


AN A.S. PRATT PUBLICATION

APRIL 2016

VOL. 2 • NO. 4



PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



EDITOR'S NOTE: A CURIOUS CASE

Victoria Prussen Spears

**IT'S GOOD TO BE THE KING:
THE CURIOUS CASE OF *UNITED STATES
V. JAAAT TECHNICAL SERVICES***

J. Andrew Howard, Breana Ware, and
Janille C. Corbett

**UNDERSTANDING WHEN AN
OVERPAYMENT CAN RESULT IN FALSE
CLAIMS LIABILITY AND WHY CURRENT
COURT PRECEDENT AND REGULATORY
GUIDANCE IS MISTAKEN - PART II**

Robert S. Salcido

**2015 DOJ FALSE CLAIMS ACT
STATISTICS REVEAL TREND SHIFTS AND
INCREASING ENFORCEMENT FOR 2016**

Suzanne Jaffe Bloom and Benjamin Sokoly

**U.S. FEDERAL CONTRACTORS:
ARE YOU UP TO DATE ON ALL NEW
REQUIREMENTS?**

Meghan E. Hill, Christina A. Pate,
Jill S. Kirila, and Susan M. DiMickele

**TWO MORE YEARS: DOD GIVES
DEFENSE CONTRACTORS UNTIL
DECEMBER 31, 2017 TO COMPLY
WITH BASELINE "ADEQUATE"
CYBERSECURITY REQUIREMENTS**

Ronald D. Lee, Charles A. Blanchard,
and Tom McSorley

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 2

NUMBER 4

APRIL 2016

Editor's Note: A Curious Case

Victoria Prussen Spears

113

It's Good to be The King: The Curious Case of *United States v. JAAAT Technical Services*

J. Andrew Howard, Breana Ware, and Janille C. Corbett

115

Understanding When an Overpayment Can Result in False Claims Liability and Why Current Court Precedent and Regulatory Guidance is Mistaken—Part II

Robert S. Salcido

123

2015 DOJ False Claims Act Statistics Reveal Trend Shifts and Increasing Enforcement for 2016

Suzanne Jaffe Bloom and Benjamin Sokoly

135

U.S. Federal Contractors: Are You Up to Date on All New Requirements?

Meghan E. Hill, Christina A. Pate, Jill S. Kirila, and Susan M. DiMichele

140

Two More Years: DoD Gives Defense Contractors Until December 31, 2017 to Comply With Baseline "Adequate" Cybersecurity Requirements

Ronald D. Lee, Charles A. Blanchard, and Tom McSorley

145

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at 516-771-2169

Email: heidi.a.litman@lexisnexis.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844

Outside the United States and Canada, please call (518) 487-3000

Fax Number (518) 487-3584

Customer Service Web site <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940

Outside the United States and Canada, please call (518) 487-3000

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt);

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. A.S. Pratt is a registered trademark of Reed Elsevier Properties SA, used under license.

Copyright © 2016 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. All Rights Reserved.

No copyright is claimed by LexisNexis, Matthew Bender & Company, Inc., or Reed Elsevier Properties SA, in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

An A.S. Pratt® Publication

Editorial Office
630 Central Ave., New Providence, NJ 07974 (908) 464-6800
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

