Federal Forecaster

RELEVANT NEWS FOR ENTITIES & INDIVIDUALS WITH BUSINESS CONCERNS IN THE AREAS OF GOVERNMENT CONTRACTS & GRANTS –
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PROTEST, CLAIM, OR BOTH?
TAKING ADVANTAGE OF DUAL JURISDICTION IN THE U.S. COURT OF FEDERAL CLAIMS

If a federal contractor loses an agency-level bid protest or has had its certified claim for contract costs denied by a contracting officer, the contractor must decide how to proceed in each regard. The U.S. Court of Federal Claims has dual jurisdiction to decide claims against the federal government seeking monetary damages based on implied or express breaches of contract (in excess of $10,000), and both pre-award and post-award bid protests. Even if a contractor loses its bid protest before an agency or the Government Accountability Office, it may still bring essentially the same protest in the Claims Court, and the court will review the agency's actions anew based on the entire record.

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Incumbent federal contractors in particular tend to think about bid protests on one hand and the recovery of costs or damages under their contract on the other, treating them as separate courses of action. However, if the government's wrongful act taken in connection with a procurement or proposed procurement also happens to breach the contractor's express or implied-in-fact contract, the contractor may be able to assert a bid protest and a claim for damages together in the same action in the Claims Court.

In two recent decisions, the Claims Court examined its own jurisdiction to consider bid protests and claims for damages under the Contracts Disputes Act ("CDA"), 41 U.S.C. §§ 601-613, and analyzed the interplay between each type of relief.

In the first case, *Montana Fish, Wildlife and Parks Foundation v. United States*, 2010 WL 125971 (Fed. Cl. Jan. 11, 2010), the court decided it had jurisdiction to hear the plaintiffs' bid protest claims and their claims for monetary damages under the CDA.

In the second case, *Digital Technologies Inc. v. United States*, 89 Fed. Cl. 711 (Fed. Cl. Dec. 4, 2009), the court concluded that the plaintiff properly alleged a breach of contract claim under the CDA, and rejected the government's argument that the claim was a "thinly disguised" bid protest of a task order, which is a type of protest prohibited by federal law.

Montana Fish is important because it provides useful guidance on how a plaintiff contractor can take advantage of the Claims Court's dual jurisdiction and efficiently assert both bid protest and CDA claims together in one combined action. The *DTI* case is significant because it demonstrates that if a plaintiff pleads properly in the Claims Court, a claim for damages against the government may still be alive even after an agency bid protest proves unsuccessful.

Montana Fish

In *Montana Fish*, the plaintiff trustee alleged that the Department of Interior, Bureau of Reclamation breached a trust agreement by unilaterally amending the agreement to allow the solicitation of offers for a replacement trustee. The plaintiff asserted a pre-award bid protest in its Claims Court complaint and asked the court to issue emergency injunctive relief and a declaratory judgment, which is typical in protest cases. The plaintiff also sought monetary damages under the CDA for breach of the trust agreement.

Judge Charles F. Lettow held that the Claims Court had subject matter jurisdiction under the Tucker Act, 28 U.S.C. § 1491, to consider both the bid protest and CDA claims. The judge explained that the Claims Court has "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a federal agency for bids or proposals for a proposed contract or to a proposed award, or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement … without regard to whether suit is instituted before or after the contract is awarded." 28 U.S.C. § 1491(b)(1).

In such cases, the Claims Court is empowered to award "any relief that the court considers proper, including declaratory and injunctive relief," except that monetary relief is limited to an award of "bid preparation and proposal costs." 28 U.S.C. § 1491(b)(2).

The court emphasized, however, that it also has jurisdiction under Section 1491(a)(2) "to render judgment upon any claim by or against, or dispute with, a contractor arising under Section 10(a)(1) of the [CDA] including a dispute concerning termination of a contract…on which a decision of the contracting officer has been issued under Section 6 of that act." The primary form of relief available in causes of action under Section 1491(a)(2) is monetary damages.

