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FEATURE COMMENT: In Three Recent Decisions, COFC Takes An Expansive View Of Its Bid Protest Jurisdiction

FAS Support Servs., LLC v. U.S., 2010 WL 3038713 (Fed. Cl. Aug. 4, 2010)

K-LAK Corp. v. U.S., 2010 WL 3123265 (Fed. Cl. Aug. 3, 2010)

L-3 Commc'ns Integrated Sys., L.P. v. U.S., 2010 WL 3296862 (Fed. Cl. Aug. 23, 2010)

In three recent decisions, the U.S. Court of Federal Claims has taken an expansive view of its bid protest jurisdiction under the Tucker Act, 28 USCA § 1491. The decisions are *FAS Support Servs., LLC v. U.S.*, 2010 WL 3038713 (Fed. Cl. Aug. 4, 2010); *L-3 Commc'ns Integrated Sys., L.P. v. U.S.*, 2010 WL 3296862 (Fed. Cl. Aug. 23, 2010); and *K-LAK Corp. v. U.S.*, 2010 WL 3123265 (Fed. Cl. Aug. 3, 2010).

Taken together, these decisions build on the expansive view of § 1491(b)(1) jurisdiction first expressed by the U.S. Court of Appeals for the Federal Circuit in *RAMCOR Servs. Group, Inc. v. U.S.*, 185 F.3d 1286 (Fed. Cir. 1999); 41 GC ¶ 361, but adopt an approach to § 1491(a)(1) jurisdiction that is potentially in tension with the appellate court's decision in *Res. Conservation Group v. U.S.* (RCG), 597 F.3d 1238 (Fed. Cir. 2010); 52 GC ¶ 95.

Background—The COFC's Tucker Act jurisdiction is defined in 28 USCA § 1491. Section 1491(a)(1) provides that the court

shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive depart-

ment, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Historically, the COFC interpreted this provision as giving it jurisdiction over protests based on an alleged breach of an implied contract to consider proposals fairly and honestly. Prior to the passage of the Administrative Dispute Resolution Act of 1996, P.L. 104-320, § 12, 110 Stat. 3870, 3874-76 (1996), that interpretation was the basis for the COFC's bid protest jurisdiction. *Keco Indus., Inc. v. U.S.*, 492 F.2d 1200 (Ct. Cl. 1974); 16 GC ¶ 104. Before 1982, the court typically could grant only monetary relief, such as bid and proposal costs, in procurement protests brought under § 1491(a)(1). *RCG*, 597 F.3d at 1243 n.7. In 1982, Congress authorized the COFC to grant injunctive relief in pre-award protests, but continued to permit only monetary relief in postaward protests. *Id.* at 1244 n.10.

ADRA added § 1491(b)(1) to the court's Tucker Act jurisdiction. Section 1491(b)(1) provides that the COFC

shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.

ADRA invested the COFC with comprehensive jurisdiction over both pre- and postaward protests, with the ability to award both monetary and injunctive relief in both types of protests. In addition, ADRA included a sunset provision, after which the district courts' jurisdiction over protests covered by § 1491(b)(1) would expire and the COFC's jurisdiction would become exclusive.

ADRA's passage created new questions regarding the scope of the court's jurisdiction in bid protest cases. In the early years of the new jurisdiction, the Federal Circuit took an expansive view of that juris-

diction, giving a broad interpretation to the requirement that a violation of a statute or regulation must be “in connection with” a procurement. In the context of a challenge to a stay override, the court held that the COFC can have jurisdiction under this provision even if a protester does not challenge the actual underlying procurement. *RAMCOR*, 185 F.3d 1286. More recently, the Federal Circuit has also adopted an expansive interpretation of the term “procurement,” explaining that it includes “all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout.” *Distrib. Solutions, Inc. v. U.S.*, 539 F.3d 1340, 1345 (Fed. Cir. 2008); 50 GC ¶ 332.

