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Case of the Month Club

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Roadmap

- Introduction
- Claims Case of the Month
- Claims Case of the Month #2
- Presenter Information

JKB Solutions—Claims Case

- Full Cite
  - *JKB Sols. and Servs. v. United States*, 2024 WL 1131445 (Fed. Cl., Mar. 15, 2024) (J. Dietz)
- Brief Summary
  - Last Discussed January 2022.
  - JKB Solutions & Services, LLC (JKB) held a three-year indefinite-delivery/indefinite-quantity (IDIQ) contract with the Army to provide a maximum of fourteen instructional services classes per year.
  - The Army issued three one-year task orders, which each had a total price corresponding to the price of fourteen classes.
  - JKB filed suit at the Court of Federal Claims (COFC) arguing the Army breached the contract by ordering fewer than fourteen classes each year and only paying for the classes provided by JKB.
  - COFC held that the Army constructively terminated each task order for convenience, and JKB's recovery was therefore limited to termination for convenience (T4C) costs, which JKB did not seek in its complaint.
    - JKB's contract contained a T4C clause because it incorporated Federal Acquisition Regulation (FAR) 52.212-4(l).
  - JKB appealed to the Federal Circuit, which vacated and remanded the case, holding that FAR 52.212-4 only applies to the acquisition of commercial items.
  - On remand, COFC noted the Federal Circuit had assumed the contract was a services contract not for commercial items because the Army had not contested that issue. But now, on remand, the Army contested the issue—it argued the contract was a commercial items contract.
  - Because the Army now contested the issue, COFC needed to determine whether this was a contract for commercial items and found that it was.
    - Even if FAR 52.212-4 did not apply, the termination for convenience clause at FAR 52.249-2 applied under the *Christian* doctrine.

JKB Revisited–Factual Background

- In September 2015, JKB and the Army entered into a three-year IDIQ contract for instructor services for a course that teaches military personnel about contract management and acquisitions.
  - This was solicited under FAR Part 12 and issued on SF 1449 for commercial item contracts.
  - JKB was required to provide instructional services to support a maximum of fourteen classes per year.
- The contract incorporated FAR 52.212-4, Contract Terms and Conditions—Commercial Items.
  - FAR 52.212-4 contains a T4C clause (52.212-4(l)) in which "[t]he Government reserves the right to terminate this contract or any part hereof, for its sole convenience."
- The Army issued three one-year task orders, which all listed one "lot" of training instructor services, the price per class, and a total price corresponding to the price of fourteen classes.
- Each year, the Army ordered fewer than fourteen classes and used its own personnel to teach the remainder of the classes.
  - The Army paid JKB for each class the contractor taught but refused to pay the total price of the fourteen classes listed in the task orders.

JKB–Factual Background cont.

- JKB filed claims with the Contracting Officer in September 2018 and January 2019 seeking payment for the remaining classes.
  - The CO denied the first claim in November 2018 and did not issue a final decision on the second claim.
- In September 2019, JKB filed suit at COFC, challenging the denial of its claims.
  - JKB argued that the Government had breached the contract by refusing to pay the total contract price.
- The Government moved for summary judgment based on FAR 52.212-4(l) and the doctrine of constructive T4C.

JKB–Factual Background cont.

- COFC granted the Government's motion for summary judgment, finding:
  - JKB's contract contained a T4C clause by its incorporation of FAR 52.212-4(l), and nothing in the FAR limited the applicability of the T4C clause in FAR 52.212-4(l) to commercial contracts only.
  - There was no indication that the Army terminated the task orders in bad faith or abused its discretion.
  - The doctrine of constructive T4C applied because the CO could have terminated the task orders for convenience when it became clear that the Army required fewer classes than originally anticipated for each task order.
  - Because the task orders were constructively terminated for convenience, JKB could only recover T4C costs, which it did not seek in its complaint.

JKB–Factual Background cont.

