

# THE NASH & CIBINIC REPORT

government contract analysis and advice monthly from  
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## GUEST APPEARANCE

### ¶ 14 LITIGATING APPEALS IN THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT: Insights From The 2017 Roundtable

*A special column by Robert K. Huffman, partner, Akin Gump Straus Hauer & Feld LLP, Washington, D.C.*

The December 2017 NASH & CIBINIC REPORT ROUNDTABLE included a panel on “Litigating Appeals in the Court of Appeals for the Federal Circuit.” In addition to Professor Nash, my fellow panelists were Professor Steve Schooner of The George Washington University Law School and Martin Hockey, Deputy Director of the Deputy Director of the Commercial Litigation Branch, Civil Division, of the U.S. Department of Justice. We discussed several Government contracts decisions that the Federal Circuit issued in 2017.

#### ***Agility Public Warehousing Co. v. Mattis***

The first case discussed was *Agility Public Warehousing Co. v. Mattis*, 852 F.3d 1370 (2017), 59 GC ¶ 112, decided in April 2017. In *Agility Warehousing*, the Federal Circuit reversed the Armed Services Board of Contract Appeals because the board failed to consider the contractor’s breach of the implied covenant of good faith and fair dealing and constructive change claims. Professor Nash said that this decision was unusual because the Federal Circuit affirmed the ASBCA’s finding that a modification to the contract unambiguously set a 29-day cap on the payment of transportation fees for the use of the contractor’s refrigerated trucks even when the trucks were used for storage. Nevertheless, the court found that the ASBCA erred in refusing to consider the contractor’s breach of the implied covenant claim. The Federal Circuit noted that while a party cannot use the implied duty of good faith and fair dealing “to expand another party’s contractual duties beyond those in the express contract or create duties inconsistent with the contract’s express provisions,” a breach of the implied duty of good faith and fair dealing does not require a violation of an express provision in the contract, citing *Metcalfe Construction Co. v. U.S.*, 742 F.3d 984 (Fed. Cir. 2014), 56 GC ¶ 52. Thus, even though the Government had abided by the contract’s express terms in not paying transportation fees for trips longer than 29 days, the Federal Circuit found that the Government may have breached its implied duty of good faith and fair dealing by interfering with the contractor’s ability to perform its duties under the contract by unnecessarily delaying the return of its trucks or not increasing its on-site food storage capabilities. “In other words, if the government simultaneously imposed a cap and engaged in conduct that made it impossible for Agility to perform within that cap, the government may have breached its implied duties to Agility.”

Professor Nash questioned whether the *Agility Warehousing* or *Metcalfe* decisions give adequate guidance to the boards and the Court of Federal Claims on how to apply the implied covenant. He noted a recent article in the REPORT in which he analyzed the decisions of the Court of Federal Claims and the boards regarding the implied covenant subsequent to *Metcalfe* and found no consistent pattern. See *Postscript VI: Breach of the Duty of Good Faith and Fair Dealing*, 31 NCRNL ¶ 45, as well as *Postscript VII*, 31 NCRNL ¶ 66.

I said that *Metcalfe* reflected a greater acceptance of the implied covenant and the RESTATEMENT (SECOND) OF CONTRACTS than did the Federal Circuit’s earlier decisions in *Precision Pine & Timber, Inc. v. U.S.*, 596 F.3d 817 (Fed. Cir. 2010), 52 GC ¶ 97.

and *Scott Timber Co. v. U.S.*, 692 F.3d 1365 (Fed. Cir. 2012), 54 GC ¶ 297. In my view, the *Agility Warehousing* decision continued this trend. I noted that *Agility Warehousing* had been authored by Judge O'Malley, who had served on the panel that decided *Metcalfe*, and that the author of the *Metcalfe* decision, Judge Taranto, served on the panel that issued the *Agility* decision.

Professor Schooner stated that it was too early to tell whether *Metcalfe*, *Agility*, or any other case represented a departure from the Federal Circuit's formalistic approach to deciding Government contracts cases. To begin with, only a handful of the Federal Circuit judges participated in these decisions, and the remaining judges have yet to be heard from. Second, the Government contract cases constitute a small percentage of the Federal Circuit's docket, which continues to be dominated by patent cases. In fact, a Federal Circuit judge may not see more than one Government contracts case per year, which is not enough to become familiar with the law or the policies in the area. On the other hand, each Federal Circuit judge hears several patent cases a year, and most if not all of them have law clerks who are patent specialists. By contrast, few, if any, Federal Circuit judges hire law clerks with Government contracts experience or expertise.

Martin Hockey agreed that *Agility* did not necessarily reflect a more favorable view towards the implied covenant of good faith and fair dealing. (He joked that he liked the implied covenant when it favored the Government.) He noted that the facts of the case were unusual in that the Government had expressly agreed in the contract to consider granting exceptions to the 29-day cap (although both the ASBCA and the Federal Circuit agreed that the Government had not breached this obligation.) Hockey said that it would have been interesting to see how the ASBCA would have decided *Agility*'s implied covenant and constructive change claims on remand, but he noted that the parties had recently settled the case.