MARY BETH BOSCO

Partner, Holland & Knight LLP

DARWIN A. HINDMAN III

Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

J. ANDREW HOWARD

Partner, Alston & Bird LLP

KYLE R. JEFCOAT

Counsel, Latham & Watkins LLP

JOHN E. JENSEN

Partner, Pillsbury Winthrop Shaw Pittman LLP

DISMAS LOCARIA

Partner, Venable LLP

MARCIA G. MADSEN

Partner, Mayer Brown LLP

KEVIN P. MULLEN

Partner, Jenner & Block

VINCENT J. NAPOLEON

Partner, Nixon Peabody LLP

STUART W. TURNER

Counsel, Arnold & Porter LLP

WALTER A.I. WILSON

Senior Partner, Polsinelli PC

PRATT'S GOVERNMENT CONTRACTING LAW REPORT is published twelve times a year by Matthew Bender & Company, Inc. Copyright 2016 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. All rights reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For permission to photocopy or use material electronically from *Pratt's Government Contracting Law Report*, please access www.copyright.com or contact the Copyright Clearance Center, Inc. (CCC), 222 Rosewood Drive, Danvers, MA 01923, 978-750-8400. CCC is a not-for-profit organization that provides licenses and registration for a variety of users. For subscription information and customer service, call 1-800-833-9844. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 718.224.2258. Material for publication is welcomed—articles, decisions, or other items of interest to government contractors, attorneys and law firms, in-house counsel, government lawyers, and senior business executives. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher. POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 630 Central Avenue, New Providence, NJ 07974.

It's Good to be The King: The Curious Case of *United States v. JAAAT Technical Services*

*By J. Andrew Howard, Breana Ware, and Janille C. Corbett**

It is a historical reality that the government generally shies away from involving itself in downstream disputes arising between prime contractors and their subcontractors and suppliers. This article discusses a recent case that demonstrates that the government can and will more directly enter the fray to protect important governmental interests, which can have dramatic effects on prime/subcontractor relations.

As every experienced government contractor can attest, doing business with the federal government is anything but business as usual. In virtually every respect, the government sets the rules and calls the shots. This is particularly true in federal contracting's formal dispute resolution under the Contract Disputes Act, which in addition to waiving the government's sovereign immunity for contract claims, establishes the procedural requirements for resolving them.

In large part because of principles of privity of contract and the inherent limitations on the scope of the waiver of sovereign immunity, it is a historical reality that the government generally shies away from involving itself in downstream disputes arising between prime contractors and their subcontractors and suppliers. And any prime contractor attempting to pass through a lower-tier subcontractor's or supplier's claim ostensibly predicated upon the acts or omissions of the government is well-advised to abide by the limitations derived from the Supreme Court's 1943 decision in *Severin v. United States*, lest the claim be dismissed out of hand.

Of course, none of this is to say that Congress has made no effort to protect lower-tier subcontractors and suppliers. One need only consider the payment obligations of prime contractors imposed by the Prompt Payment Act, and the payment protections afforded by the Miller Act to certain public works subcontractors and suppliers, to know Congress indeed has made provision for (some of) those the government does not contract with directly but whose labor and materials are provided for the ultimate benefit of the government. However,

* J. Andrew Howard, a member of the Board of Editors of *Pratt's Government Contracting Law Report*, is a litigation partner at Alston & Bird LLP, representing clients across a wide range of industries in federal, state, and local government contracting matters. He may be contacted at andy.howard@alston.com. Breana Ware and Janille C. Corbett are associates in the Construction & Government Contracts Group at Alston & Bird.

as a recent case demonstrates, the government can and will more directly enter the fray to protect important governmental interests, which can have dramatic effects on prime/subcontractor relations.

In *United States v. JAAAT Technical Services, LLC, et al.*, the United States sued to obtain a temporary restraining order and preliminary injunction against three private parties: JAAAT Technical Services, LLC, the government's prime contractor on various construction projects in the Southeast; Tetra Tech Tesoro, Inc., one of JAAAT's subcontractors; and JAAAT's payment bond surety. The government sought to enjoin the defendants from taking any action that would interfere with JAAAT's ability to disburse payments to subcontractors and suppliers from funds paid to JAAAT by the government. The government also sought to enjoin Tetra Tech from enforcing an earlier state court injunction that would have prohibited JAAAT from disbursing any funds to subcontractors and suppliers on the projects.

The United States, acting through the Army Corps of Engineers, hired JAAAT to oversee construction of various improvements at various military bases located in North Carolina and Georgia. As it was required to do, JAAAT obtained payment and performance bonds for the projects, which were issued by its surety and other co-sureties. Rather than perform the construction work itself, however, JAAAT subcontracted with Tetra Tech, which is described in court filings as the general contractor responsible for physically executing the construction work.

