

By  
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The Federal Circuit's recent decision in *Furash & Co. v. United States*<sup>1</sup> serves as a reminder that not all government entities can be sued, even when they breach their contracts. The contractor in *Furash* was awarded a consulting services contract by the Federal Housing Finance Board, an independent executive agency established by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.<sup>2</sup> The Finance Board subsequently terminated the contract for default, and demanded that *Furash* return most of the progress payments it had been paid. *Furash* brought suit in the U.S. Court of Federal Claims (COFC), seeking to convert the default termination to a termination for convenience, to retain the progress payments, and to be paid for additional work allegedly performed at the Finance Board's direction. In a decision affirmed on appeal, the COFC dismissed *Furash's* complaint, holding that because Congress intended the Finance Board to operate on a self-funding basis (through fees assessed on federal home loan banks), the non-appropriated funds doctrine precluded the court from exercising its jurisdiction.<sup>3</sup>

Three familiar principles underlie the non-appropriated funds doctrine. First, as a sovereign, the United States can only be sued with its consent,<sup>4</sup> and such consent can only be granted by statute and not by contract or regulation.<sup>5</sup> Second, when the United States consents to be sued, any conditions or limitations on that consent must be strictly observed.<sup>6</sup> Third, only Congress can authorize the expenditure of public funds.<sup>7</sup>

The Tucker Act is a waiver of sovereign immunity for certain types of claims against the United States.<sup>8</sup> Under

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the Act, the COFC is granted

jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive agency, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.<sup>9</sup>

Although the Tucker Act thus establishes the COFC as a judicial forum, it does not create any substantive right to recover monetary damages against the United States.<sup>10</sup> Instead, that right must be found in the Constitution, a statute or regulation, or an express or implied provision of a contract. For certain types of constitutional claims, such as a "takings" claim under the Fifth Amendment, the Constitution provides the substantive right, because it mandates payment of "just compensation."<sup>11</sup> Otherwise, a claimant bringing a claim founded upon the Constitution, a statute, or a regulation "must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'"<sup>12</sup> Contract claims, on the other hand, generally do not require a separate substantive right to recover monetary damages, because a Federal agency's authority to enter into contracts includes the authority to pay damages for breaching those contracts.<sup>13</sup>

However, the "payment of judgments" statute, 28 U.S.C. § 2517, requires that any final judgment rendered by the COFC on a claim against the United States must be paid out of funds appropriated for that purpose.<sup>14</sup> At the same time, the Automatic Payment of Judgments Act, more commonly known as the "judgment fund," 28 U.S.C. § 1304, would seem to solve any problems 28 U.S.C. § 2517 might present for entities or activities that lack appropriated funds. It provides that "[n]ecessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified

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in the judgments," when "the judgment, award, or settlement is payable" under any of several enumerated statutes, including 28 U.S.C. § 2517.<sup>15</sup> Nevertheless, the former Court of Claims<sup>16</sup> and, more recently, the COFC and the U.S. Court of Appeals for the Federal Circuit have construed 28 U.S.C. § 2517 as a limitation on the COFC's Tucker Act jurisdiction.<sup>17</sup>

For example, in *Kyer v. United States*, the Court of Claims dismissed a contractor's claim for payment of a brokerage commission for services allegedly rendered under a contract with the Department of Agriculture's Grape Crush Administrative Committee.<sup>18</sup> Although the Secretary of Agriculture had discretion to obligate appropriated funds as necessary, the Committee's enabling statute provided that the Committee's financial support would be derived entirely from fees assessed against handlers and producers of agricultural commodities.<sup>19</sup> Thus, the court in that case held that it lacked jurisdiction, because "to remain within the framework of our jurisdiction, it is essential that the contract sued on be one which could have been satisfied out of appropriated funds."<sup>20</sup> The court similarly dismissed a construction contractor's claim against the District of Columbia Armory Board. That board had been authorized by Congress to contract for construction of a stadium and to issue bonds to finance the construction.<sup>21</sup> Reasoning that it was evident from the financing scheme the contract could not "be satisfied out of appropriated funds and that Congress has indicated that public funds shall not be involved," the court held the contractor's claim was not actionable.<sup>22</sup>

