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Bid Protest Pitfalls: Three Commonly Misused Arguments at GAO

By Cherie Owen

In over nine years as a Government Accountability Office (GAO) bid protest attorney, I handled more than 600 protests. These filings ranged from a single-paragraph e-mail submitted by a pro se contractor to hundreds of pages of filings submitted by a team of outside bid protest attorneys. In reviewing these protests, I found that even filings submitted by attorneys specializing in bid protests often contained flawed arguments—allegations which, if pleaded correctly, might have been successful. Three of the most misused or mis-argued allegations were (1) "improper bait and switch," (2) the *Boeing Sikorsky* rule supplementing the record, and (3) the "too close at hand" principle. Gaining a better understanding of the pitfalls that await a protester arguing these concepts will allow bid protest attorneys to draft more effective arguments.

Improper Bait and Switch

The concept of bait and switch originates in advertising—it describes the unethical (and often illegal) process of advertising a good or service that seems to be a good bargain, then once the customer has been "hooked," substituting something of inferior quality or higher price. In government procurements, just as in advertising, the process is prohibited. Therefore, if a contractor performs a bait and switch of its contract personnel by proposing employees who seem like an attractive bargain to the government then and later substituting inferior employees, GAO may sustain a challenge to a contract award based on a proposal containing such a flaw. This could result in the procuring agency having to make a new source selection decision or even having the contractor eliminated from the competition.

GAO has stated that there are three elements of a successful bait and switch claim: (1) the awardee either knowingly or negligently represented that it would rely on specific personnel who it did not have a reasonable basis to expect to furnish during contract performance; (2) the misrepresentation was relied on by the agency; and (3) the agency's reliance on the misrepresentation had a material effect on the evaluation results.[1] However, protesters rarely allege and are able to demonstrate all three of these elements.

For example, in *Alamo City Engineering Services, Inc.*, Alamo City protested the issuance of a task order for IT professional services, alleging that the awardee had engaged in an improper bait and switch of key personnel.[2] Alamo City based its bait and switch allegations on the fact that, after award, the awardee began recruiting efforts for 28 positions identified in the solicitation, including eight key personnel positions. The solicitation required offerors to specifically identify in their quotations the individuals proposed to fill key personnel positions; therefore, Alamo City alleged that the awardee's recruiting efforts demonstrated that it did not intend to supply the individuals identified in its quotation.

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Issue Highlights

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News from the CHAIR

By Ty Hughes, Chair

As this edition of *The Procurement Lawyer* was going to press, we received the sad news that Marilyn Neforas, our beloved Section Director for 39 years, passed away on March 27, 2017. Marilyn was the Section's heart, soul, and guiding light. She was beloved by everyone she encountered, and she had a tremendous spirit—which we will all remember. Please see the tribute to Marilyn on page 11.

As the Section passes the midyear mark of the 2016–17 Section year, I am pleased to report that the Section leadership has been actively engaging our members from both the private and public sectors in substantive discussions, programs, and projects. The programs at both the committee and Section level have been top-notch.

Federal Procurement Institute. By every measure, the 23rd Annual Federal Procurement Institute (FPI) in Annapolis in March was a great success. The program co-chairs, Amy Conant, K&L Gates; John McCarthy, Jr., Crowell & Moring; David Robbins, Crowell & Moring; and Bryant Snee, PAE, planned and executed an exceptional two-day program that drew 300 attendees. There were many new faces at FPI, particularly young lawyers who have joined and are actively participating in the Section. For the first time this year, some of those young lawyers served as co-moderators for the various substantive panel presentations.

Kenneth Patton, Managing Associate General Counsel for Procurement Law in the Office of the General Counsel of the U.S. Government Accountability Office, was our keynote speaker. Ken gave an inspiring presentation on the importance of diversity and inclusion and how the Section can continue in its efforts to foster both.

If you have not attended FPI, you are missing a great event. Not only does it provide an opportunity to network with our government contract colleagues, but the CLE program also always offers an insightful look at what is currently happening in federal procurement and what we can expect for the future. It is much more than just a year in review.

I want to acknowledge the generosity of our Gold and Silver Program Sponsors whose support enables the Section to provide cost-effective quarterly CLE programs to our members. Both WilmerHale and PwC hosted receptions at FPI. Past Chair Sharon Larkin once again hosted the women's networking event at her Annapolis home, along with sponsors Baker Tilly, Berkeley Research Group,

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James A. (Ty) Hughes is the founder of Hughes Law PLC in Arlington, Virginia, and is the 2016–17 chair of the ABA Section of Public Contract Law.

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State and Local Government Agencies Face Complex Jurisdictional Issues in Contractual Disputes with the Federal Government

By Donald G. Featherstun, Edward V. Arnold, Patty H. Lee, and Daniel P. Wierzba

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Two recent cases from the U.S. Court of Federal Claims (USCFC) depict the complex jurisdictional challenges that state and local government entities have in contract disputes with the federal government at the USCFC. In *Anchorage v. United States*,[1] the USCFC determined that it had jurisdiction under the Tucker Act[2] to hear a dispute concerning two memoranda of understanding (MOU) between the Municipality of Anchorage (Anchorage) and the United States Maritime Administration (MarAd) relating to an effort to expand the Port of Anchorage in Anchorage, Alaska. More recently the USCFC, in *California Department of Water Resources v. United States*,[3] held that it did not have jurisdiction under the Contract Disputes Act (CDA)[4] to hear a dispute between the California Department of Water Resources (CDWR) and the United States Bureau of Reclamation (USBR) concerning a series of agreements relating to federal and state water projects in California. In these two decisions, the USCFC discusses many of the subtleties of its jurisdiction under both the Tucker Act and the CDA as these statutes apply to express contracts. Any state or local government agency considering a suit based on a contract dispute against the federal government at the USCFC should review these decisions before commencing litigation.

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Statutory Framework

Tucker Act. The Tucker Act states that the USCFC has jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an 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."[5]

At issue in the cases at hand was the portion of the Tucker Act that deals with express contracts. The then U.S. Court of Claims stated in *Kania v. United States*:

> The contract liability which is enforceable under the Tucker Act consent to suit does not extend to every agreement, understanding, or compact which can semantically be stated in terms of offer and acceptance or meeting of minds. The Congress undoubtedly had in mind as the principal class of contract case in which it consented to be sued, the instances where the sovereign steps off the throne and engages in purchase and sale of goods, lands, and services, transactions such as private parties, individuals or corporations also engage in among themselves.[6]

Furthermore, it is generally recognized that in establishing either a statutory or contractual basis for recovery of damages, the plaintiff must demonstrate a substantive source of law that creates the right to recovery of money damages against the United States.[7] This is sometimes referred to as a "money mandating" requirement. However, the substantive right to damages is presumed in contracts.[8] Thus, when a breach of contract claim is brought in the USCFC under the Tucker Act, the plaintiff comes armed with the presumption that money damages are available. As such, there is no need to inquire as to the money-mandating issue.[9]

Stovall v. United States identified the limited circumstances in which the money-mandating provision argument would be applicable to an express contract:

> [T]he requirement that there be unmistakable language mandating a payment upon breach applies only to the relatively narrow band of cases that can be correctly characterized as involving agreements only entered into by the sovereign. [W]ere the law otherwise, this Court would have lacked jurisdiction over *Winstar* and all of its various progeny, none of which involved contracts containing "money mandating" language.[10]

The court went on to describe the "sovereign" agreements as ones that have no "private analogue."[11] The decision then provides several examples of agreements related to the administration of criminal justice (e.g., plea, witness protection, informant, and other criminal agreements).[12] These types of agreements were contrasted to contracts where the "sovereign steps off the throne and engages in purchase and sale of goods, lands, and services, transactions such as private parties, individuals or corporations also engage in among themselves."[13]

Holmes v. United States[14] involved several alleged breaches of multiple settlement agreements related to Title VII claims based on former employment with the United States Navy. The court was concerned that "[t]ypically, the employee's remedy is enforcement of the settlement terms or rescission of the settlement agreement and reinstatement of the underlying action."[15] However, the court reiterated the concept that the money-mandating approach is normally limited to noncontract claims. Specifically, the court stated: "The Supreme Court has shown continued support for this distinction by excluding contract claims from its subsequent discussion of the money-mandating requirement."[16] Later the court stated: "In our view, when referencing the money-mandating inquiry for Tucker Act jurisdiction, the cases logically put to one side contract-based claims."[17]

Due to the unique nature of the agreement (settlement agreement of a Title VII case), the court did apply the money-mandating concept to the case and found that the agreement could be interpreted as contemplating such damages.[18] In making its ruling, the court noted:

> To begin with, "[n]ormally contracts do not contain provisions specifying the basis for the award of damages in case of breach . . . ." . . . Put another way, in a contract case, the money-mandating requirement for Tucker Act jurisdiction normally is satisfied by the presumption that money damages are available for breach of contract, with no further inquiry being necessary.[19]

It should be noted that the origin of the money-mandating requirement comes from noncontract cases. For instance, in *United States v. Mitchell*,[20] the Supreme Court distinguished between cases involving contracts and noncontract cases for money-mandating purposes. There, the Court stated:

> [F]or claims against the United States "*founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department*," 28 U.S.C. § 1491, a court must inquire whether the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.[21]

The Court omitted contract cases from the money-mandating requirement. The plaintiffs in *Mitchell* specifically based their money claims on various congressional acts and executive regulations, including the General Allotment Act, and the Court found jurisdiction because they could be interpreted as mandating compensation for government violations of its fiduciary responsibilities in managing tribal property.[22]

Likewise, in *United States v. Testan*,[23] the plaintiffs sued to have their positions reclassified at the government. The Court specifically noted that the plaintiffs "do not rest their claims upon a contract; neither do they seek return of money paid by them to the Government."[24] The Court went on to say, referencing the limited jurisdiction of the Court of Claims to only award damages: "It follows that the asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'"[25]

Testan relied on *Eastport Steamship Corp. v. United States*.[26] In *Eastport*, the plaintiff was not pursuing a breach of contract case, instead suing under the Shipping Act of 1916,[27] claiming the government wrongfully withheld approval of a contract to sell a ship. The court noted that its jurisdiction relating to "any Act of Congress" can fall into two categories.

> *Within that sphere, the non-contractual claims we consider under Section 1491 can be divided into two somewhat overlapping classes*—those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury. In the first group (where money or property has been paid or taken), the claim must assert that the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation. *In the second group, where no such payment has been made, the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum*.[28]

Clearly, *Mitchell*, *Testan*, and *Eastport* demonstrate that the money-mandating provisions originate from cases not involving an express contract. The purpose of the rule was to distinguish cases based on "Act[s] of Congress" that did not require the payment of damages from statutes that did. The reason was because the court's jurisdiction is limited to statutes where the payment of money was foreseeable. As noted in *Holmes*, there is a presumption in an express contract case that damages were foreseeable. As such, the money-mandating requirement typically is met by the existence of an express contract.

Contract Disputes Act. The second statute that impacts the USCFC's jurisdiction with respect to express contracts is the CDA. This statute applies to any express contracts made by an executive agency of the federal government 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; or
4. the disposal of personal property.[29]

The statute has a dispute resolution process that requires a contractor to submit a claim to the contracting officer and either obtain a final decision on the claim or a deemed denial of the claim prior to filing litigation at either a Board of Contract Appeals or the USCFC.[30] A contractor must perfect its claim within six years after accrual of the claim.[31]

As will be described in more detail below, the CDA generally covers contracts for the acquisition of supplies or services for use by the federal government.[32] With respect to the jurisdiction of the USCFC, the CDA is viewed as a money-mandating statute.[33] As such, the USCFC has jurisdiction to consider claims under the CDA.[34]

Types of Agreements

As noted above, contractors typically enter into contracts where the contractor provides supplies or services to the federal government. State and local entities are more likely to be on the receiving end of their agreements with the federal government, although the two cases to be discussed demonstrate this is not always the situation. However, to help place the decisions in context, we will discuss grants, cooperative agreements, and MOU, which are the typical types of agreements state or local entities enter into with the federal government.

Grant. A grant is used where the "principal purpose of the relationship" between the federal agency and the state or local government is "to transfer a thing of value to the State or local government . . . to carry out a public purpose of support or stimulation authorized by a law . . . instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government."[35] There is not expected to be "substantial involvement" between the agency and the state or local government.[36]

Cooperative Agreement. Similar to a grant, a cooperative agreement involves an agreement where the "principal purpose of the relationship" is "to transfer a thing of value to the State [or] local government . . . to carry out a public purpose of support or stimulation authorized by a law . . . instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government."[37] However, with a cooperative agreement, "substantial involvement is expected between the executive agency and the State [or] local government."[38]

When a breach of contract claim is brought in the USCFC under the Tucker Act, money damages are presumed to be available.

Memorandum of Agreement/Memorandum of Understanding. Perhaps the least statutorily defined agreements between a federal agency and a state or local government are the memorandum of agreement (MOA) and MOU. As described below, they may be subject to jurisdiction of the USCFC.

Recent Decisions

***Anchorage v. United States*.** In the *Anchorage* case, Anchorage determined that it needed to replace its port facilities that were viewed to be "deteriorating and outdated."[39] Anchorage entered into two MOUs with MarAd, an agency of the United States Department of Transportation.[40]

The first MOU, which was executed in 2003 (2003 MOU), involved the design and construction of new facilities.[41] This agreement outlined both of the party's responsibilities. MarAd was to "[c]oordinate with other Federal Agencies that receive annual Congressional appropriations for Port Expansion."[42] The MOU also required MarAd to execute all financial documents, accept transfers of nonfederal funds, and "[o]bligate and disburse funding for Port Expansion oversight, program management, study, environmental analysis, engineering, design, construction, or rehabilitation pursuant to Port Expansion requirements."[43]

Under the 2003 MOU, Anchorage was to "[p]rovide overall program requirements and direction of Port Expansion to MarAd."[44] Anchorage also was to review all plans, specifications, and status reports submitted by the primary contractor and certify the work was acceptable before a certificate of completion could be submitted to MarAd for MarAd to accept work from the contractor.[45]

Anchorage agreed to provide significant state and local funding of over $200 million. Congress appropriated roughly $130 million for the project. Anchorage was to pay MarAd 3 percent of the funding of the port for providing "specialized technical expertise and input as appropriate."[46] The project also called for "the construction of a new road to directly connect the Port of Anchorage with Elmendorf Air Force Base" and the addition of "new staging areas for military deployments and dual-use facilities which can be used for military hangars for helicopters."[47]

As a result of the 2003 MOU, MarAd entered into a contract with Integrated Concepts and Research Corporation (ICRC) in 2003 to "provide program management, design-build and related procurement services with respect to the Project's management, design and construction."[48] ICRC then awarded a contract to PND Engineers Inc. for design services and Quality Asphalt Paving (QAP) for construction efforts.[49] QAP then awarded a second-tier subcontract to MKB Contractors.[50]

> ***The government argued in* Rick's Mushrooom Service, Inc. v. United States *that cooperative agreements are not presumed to provide monetary relief.***

Problems on the project were discovered in 2010 relating to the installation of sheet piles, and the project was suspended while the United States Army Corps of Engineers was hired by MarAd to perform a technical evaluation of the sheet pile system.[51] ICRC, in the meantime, filed a claim at the Civilian Board of Contract Appeals for a pass-through claim of approximately $20 million submitted by QAP/MKB.[52]

In the midst of the project evaluation, Anchorage and MarAd entered into the 2011 MOU.[53] This agreement described in detail the parties' roles and responsibilities.[54] First, the MOU created a "Port Oversight and Management Organization," which was to "provide overall executive leadership, vision, policy, strategic objectives, and priorities for the project."[55] This agreement specifically provided that "MarAd or its designee would 'provide acquisition, construction, design, and quality assurance service for the Project.'"[56]

MarAd settled ICRC's claim for $11.3 million in September 2012.[57] Anchorage claims this settlement occurred without its knowledge or approval.[58]

On February 28, 2014, Anchorage filed a complaint at the USCFC for breach of contract, in which there were three counts: (1) breach of the 2003 and 2011 Anchorage-MarAd agreements; (2) breach of the implied covenant of good faith and fair dealing; and (3) breach of the 2003 and 2008 MarAd-ICRC contracts for which Anchorage was a third-party beneficiary. The government filed a motion to dismiss the complaint pursuant to Rules of the Court of Federal Claims (RCFC) 12(b)(1) and 12(b)(6). In its motion, the government made three arguments: (1) the USCFC did not possess jurisdiction under the Tucker Act because the two MOUs were not "money mandating"; (2) the complaint failed to state a claim for breach of contract or breach of the implied covenant of good faith and fair dealing; and (3) the complaint failed to state a claim as a third-party beneficiary.[59] This article will focus on how the USCFC addressed the government's first argument.