Questions remain, however, regarding the limits of the COFC’s jurisdiction after ADRA, including two of particular significance: (1) What is the effect of ADRA on the COFC’s traditional § 1491(a)(1) jurisdiction over protests alleging a breach of an implied contract to consider proposals fairly and honestly? (2) What are the limits of the COFC’s § 1491(b)(1) jurisdiction to hear protests challenging a violation of a statute or regulation “in connection with” a “procurement”?

The Federal Circuit recently addressed the first question in *RCG*, but subsequent COFC decisions have cast doubt on the meaning and effect of the decision in that case. Further, although the Federal Circuit in *RAMCOR* and *Distrib. Solutions* established an expansive reading of the phrase “in connection with a procurement,” recent COFC decisions have embraced and built on that reading.

COFC Jurisdiction over Protests Alleging a Breach of the Implied Contract to Consider Proposals Fairly and Honestly—*RCG*: In *RCG*, the Navy offered a former dairy farm for lease. 597 F.3d at 1240. After *RCG*, with the Navy’s knowledge, undertook an expensive survey of the land to determine the presence of minable sand and gravel, *RCG* submitted a proposal to lease the land with the intent to use it as a mine. *Id.* at 1240–41. The Navy rejected *RCG*’s proposal because Congress had required the Navy to ensure that the land remained rural and agricultural in nature. *Id.* *RCG* filed a protest at the COFC alleging a breach of the agency’s implied contract to consider its offer fairly and equally, based on the Navy’s failure to inform *RCG* that it would not award a lease for mining purposes. *Id.* *RCG* sought to recover \$500,000 in bid

preparation costs, but did not challenge the award of a lease to another offeror. *Id.*

The COFC concluded that it lacked jurisdiction. It held that its jurisdiction under § 1491(b)(1) is limited to bid protests “in connection with a procurement or proposed procurement,” and that a lease in which the Government acts as lessor does not qualify as a “procurement.” *Id.* at 1242. It also held that ADRA’s creation of § 1491(b)(1) jurisdiction impliedly repealed the COFC’s § 1491(a)(1) jurisdiction over protests alleging breach of an implied contract to have bids fairly and honestly considered. *Id.*

The Federal Circuit agreed that no jurisdiction existed under § 1491(b)(1). The lease did not qualify as a “procurement” for purposes of ADRA jurisdiction because the Government was acting as the lessor and was not acquiring property or services. The Federal Circuit held, however, that the COFC did have jurisdiction under § 1491(a)(1) to hear *RCG*’s implied contract claim. The Federal Circuit focused on Congress’ intent, as reflected in ADRA’s legislative history, to have § 1491(b)(1) give the COFC exclusive jurisdiction over “the full range of procurement protest cases.” *Id.* at 1246 (quoting H.R. Rep. No. 104-841, at 10 (1996) (Conf. Rep.)). It reasoned that Congress did not intend to repeal jurisdiction under § 1491(a)(1) in areas in which it did not create new jurisdiction under § 1491(b)(1), and concluded that the COFC therefore retained jurisdiction under § 1491(a)(1) to hear non-procurement protests. *Id.*

Because the Federal Circuit emphasized the nonprocurement nature of *RCG*’s protest and noted Congress’ intent to have § 1491(b)(1) cover “the full range of procurement protest cases,” many commentators, and at least one subsequent COFC decision, interpreted *RCG* as holding that the COFC no longer possessed implied-in-fact jurisdiction for procurement protests under § 1491(a)(1). See e.g., *Metro. Van & Storage, Inc. v. U.S.*, 92 Fed. Cl. 232, 249 n.7 (2010); Nash, “Postscript: The Implied Contract to Fairly and Honestly Consider an Offer,” 24 N&CR ¶ 27; Nibley, Feature Comment, “The Protest Record—What Should Be In; What Should Be Out?,” 52 GC ¶ 211.

Two recent COFC decisions have rejected this interpretation of *RCG*, however.

