the first task order 1 invoice submitted for payment under the MAS contract. The CBCA noted that, at that point in time, the terms of the MAS contract clearly put both Ft. Irwin and GSA on notice that UPE was overbilling the government, and all events that fixed the alleged liability, specifically, in this case, overpayments in a "sum certain," were known or should have been known. Furthermore, government claims continued accruing each time Ft. Irwin overpaid a task order 1 invoice under the MAS contract, because every time a payment was made on an invoice, the government knew or should have known of the overpayment and the "sum certain" it was overpaying.

***DRS Global Enter. Sols., Inc.*, ASBCA No. 61368 (August 30, 2018)**

The government sought repayment from DRS Global Enterprise Solutions, Inc. ("DRS") for over $8.6 million, mostly for other direct costs that the administrative contracting officer determined to be unallowable based on the alleged lack of supporting documentation, including the lack of an invoice for the costs, proof of payment, and a signed purchase order. DRS moved for summary judgment, arguing that the government's claim was untimely because it accrued more than six years before the September 11, 2017 final decision. DRS identified three alternative claim accrual dates. First, DRS argued that for direct costs, the government's claim accrued no later than December 15, 2006, when it paid the last of

the invoices at issue. Second, for indirect costs, DRS argued that the government's claim accrued when DRS submitted its annual incurred cost proposals ("ICPs"). Third, DRS argued that the government's claim accrued no later than July 17, 2009, when the Defense Contract Audit Agency ("DCAA") conducted the entrance conference for its audit of DRS' ICPs. The government argued that interim vouchers by their very nature do not contain supporting documentation, and that there was no way the government could have known that DRS could not substantiate the amounts billed until it failed to provide DCAA with requested supporting documentation in October 2013.

The Board denied DRS's motion, finding that DRS's contention that the government should have known of its claim in 2006 was undermined by letters DRS wrote to DCAA and DCMA in 2013 and 2014, and that generally, DRS's sweeping statements with respect to the level of knowledge possessed by the government in 2006 were not supported by the current record. For those reasons, the Board decided the best course of action was to allow further development of the record to determine when the government should reasonably have known of its claim.

F. Consolidation of Appeals

***Collecto, Inc. dba EOS CCA and Transworld Systems Inc.*, CBCA Nos. 6049, 6001 (July 26, 2018)**

In *Collectco Inc*., the Department of Education filed motions seeking to consolidate the appeal docketed as *Transworld Sys. Inc. v. Dep't of Ed.*, CBCA 6049, with the appeal docketed as *Collecto, Inc. d/b/a EOS CCA v. Dep't of Ed.*, CBCA 6001, asserting that the task orders underlying both appeals were essentially the same and that the issues to be decided in the two appeals were the same. The government had filed claims with both appellants seeking reimbursement of allegedly overpaid amounts on certain invoices under contracts to perform student loan debt collection services as a result of a new debt management collection system that disrupted the invoicing process.

The CBCA denied without prejudice the Agency's request to consolidate the two appeals of the Agency's claim for reimbursement of overpaid invoices, concluding that the matters did not constitute "complex litigation" warranting such consolidation. Complex litigation, as it is traditionally defined, generally involves multiple related cases, extensive pretrial activity, extended trial times, difficult or novel issues, or post-judgment judicial supervision. The Board noted that consolidation might be warranted were there a multitude of vendors with identical task orders challenging the same type of refund demand. Here, however, the Board was presented with only two rather than multiple appellants, and the agency had not indicated that there were likely to be any other related appeals. Further, only minimal discovery was anticipated and the Board found it possible that the issues could be resolved through dispositive motions rather than a hearing on the merits. The Board noted, however, that the Agency could renew its motion if the cases could not be resolved through dispositive motions.

IV. DEFAULT TERMINATIONS

The ASBCA issued three noteworthy decisions during the second half of 2018 arising from default terminations, in each case upholding the termination for default.

***Coastal Environmental Grp., Inc.*, ASBCA No. 60410 (July 17, 2018)**

The parties contracted for Coastal Environmental Group, Inc. ("Coastal") to make repairs to the Security Boat Marina at Naval Weapons Station Earle, Leonardo, New Jersey. With 50 days remaining before the contract completion deadline, the contracting officer terminated the contract for default, citing "continued lack of progress thereby endangering completion. . . " The Board declined to convert the default termination into a terminate for convenience because, despite evidence Coastal presented that it had a plan to complete the work on time, because there was no evidence that the government was actually aware of any such plan at the time of the termination. As such, it was reasonable for the government to conclude that there was no reasonable likelihood that Coastal would complete the work on time. The Board also rejected Coastal's claim for excusable delay because it had released that claim in a bilateral modification which stated that the modification constituted an "accord an satisfaction…for delays and disruptions arising out of, or incidental to, the work as herein revised."

