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## 2011 Government Contract Law Decisions of the Federal Circuit

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# 2011 Government Contract Law Decisions of the Federal Circuit

**Keywords**

Government Contract Law

# 2011 GOVERNMENT CONTRACT LAW DECISIONS OF THE FEDERAL CIRCUIT\*

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\* The views expressed in this Article are solely those of the authors.

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## INTRODUCTION

Over the past year, the United States Court of Appeals for the Federal Circuit issued a relatively small body of new precedential opinions in the field of government contracts. Indeed, during 2011, the court issued only twenty-two precedential opinions in this area, seven of which were in the “non-mainstream” context of *Winstar* and spent nuclear fuel (SNF) litigation.<sup>1</sup> While it is not possible to draw many broad conclusions from the relatively small number of remaining decisions, there were four main developments that likely will be of interest to practitioners in the field.

First, the number of bid protest decisions published by the Federal Circuit in 2011 continued to dwindle as compared to recent years. In the past year, the Federal Circuit published only two bid protest decisions, *Allied Technology Group, Inc. v. United States*<sup>2</sup> and *Turner Construction Co. v. United States (Turner III)*.<sup>3</sup> In comparison, in 2010,

1. See Steven L. Schooner, *A Random Walk: The Federal Circuit's 2010 Government Contracts Decisions*, 60 AM. U. L. REV. 1067, 1068 (2011) (characterizing the *Winstar* cases and spent nuclear fuel cases as “non-mainstream”).

2. 649 F.3d 1320 (Fed. Cir. 2011).

3. 645 F.3d 1377 (Fed. Cir. 2011). Because this was the third opinion in the case's history, this Article refers to this opinion as *Turner III*.

the Federal Circuit published three bid protest decisions,<sup>4</sup> and, in 2009, it published seven bid protest decisions.<sup>5</sup> This trend is consistent with that of the Comptroller General, where the surge in the number of bid protests filed annually between 2007 and 2010 flattened in 2011.<sup>6</sup> The reduction in bid protest decisions by the Federal Circuit may be a function of the Government's recent record of successfully defending its procurement decisions before the Court of Federal Claims (the COFC or Claims Court) and in the Federal Circuit. Indeed, of the ten bid protest decisions issued by the Federal Circuit in 2009 and 2010, the Federal Circuit's disposition favored the Government in all but one of these cases.<sup>7</sup>

In keeping with this trend, both of the Federal Circuit's 2011 bid protest decisions favored the Government. Both *Allied* and *Turner III* involved proceedings that commenced at the COFC following an earlier bid protest before the Government Accountability Office (GAO).<sup>8</sup> In *Allied*, the COFC agreed with the decision of the GAO, which denied the earlier bid protest, and the Federal Circuit affirmed.<sup>9</sup> Conversely, in *Turner III*, both the COFC and the Federal Circuit effectively overruled the GAO's earlier decision by ruling that it was unreasonable for the Government to have followed the GAO's recommendations sustaining the original protest.<sup>10</sup> Given the deference the COFC and Federal Circuit usually give to GAO recommendations,<sup>11</sup> this outcome is unusual, and it seems unlikely

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4. See *Schooner*, *supra* note 1, at 1085–89.

5. See Daniel P. Graham et al., *2009 Government Contract Law Decisions of the Federal Circuit*, 59 AM. U. L. REV. 991, 993 (2010).

6. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-199SP, COMPTROLLER GENERAL'S REPORT TO CONGRESS 4 (2011), available at <http://www.gao.gov/special.pubs/bidpro11.pdf> (reporting that the number of bid protests filed in the years 2007–2010 increased by 6%, 17%, 20% and 16%, respectively, but that in 2011, the number of bid protests filed increased by only 2%). Similarly, the number of bid protests decided on their merits decreased from 441 in 2010 to 417 in 2011. *Id.*

7. See *Schooner*, *supra* note 1, at 1085–89 (discussing the Federal Circuit's three bid protest decisions in 2010 and noting that the court affirmed the COFC's denial of the protest in two cases: *Savantage Financial Services, Inc. v. United States*, 595 F.3d 1282 (Fed. Cir. 2010), and *PAI Corp. v. United States*, 614 F.3d 1347 (Fed. Cir. 2010)); Graham et al., *supra* note 5, at 993 (noting the Federal Circuit's decision in each of its seven 2009 bid protest decisions "favored the Government and emphasized the need for judicial restraint and deference to procuring officials"). Of the bid protest decisions issued by the Federal Circuit in 2009 and 2010, the only one where the protester enjoyed some degree of success was *Resource Conservation Group v. United States*, 597 F.3d 1238 (Fed. Cir. 2010), where the Federal Circuit held that the COFC improperly dismissed a protest for lack of jurisdiction and remanded the protest to the COFC for further proceedings. *Id.* at 1247.

8. *Turner III*, 645 F.3d at 1379; *Allied Tech. Grp., Inc. v. United States*, 649 F.3d 1320, 1322 (Fed. Cir. 2011).

9. *Allied*, 649 F.3d at 1322.

10. *Turner III*, 645 F.3d at 1379.

11. *Id.* at 1384.

that *Turner III* will usher in a new era of Federal Circuit reversals of the GAO.<sup>12</sup>

Second, 2011 saw an unusually large number of cases addressing the jurisdiction of the Federal Circuit, the COFC, and the Boards of Contract Appeals (the Boards). In the majority of these cases, the Federal Circuit took a broad view of the respective jurisdictions of these tribunals over government contract disputes.<sup>13</sup> For example, in *Slattery v. United States*,<sup>14</sup> the Federal Circuit, in an en banc decision, held that the Tucker Act<sup>15</sup> grants the COFC jurisdiction to entertain suits against a non-appropriated fund instrumentality (NAFI), the Federal Deposit Insurance Corporation (FDIC), and expressly disavowed all of the circuit's prior case law to the contrary.<sup>16</sup> In doing so, the Federal Circuit explained that, under the Tucker Act, jurisdiction is "not [based on] how the government entity is funded or its obligations met, but [on] whether the government entity was acting on behalf of the government."<sup>17</sup> In *Todd Construction, L.P. v. United States*,<sup>18</sup> the Federal Circuit took a similarly broad view of its jurisdiction; the *Todd Construction* court held that the COFC has the authority, pursuant to the Tucker Act and the Contract Disputes Act (CDA),<sup>19</sup> to hear challenges to agency-issued performance evaluations that are mandated by the Federal Acquisition Regulation (FAR).<sup>20</sup> In *Holmes v. United States*,<sup>21</sup> the Federal Circuit settled a longstanding split among the decisions of the COFC as well as the other circuit courts of appeals regarding whether the COFC has jurisdiction under the Tucker Act to hear claims for an alleged breach of a Title VII<sup>22</sup>

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12. See *infra* note 55 and accompanying text (providing context to suggest a narrow interpretation of the *Turner III* decision).

13. See, e.g., *Todd Constr., L.P. v. United States*, 656 F.3d 1306, 1311 (Fed. Cir. 2011) (broadly construing the COFC's jurisdiction on the basis of congressional intent); *Slattery v. United States*, 635 F.3d 1298, 1301 (Fed. Cir. 2011) (en banc) (recognizing that "Tucker Act jurisdiction does not depend on and is not limited by whether the government entity receives or draws upon appropriated funds").

14. 635 F.3d 1298 (Fed. Cir. 2011) (en banc).

15. 28 U.S.C. §§ 1346(a), 1491 (2006).

16. *Slattery*, 635 F.3d at 1301 (holding that any "[c]onflicting precedent shall no longer be relied upon").

17. *Id.* This holding was met with vigorous dissent by four of the judges, who criticized the majority's holding as "eviscerat[ing]" more than a half century of case law holding that the Tucker Act's waiver of sovereign immunity does not apply to contracts entered into by NAFIs. *Id.* at 1321 (Gajarsa, J., dissenting); see *infra* Part II.A (discussing the *Slattery* dissent in more detail).

18. 656 F.3d 1306 (Fed. Cir. 2011).

19. 41 U.S.C.A. §§ 7101-09 (West 2011) (formerly codified at 41 U.S.C. §§ 601-13 (2006)).

20. *Todd Constr.*, 656 F.3d at 1308. The Federal Acquisition Regulation is found at Title 48 of the Code of Federal Regulations.

21. 657 F.3d 1303 (Fed. Cir. 2011).

22. 42 U.S.C. §§ 2000e-2000e-17 (2006).

settlement agreement.<sup>23</sup> Again, the Federal Circuit resolved this dispute in favor of finding jurisdiction over these claims.<sup>24</sup> Finally, in *Engage Learning, Inc. v. Salazar*,<sup>25</sup> the court held that, under the CDA, a contractor is not required to prove that it actually had either an express or an implied-in-fact contract to establish jurisdiction.<sup>26</sup> Rather, the CDA “requires no more than a non-frivolous *allegation* of a contract with the government” to establish the Boards’ jurisdiction over a dispute.<sup>27</sup>

Other decisions, however, took a narrower view of the court’s jurisdiction. For example, in what appears to be the first published Federal Circuit case applying the Supreme Court’s recent decision in *United States v. Tohono O’Odham Nation*,<sup>28</sup> the Federal Circuit, in *Trusted Integration, Inc. v. United States*,<sup>29</sup> partially reversed the COFC’s dismissal of a plaintiff’s case pursuant to 28 U.S.C. § 1500, “which generally prohibits simultaneous actions against the government in separate forums” and “was enacted to prevent a claimant from seeking recovery in district court and the Court of Claims for the same conduct pleaded under different legal authorities.”<sup>30</sup> The Federal Circuit explained that, “[a]fter *Tohono*, it is clear that [the court] must: (1) not view § 1500 narrowly; (2) focus only on whether two claims have the same operative facts and not on the relief requested; and (3) determine whether two suits share substantially the same operative facts.”<sup>31</sup> Applying these guidelines, the Federal Circuit agreed with the Government that the COFC properly

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23. *Holmes*, 657 F.3d at 1306.

24. *Id.*; see also *Tucker Act Provides Jurisdiction Over Breach of Settlement Agreement*, *Fed. Cir. Holds*, 53 GOV’T CONTRACTOR ¶ 305, Sept. 21, 2011, at 10 [hereinafter *Tucker Act Provides Jurisdiction*] (claiming that the *Holmes* decision is supported by Federal Circuit precedent); *COFC Has Exclusive Jurisdiction Over Claim Alleging Breach of Settlement Agreement*, 41 GOV’T CONTRACTOR ¶ 420, Oct. 6, 1999, at 16 [hereinafter *COFC Has Exclusive Jurisdiction*] (discussing *Puerto Rico v. United States*, 44 Fed. Cl. 618 (1999), and noting that, in that case, the COFC had exclusive jurisdiction because the plaintiff was challenging the breach of a settlement agreement and not the authority to actually settle). Moreover, the *Holmes* court favored a broad view of the COFC’s jurisdiction, by holding that the “accrual suspension rule” applies to such claims, thus permitting the court to hear claims for breaches of Title VII agreements that might otherwise be untimely. *Holmes*, 657 F.3d at 1322; see also *infra* Part II.D (discussing the court’s holding regarding the “accrual suspension rule”).

25. 660 F.3d 1346 (Fed. Cir. 2011).

26. *Id.* at 1353.

27. *Id.*

28. 131 S. Ct. 1723 (2011).

29. 659 F.3d 1159 (Fed. Cir. 2011).

30. *Id.* at 1163 (citing *Tohono*, 131 S. Ct. at 1728).

31. *Id.* at 1164.

dismissed two out of the plaintiff's three claims as duplicative with claims brought before the district court.<sup>32</sup>

While it may be unwise to draw too strong of a conclusion from such a small number of jurisdictional cases decided in 2011, they do seem to suggest, on balance, the Federal Circuit's willingness to protect its role, as well as the role of the COFC and the Boards, as designated tribunals for the resolution of government contract disputes.

Third, among the cases decided in 2011, *Todd Construction* and *Slattery* seem most likely to affect the composition of the docket of the COFC and the Federal Circuit going forward. Indeed, for government contractors, the importance of receiving favorable performance evaluations cannot be understated, as a contractor's prior performance is often a critical element in determining whether the contractor will receive future work from the Government. Given the importance of the performance evaluation after *Todd Construction*, legal challenges to performance evaluations are likely to be more common, particularly where these challenges are added as secondary claims to a complaint primarily seeking monetary relief pursuant to the CDA. Moreover, following the court's en banc holding in *Slattery*, an increase in cases before the COFC and the Federal Circuit involving NAFIs also seems likely.

Finally, the past year saw a substantial increase in Federal Circuit decisions addressing the calculation of damages in the long-running saga of SNF cases. Previous decisions of the Federal Circuit established the Government's liability for failing to begin accepting SNF from the nation's nuclear utilities,<sup>33</sup> and the court's decisions this year focused primarily on the proper calculation of the quantum of damages owed by the Government to the utilities for breach of the Government's contractual obligation to begin accepting SNF by January 31, 1998.<sup>34</sup>

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32. *Id.* at 1164–65. Similarly, in *Systems Development Corp. v. McHugh*, 658 F.3d 1341 (Fed. Cir. 2011), the Federal Circuit affirmed the decision of the Armed Services Board of Contract Appeals that it lacked jurisdiction over a monetary claim that was untimely. *Id.* at 1342. While this decision did not break any substantial new legal ground, it demonstrated the importance of ensuring that claims are timely submitted and appealed where necessary.

33. *See, e.g., S. Nuclear Operating Co. v. United States*, 637 F.3d 1297, 1299 (Fed. Cir. 2011) (characterizing the Federal Circuit's previous decision in *Nebraska Public Power District v. United States*, 590 F.3d 1357 (Fed. Cir. 2010) (en banc)); *see also infra* note 543 and accompanying text (discussing the Nuclear Waste Policy Act of 1982 and the government's contractual duty to begin receiving SNF by January 31, 1998).

34. *See, e.g., S. Nuclear Operating*, 637 F.3d at 1302 (addressing issues related to the calculation of damages).



Many of the issues raised in these decisions are specific to the Standard Contract between the Government and the nuclear utilities for the management of SNF, and most government contracts counsel will find them of little, if any, utility.<sup>35</sup> Other issues in these decisions, however, relate to the calculation of damages generally and may be of broader interest. For example, in *Boston Edison Co. v. United States*,<sup>36</sup> the Federal Circuit held that because damages for partial breach may only be recovered to the extent that they are actually incurred as of the time of trial, damages for partial breach cannot be recovered under a diminution of value theory when assets are sold to a third party.<sup>37</sup> In *Energy Northwest v. United States*,<sup>38</sup> the Federal Circuit held that when the Government breaches a contract, the Government is immune from damages for interest and financing expenses incurred by the contractor to mitigate the breach absent a changes clause in the contract.<sup>39</sup> Moreover, several of the 2011 SNF decisions reaffirmed the recoverability of indirect overhead expenses “by whatever means available,” so long as the cumulative result is a reasonable certainty that the awarded costs were actually caused by the breach.<sup>40</sup>

This Article discusses twenty-one of the twenty-two precedential decisions that were issued in 2011.<sup>41</sup> The decisions are grouped into

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35. See, e.g., *id.* at 1303, 1305 (addressing the need for remand where neither the utility nor the Government had introduced evidence concerning damages using the SNF acceptance rates that were mandated by the Federal Circuit in *Carolina Power & Light Co. v. United States*, 573 F.3d 1271, 1274 (Fed. Cir. 2009), as well as the Government’s ability to invoke the “Unavoidable Delays” clause of the Standard Contract following the D.C. Circuit’s mandamus order in *Northern States Power Co. v. Department of Energy*, 128 F.3d 754, 761 (D.C. Cir. 1997)); see also *Bos. Edison Co. v. United States*, 658 F.3d 1361, 1370 (Fed. Cir. 2011) (addressing whether fees paid by the utilities to the Nuclear Regulatory Commission were recoverable as damages); *Dairyland Power Coop. v. United States*, 645 F.3d 1363, 1370–71 (Fed. Cir. 2011) (addressing the proper calculation of damages based on a hypothetical “exchange market” for SNF removal allocations if the Government had not breached the Standard Contract). The Federal Circuit’s resolution of these issues will likely have little impact for government contracts counsel outside of the area of SNF.

36. 658 F.3d 1361 (Fed. Cir. 2011).

37. *Id.* at 1366.

38. 641 F.3d 1300 (Fed. Cir. 2011).

39. *Id.* at 1311–13; see also *Bos. Edison*, 658 F.3d at 1370–72 (denying the plaintiff’s costs of securing capital because it was unable to demonstrate that the Standard Contract had any provisions waiving the no-interest rule).

40. *Dairyland Power*, 645 F.3d at 1373–74; *Energy Nw.*, 641 F.3d at 1309; see also *S. Cal. Edison Co. v. United States*, 655 F.3d 1319, 1322 (Fed. Cir. 2011) (affirming the COFC’s award of indirect overhead costs).

41. This Article does not discuss the Federal Circuit’s decisions in *Stockton East Water District v. United States*, 638 F.3d 781 (Fed. Cir. 2011). In *Stockton*, the Federal Circuit granted in part and denied in part the Government’s petition for a panel rehearing of its earlier decision in *Stockton East Water District v. United States*, 583 F.3d 1344 (Fed. Cir. 2009). *Stockton*, 638 F.3d at 785. See generally Graham et al., *supra* note

four categories: (1) bid protests and contract formation issues; (2) contract performance disputes; (3) *Winstar* cases; and (4) spent nuclear fuel cases.

### I. BID PROTESTS AND CONTRACT FORMATION

The number of bid protest decisions published by the Federal Circuit in 2011 continued to dwindle as compared with those published over the previous couple of years. In keeping with this trend, the Federal Circuit published only two bid protest decisions in 2011, *Allied* and *Turner III*. In comparison, in 2010, the court published three bid protest decisions,<sup>42</sup> and in 2009, it published seven bid protest decisions.<sup>43</sup> This trend is consistent with the one experienced at the Comptroller General where the surge that was experienced in the number of bid protests filed annually between 2007 and 2010 flattened in 2011.<sup>44</sup> In 2011, the Federal Circuit published only one decision relating to contract formation, *Chattler v. United States*.<sup>45</sup>

In all three cases, the Federal Circuit affirmed the decision of the U.S. Court of Federal Claims. In each of the two bid protest cases, the proceeding commenced at the COFC following an earlier bid protest filed with the GAO.<sup>46</sup> In *Allied*, the COFC agreed with the decision of the GAO, which denied the earlier bid protest, and the Federal Circuit affirmed.<sup>47</sup> Conversely, in *Turner III*, the COFC and the Federal Circuit both disagreed with the GAO's decision that sustained an earlier bid protest, both ruling that it was unreasonable for the Government to follow the GAO's recommendations in its decision on the earlier bid protest.<sup>48</sup>

In *Turner III*, the Government lost the two rounds of the prior legal proceedings. First, the GAO sustained the bid protest filed by Turner's competitors and recommended termination of the contract awarded to Turner.<sup>49</sup> Then, after the Government accepted those

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5, at 1042-43 (discussing the 2009 decision).

42. See *Schooner*, *supra* note 1, at 1085-89 (discussing the resolution of the 2010 bid protest cases and the potential impact on government interests).

43. See *Graham et al.*, *supra* note 5, at 993 (noting that all seven 2009 bid protests favored the government's position).

44. See *supra* note 6 and accompanying text.

45. 632 F.3d 1324 (Fed. Cir. 2011).

46. *Turner Constr. Co. v. United States (Turner III)*, 645 F.3d 1377, 1379 (Fed. Cir. 2011); *Allied Tech. Grp., Inc. v. United States*, 649 F.3d 1320, 1322 (Fed. Cir. 2011).

47. *Allied*, 649 F.3d at 1322.

48. *Turner III*, 645 F.3d at 1379.

49. *Id.* at 1383.

recommendations and terminated Turner's contract, the COFC entered a judgment in favor of Turner in its bid protest against the Government's decision to terminate its contract, finding that the Government's decision to accept the GAO's recommendations was arbitrary and capricious.<sup>50</sup> Finally, the Federal Circuit dismissed the appeal and affirmed the COFC's judgment.<sup>51</sup> Notwithstanding the Government's consecutive losses, ultimately, the status of Turner's Government contract has come full circle and the original intention of the Government to award the contract to Turner has been vindicated.<sup>52</sup> In the final analysis, therefore, in all of its decisions regarding bid protests and contract formation matters, the Federal Circuit approved the Government's actions, at least as originally conceived.

#### A. Turner Construction Co. v. United States (Turner III)

In *Turner III*, a case addressing a FAR Organizational Conflict of Interest (OCIs) issue, the Federal Circuit affirmed a COFC decision<sup>53</sup> that overturned the GAO ruling in two earlier bid protests.<sup>54</sup> The COFC's decision held that the GAO's recommendations, and the Government's subsequent decision to adopt them, were unreasonable, thus departing from a longstanding policy of deference to GAO recommendations.<sup>55</sup> Because of the many twists and turns in this saga, the multitude of parties involved and the fact-specific nature of the OCI analysis,<sup>56</sup> some background is necessary.

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50. *Id.*

51. *Id.* at 1388.

52. *Id.* (reinstating Turner's military contract, which the Army had overturned but upon further examination found advantageous to its interests).

53. *Turner Constr. Co. v. United States (Turner I)*, 94 Fed. Cl. 561 (2010), *appeal dismissed in part* by 407 F. App'x 478 (Fed. Cir. 2011), *aff'd*, 645 F.3d 1377 (Fed. Cir. 2011).

54. *Id.* at 581 (disagreeing with the GAO rulings in *B.L. Harbert-Brasfield & Gorrie, JV*, B-402229, 2010 CPD ¶ 69 (Comp. Gen., Feb. 16, 2010) and *McCarthy/Hunt, JV*, B-402229.2, 2010 CPD ¶ 68 (Comp. Gen., Feb. 16, 2010)).

55. *Id.* at 586. As explained by outside counsel for the successful plaintiff-appellee, however, the Federal Circuit's decision in this case should not be considered a precedent allowing federal agencies more latitude in declining to follow GAO decisions; rather, the Federal Circuit's decision should be understood as limited to its own specific facts consistent with the fact-specific nature of the GAO's review of OCI issues. See *Winning Attorney Discusses Federal Circuit's OCI Ruling in Turner Construction Case*, 96 FED. CONT. REP. (BNA) No. 414 (Oct. 25, 2011) (interviewing one of the attorneys who successfully represented Turner Construction regarding the implication of the Federal Circuit's decision).

56. FAR 9.505, which lays down the general OCI rules, states: "Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract." FAR 9.505 (2011); see also *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1382 (Fed. Cir. 2009) (citing FAR 9.505 and noting that it "recognizes that the identification of OCIs and the evaluation of mitigation

In June 2008, the U.S. Army Corps of Engineers (the Army) issued a two-phased solicitation to design and build a Government hospital at Fort Benning, Georgia.<sup>57</sup> At the conclusion of Phase I, the Army selected three offerors for submitting Phase II proposals: (1) B.L. Harbert-Brasfield & Gorrie, JV (Harbert/Gorrie); (2) McCarthy/Hunt, JV (McCarty/Hunt); and (3) Turner Construction Company (Turner).<sup>58</sup>

Turner proposed that an architectural and engineering firm called Ellerbe Becket (EB) serve as a subcontractor for the design portion of the contract.<sup>59</sup> In June 2007, prior to issuing the solicitation, the Army entered into a contract for design-related technical assistance in connection with the solicitation with a joint venture consisting of two companies: (1) Hayes, Seay, Mattern & Mattern (HSMM); and (2) Hellmuth, Obata & Kassbaum, Inc. (HOK) (collectively HSMM/HOK).<sup>60</sup> This contract called for both the preparation of the hospital design concept and a technical review of the proposals to be submitted to the Government.<sup>61</sup>

On September 28, 2009, the Army made an award to Turner.<sup>62</sup> Following this award, both McCarthy/Hunt and Harbert/Gorrie filed bid protests with the GAO making various OCI-related allegations; these allegations were prompted by the fact that, during the solicitation process, EB (Turner's subcontractor) engaged in discussions with HSMM's parent company, AECOM, regarding a

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proposals are fact-specific inquiries"). See generally, Graham et al., *supra* note 5, at 998 (discussing the contribution of the *Axiom* decision to the field of government contract law).

57. Turner Constr. Co. v. United States (*Turner III*), 645 F.3d 1377, 1379 (Fed. Cir. 2011); see 10 U.S.C. § 2305a (2006) (describing the two-phased solicitation procedure); see also 41 U.S.C. § 253m (2006) (including similar provisions for non-military agencies); FAR Subpart 36.3 (2011) (implementing 10 U.S.C. § 2305a and 41 U.S.C. § 253m). The two-phase design-build procedures may be accomplished through two consecutive solicitations or one solicitation covering both phases. FAR 36.303. Phase I describes the scope of work and includes various technical (but not cost or price-based) evaluation factors and a statement regarding the maximum number of offerors that will be selected to submit Phase II proposals. *Id.* at 36.303-1. Phase II includes a second round of proposals limited to the offerors selected in Phase I; it involves a new set of evaluation factors that cover both cost or price-related factors, as well as technical factors. *Id.* at 36.303-2. At the conclusion of Phase II, one offeror is selected for award based on FAR Part 15 procedures. *Id.* See generally Kurt A. Didier, *Construction Contracting and the New Two-Phase Design-Build Selection Procedures: Balancing Efficiency with Full and Open Competition*, 27 PUB. CON. L.J. 589 (1998) (analyzing the effect of two-phase contracting procedures on the field of military construction law).

58. *Turner III*, 645 F.3d at 1380.

59. *Id.*

60. *Id.* at 1379-80.

61. *Id.*

62. *Id.* at 1380.

possible merger.<sup>63</sup> HSMM was a member of the HSMM/HOK joint venture, which the Army had retained to assist with the technical evaluation of the competing proposals in the project.<sup>64</sup> The discussions between AECOM and EB were successful and, in October 2009, the companies completed a merger.<sup>65</sup>

On February 16, 2010, the GAO decided to sustain the two protests,<sup>66</sup> finding that Turner/EB had an “unequal access to information” and that there had also been a “biased ground rules” OCI,<sup>67</sup> consequently, it recommended that the Army proceed with the procurement after eliminating the Turner/EB team from the competition.<sup>68</sup> On March 19, 2010, the Army announced that it had accepted the GAO recommendations and eliminated the Turner/EB team from the procurement.<sup>69</sup> Turner then filed a bid protest with

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63. *Id.*

64. *Id.* at 1379–80.

65. *Id.* at 1381.

66. See *Turner Constr. Co. v. United States (Turner I)*, 94 Fed. Cl. 561, 563 (2010), *appeal dismissed in part* by 407 F. App'x 478 (Fed. Cir. 2011), *aff'd*, 645 F.3d 1377 (Fed. Cir. 2011).

67. According to FAR Subpart 9.5, there are three groups of OCI situations. See generally FAR 2.101 (explaining that an organizational conflict of interest arises when “a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage”). The first group consists of situations in which a contractor obtains access to nonpublic information as a result of its performance of a Government contract and the information may provide that contractor a competitive advantage in a later competition for another Government contract. FAR 9.505-4(a); see also Keith R. Szeliga, *Conflict and Intrigue in Government Contracts: A Guide to Identifying and Mitigating Organizational Conflicts of Interests*, 35 PUB. CONT. L.J. 639, 648–49 (2006) (classifying this group of cases as “unequal access to information” cases and stating that the main OCI concern in this line of situations is the risk of the contractor gaining a competitive advantage). The second group consists of situations in which a contractor, as part of the performance of one Government contract, has set the ground rules for another Government contract, such as through the development of the statement of work or specifications for that other contract. FAR at 9.505-2(a)-(b); see also Szeliga, *supra*, at 651–52 (labeling these situations as the “biased ground rules” group of cases, and suggesting that the main OCI concern in these cases is that the contractor may skew the competition, whether deliberately or not, in its own favor). The third group of OCI situations consists of cases where a contractor’s work under one Government contract could entail its evaluating itself or a competitor, either through an assessment of performance under another contract or an evaluation of offers. FAR at 9.505-3; see also Szeliga, *supra*, at 660 (characterizing this final group as “impaired objectivity” cases, and noting that the OCI concern in these cases is that the contractor’s ability to provide impartial advice to the Government will be impaired). See generally Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONT. L.J. 25 (2005) (suggesting reasons for the increased frequency of OCIs in recent times and surveying relevant case law in the U.S. federal procurement system).

68. B.L. Harbert-Brasfield & Gorrie, JV, B-402229, 2010 CPD ¶ 69, at 11 (Comp. Gen. Feb. 16, 2010).

69. *Turner I*, 94 Fed. Cl. at 563.

the COFC on March 31, 2010.<sup>70</sup> On July 16, 2010, the COFC held that the Army acted arbitrarily and capriciously in implementing the GAO's decision because the trial court found that the GAO's decision itself was irrational. Accordingly, the trial court granted Turner injunctive relief, which included reinstatement of Turner's contract.<sup>71</sup> On August 5, 2010, consistent with the COFC's decision, the Army reinstated Turner's contract;<sup>72</sup> Harbert/Gorrie appealed to the Federal Circuit, which affirmed the COFC's decision.<sup>75</sup>

The GAO's ruling regarding whether an "unequal access" OCI situation existed focused primarily on the *potential* for access to nonpublic information that was created as a result of the merger discussions between AECOM and EB personnel, rather than on whether access to such nonpublic information was *actually* obtained by AECOM or EB.<sup>74</sup> The GAO stated:

[W]ith respect to the AECOM employees who worked on the design contract, without credible evidence that AECOM had systems in place to prevent the receipt of competitively useful information by EB, there is no reasonable basis to assume that the information was not made available to EB employees.<sup>75</sup>

With regard to the "biased ground rules" OCI category, the GAO concluded that, through AECOM's work on supporting the Army in developing the hospital design concept, AECOM obtained special knowledge of the Army's requirements that would have enabled AECOM to provide Turner/EB with an unfair advantage in the competition over the other competitors.<sup>76</sup>

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70. *Id.*

71. *Id.* at 586.

72. *Turner Constr. Co. v. United States (Turner III)*, 645 F.3d 1377, 1383 (Fed. Cir. 2011).

73. *Id.* at 1379. Earlier, Harbert/Gorrie filed with the COFC a Motion for Stay of Injunction Pending Appeal, which the COFC denied. *Turner Constr. Co. v. United States (Turner II)*, 94 Fed. Cl. 586, 597 (2010).

