

COURTS MUST REVIEW VALIDITY OF UNDERLYING DEBT BEFORE OFFSETTING UNDER DEBT COLLECTION ACT

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The Federal Debt Collection Act of 1982 (“DCA”), provides a way for agencies to offset a pre-existing, valid debt. Pursuant to the DCA the U.S. Government is authorized to “withhold[] funds payable by the United States...to satisfy a claim.” 31 U.S.C. § 3701(a)(1). “A claim includes, without limitation...over-payments.” *Id.* §3701(b)(1)(C). Under the DCA, a recoverable claim must first be owed to the U.S. This is important because an amount properly owed on one contract can be used to offset payments owed on a different contract. A recent decision, though procedurally complex, turned on the proper application of the DCA. *Agility Public. Warehsg. Co. KSCP v. United States*, No. 2019-1886, 1887 (Fed. Cir. Aug. 12, 2020). The Federal Circuit held that before permitting the offset, the agency must determine the validity of the alleged debt—that is, in this case, whether the government had actually overpaid the contractor and therefore had a valid recoverable claim. The Federal Circuit also insisted that the lower court follow the DCA procedures that were required before agreeing to the offset.

The Coalition Provisional Authority or “CPA” (created after the U.S. invasion of Iraq) was created to provide support for reconstruction in Iraq. Agility was awarded a CPA contract for logistics support, and the contract was from Iraqi funds and U.S. and its coalition partner funds. Following an audit, the US Army issued final decisions regarding certain task orders under which the Army had paid Agility with U.S. funds, following by demand letters for \$80.8 million in alleged overpayments. The Army notified Agility it was withholding \$17 million from a different and *separate* contract with Agility, under the DCA.

After the procedural actions which resulted in a case at the Court of Federal Claims (“COFC”), the COFC determined that the U.S. was owed the alleged overpayment and the DCA authorized the U.S. to offset that payment. This appeal followed.

Leaving aside some of the issues involving the CPA, the Court held that the money at issue were U.S. funds and subject to the DCA.

The Court made the point that “to trigger the DCA offset provision, a pre-existing, valid debt must first be owed to the United States.” Further, this can’t be interpreted to mean that the determination of a pre-existing debt is shielded from judicial review—any court review must include the underlying inquiry of whether the U.S. is even owed a pre-existing debt. In reviewing the case, however, the COFC denied judicial review of the substantive validity of the U.S. overpayment determination—and this was legal error. The Court also noted that the U.S. government had not complied with the legal protections in the DCA (written notice, opportunity to inspect related records, opportunity for a review within the agency of the decision related to the claim and an opportunity to make a written agreement to repay the amount of the claim). The Army failed to provide all of these safeguards to Agility. For these two reasons, the Court remanded the case back to the COFC for further proceedings.

Takeaway: If the government seeks to offset payments owed to a contractor on one contract by withholding money on another contract, it must first verify the validity of the debt, and also must fully comply with the procedural safeguards in the Debt Collection Act. Failure to do so will result in a remand to the court below to comply with the DCA.

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