In *Montana Fish*, the court found that the plaintiff timely filed and properly asserted its pre-award bid protest alleging that the government had unlawfully solicited a new trust manager, and requesting that the solicitation be enjoined. In addition, the court found that the plaintiff had properly invoked the Claims Court's jurisdiction under the CDA because it timely appealed "the final decision of the [c]ontracting [o]fficer" who had denied its certified claim for money damages.

The government in *Montana Fish* did not dispute the Claims Court's dual jurisdiction over both the bid protest and CDA claims, but instead argued that the court should address the bid protest component independently before turning to the foundation's contract claims, thus urging the court to bifurcate the proceedings.

Judge Lettow refused to order bifurcation and sided with the plaintiff, who argued that it would be impossible to resolve the bid protest claim without addressing the merits of the contract claim because the two claims are sufficiently intertwined. He did, however, order that damages under the CDA would be addressed after liability had been determined.

Digital Technologies Inc.

In *Digital Technologies*, the plaintiff brought a claim under the CDA, seeking monetary damages for breach of a "fair opportunity to compete" clause under its multiple-award, "indefinite delivery/indefinite quantity" contract to provide computer hardware maintenance to U.S. Customs and Border Protection, an agency within the U.S. Department of Homeland Security.

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Protest, Claim, or Both? Taking Advantage of Dual Jurisdiction in the U.S. Federal Court of Claims—continued from page 2

Having lost its lengthy bid protest before the GAO, DTI timely filed a certified claim for more than $9 million, which was denied by the contracting officer. The GAO had dismissed DTI's protest because it challenged a task order issued under an ID/IQ contract. Under the Federal Acquisition Streamlining Act of 1994, 41 U.S.C. § 253j(e), protests of task orders under $10 million are generally prohibited.

The government filed a motion to dismiss DTI's Claims Court complaint, arguing that the company's breach of contract claim under the CDA was really a "thinly disguised" bid protest of a task order masquerading as a CDA contract claim. Specifically, the government claimed that the plaintiff filed its claim in this manner to evade FASA's task-order-protest prohibition under 41 U.S.C. § 253j(e).

DTI argued in response that certain improprieties during the solicitation and award process that were the subject of its bid protest *also* constituted a breach of a contract under the CDA for failure to provide it with a fair opportunity to be considered for work under the master ID/IQ contract. DTI asserted that its claim was not a bid protest, but rather a valid CDA breach-of contract claim that was not barred by FASA.

The court agreed with DTI that the FASA prohibition on task order bid protests below $10 million does not apply to a breach of contract claim brought under the CDA. The court observed that the statutory language of the FASA protest ban "says nothing" about CDA claims. *See* 10 U.S.C.A. § 2304c(d).

Nevertheless, the court determined that it was required to analyze the complaint to ensure that the plaintiff had alleged a valid breach of contract claim under the CDA.

Relying on precedent established by the U.S. Court of Appeals for the Federal Circuit, the Claims Court concluded that its jurisdiction over CDA disputes is "expansive" and that DTI had, in fact, properly alleged a valid breach of contract claim. The court said this was the case because the plaintiff included (1) a written demand (2) seeking, as a matter of right, (3) the payment of money in a certain sum that was (4) submitted to the contracting officer for a final decision. *Reflectone v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (*en banc*).

In reaching its decision, the Claims Court distinguished the case from others it dismissed based on the FASA prohibition as being mere post-award protests. In those suits, the plaintiffs sought only declaratory and injunctive relief as is typical in bid protest cases and did not seek to certify a claim before the contracting officer under the CDA.

In DTI's case, the Claims Court was persuaded it had jurisdiction over the case because the company did not seek a "classic bid protest remedy." DTI had alleged a breach of the master ID/IQ contract, presented its certified claim for damages under the CDA to the contracting officer, and the officer's final denial of the certified claim was attached to the Claims Court complaint.