74. B.L. Harbert-Brasfield & Gorrie, JV, B-402229, 2010 CPD ¶ 69, at 6-9 (Comp. Gen. Feb. 16, 2010); *see also Turner III*, 645 F.3d at 1387 (supporting the COFC's determination that the GAO erred in its assessment of whether there was unequal access).

75. B.L. Harbert-Brasfield & Gorrie, JV, 2010 CPD ¶ 69, at 9. The GAO also found that the access restrictions imposed on AECOM's employees were not sufficient and that the record did not include any indication that AECOM disclosed to the contracting officer its insufficient mitigation effort; therefore, the contracting officer could not have been involved in developing or monitoring these mitigation efforts. *Id.* In this respect, the FAR imposes on the contracting officer the responsibility to "[a]void, neutralize or mitigate significant potential conflicts before contract award." FAR 9.504(a)(2) (2011).

76. *See B.L. Harbert-Brasfield & Gorrie, JV*, 2010 CPD ¶ 69, at 9-11 (concluding that the record did not contain any information suggesting that the Army supervised AECOM to mitigate this OCI concern, and further, that it would be unreasonable to assume that such supervision, even if it existed, would have prevented AECOM from

With regard to both of the GAO's determinations, the COFC found that the GAO relied on mere suspicions or innuendos, rather than on "hard facts," thus contrasting the GAO's questionable determinations with the thorough investigation and analysis conducted by the contracting officer (CO), albeit after the fact.<sup>77</sup> The COFC additionally criticized the GAO for discounting the CO's post-award investigation and findings, determining that this discounting was irrational.<sup>78</sup> The Federal Circuit affirmed and adopted all of the bases on which the COFC relied to justify its conclusion that the GAO's decision was irrational. Among other things, the Federal Circuit stated that the COFC correctly reviewed the GAO decision,<sup>79</sup> which was not a de novo review, as the appellant asserted, but rather an inquiry as to "whether the GAO's decision was a rational one."<sup>80</sup> With regard to application of this standard, the Federal Circuit concluded that the COFC did not err in finding that the GAO's decision "lacked a rational basis."<sup>81</sup> In this regard, the Federal Circuit also did not find error with the COFC's conclusion that, even though its review of GAO decisions should be a deferential one, the GAO's decision did not have a rational basis because the GAO's analysis failed to give any deference to the CO's analysis.<sup>82</sup> Thus, in the particular factual circumstances of this case, the tension between two required deferences was resolved with the required deference to the CO's

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using this special knowledge it had gained to unfairly benefit the Turner/EB team).

77. See *Turner Constr. Co. v. United States (Turner I)*, 94 Fed. Cl. 561, 581 (2010) (noting the CO's determination that the Army's steps to control access to certain materials were effective in preventing a potential unequal access OCI), *appeal dismissed in part* by 407 F. App'x 478 (Fed. Cir. 2011), *aff'd*, 645 F.3d 1377 (Fed. Cir. 2011).

78. See *id.* at 574–76 (asserting that the GAO's dismissive approach to the CO's post-award investigation represented a sharp departure from established precedent). In this regard, the Federal Circuit noted that "[c]ourts reviewing bid protests routinely consider post-award OCI analyses and consider evidence developed in response to a bid protest." *Turner Constr. Co. v. United States (Turner III)*, 645 F.3d 1377, 1386 (Fed. Cir. 2011) (citing *Masai Techs. Corp. v. United States*, 79 Fed. Cl. 433, 449–50 (2007)) (recognizing that "[i]f the first time an allegation or evidence of a potential OCI appears is after award, then the earliest time to evaluate that potential OCI as countenanced by § 9.504(a)(1) might be at that time").

79. *Turner III*, 645 F.3d at 1384; see also *Turner I*, 94 Fed. Cl. at 571, 574, 579 (providing an overview of and applying the appropriate standard of review of GAO decisions).

80. *Turner III*, 645 F.3d at 1384 (quoting *Honeywell, Inc. v. United States*, 870 F.2d 644, 647 (Fed. Cir. 1989)).

81. *Id.*; see also *Army Decision to Follow GAO Recommendation Lacked a Rational Basis*, Fed. Cir. Holds, 53 GOV'T. CONTRACTOR ¶ 245, July 27, 2011, at 10 (explaining that since the GAO recommendation lacked a rational basis, the Army's decision to follow the recommendation was also irrational).

82. See *Turner III*, 645 F.3d at 1384 (recognizing the deference generally given to a CO with respect to OCIs, and contrasting the depth of review conducted by this particular CO with that performed by the GAO).

analysis prevailing over the required deference to the GAO's analysis.<sup>83</sup>

The Federal Circuit also affirmed the COFC's determination that the GAO's conclusion that the interests of HSMM and EB were aligned was conclusory and thus lacked a rational basis.<sup>84</sup> The Federal Circuit similarly adopted the COFC's conclusion that the GAO's cursory rejection of the well-developed CO's analysis of the "biased ground rules" OCI determination lacked a rational basis, because it was based on "mere suspicion and innuendo."<sup>85</sup> Likewise, the Federal Circuit affirmed the COFC's conclusion that the GAO's decision lacked a rational basis for rejecting the carefully assessed CO's "unequal access" determination, noting "that the GAO 'failed to cite any hard facts'" and, instead, pointed only to "vague allegations that someone 'may have had access' to unidentified information or that someone 'was familiar with the details.'"<sup>86</sup> Finally, with regard to whether the CO properly addressed the responsibility to mitigate the potential OCIs, the Federal Circuit distinguished between two separate CO responsibilities under FAR 9.504(a): (1) the duty to identify and evaluate potential OCIs, which applies to *all* types of OCIs; and (2) the duty to mitigate such conflicts, which applies only to *significant* OCIs, noting that there is no requirement for the CO to document the preliminary analysis.<sup>87</sup> With respect to the duty to mitigate significant OCIs, the Federal Circuit added that the CO has

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83. See *id.* (noting that the GAO's actions represented a substitution of its own judgment for the judgment of the CO).

84. See *id.* at 1384–85 (explaining the COFC's criticism of the GAO's divergence from precedent with regard to the need for "hard facts" supporting the existence of an alignment of interests as opposed to suspicion or mere potential for such an alignment).

85. *Id.* at 1385. The COFC and the Federal Circuit were both clearly impressed with the CO's meticulous analysis of the precise state of merger negotiations between AECOM and EB. *Id.* at 1385, 1387; see also *Turner Constr. Co. v. United States (Turner I)*, 94 Fed. Cl. 561, 574, 579 (2010) (contrasting the detailed investigation conducted by the CO with the more cursory analysis of the GAO), *appeal dismissed in part* by 407 F. App'x 478 (Fed. Cir. 2011), *aff'd*, 645 F.3d 1377 (Fed. Cir. 2011). Of particular importance to this conclusion were the CO's factual findings that: (1) of the 25–30 AECOM employees that were involved in the merger negotiations with EB, none was part of the HSMM/HOK joint venture team that assisted the Army with the hospital procurement; (2) that AECOM was only one of three firms that showed interest in acquiring EB, but not the highest bidder; and (3) that the AECOM-EB negotiations initially failed and were terminated before HSMM/HOK provided any advice or materials to the Army for the Phase II solicitation. *Turner III*, 645 F.3d at 1380–81 (noting that after breaking down, the AECOM-EB merger negotiations subsequently restarted, but that was a month after the Phase II solicitation materials proposed by AECOM was complete).

86. *Turner III*, 645 F.3d at 1385 (quoting *Turner I*, 94 Fed. Cl. at 581–82).

87. *Id.* at 1386 (defining a significant OCI as "one which provides the bidding party a substantial and unfair competitive advantage during the procurement process on information or data not necessarily available to other bidders").



considerable discretion to determine whether an OCI is significant.<sup>88</sup> The Federal Circuit affirmed the COFC's conclusion that the CO discharged both of these duties properly.<sup>89</sup>

As the Federal Circuit noted, GAO decisions generally deserve deference;<sup>90</sup> it was only in the very unusual circumstances of this case that the Federal Circuit decided to overturn the GAO decision.<sup>91</sup> Thus, while the Federal Circuit's decision overturning the GAO's decision is noteworthy, it seems unlikely that this decision will usher in a new era of Federal Circuit decisions challenging the GAO's recommendations in bid protest cases.

### B. Allied Technology Group, Inc. v. United States

*Allied Technology Group, Inc. v. United States*<sup>92</sup> addresses a dilemma that almost every Government contractor must resolve prior to submitting an offer or a proposal in response to a Government solicitation: whether to take exceptions to the solicitation. The Federal Circuit's decision in *Allied* underscores the inherent risk associated with taking exceptions.

Allied Technology Group (Allied) protested the award of a Department of Justice (DOJ) commercial item contract for a web-based application for recruiting and staffing employees to Monster Government Solutions, LLC (Monster), which intervened in the protest.<sup>93</sup> Allied's protest was based primarily on two<sup>94</sup> allegations: (1) that the DOJ Contracting Officer (the CO) should have engaged in discussions with Allied over the exceptions in its proposal before disqualifying Allied; and (2) that the CO should have disqualified Monster's proposal because of the exceptions it took to the

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88. *Id.*

89. *Id.*

90. *Id.* at 1384 (stating that the COFC recognized that its review of the GAO decision should be deferential).

91. See *Turner I*, 94 Fed. Cl. at 581 (finding that the GAO failed to meet the highly deferential rational basis standard because it lacked specificity and neglected to properly analyze the CO's determinations).

92. 649 F.3d 1320 (Fed. Cir. 2011).

93. *Id.* at 1322. The "contract" to which the Federal Circuit's decision referred was actually a Blanket Purchase Agreement (BPA) to be awarded pursuant to the offeror's General Services Administration (GSA) Federal Supply Schedule (FSS) contract. See *Allied Tech. Grp., Inc. v. United States*, 94 Fed. Cl. 16, 23 (2010) (noting that Allied had been involved in providing similar services since 2001), *aff'd*, 649 F.3d 1320 (Fed. Cir. 2011). See generally FAR 13.303-1(a) (2011) (characterizing a BPA as "a simplified method of filling anticipated repetitive needs for supplies or services by establishing 'charge accounts' with qualified sources of supply").

94. See *Allied*, 649 F.3d at 1326 (declining to address a third allegation brought by Allied—that the Government acted arbitrarily and capriciously in making its best value determination—based on its affirmation of the COFC's decision on Allied's first two allegations).

solicitation's requirement to comply with Section 508 of the Rehabilitation Act (Section 508).<sup>95</sup> Following the contract award, Allied filed a post-award bid protest with the GAO, which denied the protest.<sup>96</sup> Allied then filed a second protest with the COFC, which granted judgment on the administrative record in favor of the Government and Monster.<sup>97</sup> On appeal, the Federal Circuit affirmed the opinion of the COFC, with the panel majority holding that the CO's decisions to disqualify Allied's proposal and to accept Monster's proposal were both reasonable.<sup>98</sup> Judge Bryson dissented, determining he could not uphold the award to Monster because the CO's decision to accept Monster's proposal was unreasonable.<sup>99</sup>

Under the DOJ's Request for Quotation (RFQ) evaluation criteria, the various technical factors, including Past Performance, when combined, were "significantly more important than price;" however, the RFQ went on to state that the final award would be made on the basis of a best value determination, wherein "the total evaluated price will be the determining factor for award where two or more quotes are considered substantially technically equal."<sup>100</sup>

Ultimately, Allied's bid received a higher technical score than

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95. *Id.* Section 508 of the Rehabilitation Act of 1973 guarantees "individuals with disabilities who are Federal employees to have access to and use of information and data that is comparable to [that enjoyed] by those who are not individuals with disabilities." Rehabilitation Act of 1973, 29 U.S.C. § 794d (2006); see Federal Electronic and Information Technology Accessibility Standards, 36 C.F.R. § 1194 (2011) (setting forth standards for such access and use); see also FAR 39.201(a) (2011) (implementing Section 508).

96. Allied Tech. Grp., Inc., B-402135 *et al.*, 2010 CPD ¶ 152, at 2 (Comp. Gen. Jan. 21, 2010).

97. *Allied*, 94 Fed. Cl. at 24. Monster intervened in both the GAO and the COFC protests. *Id.* at 23. Prior to the COFC's ruling on the merits of this case, both Allied and Monster filed motions with the COFC seeking to supplement the administrative record with various declarations and other materials, including materials that formed part of the record before the GAO when addressing the original Allied protest. See *Allied Tech. Grp., Inc. v. United States*, 92 Fed. Cl. 226, 228, 231 (2010) (denying, with a few limited exceptions, the motions to supplement the record), *aff'd*, 649 F.3d 1320 (Fed. Cir. 2011). Relying on the Federal Circuit's decision in *Axiom Resource Management, Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009), the COFC ruled that the Court's review of bid protests should proceed on the basis of the administrative record before the agency at the time of the procurement decision. *Allied*, 92 Fed. Cl. at 229. Accordingly, the only materials with which the COFC agreed to supplement the administrative record were those that the DOJ actually had reviewed or those that "were available to and probably should have been reviewed by the agency" before making the award decision. *Id.* at 231. See generally *Graham et al.*, *supra* note 5, at 998 (discussing the Federal Circuit's decision in *Axiom*).

98. *Allied*, 649 F.3d at 1333.

99. See *id.* at 1335–36 (Bryson, J., dissenting) (relying on Monster's lack of compliance with Section 508—in comparison to Allied's full compliance—as the basis for determining that the CO's decision was unreasonable).

100. *Id.* at 1323 (majority opinion) (adding that disparities in technical capabilities between offerors may justify selection of a more expensive bid).

Monster's bid.<sup>101</sup> Notwithstanding the technical superiority of Allied's bid, the CO decided to award the contract to Monster because, among other reasons, Allied's bid proposed a total evaluated price (TEP) of \$7 million, whereas Monster's TEP was \$3.2 million.<sup>102</sup> As the CO explained, the best value analysis resulted in a conclusion that Allied's 5.04% high technical score did not justify a 100% price premium.<sup>103</sup>

The primary reason, however, why the CO selected Monster's bid over Allied's, was the CO's determination that the exceptions Allied took to the RFQ were tantamount to a refusal to accept material RFQ requirements.<sup>104</sup> The RFQ stated that, to be eligible, an offeror must "accept... each of the requirements, provisions, terms and conditions, and clauses stated in all sections of this RFQ."<sup>105</sup> Moreover, the RFQ contained a section titled "Part 4—Additional Documents," which stated:

The Offeror shall highlight any provisions that conflict with the Terms and Conditions outlined in Document B. These documents will be reviewed by the Government. Any Terms and Conditions that are considered unacceptable by the Government and cannot be resolved may result in the Offeror being removed from consideration. Conflicting provisions will be considered as exceptions to the Terms and Conditions of the RFQ.<sup>106</sup>

Finally, the RFQ warned offerors "that any exception taken to the terms and conditions of the RFQ may adversely impact its evaluation rating."<sup>107</sup>

Based on these provisions, Allied's bid was disqualified. Monster's bid—which the CO determined did not take any exceptions—was the only bid remaining and was selected for award.<sup>108</sup> In fact, however, both Allied and Monster took exceptions to different portions of the RFQ. Allied's bid listed six exceptions, all relating to the relations

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101. *See id.* at 1325 (referring to Allied's superior technical score as a "small technical advantage").

102. *Id.* at 1324–25.

103. *Id.* at 1325.

104. *Id.*

105. *Id.* at 1323.

106. *Id.* The potential conflict addressed in this provision could have been created as a result of a contradiction between provisions in the RFQ, on one hand, and a contradiction between provisions included in each offeror's standard commercial Master Subscription Agreement (MSA) or Service Level Agreement (SLA) that was supposed to become part of the BPA, on the other hand. *See id.* at 1327–29 (noting that in the instant case, such a conflict indeed occurred between the RFQ and Allied's MSA).

107. *Id.* at 1323.

108. *Id.* at 1325.

between its Master Subscription Agreement (MSA) and the Blanket Purchase Agreement's (BPA) Terms and Conditions.<sup>109</sup> Monster's bid, while stating that the proposed system was compliant with Section 508 and attaching the required Section 508 Compliance Certification,<sup>110</sup> also stated, in its "Part 5. Exceptions," that the proposed system was only "*generally compliant with exceptions to the relevant Section 508 requirements*" and that it had "*minor compliance exceptions*" to the Section 508 requirements.<sup>111</sup>

Allied first argued its disqualification was inconsistent with the terms of the solicitation. The RFQ stated that "[a]ny Terms and Conditions that are considered unacceptable by the Government *and cannot be resolved* may result in the offeror being removed from consideration."<sup>112</sup> Based on this language, Allied asserted that the RFQ required that the CO engage in discussions with an offeror that had taken exceptions—before disqualifying its proposal—to determine whether the conflict created can be resolved, which the CO failed to do.<sup>113</sup> The court rejected this argument for a number of reasons. First, it noted that the RFQ states clearly that "[t]he Government intends to make an award on the basis of initial quotations *without the use of discussions*. . . . However, *the Government reserves the right to use discussions after receipt of quotations if it is considered in the Government's best interests to do so*."<sup>114</sup> The court accepted the Government's argument that this language gave the CO full discretion to conduct discussions.<sup>115</sup> Second, the Federal Circuit explained that Allied's interpretation, if accepted, would create a patent ambiguity in the contract because one provision would require discussion and another provision would leave this issue exclusively to the CO's discretion.<sup>116</sup> In light of this patent ambiguity, the court

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109. *Id.* at 1324, 1329.

110. *Id.* at 1324. The RFQ included a requirement that the proposal offered by an offeror must comply with Section 508 and that a Section 508 Compliance Certification must be signed by the contractor. *Id.* at 1323.

111. *See id.* at 1324–25 (emphasis added) (noting that the CO, in his award decision, found that "Monster took no exceptions," thus apparently ignoring Monster's statement regarding its "minor compliance exceptions" and relying instead on Monster's Compliance Certification and other statements to the contrary); *see also infra* notes 128–132 and accompanying text (explaining the flexibility of Section 508 as a consideration in the CO's determination regarding Monster's compliance).

112. *Allied*, 649 F.3d at 1327 (emphasis added).

113. *Id.*

114. *Id.* (emphasis added).

115. *See id.* at 1328 (arguing that adopting Allied's reading of the RFQ would amount to an elimination of the CO's discretion over the use of discussions).

116. *See id.* at 1327–28 (concluding that Allied's interpretation of the RFQ was erroneous).

concluded that such an argument, if not made the subject of a pre-award protest, was waived.<sup>117</sup>

The court also was not impressed with Allied's argument that, if the Government's interpretation were to be accepted, it would render meaningless the RFQ's "*cannot be resolved*" phrase.<sup>118</sup> In fact, the court stated it was Allied's interpretation that would render meaningless another RFQ provision—the one granting the CO discretion to engage in discussions.<sup>119</sup> Under Allied's interpretation, the court elaborated, a CO who does not desire to engage in discussions may be forced to do so by a contractor who takes an exception or simply submits a proposal that fails to conform to the RFQ.<sup>120</sup> A correct interpretation, the court concluded, would be one that gives reasonable meaning to both the RFQ provision highlighted by the appellees (the CO's discretion regarding whether to engage in discussions) and the one emphasized by Allied ("and cannot be resolved").<sup>121</sup>

Without definitively opining on the meaning of the phrase "cannot be resolved," the court offered one possible interpretation that may reconcile the two seemingly conflicting RFQ provisions: the CO may be required to hold discussions only when a contractor proposes additional terms that do not conflict with other RFQ terms, but the CO's discretion to not engage in such discussions (and, therefore, to disqualify the contractor) will be maintained when the proposed additional terms conflict with the RFQ's terms.<sup>122</sup>

Having concluded that the RFQ did not require discussions prior to disqualifying a contractor on the basis of unacceptable exceptions, the court proceeded to examine whether the CO acted in a rational

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117. See *id.* at 1327 (discussing *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1315 (Fed. Cir. 2007), for the proposition that the failure to raise an argument on the basis of a patent ambiguity prior to bidding results in waiver of the argument).

118. *Id.*

119. See *id.* at 1328 (arguing that Allied's interpretation would limit the CO's discretion to situations wherein an offer was in complete conformance with the RFQ).

120. See *id.* (rejecting Allied's position that the RFQ permits CO discretion only in the face of precise conformance with the RFQ's terms).

121. *Id.*; see also *Burnside-Ott Aviation Training Ctr. v. Dalton*, 107 F.3d 854, 860 (Fed. Cir. 1997) (citing *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (Fed. Cir. 1996)) ("A contract must be interpreted as a whole in a manner that gives reasonable meaning to all its parts and avoids conflicts in, or surplusage of, its provisions.")

122. *Allied*, 649 F.3d at 1328 (noting that regardless of the exact interpretation of the phrase "cannot be resolved," it is clear that the phrase does not unequivocally force a CO to engage in discussions prior to disqualifying an offer).

manner in disqualifying Allied on this basis.<sup>123</sup> The court concluded that the CO acted reasonably.<sup>124</sup>

Allied's second protest ground raised a more interesting question. Allied asserted that the award to Monster lacked a rational basis because Monster, like Allied, had taken exceptions to the RFQ.<sup>125</sup> The panel majority, however, rejected this argument. It explained that Monster had certified that it met all of the RFQ's technical requirements and that the CO was entitled to rely on this certification in determining whether to accept the bid.<sup>126</sup> Citing *Centech Group, Inc. v. United States*,<sup>127</sup> the majority noted that the only time a CO may not rely on a certification is "where a proposal, *on its face*, should lead an agency to the conclusion that an offeror could not comply with the applicable requirement."<sup>128</sup> Based on this principle, the court found that the exceptions taken by Monster did not constitute "significant countervailing evidence" of non-compliance.<sup>129</sup> The majority explained that "[c]ompliance with Section 508 is not an all-or-nothing attribute of a product, requiring perfect compliance or disqualification" and that Section 508 and its implementing

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123. *Id.* at 1329.

124. *See id.* at 1329-30 (explaining Allied's argument that the CO disqualified its proposal on the cumulative basis of all six exceptions, but that because two of the six were not "true" exceptions, the CO's determination required remand to examine whether disqualification on the basis of only four of the six exceptions was appropriate). In support of its argument, Allied cited *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), which required an appeals court to make its judgment exclusively based on the grounds invoked by the agency in making its decision and "if those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be more adequate or proper basis." *Id.* at 196. The Federal Circuit in *Allied* rejected this argument primarily by not accepting the assertion that the CO's disqualification relied only on the aggregate of Allied's six exceptions. 649 F.3d at 1329.

125. *Allied*, 649 F.3d at 1330; *see supra* note 111 and accompanying text (discussing Monster's "exception" with regard to compliance with Section 508).

126. *See Allied*, 649 F.3d at 1330 (stating that failure on the part of an offeror to abide by a proposal's requirements implicates issues of contract administration rather than the appropriateness of the bid decision).

127. 554 F.3d 1029 (Fed. Cir. 2009). *See generally* Graham et al., *supra* note 5, at 1013-17 (providing an overview of *Centech*).

128. *Allied*, 649 F.3d at 1330 (citing *Centech*, 554 F.3d at 1039); *see also In re Spectrum Sys., Inc.*, B-401130, 2009 CPD ¶ 110, at 3 (Comp. Gen. May 13, 2009) (proposing that "an agency may accept a quotation's representation that indicates compliance with the solicitation requirements, where there is no significant countervailing evidence reasonably known to the agency evaluators that should create doubt whether the offeror will or can comply with the requirement").

129. *Allied*, 649 F.3d at 1331-32 (quoting *Spectrum*, 2009 CPD ¶ 110, at 2) (concluding that the correct benchmark for determining whether the DOJ acted in a rational manner is whether the "generally compliant with exceptions" language in Monster's proposal constitute[d] 'significant countervailing evidence reasonably known to the agency evaluators that should create doubt whether the offeror will or can comply with the requirement'").

regulations permit flexible compliance.<sup>130</sup> The majority also emphasized the fact that Monster's exceptions were only minor,<sup>131</sup> and that they were supported by a Compliance Certification providing that, contrary to the exceptions taken, Monster would comply with Section 508.<sup>132</sup>

Judge Bryson dissented, rejecting the majority's analysis. He explained that regulations promulgated pursuant to Section 508 required "specific modes of compliance," and that Monster simply did not meet these requirements.<sup>133</sup> Moreover, Judge Bryson rejected the Government's argument—which was accepted by the majority—that Monster's exceptions to the RFQ were "minor", because the Section 508 regulations require that products "comply with *all* applicable provisions."<sup>134</sup> The dissent also rejected the majority's assertion that Section 508 permits a flexible approach to compliance.<sup>135</sup> According to Judge Bryson, Section 508 allows contractors to provide an alternative means of access to information only when strict compliance with the requirements would impose an "undue burden."<sup>136</sup> Thus, before taking advantage of the "undue burden" exception, the CO must explain why and to what extent "compliance would create an undue burden."<sup>137</sup> Because the CO failed to conduct the requisite analysis and provide the requisite explanation, Judge Bryson would have remanded the case to give the DOJ an opportunity to do so.<sup>138</sup>

The Federal Circuit's decision in *Allied* may be interpreted narrowly as permitting flexible compliance only with regard to Section 508 requirements. It may also be interpreted more broadly

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130. *Id.* at 1331. As elaborated above, the dissent disagreed with this conclusion, stating that, for the flexible compliance to be permitted, the CO should have analyzed whether there was "undue burden" and provided explanation regarding such burden, which the CO failed to do in this case. *See id.* at 1334 (Bryson, J., dissenting) (noting that the CO initially failed to recognize that Monster had taken exceptions to the RFQ's Section 508 requirements); *see also supra* text accompanying note 99 (discussing the dissent's determination that the CO's decision was unreasonable).

131. *See Allied*, 649 F.3d at 1332 (citing *Centech*, 554 F.3d at 1039) (comparing Monster's exceptions to those in *Centech*, in which the court determined that the Air Force reasonably followed the GAO's recommendation not to accept Centech's offer when Centech proposed to perform only 43.2% of the work itself despite a statute requiring that small business prime contractors perform at least 50% of the work themselves).

132. *Id.* at 1324.

133. *Id.* at 1334 (Bryson, J., dissenting).

134. *Id.* at 1335 (emphasis added) (quoting 36 C.F.R. § 1194.2(a) (2011)).

135. *Id.* at 1334.

136. *Id.* (quoting 29 U.S.C. § 794d(a)(1)(B) (2006)).

137. *Id.* (quoting 36 C.F.R. § 1194.2(a)(2)).

138. *Id.* at 1336.

as recognizing that strict compliance with all the myriad requirements of each solicitation is often difficult to accomplish; therefore, some flexibility in how compliance is assured may occasionally be permitted, especially if the exceptions taken are minor or when they are counterbalanced by some contradicting promises, such as a Compliance Certification.

### C. *Chattler v. United States*

In *Chattler v. United States*,<sup>139</sup> the Federal Circuit was faced with a unique contract formation question: Can an implied contract, which obligates the government to perform a service required by regulation, be formed based on statements by the agency explaining how its regulations work? The Federal Circuit panel majority responded negatively, with Judge Newman dissenting.

The regulatory scheme at issue in *Chattler* was created as a result of the September 11 attacks when Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004.<sup>140</sup> This legislation required anyone entering the United States to present a passport, including upon entry from countries such as Canada and Mexico, which was not previously required.<sup>141</sup> This new requirement burdened the State Department with a significant increase in demand for passports and thus prolonged the time it took the State Department to process passport applications.<sup>142</sup> To accommodate persons with urgent needs, the State Department issued regulations that allowed for the processing of passport requests within three days of the request for an additional \$60.00 "expedite fee."<sup>143</sup> These regulations also stated that "[t]he passport expedite fee will be refunded if the Passport Agency does not provide the requested expedited processing."<sup>144</sup>

Chattler applied for a passport, requested expedited processing, and paid the expedite fee, but her request was not fulfilled within the three-day expedited processing window.<sup>145</sup> Instead of requesting a refund, Chattler initiated legal action against the Government in the United States District Court for the Northern District of California under the "Little" Tucker Act.<sup>146</sup> Even though the Government

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139. 632 F.3d 1324 (Fed. Cir. 2011).

140. Pub. L. No. 108-458, 118 Stat. 3638 (2004).

141. *Chattler*, 632 F.3d at 1326.

142. *Id.*

143. *Id.* at 1327 (citing 22 C.F.R. § 51.66(b) (2007)).

144. *Id.* (quoting 22 C.F.R. § 51.63(c)).

145. *Id.* at 1326.

146. *Id.* at 1326-27; see also 28 U.S.C. § 1346(a)(2) (2006) (allowing district courts



offered to refund Chattler the expedite fee if she filed a request, Chattler rejected the offer and insisted on litigating the case in which she sought \$60 in damages.<sup>147</sup> The district court ruled in favor of the Government, finding that no implied contract was formed between Chattler and the Government.<sup>148</sup>

Chattler subsequently appealed to the Federal Circuit.<sup>149</sup> On appeal, Chattler's main argument centered on provision 5(b) of the expedited request application form, which provided that "[e]xpeditied requests will be processed in three workdays from receipt at a passport agency [for a \$60 fee]."<sup>150</sup> Chattler asserted that the 5(b) language on the form constituted an offer, that she accepted the offer by paying the \$60 fee, and that the breach of contract occurred when the Government did not process her application within three days.<sup>151</sup> The Federal Circuit agreed with the district court that no contract was formed between the Government and Chattler as a result of provision 5(b).<sup>152</sup> For this provision to be considered an offer, the court noted, it must be "a manifestation of willingness to enter into a bargain," but provision 5(b) did not meet this standard for several reasons.<sup>153</sup>

First, provision 5(b) characterized the applicant's initiation of the expedited procedure as a "request" submitted to the Government,

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to have concurrent jurisdiction with the COFC over claims against the Government that do not exceed \$10,000). The "Big" Tucker Act provides that the COFC has exclusive jurisdiction of contract claims against the United States Government. 28 U.S.C. § 1491(a)(1) (2006).

147. *Chattler*, 632 F.3d at 1326–27 n.2 (clarifying that Chattler originally called her complaint a class action, but she never filed a motion to certify the class and, accordingly, the court declined to treat the case as a class action).

148. *Chattler v. United States*, No. C-07-4040 MMC, 2009 WL 2450518, \*4 (N.D. Cal. July 10, 2009), *aff'd*, 632 F.3d 1324 (Fed. Cir. 2011).