The government's challenge to the USCFC's jurisdiction was analyzed by the court as based on the position that both MOUs failed to meet the money-mandating requirement for jurisdiction because they were cooperative agreements.[60] The government argued that under *Rick's Mushroom Service, Inc. v. United States*,[61] cooperative agreements are not presumed to provide monetary relief. Furthermore, the government argued that because the agreements failed to contain any provision for monetary relief, money damages should not be presumed to be a remedy of a breach of the agreements.[62]

The court rejected the government's argument by finding that the two MOUs were not cooperative agreements.[63] The court pointed out that 31 U.S.C. § 6305 defines cooperative agreements to be agreements where "the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support [or] stimulation authorized by a law . . . instead of acquiring . . . property or services for the direct benefit or use of the United States Government."[64] The MOUs were found to do much more than what a typical cooperative agreement would do.[65] First, the MOUs provided for a road and hangars for use by federal troops stationed at Elmendorf Air Force Base.[66] Furthermore, Anchorage gave MarAd approximately $300 million toward construction of the port.[67] MarAd was to receive 3 percent of that amount for providing "specialized technical expertise and input as appropriate."[68] Based on these facts, the USCFC ruled the agreements were not cooperative agreements because "the relationship contemplated between the parties goes well beyond merely transferring a 'thing of value' to a local government."[69]

The court also pointed out that MarAd admitted it had not followed its regulatory process for awarding cooperative agreements set forth in 46 C.F.R. § 385.1.[70] The court rejected MarAd's claim that the agreements were cooperative agreements when the agency had failed to follow its own regulations.[71] In conclusion, the court found that it did have jurisdiction under the Tucker Act to hear the dispute.[72]

California Department of Water Resources v. United States. In this case, the CDWR adopted the tactic of claiming USCFC jurisdiction under the CDA, not the Tucker Act.[73] The CDWR sought to recover $10 million from the USBR and the Western Area Power Administration for scheduling coordinator charges the CDWR paid to obtain electricity for a series of water storage and distribution facilities.[74] The CDWR relied solely on the CDA for jurisdiction.[75] As will be discussed below, the USCFC found the agreements to be cooperative agreements to which the CDA does not apply.

This case involved two separate, but related, water projects in California.[76] The California State Water Project (SWP) is a series of water storage facilities, aqueducts, pipelines, pumping plants, and power plants run by CDWR. The SWP includes the Banks Pumping Plant, which is state owned.[77]

The USBR runs a federal multipurpose water project in California known as the Central Valley Project.[78] In this project, there are joint-use facilities that both the CDWR and the USBR use.[79] In addition, there are facilities used only by the federal government (federal-use facilities).[80] The CDWR maintains and operates the joint-use facilities for both the state and the USBR.[81]

The CDWR attempted to recover scheduling coordination charges it incurred from the California Independent System Operator to schedule energy for delivery to the joint-use facilities and the state-owned facilities.[82] The CDWR based its claim for jurisdiction on the joint-use agreement, a supplement to the joint-use agreement, and an agreement known as the coordinated operation agreement (COA).[83] The CDWR submitted a certified claim under the CDR to the USBR that was denied by a contracting officer.[84] The CDWR then filed suit at the USCFC.[85] The government filed a motion to dismiss based on the grounds that the court did not have jurisdiction under the CDA because the agreements were not procurement contracts but rather cooperative agreements.[86] The court granted the government's motion to dismiss for lack of subject matter jurisdiction.

The USCFC began its analysis by noting that the Tucker Act is a "jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages . . . . [T]he Act merely confers jurisdiction upon [the United States Court of Federal Claims] whenever the substantive right exists."[87] The court then noted the need to plead "a money-mandating constitutional provision, statute, or regulation; an express or implied contract with the United States; or an illegal exaction of money by the United States."[88] Eventually the court ruled that the CDA is a money-mandating statute so the USCFC has jurisdiction over CDA disputes.[89] However, the court then went on to analyze the agreements at issue and determined that they were not contracts covered by the CDA.

GW Student Member Wins 2017 Writing Competition

Parker Lewton, a 2017 JD candidate from The George Washington University Law School, was named the Division I first-place winner of the 2016 ABA Section of Public Contract Law writing competition for his paper, "From the Mouth of a Shark: Refugee Resettlement and the Need for Procurement Contracts."

In addition to receiving a $5,000 award, Lewton presented a talk on his paper to the Section's 23rd Annual Federal Procurement Institute in Annapolis, Maryland, in March 2017. His article was featured in the Fall 2016 issue of the *Public Contract Law Journal.*

Eric P. Roberson, a 2016 JD candidate from The George Washington University Law School, received the Division I second-place award of $2,500 for his paper, "No Compete Contracting in Cooperative Purchasing? Proposed Solutions to Resolve Gaps in Competition, Transparency and Socioeconomic Policy at the State & Local Level."

Roya Motazedi, a 2017 JD candidate from The George Washington University Law School, received the Division I third-place award of $1,000 for her paper, "The Long-Awaited Cuban Reunion: Public Procurement's Role in U.S.-Cuba Relations."

Thomas Laubacher and Charles Pruett tied for the Division II first-place award, each receiving $3,750 for their respective papers:

"Simplifying "Inherently Governmental" Functions: Choosing Between a Principled Approach or More of the Same" (Thomas Laubacher)

"The *Anna Karenina* Principle and Government Contractors, A Case Study of the International Relief and Development Suspension" (Charles Pruett)

The 2017 Section of Public Contract Law writing competition consists of two divisions. Division I is open to JD candidates attending law schools within the United States. Division II is open to lawyers under the age of 36 or admitted to practice less than five years, LL.M. graduates who attended law schools within the United States and its possessions and completed their LL.M. degrees after May 1, 2017, and LL.M. candidates attending law schools as of September 30, 2017.

In addition to cash awards, quality papers are considered for publication in the *Public Contract Law Journal.* Additionally, selected competitors may be invited to present their papers at the annual Federal Procurement Institute in Annapolis, Maryland. Entries are due September 30, 2017.

Complete rules are available at http://www.americanbar.org/groups/public_contract_law/awards.html.

The court stated that the Federal Circuit has long recognized that the CDA does not apply to all government contracts.[90] The court went on to describe contracts covered by the CDA as those where property, services, or construction is to be used directly by the federal government.[91] In an interesting twist, the court explained that "[t]o determine whether a contract falls within the purview of the CDA, the Court looks first to the definition of the term procurement and then the Court examines the purpose and legislative history of the CDA."[92] The court then pointed out:

> [E]ven where a statute is clear on a purely linguistic level, interpretation may be necessary if that interpretation does not do justice to the realities of the situation. . . . To determine whether the applicability of the CDA to the pleaded contracts is within the intention of Congress, we must look to the purpose of the Act and its legislative history.[93]

The court also noted that the CDA should not apply "where application of complex, burdensome, and inevitably time-consuming procurement regulations . . . would 'not do justice to the realities of the situation.'"[94] Finally, in its overview of the law, the court cited to *Rick's Mushroom*[95] for the proposition that cooperative agreements are not procurement contracts that are covered by the CDA.[96]

After setting forth its legal analysis, the court began to evaluate each of the three contracts. With respect to the joint-use agreement, the court focused on the fact that the purpose of the agreement was to jointly reduce costs incurred by the state and the federal governments.[97] Furthermore, because the facility was not solely for the benefit of the federal government (as the state could use the facility for its own benefit), the court found that the contract could not be a contract for repair or services under the CDA.[98] Finally, the court, relying on *Rick's Mushroom*, found the joint-use agreement to be a cooperative agreement because its principal purpose was to "carry out a public purpose of support or stimulation authorized by a law of the United States."[99] Because the joint-use agreement was a cooperative agreement, the court found the CDA did not apply.[100]

The court went on to reject a claim that the CDA covered the COA because the agreement permitted the federal government to use state-owned water distribution facilities.[101] The court concluded that the federal government was not procuring services under the COA, rather the COA was simply an agreement to enter into an agreement in the future for such services.[102]

Finally, the court addressed the supplemental agreement. The CDWR agreed this agreement required the state to operate federal-owned facilities for the sole benefit of the federal government.[103] The court sidestepped this argument by concluding that the state's claim for damages was not focused on this agreement because the CDWR did not pay scheduling coordinator fees for the federal-only facilities.[104]

After analyzing the key contracts and finding that they were not covered by the CDA, the court supported its conclusion by determining that the legislative history of the CDA demonstrates that the CDA did not apply to the contracts at issue.[105] The court pointed out that the agreements were not the subject of competitive bidding, rather they were proscribed by statute.[106] Only the state of California could receive the contracts.[107] Furthermore, the agreements incorporated a different dispute resolution process.[108] The court felt that the application of the CDA to these contracts would "not do justice to the realities of the situation" and that applying the CDA to contracting on a noncompetitive basis would be "equally inappropriate."[109]

Rick's Mushroom Service, Inc. v. United States. Both the *Anchorage* decision and the *California Department of Water Resources* decision rely heavily on the *Rick's Mushroom* decision. In *Anchorage*, the government argued the MOUs were cooperative agreements and, pursuant to *Rick's Mushroom*, the USCFC did not have jurisdiction under the Tucker Act. In *California Department of Water Resources*, the government argued that the agreements at issue were cooperative agreements and, pursuant to *Rick's Mushroom*, the USCFC did not have jurisdiction under the CDA. It is important to note what the *Rick's Mushroom* decision does and does not do.

In *Rick's Mushroom*,[110] Rick's Mushroom Service Inc. entered into a cost-sharing agreement with the Natural Resources Conservation Service (NRCS), which was part of the Unitede States Department of Agriculture, to carry out conservation practices in a facility for recycling mushroom waste.[111] The NRCS designed and provided specifications for conservation practices to be utilized at the facility.[112] Rick's followed the NRCS's direction but was eventually sued by neighbors for violating the federal Clean Water Act.[113] The federal district court in that action granted the neighbors an injunction.[114] To settle the case, Rick's paid $950,000.[115] In addition, Rick's needed to modify its facility.[116] Rick's sued the NRCS for breach of implied warranty, equitable indemnification, and professional negligence.[117]

The USCFC ruled that it did not have jurisdiction over the professional negligence claim because that claim sounded in tort and the Tucker Act does not cover tort claims.[118] Second, the USCFC ruled that it did not have jurisdiction over the implied warranty claim because the CDA does not cover cooperative agreements.[119] Finally, the USCFC rejected the equitable indemnification claim because such a claim violated the Anti-Deficiency Act.[120]

The plaintiff in *Rick's Mushroom* never raised the issue of whether its contract claims should be heard under the Tucker Act rather than the CDA. Apparently missing this issue also, the Federal Circuit upheld the USCFC decision. The Federal Circuit ruled that Tucker Act jurisdiction requires the plaintiff to "look beyond the Tucker Act to identify a substantive source of law that creates the right to recovery of money damages against the United States."[121] The court further stated:

> Rick's breach of contract claim arises from its cost-share agreement with the government; however; the cost-share agreement does not provide a substantive right to recover money-damages and Rick's does not point to a money-mandating source of law to establish jurisdiction under 28 U.S.C. § 1491(a)(1) for its breach of contract claim.[122]

The court eventually denied jurisdiction under the CDA but never addressed the issue of a breach of contract claim under the Tucker Act.[123] Although not raised in the court's opinion, the court's interpretation is consistent with the definition of "contract" in the Federal Acquisition Regulation (FAR), which provides that cooperative agreements are not FAR-covered contracts.[124]

Cooperative Agreements under the Tucker Act

State and local government entities should be aware that there is case law suggesting that the USCFC has jurisdiction to resolve disputes on cooperative agreements under the Tucker Act. In *Trauma Service Group, Ltd. v. United States*,[125] plaintiff Trauma Service Group (TSG), a hospital, pleaded that it had jurisdiction under the Tucker Act, based on breach of an MOA with the United States. The USCFC specifically indicated that the agreements in question were cooperative agreements, authorized by the Federal Grant and Cooperative Agreement Act.[126] The government argued that the MOA was not a binding contract because it did not contain a statement that it was binding nor did it set forth the consequences of a breach or any method for resolving disputes.[127] The plaintiff alleged the MOA was an express contract, or alternatively, an implied-in-fact contract. The court granted the United States' motion to dismiss on the following grounds:

> First, the USCFC concluded that the MOA was unenforceable (and therefore it lacked subject matter jurisdiction under the Tucker Act) because the MOA was a cooperative agreement or assistance agreement, as opposed to a procurement agreement.[128]

Second, the USCFC concluded that even if the MOA was a contract and provided for the payment of money, it would not necessarily be a contract enforceable under the Tucker Act because consent to suit under the Tucker Act "does not extend to every agreement, understanding, or compact which can semantically be stated in terms of offer and acceptance or meeting of minds."[129] The court stated that the MOA, unlike most contracts, did not provide a remedy for breach or nonperformance or any definitive terms evidencing the government's intent to be presently bound or setting out the consequences of a breach. Rather, the sole remedy was simply to terminate the agreement, and the presence of standard contract provisions—such as non-assignability and termination provisions—did not convert the MOA into a contract.[130] To support that the MOA was not a contract because it could not be determined whether a breach had occurred, the court cited an earlier case, *Modern Systems Technology Corp. v. United States*,[131] where the Federal Circuit determined that a basic pricing agreement between the plaintiff and the United States Postal Service for telephone repairs merely established terms and conditions for future contracts, but did not itself create any enforceable obligations between either party.

