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FEATURE COMMENT: The Most Important Government Contracts Disputes Decisions Of 2018

In 2018, the U.S. Court of Appeals for the Federal Circuit decided two important cases relating to Contract Disputes Act jurisdiction. The cases provide key lessons for avoiding procedural missteps that prevent consideration of the full merits of contract claims and defenses.

Claims Seeking Nonmonetary Relief (*Securiforce Int'l Am., LLC v. U.S.*, 125 Fed. Cl. 749 (2016), *aff'd in part, vacated in part and remanded*, 879 F.3d 1354 (Fed. Cir. 2018); 60 GC ¶ 31)—In a case where a contractor asserted prior material breach both as a nonmonetary affirmative claim and as a defense, the Federal Circuit adopted a new analytical framework for determining whether a nonmonetary claim was in essence a monetary claim that required the statement of a sum certain, and confirmed that a defense of prior material breach need not be presented to the contracting officer for decision.

Securiforce International America LLC was awarded a contract by the Defense Logistics Agency (DLA) to deliver fuel to eight sites in Iraq. Within three months of the award, the contract was partially terminated for the Government's convenience. The remaining portions of the contract were later terminated for cause. Securiforce filed a complaint in the U.S. Court of Federal Claims seeking declaratory relief for the termination for cause. Securiforce then sent DLA a letter requesting a CO's final decision and a declaration that the Government's prior partial termination for convenience was a material breach of contract, entitling Securiforce to breach damages.

The DLA CO responded that she could not provide a final decision because Securiforce's letter did not present a cognizable claim—demanding a sum certain or requesting an adjustment or interpretation of contract terms. Securiforce amended its complaint at the COFC to add a request for declaratory relief regarding the allegedly improper termination for convenience.

The COFC's decision on the merits, rendered after trial, addressed the threshold issue of subject matter jurisdiction. The Government argued that the COFC lacked CDA jurisdiction over Securiforce's claim that the termination for convenience constituted a material breach because Securiforce's letter did not set forth a sum certain and hence was not a valid claim. Securiforce contended that the letter was a valid claim seeking declaratory, nonmonetary relief, and thus a statement of a sum certain was not required.

The COFC agreed with Securiforce, concluding that the essence of Securiforce's claim letter was nonmonetary and revolved around the propriety of the termination for convenience. Although Securiforce briefly mentioned possible entitlement to breach damages in its letter, the COFC found that the letter focused on DLA's conduct, and did not mention the financial impact of DLA's allegedly improper conduct on Securiforce, or reference costs or damages incurred by plaintiff.

The COFC also considered Securiforce's letter in the context of the COFC litigation, noting that Securiforce pursued a CO's final decision declaring that the termination for convenience was a prior material breach to support its argument that the ensuing termination for cause was improper, and not solely to recover monetary relief. Accordingly, the COFC held that Securiforce's letter was a valid claim for nonmonetary relief. The COFC also ruled that the CO's response to the letter constituted a final decision, or in the alternative, that there was a deemed denial of Securiforce's claim. Thus, the COFC determined that it had jurisdiction over the termination for convenience claim.

The Government posed an additional jurisdictional challenge to the COFC's consideration of Securiforce's allegations of material breach, contending that the allegations were "separate, affirmative claims" that had to be presented to the CO as defenses to the termination for cause before they could be asserted in the litigation under the authority of *M. Maropakis Carpentry, Inc. v. U.S.*, 609 F.3d 1323 (Fed. Cir.2014) ("a contractor seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the CDA, whether asserting the claim against the government as an affirmative claim or as a defense to a government action."); 52 GC ¶ 225. The COFC disagreed, finding *Maropakis* inapplicable because Securiforce was not seeking to recover costs or modify the terms of the contract, but was seeking declaratory judgment that DLA's terminations for cause were improper based on the Government's prior material contract breaches.

Having determined that the COFC had jurisdiction over the claim and defense relating to the allegedly improper convenience termination, the COFC proceeded to address the merits, finding that the CO abdicated her duty to exercise her own independent business judgment in deciding to terminate for convenience, thus abusing her discretion and breaching the contract. However, the COFC ruled that Securiforce's failure to perform (which resulted in the termination for cause) was not due to the improper termination for convenience, and therefore the prior breach by DLA did not invalidate the subsequent termination for cause. The COFC disposed of Securiforce's remaining arguments, holding that the termination for cause was proper. Securiforce appealed to the Federal Circuit.

