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Annual Review 2022

January 24 – 27, 2022

DAY 3

12:00 p.m. Claims, Terminations & Disputes
2:00 p.m. Construction Contracting
3:00 p.m. Small Business Contracting
4:00 p.m. Mergers & Acquisitions

WEDNESDAY, JANUARY 26, 2022
12:00 PM to 5:00 PM

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Alan Chvotkin
President, Pub K Group
Partner, Nichols Liu LLP

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CLEs

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SESSION 7

CLAIMS, TERMINATIONS, AND DISPUTES

WEDNESDAY, JANUARY 26, 2022
12:00 PM to 1:50 PM

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Paul Khoury, Partner

wiley

Robert Nichols, Partner

NICHOLS LIU

SERVING GOVERNMENT CONTRACTORS

Seth Locke, Partner

PERKINSCOIE

COUNSEL TO GREAT COMPANIES

Jamie Tabb, Partner

Vinson&Elkins

Terminations

- *JKB Sols. & Servs., LLC v. United States*, 18 F.4th 704 (Fed. Cir. 2021)
- *Microtechnologies LLC v. Dept. of Justice*, CBCA 6772, Mar. 31, 2021, 21-1 BCA P 37830

JKB Sols. & Servs., LLC v. United States, 18 F.4th 704 (Fed. Cir. 2021)

- JKB held an IDIQ contract with the Army for instructor services.
- For each task order issued under the contract, the Army only paid for the courses JKB actually taught, rather than the total price outlined in the order.
- JKB sued for breach of contract, but the Court of Federal Claims found that the government had constructively terminated the contract for convenience, relying on the fact that the contract included the commercial item termination for convenience clause: FAR 52.212-4(l).
- Under a constructive termination for convenience theory, JKB was only entitled to the percentage of work performed and costs resulting from the termination.

JKB Sols. & Servs., LLC v. United States, 18 F.4th 704 (Fed. Cir. 2021)

- The Federal Circuit reversed, holding that the contract did not contain an applicable termination for convenience clause.
- The contract incorporated the commercial *items* termination clause, but the Federal Circuit found that the contract was for *services*, and thus the commercial items termination clause was a nullity.
- Without a proper termination for convenience clause, the Government could not invoke the constructive termination for convenience theory. The fact that JKB had accepted the contract's terms did not mean that the clause should be given effect.
- Finding that the commercial item termination for convenience clause was inapplicable, the Federal Circuit remanded so that the Court of Federal Claims could determine whether another termination for convenience clause was included in the contract through the *Christian* doctrine.

Microtechnologies LLC v. Dept. of Justice, CBCA 6772, Mar. 31, 2021, 21-1 BCA P 37830

- MicroTech received an order from DOJ for software licenses and software maintenance for one base year and two option years.
- MicroTech purchased three years of software maintenance services in advance.
- DOJ exercised the first option but 12 hours later terminated it, notifying MicroTech that it had exercised it in error.
- MicroTech sought recovery of the second year of software maintenance as part of its termination costs.

Microtechnologies LLC v. Dept. of Justice, CBCA 6772, Mar. 31, 2021, 21-1 BCA P 37830

- The CO denied the software maintenance costs for the option year. No work was performed, nor costs incurred, during the 12-hour option period.
- MicroTech appealed to the CBCA and argued that, regardless of when it purchased the software maintenance services, MicroTech was contractually obligated to provide the services to DOJ after exercise of the option.
- The CBCA disagreed. MicroTech could not establish that the cost of the second year of software maintenance services arose from the termination of the option year.

Jurisdiction

- *Lockheed Martin Corp.*, ASBCA No. 62377, Jan. 7, 2021, 21 BCA P 37783
- *Lockheed Martin Aeronautics Co.*, ASBCA No. 62505, 62506, June 24, 2021, 2021 WL 2912101
- *ECC International Constructors, LLC*, ASBCA No. 59586, May 17, 2021, 2021 WL 2311891
- *Safeguard Base Operations, LLC v. United States*, 989 F.3d 1326 (Fed. Cir. 2021)
- *Johnson Lasky Kindelin Architects, Inc. v. United States*, 151 Fed. Cl. 642 (2020)

Lockheed Martin Corp., ASBCA No. 62377, Jan. 7, 2021, 21 BCA P 37783

- Lockheed and the government entered into a memorandum of understanding ("MOU") that the Fly America Act ("FAA") applied only to direct personnel performing direct work on covered contracts.
- Government later withdraws from the MOU via letter, stating that the MOU misinterprets the law with regard to the treatment of certain costs.
- CO's decision disagreed with Lockheed's interpretation of the FAA and Lockheed appeals to the ASBCA.

