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FEATURE ARTICLE

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Choice Of Forum For Government Contract Disputes

By Karen L. Manos

One of the novel aspects of contracting with the Government is that the contractor has the unilateral right to choose the forum for most contract disputes. The Contract Disputes Act requires that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision."[1] Likewise, it requires that "[a]ll claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer."[2] The CO's decision on a claim is final and not subject to review unless the contractor either (1) appeals the decision within 90 days of receipt to the appropriate agency board of contract appeals (BCA) or (2) brings an action on the claim in the U.S. Court of Federal Claims within 12 months from the date of receipt.[3] Consequently, the contractor has the sole right to elect whether and where to appeal a CO's final decision.

The contractor's choice of forum can have significant consequences. Under the so-called "election doctrine," once a contractor makes an election to appeal a CO's final decision in one forum, the election is binding and the contractor loses its right to pursue the appeal in another forum.[4] For example, in *Bonneville Assocs. v. U.S.*, the contractor initially appealed to the General Services Board of Contract Appeals, and then withdrew its appeal in order to file suit in the COFC. The COFC dismissed the contractor's complaint under the election doctrine, but the time for filing an appeal at the GSBCA had expired by then. The GSBCA therefore dismissed the second appeal as untimely. The U.S Court of Appeals for the Federal Circuit affirmed both dismissals.[5] As a result, the contractor lost its opportunity to contest the final decision. Notably, however, the contractor's election does not become binding unless the selected forum has jurisdiction.[6] Applying these rules, the COFC has permitted contractors to file protective complaints in the COFC while awaiting a determination regarding jurisdiction at the boards of contract appeals.[7]

Before making a forum election, contractors should consider several differences between the COFC and the BCAs. This article discusses some of the more significant factors.

Jurisdiction

Depending on the type of claim, subject matter of the contract and identity of the Government entity involved, the BCA or COFC may not have jurisdiction over the dispute. Both the BCAs and the COFC have jurisdiction under the CDA, which covers express or implied contracts entered into by an executive agency (and certain specified nonappropriated fund activities) for the procurement of property, services or construction, or the disposal of personal property.[8] Thus, for example, the CDA does not cover contracts for the sale of real property. In addition to its CDA jurisdiction, the COFC also has jurisdiction under the Tucker Act to

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> render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of any executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.[9]

Although the Tucker Act waives sovereign immunity, the U.S. Supreme Court has repeatedly held that it "does not create any substantive right enforceable against the United States for money damages."[10] Thus, the Court held:

> A substantive right must be found in some other source of law, such as "the Constitution or any Act of Congress, or any regulation of an executive department." Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act. The claim must be one for money damages against the United States, and the claimant must demonstrate the source of substantive law he relies upon "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."[11]

Hence, if a contractor's claim were founded on the Constitution or a statute instead of its Government contract, neither the BCAs nor the COFC would have jurisdiction under the CDA,[12] but the COFC would have jurisdiction under the Tucker Act as long as the substantive source of law granted the right to recover damages.[13] For that reason, takings cases, such as *U.S. v. Winstar*,[14] must be brought in the COFC.

The Federal Circuit's decision in *Wesleyan Co. v. U.S.* points out an important distinction between the CDA jurisdiction of the BCAs and the broader Tucker Act jurisdiction of the COFC.[15] *Wesleyan* arose out of a claim for breach of an implied-in-fact contract limiting Government use of the proprietary data contained in three unsolicited proposals. After submitting unsolicited proposals for a proprietary drinking system that allows soldiers wearing protective masks to drink without removing the masks, Wesleyan entered into a bailment agreement for the purpose of loaning the drinking system to a manufacturer of protective masks and suits. Thereafter, the Army issued purchase orders to acquire prototypes of the system for testing and evaluation. Neither the bailment agreement nor the purchase orders contained any express provisions on the safeguarding or use of Wesleyan's proprietary data. After the Army rejected the Wesleyan system in favor of a CamelBak drinking system, Wesleyan brought a claim for more than $20 million, alleging that the Army improperly disclosed its proprietary data to non-governmental third parties, and that its proprietary information had been incorporated into the CamelBak drinking system. The ASBCA dismissed the appeal for lack of jurisdiction.[16] Assuming for purposes of the decision that there were implied-in-fact contracts to protect the proprietary data against disclosure, the board concluded that the contracts were not for the procurement of property or services, and, therefore, were not subject to the board's jurisdiction under the CDA.