The Federal Circuit affirmed in part, vacated in part and remanded the case. 879 F.3d 1354, 1368 (Fed. Cir. 2018). First, the Federal Circuit disagreed with the COFC's determination that Securiforce's letter challenging the convenience termination constituted a valid claim for nonmonetary relief. The Federal Circuit reasoned that although contractors may in some circumstances properly seek only declaratory relief, they may not circumvent the requirement for a statement of a sum certain by reframing monetary claims as nonmonetary.

The Federal Circuit noted that it had been "careful" to recognize the distinction between monetary and nonmonetary claims in the context of the Administrative Procedure Act (APA), 5 USCA § 702, which

provides for a cause of action for a nonmonetary claim only if there is no other adequate remedy in a court. The Federal Circuit stated that courts have consistently held that litigants may not avoid the COFC's exclusive Tucker Act jurisdiction over monetary claims exceeding \$10,000 (28 USCA §§ 1346 (a)(2), 1491(a)(2)), by "dressing up" monetary claims as requests for nonmonetary relief under the APA.

In determining whether a claim is classified as monetary or nonmonetary under the APA, courts have customarily looked to the substance of the pleadings. Where the "the only significant consequence" of the declaratory relief sought would be that plaintiff would recover monetary damages, the claim is in essence a monetary one. The Federal Circuit found no reason to depart from this analytical construct in determining whether a claim is monetary or nonmonetary for purposes of the CDA.

In looking at the specifics of Securiforce's claim, the Federal Circuit decided that although Securiforce styled its claim as a nonmonetary request for declaratory relief, its claim, if granted, would yield only one significant consequence—Securiforce's entitlement to money damages from the Government for breach. This was confirmed by Securiforce's own claim letter, which asked for a determination that Securiforce was entitled to breach damages for the improper termination for convenience. The Federal Circuit held that Securiforce's failure to present a sum certain to the CO as required by the CDA rendered its claim letter deficient, and the COFC had erred in (a) ruling that the convenience termination claim was nonmonetary, and (b) assuming jurisdiction over the declaratory judgment action.

The Federal Circuit further opined that even if Securiforce's claim were accurately characterized as nonmonetary, the COFC could not exercise jurisdiction because the COFC's discretion to grant declaratory relief is limited. The Federal Circuit reasoned that Securiforce had available the legal remedy of damages for breach of contract, so the grant of equitable relief, in the form of a declaratory judgment, would violate the traditional rule that the courts will not grant equitable relief if money damages are adequate. Thus, the Federal Circuit concluded that the COFC erred in assuming jurisdiction over and adjudicating Securiforce's convenience termination claim, and it vacated the COFC decision on this issue.

The Federal Circuit next addressed whether the COFC had jurisdiction to review Securiforce's defense

to the default termination that the termination for convenience was a prior material breach that excused Securiforce's later failure to perform. The Federal Circuit rejected the Government's argument that the COFC could not consider Securiforce's defense because a proper claim setting forth the defense had not been submitted to the CO for decision. Relying on *Maropakis*, supra, and *Laguna Constr. Co. v. Carter*, 828 F.3d 1364 (Fed. Cir. 2016); 58 GC ¶ 264, the Federal Circuit explained that a defense is not a claim for money and affirmative defenses must be submitted to the CO for decision only if the defense seeks a change in the terms of the contract—for example, an extension of time or an equitable adjustment. Since Securiforce raised a common law affirmative defense under the contract as written, no presentment to the CO was required. Accordingly, the Federal Circuit affirmed the COFC's jurisdiction over the affirmative defense.

In addressing the merits of the affirmative defense, the Federal Circuit concluded that the COFC erred in holding that the decision to terminate for convenience was invalid because it was not reached independently by the CO, reasoning that the contract only required that the Government (and not the CO specifically) make the termination decision. And the Federal Circuit rejected Securiforce's remaining arguments regarding the propriety of the convenience termination, finding that the Government had not breached the contract. The Federal Circuit likewise rejected Securiforce's remaining arguments that Government actions and omissions excused its failure to perform.

Key lessons from Securiforce: First, a contractor's denomination of its claim as a nonmonetary CDA claim and request for declaratory relief is not determinative. The boards and COFC will look behind the contractor's characterization and use the "only significant consequence" test articulated by the Federal Circuit to analyze whether a nonmonetary claim is actually a "dressed up" monetary claim. And, if the "only significant consequence" of the claim is entitlement to money, unless the contractor has stated a sum certain, the claim will be dismissed for lack of jurisdiction.