The non-appropriated funds doctrine is unquestionably harsh. Because non-appropriated fund activities are instrumentalities of the United States, contract suits against them are barred in the absence of an express waiver of sovereign immunity.<sup>23</sup> The non-appropriated funds doctrine also precludes contractors from seeking a remedy against the United States because it limits the Tucker Act's waiver of sovereign immunity to claims upon contracts that obligate appropriated funds. Consequently, contractors with contract claims against a non-appropriated fund activity have no redress<sup>24</sup> – and non-appropriated fund activities can breach their contracts with impunity. Congress amended the Tucker Act in 1970, to address, and at least partially ameliorate, the "injustice and inequity worked by this Tucker Act 'loophole.'"<sup>25</sup> However, Congress decided against removing sovereign immunity for all non-appropriated fund activities based largely on its concern about exposing the Federal

government to their liabilities.<sup>26</sup> Accordingly, the 1970 amendment was limited to express or implied contracts of the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, and Exchange Councils of the National Aeronautics and Space Administration, whose contracts are, for purposes of the Tucker Act, "considered an express or implied contract with the United States."<sup>27</sup> Although the amendment did not change 28 U.S.C. § 2517, it revised the "judgment fund" to require the enumerated non-appropriated fund instrumentalities (NAFIs) to reimburse the United States for any judgments paid on their behalf.<sup>28</sup>

The Federal Circuit has fairly broadly construed the 1970 amendment, reasoning that Congress intended to waive sovereign immunity for all "post exchange types of operations," meaning "military [and NASA] organizations funded by resale activities which rendered them solvent and therefore able to support an adverse judgment without risk to the general treasury."<sup>29</sup> Hence, the Federal Circuit held that McDonald's Corporation could sue the Navy Resale and Services Support Office, even though that office was not one of the five NAFIs enumerated in the statute; but "a NAFI which lacks sufficient assets, is not clearly defined as being within the resale system, or over which the Government could not obtain financial data, would not be included in the statutory waiver."<sup>30</sup>

Moreover, cases since enactment of the 1970 amendment have narrowed the applicability of the non-appropriated funds doctrine, even for NAFIs not enumerated in the 1970 amendment. In *L'Enfant Plaza Properties, Inc. v. United States*, the Court of Claims held that the fact that an agency or activity was financially self-sufficient was not enough to invoke the doctrine.<sup>31</sup> Rather, "[t]here must be a clear expression by Congress that the agency was to be separated from general federal revenues," and that "the activity resulting in the claim was not to receive or be funded from appropriated funds."<sup>32</sup> In *McCarthy v. United States*, the Court of Claims took this one step further, stating that the doctrine was "limited to instances when, by law, appropriated funds not only are not used to fund the agency, but could not be."<sup>33</sup> Hence, a contractor's claim under a foreign military sales contract was not barred because the underlying statute did not prohibit the use of appropriated funds.<sup>34</sup> Likewise, a contract claim against the Federal Grain Inspection Service was not barred, even though its operations were largely financed by fees collected from grain sellers, because the enabling statute contemplated that the agency could receive appropriated funds for certain other functions.<sup>35</sup> In yet

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another case, the court let stand a contract claim against the Department of the Treasury for architect-engineering services provided in connection with a Technical Cooperation Agreement with the Kingdom of Saudi Arabia.<sup>36</sup> Although the contract was financed entirely by a trust fund established by Saudi Arabia, the court held that it was “irrelevant in this case that the Treasury Department did not use appropriated funds.”<sup>37</sup> Because the Foreign Finance Act did not prohibit, and in fact permitted, use of appropriated funds, the court concluded the non-appropriated funds doctrine did not apply.<sup>38</sup>

