Government Contracts Advisory

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ASBCA Lacks Jurisdiction Over Claims Against the Coalition Provisional Authority: Is There a Silver Lining for Reconstruction Contractors?

CONTACTS

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On October 29, 2010, Judge Diana Dickinson of the Armed Services Board of Contract Appeals ("ASBCA" or "the Board") held that the Board did not have jurisdiction to adjudicate claims arising under a contract between MAC International FZE ("MAC") and the Coalition Provisional Authority ("CPA") of Iraq. *Appeal of MAC International FZE*, ASBCA No. 56355. Judge Dickinson's opinion in *MAC* not only builds upon federal district court precedent regarding the status of the CPA vis-à-vis American government contractors performing in Iraq, *see United States of America ex. rel. DRC, Inc. v. Custer Battles*, *LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2005), *rev'd in part on other grounds and remanded*, 562 F.3d 295 (4th Cir. 2009) ("*Custer Battles*"), but it also provides both a shield and a sword to contractors engaged in affirmative claims or fraud investigations arising from their performance of Iraqi reconstruction contracts.

As noted in the Board's opinion, the CPA was created by international coalition partners on May 8, 2003 to temporarily govern Iraq during the post-conflict period in the country. Secretary of Defense Donald Rumsfeld initially appointed Ambassador Paul Bremer to serve as the Administrator of the CPA, a position in which the Ambassador had authority to promulgate interim laws, regulations, orders and public notices. During the course of its existence, the CPA received funding from a number of different international sources, including: (1) funds from the Development Fund for Iraq ("DFI"), which was a bank account created by the CPA and held by the Central Bank of Iraq at the Federal Reserve Bank of New York, pursuant to that Bank's authority to maintain foreign bank accounts under 12 U.S.C. § 358(14)(e) (2006); (2) U.S. congressional funds appropriated to support the reconstruction of Iraqi infrastructure; and (3) funds from the other coalition partners.

In May 2003, the Secretary of the Army was granted authority to provide acquisition and program management support to the CPA and any successor entity. The Secretary's responsibilities with respect to acquisition and program management support included authority over "contract awards, contract administration and oversight of all contracts, grants, and other acquisition actions as well as applicable financial management." As a result, the CPA routinely awarded contracts obligating Iraqi funds and U.S. appropriated funds that had been contributed in support of the reconstruction effort. In fact, the CPA served as the awarding authority for most of the major design-build Indefinite Delivery/Indefinite Quantity ("IDIQ") contracts issued to U.S. companies in 2003 and 2004.

The dispute between MAC and the CPA arose out of an IDIQ contract awarded by the CPA to MAC for the delivery of vehicles in Iraq. The contract between MAC and the CPA contemplated that MAC would supply these vehicles via individual delivery orders ("DOs") and that the CPA would administer MAC's contract during the contractor's performance of the IDIQ delivery orders. Moreover, the contract between MAC and the CPA included FAR clause 52.212-4, Contract Terms and Conditions — Commercial Items (Oct 2003), which states that the Contract Disputes Act of 1978 ("CDA") and the Prompt Payment Act apply to the parties' underlying agreement. MAC initiated its appeal after the CPA had failed to pay MAC for vehicles delivered under DO Nos. 8 and 9 of MAC's IDIQ contract. Although the government agreed that MAC was entitled to compensation for DO Nos. 8 and 9, the government asserted that the ASBCA did not have subject matter jurisdiction to adjudicate MAC's appeal given that the CPA was not an executive agency within the meaning of the CDA, and given that the

funding for the contract was to come from the Development Fund for Iraq instead of from U.S. appropriated funds.

In siding with the government's position that the Board lacked jurisdiction over MAC's claims, the Board relied heavily on the Eastern District of Virginia's decision in *Custer Battles*, *supra*. The Board stated that because "the CPA was an international entity that was not an entity of any of the member nations of the CPA, including the U.S. government," it was not an executive agency within the meaning of the CDA. The Board gave little weight to the fact that the CPA had used standard government contracting forms throughout MAC's performance of the IDIQ contract, that an individual with a U.S. government contracting officer's warrant had signed the agreement on behalf of the CPA, or that a Defense Financing and Accounting Service ("DFAS") office had made payments to MAC for deliveries under the contract. Further, the Board was not persuaded by the fact that the CPA later transferred its authority to a Defense Department agency after the CPA had resolved (the Joint Contracting Command for Iraq/Afghanistan). In this regard, the Board held that "[t]he government did not become the CPA (nor did the CPA become the government) by virtue of the government's use and contribution of its resources in its role as a coalition partner." In addition, with respect to the fact that the parties' agreement had specifically incorporated the Disputes clause at FAR 52.212-4(d), the Board held that "the mere invocation of the [Disputes clause] by non-government parties in their contracts is insufficient to invoke [the Board's] jurisdiction under the CDA" because "only Congress can grant waivers of sovereign immunity." While the funding source (DFI funding) was a factor in the Board's decision to hold that it did not have jurisdiction, the holding relies almost entirely on the fact that the Board viewed the relevant contracting party as being the CPA, which is not a U.S. government agency.

The Board's holding in *MAC* has significant ramifications for the contractors that engaged in reconstruction efforts in Iraq. Specifically, contractors that are presently pursuing claims against the U.S. government under contracts awarded by the CPA must be prepared for the government to make similar jurisdictional arguments in their matters. While this may be a "curse," we see potential "blessings" for actual or potential fraud defendants under contracts originally led by the CPA. Specifically, the *MAC* decision provides a potential defense for contractors faced with the specter of a False Claims Act ("FCA") suit arising from their performance of a CPA-administered contract, the Board's decision suggests that U.S. procurement law does not apply to such CPA contracts. If the government is immune from contract claims because it was not a party to such contracts, it should not be able to pursue fraud claims under such contracts with foreign entities.