If a nonmonetary claim requesting the interpretation of the contract is submitted, the key inquiry will be the "significant consequence" of granting the requested relief to the contractor. Where a declaration that the contractor's interpretation prevails will result in the contractor's entitlement to recover costs incurred in

performing in accordance with the Government's contrary interpretation, the claim is likely to be seen as a monetary claim. Therefore, the prudent course is to include a sum certain with the claim.

While the determination of a sum certain requires effort, a claim can include estimated costs if the demanded amount is expressly stated in a sum certain. See, e.g., *KBAJ Enters., LLC*, ASBCA 59932 et al., 16-1 BCA ¶ 36,493. And once a claim has been submitted to the CO in a sum certain, a change in the amount of a claim on appeal does not render the monetary claim a new one, as long as the same operative facts are at issue. See, e.g., *Todd Pac. Shipyards Corp.*, ASBCA 55126, 06-2 BCA ¶ 33,421.

Following the Federal Circuit's decision in *Securiforce*, the boards and courts have scrutinized nonmonetary claims to assess whether a claim is a monetary one. See *Northrop Grumman Sys. Corp. v. U.S.*, 140 Fed. Cl. 249 (2018). In *Northrop*, the contractor submitted a claim alleging that the Government effected a cardinal change to the contract entitling the contractor to breach damages. The COFC determined that the claim was monetary and the contractor had an obligation to submit its "best effort to state a sum certain, albeit one that could have been modified later to fit the proof." Because *Northrop* failed to state a sum certain in its claim, the COFC dismissed this count of the complaint for lack of jurisdiction.

Similarly, in *Duke Univ. v. Dep't of Health & Human Servs.*, CBCA 5992, 18-1 BCA ¶ 37,023; 60 GC ¶ 165, the Civilian Board of Contract Appeals dismissed Duke's appeal because its nonmonetary claim for contract interpretation was in reality a monetary claim that did not identify a sum certain. Applying *Securiforce*, the CBCA found that Duke had already incurred costs associated with its contract interpretation dispute, and it could have quantified those costs and stated them in a sum certain in a claim to the CO. The CBCA also noted that Duke was asking the CBCA to interpret the contract in a manner that would permit Duke to recover additional costs, not to stop work or preclude Duke from incurring additional costs in the future.

Because a ruling in Duke's favor would not result in Duke avoiding costs, but instead would be used as the basis for entitlement to monetary relief in a separate proceeding, the CBCA concluded that Duke had presented an unquantified monetary claim, and accordingly the CBCA lacked jurisdiction. See also *Elkton UCCC, LLC v. Gen. Servs. Admin.*, CBCA 6158,

18-1 BCA ¶ 37,103 (CBCA dismissed lease dispute for lack of jurisdiction because claim letter was a monetary claim that lacked a demand for a sum certain).

Second, the Federal Circuit has reaffirmed the rule in *Maropakis* that where “the affirmative defense seeks a change in the terms of the contract—for example an extension of time or an equitable adjustment—it must be presented to the CO,” and confirmed that a common law defense of prior material breach asserted under the contract as written need not be submitted to the CO for final decision.

Since the Federal Circuit’s decision was rendered, the boards and courts have relied on *Securiforce* in determining whether an affirmative defense requires a final decision. See, e.g., *ECC Centcom Constructors, LLC*, ASBCA 60647, 18-1 BCA ¶ 37,133 (in appeal from termination for default, board could not consider contractor’s affirmative defense of excusable delay because a claim for a time extension had not been submitted to the CO); 60 GC ¶ 307; *Raytheon Co.*, ASBCA 60448, 18-1 BCA ¶ 37,029 (Government’s affirmative defense that contractor’s recovery on claim was barred by unclean hands did not seek money or an adjustment of contract terms so it was not required to be submitted to the CO for decision).

Scope of Jurisdiction under the CDA and the ASBCA Charter (*Agility Logistics Servs. Co. KSC*, ASBCA 57415, 15-1 BCA ¶ 35,840, *aff’d in part, dismissed in part, Agility Logistics Servs. Co. KSC v. Mattis*, 887 F.3d 1143 (Fed. Cir. 2018); 60 GC ¶ 137)—In a case in which the U.S. Government acted as an agent for the Coalition Provisional Authority (CPA), the Federal Circuit confirmed that there was no CDA jurisdiction and it lacked jurisdiction to review the Armed Services Board of Contract Appeal’s decision on jurisdiction under the board’s charter.