Third, the court concluded that because the plaintiff provided no evidence that any government employees were authorized to enter into a contract for payment of money to the plaintiff, the MOA was unauthorized, and therefore unenforceable.[132]

Finally, the USCFC concluded that the plaintiff stated a claim in tort, not in contract, because it was grounded upon alleged misconduct by a government employee (e.g., conversion, threats, or tortious interference with the plaintiff's own employment contract with the technician).[133]

On review, the Federal Circuit upheld the USCFC's ruling that the plaintiff's allegation was sufficient to confer subject matter jurisdiction in the USCFC.[134] The court relied on the rule that a well-pleaded allegation in the complaint is sufficient to overcome challenges under RCFC 12(b)(1) to subject matter jurisdiction.

> ***Perhaps the least statutorily defined agreements between a federal agency and a state or local government are the MOA and MOU.***

Despite that victory, the Federal Circuit upheld the decision to dismiss for failure to state a claim under RCFC 12(b)(4).[135] The plaintiff failed to allege any contractual duty that the government failed to perform. Furthermore, TSG admitted that the MOA failed to provide provisions concerning reimbursement of salary for an X-ray technician, which was the basis of its request for money damages. Because the MOA did not require such reimbursement, the court held that the MOA did not create a duty to pay the X-ray technician, and thus there was no breach.[136]

In making this conclusion, however, the court specifically noted that the USCFC had mistakenly ruled that the MOA could not be a contract. Specifically, the court stated:

> Without a breach, this court need not reach the question of whether the MOA is a valid contract. However, any

> agreement can be a contract within the meaning of the Tucker Act, provided that it meets the requirements for a contract with the Government, specifically: mutual intent to contract including an offer and acceptance, consideration, and a Government representative who had actual authority to bind the Government. As such, contrary to the opinion of the trial court, a MOA can also be a contract—whether this one is, we do not decide.[137]

Later, in *Total Medical Management, Inc. v. United States*,[138] the Federal Circuit addressed, among other things, whether there was a valid contract, as required for jurisdiction under the Tucker Act. There, the plaintiff (TMM, a health care provider) entered into a series of facility-sharing partnership agreements concerning reimbursement for treatment in civilian medical facilities under the CHAMPUS government program, which were memorialized in MOUs or MOAs. Those MOUs were similar in nature to those in *Trauma Service Group* and hence in the form of a cooperative agreement. The plaintiff was not paid directly by the government, but through private corporations managing the payment claims issued to the government.[139] Several MOUs were executed, and a dispute arose concerning the billed charges. The plaintiff filed a complaint in the USCFC. The government moved to dismiss for lack of subject matter jurisdiction on the basis that no contract existed.[140] The motion was denied on the basis that "the existence or not of a contract is usually not a jurisdictional question" and that challenges to jurisdiction are overcome "simply 'on the basis of well-pleaded allegations in the complaint.'"[141]

The government made the following arguments that the MOUs were "generally unenforceable," none of which the Federal Circuit found persuasive[142]:

First, the government argued that the court should follow the USCFC holding in *Trauma Service Group*,[143] which held that CHAMPUS MOUs are unenforceable because they provide no remedy for breach, do not demonstrate definitively the government's intent to be bound, and contain no method for determining a breach. On appeal, the Federal Circuit reiterated that "to be binding, a contract must be 'sufficiently definite to permit determination of breach and remedies'" and that the government failed to make a convincing argument that the MOUs were so indefinite as to preclude determination of breach and remedies.[144] The court stated that to the contrary, the obligations of the parties in the MOUs were clear: (1) the plaintiff was to provide discounted services; (2) the hospital was to provide free space and support staff and to encourage dependents to use TMM's services; and (3) the CHAMPUS regulatory scheme provided payment details. The court noted that the "determination of damages or specific performance would flow naturally from a breach of these duties."[145] The court also noted that the "existence of the negotiated, signed MOUs evidences offer and acceptance. There was also consideration in the mutuality of obligation . . . ."[146]

Second, the government argued that the resource-sharing agreements were not contracts because they were not labeled "contracts" in the regulatory scheme. The court denied this argument, noting that "the failure of Congress to use the word 'contract' does not preclude the holding that a binding contract is formed."[147]

Third, the government argued that even if they were contracts, the MOUs were not subject to the CDA (previously codified at 41 U.S.C. § 602(a)) because they were not procurement contracts for the benefit of the government; rather, they were solely for the benefit of the military dependents who received the medical care.[148] The court stated that the government clearly has obligations to military dependents, and rejected that defense.[149]

While the court found that the basic requirements for a government contract had been met, the court determined that the contract was void because the MOUs were in direct conflict with CHAMPUS regulations (the rates stated in the MOUs went beyond the base rates set by regulation).[150] Because the MOUs were void ab initio, the plaintiff failed to state a claim upon which relief could be granted, and the court reversed and remanded the case with instructions to dismiss for failure to state a claim.[151] The combined petition for rehearing and suggestion for rehearing en banc was denied.[152]

Grants

Perhaps the most frequently used agreement between the federal government and state and local legal entities is the grant. In cases involving federal grant funds that are made available to various government and private organizations, jurisdiction has historically been in the USCFC.[153]

In *City of Wheeling v. United States*, the city brought a breach of contract action against the United States government, alleging the Environmental Protection Agency (EPA) had abused its discretion by refusing to award additional grant funds to the city for waste treatment works.[154] The court considered the jurisdiction issue sua sponte.[155] As part of its analysis, the court noted that the EPA administrator's approval of the plaintiff's grant-funded sewerage project was a contractual obligation of the government for its proportional contribution to the project.[156] Based on the foregoing, the case fell under the historical authority of the Tucker Act.[157] Thus, grant contracts may be covered under the Tucker Act so long as the legislation providing the statutory basis for the grant's issuance "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."[158] Similarly, notice of a grant award that creates specific obligations on the government is enough to confer jurisdiction under the Tucker Act.[159] In *Missouri Health & Medical Organization, Inc. v. United States*, the court explained that Tucker Act jurisdiction is proper for instruments, other than traditional formal contracts, if they create obligations on the government. While the court in *Missouri Health* dismissed the case on the basis that there were no new obligations

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Marilyn Neforas

(1943–2017)

Her laughter was infectious. Her devotion to the Section was ferocious. Her memory for details—including not only every detail of the Section's history and operations but also the names of all of our spouses, children, grandchildren, and pets—was encyclopedic. She was picky to the point of mania about spelling and punctuation, and she could pinch a penny until it squealed. She had firm opinions about how things should be done, and was known to be a tad bit stubborn about it from time to time. Her firm opinion of all of the Section leadership over the past 40 years was that they are wonderful if occasionally misguided.

Her smile lit up every room she ever walked into.

Marilyn worked for the ABA in some capacity from 1961 until her retirement, except for a brief sojourn in Hawaii in the early 1970s. In addition to serving as our Section Director from 1976 to 2015, she served as Staff Liaison for the International Law Section, and she also had stints with the Standing Committee on Military Law and the Standing Committee on Lawyers in the Armed Forces. But she actually started her professional life as a budding fashion designer. Who knew? Shortly before joining the ABA, she entered a competition to design an outfit for the main character in the Winnie Winkle comic strip—and she won! Her family still has drawings of everything from sportswear to evening gowns that she designed, and as most of us know, she created and sewed her own clothing for years.

But when she started working for our Section, it is fair to say that she fell in love. We were her family, just as much as her brother Ron, his wife Karen, and her cherished nieces and nephews. Her success as Section Director would have been assured simply by her qualities of leadership, tenacity, and determination—but it was her unabashed love of the Section and the people in it that made her tenure a real triumph. Our programs were infinitely better because of her; our finances were secure in her hands; our outreach was driven by her firm belief in the importance of our mission; and every one of our members could count on her enthusiastic attention to his or her interests and needs.

Her final gift to us was the grace with which she faced the news of her illness. She was relaxed and content in the comfort of her faith and the warm love of her family and friends, including her ABA family.

Marilyn served as our Section Director for 39 years. She was also our muse and guidance counselor, therapist, and nudger-from-behind; and in the end, she was an eloquent example of dignity and human kindness. But most of all she was our dear and beloved friend, and it is impossible to overstate how much we will miss her.

Government Contractors Deal with the Uncertain Shadow of *Universal Health Services, Inc. v. United States ex rel. Escobar*

By Paul F. Khoury, Ralph J. Caccia, and Shane B. Kelly

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The U.S. Supreme Court's decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*,[1] released June 16, 2016, was supposed to provide needed clarity on an important issue under the False Claims Act (FCA): implied certification. Under this theory of FCA liability, a claimant is impliedly certifying that it is complying with relevant regulatory and contractual provisions simply by submitting a claim for payment. Therefore, the claim for payment can be actionably "false" even if the claim itself is accurate and no one made explicit certifications concerning compliance with the rules at issue. The boundaries of this theory were always murky, however, and most jurists recognized that run-of-the-mill contract or regulatory violations should not come under the punishing regime of the FCA, with its civil penalties and treble damages.

This uncertainty led to circuit splits regarding implied certification. First, U.S. circuit courts of appeals disagreed on whether this was a valid theory of liability at all. For some, implied certification was too amorphous and unbounded to fall under a statutory scheme about fraudulent claims for payment,[2] while other courts thought the FCA had to encompass certain kinds of contractual and regulatory noncompliance, such as charging the government for guards who could not shoot.[3] Among those courts that did recognize the theory, there was strong disagreement about the types of violations that would count to make a claim "false." Many courts found that violating "conditions of participation" in government programs did not create liability but violating "conditions of payment" did.[4] But there was disagreement as to whether a "condition of payment" needed to be explicitly identified as such in the relevant regulations or if a court could make an independent determination as to which requirements were "conditions of payment."[5] Still other courts found that violating any material contractual or regulatory requirement was enough to create liability, ignoring that distinction entirely.[6] With this much uncertainty, those doing business with the government faced starkly different standards based on the jurisdiction in which a suit was brought.

The government contracts bar had hoped that the Supreme Court would impose order on this chaos through its decision in *Escobar*. Alas, the unanimous Court did resolve the issues presented to it, but in the process created new areas of uncertainty. As a result, the case has already spawned divergent interpretations. The Court's basic holding in *Escobar* was that "implied certification" is a valid theory of liability under the FCA, "at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."[7] Justice Clarence Thomas, who authored the opinion, reasoned that at common law, and in the law generally, omissions are considered a species of fraud where the speaker has said something that creates a misimpression and his or her silence becomes misleading. In other words, half-truths can be fraud under the FCA. Therefore, if a representation made by an FCA defendant, while not false in itself, was nevertheless misleading because of noncompliance with a contractual or regulatory provision, then the claim can be considered fraudulent.

Recognizing the potentially vast scope of this interpretation, Justice Thomas sought to limit implied certification by emphasizing that it applies only to violations of *material* legal requirements. Again looking to general principles of fraud, Justice Thomas found that materiality "look[s] to the effect on the likely or actual behavior of the

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recipient of the alleged misrepresentation."[8] Whether a requirement is a condition of payment is relevant to determining whether it is material, but it is not dispositive. The issue is whether it would be reasonable for the defendant to know a requirement is important to the government's payment decision, either in general or under particular circumstances known to the defendant.[9] The Court stressed that its interpretation of FCA materiality was "rigorous," and it appears to have strengthened what was perceived to be a relatively weak materiality standard in the statute, which defined the term as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[10]

Under *Escobar*, if these two prongs are satisfied, the FCA allows an implied certification theory to proceed. The government and would-be relators must still, of course, prove the other elements of an FCA claim, such as scienter.

In the months since *Escobar* was decided, courts have had a chance to provide their initial interpretations of this decision and *Escobar*'s new standard, and already there are significant disputes that will directly impact current and future FCA litigation. In this article, we examine three questions arising out of *Escobar* and explore how courts are starting to apply its standards.

Is the Two-Pronged *Escobar* Test Mandatory for All Implied Certification Allegations?

Escobar answered "yes" to the question of whether a defendant can be held liable for an implied certification, but some litigants are pointing to aspects of the opinion to argue that not *all* implied certification cases must meet its two-pronged test. Justice Thomas said that implied certification is a valid theory "at least" where the Court's test is met, which could be read to imply that the theory may be valid in other contexts. This interpretation is supported by other portions of the *Escobar* opinion, where Justice Thomas said that the Court "need not resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment" because "[t]he claims in this case do more than merely demand payment."[11]

The United States Department of Justice, for its part, has been filing briefs taking the position that this language in *Escobar* means that the Court did not displace prior circuit precedent that may allow implied certification liability under other circumstances. In *United States ex rel. Mateski v. Raytheon Co.* in the Central District of California, the United States filed a statement of interest stating that in *Escobar* "the [Supreme] Court did not suggest that [meeting its test] is the *only* circumstance when the implied certification theory applies" and arguing that "the Court left intact the Ninth Circuit's prior case law addressing" whether every claim for payment contains an implied representation of entitlement to payment.[12]

So far, a few district courts are adopting this position and holding that *Escobar* does not prohibit the application of implied certification even when its test is not met. In *Rose v. Stephens Institute*, the U.S. District Court for the Northern District of California explicitly held that *Escobar* did not displace prior circuit-level precedent permitting implied certification claims outside of the high Court's rubric.[13] In *Rose*, the district court reviewed allegations that an educational institution had violated United States Department of Education (DOE) rules regarding recruiting incentives while still receiving federal funding. On a motion for reconsideration of a summary judgment decision, the court had to decide whether the implied certification claims before it had to meet *Escobar*'s two-part test. The court explicitly determined that they did not, finding that "*Escobar* did not establish a rigid two-part test for falsity that must be met [in] every single implied certification case."[14] Citing the "at least" language and the Court's statement that it did not need to resolve whether all claims for payment created implied representations of compliance, the district court held that "*Escobar* . . . does not purport to set out, as an absolute requirement, that implied false certification liability can attach *only* when these two conditions are met."[15] In *Rose*, the district court ultimately found there to be triable issues of fact as to whether the *Escobar* test was met, but the court was nevertheless clear that *Escobar* is not compulsory.