The court further noted that the contracting officer had "informed DTI that it may appeal to the Civilian Board of Contract Appeals or file a claim in this court," citing section 33.210 of the Federal Acquisition Regulation, 48 C.F.R. § 33.210. The court concluded that DTI was "not challenging the issuance or proposed issuance of a task order but [sought] monetary damages based on an alleged breach of specific contractual language on ordering provisions in its ID/IQ contract with the government."

In stressing the fundamental differences between a bid protest and a CDA claim, the Claims Court emphasized:

> A claim is not a protest. The objectives of claims and protests are entirely different. A protest is filed by a noncontractor seeking to prevent [a] contract award to a competitor; a claim is filed by a contractor seeking money, time, and/or a contract interpretation. … Protests are highly disruptive to government operations. … Congress banned protests against the award of delivery orders and task orders under multiple-award IDIQ contracts to streamline the contract formation process by preventing those kinds of disruptions of agency operations. Claims do not disrupt ongoing operations because under the CDA, a board or court cannot suspend award or performance, issue a temporary restraining order, or provide injunctive relief. All that a claim involves is an assertion that the agency breached its contract and the contractor should be given damages for the breach. Claims have virtually no impact on contract performance because the CDA gives contracting officers at least 60 days to make a final decision after receipt of the claim, 41 U.S.C.A. § 605(c)(2), and litigation occurs months, if not years, later.

89 Fed. Cl. at 728-29.

Accordingly, the Claims Court held in *DTI* that "although contractors under multiple-award IDIQ contracts cannot protest the award of a task or delivery order, it does not follow that they cannot pursue a claim under the CDA when they think that the government has breached its promise to give them a fair opportunity to be considered for an order. Protests and claims are very different things in terms of their objectives, the remedies available and their effect on government operations." *Id.* at 729.

Conclusion

Montana Fish and *DTI* remind us that a failed agency or GAO bid protest may later be brought as a breach of contract claim under the CDA for damages against the government if the contractor previously certified the claim to the contracting officer and is careful to plead properly in the Claims Court.

Accordingly, once negotiations with an agency over costs owed under the contract have failed or a request for an equitable adjustment has been denied, contractors should almost always submit certified claims with the contracting officer, as this may be the only way to preserve a CDA claim for damages before the Claims Court.

Further, a contractor who has sought, but been denied, relief at the agency level or via a GAO protest should consider whether there are grounds to reassert the protest before the Claims Court if the agency violated relevant statutes or regulations in connection with the subject procurement or proposed procurement.

Montana Fish and *DTI* demonstrate that under the appropriate circumstances, plaintiff contractors can take advantage of the Claims Court's dual jurisdiction and efficiently assert both bid protest and CDA claims together in one combined action.

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CLOUD COMPUTING – THE RISKS AND REWARDS FOR FEDERAL GOVERNMENT CONTRACTORS

President Obama's Federal Cloud Computing Initiative

With the release of President Obama's Budget for fiscal year 2011, cloud computing also became an essential aspect of the nation's information technology strategy. But the administration has had its eyes on the clouds for some time, and while the 2011 budget represents its strongest commitment toward cloud computing, efforts to implement the concept have been ongoing since at least the rollout of the 2010 budget.

Around that time, the Federal Chief Information Officer ("CIO"), Vivek Kundra, the CIO Council, and the Office of Management and Budget, established the Federal Cloud Computing Initiative (the "Initiative") to develop a broad strategy and begin to identify specific applications for cloud computing across the federal government. Though one of the ultimate goals of the Initiative is to determine whether clouds will provide an appropriate means for breaking down inter-agency data stovepipes, federal cloud computing encompasses four different deployment models, and in these preliminary stages of cloud development agencies have been free to determine which model best serves their needs. The four models, as defined by the National Institute of Standards and Technology ("NIST"), include: (1) *private clouds*, for the use of a single agency; (2) *community clouds*, shared by multiple agencies; (3) *public clouds*, largely for the public's use and benefit; and (4) *hybrid clouds*, facilitating the sharing of data and utilities across two or more unique clouds of any type.

