PUBLICATION

Todd Construction v. United States: Navigating Performance Evaluation Claims in the Court of Federal Claims [Ober|Kaler]

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Winter 2015

This article appeared in the Winter 2015 edition of The Construction Lawyer.

A default termination can be a nightmare for a contractor that bids on federal projects, but a negative performance evaluation can prove just as troublesome for a contractor that finishes the job. The Federal Acquisition Regulation (FAR) requires a performance evaluation for each federal construction contract of $650,000 or more and for every contract terminated for default, and the FAR permits performance evaluations for contracts below the $650,000 threshold.[1] The agency must then submit this performance evaluation to a central database, where it remains available to future procuring agencies for six years.[2] Future procuring agencies, in fact, are *required* to factor past performance evaluations into award decisions.[3] Thus, a negative performance evaluation can be a thorn in a contractor's side or a nail in its coffin when seeking future work.

In *Todd Construction, L.P. v. United States*,[4] the Court of Federal Claims recognized the right of a contractor at least in theory to seek judicial review of an agency's refusal to change a negative performance evaluation. This "win" proved a hollow victory for the contractor in *Todd Construction*, however, as the Court of Federal Claims ultimately dismissed the contractor's appeal for failure to state a claim upon which relief can be granted, which dismissal was affirmed by the US Court of Appeals for the Federal Circuit. Even had the contractor in *Todd* not lost on a dispositive motion, the extent of relief that the Court of Federal Claims can actually afford remains unclear, as does the nature of claims that may prevail on the merits. Therefore, although *Todd Construction* has given contractors a potential recourse to challenge negative performance evaluations, contractors should prepare detailed, fact-intensive claims and meticulously comply with the claims process set forth in the Contract Disputes Act of 1978 (the CDA) to avoid dismissal.

The Relative Jurisdiction of the Court of Federal Claims and the Pre-2001 Federal District Courts Over Federal Bid Protests

To understand *Todd Construction* fully, it is useful first to compare briefly the jurisdiction of the Court of Federal Claims with the jurisdiction of the US district courts over federal bid protests. At least before January 1, 2001, the Court of Federal Claims and the US district courts exercised concurrent jurisdiction over federal bid protests. During that time period, however, the US district courts had broader power than the Court of Federal Claims to direct or enjoin agency action on remand.

Remedies Generally Available in Article I and Article III Courts

The differences between the jurisdiction of the Court of Federal Claims and the US district courts have constitutional origins. Congress established the federal district courts pursuant to Article III of the US Constitution. As Article III courts, the US district courts are expressly empowered to grant equitable relief.[5] In contrast, Congress established the Court of Federal Claims pursuant to Article I of the US Constitution.[6] As an Article I court, the Court of Federal Claims has no constitutionally based authority to grant equitable relief.[7] Instead, the equitable power of the Court of Federal Claims must arise from a specific congressional grant of such power.[8]

The Jurisdiction of the Court of Federal Claims Under the Tucker Act and the Contract Disputes Act of 1978

The Tucker Act grants the US Court of Federal Claims jurisdiction over contractor claims predicated on "any express or implied contract with the United States"[9] or "any claim by or against, or dispute with, a contractor arising under section 7104(b)(l) of title 41 [the Contract Disputes Act of 1978], including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under . . . that Act."[10] The CDA, in turn, permits a contractor to appeal a contracting officer's decision to either an agency board or the Court of Federal Claims.[11]

The jurisdictional hook of the Tucker Act requires that the contractor's action be a "claim." Neither the Tucker Act nor the CDA defines the term "claim." The FAR, however, defines "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract."[12]

The Jurisdiction of the Pre-2001 Federal District Courts Over Bid Protests

Some further history is important to this discussion. At least before January 1, 2001, the US district courts exercised essentially concurrent jurisdiction over federal bid protests with the Court of Federal Claims. In 1970, the US Court of Appeals for the D.C. Circuit held in *Scanwell Laboratories, Inc. v. Shaffer*[13] that the federal Administrative Procedure Act granted jurisdiction to the US district courts over the appeal of a disappointed bidder on a federal project.

The *Scanwell* jurisdiction of the US district courts was codified, at least temporarily, through the Administrative Dispute Resolution Act of 1996.[14] Through the Act, Congress granted concurrent jurisdiction to the US district courts and the Court of Federal Claims over bid protests and objections to violations of statutes and regulations in connection with procurement.[15] This grant of jurisdiction was subject to a sunset provision, however, under which the jurisdiction of the US district courts over such actions would terminate on January 1, 2001, unless Congress extended the grant.[16] Congress did not so act, and therefore the jurisdiction of the federal district courts under the Administrative Dispute Resolution Act was allowed to sunset.

During the time period in which the federal district courts exercised jurisdiction, however, the federal district courts possessed greater authority than the Court of Federal Claims to grant injunctive relief. Indeed, in postaward cases, the federal district courts had exclusive jurisdiction to grant injunctive relief.[17] The statutory source of this authority is section 706 of the federal Administrative Procedure Act, which allows a federal district court to "hold unlawful and set aside agency action, findings, and conclusions found to be," among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[18]

Judicial Review of Performance Evaluations Before *Todd Construction*

Also before embarking on a review of the *Todd Construction* case, it is helpful to understand the extent of judicial review of performance evaluations that had before been exercised by the Boards of Contract Appeals and the Court of Federal Claims.