The Federal Circuit reversed and remanded, concluding that the purchase orders, in contrast to the unsolicited proposals and bailment agreement, "involve the exchange of property for money, and thus involve 'procurement.' " However, the Federal Circuit emphasized that the scope of the ASBCA's jurisdiction on remand was exceedingly limited: "To succeed, then, Wesleyan must prove that the Army obtained the confidential information that it later disclosed improperly not from the unsolicited proposals, nor from the bailment, but solely from the prototypes purchased and evaluated." The Federal Circuit also made clear that the contractor could have pursued *all* of its allegations had it chosen to bring suit in the COFC instead of appealing to the ASBCA. The court stated:

> Wesleyan made a strategic decision to pursue its claim before the Board, and this forum choice has significantly limited the scope of its potential relief. Had Wesleyan desired to pursue all allegations contained in its complaint, it could have brought suit in the United States Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(b)(1), which grants jurisdiction over disputes involving "any express or implied contract with the United States." Indeed, because, unlike the CDA, the Tucker Act does not require that the contract with the United States relate to procurement, the Court of Federal Claims

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> would have possessed subject matter jurisdiction here even if the Army had not purchased *any* Wesleyan systems, and had breached the confidentiality agreement solely by disclosing information contained in the unsolicited proposals and/or bailment. By opting to pursue its claim before the Board, Wesleyan limited the scope of its dispute to the CDA, and thus to the prototypes obtained through the purchase orders.[17]

After the *Wesleyan* decision, Professors Nash and Cibinic cautioned their readers that "lawsuits claiming that the Government breached its promise in a proprietary legend on a proposal should only be brought in the Court of Federal Claims. It is also safer to bring a suit claiming breach of a promise attached to a product in that court. Basically, a board of contract appeals is not a safe place to litigate proprietary rights."[18]

The COFC may also be a safer forum for sureties to bring a contract claim against the Government. The Federal Circuit held in *Fireman's Fund Ins. Co. v. England* that a surety cannot bring an equitable subrogation claim under the CDA because a surety is not a "contractor."[19] Applying the *Fireman's Fund* decision, the ASBCA has held that "a surety would have a right of action against the government, both under the Tucker Act and under the CDA in the event that it had entered into a takeover agreement with the government, because the surety would then be considered a contractor," but "that right would cover only those events that are post-takeover agreement events."[20] Hence, pre-takeover agreement claims can only be brought in the COFC.

On the other hand, if the contract is with a nonappropriated fund instrumentality (NAFI), a BCA is probably a safer forum. Under the nonappropriated funds doctrine, the Federal Circuit has held that the COFC "lacks jurisdiction over actions in which appropriated funds cannot be used to pay any resulting judgment."[21] In *Pacrim Pizza Co. v. England*, the Federal Circuit held that the nonappropriated funds doctrine applies to the CDA, and the Federal Circuit affirmed the ASBCA's dismissal of an appeal against a military morale, welfare, and recreation activity.[22] However, in contrast to the COFC, BCAs are not courts of "special, and therefore limited jurisdiction," with powers limited to those granted by statute.[23] Before the enactment of the CDA, the BCAs' jurisdiction was derived from their charters and the agreement of the contracting parties. The CDA did not limit the boards' jurisdiction over non-CDA appeals.[24] Both the ASBCA and the former Department of Transportation Board of Contract Appeals have held that the standard Federal Acquisition Regulation "Disputes" clause gives the BCA jurisdiction to hear claims against NAFIs.[25] Thus, a suit against a NAFI would likely be dismissed by the COFC, but a BCA could consider the appeal under the terms of the parties' contract.