FAS Support Servs.: In *FAS Support Servs.*, the protester, a joint venture of First Support Services and Taos Industries, was in line for award of a base management contract with the Air Force when the Defense Logistics Agency suspended first Taos and

then FAS itself from Government contracting. *FAS*, 2010 WL 3038713, at *1–4. Relying on the suspension, the contracting officer excluded FAS from the competition. *Id.* at *4. Although FAS was later reinstated, the CO, relying on Federal Acquisition Regulation 9.405(d)(3), declined to permit FAS to reenter the competition. *Id.* at *5–6. After an unsuccessful protest at the Government Accountability Office, FAS protested at the COFC, challenging both the CO’s decision and DLA’s original decision to suspend FAS. Regarding the latter, FAS alleged that because it was 51-percent owned by First Support Services, it was not controlled by or affiliated with Taos, the suspended entity, as required by FAR 9.403.

The Government moved to dismiss, asserting that DLA’s suspension of FAS was not “in connection with a procurement,” and therefore fell outside the scope of the court’s jurisdiction under § 1491(b)(1). *Id.* at *9. In denying the motion, the court interpreted *RCG* as holding that “implied-in-fact contract jurisdiction under 28 U.S.C. § 1491(a)(1) remains for application to protests where 28 U.S.C. § 1491(b)(1) does not provide a remedy.” *Id.* The court did not address the apparent dichotomy that *RCG* created between nonprocurement and procurement cases.

The court then reviewed two prior decisions of the Federal Circuit that predate ADRA’s passage. In *Electro-Methods, Inc. v. U.S.*, 728 F.2d 1471 (Fed. Cir. 1984), the Federal Circuit concluded that the COFC had jurisdiction to review a protest challenging a suspension because the suspension would affect the protester’s ability to compete for several pending procurements. The court also cited *IMCO, Inc. v. U.S.*, 97 F.3d 1422, 1425 (Fed. Cir. 1996), as standing for the proposition that

a direct challenge to suspension from contracting with the government, divorced from any connection with a pending procurement, belongs in a district court, whereas the Court of Federal Claims correctly exercised implied contract jurisdiction to resolve allegations of error in suspension actions affecting specific procurements.

FAS, 2010 WL 3038713, at *9. Relying on these decisions, the court concluded that

it is clear that the DLA suspension action mandated that FAS be removed from consideration for an award of the [contract], [and] jurisdiction to review the suspension exists, at least under the implied contract for fair and honest bid consideration.

Id. Thus, the court concluded that it continues to possess § 1491(a)(1) jurisdiction to hear procurement protests under an implied contract theory. Because FAS did not contest its suspension before DLA on the ground that it was not affiliated with Taos, however, the court also found that FAS could not seek judicial review of that issue. *Id.* at *10–11.

The decision supports protests challenging the propriety of a suspension or debarment in the context of a specific procurement that is allegedly affected by the suspension or debarment. As a review of the full decision shows, in order to do so, a protester must not only submit an offer (properly certifying its status as suspended or debarred), but also contest its suspension before the agency responsible for the administrative action. *Id.* at *10. A protester who does not do so may then be unable to contest its suspension in a judicial forum. *Id.*

L-3: In *L-3 Commc’ns*, *L-3* asserted that the Air Force, through Darlene Druyun’s improper actions, violated its implied contract to consider *L-3*’s proposal fairly and honestly. The Government moved to dismiss that claim, arguing that under *RCG* the COFC had no implied-in-fact jurisdiction in procurement protests. In its decision, the COFC categorically rejected that argument and held that it still has jurisdiction under § 1491(a)(1) to hear protests relying on the implied contract to consider bids fairly and honestly—even in procurement cases.

The court reasoned that *RCG* did not squarely address whether ADRA eliminated all jurisdiction over implied-in-fact contract claims in connection with procurements. Instead, the court reasoned that *RCG* addressed *only* whether such jurisdiction existed in a nonprocurement contract, and did not address “the entire universe of what type of § 1491(a) actions survived the enactment of § 1491(b)(1).” *L-3 Commc’ns*, 2010 WL 3296862, at *2. The COFC declined to interpret the Federal Circuit’s emphasis on the nonprocurement nature of the lease in *RCG* as suggesting that § 1491(a)(1) does not apply to a procurement protest.