The Boards of Contract Appeals routinely held, in the years before *Todd Construction*, that a challenge to a performance evaluation was not a "claim" within the meaning of the CDA. The leading case was *Konoike Construction Co.*[19] In *Konoike*, the Armed Services Board of Contract Appeals considered a contractor's appeal of an unsatisfactory performance evaluation, and the Board concluded that it had neither jurisdiction to hear the appeal (which was not, under the Board's interpretation, a "claim" under the CDA) nor the power to grant any relief. The Boards of Contract Appeals generally reached this conclusion, [20] although even *Konoike*

acknowledged an exception to this rule if the negative performance evaluation was made in breach of a settlement agreement between the government and the contractor.[21]

The Court of Federal Claims, during this time period, had also not found a stand-alone challenge to a performance evaluation to be a "claim" under the Tucker Act and the CDA, although certain pre-*Todd* decisions began to provide inroads for contractors seeking judicial review. First, in 2004, the Court of Federal Claims decided in *Record Steel & Construction Inc. v. United States* that it had jurisdiction under the Tucker Act to review an adverse performance evaluation.[22] The court based its holding on the provision of the Tucker Act authorizing it to "render judgment upon any claim by . . . a contractor arising under [the CDA]."[23] The Court of Federal Claims expressly declined to follow the decisions of the Boards of Contract Appeals that had found no jurisdiction over challenges to performance evaluations.[24] Importantly, however, the contractor in *Record Steel* had also brought claims for monetary relief, which may have influenced the court's decision on jurisdiction. [25]

Next, in *BLR Group of America, Inc. v. United States (BLR I)*,[26] a case decided on November 25, 2008 (just two weeks before the first opinion in *Todd Construction*), the Court of Federal Claims finally determined that a request to change a performance evaluation was a "claim" under the CDA over which the Court of Federal Claims had jurisdiction.[27] In its analysis, the Court of Federal Claims explained the options for redress available to a contractor:

[A contractor] could either attempt to challenge an allegedly unfair and inaccurate performance evaluation as a contract-performance claim pursuant to the CDA at the time the [government] issued the performance evaluation or it could wait and lodge a protest when the performance evaluation played a role in an unsuccessful bid on a future contract.[28]

The contractor's third option, of course, is to submit additional information and attempt to change the contracting officer's mind.

In *BLR I*, the Court of Federal Claims concluded that a contractor's request to an agency to change a performance evaluation "is not a meaningless act"[29] and that the contractor's submitting that request and the agency's either denying it or failing to act on it "is a proper mechanism, and provides the proper jurisdictional predicate, to challenge an adverse performance evaluation in the Court of Federal Claims."[30] In so holding, the Court of Federal Claims distinguished *Konoike* on the basis that, in that case, the contractor had appealed the performance evaluation itself, rather than the agency's denial of a request to change a performance evaluation. [31] The latter, in the opinion of the *BLR I* court, constituted a "claim." (Unfortunately for the contractor, the Court of Federal Claims reversed itself on reconsideration two years later in *BLR II*,[32] holding that because the contractor's purported request to change the performance evaluation was not submitted pursuant to the CDA claims process, the agency properly treated the request as contractor "'comments" to a performance evaluation, which do not constitute a "claim.")

Although the *BLR I* opinion reached the issue of whether the appeal of a performance evaluation can constitute a claim, *BLR I* provided no guidance on what relief the Court of Federal Claims might offer and what a contractor needs to allege in order to state a claim upon which relief may be granted. In the four *Todd Construction* opinions, beginning two weeks later, the Court of Federal Claims began to flesh out these issues.

Todd Construction, L.P. v. United States

In *Todd Construction, L.P v. United States*, the Court of Federal Claims and the US Court of Appeals for the Federal Circuit issued a series of four opinions between 2008 and 2011. These opinions explore the circumstances in which the Court of Federal Claims may exercise jurisdiction over a challenge to an adverse

performance evaluation under the Tucker Act and the CDA, the relief that the court is empowered to grant, and what a contractor must plead in order to survive a motion to dismiss.

Todd Construction I: *A Challenge to a Performance Evaluation Constitutes a "Claim" Under the Tucker Act*

Todd Construction was the general contractor for two task orders awarded by the US Army Corps of Engineers (USACE) for roof repair at an Air Force base in North Carolina. The project encountered delays, which Todd Construction attributed to its subcontractors and the government. After the project was complete, Todd Construction received an "unsatisfactory" performance rating. After the initial evaluation, Todd Construction provided documentation explaining the delays, but the contracting officer declined to revise the performance rating. Todd Construction then appealed to the Department of the Army (DOA), but the DOA rejected its request. The performance evaluation was then added to the Construction Contractor Appraisal Support System (CCASS), a comprehensive database of contractor performance evaluations. Todd Construction then filed a complaint in the Court of Federal Claims, alleging that (1) the performance evaluation was arbitrary, capricious, an abuse of discretion, and not in accordance with law; (2) the performance evaluation exceeded statutory and regulatory authority; (3) DOA failed to properly observe procedures required by law; and (4) the performance evaluation was not supported by substantial evidence and/or was unwarranted by the facts. Todd Construction also requested a declaration that the DOA's final decisions were unlawful and an order directing USACE to remove the evaluations from CCASS. The government moved to dismiss Todd Construction's case for (I) lack of subject-matter jurisdiction and (2) failure to state a claim upon which relief may be granted.

