UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION OR, ALTERNATIVELY, DENIED:
July 1, 2024

CBCA 8087(6360)-REM, 8088(6627)-REM

AVUE TECHNOLOGIES CORPORATION,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent in CBCA 8087(6360)-REM,

and

GENERAL SERVICES ADMINISTRATION,

Respondent in CBCA 8088(6627)-REM.

Andy Liu of Nichols Liu LLP, Washington, DC, counsel for Appellant.

Lucy G. Mac Gabhann and Douglas W. Kornreich, Office of the General Counsel, Department of Health and Human Services, Baltimore, MD, counsel for Respondent in CBCA 8087(6360)-REM.

James T. Van Biber and Fallyme E. Guerrero, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent in CBCA 8088(6627)-REM.

Before Board Judges **SHERIDAN**, **O'ROURKE**, and **CHADWICK**.

CHADWICK, Board Judge.

These consolidated appeals are before the Board on remand from the United States Court of Appeals for the Federal Circuit. *See Avue Technologies Corp. v. Secretary of Health & Human Services*, 96 F.4th 1340 (Fed. Cir. 2024). Appellant, Avue Technologies Corporation (Avue), licenses software that another company sells under a Federal Supply Schedule (FSS) contract awarded by respondent General Services Administration (GSA). The Food and Drug Administration (FDA) acquired a subscription to the software from the schedule contractor. Avue alleges that FDA breached the software license and owes Avue damages.

The Court of Appeals vacated our prior holding that we lacked subject matter jurisdiction. *Avue Technologies*, 96 F.4th at 1346. We resumed the case by considering cross-motions for summary judgment on entitlement that the parties had filed and briefed in late 2021. As we explain, we conclude again that we lack jurisdiction—on a different basis, we believe, than the Court of Appeals considered. Alternatively, in case we have misunderstood the Court's mandate, we grant the joint motion of respondents, Health and Human Services Administration (HHS) (FDA's parent agency) and GSA, on the merits and deny the appeals. We base both our jurisdictional decision and our alternative merits holding on our conclusion that the license agreement under which Avue seeks relief is not a procurement contract.

Background

We determine the following historical and procedural facts to be undisputed for purposes of the cross-motions, except as noted.

The FSS Order

Avue offers a software "platform" that allows organizations to automate administrative and human resources tasks. Avue does not sell its software directly to federal agencies. For those users, Avue offers annual subscriptions to what it calls Avue Digital Services (ADS) through an unaffiliated reseller, Carahsoft Technology Corporation (Carahsoft), which holds an FSS contract. "Avue attempts to govern its relationship with end users of its software via an [end user license agreement (EULA)], which Avue calls a master subscription agreement ('MSA')." *Avue Technologies*, 96 F.4th at 1342.

GSA and Carahsoft modified Carahsoft's schedule contract to add ADS subscriptions in May 2012. As the Board wrote in 2022:

> [T]he modification form states in part, "GSA approved EULA rider are [sic] hereby incorporated into this contract." The context indicates that the "EULA rider" described as being "incorporated" is [Avue's MSA]. The attachments

> to the 2012 modification include an unsigned, undated template version of Avue's MSA (with the words "CLIENT NAME" on the title page where the subscriber's name would be) . . . .
>
> The template version of the MSA appended to the modification states, just above the empty signature blocks, "In the event this agreement is incorporated into a government contract award, execution by the parties is not necessary." (Capitalization altered.) The document has seventeen sections with paragraphs numbered 1.0 to 17.6. As pertinent here, paragraph 3.2 states, "For federal government Subscribers, the Subscribed Services are commercial items under [48 CFR] 2.101 and this standard commercial license to the Subscribed Services shall be incorporated into and attached to the applicable contract." Section 5 (paragraphs 5.1 through 5.9) is titled, "Right to Use Avue Digital Services." This section distinguishes "Client Data" from "ADS Material" and sets limits on Avue's permission to use the latter. Paragraph 5.2 provides, subject to conditions, "Subscriber shall have a non-exclusive, non-transferable, limited right to use [ADS] for access to the Subscribed ADS Modules during the relevant Subscription Period under this Agreement, including the right to make use, for its own internal operations, of any printable output (whether in hard copy or electronic form) of data that it generates or downloads[.]"

Avue Technologies Corp. v. Department of Health & Human Services, CBCA 6360, et al., 22-1 BCA ¶ 38,024, at 184,651, *vacated and remanded*, 96 F.4th 1340 (Fed. Cir. 2024).

In 2015, FDA issued a request for quotations under Federal Acquisition Regulation (FAR) part 12 (48 CFR part 12 (2014)) for software to automate FDA's job classification system. Carahsoft submitted a quotation to provide ADS from the GSA schedule. Carahsoft stated that its quotation incorporated the "assum[ption] that FDA will accept the terms and conditions of the [Avue] MSA" and was "expressly conditioned on the MSA," which Carahsoft attached to the quotation, "being included in the contract award." In September 2015, FSA placed an order for ADS under Carahsoft's FSS contract with a term of one year and four option years.

On the day it received the FDA order, Carahsoft asked FDA to modify the order to refer specifically to Avue's MSA. The FDA contracting officer replied by email, "I was not intending on incorporating the Master Subscription Agreement into the [FDA] contract. The contract is being issued in accordance with your GSA schedule so if this schedule is part of the Schedule [sic] we should be good."

FDA used the ADS software in the first year but did not exercise its option to renew the order in September 2016.

FDA's Alleged Breaches

The agencies do not, for the most part, point to disputes of fact as to whether FDA took the actions about which Avue complains.[1] FDA denies violating legal obligations to Avue. During the first year of the subscription, FDA considered whether it should renew for the second year. In April 2016, responsible FDA personnel circulated a PowerPoint presentation titled, "Automated Classification Initiative Project Review." The slides discussed "Avue Contract [sic] Challenges," one of which was that "FDA data is owned by Avue." The presentation recommended that, rather than extending the ADS subscription, FDA should adopt a different platform, called eClass, reportedly in use at another agency.

