2009 GOVERNMENT CONTRACT LAW DECISIONS OF THE FEDERAL CIRCUIT

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INTRODUCTION

The U.S. Court of Appeals for the Federal Circuit issued twenty-six precedential opinions in 2009 in the field of government contracts, which includes appeals from the Boards of Contract Appeals ("the Boards"), the United States Court of Federal Claims (COFC) in disputes subject to the Contract Disputes Act (CDA),[1] and appeals

1. *See* 28 U.S.C. §§ 1295(a)(3), (10) (2006) (providing for appellate review of COFC and Board of Contract Appeals decisions in the Federal Circuit); *id.* § 1491(a)(2) ("The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor . . . including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes . . . ."); 41 U.S.C. § 607(d), (g)(1)(A) (2006) (granting jurisdiction over contract disputes to the Boards of Contract Appeals and providing for appellate review of Board decisions in the Federal Circuit); § 609(a) (granting jurisdiction over contract disputes to the COFC).

from the COFC in bid protests and non-CDA contract disputes.[2] Although government contracts decisions continue to represent a relatively small portion of the Federal Circuit's case law,[3] the opinions issued in 2009 reflect significant developments in the court's government contracts jurisprudence.

Practitioners in this field should note four aspects of the 2009 decisions in particular. First, the Federal Circuit issued a host of significant bid protest decisions last year. The seven precedential opinions issued in 2009 substantially exceed the law generated in this area in any of the previous five years (during which the court issued one precedential bid protest opinion in 2008,[4] three in 2007,[5] one in 2006,[6] four in 2005,[7] and three in 2004[8]). More importantly, the court's decision in each of these appeals favored the Government and emphasized the need for judicial restraint and deference to procuring officials. In four appeals, the Federal Circuit reversed (at least in part) a trial court's decision in favor of the protester, and in three of these reversals, the court expressed concern that the trial court had exceeded the scope of its review. In *Weeks Marine, Inc. v.*

2. *See* 28 U.S.C. §§ 1295(a)(3), 1491(a)(2), 1491(b)(1) (2006) (vesting the Federal Circuit with appellate review of "an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement").

3. These decisions account for ten percent of the precedential opinions issued by the Federal Circuit in 2009. United States Court of Appeals for the Federal Circuit, Opinions & Orders, http://www.cafc.uscourts.gov/dailylog.html (last visited Apr. 7, 2010).

4. *See* Sheryl L. Floyd et al., *2008 Government Contract Law Decisions of the Federal Circuit*, 58 AM. U. L. REV. 1051, 1066 (2009) (discussing Rothe Dev. Corp. v. Dep't of Defense, 545 F.3d 1023 (Fed. Cir. 2008)).

5. *See* Hon. Mary Ellen Coster Williams, *2007 Government Contract Decisions of the Federal Circuit*, 57 AM. U. L. REV. 1075, 1088 (2008) (discussing Chapman Law Firm Co. v. Greenleaf Constr. Co., 490 F.3d 934 (Fed. Cir. 2007), Blue & Gold Fleet v. United States, 492 F.3d 1308 (Fed. Cir. 2007), and Avtel Servs., Inc. v. United States, 501 F.3d 1259 (Fed. Cir. 2007)).

6. *See* David W. Burgett et al., *2006 Government Contract Decisions of the Federal Circuit*, 56 AM. U. L. REV. 1073, 1106 (2007) (discussing Rex Serv. Corp. v. United States, 448 F.3d 1305 (Fed. Cir. 2006)).

7. *See* Robert E. Korroch et al., *2005 Year in Review: Analysis of Significant Federal Circuit Government Contracts Decisions*, 35 PUB. CONT. L.J. 581, 612 (2006) (discussing Rice Servs. v. United States, 405 F.3d 1017 (Fed. Cir. 2005), Bannum, Inc. v. United States, 404 F.3d 1346 (Fed. Cir. 2005), Kentucky v. United States, 424 F.3d 1222 (Fed. Cir. 2005), and Rothe Dev. Corp. v. Dep't of Defense, 413 F.3d 1327 (Fed. Cir. 2005), *aff'd*, 557 F.3d 1332 (Fed. Cir. 2009)).

8. *See* David Robbins, *2004 Government Contract Decisions of the Federal Circuit*, 54 AM. U. L. REV. 1205, 1222 (2005) (discussing PGBA, LLC v. United States, 389 F.3d 1219 (Fed. Cir. 2004), Banknote Corp. of Am. v. United States, 365 F.3d 1345 (Fed. Cir. 2004), and NVT Techs., Inc. v. United States, 370 F.3d 1153 (Fed. Cir. 2004)).

United States,[9] the Federal Circuit reversed the COFC's judgment in favor of the protester, concluding that if it were to find that the agency lacked a rational basis for its decision, it "would be second-guessing the Corps's action," which the court is "not permitted to do."[10] Similarly, in *Alabama Aircraft Industries v. United States*,[11] the Federal Circuit reversed the COFC's judgment against the Government, concluding that the COFC's ruling effectively "introduce[d] new requirements outside the scope of the RFP" and exceeded the scope of the trial court's review.[12] Finally, and perhaps most importantly, the Federal Circuit in *Axiom Resource Management, Inc. v. United States*,[13] reiterated that the COFC's review of bid protests under the Tucker Act is limited to the administrative record and admonished that "supplementation of the record should be limited to cases in which 'the omission of extra-record evidence precludes effective judicial review.'"[14]

Axiom, in particular, will lead to further litigation over (1) what constitutes "effective judicial review," (2) what sort of extra-record evidence may be "necessary" to provide such review if the record is inadequate, and (3) how much discretion the COFC has to decide these issues. Nevertheless, the unmistakable theme of the Federal Circuit's 2009 bid protest decisions is the court's focus on the limits of judicial review of federal procurement decisions.

Second, the Federal Circuit upheld one of the largest judgments ever reported against a contractor under the anti-fraud provision of the CDA in *Daewoo Engineering & Construction Co. v. United States*.[15] The decision in *Daewoo* is important not only for the size of the judgment levied against the contractor for submitting a fraudulent claim, but also because the line drawn between the amount of the claim that was fraudulent and the amount that was not fraudulent continues to raise more questions than it answers. Given the ever-increasing focus on allegations of contractor fraud in the media, Congress, and the Executive Branch, *Daewoo* underscores the stakes involved in such allegations and deserves an especially close reading by all members of the government contracts bar.

9. 575 F.3d 1352 (Fed. Cir. 2009).
10. *Id.* at 1371.
11. 586 F.3d 1372 (Fed. Cir. 2009).
12. *Id.* at 1376.
13. 564 F.3d 1374 (Fed. Cir. 2009).
14. *Id.* at 1380 (quoting Murakami v. United States, 46 Fed. Cl. 731, 735 (2000), *aff'd*, 398 F.3d 1342 (Fed. Cir. 2005)).
15. 557 F.3d 1332 (Fed. Cir. 2009).

Third, the Federal Circuit continued to decide questions of contract interpretation according to its view of the "plain meaning" of the contract language at issue, in some cases concluding that this plain meaning had eluded the lower tribunal. The most significant of these decisions is *Bell BCI Co. v. United States*,[16] in which a divided panel of the court ruled that boilerplate release language in a bilateral modification barred a contractor's claims for the cumulative and disruptive impact of multiple change orders.[17] Over a vigorous dissent,[18] the panel majority held that the release language unambiguously discharged claims for cumulative impact and disruption, notwithstanding the absence of any reference to "cumulative impact" or "disruption" in the modification and the Government's failure to introduce any evidence that the parties intended to release such claims.[19]

Finally, the Federal Circuit issued two significant decisions addressing cost accounting issues in 2009, both of which were adverse to contractors asserting claims against the government. In *Geren v. Tecom, Inc.*,[20] the court established a two-part analysis to determine if defense and settlement costs associated with third-party, sexual harassment litigation are allowable charges on a government contract.[21] First, the COFC or Board of Contract Appeals must examine whether damages or penalties resulting from an adverse judgment would be disallowed under the contract.[22] If not, the costs are unallowable "unless the contractor can establish that the private Title VII plaintiff had very little likelihood of success on the merits."[23] And in *Gates v. Raytheon Co.*,[24] the court held that under Cost Accounting Standard 413-50, contractors must make an adjustment during the current accounting period for the sale, discontinued operations, or other closure of a business segment.[25] Moreover, interest on the repayment amount will be compounded daily.[26]

This article discusses twenty-four of the twenty-six precedent-setting opinions involving government contract law issues, setting forth the

16. 570 F.3d 1337 (Fed. Cir. 2009).
17. *Id.* at 1341.
18. *Id.* at 1344 (Newman, J., dissenting) (arguing that the majority ignored the sound findings of the trial court, which concluded "that the parties did not intend to release all possible future claims for cumulative impact of the many changes").
19. *Id.* at 1341 (majority opinion).
20. 566 F.3d 1037 (Fed. Cir. 2009).
21. *Id.* at 1041.
22. *Id.*
23. *Id.* at 1046.
24. 584 F.3d 1062 (Fed. Cir. 2009).
25. *Id.* at 1067–68.
26. *Id.* at 1070.

relevant facts, the Federal Circuit's analysis, and—where appropriate—the ramifications of these cases. The decisions are grouped into four categories: (I) bid protests/contract formation; (II) fraud; (III) contract performance disputes; and (IV) *Winstar* and Spent Nuclear Fuel cases.[27]

27. The two precedential opinions not discussed below are *American Contractors Indemnity Co. v. United States*, 570 F.3d 1373 (Fed. Cir. 2009), and *Cambridge v. United States*, 558 F.3d 1331 (Fed. Cir. 2009). In *American Contractors*, the Federal Circuit reversed the COFC's dismissal for failure to state a claim in a dispute regarding a security bond guarantee agreement with the Small Business Administration (SBA). 570 F.3d at 1377. The COFC held that the surety had presented no evidence that the increase in the amount of the bond guaranty had been approved by the SBA before the surety agreed to the increase, as required by the SBA regulations for guarantee of surety bonds. *Id.* at 1374–75. The contract ride approving the increased bond guaranty was dated before the date of the SBA approval, but the surety claimed that it is common practice in the surety industry to "back date" bond increases to match the date of a contract change order. *Id.* at 1375. The Federal Circuit held that the relevant date for determining SBA liability under the regulations was not the bond's effective date, which was relied on by the COFC, but instead "the date the surety 'agrees to or acquiesces in' a material change to a bond." *Id.* at 1376 (quoting 13 C.F.R. § 115.19(e) (2009)). Because "back dating" is not barred by the regulation in question, the Federal Circuit concluded that "[t]he mere existence of an earlier effective date [than the date of SBA approval] thus does not establish a violation of 13 C.F.R. § 115.19(e)." *Id.* at 1377. It therefore was improper for the COFC to dismiss the complaint for failure to state a claim, although the Federal Circuit held open the possibility that the Government might show on a motion for summary judgment that the surety violated the regulation, and therefore the terms of the surety guarantee agreement, by modifying the bond without first obtaining approval from the SBA. *Id.*

In *Cambridge*, the majority decision affirmed the COFC's dismissal of a claim against the United States that Diahann Cambridge was owed a further award based on her role as an informant who provided the Internal Revenue Service (IRS) with information about tax law violations by a named individual. 558 F.3d 1331, 1332, 1336 (Fed. Cir. 2009). In her complaint, Ms. Cambridge alleged that in September, 1989 she provided the IRS with information that eventually led to the "detection of a tax violation committed by her former husband, Mr. David E. Pierce, in his capacity as the owner of Harold's Chicken Shacks." *Id.* at 1333. Subsequently, Ms. Cambridge filed a Form 211, Application for Reward for Original Information with the IRS in January 1991 and received two reward payments of $1,131 in February 1997 and $3,429 in February 1998. *Id.* In January 2007, however, the IRS notified Ms. Cambridge that no further reward money would be distributed to her and that her Application for Reward was considered finalized. *Id.* Ms. Cambridge subsequently filed a complaint at the COFC in March 2007 seeking the "balance due" on her claim for reward based on 26 U.S.C. § 7623, which allows the Secretary of Treasury to pay a reward to individuals as a result of their help in detecting and bringing to trial and punishment persons guilty of violating tax laws. *Id.*

The COFC dismissed the complaint for failure to state a claim, finding that any contractual obligation that the IRS had was limited to the two reward amounts it had already provided to Ms. Cambridge and that Ms. Cambridge had failed to specify any agreement she had with the IRS regarding any additional payments or any actual balance owed. Cambridge v. United States, No. 07-142T, 2007 WL 1888888, at *2 (Fed. Cl. May 29, 2007). The Federal Circuit affirmed the COFC's decision, holding that Ms. Cambridge had failed to meet her burden under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), to allege facts "plausibly" showing that the IRS had negotiated and fixed a specific amount as her reward. *Cambridge*, 558 F.3d at 1335. The Court held that Ms. Cambridge's allegation that, as a result of the information she had provided, the IRS had recovered additional taxes from her ex-husband failed

I. BID PROTESTS/CONTRACT FORMATION

Judicial restraint and deference were the primary themes of the Federal Circuit's bid protest decisions in 2009. In all seven of the bid protest decisions discussed below, the Federal Circuit sided primarily with the Government, and in three of those decisions the Federal Circuit reversed (at least in part) the COFC's decision on the grounds that the trial court had exceeded the Administrative Procedure Act's narrow scope of review. The impact of at least one of these decisions, *Axiom Resource Management, Inc. v. United States*,[28] is still subject to vigorous debate in recent COFC decisions, as the trial court attempts to determine whether *Axiom* should be limited to its unique facts or whether it signals a new trend of judicial restraint in the development of the administrative record.

The Federal Circuit's decisions also provide helpful guidance in procedural areas. In two cases, *Weeks Marine, Inc. v. United States*[29] and *Labatt Food Services, Inc. v. United States*,[30] the Federal Circuit articulated the standards to be applied to determine whether a protester has standing,[31] highlighting the difference between pre-award and post-award protests. In *Weeks Marine*, the Federal Circuit concluded that a protester had standing to file a pre-award protest challenging the framework of a competition based on a minimal showing of likely direct harm; the dissent criticized the majority's theory of standing, noting that it seemed "the claimed illegality of the solicitation is itself sufficient to establish injury."[32]

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to state a claim because even if this allegation were correct, it did not suggest that the IRS agreed to pay a fixed additional award to Ms. Cambridge. *Id.* Furthermore, nothing else in the record, including the letters from the IRS suggesting that there was "a possibility" that she might receive an additional award, "support[ed] the existence of the required agreement on the part of the government." *Id.*

Judge Newman dissented, arguing that the "panel majority depart[ed] from the statute and its purpose by holding that no reward need be paid to a tax informer absent a prior express agreement with the IRS to pay a reward and specifying the amount of reward or how it will be measured." *Id.* at 1337 (Newman, J., dissenting). Judge Newman argued that there was no "controlling distinction" between the facts presented in Cambridge's complaint and the facts present in *Merrick v. United States*, 846 F.2d 725, 726 (Fed. Cir. 1988), and that, "[a]pplying *Merrick*, an implied-in-fact contract came into existence at least when a reward payment was made to Ms. Cambridge, for the IRS acknowledged that she had provided information that warranted a reward." *Cambridge*, 558 F.3d at 1338, 1340.

28. 564 F.3d 1374 (Fed. Cir. 2009).

29. 575 F.3d 1352 (Fed. Cir. 2009).

30. 577 F.3d 1375 (Fed. Cir. 2009).

31. *See Weeks Marine*, 575 F.3d at 1363 (concluding that a "prospective bidder or offeror must establish 'a non-trivial competitive injury which can be redressed by judicial relief' to meet the standing requirement"); *Labatt*, 577 F.3d at 1379 (noting that "an unsuccessful bidder who alleges harmful error in a government bid contest in which he has an economic interest has the requisite standing to sue").

32. *Weeks Marine*, 575 F.3d at 1373.

By contrast, in *Labatt*, the Federal Circuit reversed the COFC's decision on standing in a post-award protest on the grounds that the protester had demonstrated only a superficial procedural error in the source selection, but failed to make any "showing of how the government's error caused Labatt to suffer disparate treatment or particularized harm."[33]

A. Axiom Resource Management, Inc. v. United States

Axiom Resource Management protested the award of a military health care support services contract to Lockheed Martin Federal Healthcare, Inc. based on the alleged existence of an unmitigated organizational conflict of interest (OCI).[34] After two rounds of protest before the Government Accountability Office (GAO) and two rounds of corrective action by the agency, each resulting in award of the contract to Lockheed, the GAO denied Axiom's third protest.[35] Axiom then protested in the COFC.[36] After allowing unlimited supplementation of the administrative record, the COFC found that the contracting officer (CO) had abused his discretion by awarding the contract to Lockheed without developing an adequate OCI mitigation plan.[37] After further briefing and a request for advice from the Federal Trade Commission's Bureau of Competition, the COFC enjoined the Government from exercising the option years on Lockheed's contract.[38] On appeal, the Federal Circuit reversed the COFC decision and held that the decision in *Esch v. Yeutter*,[39] on which the COFC had relied, is not the law of the Federal Circuit for supplementing the administrative record.[40] The Federal Circuit further held that the COFC had applied an incorrect standard of review to the CO's action—the COFC should have applied the "arbitrary and capricious" standard of the Administrative Procedure Act (APA) rather than a "reasonableness" standard.[41]

Before the COFC, Axiom requested to supplement the administrative record with "legal pleadings filed before the GAO, declarations of Axiom's employees, and declarations from

33. *Labatt*, 577 F.3d at 1380.
34. Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1377 (Fed. Cir. 2009).
35. *In re Axiom Res. Mgmt, Inc.*, Comp. Gen. B-298870.3, B-98870.4, July 12, 2007, 2007 CPD ¶ 117, at *3, *8.
36. *Axiom*, 564 F.3d at 1378.
37. *Id.*
38. *Id.*
39. 876 F.2d 976 (D.C. Cir. 1989).
40. *Axiom*, 564 F.3d at 1381.
41. *Id.* at 1381–82.

consultants retained for litigation."[42] When the Government objected, the COFC judge stated that it was her practice "to allow everybody to put . . . whatever they want to put into the record in trial and even in an administrative record to supplement."[43] The Federal Circuit explained that "supplementation of the record should be limited to cases in which 'the omission of extra-record evidence precludes effective judicial review.'"[44] The Federal Circuit concluded that the COFC had erred by allowing supplementation of the record without first "evaluating whether the record before the agency was sufficient to permit meaningful judicial review."[45] The court further noted that the exceptions to record supplementation in *Esch v. Yeutter* had been based on a law review article written before the Supreme Court's decision in *Florida Power & Light Co. v. Nuclear Regulatory Commission*[46] and that even the D.C. Circuit had backed away from *Esch*'s broad exceptions in recent years.[47]

On the merits, the Federal Circuit held that the CO had acted reasonably in determining that the OCI mitigation plan submitted by Lockheed was sufficient to mitigate the alleged conflicts of interest.[48] Moreover, the Federal Circuit concluded that the COFC erred when, without any evidence of arbitrary or capricious conduct by the CO, it directed the Government to set aside Lockheed's contract or submit to ongoing court monitoring based on the "unenforceability" of Lockheed's OCI mitigation plan.[49]

In the first few months following the Federal Circuit's decision, while acknowledging that "*Axiom* clearly signaled the Federal Circuit's adoption of a 'more restrictive' view of the permissible scope for supplementation of the record in a bid protest,"[50] judges at the COFC nonetheless have used bid protest decisions to debate the import of *Axiom*.[51] Two decisions have even declared that the COFC "does not interpret the new guidelines in *Axiom* to change the trial court's

42. *Id.* at 1379.
43. *Id.*
44. *Id.* at 1380 (quoting Murakami v. United States, 46 Fed. Cl. 731, 735 (2000), *aff'd*, 398 F.3d 1342 (Fed. Cir. 2005)).
45. *Axiom*, 564 F.3d at 1380.
46. 470 U.S. 729 (1985).
47. *Axiom*, 564 F.3d at 1380.
48. *Id.* at 1383.
49. *Id.* at 1384.
50. PlanetSpace, Inc. v. United States, No. 09-476 C, 2009 WL 3808619, at *2 (Fed. Cl. Nov. 10, 2009) (quoting *Axiom*, 564 F.3d at 1380–81); *see also* Kerr Contractors, Inc. v. United States, 89 Fed. Cl. 312, 334 (2009); L-3 Commc'ns EOTech, Inc. v. United States, 87 Fed. Cl. 656, 671 (2009) (recognizing and applying the restrictive standard for supplementation adopted by the *Axiom* panel).
51. *L-3 Commc'ns EOTech*, 87 Fed. Cl. at 671.

practice, other than to emphasize restraint and adherence to precedent."[52] Court of Federal Claims opinions also have distinguished between extra-record evidence that bears on the reasonableness of the agency's decision-making and "evidentiary submissions that go to the prospective relief sought."[53] The COFC in those cases admitted evidence related to such issues as the relative harms of granting injunctive relief and the potential effect of such relief on national security, "not as a supplement to the administrative record, but as part of [the COFC's] record."[54]

Similarly, while at least one COFC judge has noted that the viability of any of the *Esch* factors "remain[s] unclear" after *Axiom*,[55] another has held that four of the eight *Esch* factors are still viable after *Axiom*:

> (1) [W]hen the agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; . . . (8) in cases where relief is at issue, especially at the preliminary injunction stage.[56]

COFC decisions that have applied *Axiom* outside the context of remedies have more often than not allowed the requesting parties to supplement the record, including in the following bid protest situations: (1) document "should have been included" in the record because it contained contemporaneous communications between the

52. Totolo/King v. United States, 87 Fed. Cl. 680, 693 (2009); RhinoCorps Ltd. v. United States, 87 Fed. Cl. 261, 273 n.13 (2009); *see also* Global Computer Enters., Inc. v. United States, 88 Fed. Cl. 52, 62 (2009) (stating that the COFC's pre-*Axiom* principles for supplementation of the record "remain viable, even after the Federal Circuit eschewed reliance upon the specific, broad exceptions enunciated by the *Esch* court under the circumstances presented in *Axiom*").

53. *PlanetSpace*, 2009 WL 3808619, at *3; *see also* AshBritt, Inc. v. United States, 87 Fed. Cl. 344, 366–67 (2009) ("In general, it is appropriate to add evidence pertaining to prejudice and the factors governing injunctive relief to the record in a bid protest—not as a supplement to the AR, but as part of this Court's record."), *amended by*, 87 Fed. Cl. 654 (2009); *Totolo/King*, 87 Fed. Cl. at 692–93 (discussing why "the administrative record may be supplemented . . . in cases where relief is at issue, especially at the preliminary injunction stage").

