26 Lessons From the Last Half-Century of Software Acquisition

34 From the Ground Up: How Personal Contributions Reshape Entire Systems

42 Labor Cost Realism Issues

ISSUE THEME

THE SOFTWARE CHALLENGE

CONTRACT MANAGEMENT

www.ncmahq.org

OCTOBER 2024

Banishing the Blue Screen: Re-imagining Software Requirements

Why so many software solutions in the federal government become “orphans” and how government and industry can work together to keep them running smoothly!

NCMA

NATIONAL CONTRACT MANAGEMENT ASSOCIATION

CONNECTING TO CREATE WHAT'S NEXT

The Software Reseller Problem

A recent case highlights the challenge software licensors face when they use resellers and try to directly enforce license terms against the government.

BY STEPHEN L. BACON

The federal government spends billions of dollars per year on commercial software licenses. These licenses are not typically purchased by the government directly from the software manufacturer. Rather, software licenses are commonly sold through resellers that hold a prime contract with the government.

The widespread use of resellers allows commercial software vendors to avoid the burdensome requirements of being a prime contractor to the government. Software vendors can avoid onerous *Federal Acquisition Regulation (FAR)* clauses by using a reseller that will sell the vendors' software subject to its end-user licensing agreement (EULA), which is incorporated into the reseller's prime contract.

This type of arrangement offers many advantages to software vendors, but it raises a fundamental legal question: Can the software vendor independently enforce the terms of its EULA by bringing a breach of contract claim directly against the government?

This question is at the core of a dispute that has been winding its way through the Civilian Board of Contract Appeals (CBCA) and the U.S. Court of Appeals for the Federal Circuit for more than five years. The most recent CBCA decision, on remand from the Federal Circuit, ruled that Avue Technologies Corporation (Avue) could not assert a claim against the government for breach of Avue's EULA.[1]

This decision serves as a stark warning to the many companies that provide software to the government through resellers. It remains to be seen whether the latest CBCA decision will be appealed again to the Federal Circuit. If that decision is not overturned, software vendors that use resellers will need to take certain steps to ensure that they have the ability to enforce their EULAs.

Background

The Avue Digital Services (ADS) software platform allows agencies to automate federal job classification tasks in compliance with statutory, regulatory, and policy requirements. Avue sells

ADS software to agencies through Carahsoft Technology Corporation (Carahsoft), a large reseller that holds a Federal Supply Schedule (FSS) contract with the General Services Administration (GSA). Carahsoft's FSS contract was modified in 2012 to include ADS software and incorporated Avue's EULA.

In 2015, the Food and Drug Administration (FDA) placed an order under Carahsoft's FSS contract for an ADS subscription. FDA used the software in the base year of the order but did not exercise any of the four option years. Avue investigated FDA's account activity and learned that, prior to the expiration of the base year, FDA downloaded thousands of documents that Avue considered proprietary, including position descriptions and related documentation. Avue believed this was a violation of the terms of its EULA.

Avue claimed more than $41 million in damages as a result of the alleged unauthorized downloading. The FDA, however, refused to act on the claim because, in its view, the FDA only had a contract with Carahsoft, not Avue. Avue filed an appeal with the CBCA in January 2019.

The CBCA's Initial Proceedings

Since the inception of the appeal, the government argued that Avue's claim suffers from procedural defects. Initially, the government asserted that the CBCA did not have jurisdiction to decide the appeal because Avue was only a subcontractor and its claim was not sponsored by the prime contractor, Carahsoft.[2]

As a general matter, the CBCA agreed that a subcontractor cannot file a claim against the government unless the claim is sponsored by the prime contractor. But the CBCA ultimately denied the government's motion because Avue was not pursuing the claim as a subcontractor. Instead, the CBCA ruled that Avue made a plausible allegation that the EULA was a "freestanding" contract between Avue and the government that, if true, would be subject to the CBCA's jurisdiction under the Contract Disputes Act (CDA).[3]

The government later argued, in a motion for summary judgment, that the CBCA lacked jurisdiction to decide the appeal on a slightly different ground. The government asserted that, even if the EULA could be considered a freestanding contract, the EULA was still not a "procurement contract" within the meaning of the CDA.

Not every contract with the government is a "procurement contract" that is subject to the CDA. Only contracts "'for the acquisition by purchase, lease or barter, of property or services for the *direct benefit or use* of the federal government'" qualify as "procurement contracts" under the CDA.[4]

The CBCA concluded that it could not decide Avue's claim against the government because the EULA "lacks core aspects of a CDA procurement contract."[5] In the CBCA's view, the government did not purchase or acquire any ADS software from Avue under the EULA.