In June 2016, an FDA supervisor announced by email that the agency had created a SharePoint site for files relating to "Avue PD [position description] document transfer." An FDA representative testified in deposition that FDA decided to migrate to SharePoint all of the position descriptions that FDA could access via ADS, "whether they were modified PDs or legacy PDs, we wanted all of our PDs . . . that we worked on during . . . the contract with Avue [sic]." In mid-September 2016, Avue, acting on an "anonymous tip," investigated what it considered improper downloading by FDA. Avue concluded that seventeen individual users had downloaded 5706 documents Avue considered proprietary. Avue suspended FDA's access to ADS for a week but was persuaded by FDA to restore it.

By the end of September 2016, FDA succeeded, in part through the efforts of an assigned contractor employee, in downloading from ADS all of the information that FDA wanted, including position descriptions and supporting documentation such as job analyses, performance plans, and Fair Labor Standards Act determinations. FDA's downloading continued through the last day of the ADS subscription. Afterward, FDA assigned the contractor employee and others to delete all references to Avue and ADS from the downloaded information, including by converting PDFs obtained from ADS into WordPerfect documents for editing. In November 2016, an FDA supervisor expressed the view that the contractor employee and an FDA employee deserved performance awards for "supporting the sunset of Avue and document migration."

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[1] A movant for summary judgment must file a statement of undisputed material facts. Board Rule 8(f)(1) (48 CFR 6101.8(f)(1) (2023)). The opposing party responds in a statement of genuine issues, "citing appeal file exhibits, admissions in pleadings, and/or evidence filed with the opposition." Rule 8(f)(2). The agencies either do not answer or merely deny multiple paragraphs of Avue's Rule 8(f)(1) statement. We treat as undisputed any fact that is supported by record evidence in a Rule 8(f)(1) statement and is either admitted, not answered, or denied without explanation in a Rule 8(f)(2) statement.

Avue contends that FDA now uses position descriptions in eClass that "contain material from Avue PDs." The agencies deny that the record establishes this, citing deposition testimony of an FDA representative that "[FDA] can't upload anything to [eClass]. You have to go literally, physically type it, or if it's an existing PD . . . you would have to use that . . . and you could potentially take information from a PD and use it to build another PD, but you can't upload anything to it. You can attach things to [an eClass position description], but it will show as an attachment and not a part of the body of the actual PD."

<u>Avue's Claim to FDA (First Claim)</u>

In March 2018, Avue submitted a certified claim to the ordering contracting officer at FDA, seeking damages of $41,398,796.80 for the alleged, unauthorized downloading of ADS data. "Avue asserted in the claim that '[t]he Carahsoft FSS contract expressly incorporate[d]' [Avue's MSA/EULA] and that 'FDA users . . . had to "click" the box representing their agreement to the terms of [the license]. Thus, *FDA and FDA users had privity of contract with Avue through its licensing agreements*.' (Emphasis added.)." *Avue Technologies Corp. v. Department of Health & Human Services*, CBCA 6360, 19-1 BCA ¶ 37,375, at 181,705. Avue alleged in the claim that "as part of the purchase, FDA . . . agree[d] to a freestanding obligation with Avue to comply with the MSA."

The FDA contracting officer declined to act on the claim, taking the position in August 2018 that FDA "does not have [a] contract with Avue" but only with Carahsoft.

<u>Initial Proceedings at the Board and the First and Second Motions to Dismiss</u>

Avue appealed to the Board in January 2019 from FDA's deemed denial of the March 2018 claim. The Board docketed that appeal as CBCA 6360. In February 2019, before Avue filed its complaint, HHS moved to dismiss the appeal for lack of jurisdiction. HHS argued that "this Board lacks jurisdiction over a direct appeal filed by a subcontractor absent sponsorship of the claim by the prime contractor," meaning Carahsoft.

Avue argued in opposing HHS's motion, "Avue and FDA (and not Carahsoft) are the parties to Avue's EULA . . . . Avue expressly alleged this in its claim. . . . Because it is Avue's MSA that was breached, not Carahsoft's FSS contract, Avue has privity to support its claim under the MSA against FDA."

The Board denied HHS's motion and accepted Avue's framing of its claim as involving an alleged "freestanding" obligation independent of Carahsoft. We wrote:

> HHS's argument that a subcontractor cannot pursue its own claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2012), is correct

> where applicable. . . . The twist here is that Avue is not pursuing its claim as a subcontractor. Avue alleges that it is a contractor. More than this, Avue points to a specific writing (the EULA, allegedly "incorporated" in the FSS contract) that it considers a government contract. These allegations of the existence of a contract suffice to take the claim out of the realm of subcontractor claims and into the world of claims within our CDA jurisdiction, provided the other jurisdictional requirements are met.

Avue Technologies, 19-1 BCA at 181,706. In light of the possible jurisdictional significance of the incorporation language in the 2012 modification of Carahsoft's FSS contract, we also "encourage[d] the parties to consider whether Avue submitted its claim to the proper contracting officer." *Id*. (citing *Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367 (Fed. Cir. 2013); *Consultis of San Antonio, Inc. v. Department of Veterans Affairs*, CBCA 5458, 17-1 BCA ¶ 36,701).[2]

In July 2019, Avue filed the complaint in the first appeal. Avue alleged in paragraph 35 of the complaint that "Avue takes specific steps . . . to ensure that it is in privity of contract with the end user(s)" and in paragraph 42 of the complaint that "FDA and its users had privity of contract with Avue." The complaint had two counts: "FDA Breached the MSA" and "FDA Breached Its Implied Duties of Good Faith and Fair Dealing." Avue did not plead a breach of Carahsoft's FSS contract or of the order placed with Carahsoft.

In September 2019, HHS, with leave of the Board, filed a second motion to dismiss for lack of jurisdiction. This time, HHS argued that Avue should have submitted its claim to the GSA contracting officer and not to FDA.