A district court in the Central District of California explicitly sided with the *Rose* court in *United States ex rel. Brown v. Celgene Corp.*[16] In *Celgene*, the district court found that the *Escobar* test was "intended to describe the outer reaches of FCA liability . . . . Thus, *Escobar* leaves undisturbed cases in this circuit and elsewhere holding that a claim is 'false' if it is statutorily ineligible for reimbursement," even if the prongs of *Escobar* are not met.[17]

In still another case, also in the Ninth Circuit, the U.S. District Court of Arizona applied Ninth Circuit case law, not *Escobar*, to find that the relator stated a claim under an implied certification theory.[18] The district court discussed *Escobar* only when reviewing whether the relator had properly pleaded the FCA element of materiality and did not consider that the case may have upended prior precedent as to implied certification generally.[19]

On the other hand, despite these cases questioning the scope of the ruling in *Escobar*, many other courts have ignored the potentially ambiguous language in Justice Thomas's opinion and treated *Escobar* as the new standard for all implied certification claims. Under this reading, if allegations do not include a specific representation rendered misleading by noncompliance with a material legal requirement, then there can be no implied certification liability. This interpretation appears to have been adopted by the Third Circuit when it referred to the *Escobar* test as the relevant standard for falsity under an implied certification theory in *United States ex rel. Whatley v. Eastwick College*.[20] In addition, a district court in Georgia applied the *Escobar* test for materiality to dismiss implied certification claims in *United States ex rel. Southeastern Carpenters Regional Council v. Fulton County, Georgia*.[21]

Most notably, the Ninth Circuit issued a substantial decision applying *Escobar* to dismiss an implied certification theory in *United States ex rel. Kelly v. Serco, Inc.*[22] The opinion was released on January 12, 2017, so it post-dates the district court opinions in the Ninth Circuit questioning whether *Escobar*'s test is mandatory. The defendant in *Serco* was awarded a $62 million, three-year indefinite delivery/indefinite quantity contract by the United States Department of Defense Navy Space and Naval Warfare Systems Command (SPAWAR) to provide project management, engineering design, and installation support services for a range of government projects.[23] The relator, a former Serco employee, alleged that the company had been violating regulations regarding a cost and progress tracking system, the so-called earned value management system, on a particular project for the United States Department of Homeland Security. The district court in that case had asked whether the regulations were a "condition of payment" in line with prior circuit precedent, but the Ninth Circuit in *Serco* said that the Supreme Court had "[r]ecently . . . clarified the circumstances supporting FCA liability under an implied false certification theory" in *Escobar*.[24] The Ninth Circuit panel then applied the two prongs of *Escobar*, ultimately finding that the claims failed to satisfy its requirements. Based on this case, it would appear that the Ninth Circuit is adopting the position that *Escobar* is now *the* standard for implied certification, and for this reason it could be that the three district court cases rejecting that position are not good law. However, the lack of any explicit discussion regarding the scope of the ruling in *Escobar* leaves the issue formally unresolved in the Ninth Circuit. The district court in *Rose* has certified the question of *Escobar*'s scope for an interlocutory appeal, so the Ninth Circuit will have a chance to weigh in on the district court's decision and interpret *Escobar* as applied in *Serco*.[25]

Still other courts appear to have noted the potential confusion but declined to resolve it, such as the Sixth Circuit in *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, where it declined to consider the effect of *Escobar* on Sixth Circuit precedent regarding implied certification because "[t]he briefs in this case were filed before *Universal Health* was decided and the defendants did not press this issue on appeal."[26]

With this much uncertainty in the courts and no explicit ruling from a circuit court on the matter, the scope of implied certification will continue to be indefinite for those doing business with the government. How a defendant should use this uncertainty in litigation may depend on the situation. In terms of long-term jurisprudential development, one would expect that defendants would be at an advantage if *Escobar* were the sole method by which the government or relators could argue a claim for payment was false under an implied certification theory. Many circuits had implied certification standards that were more lax than *Escobar* and did not include its limits. In the long run, defendants may be better off with *Escobar* than other standards that have been adopted.

What Is a "Specific Representation"?

The first prong of *Escobar*'s two-part test allows an implied certification theory of liability when "the defendant submits a claim for payment that makes specific representations about the goods or services provided" but "omits its violations of statutory, regulatory, or contractual requirements," and the omissions "render the defendant's representations misleading with respect to the goods or services provided."[27]

While this new standard may make sense from the perspective of a legal technician, it does not provide clear boundaries for practitioners dealing with actual FCA compliance. Among the issues that are up for dispute are the types of representations or language in a claim for payment that can trigger potential FCA liability. It seems clear that a claim containing nothing more than a bare request for a specific sum of funds does not imply compliance with any particular legal requirements. But there are also claims for payment that make explicit and specific representations about the goods or services provided. On this spectrum, determining where *Escobar*'s line should be drawn will be a challenge.

This is particularly true for government procurements taking place outside the rigid confines of government health-care programs, which have a more defined set of representations in claims for payment. Claims or payment vouchers on government contracts can have a wide variety of formats and language that could shift the "specific representation" analysis, leaving contractors with a great deal of uncertainty.

The Ninth Circuit in *Serco* offers a helpful example, examined at length by the court, of a claim for payment for labor services and related costs. The contractor in that case submitted regular vouchers for payment, which were described as follows:

> Each voucher was submitted on U.S. Standard Form 1034 and provided the period of performance, total costs incurred during that period, and Serco's fee applicable to that work. Each voucher also included a continuation sheet listing the dollar amounts for Serco's costs for labor, travel, and materials. Serco additionally submitted backup documentation for each voucher, which included its internal project status reports containing even more detailed line-item descriptions of its services and total hours and costs.[28]

This type of claim for payment is common and focuses on the specific cost inputs in a relevant time period, including labor costs, which results in a claim for a specific amount of money. The court found that this type of claim did not make a "specific representation" that might implicate whether the project management reports supplied by the defendant were correct or accurate. The court noted that "Serco's vouchers each contained a single express certification that the services listed in them were performed during the time periods stated," nothing more, and "there is no evidence that these employees failed to do the work for which SPAWAR had contracted."[29] For this reason, the relator's implied certification claim failed under *Escobar*.

This should be encouraging to contractors worried that every deviation from proper protocol by an employee whose time is being billed to a government contract will result in FCA liability. The court was confident that a claim describing labor hours does not fall under *Escobar*'s "specific statement" requirement as long as the employee is actually doing what the government is paying for and without additional representations the manner of performance is not implicated.

However, not all cases coming out of *Escobar* may be as encouraging. Prior to the Supreme Court's opinion in *Escobar*, one of the leading cases on implied certification was *United States v. Triple Canopy, Inc.* from the Fourth Circuit.[30] In that case, the court reviewed allegations that a contractor had submitted claims for "guards" who had, in fact, failed marksmanship tests. There was no specific representation about the marksmanship ability of the individuals whose services were being billed to the government, and the term "guard" had no contractual or regulatory definition. The Fourth Circuit said that the allegations were nevertheless sufficient to state a claim under the FCA for implied certification, and it took the position that "the Government pleads a false claim when it alleges that the contractor, with the requisite scienter, made a request for payment under a contract and 'withheld information about its noncompliance with material contractual requirements.'"[31] Under this standard, the court said that billing for guards who can't "shoot straight" is a species of fraud that falls under the FCA.

The defendant in *Triple Canopy* filed a petition for a writ of certiorari in 2015, and at the same time it decided *Escobar*, the Supreme Court vacated the Fourth Circuit's opinion in *Triple Canopy*.[32] The case has been remanded to the Fourth Circuit to apply the new *Escobar* standard to the allegations, and the decision has not yet been released. It seems likely that the Fourth Circuit will find the allegations sufficient under *Escobar*, revealing a potential area of vulnerability for contractors in FCA litigation. In its first opinion, the Fourth Circuit, applying a standard quite similar to that adopted by the Supreme Court in *Escobar*, seemed to think that guards who can't shoot should be the exemplar of why an implied certification theory is necessary to prevent fraud against the government. If the Fourth Circuit, consistent with that attitude, finds that the allegations in *Triple Canopy* succeed under *Escobar*, then the qualifications and proficiency of employees whose time is being billed to the government will be a live issue in many claims for payment. For example, if someone billed at a "network administrator" rate has not actually passed the required network administration certifications, then the mere labor classification itself may be a "specific representation" that could result in liability under *Escobar*.

All of this has several implications for government contractors. First, it is clear that *Escobar* puts great weight on the specific language used in a claim for payment, and for this reason a contractor may be able to prevent potential litigation or exposure under the FCA merely by making representations on its invoices as vague and nonspecific as possible. While the contracting agency may not provide any flexibility in payment procedures and claim format, wherever possible a contractor should minimize the representations being made. Second, the use of words that do not have technical regulatory or contractual definitions, such as the "guards" in *Triple Canopy*, may still constitute "specific representations about the goods or services provided" under *Escobar*.[33] Contractors should review their claims for payment with an eye toward a commonsense understanding of the language, and, as necessary, take steps to ensure that the representations being made are not deceptive. Third, if a contractor finds itself in FCA litigation, it should argue that the alleged regulatory or contractual violations are sufficiently dissociated from the language of the claims for payment or billing vouchers such that the violations do not render the representations in the claim misleading. There are a host of regulatory requirements that may be only tangential to the representations implicated by a particular claim for payment, and defendants should not concede the first prong of *Escobar* unnecessarily.

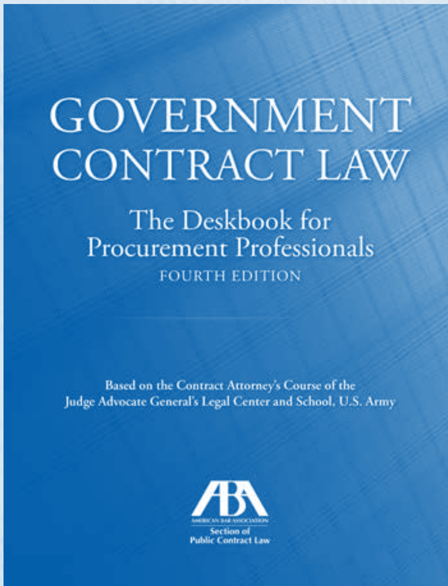
What Kind of Evidence Meets the New "Materiality" Standard?

The second prong of *Escobar* requires that the "defendant's failure to disclose noncompliance with *material* statutory, regulatory, or contractual requirements makes those representations misleading half-truths."[34] The good news for government contractors is that the Court strengthened the materiality standard under the FCA significantly. In expanding on what "material" meant in this context, the Court said "[t]he materiality standard is demanding."[35] The government's identification of a requirement as a condition of payment is relevant but not dispositive of materiality, and government practice as to whether it generally accepts or does not accept claims for payment in light of similar violations is also relevant. Garden-variety breaches of contracts or regulations are not actionable as fraud, and a requirement is not material merely because the government would be entitled to refuse payment in light of the violation.[36] The Court also said that in tort law an issue is "material" "(1) '[if] a reasonable man would attach importance to [it] in determining his choice of action in the transaction'; or (2) if the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter 'in determining his choice of action,' even though a reasonable person would not."[37]

The Eighth Circuit in *United States ex rel. Miller v. Weston Educational, Inc.* seized on the Restatement language to try and organize the Court's standard with this summary: "A false statement or record is 'material' for FCA purposes if either (1) a reasonable person would likely attach importance to it or (2) the defendant knew or should have known that the government would attach importance to it."[38] This would maintain both an objective element in the test—whether a reasonable person would give a requirement importance—and a subjective one—under which particular circumstances known to the defendant can make a requirement material even if it might not be important under all circumstances.

Application of this rule is hardly straightforward even under the Eighth Circuit's summary of the *Escobar* materiality standard, and it is likely that reasonable minds could differ on materiality in many circumstances. The defendants in *Escobar* had argued that the Court should limit implied certification to only those requirements that are labeled explicit conditions of payment, in part because a less specific standard would not provide fair notice to defendants as to which requirements might trigger FCA liability.[39] The cases decided thus far indicate this fear was well founded, as already there are divergent approaches to *Escobar*'s materiality standard that will make it difficult to determine which requirements would trigger liability. In particular, there seem to be varied approaches to whether materiality should be assessed based primarily on the facts or on the legal regime under which payment is requested. Even when examining government practices as a factual matter, courts are looking at that issue at different levels of generality and sometimes coming to conflicting conclusions.

One salient case discussing materiality under *Escobar* is *United States ex rel. George v. Fresenius Medical Care Holdings, Inc.*, which took a highly factual approach to allegations of substandard medical services being billed to federal health-care programs.[40] In *Fresenius*, the relator alleged, among other things, that the defendant was submitting claims to Medicare for dialysis treatment but shortening the treatment times to save money. The defendant was not required to report treatment times to the government, meaning there was no explicit false statement in connection with the alleged scheme. Applying *Escobar* on a motion for summary judgment, the district court in *Fresenius* concluded that the relator had failed to present evidence showing that the shortening was *material* to any government payment because there were no details about how much the defendant had shortened the treatment.[41] Implicit in the court's analysis was an assumption that de minimis deviations from proper medical practice were not actionably material under the FCA. Without more facts, according to the court, the relator "has left the court only to speculate as to the number of minutes—or, perhaps, hours—that dialysis was incomplete. Without additional facts, the court cannot determine whether reimbursements on these treatments omitted 'critical qualifying information' that would have been 'material to the Government's payment decision' under the FCA."[42] This understanding of materiality is highly factual in nature—the court did not look at Medicare regulations or payment codes to determine whether shortening dialysis treatment may be material to the government. Instead, the court took a commonsense approach that asked whether it really made a difference in terms of the treatments being provided.



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In a similar vein, the Seventh Circuit in *United States v. Sanford-Brown, Ltd.* looked to whether the DOE had initiated enforcement action against the defendant in response to purported violations of regulatory obligations for recipients of federal education subsidies.[43] Finding that the relevant agencies "have already examined [the defendant] multiple times over and concluded that neither administrative penalties nor termination was warranted," the court had no trouble concluding that the regulations at issue were not material.[44] The Seventh Circuit also said that all the relator had shown was that the government would be entitled to deny payment, which was insufficient under *Escobar*. Under this approach, the specific facts of an individual case dominated the materiality inquiry.

The First Circuit in its opinion in *Escobar* on remand from the Supreme Court took the opposite approach from the Seventh Circuit in *Sanford-Brown*, brushing off the government's decision to pay claims for payment even after it knew about the defendant's violations with respect to professionals' qualifications and licensing requirements.[45] In that opinion, the First Circuit concluded that the regulatory requirements at issue went to the "very essence of the bargain" and overcame the government's own actions, which the court said were not "dispositive" of the materiality inquiry.[46] For the First Circuit, a requirement that is sufficiently important, in general, will trump particular dealings between the government and the defendant.

