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FEATURE COMMENT: The Most Important Government Contracts Disputes Decisions Of 2017

In 2017, the U.S. Court of Appeals for the Federal Circuit decided numerous cases relating to Government contracts disputes. Although none of the cases presents a fundamental sea change in the law affecting Government contracts, the cases provide additional guidance on important areas of the implied obligation of good faith and fair dealing, regulatory interpretation, contract interpretation, negligent estimates in requirements contracts, and Contract Disputes Act jurisdiction.

Implied Obligation of Good Faith *(The Pub. Warehousing Co.*, ASBCA 56022, 15-1 BCA ¶ 36,062, aff'd in part, vacated in part and remanded, *Agility Pub. Warehousing Co. KSCP v. Mattis*, 852 F.3d 1370 (Fed. Cir. 2017); 59 GC ¶ 112)—In a case in which both breach of contract and breach of the implied obligation of good faith were alleged, the Federal Circuit confirmed that a breach of the implied duty does not require a breach of an express contract provision.

Agility Public Warehousing Co. KSCP, formerly known as The Public Warehousing Co. (PWC), contracted with the Defense Supply Center Philadelphia to supply and deliver food to Government customers in the Middle East. The contract, as modified, provided for additional transport fees to be paid by the Government for deliveries to Iraq, with charges based on the time from truck loading until return of the empty truck to PWC's distribution facility in Kuwait. Fees were capped at 29 days.

PWC experienced numerous delays in trucks being returned, including delays caused by the Government's use of the refrigerated trucks as cold storage containers. PWC submitted claims, which were denied and later appealed to the Armed Services Board of Contract Appeals, contending that the Government breached the express terms of the contract by failing to return the trucks to PWC upon completion of unloading, and by using the trucks at the delivery sites for storage purposes. PWC also contended that the delay in returning trucks past 29 days constituted constructive changes, and that the Government breached its implied obligation to cooperate by failing to address the Government's severe lack of refrigerated storage capacity in Iraq.

The ASBCA held that the Government did not breach the express terms of the contract because the Government had no obligation to pay transportation fees beyond the 29-day cap. Having determined there was no breach of an express provision of the contract, the ASBCA saw no reason to decide whether the Government constructively changed contract performance or whether it breached its implied duty of cooperation. 15-1 BCA ¶ 36,062.

On appeal, the Federal Circuit affirmed the board's ruling that the Government did not breach the express terms of the contract by failing to pay for delays beyond the 29-day cap, even when delays were caused by the Government's use of the trucks for storage. 852 F.3d at 1382. However, the Federal Circuit vacated and remanded on the issues of breach of the implied duty of good faith and constructive changes.

Turning to PWC's claim for breach of implied duty of cooperation, the Federal Circuit noted that the duty to cooperate is an aspect of the implied duty of good faith and fair dealing. Id. Under the Federal Circuit's decision in *Metcalf Constr. Co. v. U.S.*, 742 F.3d 984, 991 (Fed. Cir. 2014); 56 GC ¶ 52, a party to a contract cannot use an implied duty of good faith to expand another party's contractual duties or create duties inconsistent with the express contract provisions.

However, a breach of the implied duty of good faith and fair dealing does not require a violation

of an express contractual provision. 852 F.3d at 1384. The Federal Circuit explained that a party can breach the implied duty by interfering with performance or acting so as to destroy the other party's reasonable expectations regarding the benefits of the contract. Thus, if the Government imposed a cap, and at the same time made it impossible for PWC to perform within that cap, the Government may have breached its implied duty to PWC.

The Federal Circuit likewise found that the board's determination that there was no breach of an express contract provision was not dispositive on the issue of constructive change because a change may or may not constitute a breach of contract.

Key lessons from PWC: In 2014, the Federal Circuit's decision in *Metcalf* rejected the notion that prior precedent (*Precision Pine & Timber Co. v. U.S.*, 596 F.3d 817 (Fed. Cir. 2010); 52 GC ¶ 97) had established a "specific targeting" requirement for breach of the implied duty, and it provided much needed clarity regarding the applicable scope and standard for establishing breach of the implied obligation of good faith and fair dealing. The *PWC* decision embraces *Metcalf* and confirms that the Government can breach the implied obligation of good faith and fair dealing (including the duty not to hinder or the duty to cooperate) even if its actions are otherwise consistent with the express terms of the contract.

