UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM DENIED: December 18, 2025

CBCA 8468

FOUR LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Alexander B. Hastings of Morgan, Lewis & Bockius LLP, Washington, DC; and Clinton Small of Morgan, Lewis & Bockius LLP, Chicago, IL, counsel for Appellant.

Elin Dugan, Office of the General Counsel, Department of Agriculture, San Francisco, CA; and Michelle Weiner, Office of the General Counsel, Department of Agriculture, Charlotte, NC, counsel for Respondent.

Before Board Judges **LESTER**, **KANG**, and **NEWSOM**.

LESTER, Board Judge.

Respondent, the Department of Agriculture, has filed a motion to dismiss this appeal for failure to state a claim, arguing that, as a matter of law, the agency's Digital Infrastructure Services Center (DISC) cannot be held responsible in monetary damages for the actions of another agency, the Federal Emergency Management Agency (FEMA). DISC awarded and managed a task order to appellant, Four LLC (Four), upon behalf of FEMA. Through DISC's task order, Four supplied licenses for a particular brand of software not to DISC, but

to FEMA.[1] Four alleges that, through a bilateral modification to the original task order, DISC agreed that, if DISC did not exercise both of the one-year extension options in the task order, the Government would not use the software or replace it with a functional equivalent for the remainder of what would have been the full term (including options) of the task order. DISC did not exercise the second one-year option because FEMA, through its own procurement office, obtained replacement software through another contractor. Four considers FEMA's act of obtaining replacement software a breach of the task order provision.

Although the parties dispute whether they actually agreed to add the provision described above to the task order and dispute the meaning of the language used in it, those issues are not currently before us. The only issue that DISC presents in its motion to dismiss is whether, as a matter of law (and assuming that the provision was added to its task order), it may be held liable in damages for FEMA's actions, arguing that it was not serving as FEMA's "agent" in a manner that would impose liability under an agency theory. Contrary to DISC's position, however, Four is not asserting entitlement under an agency theory. It is seeking damages for a breach of contract. The law is clear that, although an agency like DISC is not normally responsible for the actions of another agency, an agency can, through contract, assume financial responsibility for another's actions by warranting that a future event, even if under the control of the other agency, will or will not happen. In so doing, it assumes the risk of improper action by the other agency and of liability for resultant damage. As a result, we must deny DISC's motion to dismiss, without prejudice to DISC's ability to seek summary judgment after the record is more fully developed regarding its liability for FEMA's actions. In so deciding, we are not holding that the provision was, in fact, a part of the task order or that the provision's language created a warranty by DISC about what actions FEMA would take. We hold only that, in its complaint, Four has set forth allegations of an actionable breach of warranty by DISC.

Background

I. The Task Order

The statement of facts set forth below are based upon the allegations that Four set forth in its complaint filed July 25, 2025, except as otherwise noted.

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[1] It does not appear that the existing record explains why DISC, rather than FEMA's own procurement office, issued a task order to obtain software for FEMA's, rather than its own, use.

On or about July 26, 2019, DISC posted a request for quotes on the National Aeronautics and Space Administration's Solutions for Enterprise-Wide Procurement Government-Wide Acquisition Contract website (SEWP V)[2] seeking quotes from established authorized resellers of licenses of a specific software developed by Splunk Enterprise (the Splunk software) to supply such licenses to FEMA, rather than DISC, for a base year with options for two one-year extensions. Appeal File, Exhibit 1.

Four submitted quote no. 121585001 on July 31, 2019, identifying the prices at which it would supply FEMA with Splunk software licenses in the base year and in each of the two option years. Complaint, Exhibit D. In its quote, Four asked DISC to include in any task order that it issued the following provision prohibiting DISC from obtaining replacement software if DISC declined to exercise either of the two option years:

> Government agrees that Four LLC's quote will be incorporated into and made a part of any resultant order and warrants that the use of the products is essential to its proper, efficient, and economic operation for the entire quoted period of performance; it will use its best efforts to obtain appropriations of the necessary funds to meet its obligations under the order for all payments contained therein. Should an order expire due to non-renewal or termination for convenience, the government agrees to cease use and not replace the products acquired under the order with functionally similar products for a [sic] the longer of the remainder of the full order term or a period of one year following such event. Products are provided as a single asset and priced based on the volume of the full three-year term. Partial renewal or termination is not allowed; order must be renewed in full to obtain the proposed pricing.

