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CAFC Releases Decision Addressing CBCA's Jurisdiction over Software Developers Claiming to be Parties to a Procurement Contract

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In *Avue Technologies Corporation v. Secretary of Health and Human Services, Administrator of the General Services Administration* (Case No. 22-1784), the United States Court of Appeals for the Federal Circuit vacated the Civilian Board of Contract Appeals' (CBCA) dismissal of a software developer's claim for lack of jurisdiction on the basis that the software license, standing alone, was not a procurement contract for purposes of the Contract Disputes Act (CDA). The Court found that Avue Technologies Corporation (Avue) non-frivolously pleaded the existence of a procurement contract, and that the question of whether such a contract actually existed was a merits issue not appropriately resolved on a motion to dismiss. The Court's decision establishes that companies that indirectly license their software to the Federal government through third-party authorized resellers will not be jurisdictionally barred from trying to enforce their license agreements against the Government under the CDA as long as they can plausibly allege the existence of a contract with the Government.

Avue is a software developer specializing in software that allows users to automate administrative tasks while complying with any relevant regulatory or policy requirements. Avue offers annual subscription licenses to its Avue Digital Services (ADS) software through a third-party reseller, Carahsoft Technology Corporation (Carahsoft), via Carahsoft's Federal Supply Schedule (FSS) contract. These licenses are subject to Avue's master subscription agreement (MSA), a software End User License Agreement (EULA).

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In 2015, the FDA obtained a license to ADS through a task order under Carahsoft's FSS contract. Just before the end of the base year, Avue learned that that the FDA did not intend to renew its subscription. In response, Avue reviewed the FDA's account use and accused the FDA of violating "Avue's end user terms and conditions, intellectual property rights, and the Trade Secrets Act."

Avue sent a "Cease and Desist Letter" and a claim letter to the FDA's contracting officer, who responded that the FDA's contract was with Carahsoft, not Avue, so only Carahsoft could pursue a claim against the FDA under the contract. Avue disagreed and filed an appeal, which Carahsoft did not sponsor, at the CBCA.

The CBCA *sua sponte* ordered briefing on whether the Board had jurisdiction over the claims, and, more particularly, whether a software license, such as Avue's MSA could, by itself, be considered a procurement contract for purposes of the CDA. Although it assumed for purposes of its decision that the MSA was binding on the Government, it held that "the MSA is not a procurement contract within the meaning of the CDA" and dismissed for lack of jurisdiction. Avue appealed to the Federal Circuit.

In reversing the CBCA, the Federal Circuit recognized that, under certain circumstances, a third-party may be considered a "contractor" for purposes of the CDA and, therefore, pursue a claim under the CDA – if the party is in privity with the Federal government. Citing *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011), the Federal Circuit reiterated that, to establish the Board's jurisdiction over a claim, "a party need only allege, non-frivolously, that it has a contract (express or implied) with the federal government." Conversely, "[t]he obligation to actually prove the existence of such a contract does not arise until the case proceeds to the merits, at which point the claimant can only prevail on its claim if it proves (among other things) that it has rights under a 'procurement contract.'"

Applying *Engage Learning*, the Federal Circuit concluded that Avue's allegations that it had a procurement contract with the Government were non-frivolous and satisfied the jurisdictional threshold. The CBCA's dismissal of Avue's claim for lack of jurisdiction was therefore an error.

To be clear, the Federal Circuit did not reach the question of whether Avue's MSA, standing alone, is a procurement contract under the CDA. Instead, it vacated the dismissal and remanded the case back to the CBCA with an admonition to address the merits of Avue's claim that it is a party to or otherwise has enforceable rights under a procurement contract (such as a combination of the MSA, Carahsoft's FSS contract, and/or the 2015 FDA task order).

This decision demonstrates that relief under the CDA is not necessarily a dead end for software developers licensing their software to the Government through third-party resellers. As long as such licensors can plausibly and non-frivolously allege the existence of a procurement contract, their CDA claims should proceed to the merits. These allegations may be stronger where, as in *Avue*, the alleged procurement contract incorporates aspects of the developer's EULA. Ultimately, the Federal Circuit's decision adds an additional potential avenue of relief – along with sponsored CDA claims, Tucker Act breach of contract actions, and copyright infringement claims under 28 U.S.C. § 1498(b) – for software licensors operating through resellers.

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