***LKJ Crabbe Inc., ASBCA* No. 60331 (Oct. 29, 2018)**

This appeal arose out of a commercial item contract between LKJ Crabbe Inc. ("LKJ") and the Army Mission and Installation Contracting Command ("Army") for custodial services at buildings located in two different locations at Ft. Polk, Louisiana. LKJ appealed the Army's termination for cause, contending that the Army's termination was unjustified and that the Army breached the contract by failing to reform the contract after learning of an alleged mistake in LKJ's bid. LKJ also alleged that the Army breached the contract by violating its duty of good faith and fair dealing.

The ASBCA (Woodrow, A.J.) denied the appeal, finding that LKJ's failure to provide reasonable assurances of its ability to perform in response to the cure notice supported the Army's decision to terminate for cause. Instead, LKJ indicated that it "had failed to appreciate the level of service it would be required to perform" under the contract, and that it was suffering losses that it could absorb only through November. The ASBCA found that this was an unequivocal statement that LKJ could not perform past November. Further, the ASBCA concluded that LKJ's statements were tantamount to an anticipatory repudiation of the contract, which justified the termination for cause on that basis as well. Finally, the testimony and evidence at the hearing demonstrated that LKJ's losses on the contract fundamentally were the result of faulty pricing throughout the contract.

***Ballistic Recovery Systems, Inc.*, ASBCA No. 61333 (Dec. 13, 2018)**

In 2016, Ballistic Recovery Systems, Inc. ("BRSI") entered into a fixed-price contract for the supply of parachute deployment sleeves. Pursuant to the contract, BRSI was supposed to deliver two test units for inspection, as part of the first article test ("FAT"). Prior to the award of the contract, BRSI sought a FAT waiver based on a prior contract for the same item, however, the waiver was denied because no inspections had been performed on BRSI's deployment sleeves for almost two years. After delivery of the two test units, the government found numerous major deficiencies and recommended disapproval. After BRSI submitted two subsequent test units, the government found further major deficiencies, and issued a show cause notice for BRSI to state any excusable causes of defects. Rather than address any of the major deficiencies in the test units, BRSI referred to its earlier contract and

argued that its units were "production standard." In 2017, the government terminated the contract for default as a result of the multiple FAT disapprovals.

Upon the government's motion for summary judgment, the ASBCA (Paul, A.J.) determined that the government met its initial burden of proving that the termination was reasonable and justified, and evidence that the contractor did not attempt to correct major and critical defects constituted a reasonable basis for default termination. The ASBCA reasoned that the government had provided ample evidence of the major and critical failures of BRSI's test units, and had submitted declarations in support thereof, thus, the lack of any substantive attempt by BRSI to address the faulty units constituted a reasonable basis for default termination. Accordingly, the ASBCA denied BRSI's appeal.

V. CONTRACT INTERPRETATION

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

***First Kuwaiti Trading & Contracting W.L.L. v. Dep't of State,* CBCA Nos. 3506, 6167 (Dec. 3, 2018)**

First Kuwaiti Trading & Contracting W.L.L. ("FKTC") contracted with the Department of State ("DOS") to build an embassy compound in Baghdad. First Kuwaiti claimed that it was underpaid for costs associated with building in a war zone, and asserted 200 claims totaling $270 million against DOS. DOS moved for summary judgment on thirteen of FKTC's cost claims, challenging FKTC's reliance upon the War Risks clause, the superior knowledge doctrine, the Changes clause, and the implied duty of good faith and fair dealing as the basis for these claims

The CBCA (Sullivan, A.J.) rejected FKTC's invocation of the War Risks clause as to each of the thirteen claims, applying various canons of contractual interpretation to find that the contract did not contemplate that DOS would compensate FKTC for all losses attributable to wartime conditions. The CBCA granted DOS's motion as to seven counts based on the superior knowledge doctrine, finding that DOS did not have "specific and vital" information that First Kuwaiti lacked in negotiating the contract to support its superior knowledge claim. The CBCA denied DOS's motion on six other counts where FKTC sought to recover costs in reliance upon the Changes clause, finding there were disputed issues of fact regarding responsibility over security and that DOS did not provide sufficient evidence to support a sovereign acts defense. To successfully assert a sovereign acts defense, the government must prove that its action is "public and general," meaning that its action has an impact on public contracts that is "merely incidental to the accomplishment of a broader governmental objective." The CBCA found that the government failed to provide specific evidence of the "public and general" nature of the government's actions over objections by DOS that such evidence was unavailable because the Army kept poor records during the Iraq War.