Complaint, Exhibit D; *see* Complaint ¶ 6. Four alleges that it was necessary to have a guarantee that DISC would order three years of access to the Splunk software to allow Four to "offer [DISC] a discounted rate." Complaint ¶ 7.

The task order that DISC issued to Four for the Splunk software on August 7, 2019 (*see* Complaint ¶ 4), did not contain the language that Four had requested, but it listed item numbers corresponding to the base year, the first option year, and the second option year in

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[2] According to the SEWP V website, "[t]he SEWP Program enables NASA and all Federal Agencies to efficiently and effectively acquire mission critical Information Technology, Communication and Audio Visual (ITC/AV) solutions and services via a suite of contracts encompassing a diversity of business sizes and offerings." https://www.sewp.nasa.gov/ (last visited Dec. 17, 2025).

a manner consistent with the structure and pricing of the quote. *Id.* ¶ 8; *see* Complaint, Exhibit B. Nevertheless, according to Four, the task order was amended through modification P00003 on July 8, 2020, to incorporate the quote as part of DISC's exercise of the first option. Complaint ¶ 5. The language of modification P00003 read as follows:

> Modification #3 incorporates the following changes:
>
> 1) Exercise option year 1 in the amount of $654,057.76.
> 2) The attached quote and statement of work is incorporated into the award.
>
> All other terms and conditions remain the same[.]

Complaint, Exhibit C. In the copy of modification P00003 that Four attached to its complaint, and in the copy of the modification that DISC included in the Rule 4 appeal file, the quote is *not* attached to or a part of the modification. *See id.*; Appeal File, Exhibit 9. Instead, the pricing terms from the quote are typed into the modification, and a printed copy of a statement of work is attached, but the modification itself does not reference or otherwise reflect the language from the quote relating to DISC's obligation not to use or replace the Splunk software during the full term of the task order if DISC did not exercise both options.

During the performance of the first option year, DISC informed Four that DISC would not exercise the second option year unless Four agreed to provide fewer software licenses than required under the task order and at a reduced price. Complaint ¶ 10. Four refused DISC's request, and DISC did not exercise the second option year. *Id.* ¶ 11.

The DISC contracting officer subsequently "informed Four that FEMA had found a different vendor to provide not just a 'functionally similar' product, but the Splunk software itself." Complaint ¶ 12. Four viewed FEMA's actions as a breach of its task order, which, according to Four, "expressly prohibited [DISC] from terminating the Task Order only to obtain identical replacement software from a different vendor before the conclusion of the Task Order's second option year." *Id.* ¶ 13.

Four alleges that, on September 7, 2021, Four's president, Jeffrey Nolan, informed the contracting officer during a telephonic conference that "because [DISC] was procuring the [Splunk] Software on FEMA's behalf, the Task Order's terms remained binding, and those terms prohibited [DISC] from declining to renew the Task Order solely to acquire the same software from a different vendor." Complaint ¶ 14; Complaint, Exhibit A ¶ 6. Four further alleges that "the [DISC] Contracting Officer acknowledged and agreed with Mr. Nolan's explanation" but still declined to exercise the second option year. Complaint

¶ 15. The contracting officer explained that FEMA had decided to buy the (same) Splunk software on its own (through FEMA's own contracting process) without DISC's involvement. Complaint, Exhibit A ¶ 6.

II. Four's Certified Claim and Appeal

On February 3, 2025, Four submitted a certified claim to the DISC contracting officer, seeking damages in the amount of $654,057.75 for DISC's breach of "its promise not to obtain replacement software during the Prohibition Period," its breach of the duty of good faith and fair dealing, and its misrepresentation that it would not obtain replacement software. On June 24, 2025, Four filed a notice of appeal with the Board based upon the contracting officer's "deemed denial" of Four's claim, which the Clerk of the Board docketed as CBCA 8468.