CO's Authority to Act on Claim

Another significant difference between the BCAs and the COFC is that once a claim is in litigation at the COFC, the CO no longer has authority to issue another final decision or settle the case because 28 USCA § 516 grants the Department of Justice exclusive authority to act in pending litigation.[26] The COFC applied this rule with rather unfortunate results for the Government in *Johnson Controls World Servs., Inc. v. U.S.*[27]

That case involved a contractor's termination of its defined benefit pension plan, which resulted in a reversion to the contractor of surplus pension assets. The contractor's contracts contained a special clause requiring a final pension accounting measured according to Cost Accounting Standard 413 and giving the Government the right to a credit for any pension surplus. An Air Force CO rendered a final decision, demanding payment under the contract clause of $56 million and noting that interest would begin to accrue unless payment was made within 30 days. The contractor appealed that decision by filing an action in the COFC.

Several months later and while the first case was pending, the divisional administrative contracting officer (DACO), who had exclusive authority to determine CAS compliance, rendered a final decision finding the contractor in noncompliance with CAS 413, and demanding payment of $56.8 million plus interest from the date of the Air Force's original overpayment of the pension costs.

The contractor appealed the DACO's decision by filing a second action in the COFC, in response to which the Government asserted a counterclaim in the same amount as the DACO's final decision. The contractor then moved to dismiss the second case for lack of subject matter jurisdiction. The COFC held that notwithstanding the $23 million difference in interest between the contract claim and the CAS claim, the two claims were the same because both sought the same surplus pension assets based on the same segment closing.[28] Accordingly, the COFC held that because the claim was in pending litigation, the DACO lacked authority to issue a final decision.[29] The COFC was not unsympathetic to the Government's plight,[30] but observed that the Air Force could have avoided the problem by simply coordinating its efforts with the DACO and ensuring the decisions were issued at the same time. [31]

However, even if a CO lacks authority to render a final decision because the claim is already in litigation, the Federal Circuit has held that the contractor must timely appeal the final decision in order to avoid its preclusive effect.[32]

Government Counterclaims Alleging Fraud

One of the most significant risks in choosing the COFC for a Government contract dispute is that it could expose the contractor to Government counterclaims based on alleged fraud, including, for example, the special plea in fraud statute, the False Claims Act, the Anti-Kickback Act or the anti-fraud provisions of the CDA. Moreover, the Federal Circuit has held that Government counterclaims based on alleged fraud are excluded from the requirement of rendering a CO's final decision.[33]

The BCAs lack jurisdiction to consider Government counterclaims alleging fraud because the CDA expressly excludes coverage over any "claim involving fraud."[34] Thus, for example, in *Turner Constr. Co. v. Gen. Servs. Admin.*, the GSBCA denied the Government's motion to amend its answer to assert affirmative defenses involving allegations of fraud, including violations of the FCA, the Anti-Kickback Act and the Sherman Act, but ruled that the Government "may amend its answer to plead breach of contract, not based on fraud or alleged Sherman Act violations, but based upon clauses within the contract in dispute."[35] The GSBCA also denied the Government's motion to stay the proceedings for six months, stating that the Government had not convinced the board that "continuing with these proceedings will harm any pending criminal or civil investigation." Instead of amending the Government's answer to plead breach of contract not based on fraud or alleged antitrust violations, the CO rendered a final decision purporting to offset the amount of the kickbacks against monies owed to the contractor under the contract. In a subsequent proceeding, the GSBCA held that although the CDA granted the CO jurisdiction to issue a decision on the *amount* of a kickback, neither the CO nor the GSBCA had jurisdiction to determine the *existence* of a kickback.[36] The GSBCA therefore dismissed the appeal for lack of jurisdiction.