- The Federal Circuit found that COFC erred by holding that JKB's contract contained an applicable T4C clause by relying on the contract's incorporation by reference of FAR 52.212-4(l).
- The Federal Circuit held that FAR 52.212-4 applies only to commercial contracts.
  - Because JKB's contract was not a commercial item contract, but a services contract, COFC erred in relying on FAR 52.212-4(l) to supply an applicable T4C clause.
- The Federal Circuit rejected COFC's finding and the Government's argument reiterating that nothing in the FAR limits the applicability of FAR 52.121-4 to commercial item contracts.

JKB–COFC Decision #2

- "Contrary to JKB's contention, the government has not conceded that it breached the contract by raising constructive termination in response to JKB's breach of contract claim."
  - The effect of constructive termination for convenience "is to moot all breach claims and to limit recovery to costs which would have been allowed had the contracting officer actually invoked the clause." The Government can invoke constructive termination for convenience as a defense in the alternative.
  - Thus, summary judgment was not appropriate on the issue of breach.
- COFC next found that FAR 52.212-4 is applicable because the contract is a commercial item contract.
  - In the instant case, the Federal Circuit held that FAR 52.212-4 "applies only to commercial item contracts" and that "it has no effect on the service contract between JKB [ ] and the government." However, the Federal Circuit also noted that "[f]or the purposes of its summary judgment motion, the government does not dispute [JKB's] characterization of the contract as a service contract (and not a commercial item contract)." ***Thus, the Federal Circuit did not consider whether the Contract is a commercial item contract, as the issue was not in dispute***.

JKB–COFC Decision #2 cont.

- The Contract is clearly a commercial item contract.
  - The Contract is on SF 1449, which is the form used in solicitations and contracts for the acquisition of commercial items. The form is titled: "SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEM."
  - The Contract explicitly incorporates FAR 52.212-4 and FAR 52.212-5, which contain the contract terms and conditions applicable to commercial item acquisitions.
  - The PWS describes the services to be performed as generic instructor services for course material provided by the Army. It does not contain any indication that the instructor services are unique to the Government.
  - Although not necessary to consider, extrinsic evidence is consistent with the Court's determination.
    - Prior to issuing the solicitation, the Army conducted market research and determined that the instructor services it sought were common in the commercial market and met the FAR definition of a commercial item under FAR 2.101.
  - JKB argued that the CO made a "plainly incorrect determination of commerciality."
  - Court found that JKB waived this argument by not previously protesting or otherwise objecting to the solicitation as a commercial item acquisition.
  - JKB also characterizes the services as non-commercial, arguing that "the OCS course is purely military in nature" and that "the OCS course is not available whatsoever to the general public."
    - Court found "these arguments are misguided because they focus on the audience, location, and subject matter of the instructor services, instead of the services themselves. The Contract's objective was to acquire instructor services, not to acquire a type of instructor services used only in non-commercial applications."

JKB–COFC Decision #2 cont.

- FAR 52.249-2 is applicable under the *Christian* Doctrine.
  - *G.L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963)
    - If the FAR requires that a clause that addresses an *important topic* (one deeply ingrained in procurement law) be included in a government contract, and the Government omits the clause without authorization, courts will "read in" the clause as a matter of law.
    - The principle underlying the "Christian Doctrine" is that government regulations have the force and effect of law, and government personnel may not deviate from the law without proper authorization.
    - Termination for convenience is one of those clauses.
  - The Court found that FAR 52.249-2 is mandatory for firm fixed-price services contracts.
    - The FAR requires insertion of FAR 52.249-2 "[a]s prescribed in 49.502(b)(1)(i)."
    - FAR 49.502(b)(1)(i) provides that "[t]he contracting officer shall insert the clause at 52.249-2, Termination for Convenience of the Government (Fixed–Price), in solicitations and contracts when a fixed price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold."
    - Here, the Contract's ceiling price was $1,072,594, which exceeds the simplified acquisition threshold. Accordingly, the Court found that whether the clause is incorporated by operation of law hinges on whether the Army contemplated a fixed price contract.
  - The Court next found that the Army "clearly contemplated a fixed price contract type for the instructor services."
    - The Contract explicitly states that it is a firm-fixed price contract.
    - Additionally, the Contract incorporates FAR 52.246-4, "Inspection of Services - - Fixed-Price."
    - ***"Because the Contract is a fixed price contract, if the Contract were to be treated as a non-commercial contract, the Court would read FAR 52.249-2, Termination for Convenience of the Government (Fixed Price), into the Contract by operation of law."***
- The Court granted summary judgment for the Government on the commercial item contract and Christian doctrine arguments but denied summary judgment on the remaining arguments. Whether the Government acted in bad faith or abused its discretion—thus negating a constructive termination for convenience—involved issues of disputed material facts.