Applying this same rationale, the COFC has held that a Morale, Welfare and Recreation Vehicle Registration Fund (VRF) was subject to suit, even though “the VRF is, in fact, a NAFI,” and not a NAFI enumerated in the 1970 amendment, or even a military exchange operation.<sup>39</sup> However, because Army regulations authorized “very limited direct [appropriated funds] support” of the VRF, the COFC concluded that the non-appropriated funds doctrine did not bar its jurisdiction.<sup>40</sup> Consistently, the Federal Circuit held that the doctrine did not bar a suit seeking damages for breach of an insurance contract under the Army’s Nonappropriated Fund Risk Management Program because the Army had statutory authority to use appropriated funds for child care and child-related services, which the insurance covered.<sup>41</sup>

However, the U.S. Court of Appeals for the Fourth Circuit and the Federal Circuit in *Furash* have rejected the argument that the non-appropriated funds doctrine applies only when the underlying statute expressly prohibits the use of appropriated funds. In *Research Triangle Institute v. Board of Governors of the Federal Reserve System*, the Fourth Circuit held that the Board of Governors of the United States Federal Reserve System was immune from suit, even though “the Board’s governing statutes do not explicitly preclude Congress from funding the Board in an emergency.”<sup>42</sup> It was sufficient, the Fourth Circuit held, that the statute “states that the money used to fund the Board (assessments from Federal Reserve banks) ‘shall not be construed to be Government funds or appropriated moneys.’”<sup>43</sup>

Similarly, the Federal Circuit in *Furash* noted that the Finance Board’s statute did “not expressly prohibit Congressional appropriation of funds to the Finance Board,” but held that “[t]he absence of such an express statement ... does not end the inquiry.”<sup>44</sup> Rather, “what matters is whether the agency’s authorizing legislation makes clear that Congress intends for the agency – or the particular activity that gave rise to the dispute in question – to be separated from general federal revenues.”<sup>45</sup> The

Federal Circuit found such an intent in the Finance Board’s Congressionally-designed funding scheme, which the court viewed as “a clear expression by Congress that the Finance Board’s operations are to be funded through assessments against federal home loan banks, not from general fund revenues, and that the Court of Federal Claims therefore lacks Tucker Act jurisdiction over this case.”<sup>46</sup>

The Supreme Court has not directly considered the validity of the non-appropriated funds doctrine,<sup>47</sup> which the Federal Circuit acknowledges was “created” by the Court of Claims.<sup>48</sup> Moreover, the Federal Circuit does not appear to have expressly considered the inconsistency between the doctrine’s statutory underpinning and the fact that contract judgments under the Tucker Act are paid from the appropriations made by Congress specifically for that purpose. Accordingly, a future case may present an opportunity to overrule or further narrow the reach of the non-appropriated funds doctrine. Until then, contractors should beware that not all government entities are necessarily subject to suit for breaching their contractual obligations.

#### Endnotes

- 1 *Furash & Co. v. United States*, No. 00-5084, 2001 U.S. App. LEXIS 12835 (Fed. Cir. Jun. 13, 2001).
- 2 Pub. L. No. 101-73, § 702, 103 Stat. 183, 413-15 (1989), *codified at* 12 U.S.C. § 1421 *et seq.* (1994).
- 3 *Furash & Co. v. United States*, 46 Fed. Cl. 518, 521-25 (2000), *aff’d*, 2001 U.S. App. LEXIS 12835 (Fed. Cir. Jun. 13, 2001). The COFC’s decision fails to explain why the non-appropriated funds doctrine should preclude its jurisdiction over the contractor’s *non-monetary* claims (*i.e.*, the propriety of the default termination and whether *Furash* could retain the progress payments). However, the court rejected the contractor’s argument that “the Contract Disputes Act directs us to a different outcome,” reasoning that the five non-appropriated fund instrumentalities listed in 28 U.S.C. § 1491(a) were the only ones “over whose contract disputes this court may exercise jurisdiction,” and, “[s]ince the Finance Board is clearly not among the non-appropriated fund activities enumerated in Section 1491, its contracts do not come within our jurisdiction.” 46 Fed. Cl. at 525.
- 4 *See, e.g., Hercules Inc. v. United States*, 516 U.S. 417, 422 (1996).
- 5 *United States v. Mitchell*, 463 U.S. 206, 215-26 (1983) (“[N]o contracting officer or other official is empowered to consent to suit against the United States. The same is true for claims founded upon executive regulations.”) (footnote omitted).
- 6 *See, e.g., Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 287 (1983).
- 7 U.S. Const., Art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law....”). *See also Office of Personnel Management v. Richmond*, 496 U.S. 414, 424 (1990) (“Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by statute.”); *Bausch & Lomb Optical Co. v. United States*, 78 Ct. Cl. 584, 607 (“Agents and officers

