The Supreme Court's Ruling in General Dynamics and the Superior Knowledge Doctrine

Aerospace & Defense Group Newsletter

OVERVIEW

The United States Supreme Court rarely issues a decision regarding public contracting. When it does, it is a noteworthy event. Such an instance occurred when it handed down an opinion in *General Dynamics Corp. v. United States*, No. 09-1298 (U.S., May 23, 2011).

The *General Dynamics* case raises issues for federal contractors. Of particular concern is the Court's holding regarding the Superior Knowledge Doctrine. The Superior Knowledge Doctrine requires the government to make an adequate (i.e., commercially reasonable) disclosure of essential information that is necessary to performance, but that is not within the zone of knowledge that contractors would normally possess. The Doctrine has its origins in the landmark case, *Helene Curtis Industries, Inc. v. United States*, 312 F.2d 774 (Ct. Cl. 1963), and it is a function of that court's application of the implied duty of cooperation that parties to a contract owe to one another.

IMPLICATIONS

The Court's recent holding regarding the Superior Knowledge Doctrine means that performance risk-assessment changes are necessary for federal contractors. A central concern raised by the Court's decision is the risk associated with contract performance where state secrets (classified information) are involved. This risk is particularly acute in the fixed-price context and requires close scrutiny from a business perspective, in light of the Court's ruling.

In *General Dynamics*, the federal contractors fell over budget and behind schedule in developing the A-12 stealth aircraft for the Navy. The A-12 program was a fixed-price effort to build a stealth replacement for the F-14 Tomcat, and the Navy terminated the program for default and demanded that the contractors repay the progress payments already tendered. The federal contractors sued, and a protracted period of litigation followed. The details of the procedural history require a score card, but they are only vaguely relevant to this issue. The case eventually came before the Supreme Court.

Among the matters raised by the federal contractors seeking to overturn the default termination was the contention that the Government had superior knowledge concerning stealth technology (flowing from the F-117 and B-2 programs) that it improperly failed to make available to them.

The Court held that when a trial court, to protect state secrets, dismisses a federal contractor's prima facie valid affirmative defense to the Government's allegations of contractual breach (i.e., termination for default), the proper remedy is to leave the parties where they were on the day they filed the lawsuit. The Court noted that the trial court found that, since the Government's invocation of the state-secrets privilege obscured too many of the facts relevant to the Superior Knowledge defense, the issue of that defense was nonjusticiable (meaning that it was not subject to a judicial resolution) even though the federal contractors had brought forward enough unprivileged evidence (evidence not subject to a claim of state secret) for a prima facie showing if its claim.

The Court then stated that in such circumstances it must exercise its common-law authority to fashion contractual remedies in Government-contracting disputes. It found the relevant state-secrets jurisprudence not in *United States v. Reynolds*, 345 U.S. 1 (1953) (a case involving court-ordered disclosure of state and military secrets that was asserted in the papers before it), but in *Totten v. United States*, 92 U.S. 105 (1875), and *Tenet v. Doe*, 544 U.S. 1(2005), two cases dealing with alleged contracts to spy.

Applying those cases, the Court found that "[w] here liability depends on the validity of a plausible superior- knowledge defense, and when full litigation of that defense 'would inevitably lead to the disclosure of' state secrets, [under *Totten*], neither party can obtain judicial relief." Thus, it becomes unrealistic to separate the claim from the defense, allowing the former to proceed while barring the latter. Claims and defenses together establish the justification – or lack of justification – for judicial relief; and when public policy precludes judicial intervention for the one, it should also preclude judicial intervention for the other. Suit on the contract, or for performance rendered or funds paid under the contract, will not lie, and courts should leave the parties to the agreement where they stood on the day they filed suit.

Regarding the Government's suggestion that at the time of suit, the contractors had been held in default by the contracting officer and were therefore liable for the ensuing consequences, the Court viewed that as merely one step in the parties' contractual regime. Significantly, it found that the "position of the parties" at the time of suit is not their position with regard to legal burdens and the legal consequences of contract-related determinations, but their position with regard to possession of funds and property.

In addition, the Court noted that state secrets would make it impossible to calculate the federal contractors' damages, and the Government wanted the return of the $1.35 billion it paid the contractors for work it never accepted – yet the validity of those claims depended on the nonjusticiable issue of whether petitioners were in default. Thus, as in *Totten*, the Court's refusal to enforce this contract captures what the *ex ante* expectations of the parties were or reasonably should have been. The parties assumed the risk that state secrets would prevent the adjudication of inadequate performance claims. The Court's ruling in *General Dynamics* renders the law more predictable and subject to accommodation by contracting parties. Ultimately, whether the Government had an obligation to share its superior knowledge concerning stealth technology is left for the U.S. Court of Appeals for the Federal Circuit to address on remand.

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