On December 9, 2008, the Court of Federal Claims issued the first of three opinions in that case (*Todd Construction I*), in which it denied the government's motion to dismiss for lack of subject-matter jurisdiction. The court's analysis began with the court's setting forth the four elements of what constitutes a "claim" under the Tucker Act:

(1) a decision of the contracting officer; (2) on a written demand; (3) made as a matter of right; [and] (4) requesting relief arising under or relating to the contract. [33]

The Court of Federal Claims found that Todd Construction's challenge to the performance evaluation "easily satisfied" the first two elements.[34] As to the third element, the court found that Todd Construction was making the claim "as a matter of right" because it was asserting its entitlement to "an accurate and fair performance evaluation prepared in accordance with the [FAR and USACE] regulations."[35] Finally, on the fourth element, the court found that Todd Construction's requested relief arose under, or related to, the contract. The court explained that "as a matter of logic," Todd Construction's performance evaluation related to its performance under the contract.[36] To hold otherwise would "simply def[y] reason."[37]

Although the Court of Federal Claims held that it had jurisdiction over Todd Construction's claim, the court nonetheless requested further briefing on whether Todd Construction's complaint stated a claim for which relief could be granted.[38] The issue was whether the court was within its power to offer any real remedy. Jurisdiction means little if the court cannot offer a contractor the relief it seeks.

Todd Construction's complaint had requested two forms of relief: "(1) a declaration that the [USACE's] refusal to rescind the performance evaluations was unlawful and should be set aside and (2) an order requiring the [USACE] to alter the CCASS database."[39] Within the power of the Court of Federal Claims under the Tucker Act is the power (1) to, in order to "provide an entire remedy and to complete the relief afforded by the judgment . . . [,] as an incident of and collateral to any such judgment, issue orders directing . . . correction of applicable records" and (2) "to remand appropriate matters to any administrative or executive body or official

with such direction as it may deem proper and just."[40] The court could not conclude based on the memoranda before it, however, whether this power reached a claim like that of Todd Construction, in which there was no independent claim for monetary relief.

Todd Construction II: *The Court of Federal Claims Examines the Extent of Its Remedial Power*

On July 22, 2009, following additional briefing by the parties, the Court of Federal Claims issued its second opinion in the *Todd Construction*

matter (*Todd Construction II*).[41] The court concluded that it (1) did not have authority to grant general equitable or injunctive relief"[42] but (2) did have authority to enter a declaratory judgment simply by virtue of its having jurisdiction over the claim.[43]

Further, pursuant to its authority under the Tucker Act, the Court of Federal Claims may remand matters to the agency with "proper and just "directions.[44] The court's opinion in *Todd Construction II* examined the contours of this remand authority. Certainly, a mere declaration, standing alone, would have little pragmatic effect without ordering the agency to do something about it.[45] However, this authority was limited because the court could not issue injunctive relief.[46] Thus, the court resolved that the answer "lies somewhere in between these two extremes."[47] Although the court could do more than tell the agency it was wrong, it could not order the agency to throw out the performance evaluation. Instead, the "proper and just" directions of the Court of Federal Claims should direct the attention of the agency to matters that require a more complete record at the agency level.[48]

Within these parameters, the court further dictated that different standards of review should apply between procedural and substantive challenges to a performance evaluation. The agency's procedure was subject to *de novo* review[49] because the "Court is fully capable of reviewing whether [procedural] requirements were satisfied or not."[50] If the court found procedural errors, it "should use its power to issue a declaratory judgment to assist the agency, on remand, to address the identified concerns."[51]

In contrast, a substantive challenge to the assignment of a particular performance rating is subject to deferential review. The Court of Federal Claims stated that it would only find a performance evaluation inaccurate or unfair if it constituted an abuse of discretion, "for example, if the decision was arbitrary or capricious."[52] Because performance ratings are "necessarily subjective" and "within the sole purview of the Government," the court was reluctant to impede the contracting officer's discretion.[53] Although the court did not state what relief it could afford if the performance evaluation was an abuse of discretion, it clarified that the remand instructions to the agency could not require the agency to reach a particular conclusion. The court did not have the power to require a particular rating, the withdrawal of a rating, or the removal of a rating from the database. Thus, a remand would likely require the agency to reexamine its rating and either build a proper record to support its conclusion or assign a new rating that was supported by the record.