JKB– Key Takeaways

- The Court found a way NOT to upend the definition of commercial item as excluding services.
  - Federal Circuit was relying on uncontested facts that are now contested.
  - FAR 2.101 definition of commercial items includes services.
  - Note: FAR revision after this contract was issued split commercial items into commercial products and commercial services. FAR 52.212-4 now titled, "Contract Terms and Conditions—Commercial Products and Commercial Services."
- Contractor's obligation to object to solicitations terms before award—not just a bid protest rule.
- *Christian* extends to IDIQ contracts.
- Substantively, the Government is not off the hook.
  - COFC could still find that failure to order all courses was bad faith/abuse of discretion, which precludes constructive termination for convenience.
  - BUT contractor faces an extremely high burden of proof.

MLB Transportation—Claims Case #2

- Full Cite
  - *MLB Transportation v. United States*, 2024 WL 1281078 (Fed. Cl., March 25, 2024)
- Brief Summary
  - In August 2009, MLB Transportation won a Service-Disabled Veteran-Owned Small Businesses (SDVOSB) set-aside contract to provide transportation services to the VA.
  - In November 2009, MLB notified the VA of its concern that actual ridership was much lower than the estimates contained in the solicitation. MLB did not submit an REA or a claim.
  - In September 2017, MLB submitted an REA seeking various costs, including claims based on the ridership being lower than expected. It updated its REA multiple times in 2019 before the CO denied the REA/claim.
  - In 2020, MLB appealed the REA to the Court of Federal Claims (COFC).
  - The Court granted partial summary judgement/dismissal for the government based on a majority of MLB's claims being time barred.
    - The remaining issues, including MLB's status as an SDVOSB; MLB's claims based on out-of-scope contract change and attorneys' fees, will continue through litigation if MLB continues to press its appeal.

MLB–Factual Background

- Leon Gresham served in the U.S. Navy from 1955 until 1958, when he was honorably discharged with a service-connected disability. After leaving the Navy, Mr. Gresham operated an oil service station and worked in his wife's preschool as a bus driver.
- In the early 2000s, Mr. Gresham began working for his brother-in-law, Michael Baker, at MB Transportation (MB). Mr. Baker was the sole owner of MB. Mr. Baker is not a veteran.
- Around 2006, Mr. Baker and Mr. Gresham formed MLB. They signed a shareholder agreement indicating that it was effective on July 1, 2007. A shareholder certificate record was also prepared, which shows that Mr. Gresham was issued fifty-one shares and Mr. Baker was issued forty-nine shares on January 6, 2006. Mr. Gresham later signed a promissory note on August 15, 2009, promising to pay Mr. Baker roughly $900,000 for MLB.
- On March 27, 2009, the VA issued a solicitation seeking contractors to transport patients to and from the Atlanta VA Medical Center (VAMC) by wheelchair-accessible vans and sedans.
- This was a follow-on contract to a 2003 contract performed by MB. Unlike the 2003 contract, the 2009 contract was set-aside for Service-Disabled Veteran-Owned Small Businesses (SDVOSB), and only SDVOSBs were eligible for award.
- The solicitation called for a one-year contract with four option years.
  - The solicitation provided an estimated quantity of 63,000 van trips and 106,000 sedan trips for the 2009-2010 base year.
  - For the option years, the VA estimated a 15% increase in ridership each year. The solicitation stated that "[b]ids offering less than 75 percent of the estimated requirement or which provide that the Government shall guarantee any definite quantity, will not be considered."

MLB–Factual Background cont.