***OMNIPLEX World Services Corp. v. Dep't of Homeland Security,* CBCA No. 5971 (Nov. 27, 2018)**

OMNIPLEX World Services Corporation ("OMNIPLEX") contracted with the Department of Homeland Security to provide guard services. OMNIPLEX's contract contained clauses permitting the government to take deductions from payment for instances where the contractor fails to satisfy contract requirements, and a dispute arose concerning the applicability of the deduction provisions. OMNIPLEX argued that the deduction clauses were ambiguous. The CBCA (Vergilio, A.J.) rejected OMNIPLEX's arguments, finding that (1) the provisions were not ambiguous and (2) even if the provisions were ambiguous, the ambiguity was patent. Patent ambiguity occurs when "facially inconsistent provisions place a reasonable bidder or offeror on notice and prompt it to rectify the inconsistency by inquiry," whereas latent ambiguity occurs when "the ambiguity is neither glaring nor substantial nor obvious." Though not explicitly stated in the CBCA decision, latent ambiguities are construed against the drafter of the agreement, whereas patent ambiguities are construed against the party later attempting to assert the ambiguity. *See, e.g., K-Con, Inc. v. Secretary of the Army*, No. 2017- 2254 (Fed. Cir. Nov. 5, 2018). Accordingly, the CBCA denied the appeal.

***Parsons Evergreene, LLC,* ASBCA No. 61784 (Sept. 5, 2018)**

In an unusual five-judge decision, the ASBCA held that Parsons Evergreene, LLC ("PE") was not entitled to compensation resulting from the government's failure to engage in a "prompt" review of Davis-Bacon Act payrolls, which PE argued was in violation of FAR 22.406-1 (which describes the government's policy of "prompt" enforcement of labor standards). The decision explained in a footnote that because the two judges who reviewed Judge Clarke's original opinion in ASBCA No. 58634 (discussed in Sections II.B. and III.B., *supra*) came to a different conclusion, the remaining two judges in Judge Clarke's division were asked to consider it, consistent with ASBCA practice and procedure. The result was a four-to-one split, with Judge Clarke issuing a dissenting opinion. For reasons of clarity and judicial efficiency, the ASBCA issued a separate opinion under a new appeal number. The ASBCA accepted PE's position that the Air Force's delay in commencing payroll reviews until 2008, when the contract was almost over, caused additional expense to PE. However, citing *Freightliner Corp. v. Caldera*, 225 F.3d 1361, 1365 (Fed. Cir. 2000), the ASBCA stated that to have a cause of action against the government for violation of a regulation, a contractor must prove that the regulation exists for the benefit of the contractor. The ASBCA thus concluded that FAR 22.406-1 does not provide a remedy to a contractor for the government's untimely investigation of complaints relating to labor standards, and therefore denied the appeal.

Judge Clarke's dissenting opinion reasoned that because FAR 22.406-1 requires that if a problem is found during payroll reviews, on-site inspections or employee interviews, there will be "prompt initiation of corrective action," "Prompt investigation and disposition of complaints," and "Prompt submission of all reports required by this subpart," the payroll reviews themselves must also be prompt, or the entire regulatory scheme becomes meaningless.

A. Course of Dealing

Two ASBCA cases addressed the circumstances under which a prior course of dealing between the government and a contractor can give rise to an implied contractual right.

***ECC Int'l, LLC, ASBCA* No. 60484 (Nov. 16, 2018)**

ECC International, LLC ("ECC") entered into a contract with the U.S. Army Corps of Engineers ("USACE") for the construction of a compound expansion in Afghanistan. During performance, an access route to the construction site referred to as "Friendship Gate" was closed by the U.S. military due to a security incident, which resulted in delay and additional costs to ECC. ECC sought to recover these costs, arguing that continued access through Friendship Gate was an implied warranty in the contract, the closure of which was a constructive change.

The ASBCA (Woodrow, A.J.) denied the appeal and rejected ECC's argument that a prior course of dealing between ECC and various Department of Defense agencies created an implied contractual right to access through Friendship Gate in its contract with the USACE. The ASBCA explained that prior course of dealing can be established where there is justifiable reliance and proof of the same contracting agency, the same contractor, and essentially the same contract provisions over an extended period of time. ECC could not establish these elements because its previous contracts with the USACE were performed concurrently with the subject contract, beginning only months before. Moreover, the ASBCA found it notable that a prior course of dealing could not "change the fact that, in a war, security considerations could change over time."