Lockheed Martin Corp., ASBCA No. 62377, Jan. 7, 2021, 21 BCA P 37783

- The ASBCA dismissed Lockheed's appeal because there was no "live dispute."
- "A live dispute exists where a disagreement clearly exists, has significant ramifications, and continues to impact the contractor."
- Lockheed acknowledged that it did not need to make any changes to its billing, accounting, or international air transportation practices, and that the government's withdrawal letter did not require Lockheed to take any action.

Lockheed Martin Aeronautics Co., ASBCA No. 62505, 62506, June 24, 2021, 2021 WL 2912101

- LM held two UCAs to upgrade F-16 aircraft. The final price for each was left undefinitized and subject to negotiation, but in the absence of agreement, the contracting officer retained the right to unilaterally set the price.
- After years of unsuccessful negotiations, the contracting officer definitized the price in a modification to the contract, which LM appealed to the Board.
- The Agency argued that the Board lacked jurisdiction because LM never submitted a certified claim, while LM argued that the definitization was a government claim and LM was thus not required to submit a claim prior to appeal.

Appeal of Lockheed Martin Corp., ASBCA No. 62505, 62506, June 24, 2021, 2021 WL 2912101

- In a split decision, the Board held that its 1988 opinion, *Bell Helicopter*, ASBCA No. 25950, controlled, and held that a definitization is an act of contract administration—not a government claim.
- LM and the dissent argued that *Bell Helicopter* had been effectively overruled by subsequent decisions, expanding the definition of a claim, and LM further argued that it was wrongly decided.
- The Board majority disagreed that subsequent decisions squarely overruled Bell Helicopter and, regardless of the quality of that opinion's reasoning, the Board was bound by its holding.

ECC International Constructors, LLC, ASBCA No. 59586, May 17, 2021, 2021 WL 2311891

- ECC held a contract to design and construct a military compound in Afghanistan.
- ECC encountered issues during performance that it alleged led to a total of 329 days of delay, for which it sought compensation in the amount of $13,519,913.91, and submitted a claim that broke those costs into individual elements (e.g., labor, overhead, equipment), but did not tie the cost to any specific delay.
- ECC appealed to the Board, and the Agency moved to dismiss for failure to state a sum certain
- The Board agreed and dismissed the appeal. The "sum certain" requirement applies not only to the overall amount sought, but also the specific amount of each individual claim.

Safeguard Base Operations, LLC v. United States, 989 F.3d 1326 (Fed. Cir. 2021)

- A rare bid protest-based claims case.
- Safeguard argued that the Agency disqualified it from competition for pretextual reasons, and that the Agency thus breached the implied duty of good faith and fair dealing to fairly consider its proposal.
- Safeguard's affiliate was the incumbent contractor, and Safeguard believed that several open contract disputes affected the Agency's evaluation of Safeguard's proposal for the follow-on contract.

Safeguard Base Operations, LLC v. United States, 989 F.3d 1326 (Fed. Cir. 2021)

- The Federal Circuit found there was jurisdiction to hear contract claims based on an implied duty to fairly consider an offeror's proposal.
- While Safeguard was ultimately not successful on the merits, this case presents another viable protest ground if the agency is alleged to have not fairly considered a proposal.
- Judge Newman dissented, agreeing that the court had jurisdiction, but disagreeing that it arose out of an implied-in-fact contract because the traditional elements of a contract—e.g., negotiation, meeting of the minds, and consideration—were not present here.