- The parties offered different documents as the operative solicitation. While nearly identical, the documents offered by each party contain conflicting FAR clauses in Section C.4.
- The government's document incorporated FAR 52.216-22, Indefinite Quantity, which provides in relevant part:
  - (a) This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.
- MLB's document incorporated FAR 52.216-21, Requirements, which provides in relevant part:
  - (a) This is a requirements contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government's requirements do not result in orders in the quantities described as "estimated" or "maximum" in the Schedule, that fact shall not constitute the basis for an equitable price adjustment.
- Under the "Basis of Award" section, both purported solicitations state:
  - "The Government anticipates awarding a single indefinite [delivery] indefinite [quantity] (IDIQ) contract."
  - Both also contain VA Acquisition Regulation (VAAR) 852.216-70 Estimated Quantities, which states, in relevant part, that "the [VA] shall not be relieved of its obligation to order from the contractor all articles or services that may, in the judgment of the ordering officer, be needed."

MLB–Factual Background cont.

- On April 25, 2009, Mr. Baker submitted a proposal on behalf of an entity identified as "MB Transportation, Inc. d/b/a MLB Transportation Company."
- The proposal included a self-certification representing that the offeror is an SDVOSB.
- On August 1, 2009, the VA awarded the contract to:

  MB TRANSPORTATION COMPANY

  MLB TRANSPORTATION
- The award document also stated that the basis of award is an IDIQ contract.
  - Section C.4 incorporated FAR 52.216-21, Requirements
  - Section C.9 incorporated VAAR 852.216-70 Estimated Quantities
- MLB began performance on October 1, 2009.
- In November 2009, MLB notified the VA of its concern that actual ridership was much lower than the estimates contained in the solicitation.
  - According to MLB, in its meeting with the VA, "the contracting officer assured MLB that the VA would deliver the number of trips it placed into the contract and told MLB to increase the size of its vehicle fleet."
  - Shortly thereafter, MLB purchased 62 wheelchair-accessible vans and sedans, at a total cost of $1,665,000.

MLB–Factual Background cont.

- Despite the VA's alleged assurances, actual ridership during the five years of the contract did not reach the solicitation's estimates.
- On September 29, 2017, MLB submitted a request for equitable adjustment (REA), seeking compensation for:
  - [T]he VA's using grossly negligent/bad faith/fraudulent estimates to suppress the rates for trips and mileage offerors placed into their bids, for the VA using prohibited competition in this requirements contract, for compensation based on increased fuel costs, for backpay paid to employees due to a Department of Labor settlement, for fringe benefit adjustment paid to employees due to the same Department of Labor settlement, for compensation for out[-]of[-]scope change, for attorney's fees, and for interest on late payments.
- MLB supplemented and amended its REA multiple times in 2019.
- On September 10, 2019, the contracting officer (CO) issued a final decision on MLB's REA.
  - The CO approved MLB's claims for employee backpay based on the Department of Labor settlement and associated fringe benefits.
  - The CO denied MLB's claims based on the VA's use of negligent estimates and prohibited competition, the VA's out-of-scope change to the contract, and MLB's request for attorneys' fees.

MLB–COFC Decision

- MLB filed suit at COFC on June 12, 2020 to appeal the CO's decision denying its REA.
  - In its complaint, MLB claimed that it is entitled to compensation because the VA used "grossly negligent/bad faith/fraudulent estimates," engaged in prohibited competition, and made an out of-scope change to the contract.
  - MLB also claimed that it is entitled to attorneys' fees because it had to negotiate with the VA and U.S. Department of Labor – Wage and Hour Division (WHD) regarding the correct prevailing wage rate applicable to its services and request an equitable adjustment due to the VA's breach of the contract.
- On June 9, 2022, the government filed a motion to dismiss MLB's complaint for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1). Alternatively, the government moved for summary judgment pursuant to RCFC 56.
  - The government argued that MLB falsely certified its status as an SDVOSB, and, because of its false certification, no valid contract was formed.
    - The government concluded that this "conclusion is fatal both to MLB's claims on the merits and to its effort to establish jurisdiction in this Court, which depends on the existence of a contract between MLB and the Government."
  - The government further argued that it was entitled to summary judgment "because there is not sufficient evidence to allow MLB to prevail on any of its claims."

MLB–COFC Decision Cont.

- MLB's Status as an SDVOSB
  - The Court disagreed with the government that MLB's alleged failure to establish the existence of a valid contract deprived the Court of jurisdiction to hear its claims.
    - "Here, it is undisputed that MLB's complaint alleges the existence of an express contract. The government's contention that the contract is void because of an alleged false certification by MLB does not divest this Court of subject-matter jurisdiction over MLB's complaint. The Court must exercise jurisdiction over MLB's complaint to determine whether MLB falsely certified its status as a SDVOSB, which involves questions of fact."
  - The Court then found that there were genuine issues of material fact regarding whether MLB was an SDVOSB and therefore summary judgement was not proper.
    - It is undisputed that Mr. Gresham is a disabled veteran.
    - MLB presented evidence of a Shareholder Record and Shareholders' Agreement designating fifty-one percent of the stock and ownership of MLB to Mr. Gresham.
    - Further, MLB presented evidence that Mr. Gresham exercised both day-to-day and long-term control over MLB and had ultimate managerial and supervisory control over MLB.
    - MLB's Contract Manager stated that Mr. Gresham conducted monthly management meetings with her, Mr. Baker, and MLB's General Manager.

MLB–COFC Decision Cont.

- MLB's Claims Based on Trip Volume Estimates
  - A claim accrues on "the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been accrued."
  - The Court found that MLB's claims based on trip volume estimates accrued by no later than November 2, 2009.
    - There are four distinct events that needed to occur for liability to be fixed with respect to MLB's claims based on trip volume estimates: (1) execution of the contract between MLB and the VA; (2) the VA's purported obligation to provide MLB with the estimated trip volumes reflected in the contract; (3) the VA's failure to meet the estimated trip volumes; and (4) MLB's incurring damages as a result of the VA's failure to meet its purported obligation.
    - Accordingly, MLB needed to submit its claims by November 2, 2015, for them to be timely.
    - No REA until 2017.
    - Moreover, MLB's January 10, 2014, letter does not demonstrate that it is seeking a final decision from the contracting officer. MLB begins the letter by stating: "Please consider this a preliminary request for an equitable adjustment."
      - "The letter does not mention the CDA and instead indicates that MLB intends to seek an equitable adjustment in a subsequent submission that will include actual amounts claimed and supporting information. Moreover, the letter fails to include any form of the statutorily required certification, whether as required for a request for equitable adjustment or a CDA claim."

MLB–COFC Decision Cont.

- MLB's Claims Based on Prohibited Competition
  - MLB argued that "the VA began competing with MLB in 2011 by using its own vehicles and using other companies to transport VA beneficiaries to appointments[.]"
  - Requirements (MLB) v. IDIQ (VA)
    - "Here, not only do the parties dispute the type of contract at issue, but they also dispute which document is the operative solicitation."
    - The Court said it doesn't matter: Irrespective of the parties' disagreement surrounding the operative solicitation, the Court finds that both versions of the solicitation contain a patent ambiguity as to the type of contract such that MLB had a duty to inquire prior to bidding.
- MLB's Claims Based on Out-of-Scope Change & MLB's Claim for Attorneys' Fees
  - COFC found these claims can survive because genuine issues of material fact remain.
  - These claims may fall within the 6-year CDA statute of limitations window.
  - Open questions on the scope issue as well as whether the legal fees sought were unallowable.

- Summary judgment/dismissal for government granted in part and denied in part.
  - Litigation will proceed on MLB's status as an SDVOSB and claims based on out-of-scope contract change and attorneys' fees.

MLB–Key Takeaways

- Again, contractor has an obligation to question contradictory contract terms before award.
- Pay attention to statute of limitations.
  - May be triggered even when total damages amount is unknown.
  - Informal REA negotiations to avoid litigation might backfire if they drag on and preclude a claim.
- Make sure documentation supporting small business status is clear.

Presenters

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