***TranLogistics LLC, ASBCA* No. 61574 (Aug. 29, 2018)**

TranLogistics LLC had a contract with the Marine Corps to move ammunition lockers to locations in Honduras, Guatemala, Belize, and El Salvador. TransLogistics claimed extra costs caused by delayed customs documentation. The ASBCA (Kinner, A.J.), in a succinct decision, agreed with TransLogistics' interpretation of the contract that the government was obligated to provide the customs documentation. Although the Marines argued in briefing that the contract required TransLogistics to provide a customs broker, the parties' course of dealing, both in the subject contract and in prior contracts, was consistent with TransLogistics' interpretation. The ASBCA found that the delay was therefore excusable, but only partially granted the appeal because the contractor did not offer direct proof of the amounts it incurred from the delay.

B. Release of Claims

***Penna Grp., LLC*, CBCA No. 6155 (Sept. 27, 2018)**

Penna Group, LLC sought $146,048.85 for costs incurred after performing under an expanded scope of work for a roofing contract with the Federal Bureau of Prisons. The contracting officer denied the claim, relying upon a release of claims signed by the contractor's president, which released the United States from any and all claims arising under the contract without exception. The agency moved for summary judgment, contending that the contractor could not pursue the claim or prevail given the release. The

contractor asserted that the release was of no force or effect because it was completed by one without the actual or apparent authority to do so, and that material facts are in dispute so as to preclude summary judgment. The contractor further argued that the release can be invalidated because of economic duress and because of mutual mistake.

The CBCA rejected the contractor's arguments and denied the claim, concluding that the release was enforceable. Here, the release bore the signature of the contractor's president. While the individual who completed the release on behalf of the contractor was not the president, the president was aware that said individual had his signature stamp. Thus, he had endowed her with actual or apparent authority, or both, to execute the release with his signature.

***Expresser Transport Corp.*, ASBCA No. 61464 (Dec. 7, 2018)**

In 1983, Expresser Transport Corporation ("Expresser") and the United State entered into a time charter contract for a vessel to support the prepositioning of military equipment and supplies. The contract allowed the government to place civilian contractors aboard the vessel, and also indemnified Expresser for liability arising from the carriage of such civilian contractors. However, the contract also included a "waiver of claims" clause that stated that "all claims whatsoever for moneys due the Contractor" must be submitted within two years of the date of "redelivery of the Vessel[.]" Upon termination for convenience of the charter contract on July 15, 2009, the parties considered the vessel "redelivered" on that date. In 2007, a civilian contractor aboard suffered paraplegic injuries, which led to a settlement with Expresser of $2.5 million in 2011. In 2017, Expresser submitted a claim seeking indemnity of the settlement amount. The government denied the claim on the basis that the waiver of claims clause was unambiguous and that the claim was not submitted within two years of the redelivery of the vessel. Expresser countered that the clause produced an unacceptable result, in that there could be claims that arose more than two years after redelivery and a cognizable claim cannot accrue until a sum certain is known or should have been known.

The ASBCA (Melnick, A.J.) considered the charter contract as a whole and determined that the government's indemnity obligations were expressly and unambiguously limited by the waiver of claims clause. Simply because Expresser found the clause unacceptable with the benefit of hindsight did not release Expresser from the agreement it entered into. The ASBCA likened the clause to a statute of repose, which cuts off a cause of action after a certain amount of time, irrespective of the time of accrual.

***United Facility Services Corporation dba Eastco Building Services*, CBCA No. 5272 (July 7, 2018)**

United Facility Services Corporation dba Eastco Building Services ("Eastco") was awarded a task order under a GSA Schedule contract for operations and maintenance services at three federal buildings. Eastco alleged that it found thousands of additional inventory pieces to be maintained that were not captured on the task order solicitation's inventory list, and submitted to GSA a certified claim seeking a contract adjustment for servicing the additional equipment. GSA denied the claim, and Eastco appealed. On cross-motions for summary judgment, GSA claimed it was not responsible for any unanticipated performance costs incurred by Eastco because two provisions in the contract – a clause

requiring the contractor to make a pre-bid site visit and inspection, and a disclaimer indicating that the list may contain some errors – placed upon the contractor the risk of any defects in the equipment list. Eastco argued that GSA's inclusion of the equipment list in the solicitation constituted a warranty regarding the facility's equipment quantities that overrode the contract's disclaimer and pre-bid site visit obligations.