Instead, the court focused on the Federal Circuit’s statement that the COFC’s implied-in-fact contract jurisdiction under § 1491(a)(1) survived ADRA’s enactment “as to claims where the new statute does not provide a remedy.” *Id.* (quoting *RCG*, 597 F.3d at 1245). The court then reasoned that “[t]here may well be procurement bid protests that do not fall within the ambit of § 1491(b), and such protests should not be left

without a judicial forum when that was not the intent of Congress.” Id. In making this point, the court did not address the possibility that, if a protest falls outside of the COFC’s exclusive jurisdiction under § 1491(b)(1), an aggrieved party would not be left without a remedy because it could seek relief in district court. Relying on its analysis that Congress did not intend protesters to be left without a remedy, the court concluded that *RCG* “does not hold that ADRA eliminated § 1491(a) jurisdiction in a breach of implied contract action involving a procurement.” Id. at *5.

The court also emphasized the Federal Circuit’s recognition that “Congress intended ADRA ‘to give the Court of Federal Claims exclusive jurisdiction over the full range of procurement protest cases previously subject to review in the federal district courts and the Court of Federal Claims.’” Id. at *3 (quoting H.R. Rep. No. 104-841, at 10) (emphasis in original). The court reasoned that, “[a]t the time of ADRA’s enactment, the ‘full range of procurement protest cases’ subject to review in federal courts included cases based on the breach of the implied contract of fair dealing.” Id. Under this analysis, the court appeared to conclude that, even for protests that do fall within the ambit of § 1491(b)(1), the COFC continues to possess jurisdiction to hear claims alleging a breach of implied contract. Id. at *5 (“Nor did ADRA affect a protester’s ability to argue a breach of the implied contract of fair dealing in a bid protest where jurisdiction is predicated on § 1491(b).”).

The court’s decision thus has a two-fold potential value for protesters. Most immediately, it supports the ability of the COFC to hear implied contract claims in bid protests filed, as they routinely are, under § 1491(b)(1). Moreover, it states that if there were ever a procurement protest that fell outside the scope of § 1491(b)(1), as was potentially the case in *FAS*, the protester would not lack a remedy, because it still could proceed under § 1491(a)(1) (albeit without the availability of injunctive relief). In this respect, *L-3* appears to be in tension with *RCG*; whether its interpretation will prevail in the long term is open to question. If the analysis in *L-3* does prevail, the COFC’s jurisdiction over procurement protests under § 1491(a)(1) would presumably not be exclusive, and the protest could also be brought in district court. See *RCG*, 597 F.3d at 1246 (noting that ADRA repealed the jurisdiction of the district courts only for actions covered by § 1491(b)(1)). Moreover, although injunctive relief may not be available at the COFC in such

a case, see *RCG*, 597 F.3d at 1243 n.7, 1244 n.10, it would be available in district court.

COFC Jurisdiction over Bid Protests Challenging Violations of Statute or Regulation in Connection with a Procurement—*RAMCOR*: *RAMCOR* is the Federal Circuit’s seminal case on the meaning of the phrase “in connection with a procurement” in § 1491(b), and the resulting breadth of the COFC’s jurisdiction under that provision. In *RAMCOR*, the protester protested the agency’s award of a contract at GAO, the agency executed an override of the stay and the protester challenged the override at the COFC. 185 F.3d at 1287. The COFC, however, concluded that it lacked jurisdiction because the protest did not include “an attack on the merits of the underlying contract award.” Id. at 1289. The Federal Circuit reversed, confirming that the COFC has jurisdiction to hear challenges to an agency’s stay override. As the Federal Circuit explained,

The language of § 1491(b) ... does not require an objection to the actual contract procurement, but only to the “violation of a statute or regulation in connection with a procurement or a proposed procurement.” The operative phrase “in connection with” is very sweeping in scope. As long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction.

Id. Regarding the stay override specifically, the Federal Circuit explained that “[w]here an agency’s actions under a statute so clearly affect the award and performance of a contract, this court has little difficulty concluding that that statute has a ‘connection with a procurement.’” Id.