Legal Issues in Hybrid Cloud Contracting at the U.S. General Services Administration

One of the most visible examples of federal hybrid cloud contracting is the General Services Administration's ("GSA") Apps.gov. Designed as an "online

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NEW GOVERNMENT CONTRACTOR REPORTING REQUIREMENTS ON SUBCONTRACTS AND COMPENSATION

A new Federal Acquisition Regulation ("FAR") clause published on July 8, 2010, requires certain contractors to register in two locations and potentially provide two new types of information: (1) information regarding subcontracts must be disclosed via the Federal Funding Accountability and Transparency Act Subaward Reporting System at www.fsrs.gov; and (2) information regarding executive compensation must be reported via the Central Contractor Registration database at www.ccr.gov. 75 F.R. 39414 (July 8, 2010).

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The subcontract reporting requirement applies to all *prime contracts* worth $25,000 or more. The prime contractor must report a number of items for any *first-tier subcontract* worth $25,000 or more, including the name and address of the subcontractor, the amount of the subcontract, and the nature of the items or services being acquired. The requirement is being "phased in" so that, until September 30, 2010, the reporting requirement only applies to *prime contracts* worth at least $20 million and, until March 1, 2011, the reporting requirement only applies to prime contracts worth at least $550,000. After March 1, 2011, the subcontract reporting requirement applies to all contracts over $25,000 in value. In other words, the requirement is being phased in based on the value of prime contracts, but applies to all first-tier subcontracts $25,000 or greater in value under covered prime contracts.

The task that contractors face is identifying which of their various supplier and vendor agreements are "first-tier subcontracts." The new rule defines "first-tier subcontract" as "a subcontract awarded directly by a Contractor to furnish supplies or services (including construction) for performance of a prime contract, but excludes supplier agreements with vendors, such as long-term arrangements for materials or supplies that would normally be applied to a Contractor's general and administrative expenses or indirect costs." Thus, the definition generally implies that agreements relating to supplies or services that are "direct costs" are subcontracts that must be reported. The FAR defines "direct cost" as "any cost that is identified specifically with a particular final cost objective." 48 C.F.R. § 2.101. The definition does not elaborate further regarding the distinction between vendor and supplier agreements that are "first-tier subcontracts" versus those that are not. We expect that contractors will find it difficult in some cases to identify "first-tier subcontracts" by applying the new rule's definition.

The compensation reporting requirement requires contractors to identify the five most highly compensated executives and report the amount of their compensation. This requirement only applies to contractors that have ***both*** annual revenue of at least $25 million from federal contracts, grants, and/or loans, ***and*** that derive at least 80 percent of their annual revenue from federal contracts, grants, and/or loans.

For those subcontracts that trigger a reporting obligation (*i.e.*, "first-tier subcontracts" over $25,000 in value), the new rule imposes a duty to report the *subcontractor's* five highest-compensated executives if the *subcontractor* received 80 percent or more of its annual revenue from federal sources; received $25 million or more from federal contracts, grants, or loans; and this information is not already published via certain SEC or IRS filings. Thus, it will be important for contractors to obtain sufficient information from their subcontractors to determine whether the *subcontractor* executive compensation requirement applies.

These reporting requirements have had the force of law since their promulgation on July 8, 2010. The regulatory body that issued the requirements, the FAR Council, accepted comments on this interim rule until September 7, 2010, and should be issuing a final rule shortly.

Cloud Computing – The Risks and Rewards for Federal Government Contractors—continued from page 4

storefront for federal agencies to quickly browse and purchase cloud-based IT services, for productivity, collaboration, and efficiency," Apps.gov provides agency consumers four different kinds of cloud computing applications: (1) *business applications*, to facilitate process and analytical tasks; (2) *productivity applications*, to support individual and group functionality; (3) *cloud IT services*, for storing and enabling diverse access to data; and (4) *social media applications*, to enhance communication and collaboration. Following the NIST taxonomy, the capabilities embodied by the applications on Apps.gov may be delivered to agency customers in one of three methods: (1) *software as a service* ("SaaS"); (2) *platform as a service* ("PaaS"); or (3) *infrastructure as a service* ("IaaS").