Thus, as recognized in *PWC*, the key inquiry is whether one party has interfered with another's performance or acted in a way to destroy the reasonable expectations of the other party regarding the benefits provided by the contract. The Federal Circuit's reference to the Restatement (Second) of Contracts § 205 in the *PWC* decision provides additional insight into factual scenarios in which breach of the implied obligation might occur: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." With the legal framework of *Metcalf*, confirmed by *PWC*, and the guidance provided by the Restatement, contractors should be in a position to analyze whether Government actions or inactions give rise to a credible claim of breach of the implied duty of good faith and fair dealing.

Deference Given to Agency Interpretation of Regulations (*Garco Constr., Inc.*, ASBCA 57796, 15-1 BCA ¶ 36,135, motion for recon. denied, 16-1 BCA ¶ 36,278, aff'd, *Garco Constr., Inc. v. Sec'y of the Army*, 856 F.3d 938 (2017), petition for cert. docketed Aug. 10, 2017; 59 GC ¶ 153)—In a case involving the interpretation of a base access policy for contractor workers, the Federal Circuit deferred to the Government's interpretation of its ambiguous regulation.

Garco Construction Inc. had a contract to build housing units on Malmstrom Air Force Base, Mont. The 2006 contract incorporated Federal Acquisition Regulation 52.222-3, which authorizes contractors to employ ex-felons, but does not exempt a contractor from adhering to base access policies. As of 2005, Malmstrom AFB policy for contractor entry provided that the Air Force would run a "wants and warrants check" for individuals seeking base access.

During performance of the housing contract, the Air Force conducted criminal background checks on contractor employees and denied base access to certain ex-felon and pre-release workers employed by Garco's subcontractor. The subcontractor objected that the 2005 base access policy did not require a full criminal background check, but only a check for "wants and warrants," which is a limited review. In October 2007, after the dispute with Garco arose, the base commander issued a memorandum expressly requiring a background check for base access. The subcontractor, through Garco, then pursued a claim for the increase in labor costs attributable to using workers who could pass a criminal background check. Garco appealed the deemed denial of its claim to the ASBCA.

In 2014, the ASBCA granted partial summary judgment in favor of the Air Force holding that the October 2007 base access memorandum (which expressly set forth the requirement for background checks) was a sovereign act and the Air Force was not liable for damages from that date forward. 14-1 BCA ¶ 35,512. After further factual development, the board addressed whether the 2005 base access policy required criminal background checks for base access. In interpreting the language in the 2005 policy that the Air Force would run a check for "wants and warrants," the board was guided by the "requirement that when interpreting regulatory language[, the board] must find an interpretation that is harmonious with the regulatory scheme and thus look not only to particular language but to design of the provision as a whole." 15-1 BCA ¶ 36,135. In looking to the policy as a whole, the board concluded that the language "check for wants and warrants" meant a background check. Id.

On appeal to the Federal Circuit, Garco asserted that the 2005 base access policy did not authorize the Air Force to prohibit workers with a prior criminal record, and instead, authorized denial of access only if there were outstanding wants or warrants. The Federal Circuit began its analysis of the base access policy language by stating that an agency's construction of its own regulations is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 856 F.3d at 943. The Federal Circuit then assessed Garco's argument that the plain language of the policy required nothing more than a simple check for wants and warrants. It found that Garco's interpretation was placed in doubt when considered in the context of the regulation as a whole. Because the policy was ambiguous, the Federal Circuit deferred to the Air Force's interpretation that the policy required a background check, concluding that the Air Force's "interpretation is not plainly erroneous or inconsistent with the regulation and we therefore must give it controlling weight." 856 F.3d at 945.

Key lessons from Garco: In interpreting the base access policy, the Court determined that the Air Force's interpretation of its own regulation was entitled to deference because the language of the policy was ambiguous. If a dispute arises in connection with an agency regulation, contractors should be mindful that under existing precedent, unless the regulation is viewed by a court or board as unambiguous, the tribunal will give deference to an agency's interpretation unless that interpretation is "plainly erroneous or inconsistent with the regulation."