In 2003, the U.S. and its coalition partners created the CPA as a transitional government in Iraq. On June 6, 2004, the CPA awarded Agility Logistics Services Co. KSC (Agility) an indefinite-delivery, indefinite-quantity contract to support a supply chain management system in Iraq, with task orders to identify the specific work required. The CPA would transfer authority to a new Iraqi interim government (IIG) on June 30, 2004, at which time the CPA would be dissolved.

The contract specified that neither the CPA, the U.S. Government nor the coalition government would be liable to the contractor for work performed after

the IIG assumed authority. The IIG delegated contract administration to the CPA’s program management office, and then to the Department of Defense Project and Contracting Office (DOD PCO), which later became part of the Army. The DOD PCO issued a memorandum providing its understanding that it would administer contracts awarded by the former CPA, but that it had no authority to award, terminate, amend or novate any contracts.

Many undefinitized task orders were issued under the contract. Agility submitted several rounds of definitization proposals to the Army. The Defense Contract Audit Agency audited the proposals and issued audit reports. After negotiations with Agility were unsuccessful, the Army CO issued final decisions unilaterally definitizing the task orders. Agility appealed those final decisions to the ASBCA.

Agility later submitted a certified claim seeking \$47 million for the work performed under the task orders. The CO issued a final decision denying the claim, and Agility again appealed to the ASBCA. Each final decision included CDA language pertaining to a contractor’s right of appeal. The appeals were consolidated at the ASBCA, and the Government moved to dismiss the appeals for lack of jurisdiction, contending that the CDA did not apply because the contract was not with an “executive agency,” that there was no CDA jurisdiction over an alleged implied-in-fact contract with the Army, and that there was no jurisdiction under the ASBCA’s charter.

The ASBCA agreed with the Government, ruling, consistent with prior precedent, that the CPA was not an “executive agency,” and ruling that there was no evidence that the CPA’s contract with Agility was novated to the Army or that the Army had agreed to assume the CPA’s contractual obligations, particularly since the contract made clear that the U.S. would not be liable to the contractor for performance after the transfer of authority. The ASBCA was not persuaded that the Army’s execution of task orders and use of appropriated funds made the Army a contracting party rather than a contract administrator.

Accordingly, the ASBCA concluded that Agility’s contract was not with an “executive agency” and thus the CDA did not apply. Agility also argued that it had a CDA-covered implied-in-fact contract for the Army to provide task order definitization services. However, the ASBCA rejected the argument since the CDA (41 USCA § 7102(a)) does not extend to contracts where the Government provides services to a contractor.

With respect to jurisdiction, the ASBCA's charter provides that the Board has jurisdiction over appeals taken pursuant to a contract disputes provision that requires decision by the secretary of defense/secretary of a military department or designee. Agility argued that the Disputes clause in the contract provided for appeal of disputes to the ASBCA. However, the Board found that the CPA rescinded the Disputes clause on June 28, 2004, and even if the Disputes clause had not been removed from the contract, parties to a contract cannot by agreement confer jurisdiction. Finding no jurisdiction, the ASBCA dismissed the appeals. Agility appealed to the Federal Circuit.

The Federal Circuit affirmed in part and dismissed in part. 887 F.3d 1143, 1153 (Fed. Cir. 2018). It first turned to the question whether the contract was "made by an executive agency" as required by the CDA. The Federal Circuit concluded that it was not, finding that the plain language of the contract confirmed that the contract was awarded by the CPA. Although Agility argued that the conduct of the CPA, IIG and U.S. Government demonstrated that the Government was the contracting party, the Federal Circuit declined to consider extrinsic evidence since the contract was not ambiguous as to the contracting parties.

Even if the conduct of the parties were considered, the Federal Circuit agreed with the ASBCA's finding that the Government was acting as a contract administrator for the IIG, and even assuming the Government exceeded its delegation of authority, acting without power does not make the agent a party to the contract. The Federal Circuit also rejected Agility's argument that the contract (or at least the task orders) had been novated to the Government since the contract expressly disclaimed any U.S. Government liability to Agility. Thus, the Federal Circuit affirmed the Board's dismissal for lack of CDA jurisdiction.

As for Agility's contention that the Board had jurisdiction under the ASBCA charter, the Federal Circuit ruled that under 28 USCA § 1295(a)(10), it lacked jurisdiction to review the ASBCA decision since it was not made pursuant to the CDA.