<u>Avue's Protective Claim to GSA (Second Claim)</u>

In July 2019—the same month in which it filed the complaint in the first appeal—Avue submitted a "protective" certified claim to the GSA schedule contracting officer. This claim was substantively identical to the claim to FDA (which Avue attached to the claim to GSA). Avue advised GSA, among other things:

> Avue's claim deals with the alleged misappropriation of Avue's proprietary data by FDA and the consequent breach of the data rights provisions of its MSA. It does not involve any Carahsoft data, and Carahsoft is not a party to

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[2] "[48 CFR] 8.406-6 does not authorize an ordering [contracting officer] to decide a dispute requiring interpretation of schedule contract provisions." *Sharp Electronics*, 707 F.3d at 1374.

> the MSA. . . . Avue believes its claim was properly submitted to the FDA contracting officer. . . . This claim [to GSA] is a protective claim and does not take the place of Avue's claim before the Board.

(Paragraph break omitted.)

In October 2019, the schedule contracting officer wrote to Avue that he was "not in a position to render a final decision" because Avue had no contract with GSA.

Initial Proceedings in the Second Appeal and the Third Motion to Dismiss

Avue promptly filed what it styled a "protective appeal from the deemed denial of [its] protective claim" to GSA. The Board docketed this second appeal as CBCA 6627. Avue stated in the notice of appeal that it still "believe[d] its original claim was properly submitted to the contracting officer of the ordering agency," FDA.

Avue filed the complaint in the second appeal in November 2019. This complaint was essentially identical to the complaint in the first appeal except that the counts were titled, "The Government Breached Its Contract with Avue" and "The Government Breached Its Implied Duties of Good Faith and Fair Dealing." The Board consolidated the first and second appeals over HHS's objection in December 2019.

Also in December 2019, GSA filed a motion to dismiss for lack of jurisdiction with its answer. GSA argued that it "never entered into a contract with Avue" under the FSS and that Avue could "only establish CDA jurisdiction . . . by sponsorship and certification of the claim by Carahsoft," the prime FSS contractor. Opposing GSA's motion mainly as premature, Avue acknowledged that it was inclined to agree with GSA that "HHS is the proper [respondent] in this matter, but the Board has raised the question of whether [precedent] dictates that GSA is the proper party, and the answer to that question is uncertain enough that it makes sense to keep both HHS and GSA in this case." Avue averred, among other things, that "GSA recognizes that the MSA is a contract separate from the FSS."

Oral Argument on Jurisdiction

The full panel heard oral argument in January 2020 on HHS's and GSA's respective, pending jurisdictional motions (the second and third such motions). The presentation of Avue's counsel, which followed argument for HHS, began as follows:

> MR. LIU: So, you know, I think Your Honors are correct, our position is, and the Board has already found that there is a standalone, separate contract between Avue and the FDA.

JUDGE SHERIDAN: No, I don't think we have found that.

JUDGE CHADWICK: No, nonfrivolous.

JUDGE O'ROURKE: Nonfrivolous.

MR. LIU: Well, a nonfrivolous.

JUDGE CHADWICK: Yes.

JUDGE SHERIDAN: It's a nonfrivolous allegation of a contract.

Avue's counsel went on to reiterate and defend Avue's position that the MSA "creates the direct relationship between the agency [FDA] . . . and Avue." Counsel for the two agencies continued to argue that Avue was not a contractor under the schedule contract or the order.

The Board Defers Ruling Again on Jurisdiction

In February 2020, the Board adopted Avue's suggestion in its opposition to GSA's motion and tabled the latest jurisdictional issues raised by the agencies. "Both agencies," we found, "raise colorable arguments that we may eventually adopt in dismissing one appeal or the other." *Avue Technologies Corp. v. Department of Health & Human Services*, CBCA 6360, et al., 20-1 BCA ¶ 37,503, at 182,185. We concluded among other things, however, that the "jurisdictional arguments are intertwined with and overlap arguments going to the merits of Avue's novel claim regarding whether the EULA is a freestanding contract and, if so, whom the contract binds. Answering such merits questions may shed light on jurisdictional issues." *Id*. at 182,186. We denied both motions "without prejudice to eventual refiling at a time set by the presiding judge." *Id*.

The Merits Briefing

After discovery, the parties filed simultaneous cross-motions for summary judgment on entitlement in November 2021. Avue argued in support of its motion (we quote section headings of its brief) that "There Is a Direct Contract Between Avue and FDA," "Alternatively, FDA Entered an Implied Contract with Avue," and "The FDA Breached the MSA." Avue summarized its legal position as follows:

> (1) as a condition of making its software available to the government, Avue ensured that its EULA, the MSA, provided direct privity between Avue and the user agency; (2) GSA approved incorporation of the MSA, a freestanding document, into the Carahsoft FSS contract reselling ADS as Avue's

> EULA/license agreement; (3) FDA was expressly made aware that it would be directly entering into the MSA and the MSA's terms, including those controlling data rights, before it issued the Order; and (4) FDA accepted those terms when it issued the Order, as is consistent with commercial practice, and shortly thereafter acknowledged that it had.

Avue argued further that "[t]he MSA directly bound FDA as an end user of Avue's data and prohibited FDA from misappropriating Avue's intellectual property and putting it to an unlicensed use. . . . And it was Avue, not Carahsoft, that substantially performed under the Order."

The agencies jointly argued (again, we quote section headings) that "Even if [the MSA] was incorporated into the FDA task order with Carahsoft, the MSA does not create privity of contract between Appellant and Respondents," "Avue has not shown an implied-in-fact contract," and "[Absent] an existing contract with the United States, . . . the duty of good faith and fair dealing has not attached." The agencies urged the Board, if we found an enforceable contract, to deny Avue's motion on the grounds that genuine issues of material fact exist as to whether FDA committed the alleged breaches.