Because the government procured ADS software and paid for it under Carahsoft's FSS order, the CBCA ruled that Avue could not pursue a claim "in its own capacity" for breach of the EULA's terms.[6] The CBCA reached this decision without deciding whether the EULA "establish[ed] privity of contract between Avue and the Government."[7]

The Federal Circuit's Reversal

Avue prevailed in its appeal of the CBCA's decision to the Federal Circuit. The Federal Circuit determined that, "[w]hether or not the [EULA], all by itself, is a 'procurement contract' is a not a question we need to decide."[8]

According to the Federal Circuit, the relevant question was "whether Carashoft's FSS contract with GSA or the task order placed by the FDA, each of which incorporates the [EULA], constitutes a 'procurement contract' giving rise to rights enforceable by Avue."[9]

Although Avue did argue that the EULA was a "freestanding" contract before the CBCA, the Federal Circuit concluded that Avue also "made the more *comprehensive* allegation that its rights arise from the combination of the [EULA] with the FSS contract or with the task order."[10]

Thus, the Federal Circuit decided "that Avue's allegation that it is a party to a procurement contract (i.e., the FSS contract or the task order) with the federal government that incorporates its [EULA] is nonfrivolous and, therefore, sufficient to establish the Board's jurisdiction."[11]

The Federal Circuit instructed the CBCA on remand to decide the merits "of whether Avue is a party to – or otherwise has enforceable rights pursuant to, for example by being in privity with Carahsoft – the conceded

procurement contract (i.e. the MSA plus the FSS or the task order)."[12]

The CBCA's Remand Decision

On remand, the CBCA considered the question framed by the Federal Circuit and found that Avue had no enforceable rights under Carahsoft's FSS contract or the task order. The CBCA noted that this theory was inconsistent with Avue's position that the EULA created a separate and distinct contract with the government.

Moreover, the CBCA found there was no evidence that Avue signed a contract with the government, nor was there evidence that the parties intended to make Avue part of a group of contractors subject to joint and several liability. As a result, the CBCA rejected Avue's argument that it had privity of contract with the government.

After concluding that Avue had no privity of contract, and therefore no rights under the Carahsoft agreements, the CBCA again addressed the question of whether Avue's EULA was an independent "procurement contract." The CBCA reiterated its prior conclusion that Avue did not have a "procurement contract" because the "Government did not procure the license from Avue."[13]

The CBCA also disagreed with Avue's argument that a standard GSA contract clause permitted the CBCA to resolve this dispute. That clause provides, in part, that "[i]f the supplier *or licensor* believes the ordering activity to be in breach of the agreement, it shall pursue its rights under the Contract Disputes Act."[14]

The CBCA understood this clause to refer to pass-through claims that could be brought by subcontractor-licensors, but it did not expressly grant licensors the right to assert a claim directly against the government. In any event, the CBCA concluded that the clause could not "create CDA jurisdiction that does not otherwise exist."[15]

Conclusion

The CBCA's decision in *Avue* underscores the need for software manufacturers to carefully scrutinize their agreements with resellers. Avue could have avoided the procedural roadblocks it has faced in litigation if Carahsoft had been willing to "sponsor" Avue's claim.

Although the CBCA's decision does not discuss the terms of Avue's reseller agreement, it likely did not require Carahsoft to submit Avue's claim to the government on a pass-through basis. Thus, if Carahsoft did not agree to sponsor Avue's claim when Avue discovered the FDA's alleged improper downloading, Avue was left with effectively no recourse to enforce its EULA.

Unless the Federal Circuit overturns the CBCA's latest decision, software vendors will not have the right to independently enforce their EULAs when they use a reseller. To ensure that a software vendor's EULA can be enforced, its reseller agreement must obligate the reseller to sponsor and submit pass-through claims to the government.

Finally, although CBCA's decision means that a EULA cannot be enforced against the government absent the prime contractor's sponsorship, this rule does not apply to copyright infringement claims. A software licensor may sue the government directly in an action at the Court Federal Claims for copyright infringement by alleging, for example, that the government has exceeded the number of authorized licenses.[16] CM

Stephen L. Bacon is a shareholder in the Washington, D.C. office of the law firm Rogers Joseph O'Donnell, where he represents government contractors in bid protests, claims, investigations, and suspension and debarment proceedings. He frequently litigates cases at the Court of Federal Claims, the Government Accountability Office, the Boards of Contract Appeals, and the Small Business Administration's Office of Hearings and Appeals. He also provides advice and counsel to clients on a broad range of contractual and regulatory compliance issues that confront government contractors.

The views expressed in this article are those of the author and do not necessarily reflect the views of Rogers Joseph O'Donnell or its clients. This article is for general information purposes and is not intended to be and should not be construed as legal advice.

ENDNOTES

1 Avue Technologies Corp. v. Dep't of Health and Human Services, CBCA Nos. 8087, 8088, 24-1 BCA ¶ 38,617.
2 Avue Technologies Corp. v. Dep't of Health and Human Services, CBCA No. 6360, 19-1 BCA ¶ 37,375.
3 Id.
4 New Era Construction v. United States, 890 F.2d 1152, 1157 (Fed. Cir. 1989) (emphasis in original).
5 Avue, 24-1 BCA P38,617 at 187,717.
6 Id.
7 Avue Technologies Corp. v. Dep't of Health and Human Services, CBCA No. 6360, 22-1 BCA P38,024 at 184,652.,
8 Avue Technologies Corp. v. Sec. of Health and Human Services, 96 F.4th 1340, 1345 (Fed. Cir. 2024).
9 Id.
10 Id. at 1346 (emphasis in original).
11 Id.
12 Id.
13 Avue, 24-1 BCA P38,617 at 187,717.
14 48 C.F.R. § 552.212-4(w)(1)(iv) (emphasis added).
15 Avue, 24-1 BCA P38,617 at 187,717.
16 See 28 U.S.C. 1498(b).