Johnson Lasky Kindelin Architects, Inc. v. United States, 151 Fed. Cl. 642 (2020)

- GSA awarded a contract to JLK to design office space for the NLRB.
- GSA separately awarded a contract for related construction services to Master Design Build (MDB).
- During construction, a pipe burst, causing major damage to the offices.
- GSA issued a final decision alleging that JLK and MDB were "jointly and severally liable."
- MDB appealed the decision to the CBCA, while JLB initiated action in the Court of Federal Claims

Johnson Lasky Kindelin Architects, Inc. v. United States, 151 Fed. Cl. 642 (2020)

- *Sua sponte*, the Court raised the issue of whether it had jurisdiction over a claim alleging joint and several liability
- The Court ultimately found that it generally lacked jurisdiction over such a claim, because the Court only had jurisdiction over contract claim—not tort claims
- Absent specific circumstances not present here, such as multiple parties contractually agreeing to assume jointly assume liability, a joint and several liability claim sounds in tort, and is thus outside the Court's jurisdiction.

Timeliness

- *Miami-Dade Aviation Department v. General Services Administration*, CBCA 6689, Nov. 12, 2020, 20-1 BCA P 37727
- *BAE Sys. Ordnance*, ASBCA No. 62416, Feb. 10, 2021, 2021 WL 934959
- *Triple Canopy, Inc. v. Sec'y of Air Force*, 14 F.4th 1332 (Fed. Cir. 2021)
- *BNN Logistics*, ASBCA Nos. 61841, et al.

Miami-Dade Aviation Department v. General Services Administration, CBCA 6689, Nov. 12, 2020, 20-1 BCA P 37727

- GSA leased office space from Miami-Dade Aviation Department (MDAD) for several years. In 2011, GSA advised that one of the agencies would vacate, but a disagreement arose in 2012 as to whether the agency had fully vacated the space.
- The parties engaged in regular negotiations for the next several years.
- In 2020, MDAD submitted a claim for unpaid rent, which GSA denied, and MDAD appealed.
- Under the Contract Disputes Act, a claim must be submitted within six years of accrual.
  - FAR 33.201: "*Accrual of a claim* means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred."

Miami-Dade Aviation Department v. General Services Administration, CBCA 6689, Nov. 12, 2020, 20-1 BCA P 37727

- The Board held that the claim accrued more than six years before it was filed, and was thus untimely.
- The claim was not a "continuing claim" because all events fixing liability occurred in 2012, when the agency did not fully vacate.
- Equitable tolling was unavailable because MDAD could not show any circumstance that prevented it from filing its claim earlier.
- MDAD failed to establish "affirmative misconduct" by GSA that would equitably estop the Government from asserting the statute of limitations.

BAE Sys. Ordnance, ASBCA No. 62416, Feb. 10, 2021, 2021 WL 934959

- Issues arose in performance of BAE contracts with the Army, leading BAE to submit letters labeled as “REAs” seeking an equitable adjustment concerning worksite conditions.
- The agency denied the REAs and suggested that BAE could submit a certified claim, which it did, and later appealed as deemed denied.
- The Agency moved to dismiss the appeals as untimely, arguing that Federal Circuit precedent required the REAs to be deemed “claims.”

BAE Sys. Ordnance, ASBCA No. 62416, Feb. 10, 2021, 2021 WL 934959

- The Board recognized that, notwithstanding the REA certification language, the REAs could be deemed claims if they met the other requirements of a claim—e.g., stating a sum certain, requesting a final decision, etc. A defective certification alone would not result in concluding that the REAs were not "claims."
- But the Agency found that the REAs did not meet the other requirements—specifically, they did not request a final decision from the contracting officer.
- In the prior Federal Circuit precedent, the contractor impliedly requested a final decision, whereas here, the contractor merely provided additional information in response to Agency request

Triple Canopy, Inc. v. Sec'y of Air Force, 14 F.4th 1332 (Fed. Cir. 2021)

- Law in Afghanistan limiting private security companies ("PSC") to 500 employees.
- In March 2011, the Afghan government assessed a penalty against Triple Canopy for having too many employees.
- Triple Canopy appealed the penalty to the Afghan government, but it was denied in July 2011.
- In June 2017, Triple Canopy submitted a claim to the CO under the Foreign Tax Clause at FAR 52.229-6. The claim was deemed denied and Triple Canopy appealed to the Board.

Triple Canopy, Inc. v. Sec'y of Air Force, 14 F.4th 1332 (Fed. Cir. 2021)

- The Board ruled in favor of the government, reasoning that Triple Canopy's claim was untimely.
- The Federal Circuit disagreed. The Foreign Tax Clause requires the contractor to take all reasonable action to obtain an exemption before submitting a claim for reimbursement.
- Triple Canopy's claim did not accrue until July 2011, after its appeal to the Afghan government had been denied.