***FAS*:** In *FAS*, as discussed above, the protester challenged a suspension that had prevented it from competing for and receiving award. Although the court did not decide the issue, it strongly suggested that such a protest qualifies as an objection to an “alleged violation of statute or regulation in connection with a procurement,” and thus falls within its jurisdiction under § 1491(b)(1). The court stated,

It is considered likely that the phrase [“in connection with a procurement”] is sufficiently sweeping in scope to accommodate, in a procurement protest action, review of well pleaded allegations of a regulatory or statutory violation(s) in a suspension or debarment process that directly impacts a specific procurement action, such as an award or a competitive range determination.

FAS, 2010 WL 3038713, at *9. Thus, even if the Federal Circuit rejects the court's analysis of its § 1491(a)(1) jurisdiction, *FAS* supports the possibility that the COFC may still use § 1491(b)(1) to take jurisdiction over protests challenging suspensions and debarments that affect specific procurements.

K-LAK: In *K-LAK*, the protester was an incumbent 8(a) contractor providing credit reports to the Air Force at a cost of \$3.80 per report. *K-LAK*, 2010 WL 3123265, at *1. During performance of the contract, the agency learned that the same service was available from a large business through its General Services Administration Federal Supply Schedule. After attempting to negotiate a lower price, the agency declined to exercise an option extending K-LAK's contract because K-LAK could not provide the reports at a fair market price. *Id.* Further, after it could not locate any 8(a) business able to provide a fair price, the agency canceled its requirement with the Small Business Administration. SBA advised the agency that it could not remove the requirement because it had not met the criteria of 13 CFR § 124.405(c).

The Government moved to dismiss, arguing that K-LAK's complaint either (1) challenged the agency's decision not to exercise the option on its contract, in which case K-LAK failed to comply with the requirements of the Contract Disputes Act; or (2) challenged the award of an FSS contract, in which case K-LAK was not an interested party because it had no FSS contract and could not compete for award. *Id.* at *1-2.

The court denied the Government's motion. It first explained that the procurement at issue was not K-LAK's lapsed contract, but the award to the large business under the FSS program. *Id.* at *3-4. It then noted the Federal Circuit's expansive definition of procurement as including "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." *Id.* at *4 (quoting *Distrib. Solutions, Inc.*, 539 F.3d at 1345) (emphasis in original). Given this expansive definition

and the Federal Circuit's decision in *RAMCOR*, the court concluded that the agency's decision to cancel its 8(a) requirement and obtain the reports through the FSS program constituted a "procurement" decision. *Id.* Although the agency's decision not to exercise K-LAK's option was a matter of contract administration not subject to the court's bid protest jurisdiction, the court explained that the agency's separate procurement decision to cancel its 8(a) requirement did give rise to protest jurisdiction. *Id.* at *5.

This analysis led the court to hold that it had "jurisdiction over plaintiff's objections to the Air Force's decision to remove its requirement for credit reports from the 8(a) program and to use the FSS." *Id.* at *5. Whereas *FAS* demonstrates the breadth of agency actions that can give rise to a protest because the actions impair an offeror's ability to compete for award of a particular contract, *K-LAK* highlights the breadth of actions that can be challenged in a bid protest as "procurement" decisions. Protesters should keep in mind that they can challenge not only routine solicitation and award decisions, but also other decisions throughout the procurement process.

Conclusion—As these cases show, 14 years after passage, ADRA's full effect on the COFC's Tucker Act jurisdiction is still being sorted out. The three cases discussed above take an expansive view of the COFC's Tucker Act jurisdiction in protest cases, and are potentially helpful to protesters seeking to pursue nontraditional bid protest theories. Disagreement remains, however, both on and off the court, regarding the proper scope of the court's jurisdiction. It is therefore an area that bears watching as additional decisions issue from both the COFC and the Federal Circuit.



This FEATURE COMMENT was written for THE GOVERNMENT CONTRACTOR by Jason A. Carey, a partner at McKenna Long & Aldridge LLP. Mr. Carey regularly represents Government contractors in bid protests before the Government Accountability Office and the COFC.