Further Briefing at the Board on Jurisdiction

The Board paused consideration of the merits in December 2021 to raise yet another jurisdictional issue. We asked whether the MSA/EULA is a procurement contract. *See Avue Technologies*, 96 F.4th at 1343.[3] Avue raised two arguments in supplemental briefing: (1) "[T]he MSA is itself a contract for the purchase or lease of goods or services," and (2) "Even if the MSA, standing alone, is not a CDA contract, that is of no moment here because it . . . is directly 'related to' FDA's order to Carahsoft for ADS, and that is sufficient to confer jurisdiction." We disagreed with both arguments. *Avue Technologies*, 22-1 BCA

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[3] The CDA, the source of the Board's "jurisdiction" here, 41 U.S.C. § 7105(e)(1)(B) (2018), applies to "any express or implied contract . . . made by an executive agency for," among other things, "(1) the procurement of property" or "(2) the procurement of services." *Id.* § 7102(a). "The scope of the Act thus is limited . . . . It does not cover all government contracts." *Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983). "In order . . . to decide the jurisdictional question, [one] must determine whether" an operative contract is "for the procurement of goods or services by an executive agency, a question of law." *G.E. Boggs & Associates, Inc. v. Roskens*, 969 F.2d 1023, 1026 (Fed. Cir. 1992); *e.g.*, *Bio-Medical Applications of Aquadilla, Inc. v. United States*, 119 Fed. Cl. 546, 567 (2014) ("[T]hese authorizations, should they be construed to be unilateral contracts, could not have been procurement contracts to which the CDA applied.").

at 184,652–53. Avue continued to call the MSA "a 'direct contract' between FDA and Avue." *Id.* at 184,651 (quoting Avue's supplemental brief). We dismissed the appeals for lack of jurisdiction in January 2022, opining that the MSA is not a procurement contract under the CDA. *Id*. at 184,653.

Federal Circuit Review and Remand

Avue sought appellate review. The Court of Appeals vacated our dismissal and remanded with instructions to "treat[] as a merits issue the matter of whether Avue is a party to . . . or otherwise has enforceable rights pursuant to . . . the MSA plus the [schedule contract] or the Task Order," which are procurement contracts. *Avue Technologies*, 96 F.4th at 1346. The Court found that this framing of the claim "was fairly presented to the Board." *Id*. The Court determined that the question we had addressed, i.e., "[w]hether or not the MSA, all by itself, is a 'procurement contract,' is not a question we [the Court] need to decide." *Id*. at 1345. The mandate issued in April 2024. The Board reconsolidated the appeals to address the previously pending cross-motions.[4]

Discussion

The Summary Judgment Standard and the Mandate Rule

Each side seeks summary judgment on entitlement (which for Avue would be partial summary judgment). Each movant bears the burden to show "entitle[ment] to judgment as a matter of law based on undisputed material facts." Rule 8(f). "If . . . the movant bears the burden" of proof, a "non-movant is required to provide opposing evidence . . . only if the moving party has provided evidence sufficient, if unopposed, to prevail as a matter of law." *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1368–69 (Fed. Cir. 2006). "[A]ll significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. . . . However, the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390–91 (Fed. Cir. 1987).

Also applicable here is the "mandate rule," pursuant to which "issues actually decided [on appeal]—those within the scope of the judgment appealed from, minus those explicitly

[4] The parties filed recommendations under Board Rule 33 for proceedings on remand. The agencies recommended a status conference. Avue recommended that we rule on the pending cross-motions and proposed up to five pages of supplemental briefing on "the effect, if any, of the Federal Circuit's decision" on merits issues. We proceeded on the existing record with no additional briefs.

reserved or remanded by the court—are foreclosed from further consideration." *Engel Industries, Inc. v. Lockformer Co.*, 166 F.3d 1379, 1383 (Fed. Cir. 1999). We "cannot vary [the mandate], or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895), *quoted in Freedom NY, Inc.*, ASBCA 43965, 05-1 BCA ¶ 32,934, at 163,122. "[A]ctions" by a lower tribunal "on remand should not be inconsistent with either the letter or the spirit of the mandate." *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 951 (Fed. Cir. 1997).

<u>We Assume That the MSA Is Contractual</u>

As noted, the first issue joined by the parties is whether the MSA is contractually binding. Avue calls the MSA a "direct" and "freestanding" contract with FDA. The agencies deny the existence of any contract with Avue. We do not think we are departing from the mandate by taking up these arguments in the order they were presented. The Court instructed us to "treat[] as a merits issue" rather than as jurisdictional "the matter of whether Avue . . . has enforceable rights pursuant to . . . [a] conceded procurement contract." *Avue Technologies*, 96 F.4th at 1346 (also inviting the Board to apply our "considerable expertise" to "resolve merits issues (including privity) . . . in the first instance" (internal quotation marks omitted)). We do so in the next section of this decision. The Court did not instruct us to disregard other merits theories advanced by Avue. *Cf. Chicago Board Options Exchange, Inc. v. International Securities Exchange, LLC*, 748 F.3d 1134, 1140 (Fed. Cir. 2014) ("[B]ecause [a] factual issue was unresolved in the previous appeal, the trial court did not violate the mandate rule by allowing this unresolved issue to go to the jury."); *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1364 (Fed. Cir. 2008) (holding that an issue that "was not addressed by the [Circuit] panel" was "not foreclosed by the mandate rule").

We assumed in our most recent jurisdictional decision "that the MSA license is binding on the Government based on the language in the 2012 schedule contract modification incorporating the MSA as a EULA." *Avue Technologies*, 22-1 BCA at 184,652 (adding, inter alia, "the MSA appears to contain commercially significant promises that might be deemed contractual"). Our assumption that the MSA is contractual was not questioned or disturbed by the Circuit Court on appeal. *See Avue Technologies*, 96 F.4th at 1346. We adopt the same assumption now for purposes of summary judgment.

As we noted in 2022, "courts hear suits brought by software licensors under contract theories against end users who did not purchase the software directly from the licensor." *Avue Technologies*, 22-1 BCA at 184,652 (citing *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996) (suit for "an injunction against further dissemination that exceed[ed] the rights specified in the licenses"); and *i.LAN Systems, Inc. v. NetScout Service Level Corp.*,

183 F. Supp. 2d 328, 338 (D. Mass. 2002) ("The only issue before the Court is whether clickwrap license agreements are an appropriate way to form contracts, and the Court holds they are.")). This is, in substance, what Avue wants to happen here at the Board.