BNN Logistics, ASBCA Nos. 61841 et al

- BNN held a multiple-award IDIQ contract with the Army to deliver cargo, including fuel, to various locations in Afghanistan.
- The contract allowed the Army to take invoice deductions for the contractor's failure to meet certain metrics in a Quality Assurance Surveillance Plan, as well as for missing fuel.
- The Army applied several deductions based on BNN's alleged failure of performance, and began withholding the deducted amounts when paying the invoices.
- Years later, BNN filed several claims for the withheld amounts, which the Army denied.

BNN Logistics, ASBCA Nos. 61841 et al

- BNN appealed, and the Army moved for summary judgment on timeliness grounds.
- BNN argued that the claims accrued when the Army failed to pay the full invoice amounts, rather than when the Army claimed the original deductions.
- The Board sided with the Army and granted the summary judgment motion.
- A claim accrues when all events occur that fix liability—the fact that the contractor has not incurred an actual loss is irrelevant.
- BNN's claim accrued when the Army asserted that it would apply deductions to certain invoices, not when the Army subsequently paid less than the invoiced amounts.

Fraud

- *United States ex rel. Howard v. Caddell Constr. Co., Inc.*, No. 7:11-CV-270-FL, 2021 WL 1206584 (E.D.N.C. Mar. 30, 2021)
- *Nauset Constr. Corp.*, ASBCA No. 61673, May 5, 2021, 21-1 BCA P 37852
- *Hollymatic Corporation*, ASBCA Nos. 61920, March 22, 2021, 21-1 BCA P 37823

United States ex rel. Howard v. Caddell Const. Co., Inc., 2021 WL 1206584 (E.D.N.C. Mar. 30, 2021)

- False Claims Act ("FCA") case brought against a prime contractor for alleged false certification of compliance with small business subcontracting requirements.
- Relator alleged that the prime knowingly subcontracted through a "sham" small business subcontractor.
- The prime submitted subcontract reports representing compliance with the small business subcontracting plan.
- The prime further submitted claims for payment certifying that it had complied with all terms of the contract.

United States ex rel. Howard v. Caddell Const. Co., Inc., 2021 WL 1206584 (E.D.N.C. Mar. 30, 2021)

- Subcontract reports were not claims for payment.
- Claims for payment did not identify compliance with the subcontracting plan as a prerequisite to payment.
- Moreover, the court held that the subcontracting plan was not material to the government's decision to pay—no implied false certification.
- Plaintiff could not establish scienter because the prime was justified in relying on the subcontractor's self-certification of small business size status.
- Finally, relator could not maintain action based on Anti-Kickback Act against prime.

Nauset Constr. Corp., ASBCA No. 61673, May 5, 2021, 21-1 BCA P 37852

- The Agency awarded Nauset a construction contract, under which Nauset submitted a certified claim for $2.5M. The Agency delayed ruling on the claim, and subsequently terminated the contract for default while multiple law enforcement investigations were pending.
- Nauset submitted another claim appealing the termination and seeking additional compensation. The Agency responded by contending that it lacked authority to issue a decision under FAR 33.210 because the Agency suspected fraud.
- Nauset appealed, and the Agency moved to dismiss for lack of jurisdiction because it lacked authority to decide "any claim involving fraud."

Nauset Constr. Corp., ASBCA No. 61673, May 5, 2021, 21-1 BCA P 37852

- The Board denied the Agency's motion, distinguishing between the Agency "suspecting" fraud and the claim actually "involving" fraud.
- The suspicion of fraud, on its own, was not enough to deprive the Board of jurisdiction if it could otherwise resolve the dispute without making factual findings of fraud.
- The Agency had received two CDA claims over which it declined to issue a decision, and thus the Board had jurisdiction to hear appeals of those deemed denials.