Ultimately, in *Todd Construction II*, the Court of Federal Claims again deferred on the government's motion to dismiss, however. Examining Todd Construction's three page complaint, the court found that the contractor's allegations were too conclusory to "plausibly suggest an entitlement to relief " under the then-recently decided *Twombly* and *Iqbal* cases.[54] Because the contractor's complaint had been filed in 2007, before *Twombly* and *Iqbal* had been decided, the court granted Todd Construction three weeks to file a motion for leave to amend.[55]

Todd Construction III *and* IV: *The Contractor's Claim Fails Under the Federal Pleading Standard*

Todd Construction amended its complaint, and the government again moved to dismiss the amended complaint for lack of subject-matter jurisdiction and for failure to state a claim upon which relief may be granted. On July 30, 2010, in its third opinion in the *Todd Construction* matter (*Todd Construction III*),[56] the Court of Federal Claims dismissed the amended complaint in part on subject-matter jurisdiction grounds and dismissed it entirely for failure to state a claim.

Specifically, as to the motion for lack of subject-matter jurisdiction, the court declined the government's motion to the extent that it relied on the same grounds that had been rejected in the earlier opinions, but granted the motion as to the contractor's claims of procedural deficiencies. Because the contractor had not pleaded facts that supported a link between the alleged procedural deficiencies and any injury to the contractor, the court held that the contractor lacked standing to bring the action .[57]

The Court of Federal Claims dismissed the balance of Todd Construction's allegations for failure to allege facts to suggest that the agency's evaluation of Todd Construction's performance constituted an abuse of discretion.[58] As projected in *Todd Construction II*, the contractor's allegations failed on the *Twombly* pleading standard. The court noted that the amended complaint was ambiguous as to whether and to what extent certain causes of delay were within the contractor's control.[59] Perhaps most notably, the contractor's allegations attempted to assign responsibility on certain of its subcontractors. [60] Todd Construction had pleaded that it was not responsible for the failings of its subcontractors, which allegations the Court of Federal Claims rejected as "legal conclusions, not facts, and . . . inconsistent with the pertinent law."[61] Rather, as the court noted, the government may properly hold a prime contractor responsible for the performance of its subcontractors.[62] Accordingly, the Court of Federal Claims dismissed the amended complaint for failure to state a claim upon which relief may be granted.

On August 29, 2011, the US Court of Appeals for the Federal Circuit affirmed the *Todd Construction* decisions in all material respects (*Todd Construction IV*).[63] Specifically, the Federal Circuit held that (1) the contractor's challenge to the performance evaluation was a "claim" under the Tucker Act and the CDA,[64] (2) the contractor lacked standing to sue over procedural deficiencies that did not cause injury to the contractor,[65] and (3) the contractor's amended complaint failed to state a claim upon which relief can be granted. Thus, the Federal Circuit ended the *Todd Construction* litigation, at some gain to contractors generally but with no remedy to the contractor that had litigated the case.[66]

Shall the Boards of Contract Appeals Follow Suit?

Under the CDA, the Boards of Contract Appeals share jurisdiction over federal bid protests with the Court of Federal Claims. Because the Boards of Contract Appeals had generally held, before *Todd Construction*, that a challenge to a performance evaluation was not a claim under the CDA, attorneys who practice in this area should closely watch the Boards of Contract Appeals to see whether *Todd Construction* will change the landscape. So far, based on the recent opinions of the Armed Services Board of Contract Appeals (ASBCA), it would appear that it has.

After *Todd Construction*, a line of ASBCA cases has clarified that the Boards have jurisdiction over challenges to performance evaluations, as long as the challenge relates to the terms of the contract.

First, in *Sundt Construction, Inc.*,[67] the government issued a marginal rating and the contractor alleged that the government had previously agreed to provide a satisfactory performance rating upon completion of the project.

The ASBCA held that while it lacked jurisdiction to decide appeals from unsatisfactory performance ratings where contract terms are not in issue, it has "jurisdiction to determine the rights and obligations of the parties under disputed terms of a contract, which includes contract modifications and settlement agreements." *Sundt* did not rely on *Todd Construction*, but instead cited an exception that the Board had earlier recognized, under which the Board will exercise jurisdiction to determine whether the terms of a settlement agreement barred a subsequently issued adverse performance evaluation.[68]

Next, in *Versar. Inc.*,[69] a contractor asked the ASBCA to order the government to rescind a "red" rating for the project. The ASBCA concluded that it had jurisdiction to consider the performance rating issue because the performance rating claim involved a contract clause that required "a fair opportunity to be considered" and set forth evaluation criteria. Thus, the claim "relate[d] to" the contract terms and sought the interpretation of contract terms and relief arising under or relating to the contract. The ASBCA therefore denied, in part, the government's motion to dismiss for lack of jurisdiction, finding that it could grant some theoretical relief to the contractor relating to its "red" rating. The ASBCA granted the government's motion to the extent of the contractor's request that the ASBCA "order" the government to change the rating, however, on the basis that the ASBCA does not have jurisdiction to grant specific performance of injunctive relief.[70]

Finally, and most recently, *GSC Construction, Inc.*,[71] an opinion dated August 18, 2014, the ASBCA considered a contractor's motion for summary judgment against the government in a case challenging a final performance evaluation. Although the ASBCA denied the contractor's motion, finding that the contractor could not demonstrate an absence of material fact disputes, the decision is nonetheless notable in that, by August 2014, the ASBCA apparently treats the conclusion that the contractor's challenge constitutes a "claim" as an uncontroversial proposition.