During the course of performance, disputes between JAAAT and Tetra Tech arose. Unable to resolve their dispute amicably, the parties then engaged in a multifaceted legal dispute that spawned—as of the writing of this article, anyway—no less than 10 separate lawsuits in federal and state courts throughout the country.¹

THE THREE NORTH CAROLINA STATE COURT CASES

On November 21, 2014, Tetra Tech filed three separate cases (one for each project located in the state) against JAAAT in North Carolina state court. As described in court filings, all three projects required the construction of a facility to house a flight simulator, a brigade headquarters building, and an administrative training facility. In each case, Tetra Tech alleged, among other things, that: (1) JAAAT had breached its contract with Tetra Tech by failing to make required payments to Tetra Tech; (2) JAAAT had misappropriated the

¹ The timeline below attempts to bring a little more clarity to the complicated procedural history of the parties' dispute.

funds Tetra Tech was entitled to receive under the contract, which included more than \$660,000 for design consulting services; and (3) JAAAT violated the federal False Claims Act by falsely certifying in its payment applications to the Corps that all undisputed amounts owed to subcontractors had been or would be disbursed from monies paid to JAAAT by the Corps. Tetra Tech also sought injunctive relief preventing JAAAT from using any monies received from the Corps for any purpose unless and until Tetra Tech was paid in full.

All three cases were consolidated. The superior court judge presiding over the consolidated action issued a preliminary injunction against JAAAT on July 16, 2015, prohibiting JAAAT from using any money collected from its contracts with the Corps to pay any of its other subcontractors or suppliers before paying Tetra Tech. The injunction also required JAAAT to hold all money received in escrow pending further order of the court.

THE TWO GEORGIA STATE COURT CASES

The contract between JAAAT and the Corps also included expansion of a facility located in Georgia at Fort Gordon. There, JAAAT subcontracted Tetra Tech to provide the architectural, engineering, design, and other consulting services for that work. Alleging that JAAAT had failed to pay Tetra Tech for the services Tetra Tech had rendered, Tetra Tech sued JAAAT for breach of contract and unjust enrichment in two separate Georgia superior courts in December 2014.

As it had in the (consolidated) North Carolina cases, Tetra Tech petitioned for injunctive relief to prevent JAAAT from using any monies received from the Corps for any purpose prior to paying Tetra Tech in full. In January 2015, JAAAT removed one of the cases to federal court. In the remaining state court case, Tetra Tech repeated its allegations that JAAAT had breached the subcontract by failing to pay Tetra Tech as agreed. Tetra Tech also alleged JAAAT breached its fiduciary duties owed to Tetra Tech under a constructive trust theory of recovery, and that JAAAT converted monies due and owed to Tetra Tech.²

THE TWO VIRGINIA FEDERAL COURT CASES

After the North Carolina state court injunction was issued, on January 9, 2015, the surety filed suit against its bond principal, JAAAT, in the federal District Court for the Eastern District of Virginia, seeking indemnification

² JAAAT moved to dismiss the remaining Georgia state court case for lack of subject matter jurisdiction, which was granted. Tetra Tech has appealed.

from JAAAT for bond claims it had received from other subcontractors alleging they were owed money that had not been paid. JAAAT filed a third-party complaint against Tetra Tech, seeking indemnification against the surety's claims and an order requiring Tetra Tech to pay its subcontractors for working on the project.

On April 14, 2015, JAAAT filed an independent lawsuit against Tetra Tech in the same federal court. In that case, JAAAT claimed Tetra Tech breached the subcontract by failing to adequately perform the work of the subcontract, which caused significant delay on each of the projects located in North Carolina and Georgia. JAAAT claimed nearly \$10 million in actual and consequential damages for these alleged delays.

No party informed the court in the Virginia surety case of the issuance of the North Carolina state court injunction, nor of the pending parallel lawsuit in the same court filed by JAAAT. Instead, all parties in the Virginia surety case consented to the court's issuance of an injunction that gave the surety control over all funds JAAAT received from the Corps for any work performed on each of the five projects. As part of the agreement, JAAAT also stipulated to final judgment in the surety's favor on the issues of breach of contract and specific performance of JAAAT's obligations under its indemnity agreement with the surety in an amount to be determined at a future hearing.