Escobar *offers opportunities for FCA defendants in a revitalized materiality standard as well as pitfalls with new potential liabilities.*

The Sixth Circuit in *Weston Educational* looked to both government practices with other parties and the applicable regulations when reviewing claims that a for-profit educational institution had altered grade and attendance records in violation of DOE requirements to receive federal aid.[47] Applying *Escobar*'s materiality standard in the context of a fraudulent inducement claim, not implied certification claim, the court first looked to whether the defendant's promise to keep accurate grade and attendance records "influenced the government's decision" to enter into a relationship with the defendant.[48] The court examined the statutory scheme and regulations and decided that promising to comply with the DOE requirements was an important condition of receiving federal aid. The court even cited fairly general language about proper recordkeeping to ensure the efficient administration of funds in finding that "[a] reasonable person would attach importance to a promise to do what is necessary to ensure funds go where they are supposed to go."[49] But the Sixth Circuit went further, looking to DOE practice and finding that it "sometimes terminates otherwise eligible institutions for falsifying student attendance and grade records."[50] The court said this was sufficient to find materiality under *Escobar*, even though there was no real harm caused by the alteration of grade and attendance records in this case. The court did not discuss whether the government had sought enforcement action against the defendant in that case.

The *Weston Educational* decision is notable in that it conflicted with the Seventh Circuit's decision in *Sanford-Brown*, where the court decided that violating similar DOE regulations was not sufficient to render claims for subsidies false under *Escobar*. Despite the similar regulatory context, the courts came to opposite conclusions as to the materiality of the conditions imposed on educational institutions, in large part because of the different methods of analysis. The court in *Weston Educational* credited both statutory and regulatory language and DOE practice generally to find that the regulations were important to the decision to pay a claim. The court in *Sanford-Brown*, by contrast, looked to DOE behavior in that specific case and came to the opposite conclusion.

It is likely that the dispute in *Weston Educational* and *Sanford-Brown* will play out across the country as courts try to parse out what legal requirements are and are not material under *Escobar*. Some courts may find legal requirements themselves convincing, while others will look at the behavior of the government, although the latter inquiry could be conducted in different ways. Given the divergent approaches, defendants would be best served by marshalling their strongest arguments regardless of which bucket they fall into. On a motion to dismiss, defendants should argue that materiality has not been alleged if the government or a relator fails to plead facts indicating that the alleged noncompliance made a practical difference to the utility of the goods or services the government is purchasing and the government's decision as to whether to pay a claim. Defendants should also provide interpretations of the regulatory regime that indicate the requirement at issue is not important.

But even using the best possible arguments, defendants may have a hard time succeeding in motions to dismiss based on materiality issues. The defendant in *Escobar* had argued that materiality was too indeterminate of a standard to apply on a motion to dismiss (or even summary judgment), but the Court did not agree, noting that "[t]he standard for materiality that we have outlined is a familiar and rigorous one. And False Claims Act plaintiffs must also plead their claims with plausibility and particularity under Federal Rules of Civil Procedure 8 and 9(b) by, for instance, pleading facts to support allegations of materiality."[51] While the Court was not concerned, defendants should be. The materiality standard is high, but it is flexible enough that creative relator's counsel or the government may be able to include some kind of allegations that would meet its standards in many cases, at least under the forgiving assumptions of a motion to dismiss. If that is the case, *Escobar* may shift the cost-benefit analysis of litigating a claim instead of settling it. Avoiding discovery is always key in efficiently disposing of a meritless suit; and if *Escobar* makes that difficult in implied certification cases, then settlement may be the more rational choice.

If a defendant is forced to engage in discovery and a matter advances past a motion to dismiss, the defendant should attempt to obtain discovery about government practices when looking at similar violations or the particular violations at issue in the litigation. While a court may be loath to burden government agencies with these kinds of discovery requests, such information is plainly relevant in light of *Escobar* and should be sought as a matter of course. Then the issues can be developed for additional briefing on summary judgment or, if necessary, for trial.

Until courts have established a body of case law about materiality that provides clearer lines, defendants will have to use whatever evidence they can when making materiality arguments. Also, unfortunately, the flexible and indeterminate nature of *Escobar*'s materiality standard means that would-be FCA defendants will have difficulty trying to predict which requirements a court might deem material.

Conclusion

Escobar is undoubtedly an important decision that practitioners need to be cognizant of when litigating FCA cases or shaping policies and procedures around claims for payment submitted to the government. It offers both opportunities for FCA defendants in a revitalized materiality standard and pitfalls with new potential avenues for liability. However, the ramifications of the decision are not yet clear, and the procurement fraud bar will need to closely monitor cases interpreting the decision in order to know how it may impact a particular case, organization, or practice. Hopefully, with further refinement, *Escobar* will spawn a set of workable rules that relieve those working in the government contracts space from the fear of unexpected FCA liability. In the meantime, defendants will have to live with the uncertainty of an unsettled environment for implied certification cases under the FCA and do the best they can to limit potential exposure. PL

Endnotes

1. 136 S. Ct. 1989 (2016).
2. *See, e.g.*, United States v. Sanford-Brown, Ltd., 788 F.3d 696 (7th Cir. 2015) (rejecting implied certification).
3. *See* United States v. Triple Canopy, Inc., 775 F.3d 628 (4th Cir. 2015), *cert. granted, vacated sub nom.* Triple Canopy, Inc. v. United States *ex rel.* Badr, 136 S. Ct. 2504 (2016).
4. *See, e.g.*, Mikes v. Straus, 274 F.3d 687 (2d Cir. 2001), *abrogated by* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989 (2016).
5. *See, e.g.*, United States *ex rel.* Augustine v. Century Health Servs., Inc., 289 F.3d 409, 415 (6th Cir. 2002).
6. *See, e.g.*, United States v. Sci. Applications Int'l Corp., 626 F.3d 1257 (D.C. Cir. 2010).
7. *Escobar*, 136 S. Ct. at 2001.
8. *Id.* at 2002.
9. *Id.*
10. 31 U.S.C. § 3729(b)(4).
11. *Escobar*, 136 S. Ct. at 2000.
12. Statement of Interest of the United States at 1–3, United States *ex rel.* Mateski v. Raytheon Co., No. 2:06-cv-3614-ODW(FMOx) (C.D. Cal. Aug. 16, 2016), ECF No. 163.
13. No. 09-cv-05966-PJH, 2016 WL 5076214, at *5 (N.D. Cal. Sept. 20, 2016).
14. *Id.*
15. *Id.*
16. No. CV10-03165-GHK(SSx), 2016 WL 7626222, at *8 (C.D. Cal. Dec. 28, 2016).
17. *Id.*
18. *See* United States *ex rel.* Fisher v. IASIS Healthcare LLC, No. CV-15-00872-PHX-JJT, 2016 WL 6610675, at *9 (D. Ariz. Nov. 9, 2016).
19. *Id.* at *13.
20. 657 F. App'x 89, 93–94 (3d Cir. 2016).
21. No. 1:14-cv-4071-WSD, 2016 WL 4158392, at *5 (N.D. Ga. Aug. 5, 2016).
22. 846 F.3d 325 (9th Cir. 2017).
23. *Id.* at 328.
24. *Id.* at 331.
25. *See* Rose v. Stephens Inst., No. 09-cv-05966-PJH, 2016 WL 6393513, at *1 (N.D. Cal. Oct. 28, 2016).
26. 838 F.3d 750, 761 n.2 (6th Cir. 2016).
27. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1995, 1999 (2016).
28. *Serco*, 846 F.3d at 332.
29. *Id.* at 332–33.
30. 775 F.3d 628 (4th Cir. 2015).
31. *Id.* at 636.
32. Triple Canopy, Inc. v. United States *ex rel.* Badr, 136 S. Ct. 2504 (2016).
33. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1999 (2016).
34. *Id.* at 2001 (emphasis added).
35. *Id.* at 2003. Although outside the scope of this article, another open question regarding *Escobar* is whether and how its "materiality" standard applies to the FCA beyond implied certification cases. *See* United States *ex rel.* Winkelman v. CVS Caremark Corp., 827 F.3d 201, 211 (1st Cir. 2016) (referring to discussion of materiality in *Escobar* when determining whether a relator "materially adds" information under the original source exception).
36. *Escobar*, 136 S. Ct. at 2003.
37. *Id.* at 2002–03 (citing Restatement (Second) of Torts § 538).
38. 840 F.3d 494, 503 (8th Cir. 2016).
39. *See Escobar*, 136 S. Ct. at 2002.
40. No. 2:12-cv-00877-AKK, 2016 WL 5361666, at *17 (N.D. Ala. Sept. 26, 2016).
41. *Id.* at *18.
42. *Id.*
43. United States v. Sanford-Brown, Ltd., 840 F.3d 445, 447 (7th Cir. 2016).
44. *Id.*
45. United States *ex rel.* Escobar v. Universal Health Servs., Inc., 842 F.3d 103, 112 (1st Cir. 2016).
46. *Id.* at 109–10.
47. United States *ex rel.* Miller v. Weston Educ., Inc., 840 F.3d 494, 504–05 (8th Cir. 2016).
48. *Id.* at 504.
49. *Id.*
50. *Id.* at 505.
51. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2004 n.6 (2016).

News from the COMMITTEES

Reported by Herman D. Levy

Commercial Products and Services Committee

November 17, 2016

Seamus Curley introduced guest speaker John Tenaglia, Deputy Director for Contract Policy and International Contracting, Office of the Under Secretary of Defense for Acquisition Technology and Logistics, Defense Procurement and Acquisition Policy. The Committee welcomed him back to speak on recent United States Department of Defense (DoD) guidance on commerciality determinations as well as DoD's proposed rule to amend DFARS to implement sections of the National Defense Authorization Act (NDAA) for FYs 2013 and 2016 relating to commercial item acquisitions. He last spoke to the Committee in December 2015 regarding DoD's proposed rule published in August 2015, which, based on comments received and the need to incorporate the pertinent requirements of the FY 2016 NDAA, was withdrawn and merged into DoD's most recent proposed DFARS proposed rule, Case 2016-D006.

John thanked the Section for its thoughtful comments (dated October 12, 2016) on DFARS Case 2016-D006. He said that he is trying to obtain expertise not only in pricing, but in products as well; he wants to set up an advisory process. He also stated a need for a database in this area. Guest speaker Mike Canales (DoD) reiterated that DoD seeks input and will work closely with Defense Acquisition University. John said that advance agreements on commerciality can take many forms. He has seen horror stories on commerciality determinations.

In answer to John Howell's question, John Tenaglia said that DoD sometimes encounters battles of the experts in commerciality determinations. He also said that contracting officers sometimes get bogged down in such determinations. Mike then urged DoD personnel to be flexible with "of a type" situations in order to get the best package for the government and to share information with contracting officers. He also urged more flexibility in commerciality determinations generally. Sam Knowles asked about modified commercial items; he has seen some inconsistency there. Aaron Raddock asked about civilian agencies; Mike said that it "wouldn't hurt" for their contracting officers to provide their interpretations to DoD. Also, he agreed, by definition an item on a Federal Supply Schedule is commercial; Jeff Clayton cautioned that this is not automatic.

December 8, 2016

Sam Knowles introduced the guest speakers, Justin Holbrook, in-house counsel, Palantir Technologies; and Hamish Hume, partner, Boies Schiller Flexner. Hamish represented Palantir in its successful protest against the Army before the U.S. Court of Federal Claims (USCFC).

The case involved the government's obligations under the Federal Acquisition Streamlining Act (10 U.S.C. § 2377), which required the government "to consider commercially available solutions to meet its requirements." Palantir, a small engineering company, developed an apparent commercial answer to the Army's Distributed Common Ground System (DCGS-A), increment 2, "an intelligence platform that processes data and disseminates intelligence, surveillance, and reconnaissance information to the field." Palantir had competitors, according to Justin. Nevertheless, Palantir experienced difficulty in breaking into the large agency market. The solicitation at issue "contemplated significant development under a cost-reimbursement contract and required certain contractor compliance systems, such as cost accounting, that are not utilized by commercial item companies." Hamish said the Army wanted a lead systems integrator, but wanted a contractor to do the work.

Justin said that Palantir made the determination to sue, and Palantir looked about for a suitable attorney. Hamish said that he contacted Army lawyers; they were perplexed and doubted that a judge would force the Army to consider a commercial item. The USCFC (Judge Horn) found that the Army had not made an effort to find a commercial item, as opposed to a developmental one. Hamish also reported that Judge Horn focused on whether the determination under 10 U.S.C. § 2377 must be in writing, a position the Army opposed; Judge Horn, however, did not address the issue in her opinion. Hamish also said that the standing issue arose, as it seems to do in every protest. Also, he observed, tribunals tend to defer to the agency in complex cases. Judge Horn allowed that the language of 10 U.S.C. § 2377 was loose; repeatedly she refused to say how to do market research. Palantir ultimately prevailed in its protest.

John Howell asked if the government is likely to appeal. Hamish replied that with the change in administration it probably will file a protective appeal by the February 9 deadline; on the other hand, he said, the government could come out worse on appeal to the Federal Circuit. PL

GAO BID PROTEST PITFALLS

continued from page 1

GAO denied the protest, finding that the awardee's post-award recruitment efforts were insufficient to establish an improper bait and switch. Specifically, GAO found that the protester presented no evidence to indicate that any of the personnel named in the awardee's proposal were unavailable, unwilling, or unlikely to perform under the contract when the awardee submitted its proposal. GAO has repeatedly stated that it is neither unusual nor inherently improper for an awardee to recruit and hire incumbent personnel.[3] Therefore, attempting to base a bait and switch argument solely on the awardee's post-award recruiting efforts will likely be unsuccessful.

Another situation in which GAO will not sustain a bait and switch argument is where there is no evidence of "baiting"—i.e., where the replacement personnel are not inferior to the personnel who were initially proposed. For example, in *AT&T Government Solutions, Inc.*, AT&T, the incumbent contractor, protested the agency's issuance of two call orders under a blanket purchase agreement.[4] AT&T alleged, in part, that the two companies that received the call orders had engaged in an impermissible bait and switch of key personnel. Specifically, the protester alleged that the awardees planned to replace some of their key personnel with incumbent employees who were better qualified. GAO denied the protest, stating that even if there was evidence that the awardee intended to switch its employees from those identified in its proposal, there was no evidence of "baiting." Specifically, GAO found that the incumbent personnel were equally or better qualified than the individuals they replaced. For this reason, GAO held that there was no evidence of "baiting" and that there could be no material effect on the evaluation.

Finally, even if a protester can show that the awardee made a misrepresentation in its proposal about the personnel it intended to provide, GAO generally will not sustain a bait and switch protest where there is no evidence that the agency relied on the misrepresentations, or that they had a material impact on the evaluation and award decision.[5] For example, in *Apache Enterprises, Inc.*, Apache alleged that the awardee engaged in an improper bait and switch of the subcontractors it identified in its proposal.[6] GAO denied the protest, noting that even if Apache could show that the awardee had misrepresented the availability of its proposed subcontractors, the agency was not required to (and did not) evaluate offerors' proposed subcontractors. As a result, GAO concluded that any possible misrepresentations in this regard could not have had a material impact on the evaluation results.

Although it is rare for a protester to prevail on an allegation of an improper bait and switch of proposed personnel, if a protester is able to demonstrate all three prongs of a bait and switch allegation, the payoff could be significant. In fact, if GAO finds that the awardee engaged in an improper bait and switch of personnel, GAO may recommend the awardee's elimination from the competition—a result that can be particularly beneficial to the protester. For example, in *Patricio Enterprises Inc.*, the awardee represented in its proposal that it had "signed offer letters in place" for certain proposed incumbent personnel—including key personnel—when in fact the company had never communicated with the individuals.[7] GAO found that not only had the awardee falsely claimed that it had signed offer letters in place for the employees, but the agency also had relied on these representations in determining that the awardee's proposal was technically acceptable and in assigning a strength to the awardee's proposed approach. Further, GAO noted that the agency's reliance on the misrepresentation had a material effect on the evaluation results because both proposals were assigned a single strength and were considered to be essentially equal with regard to nonprice factors. Had the awardee's proposal not been assigned a strength based on its misrepresentation regarding its proposed personnel, the agency would have had to conduct a price/technical tradeoff, which could have resulted in the protester's proposal being chosen for award.

In sustaining the protest, GAO noted that where an offeror's material misrepresentation has a material effect on a competition, the integrity of the procurement system "'demands no less' than the remedy of exclusion."[8] GAO, therefore, recommended that the awardee's proposal be excluded from the competition and also noted the possible applicability of FAR 33.102(b)(3), which permits an agency to require the awardee to reimburse the government's costs where a post-award protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification.

Success on a bait and switch allegation related to proposed personnel is somewhat rare; many of the successful claims involve situations in which an offeror proposes to use incumbent personnel who either are unaware that they have been proposed or have expressly rejected the awardee's request to identify them as proposed personnel in its proposal.[9] However, while it is difficult to prevail on an allegation of an improper bait and switch, when a protester can successfully demonstrate all three elements of the claim, the result can be particularly beneficial. Whereas many successful protests simply result in an agency "do over" of the evaluation, a successful bait and switch allegation could result in one of the competitors—the one initially selected by the agency—being eliminated from the competition.

The *Boeing Sikorsky* Rule

Another protest argument that is frequently misused is the *Boeing Sikorsky* rule. This rule originated from GAO's 1997 decision in *Boeing Sikorsky Aircraft Support*.[10] In that case, Boeing Sikorsky raised several arguments regarding alleged errors in the agency's evaluation of proposals, some of which GAO ultimately found to be meritorious. The Army argued strongly against each of Boeing Sikorsky's allegations and maintained throughout the process that each of the arguments was baseless. However, the Army also argued that even if some of the protester's arguments were meritorious, Boeing Sikorsky failed to demonstrate that it had been prejudiced by the errors. To support this argument, the Army submitted a hypothetical reevaluation assessing what it believed the evaluation outcome would have been if Boeing Sikorsky were to succeed on its protest challenges. In its revised hypothetical evaluation, the source selection evaluation board (SSEB) assigned new ratings under certain subfactors, but concluded that these improvements would have been insufficient to increase the protester's overall final score under most of the evaluation factors.[11] The source selection authority reviewed and adopted the SSEB's hypothetical post-protest analysis, concluding that he would not have selected Boeing Sikorsky for award even given the assumption that all of Boeing Sikorsky's protest allegations were granted. As a result, the Army argued that even though it believed that none of Boeing Sikorsky's protest arguments had merit, even if they did have merit, the outcome of the evaluation would not have changed.

GAO rejected the Army's argument that there was no reasonable possibility of prejudice, stating that "[w]hile we consider the entire record, including statements and arguments made in response to a protest in determining whether an agency's selection decision is supportable, we accord greater weight to contemporaneous source selection materials rather than judgments, such as the selection officials' reevaluation here, made in response to protest contentions."[12] Further, GAO emphasized that the agency itself viewed its new, post-protest analysis as merely hypothetical and that the new analysis was based on information the agency continued to argue was not accurate. GAO noted that the lesser weight it accords such post-protest documents "reflects the concern that, because they constitute reevaluations and redeterminations prepared in the heat of an adversarial process, they may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process."[13]

Over the years, protesters have attempted to expand the *Boeing Sikorsky* rule far beyond this original holding. However, as explained below, the majority of these arguments are unsuccessful.

Protesters' attempts to use the *Boeing Sikorsky* rule are generally unsuccessful for two reasons. First, protesters often seek to discount documents or arguments that do not consist of post-protest reevaluations but rather fill in reasonable gaps in the contemporaneous documentation. However, GAO has stated that it "generally will consider post-protest explanations where the explanations merely provide a detailed rationale for contemporaneous conclusions and fill in previously unrecorded details, so long as the explanations are credible and consistent with the contemporaneous record.[14] For example, in *Walden Security*, Walden challenged the decision of the Centers for Disease Control and Prevention to set aside a procurement for small businesses.[15] The only contemporaneous evidence of the set-aside analysis in the agency report was an e-mail containing a list of firms that responded to a sources sought notice with a "yes" or "no" notation next to each name. However, during the protest, and in response to questions from GAO, the agency provided two declarations from an agency program analyst describing the set-aside analysis she performed and documenting the conclusions she reached regarding each firm. The protester argued that GAO should disregard the agency's post-protest analysis because it was prepared during the adversarial protest process. However, GAO disagreed, finding that the list of names with "yes" and "no" notations was contemporaneous documentation with which the agency's post-protest statements were consistent. GAO concluded that the "program analyst's post-protest explanations provide detailed and credible rationales for [the 'yes' and 'no'] conclusions," and simply filled in the details she did not previously record.[16]

Second, protesters' arguments may be unsuccessful because they seek the complete exclusion of post-protest documents or arguments. As GAO frequently reminds protesters, the *Boeing Sikorsky* rule does not require that arguments or documents be completely disregarded. Rather, it states that post-protest arguments or documents will be accorded less weight than documents that were prepared contemporaneously. GAO emphasized this position in *Global Integrated Security (USA) Inc.*:

> [T]he *Boeing Sikorsky* decision and its progeny do not require that we disregard or accord "no weight" to the agency's explanation here. First, and contrary to the protester's assertion, neither our decision in *Boeing Sikorsky* nor its progeny provide for the automatic rejection of an agency's judgments made in response to protest contentions. Rather, as explained in *Boeing Sikorsky* and the cases that follow, our Office will accord such post-protest judgments "lesser weight" than the contemporaneous source selection materials. *Boeing Sikorsky Aircraft Support*, *supra*, at 15. Indeed, in certain limited circumstances, our Office has considered post-protest agency judgments regarding the correction of evaluation errors in concluding that agencies' source selections were unobjectionable.[17]

For example, in *Uniband, Inc.*, a protester alleged flaws in the agency's price realism analysis.[18] In response to the protest, the agency conceded that its analysis was flawed and submitted a statement, prepared in response to the protest, in which the agency "[f]or the purposes of this protest" conducted another realism analysis. This post-protest analysis showed that, applying the correct price realism techniques, the outcome of the price realism analysis was consistent with the agency's original conclusion that the awardee's prices were realistic. The protester argued that GAO should disregard the agency's reevaluation because it was a post-protest reevaluation. GAO rejected the protester's argument, noting that neither the *Boeing Sikorsky* decision nor its progeny provide for the automatic rejection of an agency's judgments made in response to protest contentions. Rather, *Boeing Sikorsky* and its progeny stand for the proposition that GAO will accord such post-protest judgments less weight than the contemporaneous source selection materials.[19] GAO, noting that the agency's reevaluation was not hypothetical, was limited in scope, and required only the application of simple arithmetic calculations, decided that the post-protest reevaluation would not be rejected but rather would be considered and weighed appropriately in determining whether the agency reasonably concluded that the awardee's proposed prices were realistic. Ultimately, GAO denied the protest, finding (based partly on the post-protest reevaluation) that the agency's conclusions were reasonable.

One exception to the* Boeing Sikorsky *rule is that, in the area of organizational conflicts of interest, GAO has recognized that an agency may waive an OCI at any time.

However, when used correctly, arguments based on the *Boeing Sikorsky* rule can be successful. For example, in *Deloitte Consulting, LLP*, the agency submitted post-protest explanations for its past performance relevancy ratings, attempting to explain conclusions that were not documented in the contemporaneous record.[20] However, GAO found that it could not conclude the agency's explanation was consistent with the underlying record. For example, the post-protest explanation stated that a point of contact for a past performance reference could not be reached. However, GAO noted that the contemporaneous record contained specific notations for other references that could not be reached and did not indicate an inability to reach the point of contact for this reference. In another example, the agency's post-protest statement alleged that the agency had received updated contact information for a reference, but the contemporaneous documentation showed that the agency made no changes to the reference. GAO, noting that the agency's post-protest explanations "are in multiple respects inconsistent with the underlying (insufficiently documented) contemporaneous record," concluded that there was insufficient support for the past performance rating and sustained the protest.[21]

Finally, it is important to note that there are some exceptions to the *Boeing Sikorsky* rule. First, in the area of organizational conflicts of interest (OCIs), GAO has recognized that an agency may waive an OCI at any time—even during the protest process. For example, in *AT&T Government Solutions, Inc.*, a protester alleged that the awardee of a contract had unacceptable OCIs.[22] After the protest was filed at GAO, the agency conducted an OCI analysis, which it submitted as part of the agency report. However, GAO advised the agency in an outcome prediction conference call that the analysis was insufficient to defeat the protest, and that GAO would likely sustain the protest. In response, three days before GAO's 100-day deadline to issue its decision, the agency submitted an OCI waiver signed by the head of the contracting activity, pursuant to FAR 9.503. Although the waiver was submitted in the heat of litigation and constituted a post-protest analysis, GAO did not apply the *Boeing Sikorsky* rule. Rather, GAO acknowledged that such waivers may be conducted at any time and dismissed the protest. As highlighted in this decision, an agency's OCI analysis—whether in the form of an OCI investigation and analysis or an OCI waiver—may be submitted to GAO at any time and is not subject to the *Boeing Sikorsky* rule.

Another area in which the *Boeing Sikorsky* rule does not apply relates to challenges to the decision to place a requirement under the Small Business Administration's (SBAs) section 8(a) business development program.[23] For example, in *Designer Associates, Inc.*, a protester challenged the Air Force's decision to offer a requirement for military housing to the SBA under the section 8(a) business development program.[24] The contemporaneous documentation in the agency report showed that in offering the requirement, the Air Force incorrectly represented to the SBA that the requirement had not been previously awarded to a small business firm. In reality, the requirement had been set aside for award to small business concerns since 1979. During the course of the protest, the SBA conducted a new adverse impact analysis and concluded that acceptance of the requirement would not have an adverse impact on other small business programs. Despite the fact that the new analysis was performed during the course of the protest, GAO relied on the SBA's new analysis to conclude that the protester had suffered no prejudice as a result of the Air Force's inaccurate statement. Thus, this is another area in which GAO has allowed an agency to submit a post-protest analysis or reevaluation without applying the *Boeing Sikorsky* rule to discount the new information.

Overall, the *Boeing Sikorsky* rule can be a useful protest argument when used properly to argue for less weight being given to arguments or reevaluations made in the heat of litigation. However, there are many ways in which protesters misuse this rule, resulting in a low success rate for these arguments at GAO. Knowing how to use the rule, and how not to, is essential when confronting post-protest statements submitted to GAO during the protest process.

Too Close at Hand

A final protest argument that is frequently misused is the "too close at hand" argument. The principle of "too close at hand" stems from GAO's 1997 decision in *International Business Systems, Inc.*, in which GAO sustained a protest challenging a past performance evaluation, finding that the agency acted unreasonably when it failed to consider certain information.[25] In that case, the agency refused to consider one of two relevant past performance references solely because the agency official responsible for completing the past performance reference form failed to do so. After reviewing the allegations and the agency report, GAO noted that the contract performance ignored by the contracting officer "involved the same agency, the same [contracting officer], and virtually the same services as" the procurement at issue.[26] GAO took issue with the agency's overly mechanical application of its past performance evaluation procedures that led to its refusal to consider the nearly identical past performance reference, stating that "some information is simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and consider, the information."[27] After concluding that the protester had suffered competitive prejudice as a result of the agency's unreasonable past performance evaluation, GAO sustained the protest. Since the issuance of *International Business Systems, Inc.*, the "too close at hand" argument has become a common argument in protesters' challenges to their evaluations. However, this argument is frequently unsuccessful because protesters either attempt to apply the principle to other evaluation factors that are not subject to the rule or misuse the argument.

For years, protesters have unsuccessfully attempted to expand the "too close at hand" holding to several other evaluation areas, including evaluations under the technical, experience, and cost factors. However, GAO has repeatedly rejected such attempts to expand the rule. For example, in *SNAP, Inc.*, a protester argued that the "too close at hand" rule should be applied in the context of an agency's evaluation of experience.[28] GAO rejected this argument, stating that while an agency *may* consider close at hand experience information known to the agency and not found in the firm's proposal, GAO will not require an agency to do so. Therefore, GAO "decline[d] to extend the doctrine" to the evaluation of offerors' experience.[29]

GAO has also declined to extend the "too close at hand" rule to the area of technical evaluations. For example, in *Aero Simulation, Inc.*, Aero Simulation argued that the evaluation of its technical approach to providing a visual display was unreasonable.[30] The protester's proposal contained only three sentences and a graph regarding the resolution of the display. Ultimately, the agency did not understand the actions taken by the protester to optimize its design because the protester failed to explain its approach in its proposal or in discussions with the agency, leading the agency to assign a significant weakness. Aero Simulation contended that an agency evaluator had participated in meetings under the current program when Aero Simulation presented the same method of calculating resolution. Therefore, the protester argued that the agency should have understood its response, and that this information was "too close at hand" for the agency to ignore. However, GAO again declined to extend the "too close at hand" doctrine beyond its original use in the past performance arena, noting instead that the protester should have included the information in its proposal.

Similarly, GAO has refused to apply the "too close at hand" principle to the area of cost evaluations. For example, in *Bowhead Science & Technology, LLC*, Bowhead had previously entered into a settlement agreement with the agency providing that if Bowhead was unable to certify as an 8(a) business with regard to any opportunities under its SeaPort-e contract, then it would be permitted to propose another of its small or 8(a) companies as the prime contractor.[31] Bowhead submitted a proposal in response to a solicitation, but because the firm was graduating from the 8(a) program, it would be unable to perform the requirement itself. The protester argued that the agency knew that Bowhead intended to transfer the task order to its subsidiary and that the agency had access to the subsidiary's indirect rates because the subsidiary also had a SeaPort-e contract, which the agency could have reviewed to obtain the subsidiary's indirect rates. Instead, however, the agency evaluated the protester's prices based on the prices submitted in Bowhead's proposal. Bowhead protested, arguing that the information regarding the subsidiary's pricing was "too close at hand" for the agency to ignore in its cost evaluation. However, GAO rejected the protester's attempt to expand the "too close at hand" rule, once again ensuring that the rule is applied only in the area of past performance evaluations.