The CBCA (Lester, A.J.) described the factors used to determine whether and to what extent a tribunal will enforce an exculpatory disclaimer, noting (1) that exculpatory clauses are narrowly construed because they are drafted by the government and shift to the contractor risks that would otherwise be borne by the government; (2) the clearer the disclaimer language and the more narrowly tailored it is, the more likely it is to be held effective and enforceable as written; (3) exculpatory language disclaiming representations about latent conditions that a contractor would be unable to detect through a reasonable site inspection are less likely to be enforced; and (4) disclaimers are more likely to be found ineffective if the government possesses the only information by which the contractor might have learned the truth, and the government denies the contractor access to the data prior to entering into the contract. Applying these criteria to the facts at hand, the CBCA denied the cross-motions for summary judgment based on the undeveloped record on factual issues.

C. Rights in Commercial and Noncommercial Computer Software & Rights in Technical Data

***CiyaSoft Corp.*, ASBCA Nos. 59519, 59913 (June 27, 2018)**

The ASBCA (McNulty, A.J.) held that the government breached the contract by violating the commercial "shrinkwrap" and "clickwrap" license agreements that were shipped with the contractor's software, specifically by permitting installation of a copy of the software onto more than one computer, and failing to provide the contractor with a list of registered users. Importantly, the ASBCA expressly held that the "government can be bound by the terms of a commercial software license it has neither negotiated nor seen prior to the receipt of the software, so long as the terms are consistent with those customarily provided by the vendor to other purchasers and do not otherwise violate federal law." In addition, much like the implied duty of good faith and fair dealing, with respect to commercial software licenses, "an implied duty exists that the licensee will take reasonable measures to protect the software, to keep it from being copied indiscriminately, which obviously could have a deleterious effect on the ultimate value of the software to the licensor."

***The Boeing Co., ASBCA* No. 60373 (July 17, 2018)**

The ASBCA (D'Alessandris, A.J.) held that software developed with costs charged to technology investment agreements ("TIAs") pursuant to 10 U.S.C.A. § 2358 constitutes software developed "exclusively at private expense" as it is defined in Defense Federal Acquisition Regulation Supplement ("DFARS") clause 252.227-7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation. The ASBCA also held that the TIAs at issue did not make a blanket grant of government purpose rights in nondeliverable software developed with costs charged to the TIAs. The dispute arose under a low-rate initial production ("LRIP") contract, after Boeing delivered software marked with restrictive rights and asserted that the software had been developed exclusively at

private expense pursuant to the TIAs. The government challenged Boeing's assertion of restricted rights in the software, and asserted that it possessed government purpose rights because the software was developed with mixed funding. The ASBCA found that a TIA is a cooperative agreement, and not a "contract" as defined in FAR 2.101. Accordingly, to the extent that the software was funded by the TIAs, the costs were not allocated to a government contract and satisfy the definition of "developed exclusively at private expense" under DFARS 252.227-7014. For the same reason, the ASBCA found that the expenditures do not satisfy the definition of "developed with mixed funding" because the costs charged to the TIAs were not charged directly to a government contract.

***The Boeing Co.*, ASBCA *Nos*. 61387, 61388 (Nov. 28, 2018)**

The ASBCA (O'Connell, A.J.) denied Boeing's motion for summary judgment seeking the ASBCA's interpretation as to whether the contracts at issue allowed Boeing to place certain marking legends on technical data, or whether the only authorized legends for marking technical data under the contracts were those found in DFARS 252.227-7013(f). The Air Force contracting officer had concluded that because the legends used by Boeing to mark its data did not conform with DFARS 252.227-7013(f) that Boeing must remove them at its own expense and re-submit the data. Boeing argued that the DFARS clauses, as interpreted by the Air Force, failed to protect its intellectual property rights, whereas the Air Force claimed it would be harmed by use of Boeing's non-DFARS proposed legends. In denying Boeing's motion, the ASBCA agreed with the government's interpretation of DFARS 252.227-7013(f), finding that the legends authorized by that clause were the only permissible legends for limiting data rights under the contract. However, the ASBCA also noted that the issue of whether those clauses adequately protect Boeing's property rights could not be resolved based on the record developed to date. Accordingly, the Board directed the parties to submit a joint status report proposing further proceedings.