In stark contrast, the COFC may and frequently does consider Government counterclaims based on alleged fraud. The special plea in fraud statute provides that "[a] claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof."[37] It requires a specific finding by the COFC of fraud or attempted fraud.[38] Recent decisions by the COFC and Federal Circuit have extended the reach of the special plea in fraud statute far beyond its plain language.

For example, in *Morse Diesel Int'l Inc. v. U.S.*, the COFC held that a contractor's undisclosed commission-splitting arrangement with a bond brokerage firm and submission of progress payment requests including bond premium costs that had not yet been paid required the forfeiture of all of the contractor's claims, totaling approximately $54 million, in 15 different cases under four separate contracts.[39] The contractor's claims arose under four construction contracts for the St. Louis courthouse (phases I and II), the San Francisco customs house, and the Sacramento courthouse and federal building. From December 1995 through June 2003, the contractor filed nine

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appeals in the GSBCA and six complaints in the COFC for breach of contract and construction-related claims totaling more than $53 million. The single largest claim, for $28 million, arose under the Sacramento courthouse contract.

According to the facts detailed in the COFC's lengthy opinion, the contractor had a commission-splitting arrangement with a bond brokerage firm, pursuant to which the broker gave the contractor's parent corporation a rebate of 50 percent of the bond premiums in exchange for the exclusive right to all of the contractor's bond business. The contractor included the premium costs in its progress payment requests under the four construction contracts, and did not disclose the commission-splitting arrangements to the Government. In unrelated criminal proceedings that took place while most of the contract cases were pending, but before filing the $28 million GSBCA appeal, the contractor entered into plea agreements in U.S. district courts in Missouri and California for having submitted false progress payment requests in connection with the St. Louis courthouse and San Francisco customs house contracts. The plea agreements stipulated that the contractor submitted progress payment requests with bond premium invoices that were falsely marked "paid," although the contractor did not pay the premiums until after it received the progress payments. The guilty pleas did not include the commission-splitting arrangements.

Initially, only five of the contract cases were consolidated at the COFC. In each case, the Government asserted counterclaims under the Anti-Kickback Act, the FCA and the special plea in fraud statute. In an earlier opinion in the consolidated cases, the COFC granted summary judgment for the Government on its Anti-Kickback Act counterclaims in the five consolidated cases, holding that the commissions paid to the contractor's parent corporation were kickbacks in violation of the Act.[40] Thereafter, on the Government's motion, the COFC transferred and consolidated all of the GSBCA appeals with the five cases already pending before the COFC.

The COFC held that the conduct that violated the Anti-Kickback Act also violated the FCA. The court found that the contractor's progress payment requests falsely certified that the amounts requested "are only for performance in accordance with the specifications, terms, and conditions of the contract," when in fact the payment requests were inflated to include the rebates subsequently paid to the contractor's parent corporation. The court therefore granted summary judgment for the Government on its FCA counterclaims.[41]

More analytically troubling, the court held that all of the contractor's claims were forfeited because, in each case, the contractor "practiced or attempted to practice fraud against the United States" concerning the *contract* under which the claim arose. The special plea in fraud statute provides in pertinent part that "[a] claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in *the proof, statement, establishment, or allowance thereof*."[42] There is no discussion in the court's opinion of fraud in connection with any of the contractor's *claims*, none of which appears to have had anything to do with bonds, progress payment requests or the commission-splitting arrangement. Rather, the court appears to have concluded that if the contractor engages in fraud in connection with a contract, it forfeits its right to assert *any* claim under that contract.

In a recent *Winstar* case invoking, but not ultimately relying on the special plea in fraud statute, the Federal Circuit reversed a COFC decision awarding the plaintiff financial institution damages of more than $435 million, and held that the plaintiff's breach of contract claims were forfeited as a result of false certifications made 20 years earlier by the plaintiff banks' former chief executive officer.[43] In connection with the banks' acquisition of a thrift, the CEO had certified that the banks were in compliance with all laws. However, unbeknownst to the banks at the time, the CEO was violating state conflict-of-interest regulations because he continued to receive compensation from his former law firm while it performed services for the banks. The CEO concealed this fact from the banks, and when it was subsequently discovered by another outside law firm, the CEO sought injunctive relief to prevent that firm from disclosing it to the banks.