The parties' failure to disclose the existence of the state court injunction did not escape the court's notice in the Virginia surety case for long. The government ultimately initiated a lawsuit of its own seeking to compel JAAAT's payment to subcontractors and suppliers, which were prevented under the state court injunction and the stipulated federal injunction. Upon learning of the existence and scope of the state court injunction, the district court in the Virginia surety case concluded that the parties were forum shopping and dissolved the federal injunction to which the parties had stipulated. Following this dismissal, JAAAT and the surety stipulated to a partial final order in favor of the surety on its breach of contract, specific performance, and declaratory judgment claims.

THE SINGLE CALIFORNIA FEDERAL COURT CASE

Despite the multitude of other suits in which they could have intervened, the sureties joined to file a case in the federal District Court for the Central District of California against Tetra Tech, seeking indemnification for payment and performance bond claims received by the sureties for bonds issued under the contracts. Mercifully, because of the pendency of all the other actions, on September 8, 2015, this case was stayed pending the outcome of the other cases.

THE FEDERAL GOVERNMENT ENTERS THE FRAY

Not surprisingly, the federal government was not a party to or otherwise directly participating in any of the cases filed by JAAAT, Tetra Tech, or the sureties in North Carolina, Georgia, Virginia, or California. But in May 2015 that changed: in a remarkable move, the government filed its own lawsuit in the District Court for the Eastern District of North Carolina against JAAAT, Tetra Tech, and the surety.

Simultaneously with the filing of its complaint, the government filed a motion for injunctive relief, alleging that as the prime contractor, JAAAT was obligated to pay all of its subcontractors promptly from the proceeds of each pay request submitted to and approved and paid by the Corps, and that JAAAT's consistent failure to pay the subcontractors despite these requirements necessitated injunctive relief to compel the required payments. To accomplish these goals, the government requested that: (1) a declaratory judgment be entered holding both the state court injunction and federal court injunction, which at this time still were in effect, conflicted with federal laws that required prompt payment to subcontractors and suppliers;³ (2) a temporary restraining order and preliminary and permanent injunctions be issued prohibiting the parties from complying with or otherwise attempting to enforce the state and federal injunctions; and (3) an order be issued directing the disbursement of the funds to third parties (i.e., other subcontractors and suppliers) who were owed money but not paid.

To support its claims for relief, the government argued that, if enforced, the state and federal court injunctions would cause irreparable harm to the government in the form of the likely termination of the contract with JAAAT. As a result, projects the government claimed were "critical to mission success" of soldiers and operations within the Army would be stopped, and components vital to the War on Terror would be delayed. To avoid these undesired effects, the government proposed a disbursement process that it argued would comport with federal law and that would be in the best interest of all parties. The proposed process would prohibit all defendants from taking any action that would interfere with JAAAT's ability to pay, from monies obtained from the Corps, undisputed amounts owed to other subcontractors and suppliers. To support this proposition, the government argued it had a compelling interest in

³ The government specifically asserted that the state and federal court injunctions violated the Prompt Payment Act, 31 U.S.C. § 3901, et seq., which requires prime contractors to pay their subcontractors and suppliers promptly from the proceeds of payments made by the United States government, and its implementing regulations that were incorporated into JAAAT's contracts.

ensuring that the other subcontractors and suppliers on the projects were paid, an interest it claimed the surety and JAAAT shared.

Tetra Tech opposed the government's request on several grounds. First, Tetra Tech argued that there were no exigent circumstances justifying injunctive relief, which Tetra Tech argued was supported by the government's admission that it did not anticipate making any immediate payments to JAAAT. Second, Tetra Tech opposed the request on grounds the government improperly was requesting the federal court "substitute its judgment" in place of the judgment of the North Carolina state court judge who entered the state court injunction, relying on "longstanding principles of comity" that ordinarily compels a federal court's deference to a prior state court ruling. Further, Tetra Tech argued that the federal court lacked the ability to issue injunctive relief here because the North Carolina state court had exclusive jurisdiction over payments owed to JAAAT under the so-called Karatz Doctrine,⁴ and because the Anti-Injunction Act barred such an order. Finally, Tetra Tech argued that even if the federal court had the power to enter an injunction, it should refrain from doing so under the abstention doctrine.⁵