The Aftermath: The Recipe for Success?

Todd Construction and its progeny have provided contractors little guidance for successful performance evaluation challenges. In *Todd*, the Court of Federal Claims never reached the merits of the claims, and subsequent cases have had similar outcomes. Although the Court of Federal Claims has yet to prescribe a road map for successful claims, we can glean some guidance from the *Todd Construction* cases regarding how to at the very least avoid dismissal.

Frame Requested Relief as Broadly as Possible

In *Todd Construction II*, the Court of Federal Claims struck Todd Construction's requests that it (1) declare that a final decision is unlawful and should be set aside and (2) declare that the performance evaluation should be removed from the database. The only request left was "such other relief as the Court shall deem proper." The Court of Federal Claims also clarified that it would not order an agency to withdraw or change a performance evaluation. Contractors should be aware of the types of relief that the Court of Federal Claims has rejected and state other requests as generally as possible.

Facts, Facts, and More Facts

Contractors should provide a detailed account of the facts in complaints. Although the Court of Federal Claims gave Todd Construction the opportunity to amend, it rejected the initial complaint because it was a "mere three pages" and contained conclusory allegations. And, importantly, the court's granting the opportunity to amend may have been only an accommodation to the contractor in light of the *Twombly* and *Iqbal* decisions that had come down since the original complaint had been filed.

Thus, any complaint should comport with federal pleading standards and create a detailed record from Day 1. In *Todd Construction III*, the Court of Federal Claims held that Todd Construction's allegations that the delays

were its subcontractors' fault were legal conclusions, not facts. Contractors should make sure to back up all assertions with facts and to make sure that the applicable law supports the assertions. Similarly, in *Todd Construction III*, Todd Construction stated that it was not responsible for its subcontractors' deficiencies. The Court of Federal Claims found that not only was this a legal conclusion and not a fact, but also that it was not supported by the relevant legal authorities, which hold that contractors are responsible for the actions or inactions of their subcontractors.

Understand the Difference Between Procedural and Substantive Challenges

In *Todd Construction III*, the Court of Federal Claims held that Todd had "confused" procedural irregularities with the question of whether the evaluation was accurate and fair because Todd Construction merely alleged that it suffered the alleged harm because the government did not fairly and accurately follow the procedures. For allegations of unfair and inaccurate performance evaluations, contractors must create a "plausible inference of arbitrariness."[72]

When alleging procedural errors, contractors should state facts that establish a causal connection between the error and the alleged harm. In *Todd Construction III* , the Court of Federal Claims determined that the contractor lacked standing to claim procedural errors because it did not plead that the alleged errors (i.e., the failure to comply with certain procedural regulations) caused the alleged harm (i.e., worse position in future bidding on federal contracts).[73] In many cases, the alleged harm will be the same as that in *Todd Construction*□unequal or worse position when competing for future contracts. However, *Todd Construction* suggests this perceived harm is not remediable unless the contractor alleges that the procedural errors caused a particular error in the ultimate evaluation.[74]

Properly Assert a CDA Claim to the Agency

The pleadings mean little if the court determines that a contractor has failed to comply with the CDA. Since *Todd Construction*, the Court of Federal Claims has dismissed lawsuits on the ground that a contractor's response to performance evaluations was not a cognizable CDA claim. By way of example, on reconsideration in *BLR II*, the Court of Federal Claims held that while it had jurisdiction to review a performance evaluation, the plaintiff had not asserted a CDA claim because its response to the performance evaluation merely contained "contractor comments to a performance evaluation" under the FAR's performance evaluation procedures. [75] Because there was no claim, there was no contracting officer decision or deemed denial because "[i]f a contracting officer cannot be expected to understand comments from a contractor regarding a performance evaluation to be a CDA claim requesting a decision, then the contracting officer certainly is not obligated to issue a decision where no claim has been submitted."[76] Likewise, in *Kemron Environmental Services, Inc. v. United States*, the Court of Federal Claims dismissed another contractor's claim when it determined that communications with the government in response to a negative performance evaluation did not constitute a CDA claim.[77]

Ryan Redux: How Might the Contractor in *The Ryan Company v. Dalton* Have Fared Before the *Todd Construction* Court?

As highlighted toward the beginning of this article, before January 1, 2001, the federal district courts had concurrent jurisdiction with the Court of Federal Claims over federal bid protests. During that window of time, the primary author of this article brought such a challenge to a performance evaluation before the US District Court for the District of Columbia and obtained a victory for the contractor, in *The Ryan Company v. Dalton*.[78]

The *Ryan Company* Case

In the *Ryan Company* case, the low bidder on two contracts for the US Department of the Navy, worth more than $30 million, was informed that it had been rejected as a nonresponsible contractor, based upon negative past performance evaluations found in the Navy's CCASS. The contractor filed a protest with the General

Accounting Office (GAO), which would ordinarily have stayed the award pending the GAO's review. The Navy elected, however, to override the statutory stay on the basis of "urgent and compelling circumstances."[79]

The contractor then filed suit in the US District Court for the District of Columbia to seek a temporary restraining order and preliminary injunction to enjoin the Navy's overriding the statutory stay of the award. The district court initially denied the TRO, but soon thereafter granted the relief requested by the contractor.