In 2002, the United States Court of Appeals for the Second Circuit cited "well-known cases involving shrinkwrap licensing and related commercial practices" that had been held to bind commercial purchasers of software to license terms "by virtue of inquiry notice." *Specht v. Netscape Communications Corp*., 306 F.3d 17, 32 (2d Cir. 2002).

> For example, in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), the Seventh Circuit held that where a purchaser had ordered a computer over the telephone, received the order in a shipped box containing the computer along with printed contract terms, and did not return the computer within the thirty days required by the terms, the purchaser was bound by the contract. *Id*. at 1148–49. In *ProCD, Inc. v. Zeidenberg*, the same court held that where an individual purchased software in a box containing license terms which were displayed on the computer screen every time the user executed the software program, the user had sufficient opportunity to review the terms and to return the software, and so was contractually bound after retaining the product. *ProCD*, 86 F.3d at 1452; *cf. Moore v. Microsoft Corp*., 293 A.D.2d 587, 587, 741 N.Y.S.2d 91, 92 (2d Dep't 2002) (software user was bound by license agreement where terms were prominently displayed on computer screen before software could be installed and where user was required to indicate assent by clicking "I agree"); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 251, 676 N.Y.S.2d 569, 572 (1st Dep't 1998) (buyer assented to arbitration clause shipped inside box with computer and software by retaining items beyond date specified by license terms); *M.A. Mortenson Co. v. Timberline Software Corp*., 93 Wash. App. 819, 970 P.2d 803, 809 (1999) (buyer manifested assent to software license terms by installing and using software), *aff'd*, 140 Wash.2d 568, 998 P.2d 305 (2000); *see also i.LAN Sys*[*tems, Inc.*], 183 F. Supp. 2d at 338 (business entity "explicitly accepted the clickwrap license agreement [contained in purchased software] when it clicked on the box stating 'I agree'").

Id. at 32–33; *see also Wollen v. Gulf Stream Restoration & Cleaning, LLC*, 259 A.3d 867, 876–77 (N.J. App. Div. 2021) ("[W]e continue to find instructive the Second Circuit's nearly twenty-year-old decision in *Specht*.").

More recently, the Federal Circuit held in a copyright suit under 28 U.S.C. § 1498 (2018) that, "[b]ecause we must defer to the . . . finding [of the Court of Federal Claims] of a meeting of the minds, we affirm the . . . finding of an implied-in-fact [copyright] license

between the [United States Department of the] Navy" and a software maker that had marketed the product through a third-party reseller. *Bitmanagement Software GmbH v. United States*, 989 F.3d 938, 948 (Fed. Cir. 2021), *cited in Avue Technologies*, 22-1 BCA at 184,652.[5] In another copyright action, the Court of Federal Claims ruled that a licensor's "EULA was incorporated by reference in [a reseller's] original contract," and the court saw "no basis for not deeming it to be effective." *4DD Holdings, LLC v. United States*, 159 Fed. Cl. 337, 343 (2022).

Given these decisions on software licenses, the agencies offer insufficient reasons to rule—at least on summary judgment—that the MSA is *not* contractual. It is plausible at this stage to assume that FDA ordered ADS from Carahsoft *subject to* the Avue license, which had already been accepted by GSA and which FDA could violate.

We understand the agencies to argue, in essence, that FDA did not *enter into a procurement contract*, express or implied, with Avue by placing an order with Carahsoft under the FSS. The agencies rely heavily on emails exchanged after the order in 2015 in which, they contend, the FDA contracting officer "made clear that while he was amenable to adding a modified version of the MSA to the order, he was steadfast in his refusal to enter into direct privity with Avue.[6] . . . [A]ssuming . . . some part of the MSA may have been incorporated into the FDA [order] contract, it was most certainly not the part that creates privity of contract."

As discussed below, we continue to agree with the agencies that the MSA is not a procurement contract and was not awarded as such. Our problem with the agencies' position that the MSA is not a contract *at all* is that the agencies do not grapple with the law of software licenses. The Avue ADS product that the GSA schedule contracting officer listed for purchase from Carahsoft on the supply schedule came with an express, "incorporated" license, the MSA/EULA. "The MSA define[d] what an agency c[ould] procure from Carahsoft. The scope of the license to end users may be considered an integral feature of Carahsoft's FSS offering of ADS." *Avue Technologies*, 22-1 BCA at 184,652; *see also Sharp Electronics*, 707 F.3d at 1369 ("The terms of the [schedule] contract . . . are incorporated by reference into the order."); *CiyaSoft Corp.*, ASBCA 59519, et al., 18-1 BCA ¶ 37,084, at 180,517–18 ("[I]t does not matter that the licensing agreement was neither negotiated, nor the terms known by the contracting officer. . . . [C]urrent commercial law

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[5] We mistakenly wrote in 2022 that *Bitmanagement* arose under the Tucker Act, 28 U.S.C. § 1491. In copyright infringement suits, a defendant may assert a license as a defense. *E.g.*, *Bitmanagement*, 989 F.3d at 945–46.

[6] The agencies do not discuss these emails in their statement of undisputed material facts. We do not view such communications as germane to contract formation.

. . . generally recognize[s] and enforce[s] terms of licensing agreements, which are neither negotiated nor known to the user until the software has been paid for and delivered." (citing several cases cited in *Specht*)), *motion for reconsideration denied*, 19-1 BCA ¶ 37,278. The agencies do not establish on the basis of undisputed facts that the FDA contracting officer did anything that could void or evade the express Avue software license.