As acknowledged by the Federal Circuit, prior Federal Circuit cases, as well as the U.S. Supreme Court's decision in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), provide for such deference to the agency. Deferring to an agency's view regarding its own ambiguous regulations in a breach of contract dispute places contractors at a decided disadvantage. The doctrine of deference (sometimes called the *Auer* deference) has been criticized, see *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607 (2016) (Justice Thomas dissenting from denial of certiorari). As stated by Justice Thomas, "by deferring to an agency's litigating position … courts force regulated entities like petitioner here to 'divine the agency's interpretations in advance,' lest they 'be held liable when the agency announces its interpretations for the first time' in litigation."

On Aug. 7, 2017, Garco filed a petition for a writ of certiorari with the U.S. Supreme Court, presenting the question whether the *Auer* decision and *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410 (1945), should be overruled. Several amicus briefs have been filed, including by the U.S. Chamber of Commerce, arguing that *Auer* deference harms the business community by increasing regulatory uncertainty, and urging the overruling of *Auer* and *Seminole*, or at a minimum, overruling *Auer* for cases involving Government contract disputes. The Government has opposed the petition for certiorari, noting eight prior petitions where the Court declined to grant review to consider whether to overrule these precedents.

Use of Industry Practice in Contract Interpretation (*Nw. Title Agency, Inc. v. U.S.*, 126 Fed. Cl. 55 (2016), aff'd, 855 F.3d 1344 (Fed. Cir. 2017); 59 GC ¶ 163)—In a case relating to the payment of real estate closing fees, the Federal Circuit reinforced a basic tenet of contract interpretation that trade custom cannot create an ambiguity if the contract language was not reasonably susceptible to differing interpretations at the time of contracting.

Northwest Title Agency Inc. had a contract with the Department of Housing and Urban Development to provide closing services for sales of HUD-foreclosed single family homes. The contract specified that Northwest was to be paid a unit price per closing that was "inclusive of all costs," and that "the purchaser, lender, and/or seller shall not pay any additional costs for closing services."

After HUD precluded Northwest from charging additional fees to homebuyers for closing services, Northwest brought suit against HUD in the U.S. Court of Federal Claims alleging that the fee prohibition contravened the customary trade practice for a closing service agent to charge fees to both the buyer and seller, and thus was a breach of contract. The COFC granted summary judgment in favor of the Government, finding that the common industry practice was irrelevant because the contract language unambiguously prohibited the charging of additional fees. 126 Fed. Cl. at 59.

The Federal Circuit affirmed, holding that the COFC correctly found the contracts unambiguous and not subject to modification by the asserted trade practice and custom, since trade practice and custom may not be used "to create an ambiguity where a contract was not reasonably susceptible of differing interpretations at the time of contracting." 855 F.3d at 1348.

Key lessons from Northwest: The Federal Circuit decision in *Northwest* demonstrates that trade custom

is not always accepted as an aid in interpretation of contracts. Evidence of trade practice may be used to assist in interpreting a contract term that has an accepted industry meaning that differs from its ordinary meaning. *Jowett, Inc. v. U.S.*, 234 F.3d 1365, 1368–69 (Fed. Cir. 2000); 43 GC ¶ 12.

However, in *Northwest*, there was no evidence that any of the contract terms specifying fees for closing services had different meanings in the real estate industry. Rather, Northwest was arguing that the contract did not reflect standard industry *practice* that an entity providing closing services could charge both buyer and seller. Northwest attempted to use trade practice to create an ambiguity so that the contract would be interpreted in accordance with that trade practice and custom. Because the contract was not susceptible to differing interpretations at the time of contracting and hence was unambiguous, Northwest could not use trade practice to create an ambiguity.

Claims for Negligent Estimates (*Agility Def. & Gov't Servs. v. U.S.*, 122 Fed. Cl. 677 (2015), rev'd, 847 F.3d 1345 (Fed. Cir. 2017); 59 GC ¶ 49, on remand, 134 Fed. Cl. 723 (2017))—In a case addressing the scope of the Government's obligation to provide accurate estimates for requirements contracts, the Federal Circuit clarified that providing historical data does not insulate an agency from liability if more current information is available.

Agility Defense and Government Services had a contract with the Defense Reutilization Management Services (DRMS), an arm of the Defense Logistics Agency, to dispose of surplus property received from the military as troops departed from areas of operation in Iraq, Afghanistan and Kuwait. The contract required Agility to dispose of all property regardless of quantity for a fixed price, but Agility was entitled to keep the revenue it received from the sale of scrap material.