The federal district court found that certain of the information contained in the CCASS was plainly erroneous and incomplete.[80] In one case, the contractor demonstrated that a contracting officer's "satisfactory" rating had been incorrectly recorded in the database as "unsatisfactory."[81] Other contracts in which the contractor had received a "satisfactory" rating had not been recorded at all, and the contracting officer charged with making the responsibility determination , when notified of the omissions, had failed to correct them.[82] All told, the contracting officer's determination of nonresponsibility was substantially based on performance evaluations that were six years old or older, while failing to take note of 34 more recent contracts that the contractor had performed successfully.[83]

Further, the district court noted that the Small Business Administration, which had jurisdiction over the contractor until 1994, had during that time period overruled six nonresponsibility findings by the Navy.[84] This fact, the district court surmised, suggested bad motive on the part of the Navy in conducting its "halfhearted investigation."[85]

For these reasons, the US District Court for the District of Columbia found that the Navy's nonresponsibility determination was unsupported by the record and without a reasonable basis, and reversed the contracting officer's determination of nonresponsibility.[86] While noting that injunctive relief is "an extraordinary remedy which should not be granted if the plaintiff is able to obtain satisfactory relief at law,"[87] the court concluded that the only effective remedy was an injunction. In addition to acknowledging the contractor's concern over losing two lucrative contracts, the court concluded that monetary relief "will not prevent the damage to [the contractor's] reputation or erase the brand of 'nonresponsible' from [its] record as a government contractor."[88] Accordingly, the district court granted the contractor's motion for injunctive relief and ordered that the Navy award the contractor both of the contracts at issue.[89] The Navy took an appeal, and the case thereafter settled.

Imagining the **Ryan Company** *Case Before the Court of Federal Claims*

How might the Ryan Company have fared before the present-day Court of Federal Claims were it to have challenged the erroneous performance evaluations contained in the CCASS database? As noted above, while the *Todd Construction* opinions do not provide a complete road map, they do offer certain signposts that allow a reimagining.

First, it should be noted that any right of the Ryan Company to seek judicial review would depend upon its having properly asserted a CDA claim before the agency. As set forth in *BLR II*, and consistent with *Todd Construction*, it is not the performance evaluation itself that constitutes a claim, but the agency's refusal to correct the performance evaluation upon the request of the contractor. The facts of the *Ryan Company* case indicate that as to at least some of the problems with the performance evaluation, the Ryan Company had requested that a later contracting officer make corrections to the CCASS database, but it is not known whether the Ryan Company had made an earlier request to the agency that performed the initial evaluation. If it had not, then the Court of Federal Claims would likely dismiss for lack of subject matter jurisdiction.

Should the Ryan Company have properly asserted a CDA claim, it would likely have a more viable case on the merits than the contractor in *Todd Construction*. The contractor in *Todd Construction* eventually lost for failure to state a claim under the federal pleading standards, where it was unable adequately to allege facts that would entitle it to relief. The Ryan Company was not similarly situated. In its case, the performance evaluations

were alleged and ultimately established to be erroneous, incomplete, and inaccurate. The Ryan Company could, unlike the contractor in *Todd Construction*, plausibly allege that the performance evaluations were substantively defective and did not reflect the Ryan Company's performance on the subject contracts.

Of course, the Ryan Company would be less well-positioned on the ultimate relief that could be accorded by the Court of Federal Claims in 2014 than what was actually accorded by the US District Court in 1997. Acting under its authority pursuant to the Administrative Procedure Act, the district court granted the Ryan Company injunctive relief and ordered that its contract be awarded. Had the Ryan Company sought a correction of the performance evaluations before the district court, it is likely that the district court would similarly grant such relief pursuant to its jurisdiction under the Administrative Procedure Act. As *Todd Construction* demonstrates, this is not within the general power of the Court of Federal Claims. At best, *Todd Construction* indicates that the Court of Federal Claims would have remanded the case with a declaration itemizing the agency's errors in the performance evaluation. At that point, the ball would be back in the agency's court. Given the ill motives of the Navy hinted at in the *Ryan Company* opinion, it is not a forgone conclusion that the agency would immediately correct the performance evaluation. The agency might instead choose to build a record to support the negative performance evaluations already in place.

Conclusion and Open Questions

Although *Todd Construction* represents a major development in contractors' rights to challenge performance evaluations, it leaves open various questions. And, following *Todd Construction*, the Court of Federal Claims and Boards of Contract Appeals have yet to find that an erroneous performance evaluation was an abuse of discretion.

Because the Court of Federal Claims determined that Todd Construction had not complied with basic pleading requirements, it did not articulate the scope of potential relief for contractors. Although the Boards of Contract Appeals seem more open to asserting jurisdiction over these claims, the Boards have also been vague in terms of the type of relief they are willing to afford. Thus, while the door remains open, it is unclear how much relief contractors can receive by seeking judicial review of performance evaluations, or how they can get to the desired outcome.