In its complaint, filed July 25, 2025, Four alleged that DISC breached the task order "by (1) conditioning the exercise of Option Year 2 on Four's agreement to reduce the number of licenses; (2) declining to exercise Option Year 2 when Four refused those terms; and (3) procuring the same Software from a different vendor during the Prohibition Period, in direct violation of the Term." Complaint ¶ 20. On August 25, 2025, DISC filed a motion to dismiss this appeal for failure to state a claim, arguing that, as a matter of law, DISC could not be held responsible for actions that a separate agency took and that DISC had no power to control FEMA's conduct. As an addendum to its motion, DISC also filed an answer to Four's complaint. DISC responded to the motion to dismiss on September 25, 2025, and DISC filed a reply brief on October 30, 2025.

Discussion

I. Standard of Review

The Board recently described the standard that the Board must apply in reviewing a motion to dismiss for failure to state a claim as follows:

> Dismissal "for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the [appellant] do not entitle [it] to a legal remedy." *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000). "The [tribunal's] task in considering a motion to dismiss for failure to state a claim is not to determine whether [an appellant] will ultimately prevail, but 'whether the claimant is entitled to offer evidence to support the claims.'" *Integhearty Wheelchair Van Services, LLC v. Department of Veterans Affairs*, CBCA 7318, 22-1 BCA ¶ 38,156, at 185,311 (quoting *J. Cardenas & Sons*

> *Farming, Inc. v. United States*, 88 Fed. Cl. 153, 160-61 (2003) (quoting *Chapman Law Firm Co. v. Greenleaf Construction Co.*, 490 F.3d 934, 938 (Fed. Cir. 2007))). In considering a dismissal for failure to state a claim, "we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *Anaheim Gardens v. United States*, 444 F.3d 1309, 1314-15 (Fed. Cir. 2006) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). Dismissal is appropriate only "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* at 1315. "If no relief could be granted, . . . dismissal [is] proper." *Id.*; *see Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 08-1 BCA ¶ 33,770, at 167,160.

Texas Industrial Security, Inc. v. General Services Administration, CBCA 8467, slip op. at 5 (Nov. 28, 2025).

II. Four's Ability to Allege a Breach of Warranty

The sole basis of DISC's motion to dismiss is its belief that, because it was not acting as FEMA's agent or as a joint actor in connection with FEMA's purchase of the software from a different vendor, it cannot be held liable for FEMA's actions. DISC represents that "[c]ourts have repeatedly held that '[o]ne federal agency will not be charged with the knowledge of, or responsibility for, another merely because they are both part of the same government.'" Respondent's Motion to Dismiss at 2 (quoting *Tifa Limited*, Docket No. I.F. & R.-II-547-C, 1999 WL 549374, at *19 (Office of the Env't Prot. Agency Adm'r July 7, 1999) but citing *Town of Kure Beach, North Carolina v. United States*, 168 Ct. Cl. 597 (1964)). DISC asserts that, "in claims requiring interagency knowledge or attribution of conduct[,] . . . such imputation is only permitted where there is a special relationship, such as a joint enterprise, a duty to share information, or express control, none of which were alleged or exist here." *Id.* (citing *J.A. Jones Construction Co. v. United States*, 390 F.2d 886 (Ct. Cl. 1968) and *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987)). It argues that, because DISC had no involvement in or control over FEMA's decisions or conduct and that DISC's relationship with FEMA "was limited to DISC acting as a procurement conduit," Four cannot show that DISC and FEMA "operated as joint actors with any duty to share information," which "fails to state a claim upon which relief can be granted." *Id.* at 2-3. It alleges that Four's "failure to plead control, authority, or ratification *dooms* attempts to bind one party to another's conduct under an agency theory." *Id.* at 2 (citing *Bilek v. Federal Insurance Co.*, 8 F.4th 581, 586-88 (7th Cir. 2021)).

The problem with DISC's motion is that, contrary to DISC's position, Four is not asserting liability "under an agency theory." It is not claiming, and need not claim, that FEMA and DISC were joint actors or that DISC is responsible for FEMA's actions as FEMA's "agent." Four is asserting liability under a breach of contract theory, arguing that, in the task order to which the parties voluntarily agreed, DISC expressly warranted that, if DISC did not exercise both options in the task order and FEMA obtained substitute software during the unexercised option period, DISC would pay damages to Four.