The North Carolina district court rejected Tetra Tech's arguments and issued the requested injunctive relief, concluding:

1. The United States will be irreparably injured unless the defendants[, Tetra Tech, JAAAT, and the surety,] are temporarily restrained;
2. [Tetra Tech, JAAAT, and the surety] will not be harmed by a temporary restraining order;
3. the United States had provided sufficient information to show that it is likely to prevail on the merits; and
4. the injunction is in the public interest.⁶

⁴ *Lion Bonding & Sur. Co. v. Karatz*, 262 U.S. 77, 89 (1923). In *Karatz*, the Supreme Court held, "Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts."

⁵ *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* doctrine holds that "a federal court should abstain from interfering in a state proceeding, even though it has jurisdiction to reach the merits, if there is (1) an ongoing state judicial proceeding, instituted prior to any substantial progress in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and (3) provides an adequate opportunity for the plaintiff to raise the federal constitutional claim advanced in the federal lawsuit." *Moore v. City of Asheville, N.C.*, 396 F.3d 385, 390 (4th Cir. 2005).

⁶ Temporary Restraining Order, No. 5:15-cv-00227, Docket No. 17, p. 2.

Consequently, the district court ordered the Corps to deposit monthly payments owed to JAAAT directly into the registry of the court, accompanied by a list of subcontractors to be paid from those amounts, thereby effectively bypassing any payment to JAAAT directly. The district court further enjoined Tetra Tech from taking any additional steps on an attempt to enforce the state court injunction.

THE SIGNIFICANCE OF THE JAAAT-TETRA TECH DISPUTE AND ITS AFTERMATH

The final chapter of the dispute between JAAAT and its principal subcontractor, Tetra Tech, is still being written. But the incredible escalation of their dispute—manifested in a multifaceted legal battle involving nearly a dozen separate lawsuits in federal and state courts around the country—resulted in an incredible reaction from the federal government: the filing of its own lawsuit against private parties seeking injunctive relief to allow payments to be made to other subcontractors and suppliers in accordance with federal laws and regulations designed to ensure timely payment on federal works of improvement. This surprising turn of events is significant for several reasons.

First, the government routinely distances itself from the countless payment disputes that arise between the government's prime contractors and their lower-tier subcontractors and suppliers, relying on the protective mechanisms afforded by the Prompt Payment Act and Miller Act. But the dispute between JAAAT and Tetra Tech—and particularly the impact the dispute had on every other subcontractor and supplier on the projects at issue—caused the government to take the step of initiating its own lawsuit against the parties to compel their compliance with existing federal laws.

Second, there is no doubt that the subcontract between JAAAT and Tetra Tech was a sophisticated, highly negotiated agreement that detailed the rights and remedies of the parties in the event of a dispute. While the request for and ultimate issuance of injunctive relief preventing payments by JAAAT to any other subcontractor or supplier unless and until Tetra Tech was paid likely was not contemplated by the agreement, in all likelihood the parties' agreement did not contemplate the government's seeking and receiving an injunction of its own that resulted in the diversion of contract payments into the registry of a federal district court for disbursement to third parties. Effectively, the government's maneuver almost certainly disrupted JAAAT's and Tetra Tech's understanding of their respective rights and obligations to resolve payment disputes—in other words, the government's intervention undoubtedly changed the nature of the bargain reflected in JAAAT and Tetra Tech's agreement.

Finally, the legal machinations of the parties, reflected in the dozen or so

active lawsuits spread across multiple states, and the government's ensuing suit to protect the payment rights of parties not involved in that dispute no doubt has corrupted whatever partnering efforts the Corps attempted to develop in the first place. As anyone experienced with Corps-managed constructions projects knows, partnering has long been an objective and goal for the Corps. On these projects, from an outsider's perspective, that goal appears largely unattained.