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Endnotes

1. FAR 42.1502(e).
2. FAR 42.1503(f), (g).
3. FAR 15.305(a)(2), 42.1503(g).
4. 85 Fed. Cl. 34 (2008) (*Todd Construction I*), *aff'd,* 656 F.3d 1306 (Fed. Cir. 2011) (*Todd Construction IV*).
5. U.S. CONST. art. III, § 2 ("The judicial power shall extend to all cases, in law and equity.") (emphasis added).
6. The status of the Court of Federal Claims (and its predecessors, the US Court of Claims and the US Claims Court) as an Article I or Article III court has changed over time. *Compare* Williams v. United States, 289 U.S. 553 (1933) (recognizing the Court of Claims as a legislative court rather than an Article III court), with Pub. L. No. 83-158, 67 Stat 226 (1953) (amending 28 U.S.C. § 171 and declaring the US Court of Claims "to be a court established under article III of the Constitution of the United States"). In 1982, however, Congress reestablished the US Claims Court as an Article I court. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. In 1992, Congress

changed the name of the Claims Court to the Court of Federal Claims. *See* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506.

7. *See* Richardson v. Morris, 409 U.S. 464, 465 (1973) ("[T]he Court of Claims has no power to grant equitable relief . . .").
8. *See* Bowen v. Massachusetts, 487 U.S. 879. 905 n.40 (1988) (acknowledging the congressional grant of "certain equitable powers in specific kinds of litigation" to the US Claims Court pursuant to 28 U.S.C. § 1491(a)(2)-(3)).
9. 28 U.S.C. § 1491(a)(1).
10. 28 U.S.C. § 1491(a)(2).
11. 41 U.S.C. § 7104.
12. FAR 52.233-1(c). The FAR also specifies that a claim for over $100,000 must be certified. *Id*.
13. 424 F.2d 859 (D.C. Cir. 1970).
14. Administrative Dispute Resolution Act of 1996. Pub. L. No. 104-320, 110 Stat. 3870.
15. *Id*. § 12(a) (codified as amended at 28 U.S.C. § 1491(b)(l)).
16. *Id*. § 12(d).
17. *See* Ulstein Mar., Ltd. v. United States, 833 F.2d 1052, 1058 (1st Cir. 1987).
18. 5 U.S.C. § 706(2)(A).
19. ASBCA No. 40910, 91-3 B.C.A. ¶ 24, 170.
20. *See* TLT Constr. Corp., A.S.B.C.A. No. 53769, 02-2 B.C.A. ¶ 31,969 (citing cases). For a more complete discussion of the line of Board cases following *Konoike*, see Dorothy E. Terrell & Kathryn T. Muldoon, *The Rise of the Performance Evaluation: New Developments in Contractor Challenges to Adverse Evaluations Under the Contract Disputes Act*, 45 PROCUREMENT LAW., no. 2, 2010, at 3, 3-4.
21. *See Konoike*, 91-3 B.C.A. ¶ 24,170 (citing Coast Canvas Prods. II Co. Inc., A.S.B.C.A. No. 31699, 87-1 B.C.A. ¶ 19,678).
22. 62 Fed. Cl. 508, 518-20 (2004).
23. 28 U.S.C. § 1491(a)(2).
24. *Record Steel*, 62 Fed. Cl. at 520.
25. See Todd Construction I, 85 Fed. Cl. 34, 48 (2008) (distinguishing *Record Steel* on this point).
26. 84 Fed. Cl. 634 (2008) (BLR I), *rev'd on reconsideration*, 94 Fed. Cl. 354 (2010) (BLR II).
27. *Id*. at 647-48.
28. *Id*. at 647.
29. *Id.*
30. *Id.* at 647-48.
31. *Id.* at 645-46. The Court of Federal Claims also declined to follow later board-level cases applying *Konoike* in more factually analogous cases as "unwarranted extensions" of *Konoike. Id*. at 646.
32. *BLR II*, 94 Fed. Cl. 354, 373-74 (2010).
33. *Todd Construction I*, 85 Fed. Cl. 34, 42-43 (2008).
34. *Id*. at 43.
35. *Id*. (citing Alliant Techsystems, Inc. v. United States, 178 F.3d 1260, 1265 (Fed. Cir. 1999)).
36. *Id*. at 45.
37. *Id.* at 44-45.
38. *Id*. at 47-48.
39. *Id.* at 47.
40. *Id.* at 47-48 (quoting 28 U.S.C. § 1491(a)(2)).
41. Todd Constr., L.P. v. United States, 88 Fed. Cl. 235 (2009) (*Todd Construction II*), *aff'd,* 656 F.3d 1306 (Fed. Cir. 2011).
42. In fact, the parties agreed that the Court of Federal Claims lacked such authority as a general matter. *Id*. at 243.
43. *Id.* at 243-44 (citing and quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868)).