***CANVS Corp., ASBCA* Nos. 57784, 57987 (Sept. 6, 2018)**

CANVS Corporation ("CANVS") appealed the denial of its claim for $100 million asserting breach of contract for the unauthorized disclosure of allegedly proprietary information regarding night vision color goggles. CANVS had contracts under the Small Business Innovation Research ("SBIR") program to develop and deliver color night vision technology, and alleged that the government displayed its technical data containing its proprietary information at industry conferences. CANVS had delivered the technical data to the government under the SBIR contracts, but the parties disputed the rights conferred upon the government under DFARS 252.227-7018, including whether CANVS's restrictive markings conformed and whether the data was first generated under the contract. The ASBCA (Peacock, A.J.) declined to decide those issues, however, because even if the government did not comply with 252.227-7018 in disclosing its data, ultimately CANVS did not establish that it suffered any harm—much less $100 million in harm—caused by the government's disclosure. The fact that CANVS did not receive a follow-on production contract is insufficient, particularly when CANVS did not show that any competitors had produced a night-vision goggle using its technology, and when CANVS took no steps to mitigate any potential damages. The ASBCA also held that CANVS did not demonstrate that the disclosed information was proprietary in any event; the disclosure did not enable a "a person of ordinary

skill in the art to assemble an exact replica" of the goggle, and CANVS had previously voluntarily disclosed the information and thus lost any protectable interest.

VI. COMMON LAW PRINCIPLES

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

***Pros Cleaners*, CBCA No. 6077 (Aug. 30, 2018)**

The CBCA (Sheridan, A.J.) considered whether an indefinite delivery, indefinite quantity ("IDIQ") contract that does not set forth a minimum quantity is invalid for lack of consideration. Pros Cleaners, sought damages totaling $750,000 on the basis that the Federal Emergency Management Agency ("FEMA") breached its IDIQ contract. FEMA moved for summary relief, asserting that its agreement with Pros Cleaners did not constitute a valid ID/IQ contract. Pros Cleaners' contract differed from the solicitation, which stated it was an RFP for a five-year IDIQ contract, in three aspects: it omitted the indefinite quantity clause; it did not state that it was an IDIQ contract; and it defined the period of performance as one "base year + four (4) option years." Further, although, the contract stated the value was not to exceed $150,000 and the contract contained a schedule establishing the unit price for labor at $25 per hour, it did not list a minimum quantity of labor. The CBCA granted the Agency's motion and denied the appeal finding that where, as here, a contract does not set forth a minimum quantity, it is defective and invalid for lack of consideration.

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).

***K-Con, Inc. v. Secretary of the Army*, 908 F.3d 719 (Fed. Cir. 2018)**

The dispute in this case arose from two contracts for pre-engineered metal buildings. K-Con, Inc. ("K-Con") claimed additional costs it said were caused by the Army's two-year delay in imposing performance and payment bond requirements in FAR 52.228-15 that were not part of the original contracts. The ASBCA held that bonding requirements were included in the contracts by operation of law at the time they were awarded, pursuant to the *Christian* doctrine. The Federal Circuit (Stoll, J.) affirmed.

The Federal Circuit first found that there was a patent ambiguity in the contracts because they were awarded as commercial-item acquisitions, but plainly required construction. Because there was a patent ambiguity, K-Con was required to seek clarification from the contracting officer before award, which it failed to do. Accordingly, the Federal Circuit concluded that K-Con could not now argue that the contracts should be for commercial items. The Federal Circuit further held that FAR 52.228-15 satisfied both criteria necessary for the *Christian* doctrine to apply: (1) the clause is mandatory, and (2) it

represents a deeply ingrained strand of public policy. Bonding requirements, the court observed, which are meant to ensure a project is completed and that subcontractors and suppliers are paid, are a standard part of federal construction contracts under the 1935 Miller Act. Because they are both mandatory and a "deeply ingrained strand of public procurement policy," the court found they satisfy the *Christian* doctrine. Therefore, because the clause was incorporated in the contracts at the time of award, there was no basis for K-Con to recover cost increases resulting from the two-year delay in obtaining the bonds.