The agencies assert that "[n]o one with authority acted to create a contract with Avue." With respect to a *procurement* contract actionable under the CDA, we agree, as discussed below. Avue shows, however, that the FAR gave the GSA contracting officer authority (or at least did not deny such authority) to act on behalf of the Government to include EULAs such as the MSA in FSS offerings. As a sibling board has discussed, the applicable FAR part 12 guided agencies to acquire software "under licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy the Government's needs." 48 CFR 12.212 (2011), *quoted in CiyaSoft*, 18-1 BCA at 180,517. Prior to 2013, "the FAR included no provisions addressing clickwrap and shrinkwrap forms of licensing agreements, the terms of which are generally not known to the user until the software has been paid for and delivered to the user, but [the FAR] has since 2013 implicitly recognized them." *CiyaSoft*, 18-1 BCA at 180,517–18 (citing 48 CFR 12.216, 52.212-4(u)(ii) (2017)). In addition, as Avue notes, in July 2015, GSA amended its agency acquisition regulation to add a contract clause stating, "If a [commercial] supplier *or licensor* believes the ordering activity to be in breach of the agreement, it shall pursue its rights under the [CDA] or other applicable Federal statute while continuing performance . . . ." 48 CFR 552.212-4(w)(1)(iv) (July 2015 class deviation) (emphasis added).[7]

As discussed below, we believe the latter clause (which the parties agree became part of Carahsoft's FSS contract) must be read to mean "its rights, if any," and cannot create CDA jurisdiction where none would exist. We see nothing in any regulation, however, suggesting that (1) the FDA contracting officer, who was on inquiry notice of the MSA, needed to agree separately to the MSA once the GSA schedule contracting officer had done so, or that (2) the prevailing commercial law under which software licenses can become contractually binding on end purchasers should not apply in the FSS context.

We need proceed no further with this issue at this time. The agencies do not show "as a matter of law based on undisputed material facts" that the MSA cannot bind FDA.

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[7] The term "the agreement" in this clause refers to "a commercial supplier agreement (as defined in [48 CFR] 502.101)." 48 CFR 552.212-4(u)(1). Such agreements are defined broadly to include instruments "intended to create a binding legal obligation on the end user," including users of "commercial computer software." *Id*. 502.101.

Rule 8(f). As explained below, we assume for purposes of the cross-motions that the MSA became binding on FDA, but we need not resolve the issue.

Avue Has No Enforceable Rights Under Carahsoft's Contracts

We must also consider "as a merits issue . . . whether Avue is a party to—or otherwise has enforceable rights pursuant to, for example by being in privity with Carahsoft—[either of] the conceded procurement contract[s] (i.e., the MSA plus the FSS or the Task Order)." *Avue Technologies*, 96 F.4th at 1346.[8] We might have viewed such a claim as forfeited because Avue did not brief it, *cf. SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) ("[A]rguments not raised in the opening brief are waived."), but the mandate states that "all parties to th[e] appeal agree[d]" that the contention "was fairly presented to the Board." *Avue Technologies*, 96 F.4th at 1346.

Had we understood Avue to argue that it possessed rights under Carahsoft's FSS contract or under the FDA order placed with Carahsoft, we would have found it difficult to reconcile that position with Avue's consistent assertions that the MSA is "a freestanding obligation," "not Carahsoft's FSS contract," "a contract separate from the FSS," and "a standalone, separate contract between Avue and the FDA," and that "Carahsoft is not a party to the MSA" incorporated into Carahsoft's schedule contract.[9]

In any event, we reject this alternative merits theory. Avue "is not a contractor" named in the Carahsoft agreements "nor did [Avue] sign [a] contract" with either agency. *See El Malik v. Department of Veterans Affairs*, CBCA 6600, 20-1 BCA ¶ 37,536, at 182,275; *see also Avue Technologies*, 19-1 BCA at 181,706 ("Avue acknowledges that it is Carahsoft's subcontractor."). Avue cites no evidence—and we see none—of mutual intent between relevant parties to make Avue a joint or several contractor under either Carahsoft contract. *See, e.g.*, *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003) (requiring, inter alia, "mutuality of intent to contract"); 12 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 36:1 (4th ed. 2013). Instead, Avue aptly describes the MSA as running only between Avue and the end licensee. *See Avue Technologies*, 19-1 BCA at 181,706 ("Avue . . . argues that 'a party can enter two contracts concerning the same transaction . . . and [this] was done here' by FDA."). Avue's status as

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[8] We alter the Court's wording slightly and, we think, immaterially to reflect that "[t]he placement of an order" under the FSS "creates a new contract." *Kingdomware Technologies, Inc. v. United States*, 579 U.S. 162, 174 (2016).

[9] We also wonder but need not decide whether a claim that Avue has rights under a Carahsoft contract would be the "same claim" that Avue presented to FDA and GSA. *See, e.g.*, *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003).

a licensor of the product provides no basis to grant Avue's motion for summary judgment on entitlement. Subcontractors and "others that are [or may be] third-party beneficiaries" under a government contract "cannot avail themselves of the CDA provisions and appeal to the Board." *El Malik*, 20-1 BCA at 182,275; *see Erickson Air Crane Co. of Washington, Inc. v. United States*, 731 F.2d 810, 813–14 (Fed. Cir. 1984); *Kellogg Brown & Root Services, Inc*., ASBCA 59385, et al., 20-1 BCA ¶ 37,656, at 182,825; *see also* S. Rep. No. 95-1118, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5251 ("The additional problems of contract administration and program management that would arise if subcontractors were given direct access to the Government in [CDA] disputes and claims outweigh the benefit to be gained.").

Avue made a similar but different argument in the supplemental briefing on jurisdiction in 2021. There, Avue argued that the MSA is "related to" one or both of the Carahsoft contracts. *See Avue Technologies*, 22-1 BCA at 184,652–53 (rejecting the argument as a basis of CDA jurisdiction). We do not find Avue's "related to" argument to be relevant to the entitlement arguments raised in the cross-motions.