"[A] warranty is an assurance by one party to an agreement of the existence of a fact upon which the other party may rely; it is intended precisely to relieve the promisee of any duty to ascertain the facts for himself. Thus, a warranty amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue." *Dale Construction Co. v. United States*, 168 Ct. Cl. 692, 699 (1964). "An express warranty, more specifically, arises by 'express contract language regarding future events . . . which entitles the contractor to rely upon the occurrence or nonoccurrence of the event in pricing the contract.'" *Walter Dawgie Ski Corp. v. United States*, 30 Fed. Cl. 115, 126 (1993) (quoting John Cibinic, Jr. & Ralph C. Nash, Jr., *Administration of Government Contracts* 179 (2d ed. 1986)). "For a warranty to exist there must be either an affirmation of fact or a promise which relates to performance under the contract." *American Ship Building Co. v. United States*, 654 F.2d 75, 78 (Ct. Cl. 1981).

We need not delve here into the rules surrounding how to determine whether a representation in a contract constitutes a warranty or whether the language at issue here actually created a warranty—those issues are not the focus of DISC's motion to dismiss, and those questions are not currently before us. The sole focus of DISC's motion is its belief that it can become liable for actions that another federal agency takes *only* if DISC had some type of control over the other agency's actions or if the agencies are jointly acting together in a manner that damages a contractor. DISC's argument is in direct conflict with well-established precedent.

The Government's ability to create a warranty that would require it to pay damages for conduct for which it would not otherwise be liable or for conduct or behavior over which it has no control is well-settled. For example, there is a long line of cases in which courts have held that, despite the fact that the Government is immune from liability for actions that it undertakes in its sovereign capacity, an agency can agree, through contract, to compensate a contractor if a sovereign act is undertaken. "It has long been established that while the United States cannot be held liable directly or indirectly for public acts which it performs as a sovereign, the Government can agree in a contract that if it does exercise a sovereign power, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act, and that this agreement can be implied as well as

expressed." *D&L Construction Co. v. United States*, 402 F.2d 990, 999 (Ct. Cl. 1968); *see Gerhardt F. Mayne Co. v. United States*, 76 F. Supp. 811, 815 (Ct. Cl. 1948) ("[The Government] cannot enter into a binding agreement that it will not exercise a sovereign power, but it can say, if it does, it will pay you the amount by which your costs are increased thereby."); *Sunswick Corp. of Delaware v. United States*, 75 F. Supp. 221, 228 (Ct. Cl. 1948) ("We know of no reason why the Government may not by the terms of its contract bind itself for the consequences of some act on its behalf which, but for the contract, would be nonactionable as an act of the sovereign."). The Court of Appeals for the Federal Circuit in *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953 (Fed. Cir. 1993), discussed how an agency can create an obligation to pay damages for taking actions that, but for the existence of a contract provision requiring compensation, the Government could not be held financially liable:

> [T]he present case simply involves the question of how liability for certain contingencies was allocated by the contract. In its contractual capacity, the government executes countless agreements with private entities to receive and provide services, goods and supplies. These contracts routinely include provisions shifting financial responsibility to the government for events which might occur in the future. That some of these events may be triggered by sovereign government action does not render the relevant contractual provisions any less binding than those which contemplate third party acts, inclement weather and other *force majeure*.

Id. at 958-59.

The Government can make that same type of warranty, obligating itself to pay compensation for its breach, for actions or inaction by a third party over which the Government has no control. "It is also settled that although the Government is not liable for damages resulting from the action of third parties, it may be held liable if it extended to the contractor a warranty which was breached." *D&L Construction*, 402 F.2d at 999 (citing *Dale Construction*, 168 Ct. Cl. at 699). The Court of Claims in *Dale Construction* explained how a government agency, through contract, could warrant that a third party (there, a municipality) would turn off water at a construction site by a particular time, even though the agency had no control over the municipality's behavior, and pay damages to the contractor if the third party did not do so:

> It is in this context that the record clearly establishes that the post engineer [who timely requested that the municipality turn off the water valve] was not at fault in this incident; hence the Government may be held liable in damages only if the circumstances show that it extended a warranty to the contractor