The CEO resigned from the banks two months before the banks filed in the COFC their *Winstar* complaint alleging that the Government breached its contractual obligations when Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

While the banks' suit was pending in the COFC, the former CEO lost his suit to prevent disclosure to the banks of his conflict-of-interest violation. The banks voluntarily disclosed the former CEO's conflict of interest to the Government immediately upon learning of it. The Government launched an investigation, and the former CEO subsequently pled guilty to a criminal misdemeanor. Thereafter, the Government amended its answer to include affirmative defenses and counterclaims asserting forfeiture of the banks' claims and rescission of the contract based on fraud in the inducement and fraud in performance of the contract. The COFC rejected the Government's arguments and awarded the banks damages of $435,755,000.[44]

The Federal Circuit reversed, holding that the banks' claims were forfeited under the special plea in fraud statute.[45] The banks filed a combined petition for panel rehearing and rehearing en banc, and the en banc court returned the case to the original panel for revision. In its subsequent decision, the panel reached the same disposition, but for a different reason, namely that the contract was tainted from its inception by fraud and thus void ab initio, and the claims against the Government were excused by prior material breach.[46]

The risk of potential counterclaims alleging fraud may cause contractors to think twice about litigating contract claims at the COFC instead of a BCA.[47]

Rules of Procedure, Judges and Stare Decisis

The BCAs are intended to provide "to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes."[48] Consequently, the BCAs' rules of procedure are more informal than those of the COFC. Agency attorneys represent the Government in BCA appeals, whereas DOJ's Commercial Litigation Branch represents the U.S. in cases at the COFC.

The COFC is established under Article I of the Constitution. Its judges are appointed by the president with the advice and consent of the Senate for 15-year terms.[49] Many COFC judges continue to serve as senior judges after their 15-year terms expire. There are currently 26 COFC judges. Unlike the administrative judges of the BCAs, COFC judges are not required to have any experience in Government contracts. Also unlike the BCAs, which make an effort to follow their own precedent, the COFC judges are not bound by each other's decisions.[50] COFC cases are decided by a single judge, sitting alone.

There are two primary BCAs (in addition to the Postal Service and Tennessee Valley Authority BCAs): the ASBCA and the Civilian Board of Contract Appeals. The CDA requires that BCA judges have at least five years' experience in public contract law.[51] BCA judges are usually appointed by their agency and may be removed only for cause. There are currently 18 ASBCA judges and 14 CBCA judges.

Federal Circuit Standard of Review

Finally, it is worth noting that the Federal Circuit is required by statute to apply a different standard in reviewing COFC and BCA decisions. In reviewing COFC decisions, the court applies the same standard of review that any court of appeals would apply to a district court decision. That is, questions of law are reviewed de novo,[52] and questions of fact are reviewed for clear error.[53]

In contrast to COFC decisions, the CDA provides that

> the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.[54]

Accordingly, the Federal Circuit "reviews the Board's conclusions of law, including grants of

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summary judgment, without deference,"[55] that is, using the same standard it applies for COFC decisions, but it reviews the boards' factual findings in accordance with the special CDA requirements.[56]

Conclusion

In summary, there are significant differences between the BCAs and the COFC. Certain cases, such as those involving "takings" claims, proprietary rights, equitable subrogation claims and nonprocurement contracts should be brought in the COFC. On the other hand, cases involving a NAFI or in which there could be potential Government allegations of fraud should be appealed to the BCA. Contractors have the sole right to elect the forum, and should make the election with care.

❖ Endnotes

1 41 USCA § 605(a).