In the solicitation, DRMS provided historical workload data and advised offerors that it anticipated an increase in property disposals. The contract included a complex and confusing special H clause that described the circumstances under which a workload increase or decrease would result in additional compensation for the contractor. During contract performance, Agility encountered a large backlog of items requiring disposal, as well as a much greater volume of disposals than indicated by the DRMS historical data. Agility submitted certified claims asserting several theories, including negligent estimate, and these claims were partially denied by the contracting officer. Agility appealed to the COFC.

The COFC denied recovery, relying on the Federal Circuit's decision in *Medart v. Austin*, 967 F.2d 579 (Fed. Cir. 1992); 34 GC ¶ 434. In *Medart*, the Federal Circuit acknowledged that a significant variance between Government estimates and actual quantities does not ordinarily give rise to liability on the part of the Government, but a contractor can recover if it can prove that the estimates were "inadequately or negligently prepared, not in good faith, or grossly or unreasonably inadequate at the time the estimate was made." 967 F.2d at 581.

In denying Medart's negligent estimate claim, the Federal Circuit held that the Government was entitled to use information that was reasonably available, and was not obligated to search for or create additional information to prepare its estimate. 967 F.2d at 582. Applying *Medart*, the COFC determined that even though other methods of providing information to offerors "might have improved the accuracy of the government estimate," DRMS was not liable for negligent estimates because it provided reasonably available historical data. 122 Fed. Cl. 677, 690.

On appeal, the Federal Circuit reversed and remanded, holding that the COFC's findings that DRMS used reasonably available historical data and did not negligently estimate its needs were clearly erroneous. 847 F.3d 1345, 1354. First, the Federal Circuit noted that the COFC ignored that DRMS not only provided historical data, but also estimated its requirements via a chart in a subsequent solicitation amendment which showed stable and then declining scrap weight, thus reflecting that DRMS anticipated that property turn-ins would remain constant and then decline. The Federal Circuit held that it was clear error for the COFC not to treat the chart as an estimate. 847 F.3d at 1351.

Second, the Federal Circuit determined that the fact that DRMS provided historical workload data did not end the inquiry of whether it provided a realistic estimate, clarifying that "*Medart* does not hold, and we do not hold now, that providing an offeror with historical data is reasonable per se." 847 F.3d at 1351. Distinguishing *Medart*, the Federal Circuit found that Agility presented evidence that DRMS provided historical data, informed offerors that it anticipated an increase in property turn-ins, then "changed course" by updating its estimate in a chart which projected stable workload followed by a decline. Also unlike *Me-*

dart, Agility presented evidence that the most current information available to DRMS was something other than historical data—namely, a DRMS memorandum regarding planned troop movements and an expected surge of equipment to be turned over to the contractor for disposal. Because DRMS anticipated an increased disposal workload, simply providing offerors with *historical* workload data did not satisfy the Government's obligation to provide a realistic estimate based on the most current information available as required by FAR 16.503.

The Federal Circuit then determined that the COFC erred in finding that there was no causal link between DRMS' estimates and Agility's damages. 847 F.3d at 1352. The evidence, as viewed by the Federal Circuit, "overwhelmingly" showed that Agility relied on DRMS' estimates when formulating its proposal, but the workload was greater than the data provided by DRMS indicated, causing Agility to incur additional costs from performing in excess of DRMS' negligent estimates. 847 F.3d at 1353.

As final matters, the Federal Circuit noted that the COFC had not addressed whether the special H clause which provided a mechanism for price adjustment for certain workload variances foreclosed Agility's claims. Because Agility's negligent estimates claim was rooted in a violation of FAR 16.503, the Court held that the special H clause was not relevant. 847 F.3d at 1353. The Court also held that Agility's receipt of scrap sales proceeds did not limit Agility's recovery because under the contract, Agility was entitled to the scrap proceeds regardless of workload. Id.

Key lessons from Agility: The Federal Circuit did not disturb the rationale in *Medart* that a large disparity between the contract estimate and actual quantities is insufficient, in and of itself, to establish that the estimate was negligent. Nor did it retreat from the notion that the obligation to provide relevant information that is reasonably available to the agency does not obligate the Government to search for or create additional information.

However, the *Agility* decision makes clear that providing historical data can give rise to a claim of negligent estimates if the agency possesses more current information. In cases in which a contractor experiences actual quantities at odds with historical data provided by the agency, we can expect more claims to be asserted, with the contractor hoping that discovery will uncover more current information that places the contract estimate in question.

