

ALERT

The Federal Circuit Affirms a Contractor's Right to Challenge Negative Performance Evaluations Under the CDA

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On August 29, 2011, in *Todd Construction L.P. v. United States*, CAFC No. 2010-5166, August 29, 2011, the Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims (COFC) holding that a government contractor is entitled to file a claim under the Contract Disputes Act (CDA) challenging a negative performance evaluation. Thus, so long as a contractor's challenge meets all of the requirements for a claim under the CDA, review of a negative performance evaluation may be had at the COFC.

In 2003, Todd Construction (Todd) entered into two task order contracts with the U.S. Army Corps of Engineers for roofing construction projects. Citing delays and alleged deficiencies in performance, the Government's resident engineer gave Todd negative interim performance evaluations. Todd submitted comments contesting the proposed evaluations, and after receiving the final (unchanged) performance evaluation, it asked the Contracting Officer to review the resident engineer's evaluation. Thereafter, the Contracting Officer issued a "final decision," concluded that Todd's unsatisfactory performance appraisal was justified, and found that all required procedures had been followed. *Slip op.* at 2-5.

Todd promptly filed a complaint at the COFC, seeking a declaratory judgment, alleging that the unsatisfactory performance evaluations were arbitrary and capricious, and asserting that the Government failed to follow proper internal procedures governing performance evaluations. *Id.* In a series of opinions, the COFC held that it had subject matter jurisdiction under the CDA to hear claims challenging negative performance evaluations, but it dismissed Todd's complaint

Authors

Kara M. Sacilotto
Partner
202.719.7107
ksacilotto@wiley.law

Practice Areas

Government Contracts
State and Local Procurement Law

for lack of standing and for failure to state a claim. See *Todd Constr. L.P. v. United States*, 94 Fed. Cl. 100 (2010). Todd then appealed to the Federal Circuit.

On appeal, the Federal Circuit first noted that the Tucker Act provides jurisdiction to "render judgment upon any claim by or against . . . a contractor arising under [the CDA], including . . . nonmonetary disputes on which a decision of the contracting officer has been issued" *Slip op.* at 8 (quoting 28 U.S.C. § 1491(a)(2)) (emphasis in original). Citing its previous decision in *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1268 (Fed. Cir. 1999), the court rejected the Government's argument that "nonmonetary disputes" should be read narrowly. Instead, the definition of a "claim" must be read to include nonmonetary disputes, such as challenges to performance evaluations, given the broad language of the Tucker Act, the legislative history of both the Tucker Act and the CDA, and the Federal Acquisition Regulation's (FAR) expansive definition of "claim." See *Slip op.* at 7-10.

Significantly, the Federal Circuit held that to constitute a claim "relating to the contract" under the CDA, the claim "must have some relationship to the terms or performance of a government contract," and that "[w]hile unsatisfactory performance evaluations may not relate to the terms of the contract itself, they relate to . . . performance under the contract." *Id.* at 11 (emphasis added). The court clarified that it did not view then-existing FAR 36.201 or the Government's internal regulations governing performance evaluations as read into the contracts; rather, "the regulation applies of its own force and directly governs the parties' performance under the contracts." *Id.* at 13-14 n.6. Thus, the court held that to establish jurisdiction under the CDA, a claim "need not be based on the contract itself (or a regulation that can be read into the contract) as long as it relates to its performance under the contract." *Id.* at 13-14 (emphasis added). This holding is broader than prior Armed Services Board of Contract Appeals (ASBCA) decisions that held that the Board has jurisdiction to review a challenge to a negative past performance evaluation if the terms of the contract are implicated. See, e.g., *Sundt Constr., Inc.* ASBCA No. 56293, 09-01 BCA ¶ 34084 (2009) ("The Board has consistently ruled that we lack jurisdiction to decide appeals from unsatisfactory performance ratings where contract terms are not in issue" but "we have held that we have jurisdiction to determine the rights and obligations of the parties under disputed terms of a contract[.]").

The court also definitively rejected the Government's argument that regulations concerning performance evaluations "[exist] primarily for the benefit of the [g]overnment" and thus cannot provide contractors with a cause of action. *Id.* at 14. Citing the history of FAR Subpart 42.15 (the current regulation that governs performance evaluations under certain government contracts), the Federal Circuit concluded that, contrary to the Government's argument that a cause of action should be barred, "[p]erformance evaluation regulations were intended to directly and significantly benefit contractors." *Id.* at 15.

In addition to affirming the COFC's jurisdictional holding, the Federal Circuit also affirmed the COFC's dismissal of Todd's complaint on the grounds that Todd lacked standing and failed to properly state a claim. *Id.* The court's decision offers a cautionary lesson for contractors seeking to challenge a negative performance evaluation. In particular, the court found that Todd's challenge to the Government's alleged failure to follow its internal evaluation procedures were "minor procedural violations," not "fundamental procedural rights," and therefore, Todd must show prejudice to establish standing. *Id.* at 17. Because Todd

failed to allege that the outcome of the evaluation would have been different had the purported procedural errors not occurred, the court held that Todd lacked standing to challenge the Government's alleged procedural violations. *Id.*

The court acknowledged that Todd did have standing to raise its claims that the Government acted arbitrarily and capriciously. Nevertheless, it upheld the COFC's dismissal for failure to state a claim, holding that Todd failed to plead facts that would allow a court to draw a reasonable inference that the Government had, in fact, acted arbitrarily. *Id.* at 17-18.

The case is instructive for several reasons. First, the Federal Circuit has settled the jurisdictional question of whether a contractor is entitled to submit a claim to challenge a performance assessment under the CDA. Indeed, the court's broad interpretation of a claim "relating to a contract" under the CDA should get the attention of the ASBCA and may lead to broader jurisdiction to challenge performance evaluations at the Boards as well. Second, *Todd Construction* is a reminder to contractors that even though the CDA provides jurisdiction to challenge a negative performance assessment, demonstrating standing and prejudice - as well as pleading facts sufficient to establish a cause of action - are essential threshold requirements.

Wiley Rein's Government Contracts attorneys have extensive experience litigating claims at the COFC and the Boards and assisting contractors with respect to performance evaluation questions. We continue to monitor regulatory and case law developments relating to past performance and performance evaluations.