Hollymatic Corporation, ASBCA Nos. 61920, March 22, 2021, 21-1 BCA P 37823

- The Agency issued a FAR Part 12 commercial item solicitation for meat grinders, identifying three required features for the grinders: dual motors, an Underwriters Laboratory listing, and a National Sanitation Foundation certification.
- Hollymatic's initial proposal was rejected as technically unacceptable because the proposed grinder had one motor. On resubmission, Hollymatic proposed the same grinder, noting that there was a dual motor option.
- Hollymatic however did not have a dual motor grinder at the time of proposal. Instead, it had only recently begun developing that option, and it had not received the required listing and certification.
- The Agency terminated the contract for default, and asserted a government claim. On appeal to the Board, the Agency asserted the affirmative defense of fraud in the inducement.

Hollymatic Corporation, ASBCA Nos. 61920, March 22, 2021, 21-1 BCA P 37823

- The Board agreed that Hollymatic obtained the contract through a fraudulent misrepresentation: that it had meat grinders that met the solicitation's specifications.
- While the Board does not generally entertain fraud-based arguments, it could rule on the Agency's affirmative defense that no contract came into existence due to the fraudulent misrepresentation.
- Because the contract was void *ab initio*, the Board lacked jurisdiction to hear the appeal of the default termination.
- At the same time, the Board also lacked jurisdiction on the government's claim: the existence of a valid contract is a jurisdictional prerequisite, and so the Board could not order the contractor to pay the government money under a contract that was void *ab initio*.

Affirmative Defenses

- *Lockheed Martin Aeronautics Co.*, ASBCA No. 62209, June 22, 2021, 2021 WL 2912095
- *WECC, Inc.*, ASBCA No. 60949, Oct. 19, 2021, 2021 WL 5183352
- *Brantley Construction Services LLC*, ASBCA No. 61118, Jan. 28, 2021, 21-1 BCA P 37794

Lockheed Martin Aeronautics Co., ASBCA No. 62209, June 22, 2021, 2021 WL 2912095

- LM held a contract to upgrade Air Force aircraft, and eventually submitted a claim for $143M for excessive work and constructive change, which the Air Force denied and LM timely appealed.
- At the Board, the Air Force asserted the affirmative defense of laches, arguing that LM unreasonably delayed in asserting its claim.
- LM moved for summary judgment on the laches defense because it submitted its claim within the Contract Disputes Act's six-year statute of limitations.

Lockheed Martin Aeronautics Co., ASBCA No. 62209, June 22, 2021, 2021 WL2912095

- The Board granted LM's motion for summary judgment.
- While the Government contended that laches required a fact-specific analysis of the parties' respective positions and any prejudice resulting from the delayed assertion of a claim, the Board disagreed.
- Instead, the Board held that Supreme Court precedent rendered the affirmative defense of laches unavailable where there is a legislatively enacted statute of limitations, and the claimant brought its claim within that period.

WECC, Inc., ASBCA No. 60949, Oct. 19, 2021, 2021 WL 5183352

- The Agency awarded WECC a fixed-price contract to renovate the Langley Air Force Base Exchange.
- Shortly after performance began, WECC experience unexpected site conditions. The Agency issued several modifications covering some of the costs and extending the period of performance for specific periods of delay, purporting to "fully settle all entitlements arising from the changes."
- WECC subsequently sought to recover its actual extended overhead costs for the period of delay, which the Agency argued were barred by the doctrine of accord and satisfaction.

WECC, Inc., ASBCA No. 60949, Oct. 19, 2021, 2021 WL 5183352

- The Board found that the claims were not barred.
- Communications incorporated into the modifications established that the parties recognized that overhead costs would be deferred for later negotiation when the work was completed and the impact could be determined. Accordingly, those costs were not encompassed by the "full settlement" language.
- Additionally, the Board noted that there was no language in the modifications that would otherwise indicate that there was a meeting of the minds that the overhead costs were settled in the modifications.

Brantley Construction Services LLC, ASBCA No. 61118, Jan. 28, 2021, 21-1 BCA P 37794

- The Agency issued an RFP seeking replacement of two aircraft taxiways. Offerors could propose either a "fixed-form" concrete replacement method, or the "slipform" method. The method adopted would determine the relevant procedures and timing.
- Brantley submitted a bid, intending to largely subcontract the effort, but was not aware of how the subcontractors would eventually perform.
- Brantley had not actually lined up a subcontractor when it received the award. None of the subcontractors Brantley subsequently engaged with could meet the RFP requirements.
- Brantley sought a deviation, which the Agency ultimately granted, and also an REA which the Agency denied.