149. *Chattler*, 632 F.3d at 1326–27 (recognizing that the Federal Circuit has jurisdiction under 28 U.S.C. § 1295(a)(2) to hear an appeal of a district court decision in a case brought under the "Little" Tucker Act).

150. *Id.* at 1326.

151. *Id.* at 1327 (explaining that Chattler also argued, based on the then-existing text of 22 C.F.R. § 51.63(c), that she was entitled to receive the refund automatically, without first submitting a refund request). The Federal Circuit, however, rejected the automatic refund argument, deferring to the State Department's interpretation of this regulation that refund requires a request. *Id.* at 1328–29 (citing *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 702 (1991), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), for the broad proposition that the court defers to an agency's interpretation of its own minimally reasonable regulation).

152. *Id.* at 1332.

153. *Id.* at 1330 (quoting *Cutler-Hammer, Inc. v. United States*, 441 F.2d 1179, 1183 (Ct. Cl. 1971)).

rather than as a promise by the Government to do anything.<sup>154</sup> Second, to hold the government liable, its contractual promise “must be stated in the form of an undertaking, not as a mere prediction or statement of opinion or intention,”<sup>155</sup> especially when the language in dispute is merely a reiteration of the requirements of the regulation, as was the case in the text of provision 5(b).<sup>156</sup> Third, because the regulatory scheme established that the Department of State may either approve the request or disapprove it, the applicant’s “acceptance” of the Government’s alleged “offer” included in the application form would not complete the offer-acceptance requirement.<sup>157</sup> Finally, “the form of provision 5(b) informs the substance.”<sup>158</sup> When, as here, the assertion that a contract existed relied on a single sentence, no contract was formed, in part because no negotiations preceded the document alleged to be a contract, this document did not include standard FAR provisions that are typically included in Government contracts, and no one at the Government “has assented to anything.”<sup>159</sup>

The Federal Circuit also explained that the cases cited by *Chattler* to support the argument that either an express contract or an implied-in-fact contract was formed were all “inapposite,”<sup>160</sup> and that *Chattler* failed to find even “a single case where the Government was held to have contracted to perform a service in furtherance of a regulation scheme by virtue of a statement in a form application.”<sup>161</sup> The court added that in the small group of cases where courts have found the Government liable under a service contract, the contracts contained an “express obligation observing the formalities of typical government contracts, including a signature by an authorized agent.”<sup>162</sup>

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154. *Id.* (citing *Cutler-Hammer*, 441 F.2d at 1182 (“[N]owhere is there a *promise* on the part of the Government to sell even one ounce of silver at the price mentioned. Purchasers are simply invited to make application to buy certain quantities of silver . . .”)).

155. *Id.* (quoting *Cutler-Hammer*, 441 F.2d at 1182).

156. *Id.* at 1331 (citing *Floyd v. United States*, 26 Cl. Ct. 889, 891 (1992)); see also *Clawson v. United States*, 24 Cl. Ct. 366, 370 (1991) (“[W]here rights and obligations are prescribed by statute and regulations rather than determined through the mechanics of a bilateral exchange, there is no contract in the usual sense of the word.”).

157. *Chattler*, 632 F.3d at 1331.

158. *Id.*

159. *Id.* at 1331–32 (quoting *Girling Health Sys., Inc. v. United States*, 22 Cl. Ct. 66, 70 (1990) (describing a case against the IRS in which no contract was formed based on language on a form)).

160. *Id.* at 1332.

161. *Id.*

162. *Id.* at 1332–33 (citing *Me. Yankee Atomic Power Co. v. United States*, 225

Judge Newman dissented.<sup>163</sup> She explained that she would have found that a binding contract was formed when Chattler accepted the Department of State's offer in provision 5(b) of the passport application form and that the Department of State then breached this contract by not refunding the \$60 without waiting for any formal request to be submitted by Chattler.<sup>164</sup> It appears that Judge Newman was swayed by the Kafkaesque situation faced by the appellant and others like her.<sup>165</sup> In 2007, 5,910,135 people requested expedited passport application processing.<sup>166</sup> Of this group, the majority—3,358,725—had their request denied, but only 8546 received a refund; in other words, in 99.75% of the cases, the State Department kept the expedite fees paid by persons who never received expedited services simply because they failed to formally request a refund.<sup>167</sup> Judge Newman likely wanted to send a message to the State Department that it must adopt a better way of handling expedited fees collected from individuals who did not receive the services they paid for.

## II. JURISDICTION

As mentioned above, 2011 saw a marked increase in the volume of Federal Circuit decisions addressing the jurisdiction of the Court of Federal Claims and the Boards over specific types of government contracts disputes. Indeed, in the past year, the Federal Circuit issued six such decisions, which accounted for over 40% of the court's non-*Winstar* and non-SNF opinions. The majority of these decisions endorsed a reading of either the Tucker Act or the CDA that found the tribunals had jurisdiction. While it is difficult to draw any definitive conclusions based on this handful of decisions, on balance, they suggest a propensity by the Federal Circuit to protect

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F.3d 1336, 1337–38 (Fed. Cir. 2000); *N. States Power Co. v. United States*, 224 F.3d 1361, 1364 (Fed. Cir. 2000); *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1019 (Fed. Cir. 1996); *Hughes Commc'ns Galaxy, Inc. v. United States*, 998 F.2d 953, 954–55 (Fed. Cir. 1993)) (rejecting for the same reasons the argument that the statements posted on the Department of State's website were an offer to contract).

163. *Id.* at 1333 (Newman, J., dissenting).

164. *Id.* at 1335.

165. *See id.* at 1334 (looking to the discovery record, which shows that, even though this case was not certified as a class action, a large number of people applied for an expedited processing of their passport application, paid the expedite fee, and have not received the refund); *see also id.* at 1326–27 n.2 (majority opinion) (noting that “Chattler styled her complaint as a class action” but that “it did not appear that there was a motion to certify th[e] case as a class action”).

166. *Id.* at 1334 (Newman, J., dissenting).

167. *Id.* (highlighting that the percentages of cases in which the State Department did not refund expedite fees for the services not provided in the years 2004–2006 were 98.82%, 99.13%, and 98.49%, respectively).

the central role of the COFC and the Boards over contract disputes.

For example, in *Slattery v. United States*,<sup>168</sup> the Federal Circuit, sitting en banc—and over a strong dissent by Judge Gajarsa joined by three other judges—held that the Tucker Act grants the COFC jurisdiction to entertain suits against a NAFI, in this case, the FDIC, and expressly disavowed all of its prior case law to the contrary.<sup>169</sup> In *Todd Construction, L.P. v. United States*,<sup>170</sup> the Federal Circuit held that the COFC has the authority, pursuant to the Tucker Act and the CDA, to hear challenges to agency-issued performance evaluations that are mandated by the FAR.<sup>171</sup> In *Holmes v. United States*,<sup>172</sup> the Federal Circuit held that the Tucker Act gives the COFC jurisdiction to hear claims for an alleged breach of a Title VII settlement agreement.<sup>173</sup> Finally, in *Engage Learning, Inc. v. Salazar*,<sup>174</sup> the court held that the CDA grants the COFC jurisdiction over any case that raises a “non-frivolous allegation of a contract with the Government,” whether or not such a contract actually existed.<sup>175</sup>

The only one of the jurisdictionally-focused 2011 decisions that did not favor a broad reading of the COFC’s and Boards’ jurisdiction was *Trusted Integration, Inc. v. United States*.<sup>176</sup> In what appears to be the first Federal Circuit decision applying the Supreme Court’s recent decision in *United States v. Tohono O’Odham Nation*,<sup>177</sup> the Federal Circuit held that the COFC had no jurisdiction over a plaintiff’s claims that were duplicative of claims the plaintiff previously raised in federal district court.<sup>178</sup> Meanwhile, in *Systems Development Corp. v. McHugh*,<sup>179</sup> the Federal Circuit affirmed the decision of the Armed

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168. 635 F.3d 1298 (Fed. Cir. 2011) (en banc).

169. *Id.* at 1301 (holding that any “[c]onflicting precedent shall no longer be relied upon”).

170. 656 F.3d 1306 (Fed. Cir. 2011).

171. *Id.* at 1308.

172. 657 F.3d 1303 (Fed. Cir. 2011).

173. *Id.* at 1306 (favoring a broad view of the COFC’s jurisdiction, by holding that the “accrual suspension rule” applies to such claims, thus permitting the court to hear otherwise untimely claims for breaches of Title VII agreements); *see infra* Part II.D (discussing the court’s holding regarding the “accrual suspension rule”); *see also Tucker Act Provides Jurisdiction, supra* note 24, at 9 (analyzing the *Holmes* opinion’s impact on the “accrual suspension rule”); *COFC Has Exclusive Jurisdiction, supra* note 24, at 15–16 (discussing *Puerto Rico v. United States*, 44 Fed. Cl. 618 (1999), and recognizing that the COFC had exclusive jurisdiction over the claim in that case).

174. 660 F.3d 1346 (Fed. Cir. 2011).

175. *Id.* at 1353.

176. 659 F.3d 1159 (Fed. Cir. 2011).

177. *See* 131 S. Ct. 1723, 1727 (2011) (clarifying that COFC jurisdiction does not extend to a claim by a plaintiff who has a pending claim against the United States).

178. *Trusted Integration*, 659 F.3d at 1164 (applying *Tohono* and concluding that two of the claims “arose from the same operative facts upon which the claims in the district court were predicated and are, thus, barred by § 1500”).

179. 658 F.3d 1341 (Fed. Cir. 2011).

Services Board of Contract Appeals that it lacked jurisdiction over an untimely monetary claim.<sup>180</sup>

These decisions are discussed in turn.

#### A. *Slattery v. United States*

In *Slattery v. United States*,<sup>181</sup> the Federal Circuit, sitting en banc, definitively settled whether the COFC possesses jurisdiction to entertain suits against a NAFI—in this case, the FDIC.<sup>182</sup> The FDIC is “supported by fees from member banks, not by congressional appropriations, and there is no specific appropriation with respect to payment of [the FDIC’s] judgment.”<sup>183</sup> The Government’s position was that the FDIC’s status as a NAFI deprived the Court of Federal Claims of jurisdiction to entertain suits against the FDIC.<sup>184</sup>

The Federal Circuit—based upon its review of the history and application of the Tucker Act—“conclude[d] that the source of a government agency’s funds, including funds to pay judgments incurred by agency actions, does not control whether there is jurisdiction of a claim within the subject matter assigned to the court by the Tucker Act.”<sup>185</sup> In particular, according to the court, “[t]he jurisdictional criterion is not how the government entity is funded or its obligations met, but whether the government entity was acting on behalf of the government.”<sup>186</sup> In sum, “Tucker Act jurisdiction does not depend on and is not limited by whether the government entity receives or draws upon appropriated funds.”<sup>187</sup> In so holding, the Federal Circuit explicitly instructed that “[c]onflicting precedent shall no longer be relied upon.”<sup>188</sup>

The Government, for its part, pointed to the 1970 amendment to the Tucker Act which added the following sentence: “[A]n express

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180. *Id.* at 1347.

181. 635 F.3d 1298 (Fed. Cir. 2011) (en banc).

182. *Id.* at 1301. For further scholarly discussion of the NAFI doctrine, see generally Evan C. Zoldan, *All Roar and No Bite: Lion Raisins and The Federal Circuit’s First Swipe At The NAFI Doctrine*, 36 PUB. CONT. L.J. 153 (2007) (questioning the Federal Circuit’s treatment of the NAFI doctrine in *Lion Raisins v. United States*, 416 F.3d 1356 (Fed. Cir. 2005)); Evan C. Zoldan, *The King is Dead, Long Live The King!: Sovereign Immunity and the Curious Case of Nonappropriated Fund Instrumentalities*, 38 CONN. L. REV. 455 (2006) (asserting that the NAFI doctrine lacks legal support).

183. *Slattery*, 635 F.3d at 1300.

184. *See id.* (outlining the Government’s position that the Tucker Act would not apply to the FDIC).

185. *Id.* at 1301.

186. *Id.*

187. *Id.*

188. *Id.*; *see also id.* at 1303 (explaining that “some later decisions viewed as ‘jurisdictional’ the source of funds to pay judgments arising from activities of federal entities”).

or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States."<sup>189</sup> According to the Government, this amendment, "because of its explicit terms, means that all other federal entities that do not receive appropriated funds are excluded from the jurisdiction of the Tucker Act."<sup>190</sup> The Government derived that meaning by negative implication: "[B]ecause Congress listed only the military and NASA exchanges in the amendment as enacted, although an earlier draft included all non-appropriated fund activities, this means that every other non-appropriated fund activity was intended to be excluded from Tucker Act jurisdiction."<sup>191</sup>

Following an extensive review of that amendment's legislative history, the court rejected the Government's view, concluding that the "legislative record belies the [G]overnment's argument that the specificity of this amendment means that Congress intended to exclude from the jurisdiction of the Tucker Act every government entity that does not receive support from appropriated funds except for the military and NASA Exchanges."<sup>192</sup> Indeed, according to the Federal Circuit, the clear "purpose of the amendment was to restore access to the courts where such access had been removed, not to extend the removal [of jurisdiction] into new, unknown areas."<sup>193</sup>

The Government also attempted to rely upon the FDIC's "sue and be sued" clause for the proposition "that suit for breach of contract must be pursued against the FDIC in district court."<sup>194</sup> The Federal Circuit likewise rejected that argument, explaining that "it is well established that the potential availability of a remedy in district court does not of itself withdraw jurisdiction under the Tucker Act."<sup>195</sup>

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189. *Id.* at 1311 (quoting Pub. L. No. 91-350, § 1(b), 84 Stat. 449 (codified as amended at 28 U.S.C. § 1491(a)(1) (2006))).

190. *Id.*

191. *Id.*

192. *Id.* at 1311-13 (discussing *McDonald's Corp. v. United States*, 926 F.2d 1126, 1127 (Fed. Cir. 1991), which involved a contract with the Navy Resale and Service Support Office).

193. *Id.* at 1313; *see also id.* at 1313-14 ("Legislative action to close a much-criticized loophole cannot reasonably be understood as an endorsement of the loophole itself . . . [Congress's] decision not to legislate in areas whose boundaries could not be defined did not constitute an endorsement of all judicial rulings relating to instrumentalities for which no agency was able to provide a precise definition.").

194. *Id.* at 1314.

195. *Id.* at 1314-15; *see also id.* at 1315 (asserting that "[w]ith respect to the corporate status of the FDIC, it is established beyond dispute that the jurisdictional criterion is not whether the government entity is incorporated, but whether it is

Finally, with respect to how a government entity satisfies its obligations or judgments, the Federal Circuit held that “Tucker Act jurisdiction is not affected by how the agency meets its obligations or how any judgment establishing those obligations is satisfied.”<sup>196</sup>

The Federal Circuit’s decision was not without dissent. Judge Gajarsa, joined by Judges Dyk, Prost, and O’Malley, criticized the en banc decision as “overturn[ing] and eviscerat[ing] the vast body of NAFI law in one fell swoop.”<sup>197</sup> According to the dissent, the “settled law for more than half a century [is] that the Tucker Act’s waiver of sovereign immunity does not apply to contracts entered into by [NAFIs].”<sup>198</sup> The dissent would have concluded that, “[u]nder Supreme Court precedent and [Federal Circuit] precedent, the FDIC is clearly a NAFI because it receives no appropriated funds and is . . . a separate entity with independent authority to sue and be sued” and, therefore, it “is not subject to suit in the Court of Federal Claims in actions alleging breach of contract.”<sup>199</sup> The dissent also explained that the consequences of the majority’s ruling extend beyond simply expanding Tucker Act jurisdiction. In that regard, the dissent pointed out that the majority’s ruling means that “the United States is now directly liable for the FDIC’s contractual commitments . . . and future plaintiffs . . . can now sue the United States in the Court of Federal Claims and will receive money damages directly from the Judgment Fund.”<sup>200</sup> The problem is that “[t]he FDIC, however, has no statutory obligation to reimburse the [G]overnment for any damages paid out of the Judgment Fund.”<sup>201</sup> Thus, as a result of *Slattery*, “taxpayers, not the FDIC, shall bear the burden of the FDIC’s contractual commitments.”<sup>202</sup>

### B. Trusted Integration, Inc. v. United States

In what appears to be the first published Federal Circuit case

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acting on authority of the United States”).

196. *Id.* at 1318.

197. *Id.* at 1321 (Gajarsa, J., dissenting).

198. *Id.*

199. *Id.* at 1328 (concluding that the FDIC is a NAFI, which is unnecessary under the majority’s opinion since it dispenses with the NAFI doctrine entirely). In that regard, the majority in *Slattery* makes the question of whether the FDIC is a NAFI irrelevant by holding that Tucker Act jurisdiction does not depend on how an agency is funded. *Id.* at 1301 (majority opinion).

200. *Id.* at 1334–35 (Gajarsa, J., dissenting).

201. *Id.* at 1335.

202. *See id.* (criticizing the majority for an “alarming result” that “affords the FDIC complete insulation from liability . . . in stark contrast to Congress’s requirement that those NAFIs specifically identified in the 1970 Act reimburse the government for any liability incurred by their breach of contract”).

applying the Supreme Court's recent decision in *Tohono O'Odham Nation*, the Federal Circuit, in *Trusted Integration, Inc. v. United States*,<sup>203</sup> partially reversed the COFC's dismissal of a plaintiff's case pursuant to 28 U.S.C. § 1500.<sup>204</sup> That statute "generally prohibits simultaneous actions against the government in separate forums" and "was enacted to prevent a claimant from seeking recovery in district court and the Court of Claims for the same conduct pleaded under different legal theories."<sup>205</sup>

Pursuant to § 1500, the COFC "does not have jurisdiction over a claim if the plaintiff has 'another suit for or in respect to that claim pending against the United States or its agents.'"<sup>206</sup> "[T]wo suits are for or in respect to the same claim, precluding jurisdiction in the [COFC], if they are based on substantially the same operative facts, regardless of the relief sought in each suit."<sup>207</sup>

In *Trusted Integration*, the plaintiff filed a complaint in district court for \$15 million in damages, including claims based on the Lanham Act, unfair competition, and breach of fiduciary duty.<sup>208</sup> Several months later, the plaintiff filed a complaint in the Court of Federal Claims, likewise seeking \$15 million in relief, but this time for breach of an oral or implied-in-fact contract, breach of a license agreement, and breach of the duty of good faith and fair dealing.<sup>209</sup> The COFC granted the Government's motion to dismiss, holding that "it lacked subject matter jurisdiction [as] both suits sought the same relief and were 'based upon the same dispute between the same parties: defendant's allegedly wrongful development of an alternative to the [plaintiff's] product in contravention of its agreement to cooperate with plaintiff."<sup>210</sup>

On appeal before the Federal Circuit, the court first explained that, "[a]fter *Tohono*, it is clear that [the court] must: (1) not view § 1500 narrowly; (2) focus only on whether two claims have the same operative facts and not on the relief requested; and (3) determine whether two suits share substantially the same operative facts."<sup>211</sup>

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203. 659 F.3d 1159 (Fed. Cir. 2011).

204. *Id.* at 1164-65 (citing *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1728 (2011)) (accepting that after *Tohono*, § 1500 should not be viewed narrowly).

205. *Id.* at 1163.

206. *Id.* (quoting *Tohono*, 131 S. Ct. at 1727).

207. *Id.* at 1164 (quoting *Tohono*, 131 S. Ct. at 1731).

208. *Id.* at 1162.

209. *Id.*

210. *Id.* at 1163 (quoting *Trusted Integration, Inc. v. United States*, 93 Fed. Cl. 94, 101 (2010)).

211. *Id.* at 1164.



Applying those rules from *Tohono*, the Federal Circuit agreed with the Government that the Court of Federal Claims properly dismissed two out of the plaintiff's three claims.<sup>212</sup>

In particular, the court agreed that the plaintiff's claim for breach of fiduciary duty before the district court, premised as the claim was upon "the parties' roles as joint venturers," arose from the same operative facts as the plaintiff's claim for breach of "an implied agreement between the parties to engage in a joint venture."<sup>213</sup> In so holding, the Federal Circuit sided with the Government's position "that the only difference between Count I [of the Court of Federal Claims complaint] and the claims in the district court complaint are the legal theories supporting the claims, which . . . are insufficient to place Count I outside of § 1500's prohibition."<sup>214</sup>

Similarly, the Federal Circuit concurred that the plaintiff's COFC count for breach of the duty of good faith and fair dealing "is premised on the same operative facts as the district court complaint pleaded under different legal theories."<sup>215</sup> The only difference between that COFC count and the district court complaint for breach of fiduciary duty was that, in the latter, "the fiduciary duty arose from [the parties'] relationship in a joint venture, while in the [COFC] complaint, the fiduciary duty allegedly arose from an oral or implied-in-fact contract."<sup>216</sup> The Federal Circuit held that "[t]his characterization . . . is not relevant to whether the claims arose from the same operative facts."<sup>217</sup>

The Federal Circuit, however, reversed the COFC as to the plaintiff's count for breach of its licensing agreement.<sup>218</sup> On that

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212. See *id.* at 1164–65 (dismissing counts I and III but accepting that the breach of license agreement claim did not arise from the same operative facts as the district court claims).

213. *Id.* at 1165.

214. *Id.* Indeed, even the district court characterized plaintiff's breach of fiduciary duty claim as "essentially a contract claim." *Id.* (discussing *Trusted Integration, Inc. v. United States*, 679 F. Supp. 2d 70, 84 (D.D.C. 2010), on this point). The Federal Circuit held "the fact that the district court dismissed some of the counts of *Trusted Integration's* district court complaint has no effect on [the Federal Circuit's] analysis of each of the counts of the [Court of Federal Claims] complaint," because the Federal Circuit applies "§ 1500's jurisdictional bar 'by looking to the facts existing when' [the plaintiff] filed each of its complaints." *Id.* at 1166 n.2 (quoting *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993), and explaining that, "[a]t the time the [Court of Federal Claims] complaint was filed, all of *Trusted Integration's* claims were still pending before the district court").

215. *Id.* at 1166.

216. *Id.*

217. *Id.* at 1166–67 (citing *Keene Corp.*, 508 U.S. at 212).

218. See *id.* at 1170 (concluding that the CFC erred in concluding "that Count II in the CFC complaint arose from the same operative facts as *Trusted Integration's* district court claims").

point, the Federal Circuit explained that “[t]he basis of Trusted Integration’s district court complaint was [the Government’s] creation of an alternative to Trusted Integration’s product and promotion of that alternative in contravention of its promise.”<sup>219</sup> In contrast, the basis of the Court of Federal Claims count related to the alleged breach of the license agreement, “a distinct contract” from that alleged in the district court complaint.<sup>220</sup> Because “[t]he district court complaint and Count II [of the Court of Federal Claims complaint] are . . . premised on independent contracts,” the Federal Circuit concluded that “the facts that would give rise to breach of either of these agreements are not legally operative for establishing breach of the other.”<sup>221</sup>

Accordingly, the court held that Count II of the COFC complaint alleging breach of the licensing agreement “and the counts of the district court complaint are not based upon substantially the same operative facts.”<sup>222</sup> In sum, “Trusted Integration . . . asserted two distinct claims, that involve[d] distinct agreements, whose breaches g[a]ve rise to distinct damages, and which require[d] distinct proofs,” and for that reason, the COFC “erred when it concluded that Count II in the [COFC] complaint arose from the same operative facts” as the district court claims.<sup>223</sup>

### C. *Todd Construction, L.P. v. United States*

In *Todd Construction, L.P. v. United States*,<sup>224</sup> the Federal Circuit finally had the opportunity to resolve whether the Court of Federal Claims possesses jurisdiction, pursuant to the Tucker Act and CDA, to entertain challenges to agency-issued performance evaluations mandated by the FAR.<sup>225</sup> Although the COFC determined that it

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219. *Id.* at 1167–68.

220. *Id.* at 1168.

221. *Id.*

222. *Id.* In so holding, the Federal Circuit addressed a variety of nineteenth-century tests for *res judicata*, but did “not adopt these . . . tests as the standard by which to measure whether two claims arise from substantially the same set of operative facts.” *Id.* at 1170 n.5. Instead the court merely “test[ed] [its] conclusion that the claim in Count II is not barred by § 1500 by reference to these tests simply to confirm that [its] conclusion remains true to the principles encompassed in that statutory provision.” *See id.* (concluding that, while “the fact that two suits arise from different claims under the 19th century tests does not compel the conclusion that the suits do not arise from substantially the same operative facts[,] . . . [i]f two suits are determined to arise from the same claim under [such] *res judicata* tests, . . . application of the bar of § 1500 is likely compelled”).

223. *Id.* at 1170.

224. 656 F.3d 1306 (Fed. Cir. 2011).

225. *See id.* at 1310–11 n.3 (recognizing that if “[p]laintiff’s] requested relief . . . ‘relates to the contract[,]’ . . . it is a ‘claim’ under the CDA, and the Claims Court has

generally possessed such jurisdiction, the trial court dismissed the complaint of the plaintiff, Todd Construction, L.P. (Todd), “for lack of standing and failure to state a claim.”<sup>226</sup> Todd appealed the trial court’s dismissal; the Government defended the COFC’s decision based in part on the grounds that the trial court entirely lacked jurisdiction over performance evaluation challenges.<sup>227</sup> The Federal Circuit sided with Todd and the trial court regarding the COFC’s jurisdiction to hear performance evaluation claims, but upheld the trial court’s dismissal of Todd’s case for lack of standing and for failure to state a claim.<sup>228</sup>

At the time of Todd’s performance of its construction contracts for the Army Corps of Engineers, the FAR required that for each such construction contract of \$550,000 or more, a “[performance] report shall be prepared . . . in accordance with agency procedures” and that “[e]ach performance report shall be reviewed to ensure that it is accurate and fair.”<sup>229</sup> The Government also issued Army Corps of Engineers Regulation 415-1-17 “to implement FAR § 36.201 and establish procedures for contractor performance evaluations.”<sup>230</sup>

Todd received negative interim performance evaluations and a final “overall performance rating of unsatisfactory.”<sup>231</sup> After the contracting officer issued a final decision denying Todd’s request for a review of its performance evaluations, the company filed a complaint in the Court of Federal Claims, “alleging that the [G]overnment failed to follow the proper procedures and that the unsatisfactory performance evaluations were arbitrary and capricious.”<sup>232</sup> As the Government pointed out, however, “Todd did not challenge any particular performance ratings,” but “[i]nstead . . . merely pled that the government issued overall unsatisfactory performance evaluations and that these ratings were arbitrary and

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jurisdiction under the Tucker Act).

226. *Id.* at 1308 (citing *Todd Constr., L.P. v. United States*, 94 Fed. Cl. 100 (2010); *Todd Constr., L.P. v. United States*, 88 Fed. Cl. 235 (2009); *Todd Constr., L.P. v. United States*, 85 Fed. Cl. 34 (2008), *aff’d*, 656 F.3d 1306 (Fed. Cir. 2011)). A number of other COFC decisions also had held that the CDA confers jurisdiction over performance evaluation challenges. *See generally* Kara M. Sacilotto, *Challenging Contractor Performance Evaluations: FAR Processes and Claims Before The Court of Federal Claims and The Boards of Contract Appeals*, BRIEFING PAPERS, Sept. 2011 (discussing leading cases).

227. *Todd Constr.*, 656 F.3d at 1310–11.

228. *Id.* at 1308.

229. *Id.* (quoting FAR 36.201 (2006)).

230. *Id.*

231. *Id.* at 1309.

232. *Id.* (outlining that Todd sought a declaratory judgment).

capricious.”<sup>233</sup> Although the trial court concluded that it possessed jurisdiction, the court granted the Government’s motion to dismiss, pursuant to Rule 12(b)(6) of the Rules of the Court of Federal Claims, because Todd had failed to state a claim for relief.<sup>234</sup> The trial court then permitted Todd to file an amended complaint.<sup>235</sup>

Todd’s amended complaint, however, fared no better. Once again, Todd “did not specifically identify which unsatisfactory ratings were arbitrary and capricious” but rather “appeared to challenge primarily the unsatisfactory ratings related to Todd’s timeliness of performance.”<sup>236</sup> Todd also alleged “that the [G]overnment failed to comply with the procedural requirements of [Army Corps of Engineers Regulation] 415-1-17.”<sup>237</sup> The Government moved to dismiss Todd’s amended complaint, which the Court of Federal Claims granted.<sup>238</sup> Although the trial court “reaffirmed that it had subject matter jurisdiction over Todd’s complaint,” the Court of Federal Claims “also held that Todd lacked standing to sue for the alleged procedural violations because ‘there [was] no discernible injury to the plaintiff from the error.’”<sup>239</sup> Moreover, the trial court agreed that “Todd failed to state a claim under Rule 12(b)(6) because Todd was responsible for the acts of its subcontractors as a matter of law” and the amended complaint only contained “‘Todd’s bare assertion of non-responsibility to support’” its conclusory allegation that the assigned unsatisfactory ratings were an abuse of discretion.<sup>240</sup>

On appeal, the Federal Circuit rejected the “[G]overnment’s contention that the Claims Court lacked subject matter jurisdiction under the CDA.”<sup>241</sup> The Federal Circuit began by noting that the Tucker Act provides the COFC with jurisdiction to decide CDA claims “including . . . nonmonetary disputes on which a decision of the contracting officer has been issued.”<sup>242</sup> The CDA does not define “claim,” but the Federal Circuit noted that it has “held . . . that the

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233. *Id.* at 1309–10.

234. *Id.* at 1310.

235. *Id.* (discussing *Todd Constr., L.P. v. United States*, 88 Fed. Cl. 235, 249–50 (2009)).

236. *Id.*

237. *Id.*

238. *Todd Constr., L.P. v. United States*, 94 Fed. Cl. 100, 103, 116 (2010), *aff’d*, 656 F.3d 1306 (Fed. Cir. 2011).

239. *Todd Constr.*, 656 F.3d at 1310 (quoting *Todd Constr.*, 94 Fed. Cl. at 107–13).

240. *Id.* (quoting *Todd Constr.*, 94 Fed. Cl. at 116).

241. *Id.* at 1310–11; *see id.* at 1310–15 (evaluating the Government’s arguments in light of prior case law and legislative history).

242. *Id.* at 1311 (alteration in original) (emphasis omitted) (quoting 28 U.S.C. § 1491(a)(2) (2006)).

definition of the term 'claim' in the FAR governs."<sup>243</sup> The FAR, in turn, defines "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right," not only "the payment of money in a sum certain"—or "the adjustment or interpretation of contract terms"—but also "other relief arising under or relating to the contract."<sup>244</sup> Thus, the Federal Circuit viewed the jurisdictional issue as "whether Todd's requested relief—in essence a declaratory judgment that the [G]overnment's performance evaluations were unfair and inaccurate—'relat[es] to the contract.'"<sup>245</sup>

In answering that question, the Federal Circuit relied upon its precedent and the legislative history of both the CDA and Tucker Act to "support[] a broad reading of the term 'claim.'"<sup>246</sup> Moreover, the appeals court held that "[n]ot only is the term 'claim' broad in scope, [but also] the 'relating to' language of the FAR regulation itself is a term of substantial breadth."<sup>247</sup> In that regard, the Federal Circuit "previously held that to be a claim 'relating to the contract' under the CDA, the claim 'must have some relationship to the terms or performance of a government contract.'"<sup>248</sup> Applying that standard to Todd's case, the court held that "[t]he performance evaluations at issue ha[d] a direct connection and association with Todd's government contracts."<sup>249</sup> The court explained that "[w]hile the unsatisfactory performance evaluations *may not relate to the terms of the contract itself*, they relate to Todd's performance under the contract."<sup>250</sup>

Accordingly, the Federal Circuit held that Todd's performance evaluation claims were covered by the CDA and Tucker Act, and correspondingly rejected the Government's contention that Todd's claims could not relate to the contract unless the claims were based on a valid contractual theory, such as breach of contract or mistake.<sup>251</sup> In other words, "[a] contractor's [CDA] claim need not be based on the contract itself (or a regulation that can be read into the contract)

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243. *Id.* (citing *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1564–65 (Fed. Cir. 1995)).

244. *Id.* (quoting FAR 2.101 (2010)).

245. *Id.*

246. *Id.* at 1311–12 (discussing *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1268 (Fed. Cir. 1999); H.R. REP. NO. 95-1556, at 1 (1978); S. REP. NO. 95-1118, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5235).

247. *See id.* at 1312 (discussing dictionary definition and cataloging court cases).

248. *Id.* at 1312 (emphasis added) (quoting *Applied Cos. v. United States*, 144 F.3d 1470, 1478 (Fed. Cir. 1998)).

249. *Id.* at 1312–13.

250. *Id.* at 1313 (emphasis added).

251. *Id.* (discussing *Paragon Energy Corp. v. United States*, 645 F.2d 966, 975 (Ct. Cl. 1981), and holding that "*Paragon* imposes no such limitation").

as long as it relates to its performance under the contract.”<sup>252</sup>

Finally, the court acknowledged that a plaintiff may not “sue under a statute or regulation if the law was not intended to benefit that class of plaintiffs.”<sup>253</sup> In this case, the court held, however, that “it is possible for a regulation or law to benefit both the government and a class of private parties” and “[t]hat is the case with performance evaluations.”<sup>254</sup>

Todd’s victory with respect to subject matter jurisdiction was a pyrrhic one, as the Federal Circuit ultimately agreed Todd’s complaint was properly dismissed “for lack of standing (with respect to its procedural allegations) and failure to state a claim (with respect to its substantive allegations).”<sup>255</sup> With respect to the former, the Federal Circuit held that “Todd . . . alleged nothing to indicate that the outcome of the performance evaluations would have been any different if the purported procedural errors had not occurred.”<sup>256</sup> With respect to the latter category—the alleged substantive errors in Todd’s performance evaluations—Todd was required to, but did not, “plead facts which g[a]ve rise to a plausible inference that the government abused its discretion in awarding the negative performance ratings.”<sup>257</sup> Put differently, “[a]ll of the facts alleged by Todd could be true and yet it [did] not follow that any of the unsatisfactory ratings were an abuse of discretion or should be changed.”<sup>258</sup>

The Federal Circuit’s decision upholding the trial court’s Rule 12(b)(6) dismissal of Todd’s complaint—and in applying the

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252. *Id.* at 1314 n.6. In reaching that conclusion the court also rejected the Government’s argument “that this approach improperly reads the performance evaluation regulation into the contract under *G.L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963), and its progeny.” *Todd Constr.*, 656 F.3d at 1314 n.6. The court explained that it was not “suggest[ing] that the performance evaluation regulation . . . be read into the contracts. Rather, the regulation applies of its own force and directly governs the parties’ performance under the contracts.” *Id.* (distinguishing *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817 (Fed. Cir. 2010), and *Agredano v. United States*, 595 F.3d 1278 (Fed. Cir. 2010), *cert. denied*, 131 S. Ct. 994 (2011), as cases in which “the regulations were not designed to benefit the contractor and there was no claim that the regulations themselves created rights enforceable by the contractors apart from the contracts”).

253. *Todd Constr.*, 656 F.3d at 1314 (citing *United States v. N.Y. & Porto Rico S.S. Co.*, 239 U.S. 88, 90–93 (1915); *Freightliner Corp. v. Caldera*, 225 F.3d 1361, 1365 (Fed. Cir. 2000); *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1451 (Fed. Cir. 1997); *Rough Diamond Co. v. United States*, 351 F.2d 636, 642 (Ct. Cl. 1965)).

254. *See id.* at 1314–15 (“Performance evaluation regulations were intended to directly and significantly benefit contractors.”).

255. *Id.* at 1315.

256. *Id.* at 1316 (“Therefore, Todd lacks standing to sue with respect to the procedural violations.”).

257. *Id.*

258. *Id.*

Supreme Court's interpretation of that rule in *Ashcroft v. Iqbal*<sup>259</sup>—is particularly notable for ignoring, as “a legal conclusion,” the plaintiff's “bare assertion that it [was] not responsible for the actions of its subcontractors” because the court was “not required to assume that legal conclusions [were] true.”<sup>260</sup> Although Todd “specifically assert[ed] that its problems with subcontractors did not reflect poorly on its management or supervisory capabilities,” Todd's “conclusory statement that the performance of its subcontractors could not reflect negatively on its own performance [did] not support a claim that its performance ratings for effectiveness of management and control of subcontractors should be changed.”<sup>261</sup>

The Federal Circuit's application of the arguably heightened pleading requirements resulting from the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*<sup>262</sup> and *Iqbal*, as exhibited in *Todd*, should serve as a warning to would-be plaintiffs to err on the side of filing detailed complaints, and to support, with specific facts, allegations that otherwise may be deemed mere legal conclusions.

#### D. *Holmes v. United States*

In *Holmes v. United States*,<sup>263</sup> the Federal Circuit finally settled a long standing split among the decisions of the COFC regarding its Tucker Act jurisdiction to entertain claims for an alleged breach of a Title VII settlement agreement.<sup>264</sup>

Before the trial court, Timothy Holmes alleged that the Department of the Navy breached two settlement agreements relating to Title VII employment discrimination actions that he had previously brought against the Navy.<sup>265</sup> The trial court dismissed his amended complaint, which alleged two separate breach of contract claims under the Tucker Act, for lack of jurisdiction.<sup>266</sup> In particular, the

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259. 129 S. Ct. 1937 (2009).

260. *Todd Constr.*, 656 F.3d at 1316–17 (applying *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009), and concluding that, “[t]o raise a plausible inference that the ratings were arbitrary and capricious, the contractor would, at the very least, need to allege facts indicating that all of the substantial delays were excusable”).

261. *Id.* at 1317 n.9.

262. 550 U.S. 544 (2007).

263. 657 F.3d 1303 (Fed. Cir. 2011).

264. *Id.* at 1306; see also *Tucker Act Provides Jurisdiction*, *supra* note 24, at 9 (accepting that “Tucker Act jurisdiction can apply to a dispute over a breach of a settlement agreement relating to a Title VII action”); *COFC Has Exclusive Jurisdiction*, *supra* note 24, at 420 (discussing *Puerto Rico v. United States*, 44 Fed. Cl. 618 (1999), and explaining that, in that case, “[t]he COFC concluded that DLHR's claim for breach of the settlement agreement was within the Court's exclusive jurisdiction”).

265. *Holmes*, 657 F.3d at 1308.

266. *Holmes v. United States*, 92 Fed. Cl. 311, 321 (2010), *rev'd*, 657 F.3d 1303 (Fed. Cir. 2011).

trial court held that neither agreement could fairly be interpreted as mandating the payment of money damages for breach by the Government.<sup>267</sup> In the alternative, the court held that Mr. Holmes's suit was barred by the six-year statute of limitations contained in 28 U.S.C. § 2501 because Mr. Holmes, who conceded that his suit was filed outside the limitations period, was not entitled to the benefit of the "accrual suspension rule."<sup>268</sup>

The Tucker Act, from which the COFC derives its jurisdiction, provides, in relevant part, that the court shall have "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 department, or upon any express or implied contract with the United States."<sup>269</sup> The Tucker Act, however, does not create substantive rights; rather, it is a jurisdictional provision "that operate[s] to waive sovereign immunity for claims premised on other sources of law (*e.g.*, statutes or contracts)."<sup>270</sup> Although "[t]he other source of law need not explicitly provide that the right or duty it creates is enforceable through a suit for damages, . . . it triggers liability only if it 'can fairly be interpreted as mandating compensation by the Federal Government.'"<sup>271</sup> Although these basic premises are far from controversial, their application to Mr. Holmes's breach claims is a different story.

In granting the Government's motion to dismiss, the COFC held that Mr. Holmes "failed to identify any terms of either the 1996 Agreement or the 2001 Agreement which are reasonably amenable to a reading that supports [his] claim that he is entitled to money damages for defendant's breach."<sup>272</sup> The trial court also held that Mr. Holmes had not "demonstrated that there is a basis for a 'fair inference' that he is entitled to money damages based on the government's breach."<sup>273</sup> The COFC thus concluded that neither agreement upon which Mr. Holmes's claims were based could "be fairly interpreted as mandating compensation."<sup>274</sup>

On appeal, both the Government and Mr. Holmes agreed "that the Tucker Act's grant of jurisdiction for breach of contract claims can encompass such claims arising from Title VII settlement

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267. *Id.*

268. *Id.*

269. 28 U.S.C. § 1491(a)(1) (2006).

270. *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009).

271. *Id.* (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)).

272. *Holmes*, 92 Fed. Cl. at 316.

273. *Id.* at 318.

274. *Id.* at 321.



agreements.”<sup>275</sup> Mr. Holmes argued, however, that because the 1996 and 2001 Title VII settlement agreements at issue “are express contracts, the [trial] court erroneously imposed upon him the burden of demonstrating a ‘fair inference’ that the terms of the agreements entitle him to money damages.”<sup>276</sup> Mr. Holmes reasoned that such a burden does not exist when a Tucker Act claim is based upon a contract “because money is the presumptive remedy for breach of contract.”<sup>277</sup> Put differently, “[i]n the absence of contract terms specifically precluding the recovery of money damages, . . . a non-breaching party is entitled to such damages when the government breaches a contract.”<sup>278</sup>

In contrast, the Government argued that “the Court of Federal Claims properly examined whether the 1996 and 2001 Agreements were money-mandating, and that it correctly determined that Mr. Holmes had not carried his burden of establishing that the agreements supported a ‘fair inference’ that money damages were payable in event of breach.”<sup>279</sup> In the Government’s view, the trial court correctly relied upon “the absence of any provision mandating the payment of money for a breach by the government.”<sup>280</sup> Indeed, the Government pointed out “that both the 1996 Agreement and the 2001 Agreement provided for non-monetary remedies.”<sup>281</sup> With respect to the 2001 Agreement in particular, the Government argued that the agreement “is actually a consent decree because it was approved and ‘so ordered’ by the district court in the Northern District of California.”<sup>282</sup> The Government posited that “as a consent

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275. *Holmes v. United States*, 657 F.3d 1303, 1310 (Fed. Cir. 2011). The Government conceded that “the Court of Federal Claims possesses jurisdiction over a claim where plaintiff can establish a substantive right enforceable against the United States for money damages” and that “this includes a Title VII settlement agreement providing for damages as a result of a breach.” *Id.* at 1310 n.3. In other words, even the Government agreed that “simply because a settlement agreement pertains to a Title VII case does not automatically mean that the Court of Federal Claims lacks jurisdiction.” *Id.*

276. *Id.* at 1309–10.

277. *Id.* at 1310.

278. *See id.* (“In short, Mr. Holmes argues that the money-mandating requirement of Tucker Act jurisdiction was satisfied by the very nature of his suit—an action for breach of two Title VII settlement agreements—and that the Court of Federal Claims erred when it required him to identify ‘separate’ money-mandating provisions in the agreements.”).

279. *Id.*

280. *Id.* at 1310–11 (quoting *Holmes v. United States*, 92 Fed. Cl. 311, 317 (2010)).

281. *Id.* at 1311.

282. *Id.*

decree, the Court of Federal Claims lacked jurisdiction to enforce its terms."<sup>283</sup>

Before addressing the arguments raised by the parties, the Federal Circuit, *sua sponte*, first "resolve[d] the initial jurisdictional question of whether the Court of Federal Claims may exercise its Tucker Act jurisdiction over a claim alleging breach of a Title VII settlement agreement" notwithstanding that "Mr. Holmes and the [G]overnment [did] not dispute the point."<sup>284</sup> The problem for the Federal Circuit was that it previously had "not addressed this question, and there [was] a split of authority on it in the Court of Federal Claims."<sup>285</sup>

For example, a number of COFC decisions "have held that the court lacks Tucker Act jurisdiction over claims alleging breach of a Title VII settlement agreement due to the comprehensive statutory scheme established under Title VII, which assigns jurisdiction over discrimination suits to the district courts."<sup>286</sup> In contrast, other COFC decisions, relying on *Kokkonen v. Guardian Life Insurance Co. of America*,<sup>287</sup> "have found such settlement agreements to fall outside the comprehensive scheme of Title VII and to be within the jurisdiction of the court."<sup>288</sup> The Federal Circuit also noted a split on this issue among the circuit courts of appeal.<sup>289</sup>

Siding with the United States Court of Appeals for the District of Columbia Circuit, the Federal Circuit concurred with those "Court of Federal Claims cases which have reached a similar conclusion, that Tucker Act jurisdiction may be exercised in a suit alleging breach of a Title VII settlement agreement."<sup>290</sup> In the Federal Circuit's view,

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283. *Id.*

284. *Id.* (citing *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1353 (Fed. Cir. 2006), which explained that, "[a]s an appellate court, we must be satisfied that the court whose opinion is the subject of our review properly exercised jurisdiction, regardless of whether the parties challenge the lower court's jurisdiction").

285. *Id.*

286. *Id.* (citing *Griswold v. United States*, 61 Fed. Cl. 458, 464-65 (2004); *Taylor v. United States*, 54 Fed. Cl. 423, 425-26 (2002); *Mitchell v. United States*, 44 Fed. Cl. 437, 438-39 (1999); *Lee v. United States*, 33 Fed. Cl. 374, 378-80 (1995); *Fausto v. United States*, 16 Cl. Ct. 750, 752-54 (1989)).

287. 511 U.S. 375 (1994).

288. *Holmes*, 657 F.3d at 1311 (citing *Taylor v. United States*, 73 Fed. Cl. 532, 541-45 (2006); *Westover v. United States*, 71 Fed. Cl. 635, 638-39 (2006)).

289. *Id.* at 1311-12 (citing *Frahm v. United States*, 492 F.3d 258, 262-63 (4th Cir. 2007); *Greenhill v. Spellings*, 482 F.3d 569, 575 (D.C. Cir. 2007); *Hansson v. Norton*, 411 F.3d 231, 232, 237 (D.C. Cir. 2005)).

290. *Id.* at 1312.

“Title VII’s comprehensive scheme” was not “a bar to the exercise of such jurisdiction.”<sup>291</sup>

In addressing the next issue of whether an invocation of jurisdiction under the Tucker Act required Mr. Holmes to “show that the 1996 and 2001 Agreements could support a fair inference that he was entitled to the payment of money damages for breach, or was required to demonstrate that the two agreements could fairly be interpreted that way,” the Federal Circuit rejected the Government’s position, agreed with Mr. Holmes, and reversed the trial court below.<sup>292</sup> In particular, the Federal Circuit explained that “when referencing the money-mandating inquiry for Tucker Act jurisdiction, the cases logically put to one side contract-based claims” because “normally contracts do not contain provisions specifying the basis for the award of damages in case of breach.”<sup>293</sup> This is because, with respect to “government contracts, as with private agreements, there is a presumption in the civil context that a damages remedy will be available upon the breach of an agreement.”<sup>294</sup> In sum, the Federal Circuit clarified that “when a breach of contract claim is brought in the Court of Federal Claims under the Tucker Act, the plaintiff comes armed with the presumption that money damages are available, so that normally no further inquiry is required.”<sup>295</sup>

The Federal Circuit, however, did not completely disappoint the Government. The court made clear that the existence of a contract, per se, does not “always mean[] that Tucker Act jurisdiction exists.”<sup>296</sup> For example, “[a] contract expressly disavowing money damages would not give rise to Tucker Act jurisdiction”—indeed, the Federal Circuit has “found Tucker Act jurisdiction lacking in the case of an agreement ‘entirely concerned with the conduct of the parties in a criminal case.’”<sup>297</sup> Put differently, “the [G]overnment’s consent to

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291. *Id.* (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994); *Massie v. United States*, 166 F.3d 1184, 1188–89 (Fed. Cir. 1999); *Del-Rio Drilling Programs Inc. v. United States*, 146 F.3d 1358, 1367 (Fed. Cir. 1998)).

292. *Id.*

293. *Id.* at 1314 (quoting *San Juan City Coll. v. United States*, 391 F.3d 1357, 1361 (Fed. Cir. 2004)).

294. *Id.* (quoting *Sanders v. United States*, 252 F.3d 1329, 1334 (Fed. Cir. 2001)); see also *United States v. Winstar Corp.*, 518 U.S. 839, 885 (1996) (plurality opinion) (“damages are always the default remedy for breach of contract”).

295. *Holmes*, 657 F.3d at 1314 (“We view this presumption as forming the likely basis for the disparate discussion of claims arising under the Constitution, a statute, or a regulation and those stemming from a contract. Put another way, in a contract case, the money-mandating requirement for Tucker Act jurisdiction normally is satisfied by the presumption that money damages are available for breach of contract, with no further inquiry being necessary.”).

296. *Id.*

297. *Id.* (citing *Sanders*, 252 F.3d at 1334; *Kania v. United States*, 650 F.2d 264,

suit under the Tucker Act does not extend to every contract."<sup>298</sup>

Accordingly, the Federal Circuit did "not agree with Mr. Holmes that the Court of Federal Claims erred in requiring him to demonstrate that the 1996 and 2001 Agreements could fairly be interpreted as contemplating money damages for breach."<sup>299</sup> The court instead recognized that "settlement of a Title VII action involving the government could involve purely nonmonetary relief—for example, a transfer from one agency office to another."<sup>300</sup> On the other hand, the Federal Circuit "agree[d] with Mr. Holmes's alternative argument: that the agreements can fairly be interpreted as contemplating such damages" and that "[t]he Court of Federal Claims therefore ha[d] jurisdiction over Mr. Holmes's breach of contract claims."<sup>301</sup> The Federal Circuit based that conclusion on specific provisions in the settlement agreement, the purpose of which was to document and expunge Mr. Holmes's record and thereby "to prevent Mr. Holmes from being denied future employment based on his record as the Navy maintained it prior to the agreements."<sup>302</sup>

Thus, the contractual provisions that the court held were money-mandating did not do so directly, but rather were "inherently relate[d] to monetary compensation through [the] relationship to Mr. Holmes's future employment."<sup>303</sup> Moreover, the Federal Circuit highlighted the fact that "there is no language in the agreements

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268-69 (Ct. Cl. 1981)).

298. *Id.* (alteration omitted) (citing *Rick's Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1343 (Fed. Cir. 2008)). In *Rick's Mushroom*, the plaintiff brought suit in the Court of Federal Claims based upon a cost-share agreement with the Natural Resource Conservation Service (NRCS). *Rick's Mushroom Serv., Inc. v. United States*, 76 Fed. Cl. 250, 253-54 (2007). The Court of Federal Claims dismissed the suit, holding that, because the contract between Rick's and the NRCS was a cooperative agreement and not a procurement contract, the court did not have subject matter jurisdiction. *Id.* at 258, 262. The Federal Circuit affirmed the dismissal. *Rick's Mushroom*, 521 F.3d at 1348. In reaching that conclusion, the court "noted that Rick's breach of contract claim fell outside of the Tucker Act's jurisdiction because the unique cost-share agreement at issue 'd[id] not provide a substantive right to recover money-damages and Rick's d[id] not point to a money-mandating source of law to establish jurisdiction under 28 U.S.C. § 1491(a)(1).'" *Holmes*, 657 F.3d at 1315 (quoting *Rick's Mushroom*, 521 F.3d at 1343).

299. *Holmes*, 657 F.3d at 1315.

300. *Id.* at 1315 n.8 (citing *Harris v. Brownlee*, 477 F.3d 1043, 1047 (8th Cir. 2007), for the proposition "that money damages appear not to be the routine remedy for the breach of a settlement agreement involving an employment dispute," and explaining that, "[t]ypically, the employee's remedy is enforcement of the settlement terms or rescission of the settlement agreement and reinstatement of the underlying action").

301. *Id.* at 1315.

302. *Id.* at 1316.

303. *Id.*

indicating that the parties did not intend for money damages to be available in the event of breach.<sup>304</sup>

With respect to the Government's argument that the Court of Federal Claims lacked jurisdiction over the breach of a consent decree, the Federal Circuit declined to reach the issue because the court did not agree that the 2001 settlement agreement constituted a consent decree.<sup>305</sup>

In the COFC, "[c]ompliance with the statute of limitations is a jurisdictional requirement."<sup>306</sup> The applicable statute of limitations, 28 U.S.C. § 2501, provides that all claims that otherwise fall within the jurisdiction of the Court of Federal Claims "shall be barred unless the petition thereon is filed within six years after such claim first accrues."<sup>307</sup> The *Holmes* court further explained that "[a] cause of action first accrues when all the events have occurred that fix the alleged liability of the Government and entitle the claimant to institute an action."<sup>308</sup> On the other hand, under the "accrual suspension rule," the "accrual of a claim against the United States is suspended, for purposes of 28 U.S.C. § 2501, until the claimant knew or should have known that the claim existed."<sup>309</sup> For that rule to apply, a plaintiff "must either show that the defendant has concealed its acts with the result that [the] plaintiff was unaware of their

304. *Id.* The Federal Circuit rejected the Government's argument that 29 C.F.R. § 1614.504(a) bars the exercise of Tucker Act jurisdiction. *Id.* That section establishes that a plaintiff alleging breach of an EEOC agreement:

shall notify the [Equal Employment Opportunity] Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance . . . [and] may request that the terms of settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing . . .

*Id.* (quoting 29 C.F.R. § 1614.505(a) (2011)). The court did not seek to "diminish[] the force of this regulation" but saw "no reason for § 1614.504(a) to preclude a suit for money damages in the event of breach that is separate from, or in addition to, the relief the regulation provides." *Id.* at 1316 n.9 (acknowledging "that at least one other circuit has reached the contrary conclusion" (citing *Frahm v. United States*, 492 F.3d 258, 262–63 (4th Cir. 2007))).

305. *Id.* at 1316 (discussing the three related factors provided in *Aronov v. Napolitano*, 562 F.3d 84, 90 (1st Cir. 2009) (en banc), used to determine whether a court-ordered consent decree exists, and explaining that "the 2001 Agreement is not a consent decree" because the district court's jurisdiction under that agreement "lasted only for a year, while obligations under the agreement extended well beyond that period").

306. *Id.* at 1317 (citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133–34 (2008)).

307. *Id.* (quoting 28 U.S.C. § 2501 (2006)).

308. *Id.* (citing *Ingrum v. United States*, 560 F.3d 1311, 1314 (Fed. Cir. 2009)).

309. *Id.* (quoting *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008)); see also *id.* at 1317 n.11 (citing *Holmes v. United States*, 92 Fed. Cl. 311, 319 n.9 (2010)) ("[T]he accrual suspension rule is distinct from equitable tolling, which the Supreme Court has stated is precluded under 28 U.S.C. § 2501.").

existence or it must show that its injury was ‘inherently unknowable’ at the accrual date.”<sup>310</sup>

Before the COFC, Mr. Holmes conceded that, “in the case of both the 1996 and the 2001 Agreements, his original complaint was filed more than six years after the Government’s breach.”<sup>311</sup> To avoid the jurisdictional bar of the statute of limitations, Mr. Holmes contended “that he was entitled to the benefit of the accrual suspension rule.”<sup>312</sup> The Federal Circuit agreed, holding “that he reasonably should have known of the alleged breach of the 1996 and 2001 Agreements [only] when the [prospective employers] began conducting background checks in 2005 and he was no longer being offered contract jobs.”<sup>313</sup> The court thus concluded that “Mr. Holmes’s suit [was] not time-barred.”<sup>314</sup>

Mr. Holmes’s victory may well be short-lived, given that the Federal Circuit explicitly provided the caveat that its “holding [was] based solely on the allegations set forth in the amended complaint” but that, “[a]fter discovery, . . . the [G]overnment may be warranted in renewing its motion to dismiss for lack of jurisdiction due to the statute of limitations, should evidence suggest that Mr. Holmes, in fact, knew or reasonably should have known of the Navy’s alleged breach at an earlier date.”<sup>315</sup>

#### E. Engage Learning, Inc. v. Salazar

In *Engage Learning, Inc. v. Salazar*,<sup>316</sup> Engage Learning (Engage) brought a CDA claim for unpaid services it rendered to schools run by the Bureau of Indian Affairs (BIA) during the periods of October 1–November 22, 2002, and March 1–4 and April 5–7, 2004.<sup>317</sup> With respect to the 2002 period, BIA awarded Engage a \$66,480 contract in August 2002 for teacher training and site visits.<sup>318</sup> Engage, however, contended that it was owed an additional \$80,485 for services rendered as a result of amendments made to the original contract.<sup>319</sup> The Government responded that those additional claims

310. *Id.* at 1317 (quoting *Young*, 529 F.3d at 1384).

311. *Id.* at 1317–18.

312. *Id.* at 1318.

313. *Id.* at 1322.

314. *Id.*

315. *Id.* at 1322–23 n.15 (citing Oral Argument at 44:39–46:03, *Holmes*, 657 F.3d 1303 (No. 2010-5119), available at <http://www.ca9.uscourts.gov/oral-argument-recordings/all/holmes.html>).

316. 660 F.3d 1346 (Fed. Cir. 2011).

317. *Id.* at 1348–49.

318. *Id.* at 1349.

319. *Id.* at 1350.

were the product of an unauthorized commitment; while officials from the Office of Indian Affairs requested and approved the amendments, they were not officially signed by the contracting officer.<sup>320</sup> For the 2004 period, Engage claimed that it was due \$11,500 for providing education training and support services.<sup>321</sup> Specifically, Engage based its claim on the No Child Left Behind Act (NCLB), under which “the supervisor of a BIA-operated school can secure services without competitive bidding” if five factors are met.<sup>322</sup> Engage argued that it had an implied-in-fact contract with the principal of the beneficiary school.<sup>323</sup>

In 2007, Engage filed a CDA claim for the \$91,895 in unpaid services from both the 2002 and 2004 periods.<sup>324</sup> The Government filed a motion to dismiss for lack of subject matter jurisdiction, which the Board granted, “holding that it did not have jurisdiction under the CDA because Engage had failed to show that it had either an express or an implied-in-fact contract with the Government.”<sup>325</sup>

On appeal, the Federal Circuit held that the Board improperly dismissed both the 2002 and 2004 claims for lack of jurisdiction, but also found that Engage had not stated a claim upon which relief could be granted for the 2004 period.<sup>326</sup> The court noted that the CDA grants the Board jurisdiction over appeals taken “from a decision of a contracting officer of any executive agency . . . relative to a contract made by that agency.”<sup>327</sup> The Board had “ignore[d]” this jurisdictional statement, and instead improperly required that Engage “prove that it had either an express or an implied-in-fact contract with the BIA.”<sup>328</sup> The Federal Circuit rejected this position, holding that “a plaintiff need only allege the existence of a contract to establish the Board’s jurisdiction under the CDA ‘relative to’ an express or implied contract with an executive agency.”<sup>329</sup> Applied to

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320. *Id.* at 1349–50; *see also CDA Requires Only Allegation of a Contract, Fed. Cir. Holds, 53 Gov’t CONTRACTOR* ¶ 346, Oct. 19, 2011, at 13 [hereinafter *CDA Requires Only Allegation of a Contract*] (noting that “no CO signed contracts for these amendments”).

321. *Engage Learning*, 660 F.3d at 1351.

322. *Id.* at 1351 (citing 25 U.S.C. § 2010(a)(3)(A) (2006)).

323. *Id.* at 1349.

324. *Id.* at 1351.

325. *Id.*

326. *Id.* at 1353, 1356.

327. *Id.* at 1352 (quoting 41 U.S.C.A. § 7105(e)(1)(B) (West 2011) (formerly codified as 41 U.S.C. § 607 (2006))).

328. *Id.* at 1353 (citing *Engage Learning, Inc. v. Dep’t of the Interior*, CBCA 1165, 2010 WL 2484235 (June 15, 2010)).

329. *Id.* at 1353; *see CDA Requires Only Allegation of a Contract, supra* note 320, at 15 (noting that the Board’s “jurisdiction under the CDA does not depend on the undisputed existence of a contract between a provider and an agency”).

the facts of *Engage Learning*, the court held that the claim for \$80,485 in unpaid services in 2002 “undoubtedly met the jurisdictional requirements” in that it related to the original undisputed August 2002 contract with the BIA.<sup>330</sup> Similarly, the court held that the Board erred in dismissing the 2004 claim.<sup>331</sup> It then noted, however, that once the Board exercises jurisdiction, it can “assess . . . whether the claim is one upon which it can grant relief.”<sup>332</sup> The NCLB requires that five conditions be satisfied for non-competitive contracts such as the one claimed by Engage; because Engage did not contest on appeal the absence of at least two of those conditions, the court affirmed the Board’s dismissal of Engage’s 2004 period claim.<sup>333</sup>

#### F. Systems Development Corp. v. McHugh

In *Systems Development Corp. v. McHugh*,<sup>334</sup> the Federal Circuit affirmed the decision of the Armed Services Board of Contract Appeals (ASBCA or the Board) that it lacked jurisdiction over Systems Development Corporation’s (SDC) monetary claims, which stemmed from the Army’s termination of SDC’s contract for convenience.<sup>335</sup> The salient facts are straightforward, but demonstrate, like the decision itself, the importance of keeping, and paying attention to, an accurate calendar.

On February 17, 2004, the CO terminated SDC’s contract for convenience, prompting SDC to submit a new termination settlement proposal in the amount of \$789,058.<sup>336</sup> On March 25, 2005, “[t]he termination contracting officer (TCO) issued a final decision awarding SDC \$403,563 to settle the contract termination,” although the TCO denied certain “proposed costs and expenses to avoid double payment.”<sup>337</sup> At that point, pursuant to the Contract Disputes Act, “SDC had the option of appealing the TCO’s final decision to either the [ASBCA] or the Court of Federal Claims.”<sup>338</sup> Specifically, SDC had until June 23, 2005 to appeal to the ASBCA or, alternatively,

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330. *Engage Learning*, 660 F.3d at 1354.

331. *Id.* at 1356 (noting that “because the[] allegations are non-frivolous assertions of the existence of a contract under the Act, the Board may not decline to consider them on jurisdictional grounds”).

332. *Id.* (citing *Adair v. United States*, 497 F.3d 1244, 1251 (Fed. Cir. 2007)).

333. *Id.*

334. 658 F.3d 1341 (Fed. Cir. 2011).

335. *Id.* at 1342.

336. *Id.*

337. *Id.* at 1342–43.

338. *Id.* at 1343; see 41 U.S.C.A. § 7104(a) (West 2011) (formerly codified at 41 U.S.C. § 606 (2006) (providing that a contractor is allowed to appeal a decision to an agency board of contract appeals within ninety days of the contractor’s receipt of the decision)).



to file suit in the court within twelve months of SDC's receipt of the contracting officer's decision.<sup>339</sup>

SDC, however, did not act within the ninety-day timeframe, but instead initiated an action in the COFC on March 24, 2006, just prior to the one year period of limitations on CDA actions in that court.<sup>340</sup> The COFC action, however, "went beyond appealing issues resolved in the TCO's final decision."<sup>341</sup> For example, SDC, for the first time, also requested equitable adjustments totaling almost \$1.7 million, which consisted of claims for alleged defective specifications; in addition, it appended claims of breaches of the covenants of good faith and fair dealing.<sup>342</sup>

The Government filed a motion to dismiss the case, "arguing that the Court of Federal Claims did not have jurisdiction to entertain the equitable adjustment claims because they had never been submitted to a CO, a prerequisite to suit in the Court of Federal Claims or review by the [ASBCA]."<sup>343</sup> While the Government's motion to dismiss was pending before the court, SDC and the Government submitted a joint stipulation of dismissal,<sup>344</sup> but "SDC took no further appeal from the TCO's March 25, 2005 final decision."<sup>345</sup> Instead, on February 14, 2008, SDC submitted yet another set of new claims to the CO, again seeking termination costs and expenses that previously had been disallowed by the TCO.<sup>346</sup> In addition, SDC sought more than \$7 million in equitable adjustments.<sup>347</sup> In response, "the CO issued a final decision denying termination settlement costs on the grounds that the claim had already been addressed in the TCO's March 25, 2005 final decision and was not reversed on appeal."<sup>348</sup>

After the CO's second decision, SDC filed a timely appeal to the ASBCA, which held that the Board "lacked jurisdiction to entertain either" the claims for the termination settlement costs or for the equitable adjustment.<sup>349</sup> With respect to the termination settlement claim, the ASBCA concluded that SDC was time-barred from pursuing the claim due to its failure to appeal the TCO's March 25,

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339. *Sys. Dev. Corp.*, 658 F.3d at 1343 (citing § 7104(a)).

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* (citing *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785, 793 (Fed. Cir. 2009)).

344. *Id.* (citing CT. FED. CL. R. 41(a)(1)(ii)).

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* at 1343.

349. *Id.*

2005 final decision to the Board within the CDA's ninety-day limitation.<sup>350</sup> Regarding SDC's claims for equitable adjustment, "the Board noted that the CDA requires a contractor to submit its claims against the Government within six years of accrual of the claim."<sup>351</sup> SDC, however, was aware "of the basis for its equitable adjustment claims no later than November 13, 2001."<sup>352</sup> Accordingly, the ASBCA "dismissed the equitable adjustment claims because SDC did not assert them before the six-year CDA limitations period [expired]."<sup>353</sup>

The Federal Circuit agreed with the Board and affirmed its decision.<sup>354</sup> First, the court concluded that, "[i]n order to timely appeal the TCO's decision regarding termination settlement costs to the Board, SDC needed to file its appeal no later than June 23, 2005."<sup>355</sup> The fatal problem for SDC, however, was that it "elected . . . to wait nearly a year later to appeal to the Court of Federal Claims," and "then voluntarily dismissed that appeal."<sup>356</sup> Consequently, "the ninety-day period for appealing the March 25, 2005 decision to the Board had long-elapsed."<sup>357</sup> Because "SDC took no further action to contest the TCO's resolution of its claim for termination settlement costs until it filed the claims underlying the present appeal in 2008[,] . . . the TCO's determination with respect to these costs stands."<sup>358</sup>

Second, the Federal Circuit rejected SDC's "contention that the TCO lacked the authority to issue the March 25, 2005 final decision in the first place because SDC's proposed settlement amount (\$759,058) was greater than the amount of SDC's contract (\$430,000)."<sup>359</sup> Indeed, "under SDC's reasoning, a CO never has the authority to consider any settlement proposal that is greater than the amount of the awarded contract."<sup>360</sup> In that regard, the court recognized that "FAR 49.207 limit[ed] settlement amounts for fixed-price contracts terminated for convenience."<sup>361</sup> The court elaborated that the regulation specifically highlights that "[t]he total amount payable to the contractor for a settlement, before deducting disposal

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350. *Id.*

351. *Id.* at 1344 (citing 41 U.S.C.A § 7103 (West 2011) (formerly codified at 41 U.S.C. § 605(a) (2006)).

352. *Id.*

353. *Id.*

354. *Id.* at 1347.

355. *Id.* at 1344.

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.* at 1344-45.

360. *Id.*

361. *Id.* at 1345.

or other credits and exclusive of settlement costs, must not exceed the contract price less payments otherwise made or to be made under the contract.”<sup>362</sup> On the other hand, “the FAR does not limit the size of the settlement proposal that may be submitted to a CO.”<sup>363</sup> In this case, although SDC’s settlement offer exceeded SDC’s contract price by eighty-three percent, the “TCO clearly had the authority to issue the March 25, 2005 final decision because the awarded settlement amount was below the contract price.”<sup>364</sup>

Accordingly, and “[b]ecause its appeal to the Court of Federal Claims was voluntarily dismissed, SDC has never successfully appealed the costs addressed in the TCO’s final decision.”<sup>365</sup> In sum, the Federal Circuit concluded that “SDC cannot revive the lapsed settlement cost claim by simply resubmitting a previously resolved claim to a CO years later.”<sup>366</sup>

Third, the Federal Circuit held that the ASBCA did not have jurisdiction over SDC’s claims for over \$7 million in equitable adjustments because those claims were not “submitted [to the CO] within 6 years after the accrual of the claim.”<sup>367</sup> In that regard, “[c]ontractor compliance with this statutory time limit on the presentment of a claim to a CO is a jurisdictional prerequisite for any subsequent appeal of the CO’s decision on that claim.”<sup>368</sup>

The court further added that, “[u]nder the FAR, a claim accrues on ‘the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known.’”<sup>369</sup> In this case, “[a]ll three of SDC’s equitable adjustment claims seek damages arising out of allegedly defective specifications contained in the May 9, 2000 contract” and SDC’s first claim explicitly “alleges that the specifications were defective ‘at the time of award.’”<sup>370</sup>

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362. *Id.* (quoting FAR, 48 C.F.R. 49.207 (2011)).

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.* (concluding that “[t]he February 14, 2008 termination settlement costs claim is the same claim that SDC submitted on April 23, 2004 and that the TCO resolved on March 25, 2005”).

367. *Id.* (citing 41 U.S.C.A § 7103(a)(4)(A) (West 2011) (formerly codified at 41 U.S.C. § 605)) (“The Board found that SDC’s equitable adjustment claims based on the alleged liability of the Government for defective specifications, failure to cooperate, and bad faith accrued no later than November 13, 2001.”).

368. *Id.* (citing *Arctic Slope Native Ass’n v. Sebelius*, 583 F.3d 785, 793 (Fed. Cir. 2009)).

369. *Id.* (quoting FAR, 48 C.F.R. 33.201 (2011)).

370. *Id.* at 1345–46 (emphasis added) (quoting SDC’s complaint and discussing the additional two counts that were tied to the alleged defective specifications).

Although SDC argued that its equitable adjustment claims did not ripen until settlement negotiations between the TCO and SDC had reached an impasse—that is, “until March 25, 2005, when the TCO entered the final decision rejecting SDC’s settlement proposal”—the Government correctly “counter[ed] that such an impasse is not required for the equitable adjustment claims to accrue.”<sup>371</sup> SDC’s impasse argument relied upon *Rex Systems, Inc. v. Cohen*.<sup>372</sup> In *Rex Systems*, the Federal Circuit considered the question of “when a submission by a contractor to a CO meets the definition of a “claim” for the purposes of the CDA.”<sup>373</sup> In that case, the court “acknowledged that not all contractor submissions to a CO are claims” and “clarified that termination settlement proposals submitted under the termination for convenience clause of the FAR generally are not CDA claims.”<sup>374</sup> On the other hand, “a termination settlement proposal may ripen into a claim.”<sup>375</sup> Moreover, “the FAR ‘anticipate[s] the submission of claims independently of the termination settlement proposal.’”<sup>376</sup> In sum, the Federal Circuit has “never indicated that such independently submitted claims require an impasse.”<sup>377</sup>

Ultimately, the fatal defect in SDC’s argument was that “SDC’s equitable adjustment claims were wholly separate from its termination settlement proposal” and “[n]othing precluded SDC from presenting them to a CO as soon as SDC knew of their basis as provided in the FAR.”<sup>378</sup>

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As discussed above, during the past year, the Federal Circuit issued a noteworthy number of decisions addressing the jurisdiction of the COFC and the Boards to hear government contract disputes. Indeed,

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371. *Id.* at 1345–47. Notably, before the Board, “SDC argued that the equitable adjustment claims did not accrue until June 2, 2003 when the CO refused to issue a decision on [the] April 29, 2003 settlement proposal.” *Id.* at 1345 n.2. There, however, “SDC did *not* argue . . . that ‘impasse’ was required for the claims to accrue.” *Id.*

372. 224 F.3d 1367 (Fed. Cir. 2000).

373. *Sys. Dev. Corp.*, 658 F.3d at 1346 (citing *Rex Sys., Inc.*, 224 F.3d at 1371–73; *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537 (Fed. Cir. 1996)).

374. *Id.* at 1346–47 (discussing *Rex Sys.*, 224 F.3d. at 1372) (“[A]ny non-routine submission by a contractor meets the definition of a claim if it is: (1) a written demand; (2) seeking as a matter of right; (3) the payment of money in a sum certain.”).

375. *Id.* at 1347 (citing *Ellett*, 93 F.3d at 1543–44, for the proposition that “a termination settlement proposal may ripen into a CDA claim when the parties’ negotiations reach an impasse”).

376. *Id.* (alterations in original) (quoting *Ellett*, 93 F.3d at 1548).

377. *Id.*

378. *Id.* at 1347 (citing FAR, 48 C.F.R. 33.201-11 (2011)).

the court issued six such decisions—significantly more than have been issued in recent years. While it is difficult to draw any definitive conclusions based on this series of decisions, on balance, they seem to illustrate the Federal Circuit's inclination to protect its role, as well as the role of the COFC and the Boards, as specifically designated tribunals for the resolution of government contract disputes.

### III. CONTRACT PERFORMANCE DISPUTES

Besides the jurisdictionally-focused cases discussed above, the Federal Circuit issued only a handful of non-*Winstar*/non-SNF decisions addressing contract disputes in the past year. These cases cover a hodgepodge of unrelated subjects including sovereign immunity, equitable estoppel, suretyship obligations, and privity of contract.

#### A. Government Immunity

##### I. *Cardiosom, L.L.C. v. United States*

Congress frequently acts—or fails to act—in a manner that produces contract breaches and, concomitantly, this results in suits before the COFC.<sup>379</sup> In *Cardiosom, L.L.C. v. United States*,<sup>380</sup> the Federal Circuit once again was called upon to decide a breach of contract directly caused by an act of Congress.<sup>381</sup>

In 2008, with the passage of the Medicare Improvements for Patients and Providers Act of 2008 (2008 Amendment), Congress unilaterally terminated certain medical equipment and supplies contracts previously executed by the United States under a prior version of the Medicare statutes.<sup>382</sup> *Cardiosom*, whose contracts were terminated by the 2008 Amendment, promptly filed suit for breach of contract in the COFC.<sup>383</sup> The trial court dismissed *Cardiosom*'s suit, however, on the basis that Congress withdrew the court's jurisdiction to entertain *Cardiosom*'s complaint.<sup>384</sup> In particular, the 2008

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379. The *Winstar* and SNF cases being but two examples of such cases. See *infra* Parts IV–V; see also *Cardiosom, L.L.C. v. United States*, 656 F.3d 1322, 1327 (Fed. Cir. 2011) (citing *United States v. Winstar Corp.*, 518 U.S. 839 (1996)) (arguing that Congress was attempting to avoid a contract breach as in *Winstar*).

380. 656 F.3d 1322 (Fed. Cir. 2011).

381. See *id.* at 1324 (“The 2008 Amendment terminated all existing contracts, including *Cardiosom*'s, which were in effect prior to the date of the enactment.” (citation omitted)).

382. *Id.* at 1324–25.

383. *Id.* at 1325 (citing *Cardiosom, L.L.C. v. United States*, 91 Fed. Cl. 659, 661–62 (2010)).

384. *Id.* (citing *Cardiosom, L.L.C.*, 91 Fed. Cl. at 661–62).

Amendment provided that contractors whose contracts are terminated shall not have “an independent cause of action or right to administrative or judicial review with regard to the termination[s].”<sup>385</sup> The COFC, relying upon that provision, concluded “that the plain words of the statute ‘prohibit[ed] contractors from bringing any suit arising from the contract termination, such as claims for damages resulting from the termination.”<sup>386</sup>

On appeal, the Federal Circuit began with the following basic proposition: “[w]ith regard to Congress’s withholding subject matter jurisdiction from a court that already has had it established, our law is clear—such a re-invocation of sovereign immunity by Congress must be done unambiguously.”<sup>387</sup> The issue, therefore, was whether the COFC correctly read the statute in question “to bar judicial review.”<sup>388</sup>

In the 2008 Amendment, the contract termination provision provided that, “to the extent that any damages may be applicable as a result of the termination of such contracts, such damages shall be payable from the Federal Supplementary Medical Insurance Trust Fund.”<sup>389</sup> In interpreting that provision, the Federal Circuit explained that “Congress recognized that its action terminating the existing contracts might well have adverse consequences in terms of damages for breach.”<sup>390</sup> Ultimately, the court held that “[t]he existence of reasonable interpretations that are consistent with the Tucker Act’s waiver of sovereign immunity compel a finding that the 2008 Amendment did not manifest the necessary ‘unambiguous intention to withdraw the Tucker Act remedy.’”<sup>391</sup> In short, “[w]hatever may be the rule regarding nonreviewability of the act of termination, or the absence of challenge to the administrative

385. *Id.* at 1324 (quoting 42 U.S.C. § 1395w-3(a)(1)(D)(i) (2006)).

386. *Id.* at 1325 (quoting *Cardiosom, L.L.C.*, 91 Fed. Cl. at 662).

387. *Id.* (citing *Preseault v. ICC*, 494 U.S. 1, 12 (1990); *Slattery v. United States*, 635 F.3d 1298, 1301 (Fed. Cir. 2011) (en banc)); see also *supra* Part II.A (providing a discussion of *Slattery*).

388. *Cardiosom, L.L.C.*, 656 F.3d at 1324.

389. *Id.* at 1326 (quoting 42 U.S.C. § 1395w-3(a)(1)(D)(i)(I)).

390. *Id.* at 1327 (“Perhaps remembering its experience with the Savings and Loan imbroglio, . . . the termination provision was accompanied by an express recognition that payment of damages might be needed.”); see also *id.* at 1327–28 (citing 42 U.S.C. § 1395w-3(a)(1)(D)(i)(I)) (explaining that Congress “recognize[d] that damages may need to be paid as a result of the contract breaches caused by the unilateral terminations, and authorize[d] payment from a specific insurance trust fund—the Federal Supplementary Medical Insurance Trust Fund, a part of the Centers for Medicare & Medicaid Services (CMS)—from which money judgments resulting from the contract terminations may be paid”).

391. *Id.* at 1330 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984)).

remedy authorized, the legal consequences of the terminations can still be determined under existing federal law governing contract disputes with the Government.<sup>392</sup>

## 2. Klamath Irrigation District v. United States

In *Klamath Irrigation District v. United States*,<sup>393</sup> a collection of irrigation districts and agricultural landowners sued the United States, alleging that the Department of Interior's Bureau of Reclamation breached water supply contracts via temporary reductions of irrigation water provided from the Klamath River Basin reclamation project.<sup>394</sup> The Bureau of Reclamation had to reduce the delivery of such water due to obligations imposed by the Endangered Species Act (ESA).<sup>395</sup> The plaintiffs' complaint alleged counts for taking of their water rights without just compensation in violation of the Fifth Amendment of the U.S. Constitution and the Klamath Basin Compact.<sup>396</sup> The plaintiffs also alleged that, "when the Bureau halted the delivery of water, its action breached water service contracts with the plaintiff districts."<sup>397</sup>

The COFC issued two summary judgment decisions—one resolving the plaintiffs' takings claims, the other adjudicating their breach of contract claims—both in favor of the Government.<sup>398</sup> With respect to the contract claims, the trial court "emphasized that many (though not all) of the contracts had provisions absolving or limiting the United States' liability for Klamath Project water shortages."<sup>399</sup>

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392. *Id.* "The statute in effect clears away the prior administrative actions in awarding contracts under the old law and leaves the Secretary free to undertake further administrative contract actions without the hindrance of the prior arrangements, but leaves unaffected the rights and remedies created by the Government's prior contractual obligations." *Id.*; see also *id.* at 1331 ("Absent the clear and unequivocal language necessary to establish Congressional intention to withdraw jurisdiction from the Court of Federal Claims, we cannot find that the statute is effective to withdraw jurisdiction over the contract dispute alleged here.").

393. 635 F.3d 505 (Fed. Cir. 2011).

394. *Id.* at 508–10 (citations omitted).

395. *Id.* at 508–09 (citing *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 513 (2005)) (discussing the ESA and explaining that "[i]n a 1999 Ninth Circuit decision, the interests of Project water users were declared subservient to the ESA, the result being that, as necessary, the Bureau [of Reclamation] has a duty to control the operation of the Link River Dam in order to satisfy the requirements of the ESA" (citing *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999))).

396. *Id.* at 510.

397. *Id.*

398. *Id.* at 507 (citing *Klamath Irrigation Dist. v. United States*, 75 Fed. Cl. 677 (2007) (the "Contract Decision"); *Klamath Irrigation Dist.*, 67 Fed. Cl. at 504 (the "Takings Decision")).

399. *Id.* at 513 (citing *Klamath Irrigation Dist.*, 75 Fed. Cl. at 681–82). This article only discusses the contract-related issues.

However, the trial court concluded that it had no need to "resolve the bounds of the government's exemption from liability on that basis, because the 'controlling issue' in the case was whether the sovereign acts doctrine foreclosed government liability as to [the] plaintiffs' breach of contract claims."<sup>400</sup> In that regard, "[t]he court first noted that the sovereign acts doctrine immunizes the federal government for any and all acts taken in its sovereign capacity, rather than its capacity as a contractor."<sup>401</sup>

Applying the sovereign acts doctrine, the COFC "reasoned that because the ESA was a general statute enacted for public benefit, the United States could not be held liable for an obstruction to its performance as a contractor that resulted from its public and general acts of compliance as a sovereign."<sup>402</sup> According to the COFC:

[C]ompliance with the ESA was mandatory upon the government and . . . the Bureau modified the Klamath Project operating plan in 2001 in order to protect the endangered species of fish, not to provide an excuse for decreasing the amount of water provided to [the] plaintiffs in its role as [a] government contractor.<sup>403</sup>

In so holding, the trial court "rejected [the] plaintiffs' argument that, even if the sovereign acts doctrine did apply, it did not excuse the [G]overnment's breach of the water supply contracts because the [G]overnment had failed to show the contract was impossible to perform."<sup>404</sup> Although the opinions of four justices in *United States v. Winstar Corp.*<sup>405</sup> were supportive of the plaintiffs' view of the requirement to demonstrate impossibility of performance as part of the sovereign acts defense, the trial court viewed "the Court's non-majority opinion as not binding."<sup>406</sup>

On appeal, the Federal Circuit concurred with the black letter proposition of law that "[t]he government is not liable for breach of contract whenever it takes any generally applicable action in its sovereign capacity that incidentally frustrates performance of a contract to which it is a party."<sup>407</sup> The Federal Circuit also agreed with

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400. *Id.* at 513-14 (citing *Klamath Irrigation Dist.*, 75 Fed. Cl. at 682).

401. *Id.* at 514.

402. *Id.* (citing *Klamath Irrigation Dist.*, 75 Fed. Cl. at 683-84).

403. *Id.* (citing *Klamath Irrigation Dist.*, 75 Fed. Cl. at 684-85).

404. *Id.*

405. 518 U.S. 839 (1996) (plurality opinion).

406. *Klamath Irrigation Dist.*, 635 F.3d at 514 (citing *Winstar Corp.*, 518 U.S. at 839; *Klamath Irrigation Dist.*, 75 Fed. Cl. at 691).

407. *Id.* at 520 (citing *Horowitz v. United States*, 267 U.S. 458, 461 (1925)); *see also id.* (stating that under the sovereign acts doctrine, "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign" (quoting *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1574 (Fed. Cir.



the COFC “that, in this case, the Bureau’s halting of water deliveries . . . constituted a genuine public and general act that only incidentally fell upon the contracts at issue.”<sup>408</sup>

The Federal Circuit nevertheless vacated the trial court’s ruling, holding that “the Court of Federal Claims failed to undertake the second part of the sovereign acts doctrine analysis, which addresses whether the sovereign act would otherwise release the Government from liability under ordinary principles of contract law.”<sup>409</sup> That inquiry, according to the Federal Circuit, “implicates the impossibility of performance component of the sovereign acts defense, which the [G]overnment must establish.”<sup>410</sup> Thus, the Federal Circuit appeared to concur with the plaintiffs that it had already “relied upon the *Winstar* plurality holding” in *Carabetta Enterprises, Inc. v. United States*.<sup>411</sup> Indeed, the court noted that it “reaffirmed this requirement” of proving impossibility of performance in *Casitas Municipal Water District v. United States*,<sup>412</sup> in which the court explained that “performance by the [G]overnment is excused under the sovereign acts defense *only* when the sovereign act renders the [G]overnment’s performance impossible.”<sup>413</sup>

In sum, the Federal Circuit vacated the COFC’s decision and remanded the case “so that the [G]overnment may have the opportunity to carry [its] burden” of demonstrating “that performance of the various contracts at issue was impossible.”<sup>414</sup> In that regard, the Federal Circuit instructed the trial court to “determine whether additional evidence should be received in order to give the [G]overnment the opportunity to show that the Bureau lacked alternatives to halting water deliveries in 2001” and to

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1997))).

408. *Id.* at 521.

409. *Id.* at 522 (citing *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1366 (Fed. Cir. 2009)).

410. *Id.* at 522 (citing *Stockton E. Water Dist.*, 583 F.3d at 1367; *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1294 (Fed. Cir. 2008)).

411. 482 F.3d 1360 (Fed. Cir. 2007); *see also id.* at 1365 (“[I]t does not follow that discharge will always be available, for the common-law doctrine of impossibility imposes additional requirements before a party may avoid liability for breach” (quoting *Winstar Corp.*, 518 U.S. at 904)).

412. 543 F.3d 1276 (Fed. Cir. 2008).

413. *Klamath Irrigation Dist.*, 635 F.3d at 521 (emphasis added) (quoting *Casitas Mun. Water Dist.*, 543 F.3d at 1287).

414. *Id.* at 522 (footnote omitted) (“The Bureau’s reduction of water deliveries . . . was a public and general act. However, in order to escape liability from breach of contract in this case . . . the government has the burden of establishing that performance of the various contracts at issue was impossible.”).

determine whether the plaintiffs should have “the opportunity to respond to any such showing by the [G]overnment.”<sup>415</sup>

### B. *Equitable Estoppel*

#### 1. *Mabus v. General Dynamics C4 Systems*

*Mabus v. General Dynamics C4 Systems, Inc.*<sup>416</sup> stems from General Dynamics C4 Systems’ (General Dynamics) assumption of a contract between the United States Navy and Motorola.<sup>417</sup> The contract at issue was for Digital Modular Radios, to be developed and delivered by Motorola on an indefinite delivery/indefinite quantity (ID/IQ) basis; after the Navy purchased a contractual minimum, it “could order additional radios at the contract price.”<sup>418</sup> Further, the Ordering Clause provided that “‘a delivery order or task order is considered ‘issued’ when the Government deposits the order in the mail,” and that “[o]rders may be issued orally, by facsimile, or by electronic commerce methods *only if authorized in the schedule.*”<sup>419</sup> General Dynamics assumed the contract on September 28, 2001, and negotiated option pricing in 2002 and early 2003.<sup>420</sup> General Dynamics and the Navy also entered into a bilateral modification on September 27, 2002, which exercised Option IV.<sup>421</sup> Then, on September 10, 2003, the Navy exercised Option V and issued delivery orders (DOs) 18–20 and 22–29 via email.<sup>422</sup>

General Dynamics, however, did not want to accept DOs 18–20 and 22–29 at Option V prices,<sup>423</sup> and concluded that they were in conflict with the Ordering Clause in the contract.<sup>424</sup> Specifically, General Dynamics claimed that the Ordering Clause “prohibited emailing [DOs] unless authorized by the schedule,” and the schedule did not

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415. *Id.* at 522 n.14. Notably, although Judge Gajarsa filed a separate concurrence, he did not appear to take any issue with the panel majority’s analysis of the sovereign acts issue. See generally *id.* at 522–25 (Gajarsa, J., concurring in part and concurring in judgment).

416. 633 F.3d 1356 (Fed. Cir. 2011).

417. *Id.* at 1358 (citing Appeal of Gen. Dynamics C4 Sys., Inc., ASBCA No. 54988, 09-2 BCA ¶ 34150).

418. *Id.*

419. *Id.* (emphasis added).

420. *Id.* (citing Appeal of Gen. Dynamics C4 Sys., Inc., ASBCA No. 54988, 09-2 BCA ¶ 34150).

421. *Id.*

422. *Id.* at 1359 (citing Appeal of Gen. Dynamics C4 Sys., Inc., ASBCA No. 54988, 09-2 BCA ¶ 34150).

423. *Estoppel Barred Contractor’s Rejection of E-Mailed DOs*, Fed. Cir. Says, 53 GOV’T CONTRACTOR ¶ 56 (2011).

424. *Gen. Dynamics C4 Sys., Inc.*, 633 F.3d at 1359 (citing Appeal of Gen. Dynamics C4 Sys., Inc., ASBCA No. 54988, 09-2 BCA ¶ 34150).

authorize email delivery.<sup>425</sup> On October 6, 2003, General Dynamics informed the Navy that it rejected DOs 18-2C and 22-29, but the Navy responded that the DOs were valid and demanded delivery.<sup>426</sup> General Dynamics construed this demand as "direction to proceed under the Changes Clause of the contract," which required "a contractor to go forward with work even if it dispute[d] the propriety of the Navy's request."<sup>427</sup> After the Navy demanded performance, "General Dynamics filed a claim with the contracting officer," who denied the claim.<sup>428</sup> General Dynamics then appealed to the Armed Services Board of Contract Appeals, which ruled that the DOs were invalid because the Navy failed to send them in compliance with the Ordering Clause.<sup>429</sup>

On appeal to the Federal Circuit, the Navy challenged the Board's finding on the ground that the Board had incorrectly analyzed the Navy's proffered defense of equitable estoppel.<sup>430</sup> As outlined in *Aukerman Co. v. R.L. Chaides Construction Co.*,<sup>431</sup> the Federal Circuit utilizes a three-factor test for equitable estoppel: (1) misleading conduct; (2) reliance upon that conduct; and (3) material prejudice as a result of such reliance.<sup>432</sup> However, the Board applied a different test, requiring that: "(1) [General Dynamics] knew the facts; (2) it intended that its conduct be acted upon or acted such that the Navy had a right to believe it was so intended; (3) the Navy was ignorant of the true facts; and (4) the Navy relied [on General Dynamics'] conduct."<sup>433</sup> General Dynamics acknowledged that the Board utilized an incorrect standard and that the *Aukerman* standard applied, but claimed that the Board's error was harmless in that the analysis was "essentially identical."<sup>434</sup> General Dynamics also argued, in the alternative, that equitable estoppel should not apply to the type of contract at issue in the case.<sup>435</sup>

The Federal Circuit rejected General Dynamics' second argument

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425. *Id.* (citing Appeal of Gen. Dynamics C4 Sys., Inc., ASBCA No. 54988, 09-2 BCA ¶ 34150).

426. *Id.* (citing Appeal of Gen. Dynamics C4 Sys., Inc., ASBCA No. 54988, 09-2 BCA ¶ 34150).

427. *Id.* (citing Appeal of Gen. Dynamics C4 Sys., Inc., ASBCA No. 54988, 09-2 BCA ¶ 34150).

428. *Id.*

429. *Id.*

430. *Id.* at 1360.

431. 960 F.2d 1020 (Fed. Cir. 1992).

432. *Id.* at 1028.

433. *Gen. Dynamics C4 Sys., Inc.*, 633 F.3d at 1359-60 (citing *Rel-Reeves, Inc. v. United States*, 534 F.2d 274, 296-97 (Ct. Cl. 1976) (per curiam)).

434. *Id.* at 1360.

435. *Id.* at 1363.

that the doctrine of equitable estoppel did not apply to ID/IQ contracts,<sup>436</sup> and applied *Aukerman* to reverse the Board and hold that the Navy satisfied the three-factor test for equitable estoppel.<sup>437</sup> With respect to the first factor, the court found that General Dynamics' conduct was misleading in that, prior to challenging the DOs at issue in the case, it had accepted and performed on thirteen emailed DOs without objection.<sup>438</sup> Regarding the second factor, the court held that "the Navy clearly relied on General Dynamics' conduct," pointing out that General Dynamics "never rejected emailed [DOs] or even mentioned the Ordering Clause mailing requirement."<sup>439</sup> Lastly, the court found it "clear that the Navy suffered material prejudice," namely its "inability to obtain radios under its contractually negotiated pricing."<sup>440</sup>

### C. Suretyship Obligations

#### 1. *Lumbermens Mutual Casualty Co. v. United States*

*Lumbermens Mutual Casualty Co. v. United States*<sup>441</sup> presented three issues for the Federal Circuit's resolution: (1) "whether the surety's claim against the United States seeking to recover allegedly improper progress payments made to the contractor is an equitable subrogation claim and is therefore within Tucker Act jurisdiction" pursuant to *Insurance Co. of the West v. United States*;<sup>442</sup> (2) "whether the Claims Court ha[d] Tucker Act jurisdiction over impairment of suretyship claims against the [G]overnment apart from the theory of equitable subrogation;" and (3) "whether the administrative requirements of the Contract Disputes Act . . . appl[ied] to a surety's claim against the United States arising from a takeover agreement which the government and surety have entered into for the completion of a bonded contract following the [contractor's] default."<sup>443</sup>

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436. *Id.*; see *Estoppel Barred Contractor's Rejection of E-Mailed DOs, Fed. Cir. Says, supra* note 423, ¶ 56 (noting that, although DOs are like options, the court held that this does not preclude the application of equitable estoppel).

437. *Gen. Dynamics C4 Sys., Inc.*, 633 F.3d at 1361.

438. *Id.* (noting that "[t]his acceptance of email orders was misleading in light of General Dynamics' later change in course when it refused to accept the final disputed DOs").

439. *Id.* at 1362.

440. *Id.* at 1362-63.

441. 654 F.3d 1305 (Fed. Cir. 2011).

442. 243 F.3d 1367 (Fed. Cir. 2001).

443. *Lumbermens Mut. Cas. Co.*, 654 F.3d at 1307. There is no shortage of background information and commentary regarding sureties in the context of government contracts. See, e.g., Donavan Bezer, *The Inadequacy of Surety Bid Bonds in*

Although suretyship claims are not necessarily straightforward, the salient facts of this case are few. A construction company, Landmark Construction (Landmark), contracted with the United States Navy to repair and renovate military family housing units.<sup>444</sup> The contract provided for liquidated damages if Landmark failed to complete its work by the specified completion date.<sup>445</sup> Landmark, in accordance with the Miller Act, was required to furnish performance and payment bonds.<sup>446</sup> To satisfy those bond requirements, “Landmark entered into two suretyship agreements with Lumbermens.”<sup>447</sup> “The United States was not a party to either suretyship agreement, but both contracts expressly identified the United States as the intended third-party beneficiary of the bond in the event Landmark breached its obligations.”<sup>448</sup>

Although Landmark completed only a relatively small percentage of the work, the Navy had paid Landmark approximately forty percent of the contract price when Landmark abandoned the construction site.<sup>449</sup> The Navy consequently terminated Landmark for default and thereafter “exercised its rights as an intended third-party beneficiary of the performance bond and demanded that Lumbermens complete the construction contract.”<sup>450</sup> Lumbermens, in turn, accepted its obligation and hired a replacement contractor to complete what was originally Landmark’s contractual obligation.<sup>451</sup> To effectuate the new arrangement, Lumbermens, the replacement contractor, and the United States entered into a “takeover agreement.”<sup>452</sup> The replacement contractor was late in completing the construction contract and the Navy assessed liquidated damages

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*Public Construction Contracting*, 40 PUB. CONT. L.J. 87 (2010) (addressing the unavailability of surety bid bonds in protecting against bid defaults); Edward G. Gallagher & Mark H. McCallum, *The Importance of Surety Bond Verification*, 39 PUB. CONT. L.J. 269 (2010) (arguing that contractors should verify the validity and jurisdiction of surety bonds); *Postscript: The Rights of Performance Bond Sureties*, 19 NASH & CIBINIC REP. ¶ 34 (July 2005) (summarizing case law regarding current jurisdiction over cases involving sureties’ rights); *Rights of Sureties: They’re Growing*, 2 NASH & CIBINIC REP. ¶ 42 (July 1988) (acknowledging the expansion of sureties’ rights in the Claims Court to match those of the Armed Services Board of Contract Appeals); *The Rights of Performance Bond Sureties: It Depends on the Circumstances*, 6 NASH & CIBINIC REP. ¶ 57 (Oct. 1992) (discussing the rights of sureties in cases against the government).

444. *Lumbermens Mut. Cas. Co.*, 654 F.3d at 1308.

445. *Id.*

446. *Id.* (citing 40 U.S.C. § 3131 (b) (2006)).

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.* at 1308–09.

against the replacement contractor, for which Lumbermens was required to reimburse the contractor pursuant to a separate completion contract.<sup>453</sup>

Lumbermens sued the Government to recover damages under three theories.<sup>454</sup> First, Lumbermens “sought to recover damages under the theory of “equitable subrogation,” contending that “the government improperly increased Lumbermens’ suretyship costs by making overpayments to Landmark in violation of FAR payment provisions in the bonded contract that were aimed at ensuring progress payments corresponded to work actually completed.”<sup>455</sup> Second, “Lumbermens asserted identical counts to that of its ‘equitable subrogation’ claim on an alternative theory of impairment of suretyship . . . , pointing out that state contract law recognizes such claims.”<sup>456</sup> Third, Lumbermens alleged that the Government breached the takeover agreement by withholding an improper amount of liquidated damages from the replacement contractor.<sup>457</sup>

The Federal Circuit rejected each of Lumbermens’ positions. With respect to the equitable subrogation claim, the court agreed with the COFC that

[t]he theory of equitable subrogation is based on the view that the triggering of a surety’s bond obligation gives rise to an implied assignment of rights by operation of law whereby the surety . . . ‘step[s] into the shoes’ of the principal obligor and is entitled to all of its rights relating to the construction contract.<sup>458</sup>

In this case, the Federal Circuit held that “equitable subrogation is not implicated” because the doctrine “can be used to recover improper payments” only if they are made by the Government after it has received notice of the contractor’s default—that is, “notice that the bond obligation has been triggered and an implied assignment of the contract rights to the surety has occurred.”<sup>459</sup> “Because the Government did not make progress payments to Landmark after notice of its default,” Lumbermens could not recover the alleged overpayments based on a claim of equitable subrogation.<sup>460</sup>

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453. *Id.* at 1309.

454. *Id.* (citing 28 U.S.C. § 1491 (2006)).

455. *Id.*

456. *Id.* at 1310.

457. *Id.*

458. *Id.* at 1312 (quoting *Ins. Co. of the W. v. United States*, 243 F.3d 1367, 1374 (Fed. Cir. 2001)).

459. *Id.* (citations omitted); see also *id.* at 1312 n.3 (referencing *Insurance Co. of the West*, among other cases).

460. *Id.* at 1313. The court distinguished this case from *National Surety Corp. v. United States*. *Id.*; see *Nat’l Sur. Corp. v. United States*, 118 F.3d 1542, 1547 (Fed. Cir.

The Federal Circuit further held that the “surety’s affirmative cause of action for impairment of suretyship stems not from an equitable assignment of rights (like equitable subrogation), but rather is based on an implied-in-law contract theory—i.e., a recovery in the nature of quantum meruit or quantum valebant.”<sup>461</sup> Lumbermens’ theory essentially boiled down to the fact that it “ha[d] paid more than it owed and the [G]overnment was unjustly enriched.”<sup>462</sup> While Lumbermens’ claim “may be a sound legal theory for recovery against an obligee as a matter of state law,” the court “conclude[d] that the United States has not waived sovereign immunity as to such claims.”<sup>463</sup>

Notably, although the Surety & Fidelity Association of America argued in an amicus brief that the Government’s position would “leave sureties without a remedy when the government impairs the surety’s collateral,” the Federal Circuit flatly rejected that argument as “incorrect.”<sup>464</sup> Instead, the court somewhat formalistically explained that “the surety has the right to withhold payment on the bond, to the extent the surety has been prejudiced,” but that “once a surety makes overpayments on its bond obligation, it has no right to affirmatively recover against the United States.”<sup>465</sup>

Finally, the Federal Circuit rejected Lumbermens’ claim based upon the takeover agreement, because Lumbermens failed to submit a claim to a contracting officer as required by the CDA.<sup>466</sup> The Federal Circuit thus reversed the trial court’s decision below, which had held the CDA inapplicable to the surety.<sup>467</sup> In the view of the

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1997) (finding that the notice requirement for equitable subrogation was met because the Government was aware of the default). The court proceeded to explain that “a panel of this court would lack the authority to eliminate this rule in view of our prior precedents explicitly holding that equitable subrogation only applies to payments made after the obligee receives notice of the default.” *Lumbermens Mut. Cas. Co.*, 654 F.3d at 1313 (citations omitted).

461. *Lumbermens Mut. Cas. Co.*, 654 F.3d at 1314–15.

462. *Id.* at 1316. The Federal Circuit has held “in other contexts that the mere provision of goods or services to the government in excess of a party’s legal obligation does ‘not create an implied-in-fact contract’” over which the COFC would have jurisdiction. *Id.* (quoting *Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1327 (Fed. Cir. 1997)).

463. *Id.* at 1315. “Generally speaking, implied-in-law contracts ‘impose duties that are deemed to arise by operation of law’ in order to prevent an injustice, whereas implied-in-fact contracts are ‘founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding.’” *Id.* at 1316 (quoting *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998)).

464. *Id.* at 1317.

465. *Id.*

466. *Id.* at 1321.

467. *Id.* at 1318, 1321–22 (citing *Lumbermens Mut. Cas. v. United States*, 90 Fed. Cl. 558, 560–61 (2009)).

COFC, the CDA did not apply to Lumbermens' claim because the takeover agreement was not a contract for the procurement of goods or services and because Lumbermens signed the takeover agreement in order to fulfill its performance bond obligations.<sup>468</sup> The Federal Circuit, on the other hand, held that the takeover agreement "is clearly a contract for 'the procurement of construction, alteration, repair or maintenance of real property.'"<sup>469</sup> Moreover, the Federal Circuit rejected Lumbermens' contention that it was not a contractor within the meaning of the CDA, noting that the statute defines "contractor" simply as "a party to a Government contract other than the Government."<sup>470</sup>

Lumbermens, for its part, creatively argued that because the agreement expressly designated Lumbermens as a "surety"—rather than as a "contractor," it was "exempt[] . . . from the jurisdictional requirements of the CDA" and thus did not have to submit a claim.<sup>471</sup> The problem with that argument, according to the Federal Circuit, was that "the agreement ma[de] clear that Lumbermens became bound to complete the defaulted construction contract by assuming the role of a prime contractor and hiring" a replacement contractor.<sup>472</sup>

#### D. Privity of Contract

##### 1. CCA Associates v. United States

Although the issue in *CCA Associates v. United States*<sup>473</sup> is primarily one concerning the privity of contract, this case is perhaps more noteworthy for illustrating the court's willingness to follow its prior decisions even where they appear to have been wrongly decided. In this case, the owner of an apartment complex claimed that the Emergency Low Income Housing Preservation Act of 1987<sup>474</sup> (ELIHPA) and Low-Income Housing Preservation and Resident Homeownership Act of 1990<sup>475</sup> (LIHPRA) created a temporary

468. *Id.* at 1318. (citing *Lumbermens Mut. Cas.*, 90 Fed. Cl. at 560–61).

469. *Id.* (quoting 41 U.S.C. § 602(a)(3) (2006)).

470. *Id.* at 1319 (quoting 41 U.S.C. § 601(4)).

471. *Id.*

472. *Id.* at 1320 (explaining that the court "previously recognized that where, as here, a surety enters a takeover agreement with the government under which the surety agrees to complete the performance of a defaulted contract, the surety assumes the role of a prime contractor").

473. 667 F.3d 1239 (Fed. Cir. 2011).

474. Pub. L. No. 100-242, § 201, 101 Stat. 1815, 1877 (1988) (codified as amended at 12 U.S.C. § 1715l (2006)).

475. Pub. L. No. 101-625, § 201, 104 Stat. 4079, 4249 (codified as amended at 12 U.S.C. § 4101 (2006)).



regulatory taking and a breach of contract by depriving the apartment owner of its contractual right to prepay a government-backed mortgage and thereby end its participation in a low-income housing program.<sup>476</sup>

The dispute here traced its origin to a 1961 amendment to the National Housing Act<sup>477</sup> (NHA), which created incentives for private developers to build housing that would meet the needs of moderate-income families.<sup>478</sup> Under the 1961 amendments, the Government agreed to subsidize and insure mortgages that participating developers took with private lenders for up to 90% of the cost of new housing developments.<sup>479</sup> The term of these mortgages was set at forty years; however, the relevant contracts gave developers the right to prepay their mortgages after twenty years.<sup>480</sup> In return for these mortgages and other incentives, the developers were required to sign a “regulatory agreement” with the Department of Housing and Urban Development (HUD), under which HUD approval was required for, among other things, any increases in rent.<sup>481</sup> The restrictions in the regulatory agreement were to remain in effect as long as HUD insured the mortgage, which, for practical purposes, meant that developers were subject to HUD regulation until the mortgage was paid off.<sup>482</sup> Therefore, the twenty-year prepayment option in the mortgage gave developers the opportunity to convert their properties to market rate housing at an earlier date.<sup>483</sup>

To enter the program, developers signed three documents: a regulatory agreement with HUD, a secured note, and a mortgage.<sup>484</sup> Each of these documents were drafted by HUD and written on HUD or Federal Housing Administration forms.<sup>485</sup> “The secured note, which was endorsed by HUD, included a term allowing prepayment

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476. *CCA Assocs.*, 667 F.3d at 1242-43.

477. Pub. L. No. 73-479, 48 Stat. 1246 (1934).

478. Housing Act of 1961, Pub. L. No. 87-70, § 101(a)(6), 75 Stat. 149, 150-51 (codified as amended at 12 U.S.C. § 17151 (2006)); *see also* S. REP. NO. 87-281, at 4 (1961), *reprinted in* 1961 U.S.C.A.N. 1923, 1926 (noting that the 1961 amendments to the National Housing Act were made to “enable private enterprise to participate to the maximum extent in meeting the housing needs of moderate-income families”).

479. *Cienega Gardens v. United States*, 503 F.3d 1266, 1270 (Fed. Cir. 2007) (citation omitted); *see id.* at 1270-71 (discussing the history and purpose of the 1961 amendments to the NHA).

480. *Id.* at 1270.

481. *Id.* at 1271 (citation omitted).

482. *Id.*

483. *See id.* (acknowledging that the regulatory agreement would be terminated once the prepayment right was exercised).

484. *CCA Assocs. v. United States*, 667 F.3d 1239, 1243 (Fed. Cir. 2011).

485. *Id.* (citing *CCA Assocs. v. United States*, 91 Fed. Cl. 580, 586 (2010)).

after [twenty] years, and also incorporated the mortgage by reference."<sup>486</sup> The mortgage incorporated the secured note and the regulatory agreement and was signed by the developer and the lender, but not HUD.<sup>487</sup> The regulatory agreement, which was signed by the developer and HUD, incorporated the legislation and regulations related to the program, but "did not expressly include the [twenty] year prepayment provision."<sup>488</sup> In sum, the only document that HUD signed was the regulatory agreement, which did not explicitly include the prepayment provision.<sup>489</sup>

By the 1980s, Congress grew worried that program participants were preparing to prepay their mortgages and exit the program en masse.<sup>490</sup> In order to avoid a resulting shortage in low-income housing, Congress enacted ELIHPA and LIHPRHA, which, among other things, effectively prohibited prepayment of mortgages for many participants in the program.<sup>491</sup> This restriction continued until April 1996, when Congress enacted legislation restoring prepayment rights.<sup>492</sup> CCA Associates, a program participant, filed suit, alleging that ELIHPA and LIHPRHA prevented it from making prepayments, and that this constituted both a temporary regulatory taking and a breach of its contractual right to prepayment.<sup>493</sup> The COFC agreed that the restriction on prepaying the mortgage was a regulatory taking, but held that there was no breach of contract because CCA did not have privity of contract with HUD with respect to its prepayment rights.<sup>494</sup> The parties filed cross-appeals.<sup>495</sup>

With respect to CCA's breach of contract claim,<sup>496</sup> the Federal Circuit explained that it was compelled by its prior decision in *Cienega*

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486. *Id.* (citing *CCA Assocs.*, 91 Fed. Cl. at 586).

487. *Id.* (citing *CCA Assocs.*, 91 Fed. Cl. at 586).

488. *Id.* (citing *CCA Assocs.*, 91 Fed. Cl. at 586).

489. *Id.*

490. *See Cienega Gardens v. United States*, 503 F.3d 1266, 1272 (Fed. Cir. 2007) (explaining that Congress responded to concerns about withdrawal from the low-income housing market with "carrot-and-stick" legislation).

491. *Id.* at 1272-73 (citation omitted); *see also CCA Assocs.*, 667 F.3d at 1243 (discussing ELIHPA and LIHPRHA).

492. Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 2(b), 110 Stat. 834, 834-35; Omnibus Consolidated Recissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321; *see also Cienega Gardens*, 503 F.3d at 1274 (explaining that the 1996 legislation freed participants from prepayment restrictions provided that they had not entered into use agreements with HUD).

493. *CCA Assocs.*, 91 Fed. Cl. at 584.

494. *Id.* at 620.

495. *CCA Assocs.*, 667 F.3d at 1242.

496. Most of the Federal Circuit's opinion was devoted to addressing the regulatory taking issue and is, therefore, outside the scope of this article on government contracts law. *See id.* at 1244-46 (analyzing CCA Associates' takings claim).

*Gardens v. United States*,<sup>497</sup> to find that there was no privity of contract between the apartment owner and HUD regarding prepayment rights; therefore, the Government's restrictions on prepayment did not breach the contract.<sup>498</sup> In *Cienega Gardens*, a case involving the same housing program, the Federal Circuit held that there was no privity of contract between HUD and a program participant regarding prepayment rights.<sup>499</sup> The court reasoned that because the United States was a party to only one of the three documents—the regulatory agreement—and the regulatory agreement did not contain any prepayment provision, there was no privity of contract between HUD and the participant regarding this right.<sup>500</sup> The only document that mentioned prepayment rights was the secured note—a document to which the Government was never a signatory.<sup>501</sup>

In *CCA Associates*, the Federal Circuit explained that because the facts before it were not distinguishable from *Cienega Gardens*, it was compelled to find that CCA also lacked privity with HUD regarding its prepayment rights and, therefore, there was no breach of contract.<sup>502</sup>

It is interesting to note, however, the panel's<sup>503</sup> implicit acknowledgement that *Cienega Gardens* may have been wrongly decided.<sup>504</sup> Indeed, the Federal Circuit noted that both the COFC and the United States Court of Appeals for the Tenth Circuit were sharply critical of the *Cienega Gardens* decision.<sup>505</sup> The COFC asserted that the three documents (i.e., the regulatory agreement, the secured note, and the mortgage) should be treated as an "integrated

497. 194 F.3d 1231 (Fed. Cir. 1998).

498. *CCA Assocs.*, 667 F.3d at 1250 (citing *Cienega Gardens*, 194 F.3d at 1246).

499. *Cienega Gardens*, 194 F.3d at 1235–36, 1246 (citation omitted).

500. *Id.* at 1241–43.

501. *Id.* at 1242.

502. *CCA Assocs.*, 667 F.3d at 1250.

503. The majority opinion was written by Judge Moore and joined by Judge O'Malley in its entirety. Judge Dyk wrote a separate opinion concurring in the judgment and dissenting-in-part. *Id.* (Dyk, J., concurring in the judgment and dissenting-in-part). However, Judge Dyk's separate opinion focused only on his disagreement with the majority's treatment of the takings issue, and he appeared to be in agreement with the majority's opinion on the breach of contract issue. *Id.* ("I agree with . . . the majority's affirmance of the Claims Court's dismissal of the contract claim. I write separately because I disagree with the majority's . . . incorrect and wholly unnecessary dictum approving aspects of the Claims Court's takings analysis.")

504. *See id.* at 1248–50 (majority opinion) (conceding that the trial court was correct to find *Cienega Gardens* controlling but also recognizing the court's "exceedingly thoughtful and thorough analysis" suggesting that HUD was a party to the "overall transaction" involving all three relevant documents (citing *CCA Assocs. v. United States*, 91 Fed. Cl. 580, 592, 598 (2010))).

505. *Id.* at 1249–50 (citing *Aspenwood Inv. Co. v. Martinez*, 355 F.3d 1256, 1260 (10th Cir. 2004)).

transaction.”<sup>506</sup> It explained that reading these three documents together “gives effect to the fact that the [twenty-year] limit on prepayment contained in the secured note was a provision drafted by HUD that replicated HUD’s regulations on prepayment and was used by HUD to induce participation in the program.”<sup>507</sup> Thus, if not for the fact that it was bound by *Cienega Gardens*, the COFC would have held that HUD and CCA Associates were in privity as to the twenty-year prepayment provision.<sup>508</sup>

The Tenth Circuit refused to follow *Cienega Gardens* for essentially the same reasons as noted by the COFC. In *Aspenwood Investment Co. v. Martinez*,<sup>509</sup> the Tenth Circuit concluded that these related documents constituted “a single, overarching agreement.”<sup>510</sup> The court explained that the property owner’s “promises were primarily for the benefit of HUD (and the participants in the low income housing program), not for the lender” and that “it was the demonstrated intent of HUD (and of [the] plaintiff and of the lender) to be bound by the terms of all of the parts of the transaction.”<sup>511</sup>

The Federal Circuit panel was seemingly sympathetic to these arguments. It noted that:

[A]ll three documents [i.e., the regulatory agreement, the secured note, and the mortgage] are intended to reach a single goal: to induce developers to provide low income housing. Each of these three documents forms a critical part of the overall transaction, and without any one of these documents, the overall terms binding CCA would be substantially different.<sup>512</sup>

Moreover, the court noted that, “as highlighted by the dissent in *Cienega Gardens*, the Tenth Circuit in *Aspenwood*, and the Court of Federal Claims in this case, it is certainly possible that the three agreements should be interpreted together.”<sup>513</sup> Nevertheless, the Federal Circuit explained that it was bound by its prior precedent in

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506. *Id.* at 1249 (quoting *CCA Assocs.*, 91 Fed. Cl. at 598). The trial court also noted that the circumstances of the document signing supported this conclusion, as all three documents were on HUD’s preprinted forms and were signed contemporaneously in a single room in HUD’s New Orleans office. *CCA Assocs.*, 91 Fed. Cl. at 592.

507. *CCA Assocs.*, 667 F.3d at 1249 (quoting *CCA Assocs.*, 91 Fed. Cl. at 595).

508. *Id.* (quoting *CCA Assocs.*, 91 Fed. Cl. at 598).

509. 355 F.3d 1256 (10th Cir. 2004).

510. *CCA Assocs.*, 667 F.3d at 1250 (quoting *Aspenwood Inv. Co.*, 355 F.3d at 1260).

511. *Id.* at 1249–50 (quoting *Aspenwood Inv. Co.*, 355 F.3d at 1260).

512. *Id.* at 1249 (citing *CCA Assocs.*, 91 Fed. Cl. at 592).

513. *Id.* at 1250.

*Cienega Gardens* and that a petition for en banc review was CCA's only remaining avenue for relief.<sup>514</sup>

#### IV. WINSTAR CASES

##### A. First Annapolis Bancorp v. United States

In the aftermath of the savings and loan crisis of the 1980s, and given that the Federal Savings and Loan Insurance Corporation (FSLIC) lacked the funds required to liquidate all of the affected savings and loan associations (thrifts), the Federal Home Loan Bank Board (FHLBB) encouraged healthy thrifts to merge with failing thrifts.<sup>515</sup> To bring about this end, the FHLBB offered incentives to the acquiring thrifts, primarily "purchase method accounting," which would allow the thrift to "designate the excess of the purchase price over the fair value of all of the ailing thrift's identifiable assets acquired as an intangible asset, called 'supervisory goodwill.'"<sup>516</sup> The acquiring thrift could then count this supervisory goodwill as regulatory capital and amortize that capital over a long period of time.<sup>517</sup> However, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) provided that thrifts could no longer include supervisory goodwill as part of their capital accounts.<sup>518</sup> As a result, some acquiring thrifts that relied on supervisory goodwill to meet their regulatory capital requirements could no longer do so and were liquidated by the Government.<sup>519</sup> In *United States v. Winstar Corp.*,<sup>520</sup> the Supreme Court held that FIRREA constituted a breach of the Government's prior agreement that had allowed acquiring thrifts to count supervisory goodwill as regulatory capital.<sup>521</sup>

*First Annapolis Bancorp, Inc. v. United States*<sup>522</sup> is the latest—and perhaps one of the last—in the long line of *Winstar* cases that have been heard by the Federal Circuit.<sup>523</sup> After posting net losses for a

514. *Id.*

515. *First Annapolis Bancorp, Inc. v. United States*, 644 F.3d 1367, 1368 (Fed. Cir. 2011) (citing *United States v. Winstar Corp.*, 518 U.S. 839, 844, 847 (1996) (plurality opinion)); *Castle v. United States*, 301 F.3d 1328, 1332 (Fed. Cir. 2002)).

516. *Id.* at 1368–69 (citing *Winstar Corp.*, 518 U.S. at 848–49).

517. *Id.* at 1369 (citing *Winstar Corp.*, 518 U.S. at 851).

518. *Id.* (citing *Winstar Corp.*, 518 U.S. at 857).

519. *Id.* (citing *Winstar Corp.*, 518 U.S. at 858).

520. 518 U.S. 839 (1996).

521. *Id.* at 909–10 (plurality opinion).

522. 644 F.3d 1367 (Fed. Cir. 2011).

523. See *Holland v. United States*, 621 F.3d 1366, 1373 (Fed. Cir. 2010) (noting that this 2010 decision would be "one of the last of the *Winstar* cases"); *Schooner, supra* note 1, at 1104 (citing *Anchor Sav. Bank v. United States*, 597 F.3d 1356 (Fed.

number of years, First Federal Savings & Loan Association of Annapolis (First Federal) submitted an application to the FHLBB on November 5, 1987 to obtain outside capital through a supervisory conversion.<sup>524</sup> "First Federal also submitted a Holding Company Application (HCA) and Regulatory Business Plan (Business Plan)," which together provided for the incorporation of Bancorp.<sup>525</sup> Bancorp was created to acquire the stock of, and infuse capital into, First Annapolis Savings Bank, F.S.B (First Annapolis).<sup>526</sup> "On July 8, 1987, First Federal entered into a Supervisory Agreement with the FHLBB," under which it proposed a plan to merge with First Annapolis.<sup>527</sup> FHLBB approved the merger on July 21, 1988,<sup>528</sup> and also granted five years of regulatory forbearances to First Annapolis (but not to Bancorp) relating to asset amortization and regulatory capital requirements.<sup>529</sup> Bancorp then entered into a Regulatory Capital Maintenance and Dividend Agreement (RCMDA) with the FSLIC on August 12, 1988, under which Bancorp agreed to "maintain First Annapolis's regulatory capital level as required."<sup>530</sup> While First Annapolis was able to meet its first capital benchmark on June 30, 1989, FIRREA and its related regulations became effective on August 9, 1989, eliminating the prior forbearance incentives.<sup>531</sup> Without the regulatory goodwill allowances provided by the forbearances, First Annapolis failed to meet its regulatory requirements and went into receivership.<sup>532</sup>

At issue in the case was whether Bancorp had standing to sue the Government for breach of contract on the ground that FIRREA "eliminated those forbearances after roughly one year of performance."<sup>533</sup> The COFC previously held that Bancorp had standing, finding that a contract, "including the RCMDA, HCA,

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Cir. 2010)) (characterizing *Anchor Savings Bank, FSB v. United States* as "another of the vanishing breed of *Winstar* cases").

524. *First Annapolis Bancorp, Inc.*, 644 F.3d at 1369-70 (citing *First Annapolis Bancorp, Inc. v. United States*, 75 Fed. Cl. 263, 266 (2007)).

525. *Id.* at 1370 (citation omitted).

526. *Id.* (citing *First Annapolis Bancorp, Inc.*, 75 Fed. Cl. at 266, 267 n.6); see *Holding Company Lacks Standing in Winstar Suit, Fed. Cir. Holds*, 53 GOV'T CONTRACTOR ¶ 284 (2011) (explaining that Bancorp would sell shares of its stock to generate capital to be infused into First Annapolis).

527. *First Annapolis Bancorp, Inc.*, 644 F.3d at 1370 (citing *First Annapolis Bancorp, Inc.*, 75 Fed. Cl. at 266).

528. *Id.* (citing *First Annapolis Bancorp, Inc.*, 75 Fed. Cl. at 269).

529. *Id.* at 1370-71 (citing *First Annapolis Bancorp, Inc.*, 75 Fed. Cl. at 268, 270-71).

530. *Id.* at 1371.

531. *Id.* at 1372 (citing *First Annapolis Bancorp, Inc. v. United States*, 89 Fed. Cl. 765, 775-76 (2009); *First Annapolis Bancorp, Inc.*, 75 Fed. Cl. at 272).

532. *Id.* (citing *First Annapolis Bancorp, Inc.*, 75 Fed. Cl. at 272).

533. *Id.* (citing *First Annapolis Bancorp, Inc.*, 89 Fed. Cl. at 768).