2 Id.

3 41 USCA §§ 605(b), 606, 609(a). There are special rules for maritime contracts. See 41 USCA § 603. Contract claims arising under or relating to maritime contracts may be appealed to either the agency board of contract appeals or one of the 94 federal district courts. See *Dalton v. Southwest Marine, Inc.*, 120 F.3d 1251 (Fed. Cir. 1997). If the case is initially filed at an agency BCA, either party may seek de novo review of the board's decision in U.S. district court. See *Southwest Marine, Inc. v. Danzig*, 217 F.3d 1128, 1137 (9th Cir. 2000) Decisions by a district court—whether the case was initially filed in district court or appealed to the district court after an agency BCA decision—may be appealed to one of the 12 regional U.S. circuit courts of appeals.

4 See *Tuttle/White Constructors, Inc. v. U.S.*, 656 F.2d 644, 647 (Ct. Cl. 1981); 23 GC ¶ 408 ("Plaintiff appealed the contracting officer's final decision to the ASBCA, and once this avenue was chosen for resolution of its dispute, we hold that plaintiff could no longer elect to bring suit directly in this court under the Contract Disputes Act.").

5 See *Bonneville Assocs. v. U.S.*, 43 F.3d 649 (Fed. Cir. 1994) (affirming dismissal of COFC action); *Bonneville Assocs. v. U.S.*, 165 F.3d 1360 (Fed. Cir. 1999) (affirming dismissal of second GSBCA appeal).

6 See *National Neighbors, Inc. v. U.S.*, 839 F.2d 1539, 1543 (Fed. Cir. 1988) ("an untimely appeal to the board is not a binding election under the Election Doctrine").

7 See *Edward Grinnell v. U.S.*, 71 Fed. Cl. 202 (2006); *States Roofing Corp. v. U.S.*, 70 Fed. Cl. 299 (2006).

8 41 USCA § 602(a).

9 28 USCA § 1491(a)(1).

10 *U.S. v. Mitchell*, 463 U.S. 206, 216 (1983) (internal quotation marks and citations omitted).

11 463 U.S. at 216–17 (citations omitted).

12 As the Department of Housing and Urban Development BCA observed in *Bryan D. Highfill*:

> Federal agency boards of contract appeals lack the jurisdiction to decide issues of constitutional law. The Tucker Act confers jurisdiction on the Court of Federal Claims to "render judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress …." However, the boards of contract appeals have no Tucker Act jurisdiction, and the Contract Disputes Act, under which this case arises, confers no jurisdiction on the boards that would extend to claims founded upon the Constitution.

Bryan D. Highfill, HUDBCA No. 96-C-118-C7, 99-1 BCA ¶ 30316 at 149903 (citations omitted); accord *United Techs. Corp., Pratt & Whitney Group*, ASBCA 46880 et al., 95-1 BCA ¶ 27456 (dismissing takings claim because board has no jurisdiction over contractor claim founded upon the Constitution); see also *Gregory Timber Res., Inc. v. U.S.*, 855 F.2d 841 (Fed. Cir. 1988) (holding that contractor could not maintain attack on the constitutionality of the Federal Courts Improvement Act of 1982 "because it elected to challenge the contracting officer's decision before the Board rather than before the Claims Court").

13 For certain types of constitutional claims, such as a "takings" claim under the Fifth Amendment, the Constitution provides the substantive right because it mandates payment of "just compensation." U.S. Const., Fifth Am. Contract claims generally do not require a separate substantive right to recover monetary damages because a federal agency's authority to enter into contracts includes the authority to pay damages for breaching those contracts. See *Town of N. Bonneville v. U.S.*, 5 Cl. Ct. 312, 319 (1984) ("Where Congress has given specific authority to Federal officials to negotiate and enter contracts on behalf of the United States … a court is not required to make further inquiry to determine whether the source of substantive law mandates compensation."); see also *Cannon Constr. Co. v. U.S.*, 319 F.2d 173, 178 (Ct. Cl. 1963) (authority to enter into contracts includes authority to settle contract claims). But see *Sanders v. U.S.*, 252 F.3d 1329, 1335 (Fed. Cir. 2001) (holding that a federal prosecutor's breach of a plea agreement did not give rise to a claim cognizable in the COFC because the agreement did not "clearly and unmistakably subject[] the government to monetary liability for any breach").

