

Federal Circuit Affirms Court of Federal Claims Ruling on Damages Available for Partial Breach of Contract

Summary: The Court of Appeals for the Federal Circuit affirmed a Court of Federal Claims decision that denied a contractor, suing the government under a partial breach of contract theory, the ability to seek pre-breach mitigation costs as well as a present recovery for future damages. The case serves as a reminder that decisions made by a contractor relating to its legal theory of entitlement will impact the remedies available to that contractor if it prevails in the suit.

Background: In *Indiana Michigan Power Company v. United States*, No. 04-5122 (Fed. Cir. September 9, 2005), the Federal Circuit affirmed a decision by the United States Court of Federal Claims ("CoFC") dismissing Indiana Michigan Power Company's breach of contract damages claims against the Department of Energy ("DOE").

- In 1983, the contractor entered into a Standard Contract with DOE for the removal of spent nuclear fuel ("SNF") from one of its plants beginning in 2001. In 1994, DOE announced that it would not begin collecting the SNF until 2010 because its planned storage repository would not be ready until that time. The contractor then sued DOE for damages based on partial breach of contract.
- The CoFC ruled in favor of the contractor on the issue of liability, but because the contractor claimed only a partial breach of contract, the CoFC denied its attempt to recover pre-breach mitigation costs (including the costs of repositioning and fuel rods and expanding its private SNF storage facility) as well as future damages (including anticipated construction of a private facility to store SNF not collected by DOE by the contracted-for start date).

Analysis: The Federal Circuit upheld the CoFC's ruling that damages for pre-breach mitigation costs were not available to the contractor under a partial breach theory, but disagreed with the CoFC concerning the general rule on availability of pre-breach mitigation damages.

- The Federal Circuit found that there was no *per se* rule that pre-breach mitigation damages were never available to plaintiffs suing under a partial breach theory. The Federal Circuit reasoned that such a rule would conflict with a party's duty to mitigate damages, a duty that applies even in situations of partial breach. To recover such costs of mitigation, a contractor must prove foreseeability, causation, and reasonableness. In this case, such damages were not available to the contractor because much of the claimed mitigation costs occurred prior to the 1994 announcement by the DOE and the remainder of the costs were determined by the Court to be "speculative" or the result of business decisions that would have been pursued irrespective of DOE's partial breach.
- With respect to future damages, the Federal Circuit agreed with the CoFC and held that "[b]ecause of its highly speculative nature, a claimant may not recover, at the time of the first suit for partial breach, prospective damages for anticipated future nonperformance resulting from the same partial breach." Future damages would have been available had the contractor been able to claim total breach. Here, however, the contractor would be able to obtain recovery for post-breach damages in the future only by bringing additional future actions after any such additional costs were incurred.

Practitioners' Tips: There are a number of reasons why a contractor may want to treat a material breach or repudiation by the government as being merely a partial breach. For example, the contractor may wish to continue to bind the government to the "non-breached" contract terms. Moreover, the available facts may most strongly support a partial breach theory.

- In pursuing a claim based on partial breach, however, a contractor must be mindful that it is potentially limiting its available remedies and increasing its costs due to the necessity of instituting new proceedings to prosecute future claims.
- In the event of an apparent partial breach by the government, a contractor should exercise care to document fully the reasons for its decision to incur certain costs to mitigate or minimize the damages it will suffer. In particular, the nexus between the costs and the government's actions must be made clear.

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