Business Plan, Resolutions, and Forbearance Letters,” existed between Bancorp and the Government.<sup>534</sup> On appeal, the Federal Circuit conversely held that Bancorp did not have standing because it lacked privity with the Government.<sup>535</sup> Specifically, the court noted that Bancorp was only a signatory to the RCMDA and did not receive the forbearance letters that contained the Government’s goodwill promises.<sup>536</sup> Bancorp attempted to argue that it was the “acquiror” of that goodwill promise, relying on *Home Savings of America, FSB v. United States*,<sup>537</sup> but the court distinguished the case on three grounds.<sup>538</sup> First, it was First Federal, not Bancorp, that initiated negotiations with the Government and entered into the Supervisory Agreement.<sup>539</sup> Second, Bancorp was not incorporated until after First Federal infused capital in March 1987; thus, it did “not exist at the time the negotiations began.”<sup>540</sup> Third, the court held that, in the absence of a “larger transaction” to which Bancorp was a party, Bancorp was not an “essential participant as a contracting party.”<sup>541</sup>

#### V. SPENT NUCLEAR FUEL CASES

Recent years have seen SNF cases emerge as “the new *Winstar* cases,” in that there has been a significant number of similar cases brought before the Federal Circuit, which have focused primarily on the amount of damages owed to individual plaintiffs.<sup>542</sup> These cases trace their origin to the Nuclear Waste Policy Act of 1982 (NWPA), through which Congress instructed the Department of Energy (DOE) to construct and begin operating a permanent repository for U.S.

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534. *Id.* (citing *First Annapolis Bancorp, Inc.*, 75 Fed. Cl. at 273–78).

535. *Id.* at 1376.

536. *Id.* at 1375.

537. 399 F.3d 1341 (Fed. Cir. 2005).

538. *First Annapolis Bancorp, Inc.*, 644 F.3d at 1374–75.

539. *Id.* at 1374 (citing *First Annapolis Bancorp, Inc.*, 75 Fed. Cl. at 266).

540. *Id.* at 1374–75 (citing *First Annapolis Bancorp, Inc.*, 75 Fed. Cl. at 266 n.6).

541. *Id.* at 1375 (quoting *Home Sav. of Am.*, 399 F.3d at 1350).

542. Graham, *supra* note 5, at 1054 (arguing that SNF cases are “the new *Winstar* cases”); see, e.g., *Pac. Gas & Elec. v. United States*, 668 F.3d 1346 (Fed. Cir. 2012); *Sys. Fuels, Inc. v. United States*, 666 F.3d 1306 (Fed. Cir. 2012); *Yankee Atomic Elec. Co. v. United States*, No. 2011-5020 (Fed. Cir. argued Nov. 7, 2011); *S. Cal. Edison Co. v. United States*, 655 F.3d 1319 (Fed. Cir. 2011); *N. States Power Co. v. United States*, No. 2008-5037 (Fed. Cir. dismissed July 15, 2011); *Dominion Res., Inc. v. United States*, 641 F.3d 1359 (Fed. Cir. 2011); *Energy Nw. v. United States*, 641 F.3d 1300 (Fed. Cir. 2011); *S. Nuclear Operating Co. v. United States*, 637 F.3d 1297 (Fed. Cir. 2011); *Vt. Yankee Nuclear Power v. United States*, No. 2011-5033 (Fed. Cir. appeal docketed Dec. 16, 2010); *Carolina Power & Light Co. v. United States*, 573 F.3d 1271 (Fed. Cir. 2009); *Pac. Gas & Elec. Co. v. United States*, 536 F.3d 1282 (Fed. Cir. 2008); *Yankee Atomic Elec. Co. v. United States*, 536 F.3d 1268 (Fed. Cir. 2008); *Ind. Mich. Power Co. v. United States*, 422 F.3d 1369 (Fed. Cir. 2005).

nuclear utilities' SNF and other high-level radioactive waste (HLW) no later than January 31, 1998.<sup>543</sup>

While the NWPA provided that DOE would manage the disposal of the nuclear waste, it contemplated that the nuclear power industry would pay for the repository through the creation of a Nuclear Waste Fund.<sup>544</sup> In order to establish this fund, the NWPA made it effectively mandatory for the nation's nuclear utilities to enter into a uniform waste disposal contract with DOE by prohibiting the Nuclear Regulatory Commission (NRC) from issuing or renewing an operating license to any utility that refused to enter into such a contract.<sup>545</sup> This "Standard Contract" contained a schedule of fees, and, as required by the NWPA, mandated that the DOE begin accepting nuclear waste by January 31, 1998, and continue doing so "until such time as all SNF . . . has been disposed of."<sup>546</sup>

Unfortunately, the NWPA's plan to create a permanent repository for the nation's SNF went off track almost immediately.<sup>547</sup> Faced with "[c]omplex environmental regulations, fierce litigation from communities near the proposed repository sites," political pressure, and congressional neglect, progress on the permanent repository slowed to a crawl,<sup>548</sup> by the mid-1990s, "DOE had given up hope of meeting the January 31, 1998 deadline."<sup>549</sup> When this deadline passed, the utilities that were parties to the Standard Contract brought a wave of lawsuits against the federal government.<sup>550</sup> Indeed,

543. See Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, §§ 111, 302(a)(5)(B), 96 Stat. 2201, 2207-08, 2258 (codified at 42 U.S.C. §§ 10131, 10222(a)(5)(B) (2006)); see also *Energy Nw.*, 641 F.3d at 1302 (discussing the NWPA).

544. See Tom Kenny, Note, *Where to Put it All? Opening the Judicial Road for a Long-Term Solution to the Nation's Nuclear Waste Problem*, 86 NOTRE DAME L. REV. 1319, 1323 (2011) (citation omitted) (discussing the history of the NWPA). As of July 2009, the utilities had paid approximately \$17 billion into the Nuclear Waste Fund. *Budgeting for Nuclear Waste Management: Hearing Before the H. Comm. on the Budget*, 111th Cong. 5 (2009) (statement of Christopher A. Kouts, Acting Director, Office of Civilian Radioactive Waste Mgmt., Dep't of Energy).

545. 42 U.S.C. § 10222(b)(1)(A) (2006).

546. 10 C.F.R. § 961.11 (2011).

547. See generally Charles de Saillan, *Disposal of Spent Nuclear Fuel in the United States and Europe: A Persistent Environmental Problem*, 34 HARV. ENVTL. L. REV. 461, 485-90 (2010) (providing a more detailed discussion of the difficulties faced by DOE in constructing a permanent nuclear waste repository and its aborted effort to establish such a repository at Yucca Mountain); Kenny, *supra* note 544, at 1323-32 (similar).

548. Daniel Thies, *The Decline of the Court of Federal Claims in Nebraska Public Power District v. United States*, 590 F.3d 1357 (Fed. Cir. 2010), 33 HARV. J.L. & PUB. POL'Y 1203, 1205 (2010) (citing Annemarie Wall, *Going Nowhere in the Nuke of Time: Breach of the Yucca Contract, Nuclear Waste Policy Act Fallout and Shelter in Private Interim Storage*, 12 ALB. L. ENVTL. OUTLOOK J. 138, 175-83 (2007)).

549. Thies, *supra* note 548, at 1205 (citation omitted).

550. *Budgeting for Nuclear Waste Management: Hearing Before the H. Comm. on the Budget*, 111th Cong. 8 (2009) (statement of Michael F. Hertz, Deputy Assistant Att'y Gen., Civil Div., U.S. Dep't of Justice).



by 2009, seventy-one utilities had filed separate damage claims in the COFC for breach of the Standard Contract.<sup>551</sup>

The prior decisions of the Federal Circuit have established the Government's liability for breaching the Standard Contract; thus, the only remaining question is the amount of damages that are (and will be) owed to each utility.<sup>552</sup> In 2011, the Federal Circuit issued six SNF-related decisions, each of which focused primarily on the proper calculation of damages.<sup>553</sup> While many of the issues discussed in these cases are unique to the SNF area and, therefore, will likely be of little utility to most practitioners, other issues relating to the calculation of damages generally may have applicability and utility beyond the SNF context.

#### A. Southern Nuclear Operating Co. v. United States

In *Southern Nuclear Operating Co. v. United States*,<sup>554</sup> the plaintiffs, Southern Nuclear Operating Company, Alabama Power Company, and Georgia Power Company, filed suit in the COFC for partial breach of the Standard Contract after the DOE was unable to begin accepting delivery of SNF by January 31, 1998.<sup>555</sup> The COFC granted summary judgment for the plaintiffs on the question of liability and held a trial to determine the amount of damages.<sup>556</sup> This trial resulted in awards of approximately \$77 million in combined damages, which the Government appealed on two grounds.<sup>557</sup>

First, the Government argued that remand was necessary to

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551. *Id.*

552. *See* *S. Nuclear Operating Co. v. United States*, 637 F.3d 1297, 1299 (Fed. Cir. 2011) (citing *Neb. Pub. Power Dist. v. United States*, 590 F.3d 1357 (Fed. Cir. 2010) (en banc)). A complete discussion of the Federal Circuit's earlier decisions establishing the Government's liability in SNF cases is beyond the scope of this Article. A discussion of the prior case law in this area can be found in this *Law Review's* previous articles reviewing the government contracts decisions of the Federal Circuit. *See, e.g.,* Graham, *supra* note 5, at 1054, 1069–72; Schooner, *supra* note 1, at 1106–11. *See generally* Thies, *supra* note 548.

553. *Supra* note 542. The Government's potential liability in these cases is substantial. Indeed, in 2007, "the Office of Civilian Radioactive Waste Management estimated that the government would owe at least seven billion dollars in damages for delays in opening a permanent geologic repository, with further delays increasing damage costs by approximately half a billion dollars per year." Kenny, *supra* note 544, at 1331 (citing Matthew L. Wald, *U.S. to Owe Billions for Delays In Nuclear Dump, Official Says*, N.Y. TIMES, Mar. 7, 2007, at C4); *see also* Mark Maremont, *Nuclear Waste Piles Up—in Budget Deficit*, WALL ST. J., Aug. 9, 2011, at A3 (citing estimates that the delay will cost the federal government \$16.2 billion by 2020).

554. 637 F.3d 1297 (Fed. Cir. 2011).

555. *Id.* at 1298.

556. *S. Nuclear Operating Co. v. United States*, 77 Fed. Cl. 396, 398 (2007).

557. *S. Nuclear Operating Co.*, 637 F.3d at 1300–01 (citing *S. Nuclear Operating Co.*, 77 Fed. Cl. at 460).

determine the amount that the plaintiffs would have spent storing SNF if the Government had begun accepting SNF at the rates anticipated in its 1987 annual capacity report (ACR).<sup>558</sup> At trial, the parties agreed that the plaintiffs should be awarded damages equal to the amount of expenses they actually incurred to store SNF following the Government's breach minus the costs that the plaintiffs would have incurred storing SNF if the Government had performed on time.<sup>559</sup> The plaintiffs argued that, because of the breach, they were forced to construct new storage facilities, purchase dry storage casks, pay for SNF loading costs, and perform fuel reracking, all of which would have been unnecessary if the Government had begun accepting SNF as required by the Standard Contract.<sup>560</sup> The Government argued, however, that the plaintiffs would have incurred some of these expenses even if it had begun collecting SNF on time.<sup>561</sup> Determining whether these costs were incurred as a result of the Government's breach proved to be difficult, however, "because the Standard Contract itself did not specify a rate at which [the Government] was obligated to pick up SNF."<sup>562</sup> "Instead, the Standard Contract required [DOE] to issue [ACRs] stating which plants would be granted pick-up allocations first and projecting how much SNF would be accepted by [DOE]," both on an industry-wide and individual-plant basis each year.<sup>563</sup>

At trial, the Government argued that the court should have adopted a SNF acceptance rate set out in its 1991 ACR, which was approximately 900 metric tons of SNF per year.<sup>564</sup> Unsurprisingly, the plaintiffs argued that the Government would have accepted SNF at a much higher rate—3000 metric tons per year—if it were not for the Government's breach.<sup>565</sup> The trial court, however, refused to determine an actual contractual acceptance rate, and instead concluded that if the Government had begun accepting SNF at a "reasonable rate" of 2000 to 3000 metric tons per year, the plaintiffs would not have incurred any additional expenses for reracking and dry storage and awarded the plaintiffs approximately \$77 million in damages.<sup>566</sup>

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558. *Id.* at 1302.

559. *Id.* at 1299.

560. *Id.*

561. *Id.* at 1300.

562. *Id.*

563. *Id.*

564. *Id.*

565. *Id.*

566. *Id.* (citing *S. Nuclear Operating Co. v. United States*, 77 Fed. Cl. 396, 439, 460 (2007)).

Following the COFC trial, the Federal Circuit held separately in *Pacific Gas & Electric Co. v. United States*<sup>567</sup> that the Standard Contract required DOE to accept SNF at the rates set forth in the DOE's 1987 ACR, which estimated the 1998 SNF acceptance rate would be 1200 metric tons per year and that this rate would ramp up to 2650 metric tons of SNF per year by 2004.<sup>568</sup> However, neither the Government nor the plaintiffs had advocated for the use of the 1987 ACR acceptance rates at trial and neither party had introduced evidence regarding the proper amount of damages under these rates.<sup>569</sup> Given this fact, the *Southern Nuclear Operating Co.* court found it appropriate to remand the case back to the trial court to determine whether the parties could introduce evidence regarding damages under the 1987 SNF acceptance rates.<sup>570</sup> The court explained that this approach was necessary to be consistent with its decision in *Carolina Power & Light Co. v. United States*.<sup>571</sup> In *Carolina Power*, the plaintiff failed to introduce evidence concerning its damages under the 1987 rates at trial, which was held before the court's *Pacific Gas* decision.<sup>572</sup> The court "excused the failure," however, and remanded the case back to the trial court because the plaintiff "could not 'be expected to have forecasted the outcome of [the court's] intervening decision' in *Pacific Gas*."<sup>573</sup> The Federal Circuit explained that the latitude that was given to the plaintiff to reopen the record in *Carolina Power* must also be provided to the Government.<sup>574</sup>

Second, the Government argued that the "Unavoidable Delays" clause in the Standard Contract precluded expectancy damages.<sup>575</sup> The Government attempted to raise this defense before the COFC, but the court found it to be waived because the Government never mentioned it in any pre-trial pleadings or at trial.<sup>576</sup> The Government argued before the Federal Circuit that the reason it did not raise the Unavoidable Delays clause defense earlier was because it believed this defense was precluded by the D.C. Circuit's decision in *Northern States*

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567. 536 F.3d 1282 (Fed. Cir. 2008).

568. *Id.* at 1290, 1292.

569. *S. Nuclear Operating Co.*, 637 F.3d at 1300, 1302-05.

570. *Id.* at 1303-04.

571. 573 F.3d 1271 (Fed. Cir. 2009).

572. *S. Nuclear Operating Co.*, 637 F.3d at 1303-04 (citing *Carolina Power*, 573 F.3d at 1275-77); see also Graham, *supra* note 5, at 1069-72 (providing a more detailed discussion of *Carolina Power*).

573. *Id.* (quoting *Carolina Power*, 573 F.3d at 1275).

574. *Id.*

575. *Id.* at 1298 (citing *S. Nuclear Operating Co. v. United States*, 77 Fed. Cl. 396, 452-59 (2007)).

576. *Id.* at 1301 (citing *S. Nuclear Operating Co.*, 77 Fed. Cl. at 457).

*Power Co. v. Department of Energy*,<sup>577</sup> and that it would be held in contempt by the D.C. Circuit if it had raised the defense.<sup>578</sup>

By way of background, in May of 1995, once it became clear that the DOE would not be able to construct a SNF storage facility on time, the agency issued a final rulemaking concluding that it "[did] not have an unconditional statutory or contractual obligation to accept high level waste and spent nuclear fuel beginning January 31, 1998 in the absence of a repository or interim storage facility."<sup>579</sup> However, in *Indiana Michigan Power Co. v. Department of Energy*,<sup>580</sup> the D.C. Circuit found that the agency's interpretation was contrary to the NWPA and that the agency had a statutory obligation to begin accepting SNF no later than January 31, 1998, regardless of whether a storage facility had actually been constructed.<sup>581</sup> The DOE's contracting officer subsequently announced that DOE's failure to begin accepting SNF was excused under the "Unavoidable Delay" clause of the Standard Contract.<sup>582</sup> In *Northern States*, the D.C. Circuit held that DOE was improperly trying to avoid its statutory obligations under the NWPA and issued a mandamus order "precluding DOE from excusing its own delay on the grounds that it ha[d] not yet prepared a permanent repository or interim storage facility."<sup>583</sup> Thus, the Government argued before the Federal Circuit that it could not have voluntarily waived the Unavoidable Delays defense because it

577. 128 F.3d 754 (D.C. Cir. 1997).

578. *S. Nuclear Operating Co.*, 637 F.3d at 1305; see also *N. States Power Co.*, 128 F.3d at 760 ("[W]e preclude DOE from concluding that its delay is unavoidable on the ground that it has not yet prepared a permanent repository or that it has no authority to provide storage in the interim.").

579. Department of Energy Final Interpretation of Nuclear Waste Acceptance Issues, 60 Fed. Reg. 21,793, 21,793-94 (May 3, 1995); see also *Ind. Mich. Power Co. v. Dep't of Energy*, 88 F.3d 1272, 1274 (D.C. Cir. 1996) (summarizing DOE's interpretation).

580. 88 F.3d 1272 (D.C. Cir. 1996).

581. *Id.* at 1277.

582. *S. Nuclear Operating Co.*, 637 F.3d at 1305.

583. *N. States Power Co.*, 128 F.3d at 760-61. Nine years after the D.C. Circuit issued the *Northern States Power Co.* mandamus order, the COFC held that the D.C. Circuit did not have jurisdiction over disputes under the Standard Contract and, therefore, its mandamus order did "not preclude [the United States] from arguing . . . that it did not breach the Standard Contract based upon the Unavoidable Delays clause." *Neb. Pub. Power Dist. v. United States*, 73 Fed. Cl. 650, 673-74 (2006), *rev'd*, 590 F.3d 1357, 1376 (Fed. Cir. 2010) (en banc). On appeal, an en banc Federal Circuit reversed this decision and held that the D.C. Circuit had jurisdiction to enter the mandamus order and that its decision in *Northern States Power Co.* was entitled to res judicata on the issue of liability, but that the mandamus order did not "direct the implementation of any remedy." *Neb. Pub. Power Dist. v. United States*, 590 F.3d 1357, 1376 (Fed. Cir. 2010) (en banc); see also *S. Nuclear Operating Co.*, 637 F.3d at 1306 (discussing *Northern States*); Schooner, *supra* note 1, at 1106-11 (providing additional information on *Northern States Power Co.* and *Nebraska Public Power District*); Thies, *supra* note 548, at 1203-15 (similar).

“reasonably believed that it was compelled by the *Northern States* mandamus order, under threat of sanctions for contempt, from raising the Unavoidable Delays defense in this case.”<sup>584</sup>

The Federal Circuit rejected this argument. It explained that the Government misunderstood the scope and purpose of the *Northern States* mandamus order.<sup>585</sup> In the court’s view, the *Northern States* mandamus order did not prevent the Government from making any argument in the COFC.<sup>586</sup> “Rather, it was directed toward a situation in which the [DOE] itself issued a decision rejecting the premise of the court’s *Indiana Michigan* decision.”<sup>587</sup> The Federal Circuit characterized the D.C. Circuit’s concern as being that the DOE would itself “implement [an] interpretation of the Standard Contract that excuse[d] its failure to perform,” not that the agency might make any particular argument in the COFC.<sup>588</sup> Accordingly, the Government’s assertion that the Unavoidable Delays clause precluded expectancy damages was waived.<sup>589</sup>

#### B. Energy Northwest v. United States

In *Energy Northwest v. United States*,<sup>590</sup> the Federal Circuit affirmed in part, reversed in part, vacated in part, and remanded a \$56.9 million award by the COFC to Energy Northwest for damages incurred when the Government breached the Standard Contract.<sup>591</sup> The Government appealed on three issues.

First, the Government challenged the trial court’s award of approximately \$1 million to Energy Northwest for modifications that the utility made to its Columbia plant in Richmond, Washington.<sup>592</sup> When Energy Northwest’s Columbia plant was originally constructed, it included on-site wet storage pools that were projected to have enough capacity to hold the plant’s SNF through 2003.<sup>593</sup> This capacity would have been sufficient if the Government had begun accepting delivery of SNF by January 31, 1998 (as required by the

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584. *S. Nuclear Operating Co.*, 637 F.3d at 1305.

585. *Id.*

586. *Id.*

587. *Id.* at 1305–06.

588. *Id.* at 1306 (alterations in original) (quoting *N. States*, 128 F.3d at 760).

589. *Id.* Because this defense was waived, the Federal Circuit never reached the question as to whether the Unavoidable Delays clause could provide a defense to expectancy damages. *Id.* This question will, however, most likely be properly presented to the court in a future SNF case.

590. 641 F.3d 1300 (Fed. Cir. 2011).

591. *Id.* at 1304, 1313 (citing *Energy Nw. v. United States*, 91 Fed. Cl. 531, 560 (2010)).

592. *Id.* at 1304–05.

593. *Id.* at 1303.

Standard Contract); however, when it became clear that the Government would not begin accepting SNF in the foreseeable future, Energy Northwest began constructing an independent dry storage facility for its SNF.<sup>594</sup> In addition to the direct costs of building the dry storage facility—which were not challenged on appeal—Energy Northwest sought \$1 million for certain modifications that it made to its Columbia plant.<sup>595</sup> These modifications were necessary so that Energy Northwest could safely transfer SNF from the plant's wet storage pools to the dry storage casks that would be used at its newly constructed storage facility.<sup>596</sup>

The Government challenged this expense, claiming that because the Standard Contract made the utilities responsible for loading their own SNF into casks for transport to the DOE, Energy Northwest would have needed to make plant modifications even if the Government had not breached the Standard Contract.<sup>597</sup> The Government noted that, under the Federal Circuit's decision in *Yankee Atomic Electric Co. v. United States*,<sup>598</sup> the plaintiff "must submit a hypothetical model establishing what its costs would have been" in the absence of the breach, and this model must be compared to the plaintiff's actual expenses to determine the quantum of damages.<sup>599</sup> Thus, the Government asserted that Energy Northwest should have been required to prove that the modifications it made to its Columbia plant were different than those required by the Standard Contract.<sup>600</sup> Energy Northwest asserted, however, that the Government's position was a request for a "damages offset" for avoided future costs and, therefore, under *Carolina Power*, the Government had the burden of proving that these costs were completely avoided, and not merely deferred, before they could be offset from the award.<sup>601</sup>

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594. *Id.* at 1303–04.

595. *Id.* at 1304–05.

596. *Id.* at 1304.

597. *Id.* at 1305 (citing DOE Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, 10 C.F.R. § 961.11, IV.A.2(a) (1983)); *see also id.* at 1302–03 (citing DOE Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, 10 C.F.R. § 961.11, IV.A.2(a), IV.B.2 (1983)) (detailing the obligations for both the utility and the DOE in regard to SNF transportation).

598. 536 F.3d 1268 (Fed. Cir. 2008).

599. *Energy Nw.*, 641 F.3d at 1305 (citing *Yankee Atomic Elec. Co.*, 536 F.3d at 1273; *Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1380 (Fed. Cir. 2001)).

600. *Id.*

601. *Id.* at 1305–06 (citing *Carolina Power & Light Co. v. United States*, 573 F.3d 1271, 1277 (Fed. Cir. 2009)). In *Carolina Power*, the Government urged the Federal Circuit to reduce an \$83 million damages award by \$10 million based on the Government's estimate that, had the Government begun timely accepting SNF, the

The court agreed with the Government. It explained that *Carolina Power* addressed the limited circumstance where “a breaching party seeks to offset an award by proving that the non-breaching party has achieved some cost savings because the breach permitted it to avoid—not just defer—some aspect of performance.”<sup>602</sup> Here, however, the Government’s position was that Energy Northwest was attempting to recover modification costs that were not actually caused by the breach.<sup>603</sup> Thus, *Carolina Power* did not apply to Energy Northwest’s plant modifications; these expenses could only be recovered if Energy Northwest could prove, to a reasonable certainty, that but for the Government’s breach, the modification expenses would not have been incurred.<sup>604</sup>

Second, the Government sought to vacate \$2 million in compensation for certain indirect overhead expenses that Energy Northwest claimed were related to its efforts to mitigate the Government’s breach.<sup>605</sup> The Government argued that, under *Yankee Atomic*, Energy Northwest was required to prove what its indirect overhead costs would have been in a hypothetical non-breach world, and use that as a baseline to demonstrate how much its indirect overhead expenses increased.<sup>606</sup>

The Federal Circuit rejected this argument. It explained that the

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utility would have been required to spend \$10 million processing and loading its SNF into casks for transportation to the Government. 573 F.3d at 1274, 1277. The court rejected the Government’s request for an offset, explaining that the expenses for loading and processing were only “deferred” and had not been “avoided.” *Id.* at 1277. The underlying logic was that, in order to award the Government the full amount of its requested offset, the court would first need to conclude that “the utilities’ future loading costs would be zero.” *Energy Nw.*, 541 F.3d at 1306 (discussing *Carolina Power*). The court refused to speculate in that manner, explaining that “[j]ust as the utilities cannot now collect damages not yet incurred under the ongoing contract, the government cannot prematurely claim a payment that has not become due.” *Carolina Power*, 573 F.3d at 1277 (quoting *Yankee Atomic*, 536 F.3d at 1281).

602. *Energy Nw.*, 641 F.3d at 1306.

603. *Id.* at 1305.

604. *Id.* at 1307. Energy Northwest raised a number of other arguments in support of its position, including (1) that the construction of the dry storage facility was “a reasonable and foreseeable response to the government’s breach;” (2) that there was testimony in the record that there was a “90% likelihood” that it would need to re-modify its Columbia plant when the DOE eventually begins to accept delivery of SNF; (3) that the Government was responsible for causing uncertainty regarding what the non-breach modification costs would be; and (4) that the Standard Contract actually did not require it to make any modifications because DOE was responsible for selecting the type of cask that would be used. *Id.* at 1307–08 (citation omitted). The court held, however, that notwithstanding these arguments, *Yankee Atomic* placed the burden of proving the quantum of expenses in the non-breach world with the utility. *Id.* at 1308.

605. *Id.* at 1308–09.

606. *Id.*

plaintiff was entitled to prove “the amount of costs by whatever means available, so long as the cumulative result is a reasonable certainty that the awarded costs were actually caused by the breach.”<sup>607</sup> It noted that Energy Northwest “presented testimony estimating the portion of its overhead costs fairly allocated” to support of its mitigation efforts using generally accepted accounting practices; as a result, the court could find no error in the trial court’s acceptance of that testimony.<sup>608</sup>

Finally, the Government sought reversal of \$6 million in damages for interest Energy Northwest paid to obtain financing for the projects that Energy Northwest implemented in order to mitigate the Government’s breach of the Standard Contract.<sup>609</sup> The Government argued that, under 28 U.S.C. § 2516(a), it was immune from interest on funds borrowed to mitigate its breach, and nothing in any other statute or the Standard Contract waived that immunity.<sup>610</sup> Energy Northwest claimed, however, that § 2516(a) granted sovereign immunity only for “interest ‘on’ a claim (e.g., awards of prejudgment interest), and not interest ‘as’ a claim (e.g., Energy Northwest’s financing costs incurred as part of mitigation).”<sup>611</sup> In support of this position, Energy Northwest noted that the Federal Circuit had found that the Government could be liable for interest expenses incurred by a contractor.<sup>612</sup>

The Federal Circuit rejected this argument, explaining that the court only awarded interest as an equitable adjustment pursuant to changes requested by the Government under a “Changes” clause, and these Changes clauses “amounted to a waiver of the [G]overnment’s immunity against recovery of interest.”<sup>613</sup> Because the Standard Contract did not contain a Changes clause, or any other express waiver of immunity against recovering interest, there was no waiver of

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607. *Id.* at 1309 (citing *Ind. Mich. Power Co. v. United States*, 422 F.3d 1369, 1373 (Fed. Cir. 2005)).

608. *Id.*

609. *Id.* at 1310 (citing *Library of Cong. v. Shaw*, 478 U.S. 310, 314 (1986)).

610. *Id.*; see 28 U.S.C. § 2516(a) (2006) (stating that “[i]nterest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof”); see also *England v. Contel Advanced Sys., Inc.*, 384 F.3d 1372, 1379 (Fed. Cir. 2004) (barring recovery of interest paid on funds “borrowed as a result of the government’s breach” (citations omitted)).

611. *Energy Nw.*, 641 F.3d at 1310 (emphasis added).

612. *Id.* at 1310 (citing *Bell v. United States*, 404 F.2d 975, 984 (Ct. Cl. 1968)). For example, in *Bell v. United States*, the trial court allowed a contractor to recover interest costs that were accrued in order to comply with a unilateral change order issued by the Government. 404 F.2d at 984.

613. *Energy Nw.*, 641 F.3d at 1311–12.



immunity; consequently, the court held that the trial court erred in awarding Energy Northwest its interest expenses.<sup>614</sup>

### C. Dominion Resources, Inc. v. United States

In *Dominion Resources, Inc. v. United States*,<sup>615</sup> the Federal Circuit affirmed a \$42.7 million award by the COFC to Dominion for damages incurred when the Government breached the Standard Contract.<sup>616</sup> The Government appealed on two issues.

First, the Government argued that the COFC should not have allowed Dominion to recover \$10.9 million for costs incurred by Dominion's predecessor, Northeast Utilities.<sup>617</sup> In 2001, Northeast Utilities sold its Millstone Power Station (near New London, Connecticut) to Dominion.<sup>618</sup> Approximately \$10.9 million of the \$42.7 million the trial court awarded to Dominion was for interim storage expenses incurred prior to Dominion's purchase of the Millstone facility.<sup>619</sup> The Government argued that Northeast Utilities was barred from transferring its claim against the Government under the Assignment of Claims Act.<sup>620</sup>

The Federal Circuit rejected this argument, explaining that both the NWPA and the Standard Contract contained language allowing the parties to transfer all of their "rights and duties" under the Standard Contract, and that "[o]ne of the rights of a party to a contract is the right to bring a claim for damages resulting from breach."<sup>621</sup> Accordingly, the court observed that the Assignment of Claims Act did not prohibit assignment of Northeast Utilities' claim to Dominion.<sup>622</sup>

Second, the Government appealed the trial court's denial of discovery regarding the economic benefits that Dominion may have received by deferring payment of a "one-time fee" that was required under the Standard Contract.<sup>623</sup> This one-time fee was to compensate the Government for disposal of SNF generated by the utility before

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614. *Id.* at 1311-13.

615. 641 F.3d 1359 (Fed. Cir. 2011).

616. *Id.* at 1360-61 (citing *Dominion Res., Inc. v. United States*, 84 Fed. Cl. 259, 263 (2008)).

617. *Id.* at 1361.

618. *Id.* (citing *Dominion Res., Inc.*, 84 Fed. Cl. at 261).

