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NCMA-WPI

**12th Annual End of Year
Federal Contractor Update**

Interesting Court, ASBCA and GAO
Decisions from 2019

Presented by

Natalia Kruse and Bill Hughes

Husch Blackwell LLP

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Available Forums

- GAO – Protests: Pre-award and post-award
- ASBCA – Contract claims
- Court of Federal Claims (“COFC”)
 - Protests
 - Contract claims
- Court of Appeals for the Federal Circuit
 - ASBCA
 - COFC



Court of Appeals for the Federal Circuit

- The implied duty of good faith and fair dealing (*Dobyns v. U.S.*)
 - ATF undercover agent infiltrated the Hells Angels
 - Government disclosed his identity during prosecution
 - COFC held ATF violated an implied duty to ensure the agent's safety by withdrawing fictitious identities and failing to address arson at the agent's home
 - The implied duty of good faith and fair dealing is the duty not to interfere with the other party's performance and destroy its reasonable expectations regarding the fruits of the contract
 - Federal Circuit overturned the COFC and held the contract imposed no duty on ATF to ensure the agent's security



Court of Appeals for the Federal Circuit

- REA met all claim CDA certification requirements (*Hejran Hejrat Co. Ltd. v. U.S. Army Corps of Eng'rs*)
 - Contract Disputes Act and FAR 52.233-1 claim requirements:
 - Written demand
 - Sum certain
 - Certification (if over \$100,000)
 - The ASBCA found that it lacked jurisdiction because HHL had not requested a CO's final decision. Federal Circuit reversed.
 - REA can meet the requirements for a claim
 - A claim need not request a final decision (but it is good practice)
 - Such a request can be implied
 - Contractor had certified the REA
 - CO treated the decision as a “final determination”



Court of Federal Claims

- Government breached the implied duty of good faith and fair dealing (*Bowles v. U.S.*)
 - Bowles was a contractor for USPS
 - Supervisor made false accusations of assault with a mail scanner
 - Bowles refused to perform the contract and USPS terminated for default
 - Court held USPS improperly terminated Bowles' contract for default, acted in bad faith and breached the implied duty of good faith
 - The Court overturned the termination for default and awarded \$72,371



Court of Federal Claims

- Government had a rational basis for cancelling a solicitation (*A Squared Joint Venture v. U.S.*)
 - Government has discretion to cancel an acquisition
 - No showing of bad faith
- Veteran lacked “control” for SDVOSB eligibility (*XOtech, LLC v. U.S.*)
 - Operating Agreement authorized other managers to make business decisions by majority vote
 - SBA regulations require the service-disabled veteran to control “all decisions”
 - The owner’s ability to remove managers did not save the OA



GAO Bid Protest Statistics

- The number of bid protests declined from 2607 in FY2018 to 2198 (11% decrease)
 - Largely attributable to a 35-day partial government shutdown
 - GAO remained open, but many processing agencies were affected
- Slight decrease in sustain rate (down to 13% from 15% in FY2018 and a high of 23% in FY2016)
- Effectiveness rate of 44% was same as FY2018



GAO Report

- Most common protest grounds
 - Unreasonable technical evaluation
 - Inadequate documentation of the record
 - Unequal Treatment
 - Flawed selection decision
 - Unreasonable cost or price evaluation



GAO Decisions

- Agency has discretion to determine best way to meet its needs (Sigmatech, Inc.)
- Ambiguous evaluation factors resulted in successful protest (Blue Origin Florida)
- Awardee did not meet small business participation requirements and was ineligible for award (Peraton, Inc.)
- Modification was outside the scope (Leupold Stevens, Inc.)



ASBCA

- Mutual mistake results in reformation of contract (DynCorp. Int'l LLC)
 - Clear and convincing evidence
 - Mistake must be “mutual”
 - Contractor must not have assumed the risk
 - Reformation is the remedy



Other Courts

- Whistleblower retaliation claim (*Busselman v. Battelle, Eastern District of Washington*)
- FOIA request denied (*American Small Business League v. DOD, Northern District of California*)



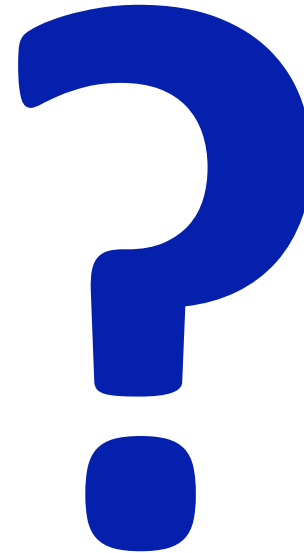
Questions?

Bill Hughes

William.Hughes@huschblackwell.com
414.978.5301

Natalia Kruse

Natalia.Kruse@huschblackwell.com
608.258.7126



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