Brantley Construction Services LLC, ASBCA No. 61118, Jan. 28, 2021, 21-1 BCA P 37794

- Brantley argued on appeal that the Agency's specifications were defective and impossible to meet.
- The Board found for the Agency, holding that the contractor has a duty to comprehend the stated requirements, investigate the site, and prepare a compliant bid.
- A contractor cannot rely on defective specifications when the contractor did not make a reasonable effort to comply with them in the first instance.
- To the extent that a contractor contends that the specifications were ambiguous, it must demonstrate that it relied on the alternative interpretation in its bid.

Other Important Cases

- *Ology Bioservices, Inc.*, ASBCA No. 62633, May 20, 2021, 2021 WL 2311903
- *Paktin Constr. Co. v. United States*, 153 Fed. Cl. 513 (Apr. 19, 2021)
- *Force 3 LLC v. Department of Health and Human Services*, CBCA 6654, Apr. 14, 2021, 2021 WL 1691457

Ology Bioservices, Inc., ASBCA No. 62633, May 20, 2021, 2021 WL 2311903

- 41 U.S.C. § 1127 requires OFPP to set annual caps on allowable executive compensation costs for each fiscal year.
- In 2014 Ology submitted executive compensation costs for FY 2013 that exceeded the executive compensation cap in effect at the time (the FY 2012 cap).
- The CO assessed a penalty against Ology for submitting "expressly unallowable costs." Ology appealed the penalty.

Ology Bioservices, Inc., ASBCA No. 62633, May 20, 2021, 2021 WL 2311903

- Ology submitted its 2013 executive compensation costs in 2014.
- For purposes of the penalty, the FY 2013 cap, promulgated in 2016, could not apply retroactively to Ology's executive compensation cost submission.
- The FY 2012 cap could not apply to later fiscal years.
- Government did not meet its burden that Ology included expressly unallowable costs.

Paktin Constr. Co. v. United States, 153 Fed. Cl. 513 (Apr. 19, 2021)

- Paktin, an Afghan company, had supported the US as both a subcontractor and prime contractor in Afghanistan.
- In 2011, it worked as a subcontractor for a construction project, brining supplies and equipment to the worksite.
- Several months into performance, the Army ordered the prime to stop work and Paktin was instructed to vacate the premises.
- The Army would not permit Paktin to retrieve its equipment, and Paktin filed a Fifth Amendment takings suit in November 2019.

Paktin Constr. Co. v. United States, 153 Fed. Cl. 513 (Apr. 19, 2021)

- The court rejected the Government's argument that Paktin was not entitled to constitutional protections.
- Paktin had supported the Government on numerous contracts, receiving consistent praise, and the court found that Paktin had demonstrated "substantial connections" with the United States.
- The court also rejected the Government's contention that Paktin's lawsuit was untimely. Although the Army had in fact taken Paktin's property as early as August 2013, Paktin was not on notice of the accrual of a takings claim until December 2013 when it observed the Afghan National Army using the property.

Force 3 LLC v. Department of Health and Human Services, CBCA 6654, Apr. 14, 2021, 2021 WL 1691457

- The Agency awarded a delivery order to Force 3 to support preexisting cybersecurity appliances.
- After the period of performance concluded, the Agency was to certify that it had deleted or disabled all copies of the subscription software Force 3 purchased from a third party.
- But the Agency did not do so. After the period of performance ended, the Agency continued using the Force 3 subscription, and Force 3 brought breach of contract claims before the CBCA.

Force 3 LLC v. Department of Health and Human Services, CBCA 6654, Apr. 14, 2021, 2021 WL 1691457

- The Board ultimately sided with Force 3, finding that the Agency had impliedly ratified its commitment to use Force 3's services.
- The Agency knew that it was continuing to use Force 3's subscription, but took no action to cancel it, benefitting from the services for over nine months at no cost.
- By failing to take any action to discontinue the use of the services, or otherwise certify that it was deleting the relevant software, the Agency was obligated to pay Force 3 fair compensation.

THANK YOU!

Paul Khoury
Wiley

Robert Nichols
Nichols Liu

Seth Locke
Perkins Coie

Jamie Tabb
Vinson & Elkins

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admin@pubkgroup.com

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