44. *Id.* at 244-46.
45. *Id*. at 244.
46. *Id.* at 245.
47. *Id.*
48. *Id.* at 245-46.
49. *See* 41 U.S.C. § 104(b)(4).
50. *Todd Construction II*, 88 Fed . Cl. at 246-47.
51. *Id.* at 246.
52. *Id.* at 248.
53. *Id.* at 247.
54. *Id.* at 248-49 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009)).
55. For an enlightening student note concerning pleading standards before the Court of Federal Claims following the *Todd Construction* cases, *see* Adam Angelo Bartolanzo, Note, *Pleading Requirements for Claims by Contractors Against the Government: Applying* Twombly *and* Iqbal *After the Federal Circuit's Decision in* Todd Construction , L.P., 42 Pub. CONT. L.J. 203 (2012).
56. Todd Constr., LP. v. United States, 94 Fed. Cl. 100 (2010) (*Todd Construction III*), *aff'd*, 656 F.3d 1306 (Fed. Cir. 2011).
57. *Id.* at 112-14.
58. *Id.* at 115-16.
59. *Id.*
60. *Id.*
61. *Id.* at 115 (citing Johnson Mgmt. Grp. CFC, Inc. v. Martinez, 308 F.3d 1245 (Fed. Cir. 2002); Olson Plumbing & Heating v. United States, 602 F.2d 950 (Ct. Cl. 1979)).
62. *Id.*
63. *Todd Construction IV*, 656 F.3d 1306 (Fed. Cir. 2011).
64. *Id.* at 1310-15.
65. *Id.* at 1315-16.
66. *Id.* at 1316-17. Although the opinion of the Federal Circuit did not address "whether an injunction was available pursuant to the Claims Court's power to remand," *see id.* at 1311 n.3, the Court of Federal Claims later confirmed the *Todd Construction* district court's finding that an injunction was not available. In the unreported Davis Group, Inc. v. United States, No. 12-275-C, 2012 WL 2686053 (Fed. Cl. July 6, 2012), a contractor appealed a contracting officer's denials of additional costs and issuance of an unsatisfactory performance rating, and moved to enjoin the continuation of the rating during the lawsuit. Citing *Todd Construction II*, the *Davis* court held that injunctive relief was not available pursuant to the court's remand power, and a remand would be ineffective anyway because the contracting officer had no authority to act on CDA matters during the lawsuit. In a technical sense, *Davis* leaves open the question of whether the Court of Federal Claims can ever issue an injunction if there was no other claim pending in the court, but based on the reasoning in *Todd Construction* and its progeny, this result seems unlikely.
67. A.S.B.C.A. No. 56293, 09-1 B.C.A. 34,084.
68. *See id*. (citing Coast Canvas Prods. II Co., A.S.B.C.A. No. 31699, 87-1 B.C.A.¶ 19,678).
69. A.S.B.C.A. No. 56857, 10-1 B.C.A. ¶ 34,437.
70. *See also* Colonna's Shipyard, Inc., A.S.B.C.A. No. 56940, 10-2 B.C.A. 34,494 (holding that the Board had jurisdiction under *Sundt* and *Versar* but striking requests for revision of the performance evaluation based on prohibition on injunctive relief).
71. A.S.B.C.A. No. 58747, 14-1 B.C.A. ¶ 35,714.
72. *Todd Construction III*, 94 Fed. Cl. 100, 115 (2010).

73. *Id.* at 113 ("Violations of procedural regulations must be remediable to be pursued . . . and plaintiff's complaint does not contend that the procedural improprieties themselves injured plaintiff-only that a flawed process ultimately resulted in a substantive evaluation with which plaintiff disagrees.").
74. *Id.*
75. *BLR II,* 94 Fed. Cl. 354, 374 (2010) ("[I]f a contracting officer receives a document in a context wholly separate and distinct from the CDA claim process, the court cannot expect the contracting officer to treat that document as a CDA claim."); *see also* Metag Insaat Ticaret A.S., A.S.B.C.A. No. 58616, B.C.A. ¶ 35,454 (2013) (acknowledging the possibility of jurisdiction but denying the government 's motion to dismiss for lack of jurisdiction on grounds that appeal was premature, but declining to reach the question of whether the claim "s[ought] the interpretation of contract terms and relief arising under or relating to the contract").
76. *BLR II*, 94 Fed. Cl. at 374.
77. 93 Fed. Cl. 74 (2010).
78. Civ. No. 96-2803 (D.D.C. Mar. 18, 1997). The opinion discussed is unreported and, to the authors' knowledge, is not available in any commercial electronic database. A copy is on file with the authors.
79. *See id.*, slip op. at 4 (citing 31 U.S.C. § 3553(c)(2)(A)).
80. *Id.,* slip op. at 9.
81. *Id.,* slip op. at 9-10.
82. *Id.,* slip op. at 10. Id., slip op. at 12. Id., slip op. at 12-14.
83. *Id.,* slip op. at 14.
84. *Id.,* slip op. at 20.
85. *Id.,* slip op. at 23 (citing Mark Dunning Indus., Inc. v. Perry, 890 F. Supp. 1504, 1517 (M.D. Ala. 1995)).
86. *Id.*
87. *Id.,* slip op. at 24.