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NEWSLETTER

Board of Contract Appeals Holds That Software Licensor Who Delivered Software Through GSA Reseller Cannot Pursue Claim Directly Against the Government

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In a decision of first impression that could have significant implications for the many commercial software vendors who license software to the U.S. Government through U.S. General Services Administration (GSA) Schedule resellers, the Civilian Board of Contract Appeals (the Board) held that it did not have jurisdiction to consider a software vendor's claim that the Government had breached the vendor's commercial end user license agreement (EULA). Although the Board suggested that the EULA was in fact "binding on the Government," the Board nevertheless held that the EULA was not a "procurement contract" over which the Contract Disputes Act (CDA) grants the Board jurisdiction. *Avue Technologies Corp. v. Department of Health & Human Services*, CBCA 6360, 6627 (Jan. 14, 2022). As a result, the Board held that the software vendor could not directly pursue its claim against the Government for breach of the EULA.

Background

The claim in *Avue* arose from the U.S. Food and Drug Administration's (FDA's) acquisition of subscriptions to Avue software licenses through a GSA Schedule contract. Like many commercial software developers, Avue did not market its software subscriptions directly to the U.S. Government; instead, Avue chose to do business through a GSA Schedule reseller, which negotiated a modification with GSA authorizing the Reseller to sell subscriptions to the Avue software through the Reseller's existing GSA Schedule. As part of this

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modification, Avue's "GSA approved EULA" as well as a "GSA approved rider" were incorporated into the Schedule.

FDA placed an order with the GSA Schedule reseller to acquire a subscription to the Avue software. The order included a base year plus four one-year options, but FDA chose not to exercise any options after the base year. For reasons not discussed in the Board's decision, Avue filed claims against FDA as well as GSA alleging misappropriation of Avue's proprietary data, in violation of the EULA. Avue's claims, which sought approximately $41.5 million in damages, were denied and Avue appealed to the CBCA.

The Board's Decision

In a prior decision, the Board denied the Government's motion to dismiss on the grounds that Avue was only a "subcontractor" (which under well-settled law would have required dismissal since the Board lacks jurisdiction over subcontractor claims). In fact, the Board assumed (without deciding) that the EULA was binding on the Government, based in part on language in the modification incorporating the EULA into the GSA Schedule. The Board noted that "GSA's designation of the [Avue license agreement] as an 'approved EULA' makes sense only if GSA intended the [license agreement] to apply to 'end users' (subscribing agencies) such as FDA." The Board also noted that the EULA "appears to contain commercially significant promises that might be deemed contractual," and may have contained "elements that make it a contract."

Even though it suggested that the EULA created a contract between Avue and the Government, the Board nevertheless observed that "not all contracts fall within the ambit of the CDA." In particular, the Board found that it lacked jurisdiction over Avue's claims because the EULA was not a "procurement contract" subject to the Board's jurisdiction under the CDA. In reaching its decision, the Board narrowly construed the scope of a CDA "procurement contract," and found that "the [EULA] standing alone lacks core aspects of a CDA procurement contract." In particular, the Board stated that the "most significant[]" aspect of the arrangement between Avue and the Government that supported its holding was that the FDA acquired the Avue software through an order under Carahsoft's FSS contract, and "not directly from Avue under the [EULA]." Accordingly, Avue's EULA only "define[d] what an agency can procure from [the reseller]," but did not itself constitute a procurement contract. The Board reasoned that while the terms of EULA may be an "integral feature" of the reseller's Schedule offering of the Avue software, the "'acquisition by purchase' . . . occur[ed] when [the FDA] order[ed] [the] subscription from . . . the schedule holder." Therefore, the Board concluded that FDA did not "make [an] acquisition[] from Avue."

The Board further reasoned that the terms of the EULA do not obligate Avue to provide any services to the Government unless and until it is incorporated into another federal contract. Further, under GSA Schedule contracts, the Government is only obligated to pay the Schedule contractor, and not upstream suppliers, for services ordered. Finally, the Board noted that "[n]o court or board of which we are aware has held that a party other than the prime contractor can establish CDA jurisdiction by relying on a separate agreement that relates to a CDA procurement contract. We will not be the first." The Board thus held that "a claim by Avue in its own capacity for breach of the EULA is not, regardless of its viability, a claim by a contractor under a CDA

procurement contract that our Board may resolve."

Implications for Contractors

The Board's decision in *Avue* should serve as a cautionary tale for companies that license software to the U.S. Government through GSA Schedule resellers—a common business model employed by many commercial software developers. Although it is only one decision by one panel of the Civilian Board, and while it could be appealed and ultimately overruled by the Federal Circuit, this is the first reported decision to affirmatively hold that a software vendor that delivers software to the U.S. Government through a reseller cannot pursue a claim under the CDA for breach of a EULA directly against the Government.

However, even if the panel's decision in *Avue* stands, this does not mean that software vendors who go to market through resellers have no legal recourse in the event the Government breaches a EULA. As the panel in *Avue* noted, the Board has considered CDA claims by "third party software vendors" for breach of a license agreement, where those claims were submitted on a "pass through" basis by the prime contractor, with whom the Government would have privity of contract under the GSA schedule contract and any order(s). Therefore, instead of pursuing its claims directly against the Government, a software vendor may be able to enforce its rights under a EULA by pursuing a "sponsored claim" through the prime contractor (*i.e.,* the GSA Schedule reseller). Software vendors should consider whether they have sufficient terms in their reseller agreements to permit or require such sponsored claims.

The Board in *Avue* also noted that "an aggrieved software licensor may sue the Government for copyright infringement . . . in the United States Court of Federal Claims." Indeed, pursuing a claim for copyright infringement in the U.S. Court of Federal Claims (COFC) could offer advantages over an appeal under the CDA, to the extent that a claim for infringement does not require the contractor to first pursue a CDA claim with the Contracting Officer and wait for a denial before pursuing an appeal to protect its rights. In addition, a software vendor could invoke the Tucker Act as an independent basis for the COFC to hear a breach claim under a contract that is not a CDA "procurement contract."

Companies that license software to the U.S. Government through GSA Schedule resellers (or similar "indirect" sales channels) should carefully consider the Board's decision in *Avue* when deciding how to structure their reseller agreements and enforce their rights under the applicable EULA.