Moreover, because the Federal Circuit deemed a scrap weight chart in a solicitation amendment to constitute an "estimate" even though there is no evidence the agency intended for it to be treated as such, contractors will be scrutinizing all information provided in solicitations and solicitation amendments for evidence of "estimates" that are faulty. Agencies will need to take a closer look at information provided pre-contract, to assess whether that information might be viewed later as an "estimate" that potentially gives rise to liability if faulty.

The *Agility* decision also clarifies the interplay between a negligent estimates claim and a request for equitable adjustment under a specific clause allowing for an adjustment if actual quantities varied from the Government estimate. In *Agility* the Government argued that a negligent estimate claim was foreclosed because the contract contained an agreed-to mechanism for an equitable adjustment for variations in quantity. The Federal Circuit held, as a matter of contract interpretation, that the negligent estimate claim was not precluded by the variation in quantity clause contained in the special H clause. The Federal Circuit reasoned that the H clause governed certain changes in workload, while the negligent estimates claim relied on the Government's violation of its duty to provide a realistic estimate.

Although the Federal Circuit seems to have opened the door for claims of negligent estimates in cases in which an agency provided recent historical data, a contractor will still need evidence that more recent information renders the historical information inaccurate. The contractor must also prove that it relied on the faulty estimate in developing its offer, that its reliance was reasonable, and that it suffered damages. After remand of *Agility*, the COFC addressed the damages incurred by Agility from performing in excess of the DRMS negligent estimates. The Government argued that Agility did not show that (1) it relied on the DRMS information, (2) DRMS' negligence caused it to suffer damages or (3) the special H clause limited damages. However, the COFC determined that it would not consider these arguments because they were foreclosed by the mandate rule. The COFC awarded Agility $6.9 million on its negligent estimate claim. *Agility Def. & Gov't Servs. v. U.S.*, 134 Fed. Cl. 723 (2017). The Government has appealed the COFC decision, so the last chapter has not been written.

Finally, the *Agility* decision is relevant only to negligent estimates in requirements contracts, not to

negligent estimates in indefinite-quantity contracts. In contrast to a requirements contract that obligates the Government to purchase all of its requirements from the contractor, an indefinite-quantity contract does not obligate the Government to purchase more than the stated minimum from the contractor.

The Government's liability for negligent estimates for requirements contracts emanates from FAR 16.503, which requires a contracting officer to state a realistic estimated total quantity in the solicitation, and provides that the CO "may obtain the estimate from records of previous requirements and consumption, or by other means, and should base the estimate on the most current information available." No such requirement is contained in the FAR for indefinite-quantity contracts. The Federal Circuit has explained that "under an [indefinite-delivery, indefinite-quantity] contract, the government is required to purchase the minimum quantity stated in the contract, but when the government makes that purchase its legal obligation under the contract is satisfied." *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001); 43 GC ¶ 42. Thus, the Government cannot be liable for breach of an indefinite-quantity contract for failing to disclose material information regarding its estimates as long as the Government orders the guaranteed minimum. Id.

CDA Jurisdiction (*Lee's Ford Dock, Inc. v. Sec'y of the Army*, 865 F.3d 1361 (Fed. Cir. 2017); 59 GC ¶ 248, aff'g in part and dismiss'g in part, *Lee's Ford Dock, Inc.*, ASBCA 59041, 16-1 BCA ¶ 36,298; 58 GC ¶ 110)—In a case involving CDA jurisdiction, the Federal Circuit reinforced that leases are contracts covered by the CDA and that a contractor can assert a new claim theory on appeal only if the new theory arises out of the same set of operative facts as the original claim.

Lee's Ford Dock Inc. (LFD) leased lakefront property from the Government for commercial concession purposes. The lease contained a provision giving the Government the right to "manipulate the level of the lake … in any manner whatsoever" without liability. During the long-term lease, the Government determined that there was a high risk of failure of a dam on the lake, and it lowered the level of the lake to "reduce imminent risk of human life, health, property, and severe economic loss."