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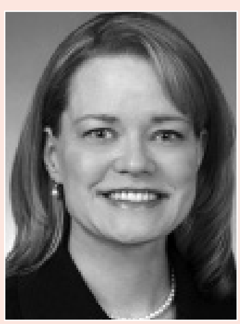
Perhaps not surprisingly, the delivery method is closely tied to the model of cloud used to provide a particular capability, and a company seeking to offer a particular cloud computing application through Apps.gov will face unique legal implications, based on the method and model involved. For example, business and productivity applications are considered SaaS applications on Apps.gov, and are currently offered mostly through private clouds (though this is an ideal area for the future development of community clouds). While a company offering an SaaS application need not be certified and accredited by the Federal Information Security Management Agency ("FISMA") simply to have its product listed on Apps.gov, the certification and accreditation process must be completed before the application is contracted to a federal government agency. Conversely, providers of IaaS applications (which are not yet available on Apps.gov, but are expected to be soon) will be awarded blanket purchase agreements under particular GSA Federal Supply Schedule contracts, agreements that will implicate a host of different federal contracting provisions, as well as impose stringent data security and access requirements. Finally, and quite differently from vendors of applications for purchase on Apps.gov, providers of free social media applications, including open source, shareware, and freeware tools and services, will not negotiate licensing or use contracts with GSA or any federal agency, but nevertheless must agree to abide by a Terms of Service agreement that addresses the particular status and needs of government agencies and users.



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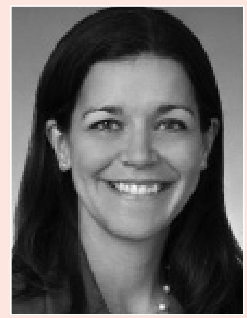
Legal Issues in Private Cloud Contracting at the U.S. Department of Defense

At the opposite end of the spectrum from GSA, the Department of Defense ("DoD" or "the Department") is focused on developing private cloud environments in which the data center is controlled by DoD rather than outsourced. DoD expects this approach to achieve the cost savings typical of cloud computing and to address the cybersecurity and other concerns particular to the Department. One example of a DoD private cloud is the Defense Information Systems Agency's ("DISA") Rapid Access Computing Environment ("RACE"). Controlled by DISA and operated behind DoD firewalls with the support of federal contractors, RACE permits DoD users to pay only for the amount of storage and processing power needed on a per-month basis. Today, at the very least, DoD contractors must comply with the Defense Information Assurance Certification and Accreditation Process ("DIACAP") and Federal Desktop Core Configuration ("FDCC") security setting requirements when such requirements are included in their contracts. Given the ever-evolving nature of cyber threats, however, federal government contractors implementing cloud computing solutions like RACE for DoD should expect compliance requirements related to cybersecurity to continue to evolve.

Cloud Computing Presents Risks and Rewards for Federal Government Contractors

Like other technology-related developments of the past hundred years or so, cloud computing presents risks and rewards for federal government contractors. Failing to recognize the unique legal implications of cloud computing presented by each federal contracting opportunity, and to carry on with business as usual, could expose a contractor to significant liability. Federal government contractors should work with legal counsel to identify and mitigate those risks, including starting early in the contracting process with the negotiation of terms and conditions of the prime contract and any related subcontracts. By mitigating those risks, a federal contractor paves the way for using the cloud to revolutionize how it does business with the federal government. Reed Smith attorneys are ready to assist contractors seeking legal advice on the risks and rewards of cloud computing in federal government contracting.



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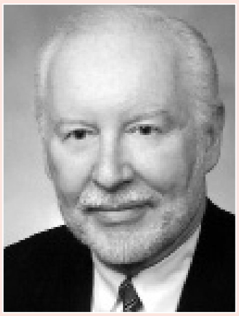
To view a more extensive text on this topic by the authors, click here.

