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REPORT

Past Performance

Revisiting the Past: *Todd Construction, Inc v. U.S.* and Judicial Review of Past Performance Evaluations, Part II[1]

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This is the second of two articles discussing the recent *Todd Construction, Inc. v United States* decision at the court of Federal Claims, 85 Fed. Cl. 34 (2008), in which the court determined that Todd Construction's challenge to the accuracy and procedural propriety of its past performance evaluation was a ''claim'' pursuant to the Contract Disputes Act of 1978, 41 U.S.C. § § 601 *et seq*., and that the court therefore had jurisdiction under the Tucker Act. *See* 28 U.S.C. § 1491(a)(2). The first article addressed the issue of jurisdiction, as well as the yet unanswered question of what standard of review the court should use in reviewing the agency's performance evaluation. However, questions regarding the available or appropriate relief remain.

At the end of its Opinion and Order in *Todd Construction*, the court asked:

> Whether the court possesses the authority, were it to declare that the final decision is unlawful, to remand the matter to the agency for further action;
>
> Whether the court possesses the injunctive power to order the agency to remove the final performance evaluation from the CCASS database;
>
> Whether the court possess authority to order correction of plaintiff's performance evaluations.

This second article addresses the issue of relief, and what the court can and should do if it determines that a contractor's claim under the CDA challenging a past performance evaluation has merit. First, there is a threshold legal issue—whether the court has the authority to award the required declaratory or injunctive relief needed to remedy such claims. Second, there are the practical concerns—what the court should *do* with respect to successful challenges of past performance evaluations.

A. The Authority of the court of Federal Claims to Remedy Past Performance Claims

The Court of Federal Claims is a court of limited jurisdiction. The scope and nature of the relief it may grant is defined by the Tucker Act, 28 U.S.C. § 1491. Prior to 1992, the court's authority to grant relief for non-monetary claims was quite limited. *See, e.g., Overall Roofing & Construction, Inc. v. United States*, 929 F.2d 687 (Fed. Cir. 1991) (holding that the court of Federal Claims lacked jurisdiction to review a termination for default not involving a monetary claim). However, since Federal Courts Administration Act of 1992, Pub. L. No. 102-572 (1992), amended the Tucker Act, the

[1] This article has been presented in two parts. The first part provided background and addressed jurisdiction generally and the applicable standard of review (91 FCR 125, 2/17/09). This part addresses the appropriate relief with respect to claims alleging improprieties in past performance evaluations under the Contract Disputes Act.

 ISSN 0014-9063

court has had broad authority to grant non-monetary relief in the form of declaratory and/or injunctive relief. The current Tucker Act now provides:

> The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978 [41 U.S.C. § 609(a)(1)], including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, **and other nonmonetary disputes on which a decision of the contracting officer has been issued** under section 6 of that Act [41 USCS 605].

28 USC. § 1491(a)(2) (emphasis added). The Federal Circuit has determined that this language granted the court broad authority to review nonmonetary claims. In *Alliant Techsystems Inc. v. U.S.*, 178 F.2d 1260 (1999), the Federal Circuit explained:

> The government's definition of nonmonetary disputes is not supported by the language of the statute, by its legislative history, or by this court's precedents. In defining the jurisdiction of the court of Federal Claims over CDA disputes, Congress has chosen expansive, not restrictive, language. As amended in 1992, the Tucker Act gives the court of Federal Claims jurisdiction ''to render judgment upon any claim by or against . . . a contractor under section 10(a)(1) of the Contract Disputes Act, including [certain specific kinds of nonmonetary disputes], and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of the [CDA].'' 28 U.S.C. § 1491(a)(2). Significantly, that portion of the statute begins by broadly granting the court jurisdiction over ''any claims''; it starts the list of specific kinds of nonmonetary disputes with a nonrestrictive term (''including''); and it ends the list with equally nonrestrictive language (''and other nonmonetary disputes''). The government's argument for a restrictive definition of the term nonmonetary disputes is at odds with the open-ended language used in the statute.