B. Good Faith & Fair Dealing

***North American Landscaping, Construction and Dredge, Co., Inc.*, ASBCA Nos. 60235 *et al.* (Aug. 9, 2018)**

North American Landscaping, Construction and Dredge, Co., Inc. ("NALCO") contracted with the U.S. Army Corps of Engineers (COE) for maintenance dredging of the Scarborough River. NALCO filed a claim for the unpaid contract balance, unabsorbed overhead, differing site conditions, and a time extension, most of which the ASBCA (Clarke, A.J.) sustained. Most notably, the ASBCA found that the COE breached the implied duty of good faith, fair dealing and noninterference by: abusing its discretion to invoke DFARS 252.236-7004(b), which authorizes the contracting officer to require the contractor to furnish mobilization cost data; improperly denying NALCO funds that the COE knew it needed to perform; insisting on a more expensive dredge at the same price; maintaining a "disturbing attitude" toward NALCO, including mocking its legitimate concerns; and coercing NALCO into signing a "take it or leave it" modification by threatening to terminate for default if it was not signed. The ASBCA observed that, "[a]t every point where an important decision had to be made, the COE chose to protect itself rather than act to successfully complete the contract or redress NALCO's legitimate claims." In addition, the ASBCA held that the release of claims was unenforceable because NALCO signed it under coercion, because the COE threatened to terminate the contractor for default, without a good faith belief that the contractor was in default.

Administrative Judge Prouty, joined by Administrative Judge Shackleford, disagreed that the COE abused its discretion and that the COE breached its duty of good faith, but concurred in the result because such findings were not necessary to award damages to NALCO (which were based on finding a constructive change). However, the concurrence noted that it found "the government's general behavior throughout the award and performance of the contract to be abhorrent."

C. 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. 58999 (Nov. 13, 2018)**

ANHAM FZCO, LLC ("Anham") had a contract with the Defense Logistics Agency – Troop Support for the supply and delivery of food and other items to military customers in Kuwait, Iraq and Jordan. During performance of the contract, the government directed ANHAM to alter its delivery

operations from Kuwait to Iraq by utilizing a certain commercial entry point instead of the contractually-required U.S. military controlled crossing, known as the K-Crossing. ANHAM subsequently submitted a claim for the resulting increased costs, which the government denied.

The ASBCA (Woodrow, A.J.) rejected the government's argument that the closure of the K-Crossing was a sovereign act that insulated it from contractual liability. The ASBCA held that while the closing of the crossing was a sovereign act, two exceptions to the defense applied here, because: (1) the contracting officer issued instructions or orders to implement the sovereign act which exceeded contract requirements; and (2) the government expressly or impliedly agreed to pay the contractor's losses resulting from the sovereign act. In making that determination, the board found that the government had ordered appellant to develop a transition plan to accommodate the new delivery method, and had also expressly agreed to compensate appellant for the additional costs. To support this, the board further found that the government was aware of the costs associated with changing the border crossing location and was open and willing to modify the contract to address the costs. Further, the government continued to be involved directly in approving the operational changes.

D. Accord & Satisfaction

***Ruby Emerald Constr. Co.*, ASBCA No. 61096 (Nov. 6, 2018)**

The Army and Ruby Emerald Construction Company ("Ruby") entered into an arrangement for the purchase of crushed gravel. The Army contended that there was never a contract because it cancelled the purchase order prior to acceptance by Ruby, notwithstanding the fact that the Army issued a notice to proceed, and the parties had executed a bilateral modification. The Army also contended that if there were a contract, the bilateral modification cancelled the contract at no cost to the Army, therefore, summary judgment should be granted in favor of the Army.

The ASBCA (Woodrow, A.J.) could not determine whether a contract existed due to contradictory and incomplete aspects of the record and denied summary judgment on this ground. However, the ASBCA granted summary judgment based on accord and satisfaction, which operates to discharge a claim when some performance other than that which was claimed is accepted as full satisfaction of the claim. To establish this, the government must show (1) proper subject matter; (2) competent parties; (3) consideration; and (4) a meeting of the minds of the parties. The ASBCA held that the Army established all four elements. In particular, there was sufficient consideration because the modification of the contract cancelled it at no cost to the Army, and Ruby in turn would not be required to perform. The ASBCA also held that there was a meeting of the minds because Ruby sought termination of the contract, then signed the modification which explicitly provided for cancellation of the contract at no cost to the Army, confirmed that Ruby had not incurred any costs, and did not reserve any rights for Ruby to assert a claim.

VII. DAMAGES

Avant Assessment, LLC v. Secretary of the Army, No. 2018-1235, (Fed. Cir. Nov. 9, 2018)

Avant appealed from a decision of the ASBCA, challenging the Board's decision to exclude evidence Avant offered regarding test items for which it argues it should have been paid under a contract with the Department of Army to deliver language testing materials to the Defense Language Institute. The contract required that the test items be of "high quality," and authorized the Army to reject unacceptable items. The solicitation explained that the contract would carry a "potentially high rejection rate," and noted that the historical rejection rate was about 33 percent. Avant therefore built a 30 percent rejection rate into its bid.