Avue and the agencies alike try to bring this case within the scope of *Park Properties Associates, L.P. v. United States*, 916 F.3d 998 (Fed. Cir. 2019). We do not find *Park Properties* to be applicable. There, "[t]he contracts at issue were executed in a two-tiered system. First, the government [agency] contracted with a public housing agency . . . . Second, the [latter agency] contracted with the private owners of rental housing . . . ." *Id*. at 1000. The *Park Properties* Court explained that in several prior cases, "our court and our predecessor court consistently held that [owners] that had not directly contracted with the government for housing projects did not have privity. . . . Based on these cases, we are compelled to conclude that there is likewise no privity here." *Id*. at 1004. The Court went on to reject four arguments by the owner-plaintiffs in support of finding them in privity with the Federal Government. *Id*. at 1004–06.

Avue cites *Park Properties* for the proposition that "privity of contract can exist in a tiered contracting scheme," despite the holding of that case, "when the conduct of the parties evinces a contractual relationship." This is a mere truism and envisions a case other than *Park Properties*. The agencies argue, for their part, that Avue cannot satisfy the test stated in *Park Properties* that "[t]o show privity," a non-prime contractor "must establish that: (1) the prime contractor was acting as a purchase agent for the government; (2) the agency relationship between the prime contractor and the government was established by clear contractual consent; and (3) the contract stated that the government would be directly liable to the vendors." 916 F.3d at 1004. The *Park Properties* Court cited this test, however, in summarizing *National Leased Housing Ass'n v. United States*, 105 F.3d 1423, 1435–37 (Fed. Cir. 1997); *see Park Properties*, 916 F.3d at 1004. In *National Leased Housing*, the would-

be contractors expressly argued that local housing authorities "acted as 'agents' for the United States." *National Leased Housing*, 105 F.3d at 1435.

The *National Leased Housing* test restated in *Park Properties* is, therefore, a test of privity via an alleged agency relationship. It has no application here, where the alleged obligation arises from license terms incorporated into the government contract under which FDA placed the order. "[B]road language in an opinion must be read in light of the issue before the court." *Northern States Power Co. v. United States*, 224 F.3d 1361, 1367 (Fed. Cir. 2000). This case does not present the issue of whether Carahsoft acted as a purchasing agent for the United States—any more than did *Specht* or the cases cited in *Specht* pose the question of whether software retailers acted as purchasing agents for private end users. *Park Properties* does not assist either Avue or the agencies in this dispute.

The MSA Is Not a Procurement Contract Under Which We May Grant Relief

Having decided that Avue lacks privity to enforce the Carahsoft procurement contracts, we consider whether Avue has the direct procurement contract with FDA that Avue alleges it has. The agencies raise arguments that—while not persuasive that the MSA is not binding—indicate that the MSA is not a "contract for . . . the procurement of" property or services that the Board has authority to address under the CDA. *See* 41 U.S.C. §§ 7102(a), 7105(e)(1)(B); *Institut Pasteur v. United States*, 814 F.2d 624, 627 (Fed. Cir. 1987) (aspects of a CDA contract include "a buyer-seller relationship and an expenditure of government funds").[10] The Court of Appeals did not decide whether the MSA, as a commercial software license, "constitutes a 'procurement contract.'" *Avue Technologies*, 96 F.4th at 1345. As a result, the mandate does not resolve the issue. *E.g.*, *Engel Industries*, 166 F.3d at 1383.

Deciding whether a claimant is a party to a given contract may present questions of fact. *E.g.*, *Avue Technologies*, 96 F.4th at 1344 (citing *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011) (allegation, not proof, of contract suffices for establishing jurisdiction)). Whether a particular contract that has been "pleaded . . . [is] covered by the CDA," however, "involves statutory interpretation, which is a question of law on which" the

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[10] Avue describes the MSA in its supplemental brief as a "lease[] of property and/or services." We described the MSA as involving "services." *Avue Technologies*, 22-1 BCA at 184,652 (quoting 41 U.S.C. § 7102(a)(2)). On reflection, we tend to think the MSA involves intangible personal property, a use license. *Cf. Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1367 (Fed. Cir. 2017) ("[L]easehold interests are items of personal property unless a statute commands otherwise."). The distinction does not matter, given that the CDA applies to contracts to procure "property, other than real property in being," or "services." 41 U.S.C. § 7102(a)(1), (2).

Board "must exercise its independent judgment." *Institut Pasteur*, 814 F.2d at 626 ("consider[ing] . . . the language and purpose of the CDA, its legislative history and associated regulations"); *see New Era Construction v. United States*, 890 F.2d 1152, 1157 (Fed. Cir. 1989) ("The Board's decision that it lacks jurisdiction . . . may be affirmed on the . . . ground . . . that *any possible contract* between New Era and [the agency] was not a contract over which the Board had jurisdiction under the [CDA]." (emphasis added)); *G.E. Boggs & Associates, Inc*., ASBCA 34841, et al., 91-1 BCA ¶ 23,515, at 117,906 (1990) (taking jurisdiction under Disputes clause of non-CDA contract), *transferred sub nom*. *G.E. Boggs & Associates, Inc. v. Roskens*, 969 F.2d 1023 (Fed. Cir. 1992) (finding no appellate jurisdiction absent a CDA contract and transferring to then-Claims Court under 28 U.S.C. § 1631 (1988)); *accord United Aeronautical Corp. v. United States Air Force*, 80 F.4th 1017, 1023 (9th Cir. 2023) ("[W]e [Ninth Circuit] look to the contours of the [CDA] administrative system to determine whether a particular claim is covered by the CDA and thus must be litigated in the Court of Federal Claims [sic]" rather than in district court.).

We do not read the mandate as requiring us to treat the question of whether the MSA is "covered by the CDA," *Institut Pasteur*, 814 F.2d at 626, as a merits issue rather than as a jurisdictional issue. In case we have misunderstood the mandate, we find that the MSA is not a procurement contract within our purview, whether or not the issue is jurisdictional. *Cf*. *Cobra Acquisitions, LLC v. Department of Homeland Security*, CBCA 7724, 23-1 BCA ¶ 38,433, at 186,783–85 (dismissing appeal for failure to state a claim where, inter alia, (1) "even if [agency] actions created a suretyship, we would not have jurisdiction under the CDA over this suretyship arrangement as it is not a contract for" procurement, and (2) another "agreement is not a procurement contract over which we have jurisdiction"); *id*. at 186,785 (Vergilio, J., concurring) ("What Cobra has failed to, and cannot, establish based upon the facts asserted is that an[y] alleged contract . . . is a procurement contract subject to the CDA, and that relief is available from this Board.").