54. *PlanetSpace*, 2009 WL 3808619, at *3; *see also* Akal Sec. Inc. v. United States, 87 Fed. Cl. 311, 320 n.8 (2009) ("Because the 'balance of harms' prong of the test for preliminary injunctive relief looks to matters outside the record of award, the court finds that the 'omission of extra-record evidence' would frustrate or preclude 'effective judicial review.'" (quoting *Axiom*, 564 F.3d at 1379–80, and *Murakami*, 46 Fed. Cl. at 735)).

55. *PlanetSpace*, 2009 WL 3808619, at *7.

56. *Totolo/King*, 87 Fed. Cl. at 692–93 (citing Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989)) (permitting supplementation of the record with an affidavit from plaintiff that "provid[ed] evidentiary support . . . for the reasonable inferences drawn and arguments made from existing record facts"); *accord RhinoCorps*, 87 Fed. Cl. at 273 n.13.

agency and the protester;[57] (2) material was necessary to correct "erroneous and misleading" information in the record;[58] (3) documents necessary to provide the court a complete understanding of the "multitude of issues" and "enormous amount of information" presented by the parties;[59] (4) post-protest affidavit explaining the agency's intent when using a specific phrase in its evaluation was "necessary to ensure 'meaningful' and 'effective' judicial review" because "[t]he record without the affidavit does not explicitly reflect the answer to this question" of the agency's intent;[60] and (5) documents in question were explicitly referenced in the agency's source selection analysis.[61]

The COFC will likely continue to grapple with the effect of *Axiom* on the scope of the administrative record following an initial protest filed at the GAO. The court's rules state that "core documents relevant to a protest case *may include, as appropriate* . . . the record of any previous administrative or judicial proceeding relating to the procurement, including the record of any other protest of the procurement."[62] Some COFC decisions appear to interpret this permissive rule to mean that the COFC *must include* the entire record before the GAO in the COFC administrative record rather than the limited GAO documents that the Competition in Contracting Act requires.[63] In general, COFC decisions have reconciled *Axiom* with

57. Kerr Contractors, Inc. v. United States, 89 Fed. Cl. 312, 335 (2009).

58. AshBritt, Inc. v. United States, 87 Fed. Cl. 344, 366 (2009), *amended by*, 87 Fed. Cl. 654 (2009).

59. Global Computer Enters., Inc. v. United States, 88 Fed. Cl. 52, 62–63 (2009).

60. Academy Facilities Mgmt. v. United States, 87 Fed. Cl. 441, 455 (2009).

61. Bannum, Inc. v. United States, 89 Fed. Cl. 184, 189 (2009). The COFC also has refused to supplement the administrative record in other circumstances, such as (1) when photographs were not before the agency during its decision-making and a declaration was duplicative of information in the record or irrelevant to the issue at hand, *Kerr Contractors*, 89 Fed. Cl. at 335; (2) when a declaration merely offered the Contracting Officer's opinion on what the court viewed as a legal issue, *AshBritt*, 87 Fed. Cl. at 366; and (3) when declarations and exhibits related to test scores the court had determined were the result of improper testing procedures and post-hoc declaration of fact and argument was not before the agency during its decision-making, L-3 Commc'ns EOTech, Inc. v. United States, 87 Fed. Cl. 656, 672 (2009) (noting that the existing record "adequately describes the issues in controversy and the decision-making of the Army").

62. CT. FED. CL. R., App. C, ¶ 22(u) (emphasis added).

63. *See, e.g.*, *Bannum*, 89 Fed. Cl. at 188 ("[T]he purpose of the rule . . . is to ensure that the Court at least has benefit of the same record that was before the GAO. Materials considered by the GAO *should*, therefore, *also be part of the record reviewed by this Court*." (emphasis added)); Holloway & Co. v. United States, 87 Fed. Cl. 381, 391 (2009) ("Each of the documents proffered by Holloway relates to the protests before GAO and falls into this category [of Appendix C, ¶ 22(u)]. By rule, the record therefore *should include these materials*." (emphasis added)); DataPath, Inc. v. United States, 87 Fed. Cl. 162, 166 n.3 (2009) ("The *Axiom* panel also may have misunderstood that the trial court did not 'supplement' the Administrative Record,

the court's rules to conclude that material included in the record before the GAO also should be included in the administrative record at the COFC.[64] At least one COFC decision disagrees with this premise, although the language is contained in dicta.[65] In another example, the COFC deemed a post-award declaration to be part of the administrative record because it was included in the record for another protest of the same procurement before the GAO, yet cited *Axiom* to explain why the court gave no weight to the declaration, which was not supported by the pre-award record.[66]

B. Weeks Marine, Inc. v. United States

Weeks Marine, Inc., a dredging contractor, filed a pre-award bid protest in the COFC challenging the Army Corps of Engineers' (the Corps) decision to solicit proposals for regional maintenance dredging and shore protection projects using multiple award, indefinite delivery/indefinite quantity (IDIQ) task order contracts, rather than sealed bidding procedures.[67] The COFC granted Weeks's motion for judgment on the administrative record, ruling that the Corps' solicitation violated 10 U.S.C. § 2304(a)(2), which provides that sealed bidding must be used when an agency plans to award a contract based solely on price and price-related factors, and finding that the Corps lacked a rational basis for departing from its traditional district-by-district procurement strategy, in which

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because [Rules of the United States Court of Federal Claims] Appendix C, ¶ 22(u) provides that declarations filed in a prior protest before the General Accountability Office [sic] *are part of the Administrative Record*." (emphasis added)); Red River Holdings, LLC v. United States, 87 Fed. Cl. 768, 788 n.28 (noting that the COFC's rules "provide[] that declarations filed in a prior GAO protest *are part of the [Administrative Record]*" (citing DataPath, Inc. v. United States, 87 Fed. Cl. 162, 166 (2009) (emphasis added)). *See* 31 U.S.C. § 3556 (for protests filed at the COFC after a GAO protest, the initial agency report, any reports to Congress and any decision or recommendation by GAO "shall be considered to be part of the agency record subject to review.").

64. *See Holloway*, 87 Fed. Cl. at 391–92 (acknowledging *Axiom* in a decision granting motion to supplement the COFC record with material included in record before the GAO); *Bannum*, 89 Fed. Cl. at 189 ("The Federal Circuit's recent decision in *Axiom*, does not undermine the Court's rules for determining the content of the administration record."); *see also* Acad. Facilities Mgmt. v. United States, 87 Fed. Cl. 441, 454–55 (2009) (noting that under *Holloway*, a post-hoc affidavit by the Source Selection Authority that was part of the record before the GAO would be admitted into the record at the COFC).

65. *See* RhinoCorps Ltd. Co. v. United States, 87 Fed. Cl. 261, 276 n.18 (2009) (disagreeing with *Holloway* and stating that documents generated after the agency decision and in the course of an administrative protest may be cited "as admissions or inconsistent positions" but cannot supplement the administrative record before the COFC).

66. *Red River Holdings*, 87 Fed. Cl. at 787–88.

67. Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1354–55 (Fed. Cir. 2009).

individual dredging efforts were sourced locally through sealed bidding.[68] On appeal, the Federal Circuit reversed the trial court, holding that the solicitation for the regional multiple award contracts did call for evaluation of non-price factors, and that the solicitation was rationally designed to address several of the Corps' goals.[69]

Weeks Marine is notable for two reasons. First, it clearly articulates the Circuit's standard for establishing standing in a pre-award protest challenging the terms of a solicitation, and clarifies the previously implicit distinction between the types of harm a plaintiff must demonstrate in a pre-award versus a post-award protest. Second, in reversing the COFC's decision, the *Weeks Marine* reiterates the recent emphasis on judicial restraint, which was also emphasized in the *Axiom* and *Alabama Aircraft Industries* decisions this year.

The court recognized that it had not previously articulated the standard that should be applied in a pre-award protest to determine whether a prospective offeror has an economic interest, and therefore prejudice, sufficient to establish standing to challenge a solicitation.[70] Under 28 U.S.C. § 1491(b)(1), standing "is limited to actual or prospective bidders or offerors whose direct economic interest would be affected by the award of the contract or by the failure to award the contract."[71] On appeal, the Corps argued that Weeks failed to demonstrate prejudice or harm arising from the Corps' solicitation, and that any potential injury would be speculative and shared by all bidders.[72] The Corps drew upon the standard for establishing standing in *post-award bid protests*, in which "[t]o establish prejudice, the protester must show that there was a 'substantial chance' it would have received the contract award but for the alleged error in the procurement process."[73] Weeks, in contrast, argued that it would suffer prejudice from competing in a "discretionary, subjective and essentially unreviewable process," and that its long-term marketing strategy was based upon sealed bidding.[74]

The court observed that "[i]n such a case [i.e., a pre-award protest], it is difficult for a prospective bidder/offeror to make the showing of prejudice that we have required in post-award bid protest

68. Weeks Marine, Inc. v. United States, 79 Fed. Cl. 22, 29-30 (2007).
69. *Weeks Marine*, 575 F.3d at 1364.
70. *Id.* at 1361.
71. *Id.* at 1359 (quoting Am. Fed'n of Gov't Employees v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001)).
72. *Id.* at 1360.
73. *Id.* (quoting Info Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1319 (Fed. Cir. 2003)).
74. *Id.*

cases" because "there is no factual foundation for a 'but for' prejudice analysis."[75] The COFC had applied a standard that had previously been articulated in *WinStar Communications, Inc. v. United States*,[76] in which standing is established by alleging "a non-trivial competitive injury which can be redressed by judicial relief."[77] The Federal Circuit determined that this standard "strikes the appropriate balance" between § 1491(b)(1)'s "interested party" requirements and Article III standing requirements, and agreed that it is the appropriate standard to apply in a pre-award challenge to an agency's solicitation.[78] The court subsequently determined that Weeks had standing because it had alleged a facial defect in the solicitation that would materially affect how Weeks would be required to do business with the Corps for the duration of the IDIQ contract.[79]

The court then turned to the merits of Weeks's claim, focusing on whether the Corps established a rational basis for structuring its procurement. The COFC had sustained Weeks's protest on the basis that the agency's Acquisition Plan failed to establish a rational basis for departing from traditional sealed bidding procedures and relying instead on negotiated task order awards that would purportedly focus on non-price factors, in addition to price.[80] Among other findings, the COFC determined that it was unlikely that the Corps intended to make task order awards based on non-price factors, because its non-price factors appeared to focus largely on matters for which a responsibility determination under Federal Acquisition Regulation (FAR) § 9.104 would suffice instead.[81] The Corps therefore would be required to use traditional sealed bidding procedures under 10 U.S.C. § 2304.[82] Moreover, the court was not persuaded by

75. *Id.*
76. 41 Fed. Cl. 748 (1998).
77. *Weeks Marine*, 575 F.3d at 1361.
78. *Id.* at 1362.
79. In a dissenting opinion, Judge Dyk disagreed that Weeks had standing, noting that "Weeks Marine made no allegations of injury in its complaint and appears to have filed no affidavits or declarations providing a basis for finding that the solicitation was likely to cause injury." *Id.* at 1371–72 (Dyk, J., dissenting). The dissent noted that "[t]he majority's theory [of standing] appears to be that the claimed illegality of the solicitation is itself sufficient to establish injury," but that this was not sufficient to demonstrate Article III standing. *Id.* at 1373–74 (citing Allen v. Wright, 468 U.S. 737, 754 (1984)) ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."). Instead, the dissent would have required a showing that Weeks's "direct economic interests have been adversely affected" to qualify as an "interested party" that had standing to protest. *Id.* at 1375–76.
80. Weeks Marine, Inc. v. United States, 79 Fed. Cl. 22, 28–34 (2007).
81. *Id.* at 30.
82. *Id.*

additional justifications identified in the Acquisition Plan—including a reduced procurement cycle, reduced administrative costs, reduced need for emergency contracting, and eliminating inter-district competition for limited resources.[83] The court generally concluded that the Acquisition Plan and other sparse record documentation failed to sufficiently justify the planned change to a regional, negotiated task order contract because the court did not believe that the benefits the agency anticipated from the changed strategy were material.[84]

On appeal, the Corps noted that the solicitation on its face called for the evaluation of non-price factors including technical merit, past performance, and small business concerns, and therefore properly qualified as a permissible negotiated procurement, not a sealed bidding procedure.[85] It further pointed out "that 'past performance is considered significantly more important than price,' and that 'all evaluation factors, when combined, are significantly more important than price.'"[86] On that basis, the Federal Circuit agreed that the solicitation did not violate 10 U.S.C. § 2304, and that it was not a sealed bid.[87] Thus, the court determined that the issue was "whether the Government established a rational basis for the structuring of the procurement."[88]

As for the merits of the Corps' decision to change its acquisition strategy, the Corps argued that the COFC erred in concluding that the benefits the Corps expected to derive from the change in procurement strategy did not constitute a rational basis for making that change, and that there were seven specific benefits that the agency anticipated, including the ability to:

> (1) pick more qualified contractors because [the Corps] will be able to rely on factors other than price; (2) reduce procurement time; (3) lower administrative costs by an estimated $1.45 million in the next two years; (4) reduce or eliminate the need for emergency procurements; (5) have greater coordination between individual districts of the South Atlantic Division; (6) facilitate the use of small businesses; and (7) promote national security through more timely execution of dredging near military bases.[89]

83. *Id.* at 32–34.
84. *Id.* at 34.
85. Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1364 (Fed. Cir. 2009).
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 1364–65.

Citing *CHE Consulting, Inc. v. United States,*[90] the Federal Circuit explained that when an agency identifies concerns or reasons for a procurement strategy in the administrative record and those concerns provide a rational basis for the procurement decision, the agency need not provide additional evidence that supports those concerns.[91] Applying that rule here, the Federal Circuit determined that the Corps had provided "seven specific reasons for its procurement action, each of which represents a legitimate procurement objective."[92] Although the Corps did not provide empirical evidence showing how each of these goals would bear out, it did identify the "reasons for its procurement decision and the thinking behind those reasons," which provided a sufficient rational basis for that decision.[93]

Ultimately, the Federal Circuit concluded that if it were to find that the agency lacked a rational basis for its decision, it "would be second-guessing the Corps's action. That is something we are not permitted to do."[94] It quoted its earlier statement in *Honeywell, Inc. v. United States*,[95] that "[i]f the court finds a reasonable basis for the agency's action, the court should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations."[96]

C. Alabama Aircraft Industries, Inc. v. United States

Alabama Aircraft Industries, Inc. ("AAII") protested the Air Force's award of a multi-billion dollar contract to the Boeing Company for long-term maintenance (five-year base period, plus five one-year options) of the KC-135 aerial refueling tanker aircraft fleet.[97] After the COFC sustained AAII's protest, the Federal Circuit reversed, concluding that the COFC's ruling effectively "introduce[d] new requirements outside the scope of the RFP" and exceeded the scope of the trial court's review.[98]

90. 552 F.3d 1351 (Fed. Cir. 2008).
91. *Id.* at 1354.
92. *Id.*
93. *Id.*
94. *Id.* at 1371.
95. 870 F.2d 644 (Fed. Cir. 1989).
96. *Weeks Marine*, 575 F.3d at 1371 (quoting *Honeywell*, 870 F.2d at 648).
97. Ala. Aircraft Indus., Inc. v. United States, 586 F.3d 1372, 1373–74 (Fed. Cir. 2009).
98. *Id.* at 1376.

AAII had previously protested the award at the GAO in 2007, at which time the GAO sustained the protest on the sole ground that the record was insufficient for the GAO to determine the reasonableness of the Air Force's price realism analysis.[99] GAO signaled concerns with Boeing's proposed labor hour reductions in light of the fact that the KC-135 fleet would continue to age during the life of the contract.[100] Following the protest, the Air Force reevaluated the realism of the offerors' proposed prices and documented factors supporting its conclusion that proposed prices were realistic and reasonable.[101] The Air Force "noted that because aging aircraft issues were not predictable with any certainty, the RFP instructed offerors to base their proposals on a three-tier work package" included in the RFP, and also "provided for the [Air Force] to negotiate new work packages as might be needed in future years."[102] The Air Force thus concluded that it was not required to consider aging-aircraft issues in its price realism analysis.[103] The Air Force affirmed the award to Boeing, and AAII protested to the GAO again, but, in light of the Air Force's rationale for its price realism analysis, the GAO denied the second protest.[104]

AAII subsequently protested the award at the COFC, which granted AAII's request for injunctive relief.[105] The COFC found the Air Force's price realism analysis to be arbitrary and capricious because it sought "to sidestep the aging-fleet issue."[106] The COFC concluded that the solicitation did not "explicitly" or adequately address aging-aircraft issues, as the Air Force contended, and that the Air Force therefore should have considered aging-aircraft issues in conjunction with its price realism analysis.[107] The Air Force and Boeing appealed the COFC's decision.[108]

On appeal, the Federal Circuit reversed the COFC.[109] Noting that the central concern in the COFC's decision was "the issue of aging aircraft," the Federal Circuit agreed with the COFC "that the issue of aging aircraft was not explicitly addressed in the Air Force's RFP."[110]

99. *Id.* at 1374.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. Ala. Aircraft Indus., Inc. v. United States, 83 Fed. Cl. 666, 703 (2008), *rev'd* 586 F.3d 1372 (Fed. Cir. 2009).
106. *Id.* at 700.
107. *Id.*
108. *Ala. Aircraft*, 586 F.3d at 1374.
109. *See id.* at 1376 (vacating the injunction against the Boeing contract).
110. *Id.* at 1375.

However, the Federal Circuit noted that due to the unpredictability of aging-aircraft impacts on maintenance requirements, the agency had elected to require the offerors instead to propose prices for specific work packages:

> The agency decided to handle the uncertainties associated with the maintenance of aging aircraft by requiring offerors to base their proposals on a work package that included three elements . . . [and] [t]he RFP explained to offerors exactly how their price proposals would be evaluated based on their prices for these various elements of the work package. The agency believed that this comprehensive framework, along with the periodic adjustments to the work package contemplated by the RFP, was the best way to account for the uncertain impact of aging aircraft.[111]

Although the Air Force determined that this was the best approach, the Federal Circuit stated that "[t]he trial court thought otherwise" because the COFC found "that the RFP should have explicitly addressed the problem of aging aircraft."[112] As a result of that finding, the COFC "attempt[ed] to rewrite the RFP to account for the impact of aging aircraft in the manner the court preferred [and] went beyond the scope of the court's review . . . ."[113] As a result, the COFC's decision "amounted to an impermissible substitution of the court's judgment for the agency's with regard to how the contract work should be designed."[114]

Ultimately, the Federal Circuit determined that the Air Force had considered the aging-aircraft issue, "but because the impact on future requirements was unknown, it decided the best approach was to provide all offerors with the three-tier work package on which to base their proposals."[115] Since it was within the agency's discretion to organize its competition in that fashion, the Air Force's subsequent price realism analysis based on the announced work packages was not arbitrary and capricious.[116]

D. Labatt Food Service, Inc. v. United States

The *Labatt* decision provides further guidance regarding standing in post-award protests and, in particular, clarifies the notion that not *all* violations of procurement law or regulation during a competition result in prejudicial error justifying a protest. Labatt Food Service,

111. *Id.*
112. *Id.*
113. *Id.* at 1376.
114. *Id.*
115. *Id.*
116. *Id.*

Inc. protested the Defense Logistics Agency's (DLA) award of a contract to provide food distributor services for military facilities.[117] Labatt's final proposal revision was not considered for award because it was submitted late and by email, a prohibited means of transmission.[118] The solicitation required all proposal modifications or revisions to be submitted in hard copy or via facsimile.[119] After reviewing initial proposals, DLA sent an email to all offerors opening discussions and requesting additional information and, despite the solicitation's restriction, all three offerors responded to that request by email.[120] DLA subsequently made an award, but following a successful GAO protest (filed by Labatt) it took corrective action and solicited revised proposals.[121] Again, all three offerors submitted revisions by email.[122] Labatt again protested with the GAO, challenging a changed solicitation requirement, which spurred the government to request revised proposals.[123] Although the government specifically requested that the final round of proposal revisions be submitted in hard copy via Federal Express by a 2:00 p.m. deadline, Labatt submitted its revision by email more than two hours late.[124] The other two offerors timely submitted their revisions via Federal Express.[125] Labatt's proposal revision was not considered for award because it had been untimely submitted via email.[126]

The COFC granted Labatt's request for permanent injunctive relief, finding that the DLA had previously relied upon email transmissions in violation of the terms of the solicitation, and that by deviating from the solicitation's scheme the agency had "violate[d] the fundamental fairness of the procurement process."[127] The COFC acknowledged that Labatt's late submission would typically render its proposal unawardable and preclude Labatt from establishing standing.[128] The court, however, relied on the Federal Circuit's decision in *Impresa Construzioni Geom. Domenico Garufi v. United States*[129]

117. Labatt Food Serv., Inc. v. United States, 577 F.3d 1375, 1377 (Fed. Cir. 2009).
118. *Id.* at 1378.
119. *Id.* at 1377.
120. *Id.*
121. *Id.* at 1377–78.
122. *Id.* at 1378.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. Labatt Food Serv., Inc. v. United States, 84 Fed. Cl. 50, 60, 66 (2008), *rev'd*, 577 F.3d 1375 (Fed. Cir. 2009).
128. *Id.* at 62.
129. 238 F.3d 1324, 1339–40 (Fed. Cir. 2001) (granting injunctive relief because the Government made an arbitrary and capricious responsibility determination

to conclude that the DLA's earlier use of email transmissions meant that the entire competition was "fatally flawed" and should be "rebid," at which time the court determined that Labatt would have a substantial chance of winning the competition.[130] On appeal, the Federal Circuit reversed the COFC's decision and concluded that the protester lacked standing because it failed to demonstrate any prejudicial error and submitted a late proposal revision.[131] The COFC found that "because the three offerors improperly submitted the first round proposal revisions via e-mail, all proposals had been effectively withdrawn at that time and therefore eliminated from the competition."[132] The Federal Circuit disagreed with this rationale and the COFC's reliance on *Garufi*: "The critical difference between *Garufi* and the present case is not the existence of error on the part of the government, but the allegation of an error that, taken as true, would be prejudicial to the complaining party's attempt to procure the contract."[133] The court stressed that the existence of errors or mistakes in the procurement process, alone, does not "nullify the contest" and require that the procuring agency "begin anew" for the protester.[134] Instead, the error must result in some form of particularized prejudice in order to establish standing.[135] Furthermore, the court warned that a party's economic interest in the procurement or the potential to win a contract in a new competition—the hallmarks of "interested party" status—is separate from any assessment of whether a party has standing:

> Here, however, there is no showing of how the government's error caused Labatt to suffer disparate treatment or particularized harm. Instead, Labatt tautologically argues that it was harmed by the method of transmission error because it would have a substantial chance of receiving the contract award in a rebid. By conflating the standing requirements of prejudicial error and economic interest, Labatt would create a rule that, to an unsuccessful but economically interested offeror in a bid protest, any error is harmful. Under this radical formulation there would be no such thing as an error non-prejudicial to an economically interested offeror in a bid contest. We decline to adopt such a rule. Instead, we reiterate the established law in this circuit that non-prejudicial

regarding the winning bidder's record of integrity and business ethics), *rev'd*, 531 F.3d 1367 (Fed. Cir. 2008).

130. *Labatt*, 84 Fed. Cl. at 61–62.
131. *Labatt*, 577 F.3d at 1380–81.
132. *Id.* at 1379.
133. *Id.*
134. *Id.* at 1380.
135. *Id.*

> errors in a bid process do not automatically invalidate a procurement.[136]

Here, the Federal Circuit concluded that Labatt had failed to show that the government's improper acceptance of emails interfered with Labatt's ability to win the contract award because there was no connection between Labatt's late filing and the error in the government's method of transmission.[137] Labatt's late submission, on the other hand, disqualified it from the competition.[138] Referring to what is commonly called the "late is late rule," the court noted that, in order to avoid the potential for abuse, "submission deadlines are strictly enforced across the board."[139] Labatt's late proposal revision was "tantamount to no proposal at all," and therefore Labatt could not demonstrate that it had a "substantial chance" of award and had "no more standing to sue than the proverbial man on the street."[140]

E. Tyler Construction Group v. United States[141]

Tyler Construction Group filed a pre-award protest in the COFC challenging the United States Army Corps of Engineers' use of a multiple award, IDIQ contract for design and construction of various types of military facilities in the Southeastern United States.[142] Tyler complained that the Corps was not permitted to use an IDIQ contract to procure construction services and that the bundled procurement overstated the agency's requirements and violated the Small Business Act.[143] The COFC granted the Government's motion for judgment on the administrative record, and the Federal Circuit affirmed that decision.[144] The Federal Circuit's decision was consistent with others in which broad discretion is afforded to agency officials to shape the nature and scope of a procurement to best meet the Government's requirements, so long as the procurement procedures do not violate a statute or regulation and there is an adequate justification for the agency's action.[145]

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136. *Id.*
137. *Id.* at 1380–81.
138. *Id.* at 1381.
139. *Id.*
140. *Id.*
141. 570 F.3d 1329 (Fed. Cir. 2009).
142. Tyler Const. Group v. United States, 83 Fed. Cl. 94, 95 (2008), *aff'd*, 570 F.3d 1329 (Fed. Cir. 2009).
143. *Id.* at 96.
144. *Tyler Constr.*, 570 F.3d 1329, 1331, 1336 (Fed. Cir. 2009).
145. *See id.* at 1334 (noting decisions in E.W. Bliss Co. v. United States, 77 F.3d 445, 449 (Fed. Cir. 1996), and Lockheed Missiles & Space Co. v. Bentsen, 4 F.3d 955, 958 (Fed. Cir. 1993), both of which recognize the advantages of allowing federal procurement entities broad discretion in procurement procedures).

The FAR provisions in subpart 16.5 that address IDIQ contracts state that IDIQ vehicles "may be used to acquire supplies and/or services when the exact times and/or exact quantities of future deliveries are not known at the time of contract award."[146] IDIQ contracts may be appropriate "when the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that the Government will require during the contract period."[147]

Tyler argued on appeal that the FAR does not permit an IDIQ contract vehicle to be used for large-scale building construction services because "services," as used in FAR subpart 16.5, does not specifically include "construction" services.[148] Tyler noted that other provisions in the FAR refer to "services," followed immediately by the reference "(including construction)," but that the omission of the "(including construction)" reference in FAR subpart 16.5 meant that construction services were not intended to be procured using an IDIQ contract.[149] The court disagreed with this construction, noting that other references to services in the FAR are sometimes accompanied by an opposite "(excluding construction)" exception.[150] Instead, the court noted that "the proper inquiry is not whether the FAR authorizes the use of IDIQ contracts for a procurement of construction, but whether there is any statutory or regulatory provision that precludes such use."[151]

Here, the court agreed with the COFC "that the Corps' use of IDIQ contracts to effect this procurement of military housing 'represents the sort of innovation envisioned by [FAR 1.102] and, with its identification of both a contract dollar value and a general scope of work, constitutes a permissible exercise of IDIQ contracting authority.'"[152] The court noted that the Corps had undertaken a thorough pre-solicitation research effort and that it reasonably determined that the use of IDIQ contracts "was the most appropriate

146. *Tyler Constr.*, 570 F.3d at 1332 (quoting 48 C.F.R. § 16.501-2(a) (2009)).
147. *Id.* at 1332–33 (quoting 48 C.F.R. § 16.504(b) (2009)).
148. *Id.* at 1331.
149. *Id.*
150. *Id.* at 1333.
151. *Id.* (citing 48 C.F.R. § 1.102(d) (2009)) ("In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.").
152. *Id.* (quoting Tyler Constr. Group v. United States, 83 Fed. Cl. 94, 99 (2008)).

method of proceeding and therefore best served the interests of the United States."[153]

Tyler also argued that the Corps "violated statutory and regulatory provisions designed to aid and protect small businesses," pointing primarily to the anti-bundling provisions of the Small Business Act.[154] Tyler complained that the Corps' combination of multiple construction efforts under the single umbrella contract resulted in a procurement whose dollar amount was beyond the financial capacity of small business firms that could have competed for individual construction efforts of a smaller size.[155] The Federal Circuit disagreed, noting that the Small Business Act "does not prohibit all bundling of contract requirements, but only 'unnecessary and unjustified bundling.'"[156] The court held that the Corps reasonably concluded that "successfully meeting the Army's goals in construction costs and time would require a departure from the Corps' traditional 'one project at a time' approach in favor of an acquisition strategy that maximized economies of scale."[157] On that record, the court concluded that the Corps' selection of the IDIQ vehicle was reasonable and did not constitute an unnecessary bundling.[158] Furthermore, the court pointed out that the Corps had included small business subcontracting requirements in its acquisition strategy to ensure that opportunities would be available for small business construction companies, and therefore "endeavored, as far as practicable, to comply with the statutory and regulatory requirements and policies for small business participation in government procurement."[159]

F. Centech Group, Inc. v. United States[160]

The Centech Group, Inc. was previously awarded a small business set-aside contract by the Air Force to perform advisory services, but during a GAO protest the Air Force learned that Centech failed to comply with the solicitation's Limitation on Subcontracting (LOS) clause.[161] When the Air Force undertook corrective action, Centech filed a bid protest in the COFC claiming that the Air Force's

153. *Id.* at 1334.
154. *Id.* (citing 15 U.S.C. § 631(j)(3) (2006)).
155. *Id.*
156. *Id.* at 1335 (citing 15 U.S.C. § 631(j)(3) (1997)).
157. *Id.* (quoting *Tyler Constr.*, 83 Fed. Cl. at 103 (2008)).
158. *Id.* at 1336.
159. *Id.*
160. 554 F.3d 1029 (Fed. Cir. 2009).
161. *Id.* at 1031–35.

corrective action was improper.[162] The COFC denied Centech's request for injunctive relief,[163] and the Federal Circuit affirmed the decision.[164]

The primary issue in the protest involved the proper interpretation and application of the LOS clause at FAR 52.219-14, implemented pursuant to the Small Business Act.[165] Under the LOS clause, an offeror must agree that at least fifty percent of its personnel costs under the contract will be based upon work of the small business prime contractor's own employees.[166] The solicitation incorporated the LOS clause by reference, but the Air Force informed offerors that it would interpret the LOS clause in accordance with an Air Force Policy Memorandum that stated:

> [W]ithin [Air Force Material Command], we interpret the clause at 52.219-14 to mean that the minimum amounts of work can be performed by the collective efforts of either small business members of a formal joint venture or a small business prime contractor together with the first tier small business subcontractor(s) . . . .[167]

Essentially, the memo stated that the Air Force interpreted the LOS clause to mean that a small business prime contractor could aggregate the small business costs between itself and its first-tier small business subcontractors to satisfy the LOS requirement.[168]

Centech relied on this Policy Memorandum and proposed to incur 43.2 percent of the total cost of the contract using its own employees, and to combine those efforts with other small business subcontractors to exceed the fifty percent LOS requirement.[169] Following award to Centech, another offeror, Tybrin, protested at GAO and argued that Centech's proposal failed to comply with the LOS requirements.[170] GAO sought the views of the Small Business Administration (SBA), and the SBA took the position that, in accordance with 15 U.S.C. § 644(o)(1)(A) and SBA regulation 13 C.F.R. § 125.6(a)(1), "a small business receiving a set-aside contract must agree to meet by itself the requirements of the LOS clause," thus invalidating the Air Force's

162. *Id.* at 1035–36.
163. Centech Group, Inc. v. United States, 79 Fed. Cl. 562, 577 (2007), *aff'd*, 554 F.3d 1029 (Fed. Cir. 2009).
164. *Centech*, 554 F.3d at 1040.
165. *Id.* at 1031.
166. *Id.* (citing 48 C.F.R. § 52.219-14 (2008)).
167. *Id.* at 1032.
168. *Id.*
169. *Id.*
170. *Id.*

Policy Memorandum.[171] The Air Force subsequently rescinded its Policy Memorandum and elected to take corrective action to reconsider whether Centech met the LOS requirements, and GAO dismissed the protest as moot.[172] Centech later notified the contracting officer by mail that, although its initial proposal was consistent with the Policy Memorandum and stated that Centech's own employees would only account for 43.5% of the effort, Centech had already performed more than 51% of the work, itself, and would continue to do so; Centech submitted revised cost models to reflect that prospective change.[173] Nevertheless, the contracting officer determined that Centech's proposal, on its face, failed to comply with the LOS requirement, rendering Centech ineligible for contract award.[174] Centech appealed that decision, contending that the contracting officer was required to consider Centech's additional information regarding its ability to self-perform more than 51% of the contract work.[175] The Air Force referred the matter of Centech's "responsibility" to the SBA, and Centech subsequently provided additional documentation to the SBA, including narratives, a compliance matrix, and spreadsheets that showed Centech had changed its previously proposed mix of prime and subcontractor labor costs.[176] Based on this additional information, the SBA informed the contracting officer that the SBA concluded Centech *would* comply with the LOS clause and that the SBA found Centech to be responsible.[177]

Based on the SBA's conclusions, the Air Force reinstated the contract award to Centech, prompting another protest from Tybrin claiming that the Air Force should have found Centech's proposal unacceptable based on its failure to comply with the LOS clause.[178] GAO sustained Tybrin's protest.[179] Although GAO noted that the issue of small business "responsibility" is generally a matter for the SBA, where a proposal on its face leads an agency to conclude that an offeror has not agreed to comply with the LOS clause, the matter is

171. *Id.* at 1033 (citing 15 U.S.C § 644(o)(1)(A) (2006) and 13 C.F.R. § 125.6(a)(1) (2009)).
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 1033–34.
177. *Id.* at 1034.
178. *Id.*
179. *Id.* (citing Tybrin Corp., Comp. Gen. B-298364.6, Mar. 13, 2007, 2007 CPD 51.

one of the proposal's "acceptability," not one of "responsibility."[180] Based on the Air Force's conclusion that Centech did not comply with the LOS, GAO concluded that the Air Force should have found Centech's proposal to be unacceptable for award and recommended that the Air Force reopen discussions and solicit revised proposals, which it did.[181]

Centech protested the Air Force's corrective action to the COFC, seeking reinstatement of its award and declaratory relief that the Air Force's decision to follow GAO's recommendation for corrective action was arbitrary and capricious.[182] Centech argued that the issue of LOS compliance was not one of "acceptability" that should have been evaluated as a condition of award, but instead whether Centech's performance actually complied with the LOS contract clause should have been examined as a matter of post-award contract administration.[183] The COFC declined Centech's request for relief, noting that Centech's proposal, on its face, did not comply with 15 U.S.C. § 644(o).[184] The COFC also concluded that the LOS clause was a material solicitation requirement, and Centech's failure to comply with that term rendered its proposal unacceptable.[185]

The Federal Circuit agreed, holding that a "subcontracting limitation, including the LOS clause, is a material RFP term and a condition of a solicitation to which the offeror must agree in its proposal."[186] The court determined that compliance is material "because the mix of prime-subcontractor labor affects cost evaluation."[187] Centech argued that even if the LOS was a material requirement, its proposal was not facially non-compliant with the LOS because Centech only proposed to self-perform less than 50% of the effort based on its reliance on the Air Force's Policy Memorandum.[188] The Federal Circuit was not persuaded by that tack, because even if Centech had relied on the Policy Memorandum, "[t]he Air Force Material Command could not, through the Policy

180. *Centech Group, Inc.*, 554 F.3d at 1034 (quoting *Tybrin Corp.*, Comp. Gen. B-298364.6, at 5).
181. *Id.* at 1035 (quoting *Tybrin Corp.*, Comp. Gen. B-298364.6, at 7).
182. *Id.*
183. *Id.* at 1036.
184. *Id.* (citing 15 U.S.C. § 644(o) (2006)).
185. *Id.*
186. *Id.* at 1038.
187. *Id.*
188. *Id.*

Memorandum, alter the requirements of the LOS clause, which was mandated by statute and regulation."[189]

The court recognized that acquisition regulations state that when a contracting officer determines that a small business cannot meet the LOS requirements, that finding "shall be treated as an element of responsibility and shall be subject to the [SBA's Certificate of Competency] process."[190] However, the court found that those regulations did not apply here because Centech's acceptability did not turn on whether it *could* comply with the LOS (which would have been an issue for the SBA), but rather whether its proposal stated that it *would* comply with the LOS.[191] The court concluded that the latter issue was properly within the contracting officer's discretion, and that it was clear from the face of Centech's proposal that it had not proposed to meet the 50% requirement.[192]

G. Tip Top Construction, Inc. v. United States[193]

Tip Top Construction, Inc. protested the intended award of a contract by the Federal Highway Administration (FHWA) under an invitation for bids to construct a traffic circle and related work on the island of St. John in the U.S. Virgin Islands.[194] Tip Top argued that the contracting officer improperly rejected its low-priced bid on the ground that the bid was not accompanied by a satisfactory bid bond.[195] Following notification that its bid had been rejected, Tip Top filed a protest at the GAO, which was denied.[196] Tip Top subsequently filed a complaint in the COFC seeking to enjoin the contract award.[197] The court granted the Government's motion for judgment on the administrative record and subsequently denied Tip Top's request for reconsideration, concluding that the contracting officer had reasonably determined that Tip Top's bid bond did not comply with FAR requirements.[198] On appeal, the Federal Circuit affirmed the COFC's decision and agreed that the

189. *Id.* at 1039 (citing United States v. Amdahl Corp., 786 F.2d 387, 392–93 (Fed. Cir. 1986)).
190. *Id.* at 1039–40 (quoting 48 C.F.R. § 19.601(d) (2009) and 13 C.F.R. § 125.6(f) (2009)).
191. *Id.* at 1040.
192. *Id.*
193. 563 F.3d 1338 (Fed. Cir. 2009).
194. *Id.* at 1339–41.
195. *Id.* at 1339, 1341.
196. Tip Top Constr., Inc., Comp. Gen. B-311305, May 2, 2008, 2008 CPD 91.
197. Tip Top Constr., Inc. v. United States, No. 08-352C, 2008 WL 4210463, at *2–3, (Fed. Cl. Sept. 12, 2008).
198. *Id.* at *1.

contracting officer reasonably determined that Tip Top failed to pledge an acceptable asset for its bid bond.[199] At its heart, the Federal Circuit's decision reaffirmed the contracting officer's ability to exercise discretion in the procurement process in cases where the acquisition regulations delegate subjective decisions to the contracting officer, so long as the basis for that discretion is rational.[200]

The solicitation included the clause at FAR 52.228-1 and required that all bids be accompanied by a bid guarantee of at least twenty percent of the bid price or $3 million, whichever was less.[201] Accordingly, Tip Top's bid was accompanied by a bid bond provided by a personal surety, which consisted of the surety's pledge of an "allocated portion of $191,350,000.00 of previously mined, extracted, stockpiled and marketable coal, located on the property of E.C. Scarborough [*i.e.*, the surety]" in West Virginia.[202] The contracting officer rejected Tip Top's bid because its bid bond did not meet the requirements of FAR 28.203:

> Individual Surety Bonds must be supported by acceptable assets, as listed in the FAR. Acceptable assets include cash, United Sates Government securities, stocks and bonds that are actively traded, real property owned in fee simple, and irrevocable letters of credit. Speculative assets—which would include marketable coal—are specifically excluded by [FAR] 28.203-2(c)(7).[203]

Tip Top's president subsequently emailed the contracting officer declaring that its surety had "other marketable assets including cash," and then phoned the contracting officer and verbally offered to have the surety substitute a different asset.[204] The contracting officer told Tip Top that "the FARs would not allow for a substitute asset by the individual surety and that she would not accept it."[205] Tip Top's surety then contacted the contracting officer and offered to provide additional documentation as to the quality and market price of the pledged coal, contending that other federal agencies had previously accepted the coal as a pledged asset.[206] Notwithstanding that offer, which the contracting officer determined to be untimely, the contracting officer determined that Tip Top had failed to provide an

199. *Tip Top Constr.*, 563 F.3d at 1339, 1343.
200. *Id.* at 1344.
201. *Id.*
202. *Id.* at 1339–40.
203. *Id.* at 1340 (citing 48 C.F.R. § 28.203-2(c)(7) (2009)).
204. *Id.*
205. *Id.*
206. *Id.*

acceptable individual surety in support of its bid guarantee and rejected Tip Top's bid as nonresponsible under FAR 28.203(c). The contracting officer concluded that "the asset listed in this instance—mined but not marketed coal—is closer in similarity to a corporate asset, speculative asset, or accounts receivable," which are listed as unacceptable assets under the FAR.[207]

In response to Tip Top's protest at the GAO, the contracting officer stated that she had "concluded coal was a speculative asset because its actual value could not be ascertained until it was sold, its price could fluctuate depending on its quality and market conditions, and it would be a difficult asset . . . to liquidate."[208] In an attempt to clarify the coal's value, Tip Top submitted a document that showed the proffered coal was actually "coal refuse" that would need to be reprocessed before any sale.[209] The GAO denied Tip Top's protest, and the COFC "determined that it was permissible for the FHWA to reject the bid bond without granting Tip Top's request for a substitution of assets."[210]

On appeal to the Federal Circuit, Tip Top argued that the contracting officer: (1) "incorrectly concluded that the pledged coal was not an acceptable asset under the FAR . . ."; (2) "was required to provide the surety an opportunity to support the pledged asset or submit a substitute asset;" and (3) "erred in rejecting Tip Top's offer to provide a substitute asset."[211]

The Federal Circuit agreed with the contracting officer's application of FAR 28.203-2(a) and her determination that the pledged coal was not the type of asset that is acceptable under the FAR as a bid bond asset.[212] The court noted that "the FAR defines the types of acceptable bid bond assets as those that have an identifiable value and are readily marketable, so that they can easily be sold to cover any expenses incurred by the government as a result of the bidder's failure to satisfy its obligation."[213] The primary emphasized difference between acceptable and unacceptable pledged assets lies in the asset's discernible value and liquidity.[214] In light of this emphasis, the court did not believe that the mined coal met this standard because it "is clearly less liquid than cash, stocks, certificates

207. *Id.* at 1340–41, 1345.
208. *Id.* at 1341.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 1343–44.
213. *Id.* at 1343 (citing 54 Fed. Reg. 48,978 (Nov. 28, 1989)).
214. *Id.*

of deposit, and bonds."[215] Although Tip Top argued that a coal market exists, ensuring liquidity, the court noted that "the fact that there is some market for a product does not mean that the product is readily marketable."[216] The court noted that the value and marketability of coal is inherently dependent on product quality, transportation and processing costs, and market volatility.[217] "Consequently, pledges of assets such as mined coal place a greater burden on the contracting officer and present a greater risk of loss to the government," and thus, the contracting officer properly rejected the pledged coal asset as a sufficient bid bond.[218]

Tip Top also argued that the contracting officer should have permitted the surety to provide additional information regarding the value and nature of the coal, which the contracting officer rejected as "untimely."[219] The court concluded that such an error would be non-prejudicial because the contracting officer later stated that "even if an independent proof of value and ownership had been provided, the asset would still be so speculative as to be unacceptable because of the liquidity issue."[220]

Finally, Tip Top argued that the contracting officer improperly refused to accept an offer for a substitute asset.[221] Pursuant to FAR 28.203-4, an individual surety may offer a substitute asset by submitting a written request to the contracting officer.[222] Tip Top noted that its president had sent an email to the contracting officer stating that "[t]he bid bond entity has other marketable assets including cash," and that in a subsequent phone call he verbally informed the contracting officer that "the surety was willing to provide a substitute asset or cash in support of the bid bond [Tip Top] provided."[223] In response, the contracting officer reportedly told Tip Top that the FAR prohibited her from considering a pledge of substitute assets.[224] As a "threshold matter," the court noted that "it is clear that a contracting officer is permitted to agree to a substitution of assets but is not obligated to do so."[225] Here, the contracting officer was not prohibited from considering a proper

215. *Id.*
216. *Id.*
217. *Id.* at 1343–44.
218. *Id.* at 1344.
219. *Id.* at 1345.
220. *Id.*
221. *Id.* at 1345–46.
222. *Id.* at 1346.
223. *Id.*
224. *Id.*
225. *Id.* (citing C.F.R. § 28.203-4 (2008)).

request, but the court concluded that the contracting officer's belief to the contrary was not a prejudicial error, since Tip Top had not made a proper, formal request to substitute assets.[226] Instead, Tip Top had only told the contracting officer that its surety had other assets available without ever actually offering them in writing for substitution.[227] "Because there was no formal request by the surety to provide a substitute asset, there was no formal rejection of an offer for substitution, and the contracting officer's purported misunderstanding of FAR 28.203-4 is irrelevant."[228]

II. FRAUD

A. Daewoo Engineering & Construction Co. v. United States[229]

The Federal Circuit in 2009 issued its much anticipated opinion in *Daewoo Engineering and Construction Co. v. United States*, which involved one of the largest judgments ever reported under the anti-fraud provision of the CDA.[230] The decision in *Daewoo* is important not only for the size of the judgment, but also because the factual basis for the judgment amount remains unclear. Although *Daewoo* involves egregious conduct that any responsible contractor would know not to repeat, the line drawn between the amount of Daewoo's claim that was fraudulent and the amount that was not fraudulent continues to raise more questions than it answers.

Daewoo involved a contract with U.S. Army Corps of Engineers to construct a road in the Republic of Palau.[231] Daewoo maintained that the Government was liable for delays and additional costs associated with Daewoo's inability to compact soil to the density required by the contract to construct the road.[232] Daewoo submitted a certified claim under the CDA that asserted two principal theories of entitlement.[233]

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226. *Id.*
227. *See id.* (concluding that the e-mail "merely referred somewhat obliquely" to the existence of other assets and finding that the telephone call was not a valid request).
228. *Id.*
229. 557 F.3d 1332 (Fed. Cir. 2009) (*Daewoo II*).
230. 41 U.S.C. § 604 (2006).
231. *Daewoo II*, 557 F.3d at 1334.
232. *Id.*; Daewoo Eng'g & Constr. Co. v. United States (*Daewoo I*), 73 Fed. Cl. 547, 561–68 (2006), *aff'd*, 557 F.3d 1332 (Fed. Cir. 2009) (describing Daewoo's arguments relying on weather-related claims and defective design). The principal technical requirement in the contract was the construction of embankments to support the road. *Daewoo I*, 73 Fed. Cl. at 551. This task required the successive compaction of layers of soil to a certain density. *Id.* Because of the moist soil, humid weather, and amount of rainfall in Palau, however, Daewoo experienced problems in achieving the required density. *Id.*; *Daewoo II*, 557 F.3d at 1334.
233. *Daewoo II*, 557 F.3d at 1334.

First, the contract included a Weather Clause in order to determine Daewoo's entitlement to delay for unusually severe weather, which set the baseline against which actual weather would be measured.[234] Daewoo argued that the baseline misrepresented the number of days out of the year that it would not be able to work due to rainfall.[235] Second, Daewoo argued that the compaction specification was defective and that performance of that specification was impracticable.[236]

Daewoo sought a contract extension of 928 days, as well as $13.3 million in costs that allegedly had been incurred as of December 2001.[237] The claim also identified $50.6 million as an "estimate[] of future cost . . . anticipated to be incurred," which was "provided as a guide to the Government for considering alternate specifications"—i.e., if the Government did not permit use of an alternative embankment construction method.[238] Daewoo's calculation of its claim is important to understand because this calculation became the basis for the judgment against Daewoo. Essentially, Daewoo determined that, absent further relaxation of the Contract's embankment specification, the contract would require an additional 928 days to complete.[239] Daewoo's claim estimated that it had experienced 153 days of delay, and that the remaining 775 days of delay would occur in the future.[240] Daewoo calculated an average monthly cost based on the last three months of 2001, and then applied that monthly average to the projected additional 25.5 months (775 days), thus reaching a $50.6 million estimate of future cost.[241]

The Government counterclaimed, alleging violations of the False Claims Act[242] and section 604 of the CDA,[243] common law fraud in the

234. *Daewoo I*, 73 Fed. Cl. at 561 n.22 (describing the Weather Clause, which provided that time extensions would only be allowed for weather-related delays if weather is "unusually severe" and not included in a schedule of monthly anticipated adverse weather delay days).

235. *Id.* at 561–63. Daewoo's specific argument was that the engineer used an arbitrary rainfall amount to denote a severe weather delay and that anticipated delay days did not include "dry-out" days. *Id.* at 562. Essentially, Daewoo's argument was that the engineer that prepared the Weather Clause only considered weather factors that could impede all construction activity, but not factors such as humidity that would only impede soil compaction. *Id.* Daewoo also argued that the Government knew that the baseline was inaccurate but failed to disclose that superior knowledge to Daewoo. *Id.* at 563–64.

236. *Id.* at 560, 566, 568.

237. *Daewoo II*, 557 F.3d at 1334, 1338 n.6; *Daewoo I*, 73 Fed. Cl. at 560 n.19.

238. *Daewoo II*, 557 F.3d at 1336–37.

239. *Id.* at 1338 n.6.

240. *Id.*

241. *Id.*

242. 31 U.S.C. § 3729 (2006).

243. 41 U.S.C. § 604 (2006).

inducement, and also seeking forfeiture of Daewoo's claims pursuant to 28 U.S.C. § 2514.[244] The COFC rejected both of Daewoo's theories of entitlement and found in favor of the Government on each of its counterclaims.[245] The court held that there was no defect in the weather clause and that this clause did not "create an implied warranty of future weather."[246] The weather experienced by Daewoo was largely to be expected in Palau, and, in any event, the court found that Daewoo did not rely on the contract's weather clause but instead conducted its own analysis.[247] With respect to the alleged defective soil specification, the court concluded that the density requirement was a performance specification, not a design specification, and therefore carried no implied warranty as to its achievability.[248] Moreover, the court found that the contract's required density was not impossible, that Daewoo itself had achieved the required density in tests, and that Daewoo failed to employ known methods and management decisions that could have achieved that required density in the field.[249]

With respect to the Government's counterclaims, the court held Daewoo liable for violations of the False Claims Act and the anti-fraud provision of the CDA.[250] False Claims Act liability was based on a number of factors, and the COFC recited a laundry list of inaccuracies and misrepresentations: Daewoo used a baseline productivity rate that was thirty-three percent higher than its original bid rate in calculating its loss of productivity;[251] the claim included

244. *Daewoo II*, 557 F.3d at 1334; Daewoo Eng'g & Construction Co. v. United States (*Daewoo I*), 73 Fed. Cl. 547, 581–88 (2006), *aff'd*, 557 F.3d 1332 (Fed. Cir. 2009). Notably, the Government sought leave to assert these counterclaims *after* Daewoo presented its case in chief during trial. *Daewoo I*, 73 Fed. Cl. at 581–82. The court allowed the amendment, finding that "[t]he evidence of fraud arose from and during the testimony of plaintiff's own witnesses, during its case-in-chief." *Id.* at 582.

245. *Daewoo I*, 73 Fed. Cl. at 597.

246. *Id.* at 563.

247. *Id.* at 558, 561, 563–64.

248. *Id.* at 566–68.

249. *Id.* at 568.

250. *Id.* at 584–85. The Government also had counterclaims under the Forfeiture statute, 28 U.S.C. § 2514, and for fraud in the inducement. *Id.* at 584, 586. For the same reasons that the Court found liability under the False Claims Act and the CDA, the Court determined that Daewoo had practiced fraud within the meaning of the Forfeiture statute. *Id.* at 584. However, this counterclaim was inapplicable because Daewoo's claims were rejected—there was nothing for Daewoo to forfeit. *Id.* The COFC also ruled in favor of the Government on its fraud in the inducement counterclaim, finding that Daewoo had made several misrepresentations during the procurement of the contract. *Id.* at 586–88. As with the False Claims Act counterclaim, the Court was unable to assign actual damages to the Government's fraud in the inducement counterclaim. *Id.* at 588.

251. *Id.* at 578, 592.

costs for certain items of equipment twice;[252] the claim included costs that the Defense Contract Audit Agency (DCAA) had found unallowable in earlier claims;[253] and the claim included scrapped equipment or equipment depreciated beyond its acquisition cost.[254] Moreover, Daewoo relied on published sample average equipment ownership and expense rates instead of actual rates.[255] In rejecting Daewoo's argument that the above-referenced matters were "honest mistakes," the COFC stated that "all Daewoo's 'errors' in the claim increased the amount of the claim; no errors had the effect of reducing the claim."[256] Ultimately, however, the COFC was unable to determine that the Government had suffered actual damages, and therefore assessed only one $10,000 penalty against Daewoo under the False Claim Act.[257]

The COFC's inability to quantify the Government's actual damages did not limit Daewoo's liability under section 604 of the CDA, which provides:

> If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim . . . .[258]

By its terms, a contractor's liability under section 604 is measured by the amount of the claim that is "unsupported" because of fraud, rather than the amount of any actual damages sustained by the Government.[259]

Daewoo's liability under the CDA was based largely on its finding that Daewoo's certified claim was a negotiating ploy:

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252. *Id.* at 583, 592 n.79.
253. *Id.* at 593.
254. *Id.* at 592.
255. *Id.* at 591–92.
256. *Id.* at 593. The COFC's findings were driven by the court's conclusion that Daewoo's witnesses lacked credibility: "Nothing about the case was so disturbing as the performance of plaintiff's witnesses, however, particularly with regard to credibility." *Id.* at 569. The COFC also found that "Daewoo damaged its case by obvious efforts to coach and lead the witnesses." *Id.* at 561. Most disturbing to the COFC was the testimony of plaintiff's expert witnesses from Exponent. The Government's certified fraud examiner "testified that Exponent's behavior in this case was at best 'professionally irresponsible.' Certainly, their testimony during trial and in plaintiff's rebuttal case did nothing to dispel that appraisal for the court." *Id.* at 572.
257. *Id.* at 585, 597.
258. 41 U.S.C. § 604 (2006); *see also id.* § 601(9) ("'[M]isrepresentation of fact' means a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.").
259. *See Daewoo I*, 73 Fed. Cl. at 584–85.

> The Government proved by any standard that Daewoo's $64 million claim was fraudulent. Plaintiff made the claim for purposes other than a good faith belief that the Government owed Daewoo that amount. Plaintiff in fact did not believe that the Government owed it $64 million as a matter of right.[260]

The COFC found that the $50.6 million future cost estimate was included simply to indicate "the seriousness of the situation" and to convince the Government to allow Daewoo to use a different method of constructing the embankments.[261] Because the claim was nothing more than a negotiating ploy, the COFC found it was evidence of fraudulent intent and that the claim was submitted "for a reason other than an attempt to recover money for which Daewoo believed the Government is liable," in violation of the CDA.[262]

Although suspecting that the entire claim was fraudulent, the COFC stated that "[i]t is theoretically possible that plaintiff's $13 million claim represents an amount that it could have incurred because of defective specifications, had such a theory been applicable."[263] Instead, the COFC ruled that "[t]he 'part of [the] claim' that is fraudulent without question is $50,629,855.88," i.e., the amount identified in the claim as "to be incurred after December 31, 2001."[264] A penalty of $50.6 million (instead of $64 million) was therefore assessed against Daewoo.[265]

On appeal to the Federal Circuit, Daewoo challenged every aspect of the COFC's ruling, including the denial of Daewoo's claims, and each of its challenges were rejected.[266] Daewoo first argued that CDA liability did not attach because it did not certify a "claim" for $64 million, asserting that the $50.6 million future costs were "merely estimates provided to encourage the government to adjust the contract specifications."[267] The Federal Circuit acknowledged that Daewoo's claim was "unclear" as to whether it sought the entire $64 million as a matter of right.[268] Because of that ambiguity, however, the Court determined that the question was a factual one, to be resolved the same way that an ambiguity in a contract is

260. *Id.* at 585.
261. *Id.*
262. *Id.* at 584–85; *see also id.* at 570, 590, 597.
263. *Id.* at 596.
264. *Id.* at 595.
265. *Id.* at 597.
266. Daewoo Eng'g & Constr. Co. v. United States (*Daewoo II*), 557 F.3d 1332, 1334 (Fed. Cir. 2009).
267. *Id.* at 1336.
268. *Id.* at 1337.

resolved—by resorting to extrinsic evidence.[269] The Federal Circuit deferred to Judge Hodges's factual finding that Daewoo submitted a $64 million claim, observing that that finding was supported by Daewoo's complaint and by testimony of Daewoo's own witnesses.[270]

Daewoo next argued that, even if it had certified a $64 million claim, the $50.6 million figure did not reflect any amount that was "unsupported" because of the fraud.[271] As noted above, the COFC stated that it "suspect[ed] that Daewoo's entire claim [was] fraudulent," but conceded that that "[i]t is theoretically possible" that the $13 million in costs allegedly incurred prior to December 31, 2001, was legitimate, had the defective specification argument been valid.[272] Daewoo thus argued that, assuming there was a non-fraudulent (even if unproved) claim for costs incurred before December 2001, there could not also have been a fraudulent claim for costs to be incurred after 2001.[273] Because both the "incurred" and "future" portions of the claim were based on the same legal theories, Daewoo argued, the COFC's ruling that all future costs were fraudulently claimed was inconsistent with that court's holding that all incurred costs were not.[274] The Government, by contrast, argued that the entire claim was fraudulent and that the COFC's lesser judgment was "a perverse reward for the incomprehensible nature of [Daewoo's] claim."[275]

The Federal Circuit addressed these arguments by drawing a distinction not readily apparent from the COFC's opinion between the underlying legal theories of Daewoo's claim on one hand, and the calculation of the different categories of costs on the other.[276] According to the Federal Circuit, "[t]he Court of Federal Claims did not find that Daewoo's theories of the government's breach of the contract . . . were fraudulent (though it ultimately found these theories to be without merit). Rather, the Court of Federal Claims found that Daewoo's $50.6 million *projected* cost calculation was

269. *Id.* at 1337, 1337 n.3.
270. *Id.* at 1337–38.
271. *Id.* at 1338.
272. Daewoo Eng'g & Constr. Co. v. United States (*Daewoo I*), 73 Fed. Cl. 547, 595–96 (2006), *aff'd*, 557 F.3d 1332 (Fed. Cir. 2009).
273. Reply Brief of Plaintiff-Appellant Daewoo Eng'g & Constr. Co. at 9–10, Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332 (Fed. Cir. 2009) (No. 07-5129).
274. *Id.* at 10.
275. Brief for Defendant-Appellee United States at 31, Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332 (Fed. Cir. 2009) (No. 07-5129).
276. Daewoo Eng'g & Constr. Co. v. United States (*Daewoo II*), 557 F.3d 1332, 1338 (Fed. Cir. 2009).

fraudulent."[277] The Federal Circuit agreed that the projected cost calculation was fraudulent because (1) Daewoo failed to consider contractor-caused delay and improperly assumed that the Government was responsible for each day of delay; (2) Daewoo assumed that current daily expenditures represented costs for which the Government was responsible; and (3) Daewoo used no outside experts to prepare its claim, and its trial experts "treated the certified claim computation as essentially worthless, did not utilize it, and did not even bother to understand it."[278]

The Federal Circuit also agreed that the cost projection was a "negotiating ploy," but did not base its fraud determination solely on that fact.[279] The Federal Circuit accepted the COFC's finding that the $50.6 million future cost portion of the claim was not submitted "in good faith" and that the amount did not "accurately reflect[] the contract adjustment for which the Contractor believes the Government is liable," both of which are required by 41 U.S.C. § 605(c)(1).[280] The Federal Circuit noted that "Congress specifically enacted the fraud provision of the Contract Disputes Act 'out of concern that the submission of baseless claims contribute[s] to the so-called horsetrading theory where an amount beyond that which can be legitimately claimed is submitted merely as a negotiating tactic.'"[281]

Finally, the Federal Circuit rejected Daewoo's argument that the $50.6 million judgment violated the Constitution because it was disproportionate to any actual damages sustained by the Government.[282] The panel reasoned that a judgment need only be proportionate to the "possible harm resulting from the conduct," and that "[h]ere the potential harm was Daewoo's securing a $50.6 million payment from the government."[283] According to the Federal Circuit, the "harm likely to result"[284] from a fraudulent claim is the amount that the Government would have overpaid because of the fraud.[285]

277. *Id.* (emphasis added).
278. *Id.*
279. *Id.* at 1339.
280. *Id.*
281. *Id.* at 1340 (quoting S. REP. NO. 95-1118, at 20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5254).
282. *Id.* at 1340.
283. *Id.* (citing United States v. Bajakajian, 524 U.S. 321, 334 (1998)).
284. *See id.* (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 581 (1996)) (explaining that the fraud's low likelihood of success did not mean the penalty was inappropriate).
285. *Id.*

Although *Daewoo* definitively resolves the constitutional question whether judgments under § 604 of the CDA depend on the extent to which the Government suffers actual damages, the opinion raises more questions than it answers. The primary questions concern the manner in which liability was calculated. Under previous decisions, the Government's remedy under § 604 of the CDA was calculated by adding up all the unsupported elements of the claim.[286] In *UMC Electronics Co. v. United States*,[287] for example, the contractor used purchase order costs rather than actual invoice costs to calculate its claim, knowing that its actual costs were lower.[288] The remedy in that case was the amount of the claim that was unsupported—the difference between the purchase order costs and the actual invoice costs.[289]

In *Daewoo*, by contrast, the COFC drew an apparently arbitrary line between the $13.3 million that Daewoo claimed as incurred costs, and the $50.6 million claimed as future costs.[290] The COFC held that the latter was the unsupported part of the claim,[291] and the Federal Circuit upheld this finding.[292] It does not appear, however, that the Government ever established that the specific inaccuracies and misrepresentations in Daewoo's claim totaled $50.6 million. For example, although the Federal Circuit believed that Daewoo's calculation failed to consider contractor-caused delay, neither the Federal Circuit nor the court quantified the impact of that failure.[293] Similarly, the Federal Circuit believed that Daewoo included costs for which the Government was not responsible.[294] The judgment against Daewoo, however, was for *all* estimated future costs—not simply the costs that the Federal Circuit or COFC believed should not have been included.[295]

Moreover, neither the Federal Circuit nor the COFC addressed Daewoo's subsequent efforts to support its claim at trial. Daewoo hired a cost expert who prepared a revised quantum calculation, after the claim's initial submission, that resulted in a claim of $29 million

286. *See* 41 U.S.C. § 604 (2006).
287. 249 F.3d 1337 (Fed. Cir. 2001).
288. *Id.* at 1339–40.
289. *Id.* at 1340; UMC Elecs. Co. v. United States, 43 Fed. Cl. 776, 821 (1999).
290. Daewoo Eng'g & Constr. Co. v. United States (*Daewoo I*), 73 Fed. Cl. 547, 596 (2006), *aff'd*, 557 F.3d 1332 (Fed. Cir. 2009).
291. *Id.* at 597.
292. Daewoo Eng'g & Constr. Co. v. United States (*Daewoo II*), 557 F.3d 1332, 1339 (Fed. Cir. 2009).
293. *Id.* at 1338.
294. *Id.*
295. *Id.* at 1339.

rather than the $64 million originally claimed.[296] Neither the COFC nor the Federal Circuit, however, addressed whether that subsequent effort "supported" some part of the $50.6 million that was otherwise considered "unsupported."[297]

Yet another problematic aspect of the Federal Circuit's opinion is its reference to Daewoo's claim as a "negotiating ploy."[298] Unlike the COFC's opinion, the negotiating ploy rationale is not the primary basis for liability in the Federal Circuit's analysis. Instead, the Federal Circuit was primarily concerned with the manner in which the $50.6 million estimate of future costs was calculated.[299] The evidence that Daewoo submitted the claim in order to "get the government's attention" and convince them to change the soil specification appears to have been considered as evidence of Daewoo's fraudulent intent, rather than evidence of the underlying overstatement of the amount to which Daewoo was entitled.[300]

This distinction, however, is not explicit in the Federal Circuit's opinion, which could lead some to argue that the negotiating ploy rationale provides an independent basis of liability. In other words, *Daewoo* may prompt the Government to argue that a contractor violates § 604 of the CDA every time it submits a monetary claim with the unstated objective of obtaining some other, non-monetary relief. That cannot be a correct application of the CDA, as the legislative history quoted in the court's opinion makes clear; Congress's concern with "horsetrading" was the situation "where an amount beyond that which can be legitimately claimed is submitted merely as a negotiating tactic.'"[301] The Government therefore must first show that the contractor claimed "an amount beyond that which can be legitimately claimed."[302] This question must be answered before offering evidence of why this higher amount was claimed, and whether the claim was a negotiating tactic.

Indeed, many contractors submitting a claim would prefer a negotiated solution in which the Government stops or corrects

296. Daewoo Eng'g & Constr. Co. v. United States (*Daewoo I*), 73 Fed. Cl. 547, 573, 580–81, 589–90 (2006), *aff'd*, 557 F.3d 1332 (Fed. Cir. 2009).

297. The COFC questioned the revised calculation and the professionalism of Daewoo's expert, *id.* at 580–81, but ultimately declined to address this issue because the approach used by the expert was used in the certified claim presented to the contracting officer, *id.* at 590–91.

298. *Daewoo II*, 557 F.3d 1332, 1339 (Fed. Cir. 2009).

299. *Id.*

300. *Id.*

301. *Id.* at 1340 (quoting S. REP. NO. 95-1118, at 20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5254).

302. *Id.*

whatever conduct the contractor complains of in the claim. Pointing out that the Government can avoid the full estimate of future damages claimed by altering its conduct is not necessarily an improper "negotiating ploy"—it simply states the truism that a breaching party can mitigate its own damages by ceasing the conduct that constitutes the breach. As a result, if the claim amount is legitimately calculated, the fact that the contractor prefers non-monetary relief should be irrelevant. Unfortunately, the Federal Circuit's opinion was less than clear on this point, which may lead to allegations of fraud resting entirely on the negotiating ploy rationale.

III. CONTRACT PERFORMANCE DISPUTES

A. Jurisdiction

The Federal Circuit issued two precedential opinions concerning the jurisdiction of the Boards and the COFC to hear contract disputes under the CDA.[303] In *Winter v. FloorPro, Inc.*,[304] the court continued its practice of strictly construing jurisdictional statutes containing a waiver of sovereign immunity, holding that the ASBCA does not have jurisdiction to hear an appeal under the CDA by a third party beneficiary to a government contract.[305] By contrast, in a matter of first impression, the Federal Circuit ruled in *Arctic Slope Native Ass'n v. Sebelius*[306] that the six-year jurisdictional limitations period for CDA claims was subject to equitable tolling.[307]

1. Winter v. FloorPro, Inc.

The claimant in *Winter v. FloorPro* was a subcontractor to G.M. & W. Construction Corp. ("GM & W"), a minority-owned business qualifying under section 8(a) of the Small Business Act, to install floor coating at warehouse bays on a military base.[308] FloorPro completed the contract work and submitted an invoice to GM & W but did not receive payment.[309] The Government then agreed to modify the contract "to specify that the government would issue a

303. 41 U.S.C. § 607(d) (2006) (granting jurisdiction over contract disputes to the Boards of Contract Appeals); *id.* § 609(a) (granting jurisdiction over contract disputes to the COFC); 28 U.S.C. § 1491(a)(2) (2006) (granting jurisdiction over non-CDA breach of contract actions to the COFC).
304. 570 F.3d 1367 (Fed. Cir. 2009).
305. *Id.* at 1370, 1373.
306. 583 F.3d 785 (Fed. Cir. 2009).
307. *Id.* at 788.
308. *FloorPro*, 570 F.3d at 1368.
309. *Id.*

two-party check made payable to both FloorPro and GM & W."[310] Nonetheless, the Government paid GM & W directly.[311] FloorPro later filed a claim with the CO for payment based on the Government's failure to follow the terms of the contract modification.[312] The CO refused to issue a decision on the claim because the Government did not have a contract with FloorPro.[313] FloorPro then filed an appeal at the ASBCA.[314]

On a motion to dismiss and later summary judgment motion, the ASBCA found that FloorPro could bring an appeal under the CDA as an intended third party beneficiary to the contract modification.[315] While acknowledging that FloorPro was not in privity of contract with the Government, the ASBCA relied on *D & H Distributing Co. v. United States*[316] to conclude that a third party beneficiary to a government contract could bring an appeal to the Board under the CDA.[317] The Board granted summary judgment for FloorPro for the full $37,500 sought.[318]

On appeal, the Federal Circuit explained that the CDA applied only to "contractors" as defined in the Act—"a party to a Government contract other than the Government."[319] In addition, the CDA applies only to "express or implied contract[s] . . . entered into by an executive agency."[320] The Federal Circuit held that the CDA did not include an exception to permit appeals by third party beneficiaries.[321] The Federal Circuit also distinguished *D & H Distributing* because the subcontractor in that case brought the claim at the COFC under the Tucker Act rather than the CDA.[322] As such, the court in *D & H Distributing* "was not interpreting or applying the CDA's provision that only 'contractors' may appeal to agency boards of appeals."[323]

310. *Id.*
311. *Id.*
312. *Id.* at 1369.
313. *Id.*
314. *Id.*
315. *In re* FloorPro, Inc., ASBCA No. 54143, 04-1 BCA ¶ 32571 (2004) (*FloorPro I*) (denying the government's motion to dismiss); *In re* FloorPro, Inc., ASBCA No. 54143, 07-2 BCA ¶ 33615 (2007) (*FloorPro II*), *aff'd on reconsideration*, *In re* FloorPro, Inc., ASBCA No. 54143, 08-1 BCA ¶ 33793 (2008) (*FloorPro III*) (granting summary judgment in favor of appellant).
316. 102 F.3d 542, 547–48 (Fed. Cir. 1996) (holding that a third party beneficiary could enforce a contract provision against the Government at the COFC).
317. *FloorPro I*, ASBCA No. 54143, 04-1 BCA ¶ 32571.
318. *FloorPro II*, ASBCA No. 54143, 07-2 BCA ¶ 33615.
319. *FloorPro*, 570 F.3d at 1369–70 (quoting 41 U.S.C. § 601(4) (2006)).
320. 41 U.S.C. § 602(a).
321. *FloorPro*, 570 F.3d at 1371.
322. *Id.* at 1372.
323. *Id.*

Because FloorPro was not in privity with the Government, and because there is no exception to the CDA's requirement that only "contractors" may bring an appeal under the Act, the Federal Circuit held that the ASBCA did not have jurisdiction to hear the appeal.[324] The Federal Circuit therefore vacated the Board's decision with instructions to dismiss the appeal.[325]

2. Arctic Slope Native Ass'n v. Sebelius

As noted above, *Arctic Slope* finally provided the Federal Circuit an opportunity to address whether the CDA's six-year limitations period is subject to equitable tolling.[326] Parties to prior appeals had raised the issue, but those appeals were disposed of on other grounds.[327] Although the case involves a unique statutory scheme and facts that are uncommon to most CDA appeals, the Federal Circuit nevertheless definitively resolved the question by stating that "we do not agree that the limitations period in section 605(a) is absolute and not subject to equitable tolling."[328]

In *Arctic Slope*, Indian tribes and tribal organizations brought claims under the CDA related to contracts with the Indian Health Service (IHS) to provide health care services to their tribe members.[329] The Civilian Board of Contract Appeals (CBCA) dismissed several of the claims because they were not filed within six years of accrual as required by section 605(a) of the CDA.[330] The CBCA held that the CDA's presentment restriction was a jurisdictional requirement that was not subject to either equitable or legal tolling.[331] On appeal, the Federal Circuit found that, while the CDA's six-year presentment period is not subject to legal tolling as a result of class action litigation, it is subject to equitable tolling.[332] The Federal Circuit remanded the claims to the CBCA to determine whether they satisfied the requirements for equitable tolling.[333]

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324. *Id.* at 1372–73.
325. *Id.* at 1373.
326. Arctic Slope Native Ass'n v. Sebelius, 583 F.3d 785, 788 (Fed. Cir. 2009).
327. *See, e.g.*, Bonneville Assocs. v. Barram, 165 F.3d 1360, 1365 (Fed. Cir. 1999) (holding that, even if equitable tolling were applicable, the contractor had not carried its burden to invoke it); *see also* Int'l Air Response v. United States, 302 F.3d 1363, 1368 (Fed. Cir. 2002) (deciding the case on res judicata grounds and thereby avoiding the question whether the CDA's one-year time period to appeal final decisions of the contracting officer to the COFC is subject to equitable tolling).
328. *Arctic Slope*, 583 F.3d at 800.
329. *Id.* at 788.
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*

The contracts at issue are "self-determination contracts" authorized by the Indian Self-Determination and Education Assistance Act (ISDA).[334] Under these contracts, the tribes administer programs previously provided by the federal government and receive the same amount of funding that the government would have appropriated for the programs if it continued to operate them directly.[335] Among other things, the 1988 amendments to the ISDA required the Government to pay administrative expenses associated with the self-determination contracts, including "contract support costs" that the federal government would not have incurred by directly providing the services.[336] The ISDA amendments also applied the CDA to disputes arising under those contracts and permitted contractors to bring claims in what is now the CBCA, the COFC, or district courts.[337] Beginning in 1999, several ISDA contractors filed class action suits against the Government for allegedly failing to fully fund contract support costs on self-determination contracts.[338] The district courts ultimately denied class certification.[339] In 2005, the Arctic Slope Native Association (ASNA) filed CDA claims seeking contract support costs on its IHS contracts for fiscal years 1996 through 2000, while asserting that it was a member of the putative class in one of the pending class actions.[340] Even though the claims were filed outside the CDA's six-year presentment period, the ASNA argued that the filing period was legally tolled until the class certification was denied or, alternatively, should be tolled for equitable reasons.[341] The CBCA dismissed the claims for lack of jurisdiction, holding that it did not have jurisdiction over claims that were not filed within the CDA's six-year window.[342]

The Federal Circuit rejected the Government's argument that the CDA's time limitation could not be tolled because it is "jurisdictional."[343] However, the plaintiffs were not eligible for class action tolling because, even if the class had been certified, they would not have been eligible to be class members because they failed to present their CDA claims to a CO within six years of accrual.[344]

334. *Id.* (citing 25 U.S.C. § 450(n) (2006)).
335. *Id.*
336. *Id.* at 788–89.
337. *Id.* at 789.
338. *Id.*
339. *Id.*
340. *Id.* at 790.
341. *Id.*
342. *Id.*
343. *Id.* at 793.
344. *Id.* at 795–96.

In addition, the Federal Circuit noted that applying class action tolling in this case would have placed the plaintiffs—putative class members—in a better position than if they had been named parties in the class action litigation.[345] As named parties, their claims would have been dismissed for failure to comply with the CDA's presentment requirement.[346] Nonetheless, when it examined the issue of equitable tolling, the Federal Circuit concluded that it was required to apply the rebuttable presumption of *Irwin v. Department of Veterans Affairs*[347] that "equitable tolling applicable to suits against private defendants should also apply to suits against the United States[,]" such as those authorized by the CDA.[348] The Federal Circuit therefore remanded for the CBCA to determine whether the limitations period should be equitably tolled.[349] To date, neither the COFC nor the boards of contract appeals have relied on *Arctic Slope* to support equitable tolling of a CDA claim that was not presented within six years of accrual.

B. Contract Interpretation

The Federal Circuit in 2009 continued to decide appeals involving questions of contract interpretation according to the "plain meaning" of the contract language at issue, and concluded in several cases that this plain meaning had eluded the lower tribunal. The plain meaning rule applied by the Federal Circuit can be stated as follows: "[When] the provisions of the Agreement are phrased in clear and unambiguous language, they must be given their plain and ordinary meaning, and we may not resort to extrinsic evidence to interpret them."[350] The Federal Circuit's application of this rule has been criticized for departing from the common law of contracts, which ostensibly controls absent statutory or regulatory instruction otherwise.[351] The plain meaning rule, however, continues to drive the Federal Circuit's analysis of contract disputes.

345. *Id.* at 796.
346. *Id.*
347. 498 U.S. 89 (1990).
348. *Arctic Slope*, 583 F.3d at 798 (quoting *Irwin*, 498 U.S. at 95–96).
349. *Id.* at 800.
350. Coast Fed. Bank v. United States, 323 F.3d 1035, 1038 (Fed. Cir. 2003) (en banc).
351. *See* Winstar v. United States, 518 U.S. 839, 887 (1996) (referring to plain meaning as the "unmistakability doctrine" and holding that the Federal Circuit correctly deferred to normal contract principles when enforcing the government contract at issue); *see also* Mobil Oil Exploration v. United States, 530 U.S. 604, 608 (2000) ("The Restatement of Contracts reflects many of the principles of contract law that are applicable to this action."). *See generally* W. Stanfield Johnson, *Interpreting Government Contracts: Plain Meaning Precludes Extrinsic Evidence and Controls at the*

1. Bell BCI Co. v. United States[352]

Perhaps the most surprising decision of the year in this regard was *Bell BCI Co. v. United States*, where a divided panel of the court ruled that boilerplate release language in a bilateral modification barred a contractor's claims for the cumulative and disruptive impact of multiple change orders.[353] Over a vigorous dissent, the panel majority held that the release language unambiguously discharged claims for cumulative impact and disruption, notwithstanding (1) the absence of any reference to "cumulative impact" or "disruption" in the modification,[354] (2) the Government's failure to introduce any evidence that the parties intended to release such claims,[355] and (3) the trial court's findings to the contrary.[356] The majority held these claims were barred notwithstanding the fact that the full disruptive impact of the change orders was not known at the time the modification was executed. Indeed, this could not have been known given that the contractors' claim was for the cumulative impact of multiple change orders, many of which had not yet been issued when the modification was signed.[357]

Bell BCI involved the construction of a laboratory building at the National Institutes of Health (NIH) in Bethesda, Maryland.[358] Approximately nine months into construction, NIH decided to add a new floor to the building.[359] NIH issued more than 200 contract modifications that delayed the completion of the project by nineteen and a half months and increased the contract price by thirty-four percent.[360] The Government and the prime contractor negotiated numerous modifications addressing the direct impact of many change orders with the following release language: "This modification provides for full compensation for the changed work, including both Contract cost and Contract time. The Contractor

Federal Circuit, 34 PUB. CONT. L.J. 635 (2005) (criticizing the Federal Circuit's application of the plain meaning rule as inconsistent with the Restatement (Second) of Contracts).

352. 570 F.3d 1337 (Fed. Cir. 2009) (*Bell BCI II*).

353. *Id.* at 1341.

354. *See id.* at 1339 (quoting the modification language).

355. Bell BCI Co. v. United States (*Bell BCI I*), 81 Fed. Cl. 617, 639 (2008), *aff'd in part,vacated in part*, 570 F.3d 1337 (Fed. Cir. 2009); *see also Bell BCI*, 570 F.3d at 1344 (Newman, J., dissenting).

356. *Bell BCI II*, 570 F.3d at 1344; *Bell BCI I*, 81 Fed. Cl. at 639–40.

357. *Bell BCI II*, 570 F.3d at 1339 (noting that the Government issued 113 additional modifications to the contract incorporating 216 changes to the contract's scope of work, and that an additional fifty-eight changes were issued but never incorporated into a modification).

358. *Id.* at 1338.

359. *Id.* at 1339.

360. *Id.* at 1339, 1342; *Bell BCI I*, 81 Fed. Cl. at 618–19.

hereby releases the Government from any and all liability under the Contract for further equitable adjustment attributable to the Modification."[361] Following contract completion, the prime contractor submitted a claim for the cumulative impact of the multiple change orders issued by the Government, which the CO denied.[362]

The COFC ruled in favor of the prime contractor, holding that the "[Government's] accord and satisfaction defense [was] without merit."[363] The COFC discussed the "clear distinction in the law" between claims for the cost of performing changed work and claims for the effect of multiple changes on unchanged work.[364] The COFC held that the release language did not bar the latter type of claim, reasoning that (1) "[n]one of the contract modifications included any payment to Bell for cumulative impact or labor inefficiency"; (2) "Bell did not expressly release its cumulative impact claim in any modification"; (3) "the release language does not address cumulative impact claims"; and (4) the releases "preceded many of the events giving rise to the claim."[365] The COFC further observed that the Government offered no evidence to support its assertion that the parties intended to bar cumulative impact and disruption claims.[366] In fact, the Government declined to offer any testimony from the CO who signed the modifications and who presumably was in the best position to know what the Government understood the release language to cover.[367] The COFC inferred that the CO's testimony would not have supported the Government's position.[368]

As discussed above, a divided panel of the Federal Circuit reversed the COFC, holding that the release language unambiguously covered "*any and all* liability . . . attributable to" the modifications containing the release language.[369] The majority reasoned that, although "there may be ambiguity as to which claims are 'attributable to' a given modification, . . . we cannot glean any ambiguity about which *types* of claims are released."[370] Accordingly, the majority held that the release encompassed cumulative impact claims to the extent they were "attributable to" modifications containing the release, and remanded

361. *Bell BCI II*, 570 F.3d at 1339.
362. *Id.*
363. *Bell BCI I*, 81 Fed. Cl. at 619.
364. *Id.* at 639.
365. *Id.* at 619.
366. *Id.* at 619–20, 639.
367. *Id.* at 639.
368. *Id.*
369. *Bell BCI II*, 570 F.3d at 1341.
370. *Id.*

the case to the COFC to "determine which of Bell's cumulative impact claims, if any, are 'attributable to' modifications *other than* those modifications that contain the release language."[371]

Judge Newman dissented, arguing that "[t]his case is a compelling illustration of why appellate tribunals should give due weight to the attributes and benefits of the process of trial, for such processes enable the trial judge to dig deeply into the events, to figure out what happened and what was intended, and to reach a just result."[372] Judge Newman disagreed with the view that the contract was unambiguous, noting that "[a]n accord does not arise until there is a dispute."[373] Judge Newman concluded that the release language "did not produce an 'accord and satisfaction' of unforeseen claims arising from unforeseen and unintended events."[374]

As Judge Newman pointed out, the majority's ruling is in tension with the well-established rule that a general release does not operate to extinguish claims which were not known and could not have been known at the time the release was executed.[375] Although parties to a contract are free to release each other from liability for unknown claims, this general rule reasonably requires specific contract language or evidence that the parties intended such a result. In the wake of *Bell BCI*, contractors must now expressly reserve their rights to cumulative impact and disruption claims in all bilateral modifications containing boilerplate releases, if such claims are possible. However, given that the scope of such claims is usually never known with any degree of certainty until later in contract performance, insisting on such reservations will undoubtedly complicate and delay the negotiation of timely change orders, frustrating the very purpose of the "Changes Clause."

371. *Id.* at 1342.
372. *Id.* at 1343 (Newman, J., dissenting).
373. *Id.* at 1346.
374. *Id.*
375. *See, e.g.*, Augustine Med., Inc. v. Progressive Dynamics, Inc., 194 F.3d 1367, 1373 (Fed. Cir. 1999) (quoting Johnson, Drake & Piper, Inc. v. United States, 531 F.2d 1037, 1047 (Ct. Cl. 1976)) ("The rule for releases is that . . . a general release bars claims based on events occurring prior to the date of the release"). "The test is not the state of the plaintiff's knowledge, but the availability of information which, properly digested, could reasonably be expected to acquaint plaintiff with the existence of a reimbursable cost." *Johnson, Drake, & Piper*, 531 F.2d at 1048 (quoting U.S. Rubber Co. v. United States, 160 F. Supp. 492, 496 (Ct. Cl. 1958)). It follows that "the critical inquiry in determining whether a release operates on a particular claim or right is whether the claim or right can be said to exist such that a party is capable of waiving or preserving it." 76 C.J.S. *Release* § 76 (2007).

2. LAI Services, Inc. v. Gates[376]

In *LAI Services, Inc. v. Gates*, the Federal Circuit's plain meaning approach to contract interpretation resulted in a partial victory for both sides. The Court held that the plain language of the contract supported the contractor's contention as to what contract line-item number (CLIN) controlled billing and payment for certain work.[377] By contrast, the Court held that the same plain language supported the Government's argument as to how payment under that CLIN would be made.[378]

The contract at issue required LAI Services to provide material distribution services to the Defense Distribution Depot in San Diego, California (DDDC).[379] Under the Contract, "[LAI] was required to receive, label, pack, store and deliver various items to meet military needs both on-base and off-base."[380] The Contract provided separate prices for individual CLINs corresponding to each of the tasks required by the statement of work.[381]

The dispute in LAI Services turned on which CLIN governed payment for a particular task, known as "minimum military packing ['MMP'] of off-base transhipments," and how payment would be made.[382] From its first invoice, LAI billed under CLIN 0002 for MMP of off-base transshipments.[383] CLIN 0002 had a unit price of $25.34 and stated that billing should be "per each," which LAI took to mean it should bill on a per-item basis.[384] The government's position was that MMP transshipments should be billed under CLIN 0001 at a unit price of $5.87, with billing and payment on a per-line basis.[385] Thus, the government denied a portion of the charges on LAI's invoice.[386] The CO denied in its entirety LAI's certified claim for the difference between what it had invoiced under CLIN 0002 and what

376. 573 F.3d 1306 (Fed. Cir. 2009).
377. *Id.* at 1314–15.
378. *Id.* at 1317.
379. *Id.* at 1308.
380. *Id.*
381. *Id.*
382. *Id.* "Under the contract, LAI packed both 'mission stock' and 'transshipments.'" *Id.* "'Mission stock' items were items owned and stored by DDDC itself," whereas "'transshipments' referred to items sent from another organization to DDDC, then quickly processed and sent to a second military entity." *Id.* at 1308–09. "Items could be sent to locations at DDDC, or to locations off-base." *Id.* at 1309. Further, different items had different packaging needs, and "minimum military packing" (MMP) was the simplest form of packing designed for typical commercial shipping environments. *Id.*
383. *Id.* at 1309.
384. *Id.*
385. *Id.*
386. *Id.*

the Government had paid under CLIN 0001.[387] The ASBCA agreed with the CO, concluding that the contract was patently ambiguous and that LAI's failure to ascertain the correct interpretation prior to contract award defeated its claim.[388] Alternatively, the ASBCA ruled that, even if the ambiguity were latent, LAI's interpretation was not reasonable, and that LAI had not established that it relied on its interpretation at the time it entered into the contract.[389]

On appeal, the Court addressed two issues: (1) whether MMP for off-base transshipments were covered by CLIN 0001 or 0002; and (2) if covered by CLIN 002, whether "per each" meant that payment would be made on a per-item or per-package basis.[390] With respect to the first issue, the Federal Circuit disagreed with the Board's view that the contract was patently ambiguous, holding that "[t]he clear language of the contract supports LAI's reading of the requirements of the contract with respect to CLIN 0001 and CLIN 0002."[391] Construing the descriptions of each CLIN in the contract, the Federal Circuit held that "CLIN 0001 was a catchall provision" to be used "'unless noted below' in another CLIN number."[392] Because CLIN 0002 specifically listed statement of work Section C-5.5.1, which dealt with MMP of off-base transshipments, the Court held that that work was "noted below" and therefore excluded from CLIN 0001.[393]

On appeal, the government argued in support of the Board's conclusion that construing Section C-5.5.1 to include the work at issue created a conflict with another provision of the contract.[394] The Federal Circuit disagreed, holding that "the plain language of the contract compels the conclusion that billing and payment for MMP of off-base transshipments was governed by CLIN 0002."[395] The court reasoned that the Government's construction of the contract, and not LAI's, impermissibly sought to add terms to the contract that were not there.[396]

LAI's victory on the first issue, however, was tempered by the Federal Circuit's resolution of the second. Although the court

387. *Id.*
388. *Id.* at 1309–10.
389. *Id.* at 1310.
390. *Id.*
391. *Id.* at 1316.
392. *Id.* at 1311.
393. *Id.* at 1314 ("As the plain language of Section C-5.5.1 covers MMP of off-base transshipments, they fall within CLIN 0002, not within CLIN 0001.").
394. *Id.* at 1312 (discussing the Board's rationale); *id.* at 1313 (discussing the Government's argument).
395. *Id.* at 1315.
396. *Id.*

agreed that the work was covered by CLIN 0002, which provided a "fixed unit price per each," the court ultimately held that "each" meant each container, rather than each item being packed.[397] Having held that the payment was to be made under CLIN 0001, the Board had not reached this issue;[398] the Federal Circuit nevertheless decided the question while noting that both parties had urged the court to do so and that the Board had taken extensive testimony and made specific factual findings related to the issue.[399] The court therefore concluded that resolving the issue was "in the interest of judicial efficiency when remand is unlikely to produce additional facts or guidance."[400]

The Federal Circuit reasoned that, although "each" was not defined in the contract, "reading the contract as a whole supports a per-container billing structure."[401] The court held that "each" referred to the title of the CLIN, which, in the case of CLIN 0002, was "PPP&M," or "Preservation, Packaging, Packing, and Marking."[402] The court's analysis on this point is not entirely clear from the opinion, but the court apparently accepted the Government's argument that "'each' means each PPP&M activity," which, in turn, meant each package.[403] The court appears to have also been swayed by the Government's argument that paying LAI per item would result in a windfall, particularly where a container contained many small items.[404] Regardless, the court held that even if the contract were ambiguous on this point, LAI would still lose because it had not demonstrated that it relied on its interpretation when preparing its bid.[405] Pointing to "numerous documents where LAI estimated the number of containers needed for transshipments in a one-to-one item-to-container ratio," the Court found that "LAI consistently believed the number of containers would equal the number of transshipment items, and therefore could not have relied on an

397. *Id.* at 1317.
398. *Id.*
399. *Id.*
400. *Id.* (citing Cienega Gardens v. United States, 331 F.3d 1319, 1337 (Fed. Cir. 2003)).
401. *Id.*
402. *Id.* at 1311.
403. *Id.* at 1316.
404. *Id.* at 1316, 1318.
405. *Id.* at 1317 (quoting P.R. Burke Co. v. United States, 277 F.3d 1346, 1356 n.3 (Fed. Cir. 2002)) ("In order for a contractor to recover based on an ambiguous contract provision, the contractor must have relied on its interpretation when preparing its bid.").

interpretation where it would make hundreds of thousands of dollars per container."[406]

3. Bank of Guam v. United States[407]

The Federal Circuit's opinion in *Bank of Guam v. United States* turned on the "plain meaning" of a single word—"imposed."[408] The question in that appeal was whether the Territory of Guam could collect taxes imposed on earnings from U.S. Treasury bonds held by the Bank of Guam (the Bank).[409] The Bank argued that the terms of the bonds exempted interest from taxation by Guam, including taxation under the Guam Territorial Income Tax (GTIT)—a tax enacted by the U.S. Congress but collected by Guam.[410] In 2002, however, a U.S. district court held that the interest was taxable under the GTIT, and the Bank thereafter brought suit against the U.S. Government in the COFC to recover back-taxes it was forced to pay on interest received from the bonds.[411]

The bonds each contained a statement "that they were exempt from all taxation now or hereafter imposed . . . by . . . any of the possessions of the United States."[412] The Federal Circuit, affirming the COFC's dismissal of the breach of contract claim, held that there was no breach of contract because the GTIT was not "imposed" by Guam.[413] The Court appeared to ground this conclusion in the plain meaning rule: "[I]t is quite clear that Congress, not Guam, enacted, authorized, or otherwise imposed the GTIT."[414]

The court's conclusion that the phrase "imposed by" clearly and unambiguously means "enacted by" or "authorized by," but not "collected by," is far from self-evident. As the Bank argued on appeal and in its petition for rehearing, the term "imposed" has meanings other than "enacted by" or "authorized by."[415] For example, Black's Law Dictionary defines "impose" as meaning "[t]o levy *or* exact."[416]

406. *Id.* at 1318.
407. 578 F.3d 1318 (Fed. Cir. 2009).
408. *See id.* at 1327 (discussing the use of the word "imposed" in regulations, in express contracts, and by Congress).
409. *Id.* at 1320.
410. *Id.* at 1321, 1324.
411. *Id.* at 1322.
412. *Id.* at 1326–27. Guam is a "possession" of the United States under the Organic Act of Guam. *See* Organic Act of Guam, Pub. L. No. 630, 64 Stat. 384 (codified at 48 U.S.C. § 1421 (2006)).
413. *See Bank of Guam*, 578 F.3d at 1328.
414. *Id.* at 1327.
415. *See id.*; Plaintiff-Appellant's Petition for Rehearing En Banc at 13–14, Bank of Guam v. United States, No. 2008-5078 (Fed. Cir. Sept. 25, 2009) (reh'g denied Dec. 18, 2009).
416. BLACK'S LAW DICTIONARY 824 (9th ed. 2009) (emphasis added).

Moreover, the court's opinion contains little analysis of the term imposed, instead relying on statements made by the Bank's counsel during oral argument[417] and two Ninth Circuit opinions finding that the GTIT was "imposed" by Congress.[418] Having concluded that the language was plain and unambiguous based, in part, on evidence outside the four corners of the contract, the court refused to consider parole evidence offered by the Bank.[419]

4. Stockton East Water District v. United States[420]

The Federal Circuit also disposed of *Stockton East Water District v. United States* based on its reading of the plain meaning of the contract at issue in that appeal.[421] The contract required the U.S. Bureau of Reclamation to release a minimum amount of water to the Stockton East Water District.[422] When the Bureau failed to release the requisite amount, the Water District sued under a breach of contract theory.[423] The Government defended on the ground that the failure to release the water was "beyond the control" of the Bureau within the meaning of a contract clause that provided "if a shortage does occur during any year because of drought, or other causes which . . . are beyond the control of the United States, no liability shall accure [sic] against the United States."[424] The Government asserted that the failure to release the water was "beyond the control" of the Bureau because it was the result of a congressionally directed change in water management policy.[425]

The Federal Circuit found the Government's argument unpersuasive.[426] The Court found that the plain meaning of the phrase "beyond the control of the United States on its face exclude[d] anything that [was] within the control of the United States."[427] Under the contract provision at issue, drought, earthquakes, or even sabotage would have excused the

417. *Bank of Guam*, 578 F.3d at 1327.
418. *Id.* at 1328 (citing Gumataotao v. Dir. of Dep't of Revenue and Taxation, 236 F.3d 1077 (9th Cir. 2001); Bank of Am., Nat'l Trust and Sav. Ass'n v. Chaco, 539 F.2d 1226 (9th Cir. 1976)).
419. *See id.* (quoting McAbee Constr., Inc. v. United States, 97 F.3d 1431, 1435 (Fed. Cir. 1996) ("[I]f the 'provisions are clear and unambiguous, they must be given their plain and ordinary meaning,' and the court may not resort to extrinsic evidence to interpret them." (internal citations omitted)).
420. 583 F.3d 1344 (Fed. Cir. 2009).
421. *Id.* at 1361–62.
422. *Id.* at 1350–51.
423. *See id.* at 1354.
424. *Id.* at 1360–61.
425. *See id.* at 1356, 1361.
426. *See id.* at 1361–62.
427. *See id.* at 1361.

Government.[428] In contrast, "changes in law, or changes in government policy, or changes in management practices brought about by the Government's changes in law or policy, are all causes within the control of the United States."[429] Thus, on this basis, the Federal Circuit rejected the Government's defense to the breach of contract claim.

5. Arko Executive Services, Inc. v. United States[430]

Arko Executive Services, Inc. v. United States appears to be the only appeal involving a question of contract interpretation where the Federal Circuit did not believe the language at issue had a "plain meaning." The court reconciled two FAR clauses that provide the Government with the right to extend performance under a contract: FAR § 52.217-9, "Option to Extend the Term of the Contract," and FAR 52.217-8, "Option to Extend Services."[431] The court held that the former clause, which provides that "the total duration of this contract, including the exercise of any options under this clause, shall not exceed five years," did not preclude the Government from extending performance beyond five years under the latter clause.[432]

The contract at issue in *Arko* provided for a base year and four one-year options, each of which the Government exercised.[433] Prior to expiration of the fourth option year on March 31, 2005, the Government solicited proposals for a follow-on contract to begin April 1, 2005.[434] The follow-on procurement was apparently delayed, and in March 2005, the Government notified Arko that it would require services through April 30, 2005, pursuant to FAR § 52.217-8, which was included in the contract and provides:

> The Government may require continued performance of any services *within the limits and at the rates specified in the contract*. . . . The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months.[435]

Arko objected, arguing that FAR § 52.217-9 placed an absolute, five-year limit on the duration of options.[436] That clause provides:

428. *Id.* at 1361–62.
429. *Id.* at 1362.
430. 553 F.3d 1375 (Fed. Cir. 2009).
431. *Id.* at 1377–78.
432. *Id.* at 1379–80 (quoting 48 C.F.R. § 52.217-9(c) (2009)).
433. *Id.* at 1376–77.
434. *Id.* at 1377.
435. *Id.* at 1378 (quoting 48 C.F.R. § 52.217-8).
436. *Id.* at 1379.

> (a) The Government may extend the term of this contract by written notice to the Contractor within the performance period of the contract or within 30 days after funds for the option year become available, whichever is later.
>
> (b) If the Government exercises this option, the extended contract shall be considered to include this option provision.
>
> (c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed five years.[437]

Arko argued that the only contractual provision allowing continued services was FAR § 52.237-3, "Continuity of Services."[438] That clause requires the contractor to provide "phase-in, phase-out services for up to 90 days after this contract expires."[439] Unlike FAR § 52.217-8, where the contractor is compensated at "the rates specified in the contract," FAR § 52.237-3(d) provides that "[t]he contractor shall be reimbursed for all reasonable phase-in, phase-out costs and a fee (profit)."[440] Arko asserted that its continued performance caused it to incur $184,010.10 in costs above the compensation provided under FAR § 52.217-8.[441]

In reconciling these "labyrinthine" contract clauses, the court ruled that the five-year limit in FAR § 52.217-9 did not prevent the Government from extending the contract under FAR § 52.217-8.[442] The court relied first on the phrase "including the exercise of any options under this clause" in FAR § 52.217-9(c), and held that "the five-year limit includes the options discussed in the FAR § 52.217-9 clause . . . but does not include options to extend services, such as FAR § 52.217-8, that are not under the clause."[443] The court reasoned further that the purpose of FAR § 52.217-8 is to "allow[] the government to extend services without negotiating short extensions to existing contracts in circumstances, such as those here, where the award of a successor contract is delayed."[444] According to the court, allowing the six months extension permitted by FAR 52.217-8 in addition to the five years permitted under FAR § 52.217-9 is consistent with that purpose.[445]

437. *Id.* at 1378 (quoting 48 C.F.R. § 52.217-9(a)–(c)).
438. *Id.* at 1377.
439. *Id.* at 1379 (quoting 48 C.F.R. § 52.237-3(b)).
440. *Id.* (quoting 48 C.F.R. § 52.237-3(d)).
441. *Id.* at 1377.
442. *Id.* at 1378, 1380–81.
443. *Id.* at 1379–80.
444. *Id.* at 1380.
445. *Id.* The Court reasoned that this holding was not inconsistent with FAR 17.204(a) and (e), which require that contracts "specify limits on . . . the overall duration of the term of the contract, including any extension," and that "the total of

The Court regarded the facts of Arko as "exactly the situation FAR § 217-8 was written to address"—i.e., one in which the award of a follow-on contract has been delayed notwithstanding the Government's reasonable efforts to have the follow-on contract in place at the expiration of the predecessor contract.[446] A tougher situation is presented by appeals such as *In re Griffin Services, Inc.*,[447] where the Government arguably used FAR § 52.217-8 to extend a contract because it failed to properly exercise the contract's options in accordance with section 52.217-9.[448] On one hand, the court in *Arko* relied first and foremost on the language of FAR § 52.217-9, which the court suggested did not limit the Government's rights under FAR § 52.217-8 by its terms.[449] On the other hand, the court's emphasis on the special purpose of FAR § 52.217-8 suggests that the court may not tolerate the Government's use of that clause to accomplish another purpose altogether.

6. States Roofing Corp. v. Winter[450]

In *States Roofing Corp. v. Winter*, the Federal Circuit found that a contractor's interpretation of a contract was within the "zone of reasonableness" and reversed the Armed Services Board of Contract Appeal's (the Board) ruling to the contrary.[451] At issue was whether States Roofing reasonably interpreted waterproofing requirements of a roofing contract such that the Government's conflicting interpretation was a constructive change to the contract that merited additional compensation.[452]

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the basic and option periods shall not exceed 5 years in the case of services." *Id.* According to the Court:

> [T]he contract still specifies limits on the 'duration of the contract including any extension,' as required by FAR 17.204(e); the maximum duration including extensions is the five years comprising the initial performance period and four renewal options, plus up to six months of extended services under FAR 52.217-8 and up to 90 days of phase-in, phase-out services under FAR 52.237-3.

Id. The Court also rejected Arko's assertion that it should be compensated under FAR 52.237-3, holding that Arko did not provide "phase-in, phase-out services" as contemplated in that clause. *Id.* at 1381. The Court reasoned that that clause "contemplates phase-in, phase-out services of a kind different from the usual services performed under the contract" and that, by contrast, "Arko performed the same type of services [after expiration of the fourth one-year option] as it did during the previous period." *Id.*

446. *Id.* at 1380.

447. ASBCA No. 52280, 52281, 02-2 BCA ¶ 31943 (2002).

448. *Id.*; *see also* Vernon J. Edwards, *Postscript: When the Government Can Choose Among Options*, 21 NASH & CIBINIC REP. ¶ 57 (2007).

449. *Arko*, 553 F.3d at 1379–80.

450. 587 F.3d 1364 (Fed. Cir. 2009).

451. *Id.* at 1372.

452. *Id.* at 1366.

Prior to bidding on the contract, States Roofing inspected the roof and observed that a prior contractor had applied waterproofing paint on the roof.[453] Based on this information and its interpretation of the contract, States Roofing accounted only for the costs of waterproofing paint when preparing its bid.[454] The Government objected to States Roofing's approach after performance began, however, and insisted that the contract required the installation of flashing, which was more costly than paint.[455] States Roofing complied with the Government's demands and then requested an equitable adjustment for the additional costs.[456]

On appeal from the CO's denial of States Roofing's claim, the Board held that the contract contained a patent ambiguity for which States Roofing was obligated to inquire.[457] The Board also reasoned that details in drawings included with the solicitation should have put States Roofing on notice that something more than waterproofing paint was required.[458] The Board came to this conclusion notwithstanding the revelation that the Government "inadvertently" omitted key specifications from the contract that could have prevented the misunderstanding.[459] Thus, while the Board recognized States Roofing's pre-bid efforts to ascertain the appropriate method of waterproofing, it concluded that the patent ambiguity contained in the contract meant that States Roofing had a duty to inquire before proceeding with the contract.[460]

The Federal Circuit reversed the Board's decision, finding that the contract's ambiguity on this issue was latent, not patent, and "that States Roofing's interpretation was within the zone of reasonableness."[461] The Court found that the totality of the evidence and circumstances—particularly the use of waterproofing paint on the roof by prior contractors—meant that States Roofing's interpretation was reasonable.[462] Conflicting expert testimony weighed in favor of States Roofing's interpretation,[463] and the fact that the Government omitted key specifications that could have

453. *Id.* at 1367.
454. *Id.* at 1369.
455. *Id.* at 1367.
456. *Id.*
457. *Id.* at 1368.
458. *Id.*
459. *Id.* (finding another document provided to the contractor sufficiently indicated the need for the flashing material).
460. *Id.* at 1367–68, 1372.
461. *Id.* at 1372.
462. *Id.*
463. *Id.*

avoided the misunderstanding weighed heavily on the Court's decision as well.[464] Applying the rule of *contra proferentem*,[465] the Federal Circuit construed the ambiguity against the contract's drafter and held in favor of States Roofing.[466]

C. Cost Accounting Issues

In both of its 2009 decisions addressing contract cost principles, the Federal Circuit declared that it was bound by prior decisions, to the detriment of the contractors involved. The court strictly interpreted the cost regulations involved in each of the cases. Accordingly, government contractors need to be familiar with these Federal Circuit decisions and factor them into their business decisions regarding whether and when to settle disagreements with third parties and the Government. Failure to do so could lead to significant unallowed contract costs or severe interest penalties.

1. Geren v. Tecom, Inc.

The Federal Circuit reversed a summary judgment decision of the Armed Services Board of Contract Appeals (ASBCA or "the Board") in favor of Tecom, Inc.[467] The ASBCA held that Tecom's defense costs and settlement payments associated with a Title VII sexual harassment suit were allowable costs under the Federal Acquisition Regulation (FAR).[468] Tecom sought to include $96,163.16 in legal fees in its indirect cost pool for general and administrative expenses (G&A) and to bill the $50,000 settlement payment, for which Tecom admitted no wrongdoing, as direct costs to the contract on which the alleged sexual harassment had occurred.[469] The Federal Circuit held that, had the lawsuit proceeded to trial, costs associated with an adverse judgment would not be allowable under the contract, and that "defense and settlement costs are allowable only if the contractor can show that the plaintiff in the Title VII suit had very little likelihood of success" on the merits.[470]

The ASBCA held that the Federal Circuit's decision in *Boeing North American, Inc. v. Roche*,[471] which established the standard of "very little likelihood of success on the merits" for reimbursement of legal and

464. *Id.*
465. *Id.*
466. *Id.*
467. Geren v. Tecom, Inc., 566 F.3d 1037, 1039 (Fed. Cir. 2009).
468. *Id.* (citing *Tecom, Inc.*, ASBCA No. 53884, 54461, 07-2 BCA ¶ 33674 (2007)).
469. *Id.*
470. *Id.*
471. 298 F.3d 1274 (Fed. Cir. 2002).

settlement costs,[472] was limited to circumstances where the underlying lawsuit alleged that the contractor had engaged in criminal conduct, fraud, or violations of the Major Fraud Act of 1988.[473] The Federal Circuit disagreed, declaring that *Boeing* was not limited to its facts, but instead applied to "all private settlements where defense and judgment costs would be disallowed if the case went to final judgment against the contractor."[474]

The Federal Circuit applied a two-step analysis to determine if defense and settlement costs are allowable under FAR subpart 31.2.[475] The first step is to determine whether damages, costs or attorney's fees would be allowable if the lawsuit proceeded to trial and an adverse judgment was issued.[476] In this case, the court held that litigation costs associated with a Title VII lawsuit would not have been allowable under the FAR because the contract contained the clause at FAR § 52.222-26, which prohibits discrimination on the basis of sex.[477] Thus, sexual harassment would breach the contract terms.[478] The Federal Circuit held that costs resulting from a contract breach are unallowable under the precedent of the claims court.[479]

Having determined that the costs would not be reimbursable if the Title VII plaintiff had obtained an adverse judgment against Tecom, the Federal Circuit proceeded to the next step in its inquiry—determining whether the costs of settlement are allowable. Here, the Federal Circuit held that its decision in *Boeing* controlled, even though *Boeing* addressed only defense costs rather than settlement payments.[480] Applying *Boeing*, the Federal Circuit concluded that if damages or penalties resulting from an adverse judgment would be disallowed under the contract, settlement costs also are unallowable "unless the contractor can establish that the private Title VII plaintiff had very little likelihood of success on the merits."[481]

472. *Id.* at 1288–89.
473. *Geren*, 566 F.3d at 1040.
474. *Id.* at 1046.
475. *Id.* at 1041.
476. *Id.*
477. *Id.* at 1043.
478. *Id.* at 1044.
479. *Id.* at 1043 (citing Dade Bros., Inc. v. United States, 325 F.2d 239, 240 (Ct. Cl. 1963)).
480. *Id.* at 1046.
481. *Id.*

2. Gates v. Raytheon Co.[482]

The Federal Circuit reversed a decision of the ASBCA and held that failure to make an adjustment during the current accounting period stemming from the sale, discontinued operations, or other closure of a business segment violates Cost Accounting Standard (CAS) 413-50[483] and results in increased payments by the Government.[484] Most importantly, the court found that Raytheon owed interest compounded daily on the amount it was required to repay the Government.[485]

The case stems from Raytheon's sale of two business units, in December 1998 and July 2000, which had performed CAS-covered government contracts.[486] After each sale, Raytheon and the Government eventually agreed on the amount of the Government's share of surplus pension costs for the closed business segments under CAS 413-50(c)(12).[487] On September 21, 2004, Raytheon paid the agreed upon amounts ($487,305 and $14,681,268), but refused to pay the simple interest the Government had requested on those amounts.[488] The CO later issued a final decision that Raytheon had not complied with the CAS 413 requirements to make pension surplus adjustments in the current accounting period and therefore owed interest to the Government.[489]

The ASBCA initially granted summary judgment in favor of the Government, holding that Raytheon's failure to promptly provide an adjustment for the Government's share of the surplus pension costs resulted in noncompliance with CAS 413.[490] Because the Board found that Raytheon's noncompliance led to increased Government costs, Raytheon was held liable for interest under the "CAS clause" in its Government contracts, FAR § 52.230-2.[491] The Board also held that this interest should be calculated using daily compounding under 26 U.S.C. §§ 6621-22.[492] On reconsideration, the ASBCA reversed its earlier decision and held that the record was unclear on the accounting treatment of the surplus adjustments.[493] The ASBCA

482. 584 F.3d 1062 (Fed. Cir. 2009).
483. 48 C.F.R. § 9904.413-50 (2009).
484. *Raytheon*, 584 F.3d at 1063–65.
485. *Id.* at 1071–72.
486. *Id.* at 1065.
487. *Id.*
488. *Id.*
489. *Id.* at 1065–66.
490. *See Raytheon Co.*, ASBCA No. 54907, 07-2 BCA ¶ 33655, at 14 (2007).
491. *Id.*
492. *Id.* at 13.
493. *Raytheon Co.*, ASBCA No. 54907, 08-1 BCA ¶ 33859, at 1–2 (2008).

determined that the Government had failed to show any increased costs had resulted from a CAS violation.[494] The Board therefore concluded that the CAS clause did not apply, and no interest was due from Raytheon.[495]

On appeal, the Federal Circuit concluded that "[o]n the undisputed facts, it is clear that Raytheon violated CAS 413" by not paying the pension adjustments in the same accounting periods in which the sales of the business segments occurred.[496] The court also found that this noncompliance increased the Government's costs on the Raytheon contracts that were open during those accounting periods, in other words, the Government's payments on those open contracts would have been lower if Raytheon had complied with CAS 413 by crediting those contracts at the appropriate time.[497] Having determined that Raytheon violated CAS 413 and that the violation resulted in increased costs to the Government, the Federal Circuit then turned to 41 U.S.C. § 422(h) to determine how interest on the Government's overpayments should be calculated.[498]

As the Federal Circuit explained, § 442(h) applies the annual interest rate designated by section 6621 of the Internal Revenue Code to CAS violations:

> The interest rate applicable to any contract price adjustment shall be the annual rate of interest established under section 6621 of title 26 for such period. Such interest shall accrue from the time payments of the increased costs were made to the contractor or subcontractor to the time the United States receives full compensation for the price adjustment.[499]

Section 6622 of the Internal Revenue Code then requires daily compounding of "any interest required to be paid under this title or sections 1961(c)(1) or 2411 of title 28, United States Code."[500] In *Raytheon*, the Federal Circuit stated that it was bound by its decision in *Canadian Fur Trappers Corp. v. United States*[501] that statutes like 41 U.S.C. § 442, "which require interest payments at the rate set

494. *Id.* at 2.
495. *Id.* at 3.
496. *Raytheon*, 584 F.3d at 1067.
497. *Id.* at 1068–69. In contrast, the ASBCA analyzed the issue of increased costs by examining whether the Government had overpaid during *previous* accounting periods. *Id.* at 1068.
498. *Id.* at 1069.
499. *Id.* at 1069–70 (citing 41 U.S.C. § 442(h)(4) (2006)).
500. *Id* at 1070 (citing 26 U.S.C. § 6622(a) (2006)).
501. 884 F.2d 563 (Fed. Cir. 1989).

out in § 6621[,] require compound interest."[502] The Federal Circuit explicitly stated that it could not contradict *Canadian Fur Trappers*, even if Raytheon's arguments appealed to the court and "may support" a different interpretation of the statutes.[503]

These statements seem to hint at the possibility of a future *en banc* decision to overturn *Canadian Fur Trappers*. Unless and until such a decision is issued, however, contractors will have to pay compound interest for any CAS violation that results in increased Government costs—likely resulting in enormous penalties for contractors.

D. Termination for Default

1. McDonnell Douglas Corp. v. United States[504]

The Federal Circuit's decision in *McDonnell Douglas Corp. v. United States* brought a final conclusion to eighteen years of litigation (including three rounds of appeals) resulting from the U.S. Navy's 1991 termination for default of the contract held by McDonnell Douglas and General Dynamics for development of the A-12 Avenger stealth aircraft.[505] The Federal Circuit affirmed the COFC's judgment that the termination for default was justified based on the contractors' failure to make progress.[506] The Federal Circuit's last opinion in this case addresses the issue of when a contract can be terminated for default for failure to make progress in the absence of a definitive contract completion date.[507] But perhaps the most important lesson to be learned from the saga of this dispute is that fixed-price research and development contracts are fraught with risk for both the contractor and the Government and should be entered into only after careful review of the business case and contract terms.[508]

The Navy awarded the $4.7 billion, fixed-price research and development contract in 1988.[509] The contract required delivery of eight prototype aircraft between June 1990 and January 1991 and provided the Navy the option to purchase four production lots of

502. 584 F.3d at 1070 (citing *Canadian Fur Trappers*, 884 F.2d at 568 (applying compound interest to international trade and tariff duties)).
503. *Id.* at 1071, n.10.
504. 567 F.3d 1340 (Fed. Cir. 2009) (*McDonnell Douglas XIV*).
505. *Id.* at 1342.
506. *Id.* at 1355–56.
507. *Id.* at 1351–53.
508. *See id.* at 1355–56 (noting that both parties realized the contract was a mistake).
509. *Id.* at 1342.

aircraft.[510] The Navy exercised its option in May 1990 for six production aircraft that were to be delivered between June 1991 and May 1992.[511] The contractors encountered significant performance problems from the beginning, which led them to miss the first flight date in June 1990 and to propose a modification to the contract's fixed-price structure.[512] The contractors anticipated that the costs necessary to complete the contract would be "unacceptable."[513] When the contractors missed the first flight date, the CO sent a letter "expressing 'serious concern' regarding the deficient performance" and requesting the contractors' plan to meet the original contract schedule, as well as a proposed contract revision.[514] The Navy issued a unilateral modification in August 1990 to revise the prototype delivery dates; the modification did not revise the delivery dates for the production aircraft.[515] The contractors continued to experience delays and to rack up additional costs, leading them in November 1990 to request that the Navy restructure the contract to a cost-reimbursement type contract.[516]

In December 1990, "then-Secretary of Defense Dick Cheney directed the Secretary of the Navy to show cause by January 4, 1991, why the A-12 program should not be terminated."[517] The Navy issued a cure notice on December 17, 1990, which stated that the contractors' performance was "unsatisfactory" and that they had failed to meet specification requirements or fabricate parts to meet the delivery schedule.[518] During meetings between Government personnel and the contractors, the contractors admitted that they could not meet the revised schedules or some of the specifications, and the Navy terminated the contract for default on January 7, 1991.[519] The contractors claimed that they were not in default because the specifications and delivery schedules were unachievable.[520]

The contractors appealed both the termination and the Government's subsequent demand for $1.35 billion in unliquidated

510. *Id.* at 1343.
511. *Id.*
512. *Id.*
513. *Id.*
514. *Id.*
515. *Id.*
516. *Id.* at 1344.
517. *Id.*
518. *Id.*
519. *Id.* at 1345.
520. *Id.*

progress payments at the COFC.[521] In the second appeal to the Federal Circuit, the appellate court instructed the COFC to determine the contract completion date under *Lisbon Contractors, Inc. v. United States*.[522] The Federal Circuit explained that under *Lisbon Contractors*, the Government was not required to establish "absolute impossibility of performance" to justify default.[523] Instead, the Government must show that the CO had a reasonable belief that there was "no reasonable likelihood that the contractor could perform the entire contract effort within the time remaining for contract performance."[524] Applying *Lisbon Contractors* while using the delivery dates in the Navy's unilateral modification as a yardstick for reasonable performance, the COFC concluded that the Government was justified in terminating the contract for failure to make progress.[525]

In the third and final appeal, the Federal Circuit agreed with the COFC that the contract as modified did not provide a definite contract completion date.[526] However, the court refused to adopt the contractors' argument that, under *Lisbon Contractors*, the absence of a definite contract completion date absolutely precluded the Government from justifiably terminating the contract for failure to make progress.[527] The Federal Circuit instead looked to the Court of Claims' decision in *Universal Fiberglass Corp. v. United States*,[528] cited in *Lisbon Contractors*, as well as previous *McDonnell Douglas* decisions.[529] In *Universal Fiberglass*, the Court of Claims held that the cure notice served to inform the contractor when the time for default had been reached in a case where the contract itself did not include a delivery schedule.[530] The Federal Circuit found that the facts related to the A-12 termination were sufficiently similar to those in *Universal Fiberglass* to rely on the latter decision as precedent.[531] Considering the totality of the circumstances, the Federal Circuit concluded that the CO was reasonably justified in his belief that the contractors

521. *Id.*
522. McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1018 (Fed. Cir. 2003) (*McDonnell Douglas XII*) (citing Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987)), *aff'd*, 567 F.3d 1340 (Fed. Cir. 2009).
523. *Id.* at 1015.
524. *Id.* at 1016 (citing *Lisbon Contractors*, 828 F.2d at 765).
525. McDonnell Douglas Corp. v. United States, 76 Fed. Cl. 385, 430 (2007) (*McDonnell Douglas XIII*), *aff'd*, 567 F.3d 1350 (Fed. Cir. 2009).
526. *McDonnell Douglas XIV*, 567 F.3d at 1348.
527. *Id.*
528. 537 F.2d 393 (Ct. Cl. 1976).
529. *McDonnell Douglas XIV*, 567 F.3d at 1347–48.
530. *Universal Fiberglass*, 537 F.2d at 398.
531. *McDonnell Douglas XIV*, 567 F.3d at 1350.

could not timely complete the contract and therefore affirmed the COFC's judgment.[532] The Federal Circuit also reiterated that *Lisbon Contractors* remains good law and that the conclusions in *McDonnell Douglas XIV* were "dictated by the unique facts of this case."[533]

IV. *WINSTAR* AND SPENT NUCLEAR FUEL CASES

After more than a dozen years of *Winstar* litigation, the Federal Circuit has reached the point at which its decisions no longer blaze paths announcing new precedent that dramatically affects the outcomes of other cases. Instead, the court's recent role has been primarily limited to policing the COFC's various decisions on issues of the Government's liability for breach and, more commonly, the quantum of damages. Following years in which there were virtually no decisions affirming damage awards against the Government, the balance has recently shifted and decisions from the COFC have slowly but steadily presented the Federal Circuit with questions regarding the effects of the Government's breach and the nature of recoverable damages. As the focus of many of the decisions shifts to damages, they are more likely to center on traditional contractual concepts of but-for or proximate causation and foreseeability, and to delve into the nuances of highly fact-specific damage models that the plaintiff's and Government's experts have prepared.

Spent Nuclear Fuel (SNF) cases have emerged as the new *Winstar* cases, in the sense that there is a critical mass of factually similar cases that are likely to focus primarily on individual plaintiffs' entitlement to, and the quantum of, damages. The Federal Circuit's sole published SNF decision in 2009 was consistent with its earlier decisions in *Pacific Gas & Electric Co. v. United States*[534] and *Yankee Atomic Electric Co. v. United States*,[535] in which the Federal Circuit determined the proper method for calculating damages in a SNF case is to include the "most reasonable measure of the contractual acceptance rate" and that, while a trial court may apply the substantial factor test to establish causation in SNF cases, a plausible but-for world must still be established in any damages modeling to calculate expectancy damages.[536]

532. *Id.* at 1355–56.
533. *Id.* at 1356.
534. 536 F.3d 1282 (Fed. Cir. 2008).
535. 536 F.3d 1268 (Fed. Cir. 2008).
536. *Pacific Gas*, 536 F.3d at 1292; *Yankee Atomic*, 536 F.3d at 1273.

A. Astoria Federal Savings & Loan Ass'n v. United States[537]

In *Astoria Federal Savings & Loan Ass'n v. United States*, a *Winstar* case, the Government arranged for Fidelity New York, F.S.B., a Long Island savings and loan association ("thrift"), to absorb Suburbia Federal Savings & Loan, another Long Island thrift about to fail.[538] In addition to a cash incentive to take on the failing thrift, the Government agreed to allow Fidelity to favorably account for "supervisory goodwill" generated by the transaction to meet Fidelity's regulatory capital maintenance requirements, and to amortize that goodwill over a thirty-year period.[539] Five years later, Congress passed the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA),[540] which prohibited the favorable treatment of supervisory goodwill, resulting in the breach at issue in the *Winstar* cases, and which was the undisputed breach in this case.[541]

Following the enactment of FIRREA, Astoria Federal Savings & Loan Association merged with Fidelity and filed suit in the COFC.[542] The Government conceded that the statutory disallowance of the supervisory goodwill resulted in a breach of its agreement with Fidelity, and the COFC conducted a trial solely to determine damages.[543] The COFC issued a judgment awarding Astoria $16,042,877.[544] "[T]he parties [did] not contest[] the court's rulings with respect to the bulk of the damages requested at trial, [however,] the government [did seek] reversal with respect to several issues that affect the size of the damages award."[545]

The Federal Circuit began its opinion with a review of the facts specific to Fidelity's situation, which affected the causal link between the breach and certain damages. The court first noted that during the early 1980s, Fidelity's portfolio had been heavily invested in commercial loans to developers of condominium and cooperative conversion projects in the New York City area.[546] Because Fidelity was so heavily weighted in this area, the Federal Home Loan Bank Board

537. 568 F.3d 944 (Fed. Cir. 2009).
538. *Id.* at 946–47.
539. *Id.*
540. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered sections of 12 U.S.C.).
541. *Astoria Federal*, 568 F.3d at 946, 948.
542. *Id.* at 946.
543. *Id.*
544. *Id.*
545. *Id.*
546. *Id.* at 947.

("the Bank Board") had warned that "Fidelity's asset management strategy was giving rise to considerable credit risk exposure."[547]

At the same time, Suburbia was struggling and on the verge of collapse due to its liabilities exceeding its assets.[548] In order to avoid a substantial deposit insurance liability that the Government would be responsible for if Suburbia collapsed, the Government sought out suitors to acquire the bank.[549]

Fidelity agreed to acquire Suburbia in exchange for various inducements from the Government.[550] Included in these inducements was Fidelity's ability to treat Suburbia's net liabilities as "supervisory goodwill" and account for the goodwill as regulatory capital that would be amortized over a thirty-year period.[551] Following its acquisition of Suburbia, Fidelity continued to expand its commercial real estate and construction loan portfolios to the point where the Government grew concerned that Fidelity's management lacked the ability to run the company.[552] Two years after the acquisition, Fidelity brought in a new, experienced management team that immediately began to diversify Fidelity's portfolio.[553]

Despite Fidelity's best efforts, when the New York real estate market experienced a sudden downturn, it severely damaged Fidelity's balance sheet.[554] Based on these changes in market conditions, Fidelity's MACRO scores—the rating system used by regulators to assess a thrift's financial health, with 1 being the best score and 5 being the worst—dropped across the board.[555]

Following the passage of FIRREA, the Office of Thrift Supervision (OTS) expanded its role in supervising thrifts and instituted regulations severely limiting thrifts with low MACRO scores—like Fidelity's—from adding assets.[556] Regulatory Bulletin 3a-1 ("RB 3a-1") mandated that "any thrift that had been deemed 'insolvent' or had received an overall MACRO score of 4 or 5 would be restricted to little or no growth in assets."[557] Post-FIRREA, Fidelity could no longer account for supervisory goodwill as regulatory capital or amortize that

547. *Id.*
548. *Id.*
549. *Id.*
550. *Id.*
551. *Id.*
552. *Id.*
553. *Id.*
554. *Id.* at 948.
555. *Id.*
556. *Id.*
557. *Id.*

goodwill over the thirty-year period.[558] Accordingly, OTS projected Fidelity would fail to satisfy regulatory capital requirements at the time FIRREA became effective and thus required Fidelity to prepare a capital restoration plan that would bring Fidelity back into capital compliance.[559] As part of this plan, Fidelity agreed to reduce its projected asset growth to almost zero.[560]

For nearly three years, Fidelity functioned under strict OTS oversight.[561] "In May 1993, Fidelity converted from mutual to stock ownership [and] used the proceeds from the public offering to complete [its] capital restoration plan."[562] After successfully completing its plan, OTS lifted its restrictions and Fidelity was free to attempt to grow its assets at a normal rate.[563] However, after operating subject to the OTS's severe restrictions that had applied to thrifts with poor MACRO ratings for so many years, Fidelity was no longer competitive in the market.[564]

Based on its market position, Fidelity elected to merge with Astoria in January 1995.[565] "Goodwill" from the Suburbia transaction did not survive the merger.[566] Fidelity/Astoria[567] then sued in the COFC "alleging that the enactment of FIRREA resulted in a breach of the government's agreement to count Suburbia's goodwill toward Fidelity's regulatory capital requirements and to permit the amortization of that goodwill over a 30-year period."[568] The Government did not dispute liability but did dispute damages, and the COFC found that Fidelity was entitled to $16,042,887 in lost profits and "wounded bank" damages attributed to Fidelity's higher operating costs based on the breach.[569] The damages award included purported damages extending through January 1995 to account for the residual effects of the breach.[570]

The Government subsequently appealed to the Federal Circuit, raising multiple challenges to the award of damages. First, the

558. *Id.*
559. *Id.*
560. *Id.*
561. *See id.* (noting that due to the capital restoration plan, the OTS District Director would have to authorize the origination of new loans or investments).
562. *Id.* at 949.
563. *Id.*
564. *Id.*
565. *Id.*
566. *Id.*
567. For simplicity's sake, the plaintiff/appellee will continue to be referred to as "Fidelity" throughout this Section.
568. *Astoria Federal*, 568 F.3d at 949.
569. *Id.* (internal quotations marks omitted).
570. *Id.*

Government contended that, due to Fidelity's financial state prior to the breach, even absent FIRREA, OTS would have had the power under RB 3a-1 to limit Fidelity's growth during the period in question and, therefore, the damages Fidelity incurred could not be attributed to the breach.[571] The Federal Circuit, agreeing with the Government and rejecting both the COFC's finding and the arguments raised by Fidelity, found that in the hypothetical non-breach world, Fidelity would have nonetheless been subject to stricter OTS oversight and that Fidelity's growth would have been restricted even in the absence of any breach.[572] Accordingly, the court found that "the evidence indicates that as of January 1990 and for at least some period thereafter, Fidelity would have been unable to grow in accordance with its growth plan due to government restrictions imposed under [OTS's authority]."[573] Thus, the court remanded the case to the COFC with instructions to revise the damages award based on the effect the OTS regulations would have had in a non-breach world.[574]

The court next affirmed the COFC's other findings related to causation and determined that "absent FIRREA, Fidelity would have improved its overall MACRO score to 3 or better prior to July 1992," and therefore, Fidelity would have been able to escape the restrictions placed upon it at that time.[575] The court also affirmed the COFC's finding that Fidelity could have improved its MACRO rating before July 1992 if FIRREA was not passed and could have continued with its expansion plans but for the breach.[576]

The Government also argued that the COFC should have denied Fidelity "wounded bank" damages for the five months preceding Fidelity's stock conversion.[577] The Federal Circuit affirmed the COFC's finding that Fidelity was entitled to "wounded bank" damages for at least the latter half of 1992 because Fidelity's overall MACRO rating would have been a 3, not a 4, resulting in lower operating costs during that period, but-for the breach.[578] However, the exact period for calculating these damages was unclear, and the Federal Circuit remanded with instructions that the COFC "should make a finding as to when, in the hypothetical non-breach world, OTS would have been satisfied that the limitations of [its regulations] were unnecessary" to

571. *Id.* at 949–50.
572. *Id.* at 952.
573. *Id.*
574. *Id.* at 954.
575. *Id.* at 953.
576. *Id.*
577. *Id.* at 953–54.
578. *Id.* at 953.

determine appropriate damages.[579] Based upon this date, "the court should fashion an appropriate award based on the evidence of lost profits and 'wounded bank' damages."[580]

The court also addressed whether the damages award should be reduced or offset by certain additional costs Fidelity would have realized in the hypothetical non-breach world.[581] First, "[t]he [G]overnment [sought] a $3.6 million reduction in the award based on the . . . expenses Fidelity would have incurred had it expanded its retail lending operations as it had planned to do in the late 1980s."[582] The court rejected the Government's argument and affirmed the COFC's finding that Fidelity's expert's damages analysis was reasonable; in particular, agreeing with his decision not to include certain expenses, such as the salary and advertising expenses Fidelity would have incurred, based on the theory that any additional costs would have been offset by the additional profit generated.[583] However, the court agreed with the Government's argument that the COFC should have reduced the damages based on the increased OTS fees that Fidelity would have incurred had it been able to achieve its projected growth from 1990 to 1993.[584] Finally, with respect to how any "non-contractual goodwill" would have affected the lost profits damages model, the court affirmed the COFC's finding that "Fidelity would have sustained a growth rate of eight percent even if it had been carrying only $37 million in excess regulatory capital."[585]

B. 1st Home Liquidating Trust v. United States[586]

In *1st Home Liquidating Trust v. United States*, 1st Home was a mutual thrift owned by its depositors.[587] Years before Congress passed FIRREA, 1st Home sought to convert from a mutual thrift to a stock-ownership thrift to avoid insolvency through a voluntary supervisory conversion in which one or more investors—not another thrift—would provide the capital necessary to save the ailing thrift.[588]

1st Home required the Bank Board approval to complete the voluntary conversion.[589] In its "Application for Voluntary Supervisory

579. *Id.* at 954.
580. *Id.*
581. *Id.*
582. *Id.*
583. *Id.* at 954–55.
584. *Id.* at 955.
585. *Id.* at 955–56 (internal quotations omitted).
586. 581 F.3d 1350 (Fed. Cir. 2009).
587. *Id.* at 1353.
588. *Id.*
589. *Id.*

Conversion," 1st Home sought a regulatory forbearance from the Bank Board and included in its business plan the proposed use of purchase-method accounting that would allow it to create a large amount of goodwill through the conversion.[590] The Bank Board granted the forbearance request, but for three years, rather than the five years requested by 1st Home.[591] The Bank Board's response did not include any mention of 1st Home's plan regarding its attempts to generate goodwill, but internal memoranda indicated that it believed the conversion would generate the goodwill 1st Home claimed it would.[592]

1st Home completed the conversion in October 1986.[593] FIRREA was subsequently passed, which prohibited 1st Home from continuing to count regulatory goodwill towards its capital requirements, as contemplated in its approved conversion plans.[594] This change led to 1st Home's demise and eventual voluntary liquidation.[595] Post-liquidation assets were transferred to a trust which, along with the 1st Home investors, sued the Government for breach of contract; they argued that the Government had a contractual obligation to permit 1st Home to continue to amortize goodwill over the approved period and that its inability to do so, following the passage of FIRREA, breached that obligation.[596] The COFC granted summary judgment in favor of 1st Home and awarded damages in the amount of $26 million.[597] The COFC found that the application for a voluntary conversion—along with the business plan submitted to the Bank Board—constituted an offer, that the Government counter-offered with a shorter forbearance period but accepted all other terms, and that 1st Home's conduct constituted acceptance of the offer.[598] As part of this "contract," 1st Home had the right to utilize "purchase-method accounting" which would have resulted in approximately $40 million of regulatory goodwill amortized over a thirty-year period.[599]

On appeal, the Federal Circuit reversed the COFC, finding that no contract existed between the Bank Board and 1st Home (or its

590. *Id.* at 1353–54.
591. *Id.*
592. *Id.* at 1354.
593. *Id.*
594. *Id.*
595. *Id.*
596. *Id.*
597. *Id.* at 1354–55.
598. *Id.*
599. *Id.* at 1353.

investors) regarding regulatory goodwill.[600] Noting that "[t]he party asserting the existence of a contract 'must show (1) mutuality of intent to contract; (2) consideration; and (3) lack of ambiguity in offer and acceptance,'" the court found that there was "nothing more than a granular cloud of evidence indicating that 1st Home and the Government contracted regarding goodwill."[601]

The court, comparing this case to its recent decision in *Suess v. United States*,[602] reiterated that the *approval* of amortization of goodwill, alone, does not constitute a guarantee or agreement that a thrift will be permitted to amortize goodwill as per the approval.[603] Thus, because all the Government had done in this case was acknowledge and approve of 1st Home's proposed accounting method and treatment of goodwill, there was no evidence that the Government had the requisite intent to enter into a contract regarding 1st Home's treatment of the goodwill and, accordingly, no contract was formed.[604] The fact that the Bank Board had benefited from and encouraged 1st Home's conversion had no effect on the court's analysis, as neither constituted negotiations between the Government and the thrift.[605] Likewise, neither the fact that the investors believed the Government had promised favorable accounting treatment nor the fact that the voluntary conversion made financial sense only if the goodwill could be amortized over an extended period of time, were evidence of any mutual intent to contract regarding the treatment of goodwill.[606] Furthermore, the court's analysis was not affected by the fact that the Bank Board had "conditioned its approval of the conversion on receiving an accountant's letter detailing the proposed amortization of goodwill."[607]

Finally, the court noted that, unlike in other cases where a contract had been recognized regarding the treatment of regulatory goodwill, here the Government had not "clearly incentivized the relevant transactions by providing cash assistance or by making express promises regarding the accounting treatment of supervisory goodwill."[608] The Federal Circuit found that "[t]he lack of such

600. *Id.* at 1355.
601. *Id.* (quoting D & N Bank v. United States, 331 F.3d 1374, 1378 (Fed. Cir. 2003)).
602. 535 F.3d 1348 (Fed. Cir. 2008).
603. *1st Home*, 581 F.3d at 1356.
604. *Id.*
605. *Id.* at 1356–57.
606. *Id.* at 1357.
607. *Id.*
608. *Id.* (internal citation omitted).

incentives in this case supports the view that a contract was not formed."[609] Thus, "[b]ecause the Government lacked the requisite intent to enter into a contract with 1st Home regarding the accounting treatment of goodwill to be generated by 1st Home's conversion, no contract was formed, and thus, there was no breach."[610] The Federal Circuit accordingly reversed the COFC's grant of summary judgment in favor of 1st Home and remanded the case for the COFC to enter judgment in favor of the Government.[611]

C. Slattery v. United States[612]

Like the other *Winstar* cases, *Slattery v. United States* involved the acquisition of a failing thrift by a healthy bank at the behest of the Federal Deposit Insurance Corporation (FDIC).[613] In 1982, the FDIC encouraged Meritor Savings Bank to merge with the failing Western Savings Fund Society.[614] Among the incentives the FDIC gave to Meritor to acquire Western was a Memorandum of Understanding (MOU) that would allow Meritor to treat Western's net liabilities as "supervisory goodwill" and count that goodwill towards Meritor's regulatory capital requirements, amortized over fifteen years.[615] Though the FDIC had to provide over $294 million in other incentives to finalize the merger, it would have cost over $400 million more to liquidate FDIC's deposit insurance liability in the event Western failed.[616]

Notwithstanding frequent modifications to its regulatory requirements in response to the financial landscape in the 1980s, the FDIC continued to allow Meritor to use its supervisory goodwill to meet regulatory requirements.[617] However, the FDIC asked Meritor to enter into a new MOU under which Meritor would maintain a minimum capital requirement in excess of the regulatory minimum of 5.5%, but it withdrew that request.[618] Later, the FDIC forced Meritor to accept yet another MOU, raising the capital requirement to 6.5%.[619] This new MOU also required that if Meritor did not satisfy