Subsequent decisions of the court of Federal Claims have reinforced this interpretation and confirmed that the court has broad power to grant equitable relief based on nonmonetary claims. For example, in *Health Insurance Plan of Greater New York v. United States*, the court rejected the defendant's argument that the exercise of declaratory jurisdiction required the court to find that the prerequisites were met for requiring specific performance, and reiterated that its equitable jurisdiction for nonmonetary claims under the CDA is broad and expansive. In *Armour of America v. United States*, the court explained: ''[t]he statutory provision cited by Plaintiff [28 U.S.C. § 1491(a)(2)] does in fact grant this court jurisdiction to give equitable relief for nonmonetary claims under the CDA. 69 Fed. Cl. 587, 591 (2006).[2]

While its broad and expansive powers to provide equitable relief for nonmonetary claims have been established by a line of cases subsequent to the Tucker Act amendments, the form of this equitable power remains unclear. For example, though the court addressed the specific issue of whether it can provide equitable relief for a claim alleging an improper past performance evaluation in one case, the case settled before the court reached the stage of fashioning relief, and offers no guidance regarding the relief itself. *Record Steel and Construction v. United States*, 62 Fed. Cl. 508 (2004). It is therefore yet to be seen how the court will fashion relief, taking into consideration prudential and practical limitations. *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1270 (Fed. Cir. 1999) (in explaining the difference between prudential versus jurisdictional considerations, the Federal Circuit found that ''[t]he government's argument, however, confuses the question whether the court of Federal Claims had jurisdiction to entertain Alliant's complaint with the question whether the court should grant relief on the merits and what form such relief should take.'').[3]

B. What Can or Should the court Do to Vindicate a Successful Contractor Challenge to a Past Performance Evaluation?

Notwithstanding this broad authority to issue equitable relief,[4] Court must still be guided by pragmatic considerations.

First, where the court finds that a past performance evaluation is flawed, it needs to take steps to assure that the contractor is not injured in the short term based on that flawed evaluation. At a minimum, this would suggest that the agency should be prohibited from using that flawed evaluation or sharing it with other agencies for their use. *Cf. Serco Inc. v. United States*, 81 Fed. Cl.

[2] *See also K & S Construction v. United* States, 35 Fed. Cl. 270, 292 (1996) (noting that in upholding the court of Federal Claims equitable jurisdiction over nonmonetary contract claims arising under the CDA, the Federal Circuit relied on the expansive and open-ended language used by Congress in amendments to the Tucker Act); *Alaska Pulp Corp. v. United States*, 38 Fed. Cl. 141, 144-45 (1997) (''Where, as here, a claim is made under the [CDA], the court's ability to provide equitable relief is defined by 28 U.S.C. § 1491(a)(2). . . . The plain language of the statute, therefore, indicates that the court has jurisdiction to render judgments in both monetary and nonmonetary disputes where a decision of the contracting officer has been rendered according to the provisions of the CDA.'') (internal citations omitted); *Dangfeng Shen Ho v. United States*, 49 Fed. Cl. 96, 101 (2001) (''This court does not lose jurisdiction over plaintiff's nonmonetary claims arising under the CDA when it dismisses her monetary claims. The Tucker Act does not require that nonmonetary CDA claims be incident to monetary claims for this court to exercise jurisdiction.'').

[3] When prudential concerns have been raised in the context of a nonmonetary claim under the CDA, the concern has generally been related to claims brought *during* contract performance, where money damages may be available at a later point to remedy the improper agency action. In that context, the Federal Circuit has noted that it may make sense for the court to decline to issue declaratory judgment during performance and await a later equitable adjustment claim by the contractor. *See Alliant Techsysts., Inc. v. United States*, 178 F.3d 1260, 1271 (Fed. Cir. 1999). That prudential concern is not present in a challenge to a past performance evaluation, which is brought after completion of performance and could not be subsequently redressed with money damages.

[4] The statutory language and case law make no distinction between declaratory or injunctive relief; rather, the available relief is described more generally as ''equitable relief.'' In that circumstance, whether declaratory or injunctive relief, or both, is proper is subject only to prudential and pragmatic limitations.

  FCR ISSN 0014-9063

463 (2008) (in bid protest action, where the court found a flawed past performance evaluation, it enjoined the agency from relying on the flawed evaluation in making future award decisions). This would require that for agencies that post their past performance evaluations to an automated past performance system, such as the Department of Defense's Contractor Performance Assessment Reporting System (or the CCASS database such as in *Todd Construction*), the court should order the agency to remove the flawed evaluation from the system. This *is*, in fact the relief that the plaintiff specifically requested in *Todd Construction*; the complaint requested a ''judicial determination that the Corps' final decision is unlawful and should be set aside'' and ''[a]n order directing the Corps to remove the final performance evaluations from CCASS. . . .'' Additionally, if the contractor files for a temporary restraining order or preliminary injunction, the court should consider granting this type of relief as an interim measure while the litigation is proceeding to avoid injury to the contractor in the short term.

