

Court of Federal Claims Holds Injunctive Relief Not Available to Prevent Posting of Unsatisfactory Past Performance Rating in PPIRS

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In *Todd Construction, L.P. v. United States*, 656 F.3d 1306 (Fed. Cir. 2011), the Federal Circuit held that the Tucker Act, 28 U.S.C. § 1491, and the Contract Disputes Act, 41 U.S.C. § 7101 *et seq.*, gave the Court of Federal Claims (COFC) jurisdiction to hear a challenge to an adverse past performance rating. Although the trial court had held that injunctive relief was not available in the case, because Todd Construction did not appeal that holding, the Federal Circuit determined that it “need not decide whether an injunction was available pursuant to the Claims Court’s ‘power to remand appropriate matters to an administrative or executive body’” *Id.* at 1311 n. 3 (quoting 28 U.S.C. § 1491(a)(2)).

In *The Davis Group, Inc. v. United States*, No. 12-275 C (Fed. Cl. July 6, 2012), the COFC (Merow, J.), held that a contractor cannot seek a preliminary injunction to prevent the continued posting of a negative past performance evaluation in the Past Performance Information Retrieval System (PPIRS) while its appeal is pending. In *The Davis Group*, the contractor submitted a claim for defective specifications and remission of liquidated damages assessed by the United States Army Corps of Engineers (Corps). The contracting officer denied the claim and, in doing so, rated Davis Group’s past performance “unsatisfactory.” The Corps then entered the “unsatisfactory” rating into PPIRS. Davis Group filed an action in the COFC challenging the denial of its claim and seeking a non-monetary judgment for the “unsatisfactory” performance rating. Davis Group also sought a preliminary injunction with respect to the past performance rating—

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seeking to preclude its continued posting in PPIRS—claiming that the adverse rating had prevented it from receiving future contract awards.

The COFC agreed with the *Todd Construction* trial court that injunctive relief was not available. The court rejected Davis Group's reliance on *Wilner v. United States*, 24 F.3d 1397 (Fed. Cir. 1994), which held that “once an action is brought following a contracting officer's decision, the parties start in court or before the board with a clean slate.” *Id.* at 1402. The court reasoned that this holding applies to the arguments the parties may make and the fact that a contracting officer final decision is reviewed *de novo* on appeal; it does not address the continuing status of the contracting officer's final decision pending appeal.

The COFC also rejected Davis Group's argument that 28 U.S.C. § 1491(a)(2) permits the court to grant injunctive relief. That provision, as noted above, states that “[i]n any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.” The court held that remanding the matter to the Corps would be “ineffective” because the initiation of litigation divested the contracting officer of any authority to act on the matter while litigation was pending. *The Davis Group*, slip. op. at 4.

Finally, the court held that in the absence of express statutory authority to issue injunctions in these factual circumstances, the court lacked jurisdiction to proceed further “as the equitable relief sought is unavailable.” *Id.* (citing *BLR Grp. of Am. v. United States*, 84 Fed. Cl. 634, 647 (2008); *Todd Constr., L.P. v. United States*, 88 Fed. Cl. 235, 243 (2009)).

The Davis Group's holding that injunctive relief is not available to prevent the posting of a negative past performance rating reiterates the importance of challenging negative past performance ratings before they become finalized in the relevant past performance databases. Under FAR 42.1503(b), contractors are given an opportunity to comment on past performance evaluations and to seek review at a level above the contracting officer. Although both the Armed Services Board of Contract Appeals (ASBCA) and the COFC have taken jurisdiction over challenges to negative performance evaluations (albeit with the ASBCA interpreting its jurisdiction more narrowly than the COFC in the past), an appeal of a negative performance evaluation still faces hurdles based on the deferential standard of review and the limited relief available in these forums. Thus, contractors should avail themselves of all opportunities under the FAR and agency-specific regulations to challenge a negative performance evaluation before it becomes finalized.