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of the Government have no authority to give away the money or property of the United States, either directly or under the guise of a contract that obligates the Government to pay a claim not otherwise enforceable against it.”), *cert. denied*, 292 U.S. 645 (1934).

8 *Mitchell*, 463 U.S. at 212.

9 28 U.S.C. § 1491(a).

10 *United States v. Testan*, 424 U.S. 392, 398 (1976).

11 U.S. Const., Fifth Am.

12 *Mitchell*, 463 U.S. at 216-17 (quoting from *United States v. Testan*, 424 U.S. at 400, and *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)).

13 *Town of North Bonneville v. United States*, 5 Cl. Ct. 312, 319 (1984) (“Where Congress has given specific authority to Federal officials to negotiate and enter contracts on behalf of the United States ... a court is not required to make further inquiry to determine whether the source of substantive law separately mandates compensation.”); see also *Cannon Constr. Co. v. United States*, 319 F.2d 173, 178 (Ct. Cl. 1963) (authority to enter into contracts includes authority to settle contract claims).

14 28 U.S.C. § 2517(a).

15 31 U.S.C. § 1304(a)(3)(A).

16 The Court of Claims was first established in 1855 to hear claims and refer meritorious cases to Congress for relief by private bill. Act of Feb. 24, 1855, 10 Stat. 612. In 1863, the court was authorized to render final judgments. Act of Mar. 3, 1863, 12 Stat. 765. The Tucker Act, introduced in 1866 by Rep. John Randolph Tucker, significantly revised the court’s jurisdiction and procedures, replacing most of the 1855 and 1863 Acts. Act of Mar. 3, 1887, 24 Stat. 505. The Federal Courts Improvement Act of 1982 merged the Court of Claims and Court of Customs and Patent Appeals into the newly created United States Court of Appeals for the Federal Circuit. 28 U.S.C. § 41. The Act also established a new Article I trial court known as the United States Claims Court, which assumed responsibility for the Court of Claims’ trial jurisdiction. 28 U.S.C. § 171. The court’s name was changed to the United States Court of Federal Claims as part of the Federal Court Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992).

17 Although the statutory underpinning is different, the non-appropriated funds doctrine has also been held to apply to the Contract Disputes Act jurisdiction of agency boards of contract appeals. See, e.g., *Federal Electric Corp.*, ASBCA No. 24002, 82-2 B.C.A. (CCH) ¶ 15,862 (“In interpreting the jurisdictional grant to the boards of contract appeals in the Disputes Act we are in basic agreement with respondent that section 13(c) of the Act [41 U.S.C. § 612(c)] has the same effect on the Board’s jurisdiction as 28 U.S.C. § 2517(a) has on the jurisdiction of the Court of Claims since both the judgments of the court and awards by the boards are to be paid out of the permanent indefinite appropriation established by [31 U.S.C. § 1304].”) *But c.f.*, *United States v. General Electric Corp.*, 727 F.2d 1567, 1570 (Fed. Cir. 1984) (“Nothing in the Contract Disputes Act of 1978 limits its application to appropriated funds.”)

18 *Kyer v. United States*, 369 F.2d 714 (Ct. Cl. 1966), *cert. denied*, 387 U.S. 929 (1967).

19 369 F.2d at 718 (citing 7 U.S.C. § 608c(6)(D)).

20 369 F.2d at 718.

21 *McCloskey v. United States*, 698, 530 F.2d 374, 375 (Ct. Cl. 1976).

22 530 F.2d at 377.