Key Lessons from Agility: The ASBCA and Federal Circuit decisions demonstrate the importance of jurisdiction in resolving contract disputes and provide important reminders regarding the scope of both ASBCA and Federal Circuit jurisdiction.

First, CDA jurisdiction extends to certain contracts made by an "executive agency." 41 USCA § 7102(a). For

a contract to be deemed made by an executive agency, the Government must be in privity with the contractor, not merely acting as an agent of the party in privity. The Government's administration of the contract, issuance of task orders, including task orders obligating U.S. funds, and exceeding its authority as agent are insufficient for the Government to be considered the contracting party. And any argument that the contract was novated to the Government requires proof of consent by all parties—including the Government. See Restatement (Second) of Contracts § 280, cmt. c (Am. Law. Inst. 1981) ("assent of the obligee of the original duty and of the obligor of the new duty is always necessary"). Given the *Agility* ruling, where the contract unambiguously names the contracting party as an entity other than the U.S. Government, it is unlikely that a contractor will be able to establish CDA jurisdiction.

Second, the CDA does not apply to all executive agency contracts. The CDA applies to express or implied contracts for the Government's procurement of (1) services; (2) property other than real property; (3) construction, alteration, repair or maintenance of real property; or (4) the disposal of personal property. 41 USCA § 7102(a). Agility argued that it had an implied-in-fact contract with the Government for the provision of definitization services. However, because the services were being provided by the Government and not the contractor, the CDA did not apply.

Third, language in a CO's final decision advising a contractor of its CDA appeal rights does not establish that the dispute is covered by the CDA. In *Agility*, the CO issued multiple final decisions that included the CDA language pertaining to a contractor's right of appeal. Nonetheless, the Board found that the CDA was not applicable because the contract was not made by an executive agency.

Fourth, the ASBCA charter does not limit Board jurisdiction to CDA disputes. Prior to the March 1, 1979 effective date of the CDA, the ASBCA's charter provided that the Board was the authorized representative of the DOD and military secretaries in determining appeals taken from CO final decisions (a) where the contract required appeals to be decided by the secretary or a representative, or (b) where a DOD or military department directive granted a right of appeal in circumstances where there was no authorization provided for by contract. ASBCA charter, revised Sept. 1, 1973.

Prior to the CDA, most appeals to the ASBCA were taken pursuant to a contractual Disputes pro-

vision specifying that CO final decisions could be appealed to the relevant military secretary or representative. See, e.g., Armed Services Procurement Regulation 7-103.12(a). With the enactment of the CDA, the ASBCA's charter was amended to add jurisdiction over CDA appeals, but the original bases for jurisdiction were not removed. Thus, while the majority of ASBCA appeals are now pursuant to the CDA, the ASBCA has authority to hear appeals on other disputes meeting the criteria set forth in the charter.

Fifth, jurisdiction cannot be conferred by agreement. Agility argued to the Board that the contract's Disputes provision (which provided for appeal to the ASBCA) remained effective notwithstanding the CPA's rescission of the clause. The Board found that the rescission of the clause removed it from the contract, but even if it had remained in the contract, it would not provide a basis for jurisdiction because the Board's charter did not include jurisdiction over contracts awarded by the CPA. Thus, a contractual agreement that disputes will be heard by the ASBCA is insufficient to confer jurisdiction on the Board.

Sixth, the Federal Circuit does not have jurisdiction to hear appeals from all ASBCA decisions. The Federal Circuit has jurisdiction to hear all contract appeals from the COFC, but the Federal Circuit's

jurisdiction over Board decisions extends only to CDA decisions. 28 USCA §§ 1295(a)(3), (10). The Federal Circuit has no jurisdiction over appeals of non-CDA decisions rendered by the boards of contract appeals. Agility appealed the Board's decision that it did not have jurisdiction under the ASBCA's charter, but that decision was not a decision made pursuant to the CDA, so the Federal Circuit lacked jurisdiction to review it.

Conclusion—The CDA sets forth a system for resolving procurement contract disputes and identifies the jurisdictional predicates for those disputes to be addressed by the Board or COFC. But, as the two decisions described in this Feature Comment demonstrate, determining what claims are covered by the CDA, what claims require the statement of a sum certain, and what claims and defenses are required to be submitted to the CO for decision can be problematic. These cases provide additional insight and guidance to both the Government and contractors on meeting the requirements of the CDA and establishing jurisdiction.



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