619. *Id.* (citing *Dominion Res., Inc.*, 84 Fed. Cl. at 263).

620. *Id.* at 1361-62; see Assignment of Claims Act, 31 U.S.C. § 3727 (2006).

621. *Dominion Res., Inc.*, 641 F.3d at 1362-63 (quoting Nuclear Waste Policy Act, 42 U.S.C. § 10222(b)(3) (2006)); see also Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, 10 C.F.R. § 961.11, art. XIV (1983) (permitting the assignment of "rights and duties").

622. *Dominion Res., Inc.*, 641 F.3d at 1363-64.

623. *Id.* at 1364.

April 7, 1983.<sup>624</sup> Under its contract with DOE, Dominion was required to pay a one-time fee of \$82.1 million, but it was allowed to make this payment “anytime prior to the first delivery” of SNF, subject to a specified rate of interest.<sup>625</sup>

On appeal, the Government acknowledged that Dominion’s one-time fee was not yet due because the Government had not begun accepting delivery of SNF.<sup>626</sup> The Government argued, however, that it should have been allowed discovery to investigate whether Dominion received any economic benefit from having “use of that money in the meantime by investing, financing other projects, or avoiding the need to obtain loans.”<sup>627</sup>

The Federal Circuit rejected this argument. It explained that this type of discovery was foreclosed by its decision in *Yankee Atomic*, which stated that a utility had no obligation to pay the one-time fee where it was not yet due under the contract.<sup>628</sup> Moreover, because Dominion was still obligated to pay the one-time fee with interest “when it comes due,” the Government could not claim an offset to the damages award.<sup>629</sup> Accordingly, the Federal Circuit affirmed the trial court’s award.<sup>630</sup>

#### D. Dairyland Power Cooperative v. United States

In *Dairyland Power Cooperative v. United States*,<sup>631</sup> the Federal Circuit affirmed in part, vacated in part, and remanded a \$37.6 million award in favor of Dairyland Power.<sup>632</sup> As with the other SNF cases decided in 2011, liability in this matter was not at issue; the Government only contested the calculation of damages.<sup>633</sup> The Government’s appeal raised three issues.

First, the Government contended that the COFC erred in finding that, absent the Government’s breach, Dairyland would have been able to negotiate with other utilities to have all of Dairyland’s SNF removed in 1998—the first year that the Government was obligated to

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624. *Id.* (quoting 10 C.F.R. § 961.11, art. VIII.B.2).

625. *Id.* (quoting 10 C.F.R. § 961.11, art. VIII.B.2).

626. *Id.*

627. *Id.*

628. *Id.* at 1365 (citing *Yankee Atomic Elec. Co. v. United States*, 536 F.3d 1268, 1280 (Fed. Cir. 2008)).

629. *Id.* (citing *Yankee Atomic*, 536 F.3d at 1280).

630. *Id.*

631. 645 F.3d 1363 (Fed. Cir. 2011).

632. *Id.* at 1366, 1368 (citing *Dairyland Power Coop. v. United States*, 90 Fed. Cl. 615, 618 (2009)).

633. *Id.* at 1366 (citations omitted).

begin accepting SNF—rather than in 2006 as anticipated by the Standard Contract.<sup>634</sup>

By way of background, Dairyland operated a nuclear power plant in Genoa, Wisconsin until 1987.<sup>635</sup> Although the reactor was no longer active, Dairyland still had thirty-eight metric tons of SNF remaining at the plant in a wet storage pool; the fact “that there was SNF stored on-site prevent[ed] Dairyland from permanently decommissioning” the plant.<sup>636</sup> Both the Government and Dairyland agreed that, under the terms of the Standard Contract, the Government would have removed the last of Dairyland’s SNF in 2006.<sup>637</sup> However, Dairyland argued before the trial court that if the Government had begun collecting SNF on time, Dairyland could have negotiated with other utilities to purchase their year-one (1998) SNF removal allocations, thereby eliminating all of its SNF in 1998 rather than 2006.<sup>638</sup> In support of this argument, Dairyland presented expert testimony which modeled the “exchanges market” for year-one removal allocations and opined that Dairyland would have eliminated all of its SNF in the first year of performance.<sup>639</sup> The trial court agreed and computed Dairyland’s damages as the cost of storing SNF from 1998 to 2006.<sup>640</sup>

On appeal, the Government argued that there were a number of deficiencies in the trial court’s findings. For example, the Government argued that Dairyland did not identify the specific utilities from whom it would have obtained the year-one delivery commitments; moreover, local communities might have pressured

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634. *Id.* at 1366–67 (citing *Dairyland Power Coop.*, 90 Fed. Cl. at 618).

635. *Id.*

636. *Id.* at 1367.

637. *Id.* (citing *Dairyland Power Coop.*, 90 Fed. Cl. at 627). Although the Standard Contract did not contain a detailed schedule for when the Government would remove SNF from each utility, the Standard Contract did give priority to removing older fuel before newer fuel. *Id.* (citing Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, 10 C.F.R. § 961.11, art. II, VI.B.1(a) (1983)). The parties agreed that under this “oldest fuel first” rule, the Government would not have removed the last of Dairyland’s SNF until 2006. *Id.* at 1369.

638. *Id.* at 1369. The Standard Contract specifically permitted this type of negotiation between utilities to move to the front of the queue for transferring SNF to the Government. Section V.E of the Standard Contract, entitled “Exchanges,” provided that the utilities

shall have the right to exchange approved delivery commitment schedules with parties to other contracts with DOE for disposal of SNF and/or HLW; *provided, however,* that DOE shall, in advance, have the right to approve or disapprove, in its sole discretion, any such exchanges.

Standard Contract, 10 C.F.R. § 9611.11, sec. V.E (1983).

639. *Dairyland Power Coop.*, 645 F.3d at 1369 (quoting *Dairyland Power Coop.*, 90 Fed. Cl. at 633).

640. *Id.*

utilities to use their year-one removal slots to remove SNF from the community instead of selling the slots.<sup>641</sup> The Government also argued that the selling utilities might have tried to extract high prices for their year-one allocations, and that Dairyland did not produce pre-litigation evidence illustrating any intent to seek early removal of SNF from its Wisconsin plant.<sup>642</sup> The Federal Circuit rejected these arguments, explaining that it could review the factual findings of the COFC only for clear error; based on this standard of review, the trial court's acceptance of Dairyland's exchange market argument appeared to be "grounded in proper weighing of the evidence."<sup>643</sup>

Dairyland filed a related cross-appeal on the "exchanges market" issue, which was similarly unsuccessful.<sup>644</sup> At trial, Dairyland argued that it was entitled to approximately \$33.28 million in storage costs for the period 1998 through 2006.<sup>645</sup> The court held, however, that Dairyland's model was flawed because it did not account for the substantial amount that Dairyland would have been required to pay to purchase year-one delivery commitments from the other utilities.<sup>646</sup> The trial court explained that the other utilities would be "sophisticated and well-advised negotiators" who would have demanded that Dairyland split the benefit of the transaction with them evenly; thus, the cost of the year-one commitments would have been \$16.64 million, and the court reduced Dairyland's award by this amount.<sup>647</sup>

On appeal, Dairyland asserted that the trial court's reduction of its damages by half was in error because the cost of the first-year delivery commitments was only deferred by the Government's breach and, when the Government ultimately performs, Dairyland will still need to negotiate for the year-one commitments.<sup>648</sup> The Federal Circuit disagreed, explaining that purchasing the year-one commitments was an "elective future cost that Dairyland might or might not take up, depending on its situation," if and when the Government begins accepting SNF.<sup>649</sup> Dairyland also asserted that the trial court's

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641. *Id.*

642. *Id.*

643. *Id.* at 1370.

644. *Id.* at 1371-72.

645. *Id.* at 1368, 1371.

646. *Id.* at 1371-72 (citing *Dairyland Power Coop. v. United States*, 90 Fed. Cl. 615, 635-36 (2009)).

647. *Id.* at 1372 (quoting *Dairyland Power Coop.*, 90 Fed. Cl. at 635-36).

648. *Id.* (citing *Carolina Power & Light Co. v. United States*, 573 F.3d 1271, 1277 (Fed. Cir. 2009)). In *Carolina Power*, the Federal Circuit held that it was inappropriate to offset for costs that are not avoided but only deferred. 573 F.3d at 1277.

649. *Dairyland Power Coop.*, 645 F.3d at 1372.

reduction of its damages by half was excessive, that the true cost of purchasing year-one commitments would have been only around the marginal bid price (\$2 million), and that the presence of multiple sellers would have driven down the price.<sup>650</sup> The Federal Circuit, however, refused to disturb the trial court's award, noting that the appellate court typically "affords the Court of Federal Claims wide discretion in assessing an appropriate quantum of damages."<sup>651</sup>

Second, the Government argued that the trial court erred in awarding Dairyland indirect overhead and general and administrative costs because Dairyland failed to show that the Government's breach actually caused Dairyland to incur these costs, and that Dairyland would have incurred at least a portion of the costs absent the breach.<sup>652</sup> The Federal Circuit disagreed, explaining that the trial court rejected this very argument, and, absent clear error, the court was bound to defer to the trial court on the matter.<sup>653</sup>

Finally, the Government asserted that the trial court erred in awarding Dairyland the entire cost of its investment in a private SNF repository; this repository was known as Private Fuel Storage, LLC (PFS), which was formed by a consortium of eleven nuclear utilities, including Dairyland, to locate, license, build, and operate an off-site SNF repository.<sup>654</sup> The Government contended that "Dairyland's investment in PFS was more profit speculation than mitigation" and thus should not be recoverable.<sup>655</sup> Specifically, the Government noted that PFS was a for-profit venture and that the size of Dairyland's investment in PFS far exceeded Dairyland's actual need for off-site interim storage of its SNF.<sup>656</sup> The Federal Circuit agreed that "expectation damages are available to compensate a plaintiff for the cost of actions taken in mitigation, and not for speculative ventures."<sup>657</sup> The court explained that Dairyland had the burden of proving how much of its investment in PFS was mitigation-related, as

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650. *Id.* at 1372-73.

651. *Id.* at 1373 (quoting *Carolina Power*, 573 F.3d at 1276).

652. *Id.*

653. *Id.* at 1374 (citing *Dairyland Power Coop. v. United States*, 90 Fed. Cl. 615, 638 (2009)).

654. *Id.* at 1368, 1374.

655. *Id.* at 1375.

656. *Id.* Trial testimony indicated that using standard storage casks, Dairyland would need six casks to store the thirty-eight metric tons of SNF remaining at its plant. *Id.* at 1375-76. Dairyland, however, owned a 13.5% share in PFS, which given the facility's projected 4000 cask capacity, was the equivalent of 540 casks at PFS—far in excess of Dairyland's own needs. *Id.* at 1376.

657. *Id.*

opposed to a speculative investment, and remanded the matter to the trial court.<sup>658</sup>

### E. Southern California Edison Co. v. United States

In *Southern California Edison Co. v. United States*,<sup>659</sup> the Federal Circuit affirmed a \$142,394,294 award to Southern California Edison (SCE) for damages caused by the Government's breach of the Standard Contract.<sup>660</sup> Of this amount, the trial court attributed \$23,657,791 to indirect overhead costs associated with SCE's construction of on-site SNF dry storage facilities following DOE's breach of the Standard Contract.<sup>661</sup> The sole issue on appeal was whether these indirect overhead costs could be included in the damages calculation.<sup>662</sup>

The Government raised two arguments against awarding the indirect overhead costs for construction of the dry storage facilities. First, the Government argued that the indirect overhead costs for construction of the dry storage facilities should have been excluded from the damages award because SCE failed to meet its burden of separating out the overhead costs caused by the breach from those unrelated to the breach.<sup>663</sup>

The Federal Circuit rejected this argument. It noted that the trial court, relying on the Federal Circuit's earlier decision in *Carolina Power*, had found that "it was proper for SCE to allocate" the indirect costs for the dry storage project on a percentage basis "because if it had not, 'other projects and SCE operations [would] support an

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658. *Id.* at 1376-77.

659. 655 F.3d 1319 (Fed. Cir. 2011).

660. *Id.* at 1319-20 (citing *S. Cal. Edison Co. v. United States*, 93 Fed. Cl. 337, 340 (2010)).

661. *Id.* at 1320 (citing *S. Cal. Edison Co.*, 93 Fed. Cl. at 371). SCE began construction of on-site dry storage facilities after DOE failed to begin accepting delivery of SNF in January 1998. *Id.* (citing *S. Cal. Edison Co.*, 93 Fed. Cl. at 345-46). Following completion of the first such facility, SCE filed a complaint in the COFC seeking damages from the United States including: (1) costs of constructing and operating the dry storage facilities; (2) overhead allocated to the dry storage project; (3) "off-site storage of SNF;" and (4) "costs associated with SCE's participation in a limited liabilities corporation with other nuclear utilities known as the Private Fuel Storage project." *Id.* (citing *S. Cal. Edison Co.*, 93 Fed. Cl. at 346).

662. *Id.* at 1319.

663. *Id.* at 1321-22 (citing *Yankee Atomic Elec. Co. v. United States*, 536 F.3d 1268, 1273 (Fed. Cir. 2008)); *see also* *Energy Nw. v. United States*, 641 F.3d 1300, 1308, 1310 (Fed. Cir. 2011) (finding that overhead costs could be awarded "[s]o long as the plaintiff can present a sufficient basis for making the trial court reasonably certain that the claimed damages were caused by the breach"). "The Government [did] not contest the existence of the claimed overhead expenses nor [did] it contest that SCE's general overhead expenses increased because of the Government's breach." *S. Cal. Edison Co.*, 655 F.3d at 1321.

unequal share of the overhead costs.”<sup>664</sup> Moreover, the Federal Circuit agreed with the COFC that the costs were causally linked to the breach because if the Government had not breached its contract and created the need for the dry storage, SCE could have allocated these resources to other projects.<sup>665</sup> The Federal Circuit stated that it found no error in the trial court’s analysis and deferred to its findings as required by precedent.<sup>666</sup>

Second, the Government argued that most of the overhead costs were unrecoverable because they were “of the type that had been incurred prior to the breach” and would have been incurred “as a result of [SCE’s] normal operations . . . irrespective of the breach.”<sup>667</sup> In making this argument, the Government cited *Precision Pine & Timber, Inc. v. United States*,<sup>668</sup> in which the Federal Circuit held that the operator of a sawmill was not entitled to the full amount of overhead damages that it requested after the Government suspended a forestry contract because several of the costs associated with the operation of the sawmills were fixed costs that were not dependent on the Government’s contract.<sup>669</sup> The Federal Circuit rejected the Government’s argument and its reliance on *Precision Pine*. The court explained that because SCE constructed the dry storage facilities after the Government’s breach and the facilities were necessary as a result of the breach, this was “not a case where the underlying costs were incurred by operations independent of and unrelated to the breach.”<sup>670</sup> Accordingly, the Federal Circuit affirmed the trial court’s award.<sup>671</sup>

#### F. Boston Edison Co. v. United States

In *Boston Edison Co. v. United States*,<sup>672</sup> the Federal Circuit affirmed in part, reversed in part, and remanded a decision awarding damages to Boston Edison Co. and Entergy Nuclear Generation Co.<sup>673</sup> The Government appealed the trial court’s award on three grounds, while

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664. *S. Cal. Edison Co.*, 655 F.3d at 1322 (alteration in original) (quoting *S. Cal. Edison Co.*, 93 Fed. Cl. at 359).

665. *Id.* (quoting *S. Cal. Edison Co.*, 93 Fed. Cl. at 359).

666. *Id.*; see also *Energy Nw.*, 641 F.3d at 1310 (acknowledging that the court would defer to the trial court’s determination of damages “in the absence of clear error”).

667. *S. Cal. Edison Co.*, 655 F.3d at 1322 (quoting *S. Cal. Edison Co.*, 93 Fed. Cl. at 356).

668. 596 F.3d 817 (Fed. Cir. 2010).

669. *S. Cal. Edison Co.*, 655 F.3d at 1322 (citing *Precision Pine*, 596 F.3d at 834).

670. *Id.*

671. *Id.* at 1319.

672. 658 F.3d 1361 (Fed. Cir. 2011).

673. *Id.* at 1363–65.

Entergy appealed on one.<sup>674</sup> Of these issues, the most noteworthy was the question of whether Boston Edison could recover damages under a "diminution-of-value theory" in a partial breach setting.<sup>675</sup>

In order to understand this issue, some background is necessary. In 1997, Massachusetts enacted legislation that required regulated utilities such as Boston Edison to either "sell their electricity generation assets and operations or to functionally separate their generation operations from their transmission and distribution operations."<sup>676</sup> As a result of this legislation, Boston Edison began seeking potential buyers for its Pilgrim Nuclear Power Station in Plymouth, Massachusetts.<sup>677</sup> "In addition to Pilgrim's physical facilities, Boston Edison offered to transfer a 'fully-funded decommissioning fund' to cover the costs of decommissioning Pilgrim" and the costs of post-decommissioning fuel storage "until such time as the Department of Energy takes title to the fuel."<sup>678</sup> This offer indicated that Boston Edison would "make an advance payment to a prospective purchaser to cover the cost of DOE's anticipated future delays in performance of the Standard Contract."<sup>679</sup>

Ultimately, Entergy agreed to purchase the Pilgrim plant for \$80 million and to "accept decommissioning and storage responsibilities in return for a decommissioning fund of \$428 million."<sup>680</sup> "In setting the price for the decommissioning fund," Entergy considered the risk of "DOE's continued delay in performance under the Standard Contract."<sup>681</sup> Under this arrangement, Boston Edison specifically retained the right to any claims "related or pertaining to the Department of Energy's defaults under the DOE Standard Contract accrued as of the Closing Date, whether relating to periods prior to or following the Closing Date."<sup>682</sup> "Entergy received rights to all other claims arising from the Standard Contract."<sup>683</sup>

On the day before the sale closed in July 1999, Boston Edison sued the United States for damages caused by its breach of the Standard Contract.<sup>684</sup> Entergy also filed suit against the United States for

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674. *Id.* at 1365-66.

675. *See id.* at 1366-67 (determining that "Boston Edison cannot recover damages under a diminution-of-value theory in a partial breach setting").

676. *Id.* at 1364 (citation omitted).

677. *Id.*

678. *Id.* (citation omitted).

679. *Id.*

680. *Id.* (citation omitted).

681. *Id.* at 1364-65.

682. *Id.* at 1365 (quoting the purchase agreement between Boston Edison and Entergy).

683. *Id.*

684. *Id.*



breach of the Standard Contract in 2003; the cases were eventually consolidated.<sup>685</sup> Following trial on the issue of damages, the COFC awarded Boston Edison \$40 million, which included compensation for the portion of the decommissioning fund that was “attributable to DOE’s breach of the Standard Contract.”<sup>686</sup> The trial court found that it should have been “reasonably foreseeable to the Government that Boston Edison would transfer the decommissioning fund to a third party” and that the DOE’s breach forced Boston Edison to pay a larger amount into the decommissioning fund than otherwise would have been necessary.<sup>687</sup> The trial court also awarded Entergy \$4 million for damages caused by the Government’s breach.<sup>688</sup>

On appeal, the Government and Entergy argued that the trial court should not have awarded Boston Edison damages for its increased payments into the decommissioning fund because partial breach damages are limited to expenses actually incurred by the time of trial and cannot include damages that are expected to arise from future delays in DOE’s performance.<sup>689</sup> The Federal Circuit agreed. The court noted that the Government’s ongoing breach of the Standard Contract was only a “partial breach” and not a “total breach.”<sup>690</sup> The court went on to explain that under *Indiana Michigan*, in the case of a partial breach of contract, damages are limited to those incurred as of the time of suit; the plaintiff must bring subsequent suits if it wishes to obtain further damages as they are incurred.<sup>691</sup>

In doing so, the court rejected Boston Edison’s argument that *Indiana Michigan* did not bar it from recovering damages under a diminution-of-value theory because Boston Edison suffered an actual pre-trial loss when it was required to include additional money in the decommissioning fund when it sold the Plymouth facility.<sup>692</sup> The court explained that allowing Boston Edison to recover damages in this manner “would undermine the prohibition on recovery of future damages” and that “the estimated value of future damages agreed upon by two private parties should not set the amount of the

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685. *Id.*

686. *Id.*

687. *Id.*

688. *Id.*

689. *Id.* at 1366.

690. *Id.* (citing *Yankee Atomic Elec. Co. v. United States*, 536 F.3d 1268, 1280 (Fed. Cir. 2008); *Ind. Mich. Power Co. v. United States*, 422 F.3d 1369, 1374 (Fed. Cir. 2005)).

691. *Id.* (citing *Ind. Mich. Power Co.*, 422 F.3d at 1376–78); RESTATEMENT (SECOND) OF JUDGMENTS § 26, cmt. g (1982).

692. *Id.* at 1365, 1367.

government's liability for partial breach."<sup>693</sup> The court observed that "[t]he purpose of allowing 'a series of recoveries' for partial breach, as opposed to a single recovery for total breach, is to avoid speculation about the quantum of future damages," and that the actual value of the future damages was "no less speculative simply because Boston Edison and Entergy attached a price to it."<sup>694</sup>

The Government also appealed the trial court's award of damages to Entergy for certain additional amounts that Entergy was required to pay to the NRC in fees that the NRC imposes on the industry to cover its budgetary expenses.<sup>695</sup> The trial court found that the NRC changed its fee structure in 1999 "as a consequence of DOE's breach of the Standard Contract" and that "Entergy was forced to pay more in aggregate fees" as a result of the change.<sup>696</sup> In its appeal, the Government contended that the trial court's calculation of damages was flawed because it did not include an offset for the fact that, under the changed fee structure, Entergy actually paid less in fees for its wet storage fees and decommissioning.<sup>697</sup>

The Federal Circuit agreed with this contention. Citing its recent decision in *Southern Nuclear*, the court stated that the non-breaching party "bears the burden of persuasion to establish both the costs that it incurred and the costs that it avoided" as a result of the breach.<sup>698</sup> When the breaching party points out costs that were avoided because of its breach, "the plaintiff must incorporate them into a plausible model" of damages.<sup>699</sup> The Federal Circuit remanded the issue to the trial court "to determine whether adjustments should be made to Entergy's damages award to account for the decreased share of generic wet storage and decommissioning fees paid by Entergy" as a result of NRC's rule change.<sup>700</sup>

The Government also asserted that the trial court's award was incorrect because, in order to recover damages for indirect overhead costs, Entergy should have been required to prove that these additional costs were incurred as a result of the Government's breach.<sup>701</sup> The Federal Circuit summarily rejected this argument, explaining that the right of utilities to recover overhead costs had

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693. *Id.* at 1367.

694. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 243, cmt. e (1981)).

695. *Id.* at 1367-68.

696. *Id.* at 1368.

697. *Id.*

698. *Id.* at 1369 (citing *S. Nuclear Operating Co. v. United States*, 637 F.3d 1297, 1304 (Fed. Cir. 2011)).

699. *Id.* (citing *S. Nuclear Operating Co.*, 637 F.3d at 1304).

700. *Id.* at 1370.

701. *Id.*

already been established in *Energy Northwest* and the Government could not show that the trial court's award of overhead costs constituted clear error.<sup>702</sup>

Finally, Entergy argued that it should have been awarded "the cost of securing capital for mitigation projects undertaken as a result of the DOE's breach."<sup>703</sup> Entergy originally argued that it was entitled to recover this cost, notwithstanding 28 U.S.C. § 2516(a),<sup>704</sup> because it was seeking the interest "as" a claim rather than "on" a claim.<sup>705</sup> However, after the court rejected this argument in *Energy Northwest*, Entergy argued instead that it was "entitled to recover the cost of securing capital because DOE 'assumed the status of a private commercial enterprise'" when it "enter[ed] into the business" of collecting and disposing of SNF.<sup>706</sup>

The Federal Circuit rejected this argument. It explained that the "commercial enterprise exception" to the no-interest rule did not apply because the government's purpose in entering into the Standard Contract was not to turn a profit but to achieve public objectives.<sup>707</sup> The court noted that the NWPA's purpose was "to solve the national problem of permanent disposal of spent nuclear materials."<sup>708</sup> Because Entergy could not point to any provision of the Standard Contract or the NWPA that specifically waived immunity for Entergy's interest claim, the court found, in light of *Energy Northwest*, that it was not recoverable.<sup>709</sup>

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In 2010, the Secretary of Energy, at the direction of the President, established the Blue Ribbon Commission on America's Nuclear Future, with a goal to conduct a comprehensive review of the country's policy for managing SNF.<sup>710</sup> In 2011, the Commission released its report, concluding that "[t]he overall record of the U.S. nuclear waste program has been one of broken promises and unmet

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702. *Id.* (citing *Energy Nw. v. United States*, 641 F.3d 1300, 1309 (Fed. Cir. 2011)).

703. *Id.* at 1370-71.

704. 28 U.S.C. § 2516(a) (2006) (providing that "[i]nterest on a claim against the United States shall be allowed . . . only under a contract or Act of Congress expressly providing for the payment thereof").

705. *Bos. Edison Co.*, 658 F.3d at 1370 (citing *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1582 (Fed. Cir. 1994)).

706. *Id.* at 1371 (quoting *Library of Cong. v. Shaw*, 478 U.S. 310, 317 n.5 (1986)).

707. *Id.* (citing *Sandia Oil Co. v. Beckton*, 889 F.2d 258, 263 (10th Cir. 1989) (per curiam)).

708. *Id.* (citing *Neb. Pub. Power Dist. v. United States*, 590 F.3d 1357, 1360 (Fed. Cir. 2010)).

709. *Id.* at 1372.

710. Blue Ribbon Commission on America's Nuclear Future, 75 Fed. Reg. 5485 (Feb. 3, 2010).

commitments.”<sup>711</sup> The Commission further concluded that the recent “decision to suspend work on the [Yucca Mountain] repository has left . . . [the public and the nuclear industry] wondering, not for the first time, if the federal government will ever deliver on its promises.”<sup>712</sup>

Indeed, today, almost three decades after the passage of the NWPA, “the federal government appears to have no viable alternative solution on the horizon for this significant problem.”<sup>713</sup> In the meantime, the nation’s nuclear utilities continue to store over 60,000 metric tons of SNF in on-site facilities, with that amount growing by 2000 metric tons per year.<sup>714</sup> Nuclear power companies whose contracts were breached will continue to file complaints for breach of contract against the Government until such time that the Government fulfills its contractual duties, settles these cases once and for all, or undertakes some alternative means of performance that cures the financial harm to the plaintiffs. Unfortunately, the outlook for any such solution in the near-term does not appear to be positive.

#### CONCLUSION

The Federal Circuit’s 2011 government contracts opinions were few in number. The decisions that were issued seem unlikely to cause any sea changes in the field of government contracts law; however, there were a notable collection of cases resolving long standing jurisdictional questions. Those decisions focused primarily on resolving jurisdictional questions regarding the authority of the Federal Circuit, the COFC, and the Boards to hear government contracts cases. Chief among these decisions are *Slattery*, which gives the COFC jurisdiction over claims against NAFIs, and *Todd Construction*, which gives the COFC the authority to hear challenges

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711. BLUE RIBBON COMM’N ON AM.’S NUCLEAR FUTURE, DRAFT REPORT TO THE SECRETARY OF ENERGY xiv (2011), available at [http://brc.gov/sites/default/files/documents/brc\\_draft\\_report\\_29jul2011\\_0.pdf](http://brc.gov/sites/default/files/documents/brc_draft_report_29jul2011_0.pdf).

712. *Id.* at 25.

713. Schooner, *supra* note 1, at 1106–07 (footnote omitted).

714. See de Saillan, *supra* note 547, at 474 (citation omitted). Obviously, it is beyond the scope of this Article to recommend any solutions to this vexing problem. However, many other articles are devoted to this topic. See generally Marta Adams, *Yucca Mountain—Nevada’s Perspective*, 46 IDAHO L. REV. 423 (2010); Thomas B. Cochran & Geoffrey H. Fettus, *NRDC’s Perspective on the Nuclear Waste Dilemma*, 40 ENVTL. L. REP. 10,791, 10,792 (2010); de Saillan, *supra* note 547; David R. Hill, *The NWPA and the Realities of Our Current Situation*, 40 ENVTL. L. REP. 10,795 (2010); Richard B. Stewart, *Solving the U.S. Nuclear Waste Dilemma*, 40 ENVTL. L. REP. 10,783 (2010); Daniel T. Swanson, *NWPA is Still a Viable Option for Solving the Nuclear Waste Dilemma*, 40 ENVTL. L. REP. 10,800 (2010); Aaron Szabo, *Reprocessing: The Future of Nuclear Waste*, 29 TEMP. J. SCI. TECH. & ENVTL. L. 231 (2010).

to performance reviews under the FAR. Those contractors and their counsel who wish to challenge a performance evaluation should take note of the court's requirement that the complaint in such cases meet the heightened pleading requirements of *Twombly* and *Iqbal*.

Following the trend of the past two years, the Federal Circuit issued a diminishing number of decisions in bid protest cases. In 2011, the Federal Circuit issued only two such decisions, both of which were decided in favor of the Government. These decisions, taken together with the decisions from the prior two years, illustrate the court's emphasis on judicial restraint and deference to procuring officials.<sup>715</sup>

A substantial number of the Federal Circuit's 2011 government contracts decisions also were dedicated to resolving damages issues related to the SNF saga. While many of these decisions focus on issues that are specific to SNF litigants, the decisions contain broader lessons regarding the calculation of damages following the Government's breach of contract, and practitioners may draw lessons from these cases regarding the proper treatment of damages.

Finally, 2011 is, in some ways, noteworthy for the cases that the Federal Circuit did not hear. Over the past year, the court issued only one *Winstar* decision, *First Annapolis Bancorp*. These *Winstar* cases, which represented a substantial portion of the court's government contracts docket in years past, are becoming fewer in number and are unlikely to be common going forward.<sup>716</sup>

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715. See *Graham et al.*, *supra* note 5, at 993 (noting that the seven precedential opinions issued by the Federal Circuit in 2009 were all decided in favor of the Government and "emphasized the need for judicial restraint and deference to procuring officials").

716. See *Holland v. United States*, 621 F.3d 1356, 1373 (Fed. Cir. 2010) (characterizing the Court's 2010 decision in *Holland* as "one of the last *Winstar* cases"); see also *Schooner*, *supra* note 1, at 1104 (referring to *Winstar* claims as a "vanishing breed of . . . cases").

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