LFD filed a certified claim requesting reformation, alleging that the parties were mutually mistaken at the time of contracting as to the condition of the dam. The claim was denied, and LFD appealed to the ASBCA. The board determined that it had jurisdiction under the CDA because a lease involves the disposal of personal property within the CDA's coverage. *Lee's Ford Dock, Inc*., ASBCA 59041, 14-1 BCA ¶ 35,679. The Government later moved for summary judgment on LFD's amended complaint.

The ASBCA granted summary judgment in favor of the Government. First, the ASBCA determined that counts I and II of LFD's complaint, which sought reformation on the ground of unilateral mistake accompanied by Government misconduct, failed because LFD did not establish (or even allege) that the Government had knowledge of LFD's mistaken belief as to the condition of the dam, and without this knowledge, there was no inequitable conduct by the Government and no entitlement to reformation. 16-1 BCA ¶ 36,298. Second, as for LFD's claim that the drawdown of the lake was unreasonable in duration and constituted a breach of contract, the board granted summary judgment for the Government because the clear and unambiguous language of the contract imposed no time limit on the Government's right to lower the lake level. Id.

LFD appealed to the Federal Circuit, arguing that the board erred in granting summary judgment. The Federal Circuit first considered whether it had jurisdiction under the CDA. It agreed with the ASBCA that leasehold interests are items of personal property and that the Government "disposed" of the property interest when it entered into the lease. Hence, there was CDA jurisdiction. 865 F.3d at 1367.

Turning to LFD's counts for contract reformation, the Court addressed the Government's argument that the board lacked jurisdiction because the counts were premised on an alleged misrepresentation as to the condition of the dam which was different than the allegation in the certified claim that the parties were mutually mistaken as to the condition of the dam. Relying on the well-established principle that a claim is new if it is based on a different set of operative facts, the Court reviewed the factual underpinnings for LFD's original claim and the complaint at the board, and found that the certified claim did not allege that the Government had knowingly misrepresented the condition of the dam, by silence or otherwise, but instead asserted the very different and inconsistent notion that the Government had a mistaken belief about the condition of the dam. Because the reformation count as pursued at the board relied on different

operative facts than those on which the certified claim relied, it was a new claim that was required to be submitted to the CO. Accordingly, the Court dismissed LFD's misrepresentation by silence reformation claim for lack of jurisdiction. 865 F.3d at 1370.

Key lessons from LFD: Jurisdiction cannot be conferred by the parties, cannot be waived and can be asserted at any time in the proceedings. LFD presented the unusual situation where the Court was called upon to address two different jurisdictional issues—whether the contract was covered by the CDA, and whether the contractor had complied with the procedural requirements of the CDA. As for the scope of the CDA, most contracts involve straight-forward situations in which the Government procures goods or services from a contractor. Nonetheless, the Government does lease property to contractors. Over 30 years ago, in the context of a lease to the U.S. Postal Service, the Federal Circuit held that a leasehold interest is personal rather than real property, *Forman v. U.S.*, 767 F.2d 875, 878–79 (Fed. Cir. 1985); 27 GC ¶ 225, and several years later the ASBCA held that a lease by the Government as lessor is a contract for the "disposal of personal property" under the CDA, reasoning that the nature of a leasehold interest was the same whether the Government was the lessor or the lessee. *Hedburg*, ASBCA 31747, 90-1 BCA ¶ 22,577. The Federal Circuit's decision is not a departure from prior case law, but the confirmation that leases are CDA-covered contracts because they are contracts for the disposition of personal property should serve to eliminate future jurisdictional disputes.

The Federal Circuit's opinion also demonstrates that although contractors have some leeway to articulate different legal theories or provide additional supporting facts on appeal, they may run afoul of the CDA requirement that each claim be submitted to the CO for decision. As the Federal Circuit has stated, cases are deemed to involve separate claims "if they *either* request different remedies (whether monetary or nonmonetary) or assert grounds that are materially different from each other factually or legally." *K-Con Bldg. Sys., Inc. v. U.S.*, 778 F.3d 1000, 1005 (Fed. Cir. 2015) (emphasis in original); 57 GC ¶ 64. What was fatal to LFD was the assertion of legal theories that had inconsistent factual premises. *LFD* demonstrates the importance of assessing the facts, and the implications of those facts on possible legal theories of relief, before submitting a claim to the CO.

Conclusion—The five decisions described in this Feature Comment are the most important Government contracts claims decisions of 2017. These Federal Circuit cases address key issues for the development and assertion of claims arising out of contract performance.

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