CLIENT ALERT

The Civilian Board of Contract Appeals Explains Preemption and CDA Jurisdiction in Denying Government Motion to Dismiss
February 22, 2019

The Civilian Board of Contract Appeals (CBCA) recently examined a potential conflict between the federal Copyright Act and the Contract Disputes Act (CDA) to determine its jurisdiction over a claim arising from a Federal Supply Schedule (FSS) contract delivery order. The decision provides analysis of the preemption doctrine and a discussion of how the CBCA determines its own jurisdiction.

The decision, *immixTechnology, Inc.*, CBCA No. 5866 (Dec. 20, 2018), involves an order by the Department of the Interior (DOI) on behalf of the Small Business Administration (SBA) for software support services and licenses. Soon after the contractor began performing, the SBA announced that it would be doing a "hardware refresh" that would necessitate different software licenses from the contractor. The contractor and the SBA negotiated a new package of licenses and services reflected in a delivery order modification. Through these negotiations, the contractor also learned that the SBA was using the contractor's software on unlicensed servers and unlicensed system environments.

The revelations of these breaches caused the contractor to submit a claim to the DOI contracting officer, who denied it. On appeal to the CBCA, the government moved to dismiss arguing that the Copyright Act preempted review under the CDA and that the Board lacked jurisdiction because the claim should have been presented to the General Services Administration (GSA), the agency responsible for the FSS contract.

Regarding preemption, the Board read the Copyright Act and the CDA side by side and rejected the government's argument based on the statutes' plain terms. The Board noted that the CDA provided the Board jurisdiction to decide appeals of final decisions of contracting officers. The Board also explained that a section of the Copyright Act, codified at 17 USC 301(d), explicitly preserved remedies afforded by other federal statutes, such the CDA. Lastly, the Board noted that "preemption" occurs when a federal law displaces a state law due to the Supremacy Clause of the Constitution. The government's argument that the Copyright Act preempted the CDA was simply wrong as a matter of law, according to the Board.

The government's second argument – that the Board lacked jurisdiction – fared no better. The government asserted that the DOI contracting officer should have forwarded the claim to the GSA under FAR 8.406-6, which directs ordering agencies to refer claims against a schedule contract. The Board acknowledged the procedures of FAR 8.406-6, but disagreed with the government's characterization of the claim. The Board found that the dispute implicated terms of the modification to the delivery order, not the FSS contract. Such terms included the number of software

licenses granted and the environments in which software could be run. The dispute simply did not involve terms of the schedule contract and a GSA contracting officer final decision was unnecessary.

Notably, the contractor also filed a substantially similar claim to GSA after it had submitted its claim to DOI. Such a protective move was moot because the Board ruled that the dispute arose from the modification and not the FSS contract. The key takeaway, however, is that contractors must scope their disputes under FSS contracts in deciding where to submit their claims.

Contacts:

Robert Nichols
202.846.9801
rnichols@nicholsliu.com

Andrew Victor
202.846.9825
avictor@nicholsliu.com