

# In the United States Court of Federal Claims

No. 00-308C  
(Filed August 23, 2002)

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CORE CONCEPTS OF FLORIDA, \*  
INCORPORATED, \*

Plaintiff, \*

v. \*

THE UNITED STATES, \*

Defendant. \*

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## ORDER

This litigation is premised on the March 18, 1999, termination of a firm fixed-price requirements contract, consisting of five option years, awarded to plaintiff on June 10, 1997 by UNICOR, a wholly-owned corporation of the United States Government.

By a 13-page Order, filed October 16, 2001, certain breach of contract claims pleaded by plaintiff were dismissed, and by a separate Pretrial Order, also filed on October 16, 2001, comprehensive pretrial procedures were prescribed and scheduled with respect to the termination settlement claims remaining for resolution. The parties proceeded to comply with the October 16, 2001 Pretrial Order and substantial discovery and audit activity has been undertaken.

On July 18, 2002, defendant filed a Motion to Dismiss For Lack Of Subject Matter Jurisdiction And For A Stay Of Discovery. Plaintiff's opposition was filed on July 31, 2002 and defendant's reply was filed on August 19, 2002.

Defendant's motion to dismiss was initiated by the ruling in *Aaron v. United States* 51 Fed. Cl. 690, 691-94 (2002) that UNICOR is a non-appropriated fund instrumentality ("NAFI"). If UNICOR is a NAFI, jurisdiction in this court over the

contract termination settlement claims presented would be lacking. This is because UNICOR is not listed in 28 U.S.C. 1491(a)(1) as a NAFI whose contract “. . . shall be considered an express or implied contract with the United States.” This language was added to the Tucker Act in 1970 to close the “loop-hole” in the Act’s coverage which resulted from the decision in *Standard Oil Co. of California v. Johnson* 316 U.S. 481 (1942) and subsequent Court of Claims decisions denying Tucker Act jurisdiction over claims brought against NAFIs. *United States v. Hopkins* 427 U.S. 123, 125-126 (1976). The solution Congress reached was to list in the Tucker Act the specific National Aeronautics and Space Administration (NASA) and military NAFIs, whose contracts would be deemed to be “with the United States” and, therefore, covered by the Tucker Act, *McDonald’s Corp. v. United States* 926 F.2d 1126, 1131-33 (Fed. Cir. 1991).

As UNICOR is not a NASA or a military organization, the 1970 language added to 28 U.S.C. 1491 (a)(1) cannot provide Tucker Act coverage, so jurisdiction over this litigation can be present only if UNICOR is not a NAFI. Upon review of the opinion in *Aaron*, 51 Fed. Cl. 693-94, and the statutes and legislative history set forth in the parties’ briefs it is evident Congress has decreed that UNICOR is to operate without appropriated funds, i.e., its operation employs funds derived from the sale of products or by-products by UNICOR or services of federal prisoners. Congress has separated UNICOR from general federal revenues. *See Furash & Co. v. United States* 252 F.3d 1336, 1339 (Fed. Cir. 2001); *Butz Engineering Corp. v. United States* 204 Ct. Cl. 561, 572, 499 F.2d 619, 625 (1974); *Kyer v. United States*, 177 Ct. Cl. 747, 751, 369 F.2d 714, 718 (1966), *cert. denied*, 387 U.S. 929 (1967). In this circumstance UNICOR is a NAFI.

Plaintiff’s argument (opposition brief pp. 27-28), that the Contract Disputes Act’s requirement for payment of judgments from the permanent indefinite judgment fund (31 U.S.C. 1304, 41 U.S.C. 612 (a)) with reimbursement by the agency whose appropriations were used for the contract (41 U.S.C. 612 (c)) confirms this court’s jurisdiction over the UNICOR contract claims plaintiff has pleaded, is not valid. With the exception of those listed in 28 U.S.C. 1491(a)(1), the judgment fund is not used to satisfy the obligations of NAFIs. *Lee by Lee v. United States* 129 F.3d 1482, 1484 (Fed. Cir. 1997).

Without subject matter jurisdiction, proceedings cannot go forward in this matter and the defendant's motion to dismiss must be granted. With a dismissal, the motion to stay discovery becomes moot.

Accordingly, it is **ORDERED** that because the contracting party, UNICOR, is a NAFI, but not one included among those named in 28 U.S.C. 1491(a)(1), jurisdiction over this litigation is lacking and the Defendant's Motion To Dismiss is **GRANTED**, with no costs to be assessed.



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James F. Merow  
Senior Judge