Moreover, the "too close at hand" argument is often unsuccessful even when protesters attempt to use it to challenge past performance evaluations. This is because protesters attempt to use the rule in situations that were not envisioned by the *International Business Systems, Inc.* decision. First, protesters often attempt to argue that agency evaluators acted unreasonably in failing to consider information when the protester itself bore the responsibility of presenting that information to the agency. For example, in *FN Manufacturing LLC*, a protester attempted to use the "too close at hand" rule to argue that the agency acted unreasonably in failing to obtain information about a past performance reference that the protester had not included in its proposal.[32] GAO rejected this argument, noting that the "too close at hand" doctrine "is not intended to remedy an offeror's failure to include information in its proposal."[33] GAO explained:

> Where an offeror is in control of the past performance information contained in its proposal—and not reliant on third parties to submit that information—it exercises its own judgment as to the information that the agency should consider. Under those circumstances, there is "no inequity" in an agency's decision to base its evaluation on an offeror's proposal as written, instead of supplementing the proposal with the agency's understanding of the offeror's performance under other contracts not cited by the offeror.[34]

Therefore, the "too close at hand" doctrine cannot be used to remedy a company's failure to include information in its proposal. It is a well-established principle that offerors are responsible for submitting a well-written proposal with adequately detailed information that allows for a meaningful review by the procuring agency, and protesters cannot use the "too close at hand" rule to shift the burden to an agency.

Protesters often unsuccessfully argue that the "too close at hand" doctrine should require an agency to research offerors using publicly available resources.

Finally, protesters often unsuccessfully argue that the "too close at hand" doctrine should operate to require agency officials to obtain information about offerors from publicly available sources, such as news reports, SEC filings, inspector general reports, and legal filings. These arguments also prove to be unsuccessful. For example, in *TriWest Healthcare Alliance Corp.*, a protester argued that the agency acted unreasonably for failing to downgrade the awardee's past performance due to: (1) information in the *Wall Street Journal* and an online video relating to a settlement of an investigation by the New York Attorney General; (2) information in the awardee's annual report and a Reuters news report relating to the settlement of class action lawsuits; (3) a news report from the CBS News website discussing fines levied against a subsidiary of the awardee; (4) a news report and information in the awardee's annual report relating to fines levied against a company acquired by the awardee for violations of California insurance laws; (5) a Consumer Reports publication; and (6) an article in the *Atlantic* ranking companies in the industry with regard to public opinion.[35] GAO rejected the argument, noting that in order to succeed on a "too close at hand" argument, a protester needs to show that the agency was aware, or should have been aware, of the information and that the agency acted unreasonably in failing to consider it.[36] GAO has also rejected attempts to apply the "too close at hand" principle to inspector general reports where evaluators were unaware of the reports,[37] accident reports,[38] and GAO audit reports.[39]

In short, if a protester hopes to succeed on a "too close at hand" argument, it should begin by demonstrating to GAO that the information relates to past performance, was known (or should have been known) to the agency at the time of the evaluation, was relevant to the agency's evaluation of past performance, and was not something that the protester should have included (but failed to) in its proposal. Finally, protesters must also demonstrate that the agency's failure to consider the information resulted in competitive prejudice.

Conclusion

Although protesters arguing the "bait and switch" rule, the *Boeing Sikorsky* rule, and the "too close at hand" principle are often unsuccessful, having a better understanding of these arguments will allow protesters to make more effective use of them when litigating a protest before GAO. By avoiding the pitfalls described above and applying these principles in the proper way, protesters stand a much better chance of success when pursuing their rights in a bid protest at GAO. PL

Endnotes

1. Patricio Enters. Inc., B-412738 *et al.*, 2016 CPD ¶ 145 (Comp. Gen. May 26, 2016).
2. B-409072 *et al.*, 2014 CPD ¶ 32 (Comp. Gen. Jan. 16, 2014).
3. Allied Tech. Grp., Inc., B-412434 *et al.*, 2016 CPD ¶ 74 (Comp. Gen. Feb. 10, 2016); STG, Inc., B-411415 *et al.*, 2015 CPD ¶ 240 (Comp. Gen. July 22, 2015); McConnell, Jones, Lanier & Murphy LLC—Costs, B-407706.3, 2013 CPD ¶ 125 (Comp. Gen. May 28, 2013).
4. B-406926 *et al.*, 2013 CPD ¶ 88 (Comp. Gen. Oct. 2, 2012).
5. *See, e.g.*, AdapTech Gen. Sci., LLC, B-293867, 2004 CPD ¶ 126 (Comp. Gen. June 4, 2004) (denying bait and switch allegation where there was no evidence that the agency relied on the proposed personnel in its evaluation).
6. B-278855.2, 98-2 CPD ¶ 53 (Comp. Gen. July 30, 1998).
7. B-412738 *et al.*, 2016 CPD ¶ 145 (Comp. Gen. May 26, 2016).
8. *Id.* at 15.
9. *See, e.g.*, *id.*; ManTech Advanced Sys. Int'l, Inc., B-255719.2, 94-1 CPD ¶ 326 (Comp. Gen. May 11, 1994) (sustaining protest where awardee submitted the résumés of 15 incumbent employees and represented that it had employment commitments from each of the employees, when in fact it did not have permission to use their résumés in its proposal and many of the employees were unaware that they had been proposed); Informatics, Inc., B-188566, 78-1 CPD ¶ 53 (Comp. Gen. Jan. 20, 1978) (excluding awardee's proposal for misrepresentation of results of a survey of the availability of incumbent's personnel).
10. B-277263.2 *et al.*, 97-2 CPD ¶ 91, at 15 (Comp. Gen. Sept. 29, 1997).
11. *Id.* at 14.
12. *Id.* at 15.
13. *Id.*
14. Green Earthworks Constr., Inc., B-410724 *et al.*, 2015 CPD ¶ 68, at 7 n.3 (Comp. Gen. Feb. 2, 2015) (citing SRM Grp., Inc., B-410571 *et al.*, 2015 CPD ¶ 25, at 6 (Comp. Gen. Jan. 5, 2015)).
15. B-407022 *et al.*, 2012 CPD ¶ 291 (Comp. Gen. Oct. 10, 2012).
16. *Id.* at 5.
17. Global Integrated Sec. (USA) Inc., B-408916.3 *et al.*, 2014 CPD ¶ 375, at 11 (Comp. Gen. Dec. 18, 2014) (citing Uniband, Inc., B-289305, 2002 CPD ¶ 51, at 8–9 (Comp. Gen. Feb. 8, 2002); Sci. & Commercial Sys. Corp.; Omni Corp., B-283160 *et al.*, 99-2 CPD ¶ 78, at 18–19 (Comp. Gen. Oct. 14, 1999); Marathon Watch Co. Ltd., B-281876 *et al.*, 99-1 CPD ¶ 89, at 6–7 (Comp. Gen. Apr. 22, 1999); and Advanced Data Concepts, Inc., B-277801.4, 98-1 CPD ¶ 145, at 4–5 (Comp. Gen. June 1, 1998)).
18. B-289305, 2002 CPD ¶ 51.
19. *Id.* at 8–9.
20. B-412125.2 *et al.*, 2016 CPD ¶ 119 (Comp. Gen. Apr. 15, 2016).
21. *Id.* at 16.
22. B-407720 *et al.*, 2013 CPD ¶ 45 (Comp. Gen. Jan. 30, 2013).
23. As explained in FAR 19.800(a): "Section 8(a) of the Small Business Act (15 U.S.C. 637(a)) established a program that authorizes the Small Business Administration (SBA) to enter into all types of contracts with other agencies and award subcontracts for performing those contracts to firms eligible for program participation. This program is the '8(a) Business Development Program,' commonly referred to as the '8(a) program.'"
24. B-293226, 2004 CPD ¶ 114 (Comp. Gen. Feb. 12, 2004).
25. B-275554, 97-1 CPD ¶ 114 (Comp. Gen. Mar. 3, 1997).
26. *Id.* at 4.
27. *Id.* at 5.
28. B-409609 *et al.*, 2014 CPD ¶ 187 (Comp. Gen. June 20, 2014).
29. *Id.* at 8.
30. B-411373 *et al.*, 2015 CPD ¶ 233 (Comp. Gen. July 2, 2015).
31. B-409871, 2014 CPD ¶ 248 (Comp. Gen. Aug. 26, 2014).
32. B-407936 *et al.*, 2013 CPD ¶ 105 (Comp. Gen. Apr. 19, 2013).
33. *Id.* at 4.
34. *Id.*
35. B-401652.12 *et al.*, 2012 CPD ¶ 191, at 32 (Comp. Gen. July 2, 2012).
36. *Id.* at 33.
37. Exelis Sys. Corp., B-407111 *et al.*, 2012 CPD ¶ 340 (Comp. Gen. Nov. 13, 2012); Carthage Area Hosp., Inc., B-402345, 2010 CPD ¶ 90, at 8 (Comp. Gen. Mar. 16, 2010). *But see* Contrack Int'l, Inc., B-401871.5 *et al.*, 2010 CPD ¶ 126, at 7 (Comp. Gen. May 24, 2010) (sustaining protest where Army was aware of relevant Department of Defense inspector general report, but failed to evaluate that report as part of its past performance evaluation).
38. Firestorm Wildland Fire Suppression, Inc., B-310136, 2007 CPD ¶ 218 (Comp. Gen. Nov. 26, 2007).
39. Shaw-Parsons Infrastructure Recovery Consultants, LLC; Vanguard Recovery Assistance, Joint Venture, B-401679.4 *et al.*, 2010 CPD ¶ 77 (Comp. Gen. Mar. 10, 2010).

NEWS FROM THE CHAIR

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and Steptoe & Johnson. Additionally, we had 56 sponsors for our Section reception. To all our hosts and sponsors, thank you very much!

Council Meeting. Here are some of the highlights from the Section Council Meeting on Saturday after the Federal Procurement Institute. The full Council agenda book with committee reports can be downloaded from the Section website.

We had two excellent presentations by members of the Young Lawyers Committee. Christian Curran, Blank Rome LLP, explained the tension between a contractor's disclosure obligations and DoD's proposed rule regarding "Withholding of Unclassified Technical Data and Technology from the Public Disclosure." Ashley N. Amen, Smith Pachter McWhorter PLC, discussed the current state of the law on statute of limitations under the Contract Disputes Act, following the Federal Circuit's December 2014 decision in *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315 (Fed. Cir. 2014). The handouts for both presentations can be found on the Section website.

The Publications Board reported that the fourth edition of the *Government Contract Law* has been published. John Jones and Robert Wu collated and edited the deskbook's individual chapters, which were prepared by various Section members. This deskbook was originally created by the faculty at the U.S. Army Judge Advocate General's School as a resource for U.S. Army JAG officers and civilian attorneys in the field. The Section has updated it and added some new content. The deskbook is an excellent resource for government contracts practitioners with references to statutes, regulations, and cases.

The Publications Board also reported that three other publications are slated for publication later this year. These include a contract claims deskbook edited by John Prairie and Paul Debolt, an international procurement monograph edited by Andy Irwin, Marques Peterson, and Erin Felix, and a suspension and debarment manual edited by Mike Wagner and Fred Levy. Finally, the Procurement Fraud Committee is working on a False Claims Act monograph that we hope will be ready in the fall.

Separately, the Council endorsed the creation of a Mergers and Acquisitions Committee. The new committee will track developments in mergers and acquisitions as they relate to government contracts, such as novation procedures, organizational conflicts of interest, corporate responsibility, past performance ratings, and transfer of facilities clearances.

Scholarships. The Section has always made diversity and inclusion a priority. To that end, the Section has several types of scholarships, including two-year scholarships that reimburse the cost of attending the Section's programs and Council meetings. Additional scholarships will be rolled out later this year. If the cost of participating in the Section has been a limiting factor, please look at the scholarship page on our website.

Comment Letters. The Section's Regulatory Coordinating Committee (RCC), led by co-chairs Craig Smith and Samantha Lee, performs an invaluable service to the Section by identifying proposed regulations and circulating them to the appropriate committees for review and potential comment. The co-chairs spend countless hours coordinating the drafting, review, voting, and submission of these comments. While challenging, it is important for each committee to put forth the effort needed to ensure that the Section continues to submit thoughtful comment letters when appropriate. The Section applauds the RCC co-chairs and each of the participating committees for their hard work and diligence. The most recent comment letters can be found on the Section website in the Council agenda book.

Annual Meeting. The Annual Meeting will be held in New York City from August 10–12, 2017. Co-chairs Annejanette Heckman Pickens, Richard Paul Rector, and Jason Nicholas Workmaster are working diligently to assemble a dynamic program featuring six CLE panel discussions on the following topics:

- Practical Considerations for Managing False Claims Act Liability and Internal Investigations
- Trends and Best Practices in Commercial Item Determinations
- Capturing International Government Contracts: Key Considerations for U.S. Government Contractors Seeking International Business Opportunities
- New Challenges for Supply Chains in Federal Contracting
- Construction Issues in Federal Leasing
- New Directions in Federal Procurement

Detailed information regarding the Section's CLE program will be available on the Section website.

Membership. Increasing membership in both the ABA and the Section remains a top priority. I encourage each member of the Section to tell non member colleagues of the many advantages of joining the Section. If you are in a position in your organization to facilitate membership and participation in the Section, please do so.

I want to close with a thank you to everyone who has taken an active role in the Section. It makes a huge difference. Our committees continue to track developments in procurement law and to share that information with Section members. Our program co-chairs work hard to plan excellent programs. And, our Director, Patty Brennan, has worked closely with the program co-chairs at all stages of the planning process to bring about successful programs.