14 *U.S. v. Winstar Corp.*, 518 U.S. 839 (1996).

15 *Wesleyan Co. v. U.S.*, 454 F.3d 1375 (Fed. Cir. 2006).

16 *Wesleyan Co.*, ASBCA 53895, 05-2 BCA ¶ 33028.

17 Id. at 1380.

18 22 N&CR ¶ 18.

19 *Fireman's Fund Ins. Co. v. England*, 313 F.3d 1344 (Fed. Cir. 2002).

20 *FloorPro, Inc.*, ASBCA 54143, 2008 WL 436937 (Feb. 8, 2008) (citations and internal quotation marks omitted).

21 *Furash & Co. v. U.S.*, 252 F.3d 1336, 1339 (Fed. Cir. 2001).

22 *Pacrim Pizza Co. v. England*, 304 F.3d 1291 (Fed. Cir. 2002) ("Contracts with NAFIs outside these enumerated exchanges are not covered by the Contract Disputes Act.").

23 See *Blazavich v. U.S.*, 29 Fed. Cl. 371, 373 (1993).

24 See*, e.g., Logan Machinists, Inc. v. Fed. Prison Indus.*, DOTCAB 4184, 05-1 BCA ¶ 32894.

25 Id. (Although neither the COFC nor the DOTCAB has jurisdiction to hear claims against UNICOR under the CDA, the board's jurisdiction is more expansive than the COFC's and includes jurisdiction over disputes the contracting parties agree to have resolved by the board by including the Disputes clause in their contract); *SUFI Network Servs., Inc.*, ASBCA 54503, 04-1 BCA ¶ 32606 ("ASBCA jurisdiction, if any, of an appeal arising under an unaffiliated NAFI contract derives from such contract's Disputes clause.").

26 See *Sharman Co. v. U.S.*, 2 F.3d 1564, 1571–72 (Fed. Cir. 1993) ("Once a claim is in litigation, the Department of Justice gains exclusive authority to act in the pending litigation. That authority divests the contracting officer of his authority to issue a final decision on the claim.") (citations omitted); see also *Peterson Builders, Inc. v. U.S.*, 27 Fed. Cl. 443, 445 (1996) (holding that "if the course of litigation is being pursued by the

Attorney General in this court, then the CO is without authority to act on a *related* claim") (emphasis in original). 28 USCA § 516 provides that: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

27 *Johnson Controls World Servs., Inc. v. U.S.*, 43 Fed. Cl. 506 (1999).

28 *Johnson Controls*, 43 Fed. Cl. at 513–14.

29 Id.

30 The court stated that it was "not unmoved by the amount of interest—almost $23 million—that the Government will forfeit if the defendant's counterclaim is dismissed." 43 Fed. Cl. at 514. Nevertheless, the court held:

> Although the interest demanded pursuant to the CAS provision is sizeable, it does not follow that interest should be certified as a separate claim and considered a substantive and distinct liability. For 20 years the Department of Justice has been punctilious about enforcing any provision of the CDA that calls for a narrow construction, and plaintiff's motion calls for no more than equal treatment for a contractor defending against a government claim.

Id.

31 Id. ("Nothing in the record suggests that the DACO and the Air Force contracting officer were precluded from issuing a joint decision, simultaneous decisions, or decisions in such temporal proximity that plaintiff effectively would have been foreclosed from appealing to this court the first decision before the second decision issued.").