Second, the court needs to provide the agency guidance sufficient to correct the flawed past performance evaluation (*i.e.*, relief that would fall into Todd Construction's request for ''other and further relief as the court might find proper.''). On one hand, the court should not micromanage agency past performance evaluations. For example, the court may be overreaching to determine that a contractor should be awarded an ''Excellent'' instead of a ''Good'' under a particular past performance evaluation factor. Evaluation at that level of granularity should be reserved for the agency.

However, it makes just as little sense for the court simply to inform the agency that they got it wrong and to go back and try again. That approach could lead to multiple trips to the court before the agency got it right. To avoid this result, it is incumbent on the court to provide the agency sufficient guidance for the agency to correct its flaws the second time around. If the evaluation was predicated on erroneous factual determinations, the court should provide the necessary factual findings. For example, if the contractor was downgraded for late deliveries when, as a factual matter, there were no such late deliveries or the delays were caused by the government, the court should highlight those errors. Similarly, if the past performance evaluation was based on irrational conclusions, the court should point out which conclusions were irrational. With this type of guidance, the agency can perform its reevaluation of the contractor in view of the flaws to be corrected.

The remedies here may be much like the remedies the court or the Government Accountability Office considers in the context of a bid protest where a bidder has challenged the agency's evaluation. For example, in the *Serco* post-award bid protest, the court found that the agency conducted a flawed past performance evaluation where there were systematic problems with the survey questions used to gather past performance information. The court also found that the agency failed to take adequate steps to ensure that the past performance information received was relevant to the evaluation factors. The Court also found that the agency failed to verify whether the ''sometimes sketchy information it obtained was accurate.'' After concluding that injunctive relief was appropriate to remedy, for example, the past performance issues, the court enjoined the agency from

> Relying, in making future award decisions pursuant to the Alliant Solicitation, on the results of the survey conducted by Calyptus, unless defendant, consistent with th[e] opinion, confirm[ed] the accuracy of those results and supplement[ed] them with information that [was] responsive to the past performance evaluation criteria specified in the Solicitation.

Similarly, in *Family Entertainment Services, Inc.*, B-298047.3, Sept. 20, 2006, GAO found that an agency improperly evaluated an offeror's past performance in several respects. Among the flaws, GAO found that the agency imposed strict deadlines on submissions from the protester's references, but did not impose similar deadlines on the awardee's references and put more effort into reaching the awardee's references than those of the offeror. GAO's recommendation in that case was detailed in terms of guidance given to the evaluating agency:

> Because we find that the Army did not treat IMC fairly with regard to the efforts made in contacting or attempting to contact IMC's references and to receive completed past performance questionnaires, we recommend that the agency again attempt to contact IMC's references in a manner consistent with the efforts made in contacting and receiving past performance questionnaires from TGM's references. We also recommend that the agency reevaluate the past performance of IMC based upon any completed questionnaires received and the past performance information already in the record. In doing this, the agency should consider the CPARs it has received regarding IMC's performance, and provide a reasonable explanation as to how the CPARs affect the agency's past performance evaluation. The agency should also reevaluate TGM's proposal under the past performance factor, and in doing so should consider the provision in the solicitation stating that past information regarding predecessor companies and key personnel will not be as highly rated as past performance information for the principal offeror.

. Although the bid protest context is somewhat different, these and similar decisions provide helpful examples of how the court could fashion an order with sufficient detail and guidance to ensure the evaluation errors are addressed adequately.

C. Conclusion

In sum, the court of Federal Claims has broad authority to grant equitable relief under the CDA in a case in which it finds that an agency improperly performed a past performance evaluation. However, practical considerations dictate the type of relief that is the most appropriate. At a minimum, the court should take steps to ensure that the injury to the contractor resulting from a flawed past performance evaluation is immediately addressed, by, for example, ordering the past performance evaluation to be removed from a database or enjoining an agency from relying on that past performance in subsequent competitions. Second, the court should use its bid protest precedent as a model for the type of guidance that agencies require to correct the

flawed evaluation. The goal here is for the *agencies* to get it right, and not for the courts to micromanage the past performance evaluation process.

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  FCR ISSN 0014-9063