23 See *Lane v. Peña*, 518 U.S. 187 (1996); see also *Borden v. United States*, 116 F. Supp. 873, 877 (Cl. Ct. 1953) (citing *Standard Oil Co. of Calif. v. Johnson*, 316 U.S. 481, 484 (1942)).

24 See *United States v. Hopkins*, 427 U.S. 123, 125 (1976) (“The Court of Claims, while denying jurisdiction, recognized the harsh consequences of this result since it could leave claimants against

the exchange with no forum in which to seek relief.”)

25 H.R. Rep. 91-933, p.2, reprinted in 1970 U.S.C.C.A.N. 3477, 3478. Ironically, the legislative history describes this “loophole” as a creation of the Court of Claims, without mentioning the statute on which it was based, 28 U.S.C. § 2517. *Id.*

26 *Id.* at 3, reprinted in 1970 U.S.C.C.A.N. at 3479 (observing that “since not every nonappropriated fund activity has sufficient assets to reimburse the United States, the cost of the judgment would in some cases be imposed on the taxpayer – a result which is inconsistent with the very concept of nonappropriated fund activities”).

27 Pub. L. 91-350, §§ 1(b), 2(b), 84 Stat. 449 (1970), codified at 28 U.S.C. § 1491(a).

28 31 U.S.C. § 1304(c).

29 *McDonald’s Corp. v. United States*, 926 F.2d 1126, 1132-33 (Fed. Cir. 1991).

30 *Id.* at 1132. See also *Swiff-Train Co. v. United States*, 443 F.3d 1140, 1143 (5<sup>th</sup> Cir. 1971) (amendment “bind[s] United States on contracts made with all service post exchanges,” but “other non-appropriated funds, such as open messes and the guest houses here involved, were not to be included along with the exchanges as to withdrawal of sovereign immunity”).

31 *L’Enfant Plaza Properties, Inc. v. United States*, 668 F.2d 1211, 1212 (Ct. Cl. 1982).

32 *Id.*

33 *McCarthy v. United States*, 670 F.2d 996, 1002 (Ct. Cl. 1982). Interestingly, the court also recognized the seeming inconsistency between the rationale behind the doctrine (*i.e.*, that its judgments must be paid from appropriated funds) and the fact that the judgments, “when awarded against the United States, are normally payable not from appropriations used to maintain the agency that incurred the liability, but from appropriations made for the purpose of paying Court of Claims and other judgments, now normally standing appropriations.” *Id.*

34 See *Norris Industries, Inc. v. United States*, 681 F.2d 751 (Ct. Cl. 1982). See also *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 912 (Ct. Cl. 1976) (non-appropriated funds doctrine not applicable where appropriated funds could be used in the first instance, subject to reimbursement by the foreign government); accord *United States v. General Electric Corp.*, 727 F.2d 1567 (Fed. Cir. 1984).

35 *South Louisiana Grain Servs., Inc. v. United States*, 1 Cl. Ct. 281, 287 (1982).

36 *Ford, Powell & Carson v. United States*, 4 Cl. Ct. 200 (1983).

37 4 Cl. Ct. at 203.

38 *Id.* at 203-204.

39 *Aaron v. United States*, 27 Fed. Cl. 295, 299 (1992).

40 *Id.*

41 *Lee v. United States*, 124 F.3d 1291, 1294-95 (“if an agency is authorized to use both appropriated and nonappropriated funds to support its activities, the NAFI doctrine precluding Court of Federal Claims Jurisdiction does not apply”), *supp’l op. on reh’g*, 129 F.3d 1482 (Fed. Cir. 1997).

42 *Research Triangle Institute v. Board of Governors of the Federal Reserve System*, 132 F.3d 985, 989 (4<sup>th</sup> Cir. 1997).

43 *Id.*

44 *Furash*, 2001 U.S. App. LEXIS 12835 at \*7-8.

45 *Id.* at \*8.

46 *Id.* at \*6-7.

47 In *United States v. Hopkins*, 427 U.S. 123, 125 (1976), the Supreme Court noted the existence of the doctrine, but expressed no opinion as to its validity.

48 See *El-Sheikh v. United States*, 177 F.3d 1321, 1324 (Fed. Cir. 1999).