See you in New York City! PL

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created on the government, it held that "[i]n enforcing grants, the Government is bound only by its express undertakings."[160]

In *Wheeling*, the court also noted that while Tucker Act jurisdiction is available to compensate for a specific, past injury, the district court is a proper forum for litigation involving "relationships . . . that occur over time and that involve constantly shifting balance sheets."[161] In *Bowen v. Massachusetts*, the Supreme Court concluded that because the award sought concerned entitlement to grant money in anticipation of future projects, the relief was primarily prospective in nature and therefore properly reviewable in the district court.[162] In contrast, in *Wheeling*, the case concerned entitlement to grant money for an isolated project that had been completed. The relief sought was for a one-time payment rather than an open account and an ongoing relationship. Because the plaintiff's relationship with the government was not a continuous one, and because it sought a remedy that was retroactive in nature (monetary compensation for an injury to property), the court concluded that the relief sought constituted "money damages" and was properly before that court.[163]

MOUs and MOAs

State and local government entities should be aware that MOUs and MOAs have complex case law with respect to Tucker Act jurisdiction. In the case of *Town of North Bonneville, Washington v. United States*,[164] the town filed a petition to obtain judgment for breach of two agreements in a series of instruments that concerned the relocation of the town as part of a project to create another powerhouse at Bonneville Dam. The issues before the court included whether the instruments were contracts within the scope of the Tucker Act. The defendant argued that the court lacked jurisdiction because the instruments—an MOA and a relocation contract—were not contracts cognizable under the Tucker Act.[165] In concluding that the two instruments were valid and binding, the court noted that both agreements incorporated by reference relevant provisions of the preceding instruments, included standard provisions for government contracts, incorporated numerous attachments by reference, and were properly executed by the parties, and that the signatories were representatives who had authority to sign the instruments.[166]

The defendant additionally argued that assuming the MOA and relocation agreement were binding agreements, the court could not render a judgment because such agreements were not the type or class covered by the Tucker Act.[167] While the defendant recognized that the United States waived its right to sovereign immunity for the classes of claims identified, it asserted that there was no other source of law that created an entitlement to the monetary damages claimed by the plaintiff. The defendant contended that no provision of the documents at issue conferred any entitlement to money damages and that the authority for the contractual instruments was limited to specific statutes that excluded compensation beyond the town's right to just compensation.[168] The court disagreed, stating that claims based on breach of contract versus claims founded upon the Constitution, a statute, or a regulation are distinguishable. If the claim is based on the Constitution, a statute, or a regulation, then the court must inquire whether the source of substantive law can fairly be interpreted as mandating compensation by the federal government for damages sustained.[169] However, when Congress gives specific authority to federal officials to negotiate and enter into contracts on behalf of the United States, a court is not required to make further inquiry to determine whether the source of substantive law separately mandates compensation. The law of contracts mandates the compensation that the United States is obligated to pay for its breach.[170]

The defendant further argued that by their terms, the MOA and relocation contract never effectively created any legal obligation for the U.S. government because they required adoption by Congress of certain clarifying language.[171] The court disagreed, noting that the agreements incorporated by reference and the chronology of congressional reports revealed that the foregoing conditions were satisfied.

In a related case, *Kentucky v. United States*,[172] the plaintiff and the Army Corps of Engineers (Corps) entered into an MOU in order to reopen locks and dams. The MOU provided that the Corps was to perform one-time maintenance and repairs, and the plaintiff was to make a good-faith effort to bring about the enactment of legislation and appropriation needed to accept the fee simple title to the land and structures and to maintain the facilities.[173] The plaintiff claimed that the Corps failed to perform one-time maintenance and repairs, as required by the MOU, and therefore the Corps defaulted on its obligations under the MOU. The defendant asserted that for purposes of Tucker Act jurisdiction, the MOU could not be considered an express contract because it lacked sufficient detail in its terms.[174] In ruling that the MOU was not an express contract, the court compared the MOU before it with the MOA in *North Bonneville*. It stated that the MOA in *North Bonneville*, unlike the MOU in *Kentucky*, was one in a series of instruments and thus the parties incorporated by reference relevant provisions. The instruments there also included standard provisions for government contracts whereas the MOU in *Kentucky* did not. Thus, the MOA in *North Bonneville* did not stand alone. Lastly, the MOU lacked a provision stating that it was binding, or any evidence of the parties' intent to make the MOU binding.[175] Without more detail as to forms of dispute resolution or remedy for breach, the MOU failed to be an express contract. Thus, the court did not have Tucker Act jurisdiction and granted the defendant's motion to dismiss.

Finally, the defendant in *North Bonneville* argued that the MOA and relocation contract were not binding because they were preliminary understandings relative to future procedures.[176] The court acknowledged that while the MOA and relocation contract established procedures in which some matters were left for future resolution, "[b]oth instruments . . . embodied mutual agreements that resolved outstanding differences and caused the parties to alter their positions in reliance upon the commitments that then were made."[177] The fact that the documents looked toward additional agreements in the future did not make them any less a contract because the documents evidenced a mutuality of obligation and intent by the parties at the time they were executed.[178] Thus, the USCFC determined that the MOA and relocation contract were included in the class of contracts subject to Tucker Act jurisdiction.

Lessons Learned

As the *Anchorage* and *California Department of Water Resources* cases demonstrate, contracts between state and local government entities and the federal government typically involve complex problems that the state and local bodies need to solve (e.g., a new port or water distribution facilities), complex contractual arrangements, and hundreds of millions of dollars. As both cases indicate, the parties did not include clearly stated dispute resolution procedures to resolve disagreements. State and local government agencies would be well served to seek such terms and conditions in their agreements with the federal government. In both cases, the absence of such provisions were cited by the federal government as grounds to challenge jurisdiction.

State and local government agencies should expect the federal government to continue to attempt to expand the *Rick's Mushroom* decision to Tucker Act jurisdiction involving cooperative agreements. As this article indicates, that is not the holding in *Rick's Mushroom,* and state and local government bodies need to be ready to defend against such a position.

State and local government organizations also need to understand the basic differences between the Tucker Act express contract jurisdiction over virtually all government contracts and the CDA coverage of contracts where the federal government is procuring supplies, services, or construction. PL

Endnotes

1. 119 Fed. Cl. 709 (2015).
2. 28 U.S.C. § 1491(a)(1).
3. 128 Fed. Cl. 603 (2016).
4. 41 U.S.C. §§ 7101–7109.
5. 28 U.S.C. § 1491(a)(1).
6. 650 F.2d 264, 268 (Ct. Cl. 1981).
7. *See* Hamlet v. United States, 63 F.3d 1097, 1101 (Fed. Cir. 1995).
8. United States v. Winstar Corp., 518 U.S. 839, 885 (1996) (plurality opinion).
9. Holmes v. United States, 657 F.3d 1303, 1314 (Fed. Cir. 2011).
10. 71 Fed. Cl. 696, 700 (2006).
11. *Id.* at 699.
12. *Id.* at 698–99.
13. *Id.* at 698 (quoting Kania v. United States, 650 F.2d 264, 268–69 (Ct. Cl. 1981)).
14. 657 F.3d 1303, 1314 (Fed. Cir. 2011).
15. *Id.* at 1315 n.8.
16. *Id.* at 1313.
17. *Id.* at 1314.
18. *Id.* at 1315.
19. *Id.* at 1314.
20. 463 U.S. 206 (1983).
21. *Id.* at 218 (emphasis added).
22. *Id.* at 219–28.
23. 424 U.S. 392 (1976).
24. *Id.* at 400.
25. *Id.*
26. 372 F.2d 1002 (Ct. Cl. 1967).
27. 46 U.S.C. §§ 808, 835.
28. *Eastport*, 372 F.2d at 1007 (emphasis added).
29. 41 U.S.C. § 7102(a).
30. *See id.* §§ 7103–7105.
31. *Id.* § 7103(a)(4).
32. *Id.* § 7102.
33. Cal. Dep't of Water Res. v. United States, 128 Fed. Cl. 603, 610 (2016) (citing Palafox St. Assocs., L.P. v. United States, 114 Fed. Cl. 773, 780 (2014)).
34. *Id.*
35. 31 U.S.C. § 6304.
36. *Id.*
37. *Id.* § 6305.
38. *Id.*
39. Anchorage v. United States, 119 Fed. Cl. 709, 710 (2015).
40. *Id.*
41. *Id.*
42. *Id.* at 711.
43. *Id.* at 714.
44. *Id.* at 711.
45. *Id.*
46. *Id.* at 713.
47. *Id.*
48. *Id.* at 711.
49. *Id.*
50. *Id.*
51. *Id.* at 713.
52. *Id.* at 711–12.
53. *Id.* at 710–11.
54. *Id.*
55. *Id.* at 711.
56. *Id.*
57. *Id.* at 712.
58. *Id.* at 714 n.1.
59. *Id.* at 710.
60. *Id.* at 713.
61. 76 Fed. Cl. 250, 258 (2007), *aff'd*, 521 F.3d 1338 (Fed. Cir. 2008).
62. *Anchorage*, 119 Fed. Cl. at 712.
63. *Id.* at 713.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 714.
71. *Id.*
72. *Id.*
73. Cal. Dep't of Water Res. v. United States, 128 Fed. Cl. 603, 609 (2016).
74. *Id.* at 605–06.
75. *Id.* at 608.
76. *Id.* at 606.
77. *Id.*
78. *Id.*

79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 608.
84. *Id.*
85. *Id.*
86. *Id.* at 609.
87. *Id.* (quoting United States v. Testan, 424 U.S. 392, 398 (1976)).
88. *Id.* (citing Cabral v. United States, 317 F. App'x 979, 981 (Fed. Cir. 2008)).
89. *Id.* at 610.
90. *Id.*
91. *Id.*
92. *Id.* (citing Int'l Indus. Park, Inc. v. United States, 95 Fed. Cl. 63, 67 (2010)).
93. *Id.* (quoting Institut Pasteur v. United States, 814 F.2d 624, 627 (Fed. Cir. 1987)).
94. *Id.* at 611 (quoting *Institut Pasteur*, 814 F.2d at 627).
95. 76 Fed. Cl. 250, 258 (2007), *aff'd*, 521 F.3d 1338 (Fed. Cir. 2008) (upholding the trial court's analysis but not specifically addressing the trial court's cooperative agreement analysis or reliance on 31 U.S.C. § 6305).
96. *Cal. Dep't of Water Res.*, 128 Fed. Cl. at 611.
97. *Id.* at 612.
98. *Id.*
99. *Id.* at 613.
100. *Id.*
101. *Id.*
102. *Id.* at 614.
103. *Id.* at 607.
104. *Id.* at 614.
105. *Id.* at 610.
106. *Id.* at 611.
107. *Id.* at 615.
108. *Id.*
109. *Id.*
110. Rick's Mushroom Serv., Inc. v. United States, 521 F.3d 1338, 1340 (Fed. Cir. 2008).
111. *Id.*
112. *Id.*
113. *Id.* at 1341.
114. *Id.*
115. *Id.*
116. *Id.* at 1341–42.
117. *Id.* at 1342.
118. *Id.*
119. *Id.*
120. *Id.* (citing 31 U.S.C. § 1341).
121. *Id.* at 1343.
122. *Id.*
123. *Id.* at 1348.
124. FAR 2.101 ("*Contract* means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.* For a discussion of the various types of contracts, see [FAR] part 16.").
125. 33 Fed. Cl. 426 (1995), *aff'd without opinion*, 104 F.3d 1321 (Fed. Cir. 1997).
126. 31 U.S.C. §§ 6301–6308.
127. *Trauma Serv. Grp.*, 33 Fed. Cl. at 429.
128. *Id.*
129. *Id.* at 430.
130. *Id.*
131. 979 F.2d 200, 201–02 (Fed. Cir. 1992).
132. *Trauma Serv. Grp.*, 33 Fed. Cl. at 432.
133. *Id.* at 432–33.
134. Trauma Serv. Grp., Ltd. v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997).
135. *Id.*
136. *Id.* at 1326.
137. *Id.* (citations omitted).
138. 104 F.3d 1314 (Fed. Cir. 1997).
139. *Id.* at 1316–17.
140. Total Med. Mgmt., Inc. v. United States, 29 Fed. Cl. 296 (1993).
141. *Id.* at 298–99.
142. *Total Med. Mgmt.*, 104 F.3d at 1320.
143. Trauma Serv. Grp., Ltd. v. United States, 33 Fed. Cl. 426, 430–31 (1995).
144. *Total Med. Mgmt.*, 104 F.3d at 1320.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 1320–21.
151. *Id.* at 1321.
152. Total Med. Mgmt., Inc. v. United States, No. 96-5013, 1997 U.S. App. LEXIS 6594 (Fed. Cir. Mar. 27, 1997), *cert denied*, 522 U.S. 857 (1997).
153. City of Wheeling v. United States, 20 Cl. Ct. 659, 663 (1990), *aff'd*, 1991 U.S. App. Lexis 1775 (Fed. Cir. 1991).
154. *Id.* at 662.
155. *Id.*
156. *Id.* at 663.
157. *Id.*
158. *Id.* at 664 n.4 (quoting Bowen v. Massachusetts, 487 U.S. 879, 905 n.42 (1988)).
159. Mo. Health & Med. Org., Inc. v. United States, 226 Ct. Cl. 274 (1981).
160. *Id.* at 278–79.
161. 20 Cl. Ct. at 664 (quoting *Bowen*, 487 U.S. at 904 n.39).
162. *See* 487 U.S. at 909–12.
163. *Wheeling*, 20 Cl. Ct. at 664.
164. 5 Cl. Ct. 312, 313 (1987). The issue of jurisdiction was not discussed in the later proceeding, which concerned damages. Town of North Bonneville, Wash. v. United States, 11 Cl. Ct. 694, *aff'd in part, rev'd in part*, 833 F.2d 1024 (Fed. Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988).
165. *North Bonneville*, 5 Cl. Ct. at 318.
166. *Id.* at 315.
167. *Id.* at 319.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 320.
172. 27 Fed. Cl. 173 (1992).
173. *Id.* at 174–75.
174. *Id.* at 176.
175. *Id.*
176. 5 Cl. Ct. at 322.
177. *Id.*
178. *Id.* at 323.

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2017–2018 Nominating Committee Appointed

The Section's Nominating Committee is now accepting nominations and expressions of interest for leadership positions for 2017–2018. The open positions are:

- **Secretary**
- **Budget Officer and Finance Officer** (term ending August 2020)
- **Section Delegate to the ABA House of Delegates** (term ending August 2020)
- **Four Council members** (three-year terms ending August 2020)
- **Young Lawyer Council member** (under 36 years of age or admitted to practice less than five years) (term expiring August 2019)

If you've been active in the Section over the years by frequently attending Council meetings and educational programs, if you've been the chair, co-chair, or vice-chair of one or more committees, and/or if you've been a contributor to the Section's journal or newsletter, please consider submitting your name for consideration for one of the officer, Young Lawyer Council member, or Council positions for 2017–2018.

Please keep in mind that Council membership is for a three-year term, during which Council members are expected to regularly comment on, participate in, and contribute to various Section matters, as well as attend Section programs that precede the Council meetings. A strong preference, therefore, will be given to those individuals who have demonstrated a willingness to be active Council participants. A preference will also be given to nominees for Council member positions who have not previously been elected for a three-year term to the Section Council.

If you have a strong history of service to the Section, please consider enhancing your involvement as an officer or Council member by submitting your name to the Nominating Committee with a statement of interest along with a list of your Section activities and résumé. Please note that the Nominating Committee must submit its report no later than June 12, 2017, so send in your letter of interest by April 27 if you would like to be considered.

The following Section members have been appointed as the Nominating Committee:

David G. Ehrhart, Chair david.g.ehrhart@lmco.com

David Black david.black@hklaw.com

Nicole Owren-Wiest nowrenwiest@wileyrein.com

Any Section member wishing to make a recommendation to the Nominating Committee is encouraged to contact directly any of the above-named Committee members.

The Nominating Committee will report to the Section at the Annual Business Meeting on Saturday, August 12, 2017, at 12:15 p.m., at the Marriott Marquis Hotel in New York, New York, where the Section membership will vote on the nominees. The Committee's report will also be available on the Section website on or before June 12, 2017.