Avant claimed that the Army improperly rejected many of the test items based on "subjective and indefinite specifications." Avant sought compensation for all "test items rejected in excess of 30 percent . . . [,]" demanding an equitable adjustment of approximately $1.9 million for the alleged breach. Following the ASBCA's denial, Avant appealed to the Federal Circuit.

The Federal Circuit (Bryson, J.) rejected Avant's contention that it was entitled to damages for all rejections over the 30 percent figure in the solicitation. The court explained that that figure was an estimate and it not a promise by the Army to not exceed a certain rejection rate or to reimburse the contractor for items rejected over that rate. Instead of seeking a blanket 30 percent recovery, Avant had to actually establish which items were improperly rejected, then the burden would shift to the government to show that the rejected items were nonconforming. In so holding, the court also upheld the ASBCA's exclusion of Avant's untimely submission of approximately 40,000 pages of evidence relating to the rejected items. The court suggested that had Avant timely submitted the evidence, it could have provided expert testimony; attempted to demonstrate breach by presenting a sample of the rejected items; or Avant could have submitted a summary of the documents under Federal Rule of Evidence 1006. Having failed to show actual breach, Avant could not rely on an estimate in the solicitation.

VIII. OTHER CASES OF NOTE

Palantir USG Inc. v. United States, 904 F.3d 980 (Fed. Cir. 2018)

In our Mid-Year Update, we highlighted *Palantir* as a pending bid protest case to watch for the wide reaching impacts the decision would have on the procurement community and the deference afforded the government's market research in developing its solicitation requirements. Palantir argued that the Army violated the Federal Acquisition Streamlining Act ("FASA") when it decided to develop a new data-management platform ("DCGS-A2") from scratch without undertaking market research to determine whether its needs could be met by a commercially available product. In September, Gibson Dunn secured a victory for Palantir in the case when the Federal Circuit (Stoll, J.) rejected the Army's argument that the claims court should have deferred to its original choice to go with a custom solution for the disputed data platform.

FASA requires that federal agencies, to the maximum extent practicable, procure commercially available technology to meet their needs. Noting that that FASA achieves its preference for commercial items in part through preliminary market research, the court concluded that the Army's procurement actions in this case were arbitrary and capricious and in violation of FASA. Key to that holding was the fact that the Army was on notice of both the desirability of hybrid options that used commercial solutions and that Palantir claimed to have a commercial item that could meet or be modified to meet the Army's needs. The decision should cause federal agencies to take their market research obligations under FASA more seriously.

The court also rejected the government's argument that the trial court wrongly discarded the presumption of regularity in determining that the Army's actions were arbitrary and capricious. The court stressed that under the presumption of regularity, the agency is not required to provide an explanation unless that presumption has been rebutted by record evidence suggesting that the agency decision was arbitrary and capricious, which in this case had been amply satisfied. In affirming the judgment of the lower court, the court stated that only after the Army complied with the requirements of FASA should it proceed with awarding a contract to meet its DCGS-A2 requirement.

***PDS Consultants v. United States*, Nos. 2017-2379, 2017-2512 (Fed. Cir. Oct. 17, 2018)**

In our 2016 Mid-Year Update, we reported on the Supreme Court's ruling in *Kingdomware Techs. v. United States*, 136 S. Ct. 1969 (2016), which held that the Veterans Benefits, Health Care, and Information Technology Act of 2006 unambiguously requires the Department of Veteran's Affairs ("VA") to apply the so-called Rule of Two – a provision specifying that, "for purposes of meeting [veteran-owned business participation] goals," the VA must restrict bidding to such businesses when there is a "reasonable expectation that two or more" veteran-owned businesses will make reasonable bids, with limited exceptions. In *PDS*, the Federal Circuit affirmed an earlier Court of Federal Claims' decision, applying *Kingdomware* and holding that the more specific nature of the Rule of Two overrides the more general preference to provide employment opportunities for the blind as set forth in the Javits-Wagner-O'Day Act of 1938, and as effectuated by the AbilityOne Program, despite the mandatory nature of both. The Court of Federal Claims held that the VA must apply the Rule of Two analysis *before* procuring the work through a non-Veteran Owned Small Business set-aside, including set-asides through the AbilityOne Program. In affirming the decision, the Federal Circuit "consider[ed] the plain language of the more specific, later enacted" Veteran's Benefits, Health Care, and Information Technology Act of 2006, "as well as the legislative history and Congress's intention in enacting it…."

IX. CONCLUSION

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

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