> which was breached. *In essence a warranty is an assurance by one party to an agreement of the existence of a fact upon which the other party may rely; it is intended precisely to relieve the promisee of any duty to ascertain the facts for himself. Thus, a warranty amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue.* The facts here appear to fall squarely within this concept. In assuming responsibility to have the water supply turned off and assuring the contractor that this had been done, the post engineer, in effect, gave plaintiff an unqualified assurance upon which the latter was entitled to and did actually rely; further, that assurance plainly was intended by the parties to relieve the contractor of any obligation to ascertain the facts for itself. Plaintiff is, therefore, reasonably entitled to recover $822.54—the amount of loss it suffered when the assurance on which it relied turned out to be incorrect.

Id. at 699 (emphasis added).

The United States Supreme Court in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), applied this same rationale to contractual warranties addressing acts of Congress in finding that, if a government agency has bound itself in contracts with savings and loan associations to pay damages if Congress changed regulatory rules in a manner that caused the savings and loan associations to incur financial losses, those contractual agreements would be enforceable and would place on the Government the financial burden of compensating the associations if Congress took action inconsistent with the warranty:

> The mere fact that the Government's contracting agencies (like the Bank Board and FSLIC) could not themselves preclude Congress from changing the regulatory rules does not, of course, stand in the way of concluding that those agencies assumed the risk of such change, for determining the consequences of legal change was the point of the agreements. *It is, after all, not uncommon for a contracting party to assume the risk of an event he cannot control, even when that party is an agent of the Government.*

Id. at 908 (emphasis added).

These same warranty concepts apply to an agency's agreement to assume financial responsibility through a promise that another federal agency will not take some action and to compensate the contractor if the other agency violates the warranty in a manner that causes the contractor to suffer damage. As the Supreme Court in *Winstar* specifically noted, "[a] common example of such an agreement is mandated by Federal Acquisition Regulation 52.222-43, which requires Government entities entering into certain fixed price service

contracts to include a price adjustment clause shifting to the Government [and to the agency issuing the contract] responsibility for cost increases resulting from [the contractor's] compliance with Department of Labor wage and fringe benefit determinations." *Winstar*, 518 U.S. at 909 n.58 (citing 48 CFR 52.222-43 (1995)). Similarly, the Federal Circuit in *Hills Materials Co. v. Rice*, 982 F.2d 514 (Fed. Cir. 1992), held that, pursuant to standard FAR clauses in the contract at issue there, the Department of the Air Force had contractually agreed to accept financial responsibility if another federal agency, the Occupational Safety and Health Administration (OSHA), changed certain OSHA regulations in a manner that negatively impacted the contractor. *See id.* at 516-17 & n.2 (finding that the sovereign acts doctrine "does not prevent the government as contractor from affirmatively assuming responsibility for specific sovereign acts" that another federal agency might undertake).

Accordingly, we reject DISC's argument that a federal agency can never be financially responsible in damages for the actions of another federal agency over which it has no control unless one is acting as the other's "agent." An agency can, through contract, create the very type of warranty that Four alleges was created here. In rejecting DISC's argument, we do not make any judgment on whether the language upon which Four relies does, in fact, create a warranty. Further proceedings will be needed to determine whether the disputed clause is even a part of the task order at all, a question that is not clear from the existing record and is disputed. If the disputed clause is part of the task order, there may be ambiguities in the language, and the Board will need to determine whether ambiguities exist; whether, if so, they are patent or latent; and whether, under the doctrine of contra proferentum, the ambiguity would be held against Four as the drafter of the provision. *See Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 413-14 (Fed. Cir. 1988) (discussing how to analyze contract language for ambiguities). Nevertheless, because it is clear that Four's theory of liability is breach of warranty, based upon an alleged contractual agreement creating the warranty, rather than an agency theory, we must deny DISC's motion to dismiss.

Decision

For the foregoing reasons, DISC's motion to dismiss for failure to state a claim is **DENIED**.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Jonathan L. Kang
JONATHAN L. KANG
Board Judge

Elizabeth W. Newsom
ELIZABETH W. NEWSOM
Board Judge