#### ***Agility Defense & Government Services, Inc. v. U.S.***

The panel then discussed another *Agility* case, this time *Agility Defense & Government Services, Inc. v. U.S.*, 847 F.3d 1345 (Fed. Cir. 2017), 59 GC ¶ 49. In *Agility Defense*, the Federal Circuit reversed and remanded a Court of Federal Claims decision denying a contractor's claim for equitable adjustment based upon the Government's allegedly negligent estimate of its needs in soliciting a requirements contract. The Federal Circuit found that the Court of Federal Claims had clearly erred in finding that the agency had complied with Federal Acquisition Regulation 16.502 by providing historical data. The Federal Circuit noted that because the agency anticipated increased workload, simply providing offerors with historical workload was not "the most current information available" sufficient to provide the realistic estimate required by Federal Acquisition Regulation 16.502. The Federal Circuit also found that the lower court had clearly erred in finding that *Agility* had failed to show a causal link between the agency's failure to provide a realistic estimate and *Agility*'s damages.

Professor Nash asked whether the *Agility Defense* decision reflected a more pro-contractor approach on the Federal Circuit's part. I opined that it did, particularly since the court rejected a number of Government arguments based on risk-sharing clauses in the contract that the court might previously have found persuasive. Martin Hockey stated that the facts of the case were unusual, thereby reducing the likelihood that the decision reflected a trend. He also pointed out that the agency had made more accurate information available prior to the offeror's submission of final revised proposals, but that the contractor chose not to base its revised proposal on the latest estimates.

#### ***Garco Construction Inc. v. Secretary of the Army***

The panel next discussed *Garco Construction Inc. v. Secretary of the Army*, 856 F.3d 938 (Fed. Cir. 2017), 59 GC ¶ 153. There the Federal Circuit affirmed a decision of the ASBCA denying a contractor's equitable adjustment claim based on an alleged constructive change to a contract to build housing units on Malmstrom Air Force Base in Montana. The contractor (*Garco*) argued that the contract language reflected the base authorities historical practice of allowing the construction contractor to bring inmates from local prisons onto the base as construction workers, and that a new base commander had constructionally changed the contract by issuing a base access policy memorandum that forbade access to felons. The ASBCA found that the new policy memorandum simply clarified and did not change the pre-existing base access policy. The ASBCA also found that the policy memorandum was a "sovereign act" and that the Government was therefore not liable for damages for breach of contract under the sovereign acts doctrine.

On appeal, the Federal Circuit affirmed the ASBCA's finding that the policy memorandum did not change the pre-existing policy. The court did not address the ASBCA's sovereign act ruling because the contractor failed to challenge that finding on appeal. Judge Wallach dissented on the grounds that the ASBCA had failed to apply the second part of the two-part test for establishing the sovereign acts defense and that the case should therefore have been remanded to the ASBCA for application of the proper test. Professor Nash stated that Judge Wallach's dissent provides a detailed and scholarly analysis of the sovereign acts doctrine. He stated that the second prong of the sovereign acts test—that the Government's performance of the contract was rendered "impossible" by the alleged sovereign act—would have been difficult for the Government to prove since the base commander had the authority to allow the contractor to bring prisoners onto the base as her predecessor had for years.

### ***Lee's Ford Dock, Inc. v. Secretary of the Army***

The last Federal Circuit decision from 2017 that the panel discussed was *Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361 (Fed. Cir. 2017). That case involved Contract Disputes Act claims by a marina operator that leased its marina from the Army Corp of Engineers. The operator asserted that the Corps had breached the lease agreement by operating a nearby dam in such a manner as to lower water levels to the point that boats could not access the marina. The ASBCA found that the lease agreement gave the Corps the right to manipulate the level of the lake "in any manner whatsoever" and therefore rejected the operator's breach of contract claim. The board also rejected the operator's superior knowledge and misrepresentation claims. On appeal, the Federal Circuit held (1) that the lease was a CDA contract because it represented the "disposal of personal property"; (2) that the ASBCA lacked jurisdiction over the operator's misrepresentation claim; and (3) that the marina operator had presented no evidence that the Corps had acted unreasonably by reducing the lake's water levels for an extended period of time in view of its legitimate concerns that the dam might fail, resulting in an "imminent risk of [loss of] human life, health, property, and economic loss."

Professor Nash pointed out that it was unusual for the Federal Circuit to assess the reasonableness of the Corps' actions where the lease agreement plainly gave the Corps the absolute right to lower the water levels. I agreed, stating that previous Federal Circuit panels would likely have stuck with the "plain meaning" of the lease and not addressed reasonableness. He said that *Lee's Ford Dock* was consistent with the other 2017 Federal Circuit decisions in reflecting a greater willingness to consider arguments that a party breached the contract by taking actions that, while permitted by the express terms of the contract, were unreasonable in light of the parties' expectations and the underlying bargain. Professor Schooner stressed the nature and benefits of the bargain as a limiting principle on the implied covenant of good faith and fair dealing.

### ***Reliable Contracting Group v. Dept. of Veteran Affairs***

Finally, the panel discussed the 2015 decision of the Federal Circuit in *Reliable Contracting Group v. Dept. of Veteran Affairs*, 779 F.3d 1329 (2015), in which the court interpreted a contractual requirement that certain generators be "new." Professor Nash criticized the court's opinion for looking to dictionary definitions of the term "new" rather than to the pre-dispute conduct of the parties, which had been to reject the generators as not "new." Professor Nash noted that the court itself found that the dictionary included multiple definitions of the term "new" and could therefore not resolve the issue. Professor Schooner pointed out that there are multiple dictionaries available now, including on-line dictionaries, thereby further diminishing the role that the OXFORD ENGLISH DICTIONARY used to play in contract interpretation. Professor Nash advised parties contracting with the Government to define key contractual terms in the contract and not rely on dictionaries, the FAR, or even industry custom and usage to supply these definitions. In that regard, he noted that the FAR did not include a definition of such commonly used terms as "equitable adjustment." *Robert K. Huffman*