



Partnering for Success: A Series on Top Legal Considerations for Gov't Contractors

Part 5: Real Estate Contracting with
Governmental Entities

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Seyfarth Shaw LLP

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First Principles

- Historically, a sovereign (the government, including federal, state, and local governments) is immune from suit.
- Today, parties can bring suit against the government in certain instances, including lease transactions.
- However, the government can only be sued to the extent that it has permitted itself to be sued.

Court of Federal Claims

- Formed in 1855 to relieve Congress from responding to individual claims
- “It is as much the duty of Government to render prompt justice against itself in favor of citizens, as it is to administer the same between private individuals.” President Lincoln, 1861
- Tucker Act, first passed in 1887; now codified under 28 U.S.C. § 1491

“[B]y giving the Court of Claims jurisdiction over specified types of claims against the United States,” the Tucker Act “constitutes a waiver of sovereign immunity with respect to those claims.” *United States v. Mitchell et al.*, 463 U.S. 206, 212 (1983)

Early Case Law

Any **suit** against the **United States** or any of its **agencies** must be **based on a particular statute** that waives the sovereign immunity of the government for the particular **type** of claim made, and must follow the **specific statutory regulations** governing recovery on such a claim.

The suing party has the **burden** of demonstrating the right to bring the particular action under the statute.

United States v. Lee, 106 U.S. 196 (1882)

Sovereign or Governmental Immunity

Immunity from Suit or from Liability

Sovereign Immunity protects the **U.S. Government** and **State governments** and their **divisions**, including, **agencies, boards, hospitals and universities**, from claims

Governmental Immunity protects **political subdivisions** of the State, including, **cities, counties, towns, villages** and **school districts** from claims

Two Distinct Principles

- Immunity from suit (gov't must consent to be sued)
- Immunity from liability (gov't must consent to enforcement of a judgment)

Type of Claim

Tort

- Federal Tort Claims Act (FTCA)
(Pub. L. No. 79-601, ch. 753, 60 Stat. 842 (1946))
Waived sovereign immunity with respect to torts
- States Tort Claims Act or State Claims Act
 - Absolute waivers
 - Limited waivers applicable to certain types of claims
 - General waivers subject to certain defined exceptions

vs.

Contract

- Federal - Congress waived the government's immunity from judicial claims arising in contract, subject to specific process and rules
- State laws waiving sovereign immunity for contract claims vary by jurisdiction
 - Legislative, judicial or common law
 - Some statutes waive immunity from suit but not from liability, others waive immunity from both
 - Others rely on express contract language

Government as Lessee / Tenant

Two challenges:

1. Challenge to the government's procurement of the lease
2. Claim against the government under a lease

Protesting the procurement of a government lease . . .

(or defending your award)

1. Court of Federal Claims

- Tucker Act Jurisdiction: COFC may “render judgment on an action by an interested party objecting to a **solicitation** by a **Federal agency** for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. 28 U.S.C. § 1491(b)(1).
- But . . . court does NOT have jurisdiction over violations of “non-procurement statutes.” *Cleveland Assets, LLC v. United States*, 883 F.3d 1378, 1381 (Fed. Cir. 2018)

2. Agency (most likely GSA) – FAR 33.103

3. Government Accountability Office (GAO) – FAR 33.104

Important Bid Protest Principles

Balance of Power (Legislative v. Executive)

- GSA may not award lease in excess of area authorized by Congress, even if the excess space is “free.”
- Any such award is void.

Springfield Parcel C, LLC v. United States, 124 Fed. Cl. 163, 190 (2015)

- Pre-award challenge to terms
- Mid-procurement challenge to exclusion from competitive range
- Post-award challenges:
 - Awardee’s proposal was not eligible for award
 - Misleading or unequal discussions
 - Evaluation inconsistent with the solicitation
 - Agency mis-evaluated protester’s proposal
 - Agency mis-evaluated awardee’s proposal

Forum Comparison

	Agency	GAO	Court
Time to file		10 days after knew or should have known protest grounds	No (but limited relief may color outcome)
Automatic stay?	No	CICA (10 days after award <u>OR</u> 5 days after debriefing (if required & requested) (+2 days-- but only w/ debriefing Qs) <i>Nika Technologies</i>	No (but DOJ usually takes discretionary stay, although stay may be partial)
Record	None	Limited	Full
Briefing	N/A	Sequential	Sequential OR concurrent
Who reviews	Attorney (usually)	GAO Hearing Officer	Federal Judge (and DOJ)
Time until decision	Can be long (but may need to go to GAO)	100 days from filing	3-4 mos. litigation + 3-5 mos. decision
Appeal	None, but redo at GAO (if 1 st timely) or at Court	Might be able to get “second bite at the apple” at COFC	Federal Circuit

Relief

1. Agency (most likely GSA)

- **2. Government Accountability Office (GAO)**

Recommendation (non-binding)

**If the contract does not have a termination for convenience clause, then only get bid/ proposal costs, no other relief.

- **3. Court of Federal Claims**

Any relief (but often award is just sent back to agency for a re-do)

**The Federal
government as
tenant: deep
pockets, unique
limitations**

Biggest problems:

1. Government employees don't respond
2. CO/COR unable/unwilling to negotiate
3. No threat of eviction—just damages.
4. Costs to recover damages can exceed the damages themselves.

Claims

Since 1978, all procurement contracts are governed principally by the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109

- CDA applies to any **express or implied contract** with an executive agency (including NAFs) for:
 - (1) the procurement of **property**, other than real property in being;
 - (2) the procurement of **services**;
 - (3) the procurement of **construction, alteration, repair, or maintenance of real property**; or
 - (4) the **disposal of personal property**.

41 U.S.C. §§ 7102(a)



REAs and Claims

- May or may not be reviewed by an agency attorney
- Most important: get “another set of eyes” on the matter
- Be careful how you ask the Government for money, lots of decision about whether a request for payment was a claim or not
- Consider cost consultant at this stage – can be more efficient up-front rather than at claim

Most important: keep extensive records, as you will need to be able to support both the underlying basis for the request for payment and the amount

Appeals Choice of Forum

- Boards of Contract Appeals
 - Don't need attorney, but there can be efficiencies, partner w/ attorney
 - Guaranteed to get “another set of eyes” on the matter, as the contracting officer or COR needs to involve legal counsel
 - Forces agency to turn over own records, early
 - Agency represents itself with own attorneys
 - 90 days from COFD
- Court of Federal Claims
 - Must proceed with an attorney
 - Regular discovery
 - Agency represented by the Department of Justice
 - 1 year from COFD



Government as Lessor/ Landlord

Two challenges:

1. Enforcing remedies against the Landlord
2. Additional provisions in documents

Liabilities/Indemnities with Government Landlords

- Government landlords want to protect against open-ended liabilities due to broad waivers of sovereign or governmental immunity in contract
- Typically assert Tort Claims Act-type limitations when the derivation of the liability is in tort
- But, indemnification is a contract claim to provide a party with a basis for recovery often for a tort action.
- Government landlords are limited to annual appropriations and often cannot agree to indemnity obligations
- Parties often look to insurance to provide a basis for recovery

Unusual Contract Provisions with a Government Landlord

- Government Landlords often add:
 - Non-discrimination provisions
 - No gifts/gratuities
 - No contingent fees/anti-bribery
 - Officials may not benefit
 - Anti-Deficiency Act or appropriations language
 - In State agreements, a preference for local vendors
 - Requirement for venue locally for suit
 - Arbitration

Thank You

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