We previously concluded "that the MSA standing alone lacks core aspects of a CDA procurement contract." *Avue Technologies*, 22-1 BCA at 184,652. We reach the same conclusion as a matter of law on summary judgment. We do not view the Government's receipt of the Avue license as, in itself, an "acquisition . . . of property or services." *See New Era Construction*, 890 F.2d at 1157 (CDA contract must be for "the acquisition by purchase, lease or barter, of property or services for the *direct benefit or use* of the Federal

Government" (quoting *Mayer*, HUD BCA 83-823-C20, 84-2 BCA ¶ 17,494, at 87,137)).[11] We explained:

> Most significantly, the Government has arranged to purchase and acquire ADS subscriptions from Carahsoft under FSS orders—not directly from Avue under the MSA. . . . [T]he acquisition by purchase of ADS occurs when an agency orders a subscription from Carahsoft, the schedule holder. . . . Applying the FAR definition of "contract,"[12] the MSA does not, by its own terms, obligate Avue to "furnish" any services *unless* the MSA is incorporated in a *separate* federal contract (which the MSA calls the "applicable contract") and does not obligate the Government to "pay" Avue directly "for" an ADS subscription under any circumstances. . . . An ordering agency owes payments under FSS orders only to the schedule contractor, Carahsoft. *See Kingdomware*[,] 579 U.S. [at] 174[.] For these reasons, a claim by Avue in its own capacity for breach of the MSA/EULA is not, regardless of its viability, a claim by a contractor under a CDA procurement contract that our Board may resolve.

Avue Technologies, 22-1 BCA at 184,652 (internal quotation marks omitted). The Government received conditional permission from Avue to use ADS. Carahsoft arranged for the license to be in place in order to sell ADS subscriptions on the FSS. Neither GSA nor FDA paid Avue. The Government did not procure the license from Avue.

Avue directed its legal arguments mainly toward showing that the MSA is binding on FDA. We assume that to be the case.[13] Our 2022 decision addressed and rejected Avue's contentions that the MSA is a CDA procurement contract because "it was Avue, not Carahsoft, that provided the services" and because "FDA specifically sought to procure a software license." *Avue Technologies*, 22-1 BCA at 184,652–53 (Board concluding, "FDA purchased the ADS subscription from Carahsoft and paid Carahsoft for it."). We adopt the

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[11] The quoted italics in *New Era Construction* originated in *Mayer*. We do not find the words "direct benefit or use" to be significant in this case. The phrase has been used to distinguish contracts from grants and cooperative agreements. *E.g.*, *Delta State University v. Department of Justice*, CBCA 6768, 20-1 BCA ¶ 37,612, at 182,564; *Latifi Shagiwall Construction Co.*, ASBCA 58872, 15-1 BCA ¶ 35,937, at 175,633.

[12] "*Contract* means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them." 48 CFR 2.101.

[13] Because we assume an express license, we need not address Avue's alternative arguments for an implied license.

same reasoning now. We hold that we lack statutory jurisdiction to address the subject matter of these appeals. Alternatively, if the MSA's status as a procurement contract is not a jurisdictional issue, we deny relief on the merits because the MSA is not a procurement contract under which the CDA authorizes us to grant relief.[14]

We are aware that Avue raised before the Federal Circuit a new argument that 48 CFR 552.212-4(w)(1)(iv), discussed above (providing, inter alia, that an aggrieved "licensor . . . shall pursue its rights under the Contract Disputes Act"), establishes that "the Board has jurisdiction to hear Avue's breach claim. That clause expressly provides the relief that Avue seeks: the recognition that a software licensor, such as Avue, can bring a breach of contract action directly against a government agency that breaches its EULA." Opening Brief for Appellant at 37, *Avue Technologies Corp. v. Secretary of Health & Human Services*, No. 22-1784 (Fed. Cir. Aug. 15, 2022). We address this argument for the sake of completeness. We do not agree that a regulation can create CDA jurisdiction that does not otherwise exist. *E.g.*, *ECC International Constructors, LLC v. Secretary of the Army*, 79 F.4th 1364, 1374 (Fed. Cir. 2023) ("Congress has not adopted the full scope of the FAR definition [of 'claim']."); *cf. Florida Power & Light Co. v. United States*, 307 F.3d 1364, 1370–71 (Fed. Cir. 2002) (contract language cannot create jurisdiction not authorized by CDA). Nor, in any event, do we read the GSA clause as saying that a vendor-licensor may assert a claim directly. A subcontractor's "rights under" the CDA may include pursuing a pass-through claim in the name of the prime contractor. *E.g.*, *International Technology Corp. v. Winter*, 523 F.3d 1341, 1347–48 (Fed. Cir. 2008); *E.R. Mitchell Construction Co. v. Danzig*, 175 F.3d 1369, 1371 (Fed. Cir. 1999).. A natural reading of the GSA clause is that it refers to pass-through claims by subcontractor-licensors. *E.g.*, *immixTechnology, Inc. v. Department of the Interior*, CBCA 5866, 22-1 BCA ¶ 37,999 (2020).

Also for completeness, we reject again Avue's argument that we have jurisdiction because the MSA is "related to" Carahsoft's CDA contracts. "No 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." *Avue Technologies*, 22-1 BCA at 184,653.

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[14] Our alternative holding applies equally to the express terms of the MSA and to any implied duty of good faith and fair dealing under the MSA.

Decision

We **DISMISS FOR LACK OF JURISDICTION** the appeals; alternatively, if the issue of whether the MSA is a CDA procurement contract is not jurisdictional, we grant the agencies' motion for summary judgment, deny Avue's motion for partial summary judgment, and **DENY** the appeals.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge