Case of the Month Club
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Roadmap

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Claims Case of the Month: *Tolliver Group*

- Full Cite
  - *Tolliver Group, Inc. v. United States*, 20 F.4th 771 (Fed. Cir. 2021)
- Brief Summary
  - Tolliver assumed a fixed-price contract to develop technical manuals.
  - Tolliver and the Army modified the contract after the Army was unable to provide a technical data package (TDP) as provided for in the contract.
    - Added time and funds → Tolliver performed successfully.
  - A *qui tam* relator filed a False Claims Act suit, alleging false certification of compliance with contract provisions relating to, in particular, the TDP.
  - Tolliver defeated the FCA suit on summary judgment and on appeal.
  - Tolliver then sought to recover its costs of defending the FCA suit from the Army.
  - After the Army denied the claim, the Court of Federal Claims (COFC) found for Tolliver: Under the *Spearin* doctrine, the Army had breached an implied warranty of specifications by not providing the TDP, which proximately caused the litigation costs.
  - The Federal Circuit reversed, finding no jurisdiction for a *Spearin* recovery because that claim was too different from the one presented to the contracting officer, who had focused on allowability of the litigation costs under FAR 31.205-47.
  - Case remanded to COFC for further proceedings.

Tolliver Group—Factual Background

- In 2011, the Army awarded a contract to write technical manuals for operating and maintaining the Hydrema 910 mine-clearing vehicle.
  - Fixed-price, level-of-effort type.
- Tolliver assumed the contract by novation in September 2012.
- The contract required the Army to provide a TDP with specifications from the manufacturer, but the Army couldn't obtain the information.
- The Army and Tolliver modified the contract to add time and funding, remove the TDP requirement, and convert to fixed-price type.
- "The parties agree that Tolliver successfully fulfilled its obligations under the modified contract."

Tolliver Group—Factual Background (cont.)

- A year after the modification:
  - *Qui tam* relator filed a False Claims Act suit against Tolliver.
  - Core allegation: Tolliver had falsely certified compliance with the original contract without having received the TDP.
- The Government declined to intervene.
  - Federal Circuit noted in passing that doing so "would have allowed the government to request dismissal of the suit."
- Tolliver prevailed at district court.
  - The Government provided evidentiary assistance, helping to create what that court called an "insurmountable hurdle."
  - Tolliver was granted summary judgment.
  - The decision was affirmed on appeal.

Tolliver Group—Factual Background cont.

- After litigation, Tolliver submitted a claim for an "equitable adjustment" for $195,889.78 in "allowable legal fees" from litigating the FCA matter.
- At the center: cost principle at FAR 31.205-47.
- In relevant part:
  - 31.205-47(b) – Costs are unallowable when incurred in connection with a civil proceeding if the result is "a finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct."
  - 31.205-47(g) – Costs that may be unallowable under this principle must be segregated and in general not reimbursed by the Government.
  - 31.205-47(e) – Costs incurred in connection with these proceedings but not made unallowable by Paragraph (b) (namely, contractor prevails) may be allowable if reasonable and not covered by other sources.
    - Contracting officer determines whether costs are reimbursable.
    - Considerations: complexity of litigation, GAAP, and other factors.
    - Reimbursement can be up to 80% of (otherwise allowable) costs.

Tolliver Group—Factual Background cont.

- The Army denied the claim, reasoning the costs were:
  - Not allocable to the contract.
  - Not permitted by the terms of fixed-price contract.

- COFC proceeding
  - Initial complaint articulated two theories.
  - "Constructive Change": Requiring Tolliver to proceed without the TDP had prompted the FCA complaint and associated legal costs.
  - "Breach of Contract – Denial of Allowable Costs": Tolliver was entitled to 80% of its FCA-case legal costs.

Tolliver Group—Factual Background cont.

- COFC proceeding
  - Motion to dismiss, then amended complaint.
    - Constructive Change: Added failure to dismiss FCA claim.
    - Breach of Contract: Added failure to provide TDP and proximate causation (as in Constructive Change).
  - Another motion to dismiss and another amended complaint.
- COFC finds for Tolliver
  - Under *United States v. Spearin*, 248 U.S. 132 (1918), when the Government provides defective/erroneous specifications or promises but doesn't provide them, the Government breaches the implied warranty that satisfactory contract performance will result from following the specs.
  - Proximate causation: Failure to provide the TDP created the circumstances leading to the FCA claim.

Tolliver Group—Federal Circuit Decision

- Jurisdictional prerequisites for a CDA action: claim and a contracting officer's final decision.
- At COFC, the contractor must advance the "same claim" as the one presented to the contracting officer.
  - "We consider the remedies sought and the elements of the claims."
  - The focus is on whether the contracting officer had "an ample pre-suit opportunity to rule on a request, knowing at least the relief sought and what substantive issues are raised by the request."
- Claim presented to Army contracting officer was based only on allowability under the FAR, not on breach of implied warranty.
  - Initial version of claim was too high level to "give adequate notice of any specific claim" and instead "could cover materially distinct claims."
  - Clarified claim gave notice only of a FAR allowability claim.

Tolliver Group—Federal Circuit Decision cont.

- Also a factor: the amount sought from the contracting officer.
  - Tolliver had sought $196k, 80% of the total legal fees (consistent with FAR 31.205-47(e)(3) when applicable).
  - Tolliver didn't request the full $245k "that might have been recovered under a non-FAR claim."

- Another factor: the claim's relative lack of attention to the issues underlying the FCA litigation.
  - Tolliver's claim to the contracting officer "did not call attention to the TDP obligation or the government's failure to provide the TDP."
  - Inclusion of documents and information from the FCA litigation read as "just background information."

Tolliver Group—Federal Circuit Decision cont.

- But what about "same operative facts" and "different legal theories"?
  - In *Scott Timber Co. v. United States*, Federal Circuit found claims to contracting officer and COFC were "essentially the same" as they:
    - "arose from the same operative facts,"
    - "claimed essentially the same relief," and
    - "merely asserted different legal theories for recovery" (albeit "slightly different"). 333 F.3d 1358, 1365-66 (Fed. Cir. 2003).
  - Tolliver raised this decision in its arguments.
  - Federal Circuit rejected the comparison: "In this case, the legal theories are not materially the same."
    - Allowability claim elements: legal costs incurred; costs were not rendered unallowable by FAR 31.205-47; and request was for an appropriate percentage of those costs.
    - *Spearin* claim: Tolliver was contractually bound to follow a government-provided design specification that, if followed, would yield a defective or unsafe result; Tolliver had followed the spec or following it was commercially impossible; and the defect proximately caused the costs sought.

Tolliver Group—Federal Circuit Decision cont.

- The surrounding circumstances may have been unhelpful to Tolliver:
  - Multiple revisions/clarifications for both the claim and the allegations in the COFC complaint.
  - COFC's having "expressed skepticism" at one point "that the claim before it had been before the contracting officer."
    - This may have been a narrower/different point by the COFC judge.
  - The Government's having "raised serious questions about whether the *Spearin* doctrine applies here" to the dispute at issue.
    - The Federal Circuit deferred this question for lack of jurisdiction.
  - The Federal Circuit observed that at COFC: "Tolliver had not mentioned *Spearin* or the implied warranty of performance in its motion for summary judgment."

- The Federal Circuit vacated COFC's judgment and remanded the case.
  - Further proceedings were contemplated "at least because [COFC] did not address the allowability of the claimed fees under the FAR."
  - There might be other legal theories as well, per the court.

Tolliver Group—Key Takeaways/Open Questions

- The scope of "different legal theories" that can be first articulated at COFC or the contract appeals boards may have some limits to be worked out in future cases.
- What future did the Federal Circuit signal for *Spearin* claims involving federal contracts?
- How will COFC rule on the allowability theory on remand?

- General best practices for contractors:
  - Research and include all potential legal theories of recovery in REAs/claims.
  - Draft REAs/claims to emphasize the facts and legal elements needed for each of these theories.

Protest Case of the Month: *S3*

- Full Cite
  - *System Studies & Simulation, Inc. v. United States*, No. 2021-1469, 2021 WL 6140242 (Fed. Cir. Dec. 30, 2021)
- Brief Summary
  - U.S. Department of the Army awarded a contract for advanced helicopter flight training services to CAE USA Inc.
  - S3 and another vendor filed a protest at the Court of Federal Claims challenging the award on several grounds.
  - The COFC agreed with one of S3's arguments challenging the SSA's assignment of a strength to CAE's proposal for providing a "significant cost savings benefit."
  - But the court upheld the decision to award to CAE because there was no prejudice to S3 from the error—and stuck to that decision on reconsideration.
  - On appeal, the Federal Circuit affirmed the COFC's decision, holding that there is no presumption of prejudice, and agreeing with the lower court that plaintiffs had not established prejudice here.

S3—Factual Background

- The Army issued Solicitation No. W9124G-18-R-0009 for advanced helicopter flight training support for the U.S. Army Aviation Center of Excellence (USAACE) at Fort Rucker, Alabama.
  - Contemplated award of a single FFP contract for a 30-day phase-in period, an 11-month base period, and six 1-year option periods.
  - Provided for a best-value tradeoff, with non-price factors (technical capacity, staffing and management approach, past performance, and small business participation) significantly more important than price.
- Initial award and protest
  - The Army informed S3 that it had awarded the contract to L3 Doss on September 16, 2019.
  - S3 filed a protest at the COFC and won.
    - The court agreed that the SSA did not conduct a proper tradeoff analysis, effectively converting the acquisition to a lowest price, technically acceptable procurement.
    - 146 Fed. Cl. 186 (2019)

S3—Factual Background cont.

- Post-decision reevaluation of proposals
  - Following the decision, the SSEB reevaluated proposals under Factors 1 and 2, and the SSA issued a new source selection decision.
    - In so doing, the Agency awarded a strength for one aspect of CAE's technical approach
      - Apparently related to CAE's proposal that if it was unable to conduct training flights for a specific reason or reasons, it wouldn't bill the Army the full amount.
    - Prices remained unchanged since the previous evaluation, and the CO and SSA concurred that the proposed prices were fair, reasonable, realistic, balanced, and below the IGCE.
  - The Army determined that paying more for CAE's proposal would be "advantageous to the program in the long-run" and was consistent with the solicitation
- On May 5, 2020, the Agency awarded the contract to CAE

S3—Factual Background cont.

- Second round of protests
  - On May 8, 2020, S3 filed a protest at COFC challenging the award to CAE; L3 Doss protested the award on May 15, 2020.
  - The court granted the Government's and CAE's motions for judgment on the administrative record (MJAR)
    - Did find error with the assignment of a strength to CAE
      - According to the court, "[t]he record show[ed] no evidence" of the alleged benefit, which also had "unpredictable applicability"
    - But the court concluded that the plaintiffs did not demonstrate that the assignment of the strength affected the best value tradeoff analysis such that they were prejudiced by the error
    - 152 Fed. Cl. 20 (2020)
- On November 2, 2020, both protesters filed motions seeking reconsideration.

S3—COFC Decision (Recon)

- Arguments on Recon
  - Plaintiffs:
    - Argued that the court applied the incorrect legal standard for competitive prejudice and that prejudice is presumed when a protester has established irrational agency action.
  - Defendant and Intervenor:
    - Argued that the court must determine that there was a "substantial chance" that protester would have received the award but for the error in question
- COFC held that it had applied the correct standard
  - Walked through the origins and applications of the "presumption of prejudice" advocated by plaintiffs, concluding:
    - "[I]n a situation where a procuring agency has acted irrationally, a presumption of prejudice would apply only when that irrational action actually affected the protestor's ability to be awarded the contract."
    - "[T]he protestor bears the burden of proving that a significant error marred the procurement in question."
  - According to the court, the analysis the court conducted in its earlier decision was fully consistent with this precedent:
    - "The error identified by the court neither undercut the integrity of the Agency's procurement process nor harmed plaintiffs' chances of being awarded the contract."

S3—Federal Circuit Decision

- On appeal, S3 again argued that there is a presumption of prejudice whenever COFC determines that an agency acted irrationally in making an award decision.
- Federal Circuit rejected that contention and affirmed the lower court's decision
  - APA (as applied by SCOTUS) generally places the burden of showing that agency was harmful—that is, prejudicial—on the challenger
  - Two-step process to determine whether to set aside a contract award:
    - First ask "whether the agency's actions were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'"
    - If so, "we ask whether the error was 'prejudicial.'"

S3—Federal Circuit Decision

- Federal Circuit precedent supports the two-step analysis
  - *DynCorp Int'l, LLC v. United States*, 10 F.4th 1300, 1308 n.6 (Fed. Cir. 2021) ("The APA does not provide an exception to the prejudicial-error rule for arbitrary and capricious action.")
  - *Glenn Defense Marine, (ASIA), PTE Ltd. v. United States*, 720 F.3d 901, 912 (Fed. Cir. 2013) (specifically stating in a case where the alleged error was an irrational rating, "[t]o prevail in a bid protest case, the protestor must show that it was prejudiced by the government's actions")
- Protester's reliance on *Impresa* does not change the analysis
  - There, the Federal Circuit stated that award may be set aside if either (1) the procurement official's decision lacked a rational basis, or (2) the procurement procedure involved a violation of regulation or procedure
    - States that a challenge brought on the latter ground requires a showing of a "clear and prejudicial violation of applicable statutes or regulations."
    - Omits reference to prejudice in discussing the former
- According to the Federal Circuit, "S3 makes more of that language than is proper."

S3—Key Takeaways/Open Questions

- Takeaways
  - Prejudice is not assumed; protesters therefore need to establish prejudice
  - In some cases, prejudice may be "easily shown" because the circumstances will make prejudice readily apparent
  - This decision also clarifies and specifically rejects the interpretation of *Impresa* advanced in several COFC cases applying a presumption of prejudice
- Questions
  - Opening the door to cases trying to define the continuum?
  - Tension in principles of construction?
    - Plain language versus reading too much into decisions?
    - Statutes, regulations, and contracts versus court opinions?
  - Opening the door to other challenges to long-standing precedent?

Presenters

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