32 See *Renda Marine, Inc. v. U.S.,* 509 F.3d 1372 (Fed. Cir. 2007).

33 See *Simko Constr., Inc. v. U.S.*, 852 F.2d 540, 545 (Fed. Cir. 1988) ("We have determined that Congress did not intend fraud claims by the Government to be included in the dispute process outlined by section 605(a) and that Congress never intended to include claims brought under section 604 to be within the agency dispute resolution process.").

34 41 USCA § 605(a).

35 *Turner Constr. Co. v. General Servs. Admin.*, GSBCA Nos. 15502 et al., 05-2 BCA ¶ 33118.

36 See *Turner Constr. Co. v. General Servs. Admin.*, GSBCA 16840, 2006 WL 2506768 (GSBCA Aug. 28, 2006).

37 28 USCA § 2514.

38 Id.

39 *Morse Diesel Int'l, Inc. v. U.S.*, 74 Fed. Cl. 601 (2007).

40 *Morse Diesel Int'l, Inc. v. U.S.*, 66 Fed. Cl. 801 (2005).

41 74 Fed. Cl. at 601. In a subsequent proceeding, the court held that the contractor was liable to the Government for statutory civil penalties of $259,457.04 under the Anti-Kickback Act, a civil penalty of $50,000 under the False Claims Act, and treble damages of $6,972,666, for a total of $7,022,666. *Morse Diesel Int'l Inc. v. U.S.*, 79 Fed. Cl. 116 (2007).

42 28 USCA § 2514 (emphasis added).

43 *Long Island Savings Bank v. U.S.*, 503 F.3d 1234 (Fed. Cir. 2007).

44 *Long Island Savings Bank, FSB v. U.S.*, 67 Fed. Cl. 616 (2005).

45 *Long Island Savings Bank, FSB v. U.S.*, 476 F.3d 917 (Fed. Cir. 2007).

46 *Long Island Savings Bank v. U.S.*, 503 F.3d 1234 (Fed. Cir. 2007).

47 See generally, A. Jeff Ifrah, *Board Procedures Involving Fraud Counterclaims Against Contractors*, 7-10 Briefing Papers (Sept. 2007); J. Stouck & Robert A. Caplen, *The Forfeiture of Claims Act Today*, 7-9 Briefing Papers (Aug. 2007).

48 41 USCA § 607(e).

49 28 USCA §§ 171–172.

50 Nor are the COFC decisions binding on the agency BCAs or the boards' decisions binding on the COFC.

51 41 USCA § 607(b)(1).

52 *Sharman Co., Inc. v. U.S.*, 2 F.3d 1564 (Fed. Cir. 1993) ("In an appeal of a CDA case, we review de novo for errors of law. A determination of whether the Claims Court had jurisdiction in such a case is a question of law. Therefore, no deference is due to the Claims Court decision on the dispositive issue here.") (citations omitted).

53 See *Wyatt v. U.S.*, 271 F.3d 1090, 1096 (Fed. Cir. 2001) ("In reviewing the judgments of the Court of Federal Claims, this court examines findings of fact for clear error and reviews legal conclusions completely and independently.").

54 41 USCA § 609(b). Additionally, the court's jurisdictional statute provides that in the event of an agency's appeal from the decision of an agency board:

> The court shall proceed with judicial review on the administrative record made before the board of contract appeals on matters so referred as in other cases pending before such court, shall determine the issue of finality of the appeal decision, and shall, if appropriate, render judgment thereon, or remand the matter to any administrative or executive body or official with such direction as it may deem proper and just.

28 USCA § 1295(c).

55 *Rex Sys., Inc. v. Cohen*, 224 F.3d 1367, 1371 (Fed. Cir. 2000).

56 See *Rice v. Martin Marietta Corp.*, 13 F.3d 1563, 1568 (Fed. Cir. 1993) ("The CDA dictates the standard this court applies in reviewing decisions of agency contract appeals boards. To the extent that the ASBCA determinations turned on its interpretation of [Defense Acquisition Regulation] 15-203(c) and CAS 410, they present questions of law subject to independent review.") (citation omitted).

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