U.S.–CANADA TRADE AGREEMENT SUGGESTS INCREASED CROSS-BORDER OPPORTUNITIES WITH REGARD TO PUBLIC PROJECTS

In early 2009, Congress passed the American Recovery and Reinvestment Act of 2009 ("Recovery Act"), Public Law 111-5, which was designed to stimulate the economy by, among other things, funding large construction and infrastructure projects. The Recovery Act contains a provision requiring the use of only American-made iron, steel, or manufactured goods in projects funded under the statute, with limited exceptions. This requirement has generated resentment among countries with which the United States is supposed to observe "free trade" – Canada in particular. The discussion below sets forth the requirements of the Recovery Act's "Buy American" requirement, and reports on recent changes to the trade relationship between the United States and Canada that will affect the marketplace for construction firms and their suppliers.



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The Recovery Act's 'Buy American' Requirement

The Recovery Act imposes the following preference for U.S.-made products:

> SEC. 1605. USE OF AMERICAN IRON, STEEL, AND MANUFACTURED GOODS. (a) None of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.

Pub. L. 111-5 § 1605(a). The section further provides, "This section shall be applied in a manner consistent with United States obligations under international agreements." Pub. L. 111-5 § 1605(d). Heads of agencies may waive this requirement in limited circumstances.

As a practical matter, many of the projects funded by the Recovery Act are administered by state or local governments or private sector government assistance recipients. These entities generally award contracts for carrying out projects on competitive bases. Competition is limited, however, to firms whose supplies meet the quoted "Buy American" requirement. Therefore, Canadian firms or manufacturers who otherwise perform work or provide supplies related to infrastructure projects in the United States are precluded from participating in projects that involve Recovery Act funding.

Recent Developments

Since the Recovery Act was passed, various media outlets have reported on the outrage and concern that the "Buy American" provision created among officials and industry figures in foreign countries, parties from Canada being perhaps the most vocal. The United States Trade Representative ("USTR") has sought to relieve these concerns and repair cross-border relations.

On February 5, 2010, the USTR announced that the United States and Canada had reached a "tentative agreement on government procurement." On February 12, 2010, the USTR signed a U.S.-Canada agreement on government procurement. This new procurement agreement provides for permanent U.S. access to Canadian provincial and territorial procurement contracts in accordance with the World Trade Organization ("WTO") Government Procurement Agreement ("GPA"). In addition, the agreement enables American companies to compete for Canadian provincial and municipal construction contracts not covered by the GPA through September 2011. The United States will provide reciprocal access for Canadian companies to 37 states already covered by the GPA and a limited number of Recovery Act programs. According to its terms, the agreement went into force on February 16, 2010.

The agreement excludes from the Recovery Act's "Buy American" requirement certain types of projects undertaken by federal and state government agencies. The agreement includes a list of federal agencies and project types excluded, and a list of affected state agencies is set forth in Appendix 2 to the GPA. On March 25, 2010, the White House Office of Management and Budget issued a formal rule that incorporates the agreement in the financial assistance regulations implementing the Recovery Act.

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What to Expect Going Forward

As a formal legal matter, Canadian manufacturers may now effectively compete for work under projects funded by the Recovery Act on an equal basis with U.S. firms. Yet, even as the U.S.-Canada agreement was negotiated, Recovery Act spending made headlines when, in early March 2010, a group of senators publicly railed against the use of Recovery Act funds to purchase components manufactured in China for a wind energy project located in Texas. These legislators, Sen. Charles Schumer (D-N.Y.) most prominent among them, have advocated for the adoption of even greater domestic preferences than the Recovery Act currently imposes. Thus, the policy pressures that influence the scope of domestic preferences that accompany Recovery Act projects and future government procurements and financial assistance agreements continue to evolve. Currently, however, Canadian manufacturers may supply projects that involve Recovery Act funding, and federal procurements generally, which were inaccessible prior to the U.S.-Canada agreement.

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