609. *Id.*
610. *Id.* at 1358.
611. *Id.*
612. 583 F.3d 800 (Fed. Cir. 2009), *reh'g en banc granted, vacated*, 2010 WL 1030729 (Fed. Cir. Mar. 19, 2010).
613. *Id.* at 804.
614. *Id.* at 803–04.
615. *Id.* at 804.
616. *Id.*
617. *Id.* at 805
618. *Id.*
619. *Id.* at 805–06.

the 6.5% capital requirement by the end of 1988, it would need to increase its tangible capital by $200 million and present a five-year strategic plan to improve its financial health.[620] When Meritor subsequently failed to timely satisfy its capital requirement, it was forced to sell fifty-four of its branches and enter into yet another agreement with the FDIC.[621]

Near the end of 1991, after the passage of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) the FDIC began to issue new rules to implement FDICIA.[622] One of these rules, which would take effect on December 19, 1992, interpreted the FDICIA to prohibit the inclusion of supervisory goodwill associated with mergers with failing institutions as regulatory capital.[623] The final agreement entered between Meritor and the FDIC regarding Meritor's takeover of Western was reached with full knowledge of the proposed FDICIA legislation but before the FDIC had adopted any new rules.[624]

Meritor could not survive under these new regulations and rules, and Meritor's Board of Directors authorized the FDIC to sell the bank in October 1992.[625] Soon thereafter, the FDIC informed Meritor that when its newest regulation took effect on December 19, 1992, disallowing the supervisory goodwill, Meritor's capital ratio would drop from 7.5% to 0.66% and it would be "critically undercapitalized."[626] Two days later, the FDIC revoked Meritor's deposit insurance, causing the Pennsylvania Secretary of Banking to immediately seize the bank.[627]

Slattery, an individual owner of Meritor stock, brought both a class action and a shareholders' derivative suit in 1993 in the COFC alleging that the FDIC breached its 1982 contract in connection with Meritor's merger with Western.[628] The COFC dismissed the class action suit but allowed the derivative suit to proceed.[629] Following a five-month trial, the COFC found the Government liable for breach, and the Government appealed on multiple grounds, including whether the COFC had jurisdiction over the claim.[630]

620. *Id.* at 806.
621. *Id.*
622. *Id.*
623. *Id.*
624. *Id.* at 806–07.
625. *Id.* at 807.
626. *Id.* (internal quotations omitted).
627. *Id.*
628. *Id.*
629. *Id.* (citation omitted).
630. *Id.*

On appeal, the Federal Circuit first addressed the Government's argument that the COFC lacked jurisdiction over the claim because the FDIC is a non-appropriated funds instrumentality (NAFI), "which does not receive its monies via congressional appropriation."[631] NAFIs are not subject to the Tucker Act or the COFC's limited jurisdiction.[632] After thoroughly examining the history of the FDIC and its initial appropriations, the Federal Circuit applied the test annunciated in *AINS, Inc. v. United States*[633] to determine whether the FDIC is a NAFI and affirmed the COFC's ruling that the FDIC did not meet the fourth factor of this test (*which requires* a clear Congressional intent to exclude the FDIC from appropriated funds).[634] Therefore, the COFC properly exercised jurisdiction over Slattery's claim.[635]

Turning to liability, the court affirmed the COFC's finding that the 1982 MOU was a legally binding contract with Meritor that the FDIC had breached.[636] The Federal Circuit also affirmed the COFC's finding that the FDIC had indicated a clear intent to allow Meritor to count supervisory goodwill towards its regulatory capital and that this concession was material to Meritor's agreement to take on the failing thrift.[637]

The COFC had found that the Government had first breached the 1982 MOU "in 1988 when it effectively ignored Meritor's right to rely on goodwill as capital, deemed the bank to be in a dangerous position with respect to capital reserves, and required it to enter into the 1988 MOU which raised its total capital requirements."[638] The COFC also found that the 1988 MOU, which Meritor entered into under duress, led directly to the "downward spiral" of the bank and forced the sale of its most valuable assets.[639] Rejecting all the Government's arguments to the contrary, the Federal Circuit found that the COFC committed no clear error in its interpretation of the 1982 MOU and "affirm[ed] the ruling that the FDIC breached the 1982 MOU when it required and continued to require Meritor to increase its primary capital," causing Meritor's downward spiral and the sale of its most valuable assets.[640]

631. *Id.* at 808 (internal quotations omitted).
632. *Id.*
633. 365 F.3d 1333 (Fed. Cir. 2004).
634. *Slattery*, 583 F.3d at 809–12.
635. *Id.* at 812.
636. *Id.*
637. *Id.*
638. *Id.* at 812–13.
639. *Id.* at 813.
640. *Id.* at 813–16.

As for damages, the Federal Circuit affirmed the COFC's $371,733,059 award on most grounds.[641] The Government appealed several aspects of the damages award; Slattery cross-appealed, arguing that the trial court should have accepted the alternative damages theory because the FDIC avoided $696 million in liquidation costs.[642]

The Federal Circuit affirmed the COFC's award of $276 million in "lost value" damages based on Meritor's market valuation immediately prior to the Government's first breach, which the COFC characterized as a form of expectancy damages.[643] This valuation was based on a complicated damages model presented by Slattery's damages expert, which the COFC accepted.[644] On appeal, the Government did not challenge the lost value theory, but did challenge the calculations and how the amount was reached.[645] The Federal Circuit found none of the Government's arguments persuasive and held that the Government failed to establish any offsetting events that would have reduced the damages award.[646] The Federal Circuit also affirmed the COFC's use of a "control premium" in valuation of the entire bank as a unit, finding that the Government had not "shown clear error in the court's resolution of competing expert testimony to rule that lost value is reasonably measured by the value of the entire franchise including a control premium."[647]

The Federal Circuit reversed the COFC's decision on two grounds. First, the court found "that the trial court erred in awarding both the net cost of entering the contract, and the value lost due to the breach."[648] While these two grounds of recovery did not technically "overlap," the $67 million in restitution damages was incompatible with the lost value award and thus had to be reversed.[649] Likewise, because the lost value award had been affirmed, the Federal Circuit reversed as duplicative the COFC's award of $28 million in "wounded bank" damages—an assessment of the costs Meritor incurred in trying to sell major assets in order to comply with the increases in capital requirements.[650] Finally, the court denied Slattery's cross

641. *Id.* at 816–25.
642. *Id.* at 816.
643. *Id.* at 816–18.
644. *Id.* at 816.
645. *Id.* at 817.
646. *Id.* at 817–18.
647. *Id.* at 819.
648. *Id.* at 820.
649. *Id.*
650. *Id.* at 820–21 (an issue both parties agreed upon).

appeal for damages equivalent to the savings achieved by the FDIC in preventing Western's liquidation by its merger with Meritor.[651]

Judge Gajarsa dissented from the majority's decision, arguing that the FDIC qualifies as a NAFI under Federal Circuit precedent and, therefore, the case should have been remanded to the COFC with instructions to dismiss for lack of jurisdiction.[652]

D. Republic Savings Bank, F.S.B. v. United States[653]

In *Republic Savings Bank, F.S.B. v. United States*, in an attempt to save nearly $30 million, the Government solicited a takeover of two failing thrifts: Citizens Federal Savings and Loan Association of Matteson, Illinois ("Citizens") and Fireside Federal Savings and Loan Association of Cicero, Illinois ("Fireside").[654] Douglas Crocker and Robert Bobb won the right to purchase Citizens and Fireside and formed Republic Holding Company, Inc. (RHC) to do so, with MCB Financial Group, Inc. (MCB) as the holding company's sole shareholder.[655] Meadows Resources, Inc. and a voting trust controlled by Crocker and Bobb owned MCB equally.[656]

On August 30, 1985, RHC purchased Citizens and Fireside and merged them together to form Republic Savings Bank F.S.B (RSB).[657] Through various agreements with the Bank Board, the investors provided $17 million in capital and the Government contributed an additional $3 million to bring RSB's total capital to $20 million.[658] Under these agreements, Meadows, MCB and RHC—the plaintiffs—promised to keep RSB's net worth above certain levels, while the Government promised to allow RSB to use the "purchase method" of accounting that would permit RSB to apply the goodwill created by the transaction to satisfy regulatory capital requirements.[659]

When Congress passed FIRREA in 1989, new capital rules eventually led to RSB being seized by the Government.[660] Despite RSB's compliance with the capital standards outlined in its agreement with the Government, the Resolution Trust Corporation (RTC) took control of the thrift on June 5, 1992, when RSB could not

651. *Id.* at 821–24.
652. *Id.* at 829–32.
653. 584 F.3d 1369 (Fed. Cir. 2009).
654. *Id.* at 1372.
655. *Id.* at 1371–72.
656. *Id.* at 1372.
657. *Id.*
658. *Id.*
659. *Id.* (internal quotations omitted).
660. *Id.* at 1372–73.

comply with the new capital standards imposed by the OTS pursuant to FIRREA.[661] RTC subsequently sold RSB to Regency Savings Bank for $926,000—of which only $284,940.71 remained after the Government paid administrative fees associated with the receivership.[662] The FDIC, which at this point was administering the receivership, paid the remainder to Meadows as the final distribution of the receivership.[663]

The plaintiffs—Meadows, MCB, and RHC—brought suit in June 1992 alleging, among other things, breach of contract based on RSB's inability to count its goodwill towards its capital requirements following the passage of FIRREA, and seeking $17 million in restitution for its capital contribution and $926,000 in "profit" based on what the Government was paid for RSB.[664] The COFC granted summary judgment in favor of the plaintiffs and awarded them $14,641,059.29 in damages, consisting of the cash contribution minus the $3 million contributed by the Government and the difference between the price paid to the Government for RSB and the remainder already paid to Meadows.[665]

The Government appealed the COFC's damages award arguing, among other things, that the Plaintiffs' alleged $17 million capitalization contribution actually amounted to no more than $2.235 million and that it was error for the COFC to award restitution based on the $926,000 sale premium.[666] Plaintiffs cross appealed, arguing that the COFC should not have offset its award by the $3 million Government contribution.[667]

In denying the Government's appeal of the $14 million dollar restitution award based on the Plaintiffs' initial pledge contribution (as offset by the Government's $3 million contribution), the court rejected all of the Government's arguments that the COFC had overstated the value of the contribution.[668] The Government first argued that the initial $17 million cash contribution pledged by the plaintiffs, consisting of $5 million in equity in Bellamah Community Development (a real estate company owned by Meadows and MCB) and a $12 million dollar earnings preference on BCD's future

661. *Id.*
662. *Id.* at 1373.
663. *Id.*
664. *Id.*
665. *Id.*
666. *Id.*
667. *Id.*
668. *Id.* at 1376.

earnings, "were so ephemeral as to be incapable of valuation."[669] In rejecting this argument, the court found that the contribution the Plaintiffs had pledged were "real assets with an objective worth and [were] therefore clearly recoverable."[670] The court also rejected the Government's argument that the restitution should be limited to the value of the income the assets pledged actually produced, as only $2.235 million from the $12 million earnings preference was ever collected, finding that the assets needed to be valued at the time of contracting.[671]

The court did reverse the COFC, however, on the award of restitution based on the premium related to the sale of RSB, finding that the COFC could not "unwind Plaintiffs' initial capital contributions without also unwinding their claim to RSB's sale premium."[672] The court noted that the Plaintiffs had not, and could not tie their efforts in turning the failing thrifts into a profitable entity to the sale premium.[673] Thus, the court found that "[t]he sale premium was not a valid basis for restitution and the court erred by including the net sale premium in Plaintiffs' award."[674]

The court also agreed with the Government that the COFC improperly failed to offset the damages award by $4.287 million in tax benefits the Plaintiffs received as a result of purchasing the thrifts.[675] The Plaintiffs did not contest that they had benefited from this tax advantage, but argued that it should not reduce their award because the benefit did not come directly from any contractual requirement.[676] The court concluded that while not specifically incorporated into the contract, "[t]he tax benefits were not some remote consequence of the contract in which the government took no part . . . . [They] were [actually] a crucial motivating force behind their willingness to take over the two failing thrifts."[677] Furthermore, the Plaintiffs had to specifically request that the Bank Board make a special authorization to allow them to take advantage of the tax benefits.[678] Thus, the court found that "[u]nder these circumstances,

669. *Id.* at 1374.
670. *Id.* at 1375.
671. *Id.*
672. *Id.* at 1377.
673. *Id.*
674. *Id.*
675. *Id.*
676. *Id.* at 1378.
677. *Id.*
678. *Id.*

we cannot conclude that the government's actions were irrelevant to the tax benefit."[679]

Finally, the court rejected Plaintiff's argument that the trial court erred by offsetting their restitution by the $3 million the Government had contributed.[680] The court reasoned that all the Plaintiffs, including RSB (who was the direct beneficiary of the $3 million cash contribution), benefited directly or indirectly from the contribution and thus should not be allowed to reap this benefit twice through the award of restitution damages.[681]

E. Carolina Power & Light Co. v. United States[682]

Carolina Power & Light Co. v. United States arose out of the Government's breach of its numerous contracts with domestic nuclear utilities to store high-level nuclear waste (HLW) and SNF.[683] The Plaintiffs, Carolina Power & Light Company and Florida Power Corporation, collectively referred to by the court as "Progress Energy," operated five nuclear reactors at four power plants in the South.[684] Progress Energy had entered into a contract with the Department of Energy (DOE) under which DOE was to take title and dispose of Progress Energy's HLW and SNF in exchange for Progress Energy paying a one-time charge and quarterly fees.[685] This contract was one of many "Standard Contract[s]" DOE had entered into with various nuclear utilities under the Nuclear Waste Policy Act of 1982.[686]

Under the Standard Contract, no fixed rate at which DOE would accept and dispose of waste was stated.[687] Instead, the DOE was required to issue annual capacity reports (ACRs) and annual acceptance priority rankings (APRs) to which the utilities were required to submit a delivery commitment schedule (DCS) to identify the SNF ready for delivery sixty-three months after the DCS submission.[688] The Federal Circuit has previously referred to this process as the acceptance capacity schedule (ACS) process.[689]

679. *Id.*
680. *Id.* at 1379.
681. *Id.*
682. 573 F.3d 1271 (Fed. Cir. 2009).
683. *Id.* at 1273.
684. *Id.*
685. *Id.*
686. *Id.*
687. *Id.*
688. *Id.*
689. *Id.*

Under the contract, DOE was required to begin to take control of Progress Energy's waste no later than January 31, 1998.[690] DOE failed to do so and as of December 31, 2005, despite Progress Energy paying more than $660 million in fees, the DOE had not collected any waste from Progress Energy.[691] Based on the DOE's clear breach, Progress Energy sued in the Court of Federal Claims where the DOE did not dispute liability, only the quantum of damages.[692]

The COFC accepted the utilities' damages model and awarded Progress Energy $82,789,289 in damages.[693] The main issue in the COFC was what acceptance rate should be applied to ascertain the actual expenses incurred by Progress Energy because of DOE's breach.[694] As noted above, the Standard Contract did not include a rate at which DOE would accept and dispose of SNF and HLW.[695] The COFC issued its opinion on June 19, 2008, in which it applied the DOE's 2004 ACR, meaning that it would apply an acceptance rate of 3,000 metric tons of uranium (MTUs), as the measure of DOE's performance absent the breach.[696] In applying the 2004 ACR as the proper standard, the COFC rejected the Government's theory that the 1991 ACS should have been applied, which would have dictated an analysis based on an acceptance rate of only 900 MTUs and would have resulted in damages of $47,755,006.[697] The COFC also awarded Progress Energy $4,231,710 in overhead costs, rejecting the Government's argument that these costs were not recoverable because they were fixed costs not proximately related to the breach.[698] Less than two months after the COFC's decision, the Federal Circuit issued its opinion in *Pacific Gas & Electric Co. v. United States*,[699] in which the court established the June 1987 ACS as the appropriate SNF acceptance rate to be applied in determining damages—a rate neither party had advocated in *Carolina Power*.[700]

On appeal, the Federal Circuit vacated the COFC's judgment based on the precedent in *Pacific Gas*.[701] First, the court explained that it did not accept the 1991 ACS as the proper measure of the parties'

690. *Id.*
691. *Id.*
692. *Id.*
693. *Id.* at 1274.
694. *Id.*
695. *Id.*
696. *Id.*
697. *Id.*
698. *Id.*
699. 536 F.3d 1282 (Fed. Cir. 2008).
700. 573 F.3d at 1274.
701. *Id.*

intended rate of contractual performance because the 1991 ACS had been influenced by "linkage requirements" of the Nuclear Waste Policy Amendments Act of 1987 that had rendered the Government's full performance unlikely.[702] Accordingly, the court had previously selected the 1987 ACS "as the best metric to gauge the parties' contractual intent" because this rate was developed prior to the imposition of the linkage requirements and thus better reflected the rate at a time when all parties realistically believed that the DOE would accept SNF/HLW on time.[703]

The Federal Circuit also rejected the Government's assertions that remand was inappropriate because Progress Energy had waived its right to prove damages under the 1987 rates by not addressing those rates at trial, or, alternatively, that Progress Energy should be restricted to relying on only the evidence already in the trial record: the Government's evidence related to the 1991 rates.[704] The court found that it would not penalize Progress Energy for pursuing its litigation in good faith and not being able to predict or await the outcome of related litigation.[705] The court also rejected Progress Energy's argument that remand was unnecessary because the difference in the 1987 and 2004 rates was immaterial.[706] Because it concluded that testing Progress Energy's theory was a "profoundly factual endeavor," the Federal Circuit determined it was not in a position to make factual findings even if it "may well be a matter that can be tested by fairly simple arithmetic."[707]

Finally, the court affirmed the COFC's damages award related to overhead and indirect costs Progress Energy incurred as a result of DOE's breach.[708] The two costs at issue were "stores overhead," which consisted primarily of warehousing costs and related labor, and indirect overhead expenses, which consisted mainly of the salaries of managers and financial employees.[709] The Federal Circuit affirmed the COFC's holding that Progress Energy should be allowed to recover these overhead and indirect costs because the record showed that Progress Energy had diverted warehousing and management resources to mitigation projects.[710] The court also rejected the

702. *Id.* at 1274–75.
703. *Id.* at 1275.
704. *Id.*
705. *Id.*
706. *Id.* at 1275–76.
707. *Id.* at 1276.
708. *Id.* at 1277.
709. *Id.* at 1276.
710. *Id.* at 1276–77.

Government's assertion that this recovery should be offset by costs Progress Energy avoided by not having to load DOE's "transportation casks" upon arrival to accept SNF.[711] The Federal Circuit found that these costs had only been deferred and not avoided, and that eventually Progress Energy would have to pay these costs when DOE finally collected SNF in the future.[712]

CONCLUSION

The Federal Circuit's 2009 Government Contracts opinions reflect significant developments in the court's jurisprudence, particularly with respect to (1) bid protests; (2) Government counterclaims alleging fraud; (3) contract interpretation; and (4) cost accounting. The court's decisions in each of these areas will have a substantial impact on Government Contracts litigation for the foreseeable future.

First, although the number of precedential bid protest opinions is noteworthy in and of itself,[713] the court's emphasis on the need for judicial restraint and deference to procuring officials will likely influence the COFC's approach to these lawsuits for some time to come. Litigants can expect that the COFC will redouble its efforts to avoid "second-guessing" an agency's procurement decisions and will disturb those decisions only where there truly is no rational basis for the agency's actions.[714] Moreover, if the COFC decisions issued in the first seven months after *Axiom* are any indication, the Federal Circuit likely will address the issue of supplementing the administrative record again soon. Despite the Federal Circuit's clear direction that the contemporaneous record should be supplemented only under narrow conditions, COFC judges have continued to liberally permit additional material into the record and to rely on those documents in their decisions. It seems only a matter of time before the Federal Circuit steps in to re-emphasize that *Esch* is not the law in the Federal Circuit and to re-iterate that APA record review should actually be based on the record—not on documents created by the parties after a protest is filed.[715]

Second, the importance of the court's decision in *Daewoo* cannot be understated. Although the facts of that case are unique and not likely to be repeated, several "lessons learned" should be considered

711. *Id.* at 1277.
712. *Id.*
713. *See supra* notes 4–8 and accompanying text.
714. Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1371 (Fed. Cir. 2009).
715. *See supra* text accompanying notes 50–66.

by any contractor preparing large, complex claims against the Government:

- Contractors must understand the CDA's certification requirement and what it means for a claim to be made in "good faith."[716] Section 605 of the CDA requires that "the amount requested accurately reflects the contract adjustment for which [the contractor] believes the government is liable."[717] *Daewoo* underscores the importance of identifying the causal connection between entitlement and quantum, and avoiding communications that could be characterized as a negotiating ploy or "horsetrading." Moreover, section 605 also requires that the "the supporting data [be] accurate and complete to the best of [the contractor's] knowledge and belief."[718] Contractors must not only get their "facts straight" before submitting claims to the Government, but judgmental factors in an estimate of claim quantum must be both reasonable and consistently applied.
- Contractors should avoid "total cost/total delay" claims unless the facts justify such an approach. The Federal Circuit's primary criticism of Daewoo's claim was that it improperly "assumed that the government was responsible for each day of [delay], without even considering whether there was any contractor-caused delay or delay for which the government was not responsible."[719] A total cost approach is permissible only when (1) it is impracticable to prove actual losses directly, (2) the contractor's bid was reasonable, (3) the contractor's actual costs are reasonable, and (4) responsibility for the contractor's added costs belong entirely to the Government.[720] Where total cost/delay claims (or "modified" total cost/delay claims) are pursued, contractors should document their effort to identify and adjust for contractor-caused delays and inefficiencies.

716. 41 U.S.C. § 605(c) (2006).
717. *Id.*
718. *Id.*
719. Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332, 1338 (Fed. Cir. 2009).
720. *See* Hi-Shear Tech. Corp. v. United States, 356 F.3d 1335, 1343 (Fed. Cir. 2004).

- Contractors should obtain input from outside experts in preparing large and/or complex claims. Although the CDA was intended to avoid trial-like processes and "to induce resolution of more contract disputes by negotiation prior to litigation,"[721] the Federal Circuit criticized Daewoo for not using outside experts to prepare its claim and observed that Daewoo's trial experts "treated the certified claim computation as essentially worthless, did not utilize it, and did not even bother to understand it."[722] Even where good faith/fraud are not at issue, experienced counsel and cost experts should be consulted to brainstorm approaches to quantum and/or review the claim's calculations. At the very least, this will avoid situations where the contractor must take a different approach to quantum in litigation than was taken in the claim.

Third, the Federal Circuit's "plain meaning" approach to contract interpretation will continue to be a source of frustration to litigants that base their claims on extrinsic evidence of the parties' intent. As the court's decision in *Bell BCI* shows, the Federal Circuit will enforce what it believes is the plain, unambiguous meaning of a contract provision, even where the opposing party is unable to produce any evidence that it shared that interpretation when it executed the contract, or where that plain meaning would contradict well-established legal rules—e.g., that a general release does not operate to extinguish claims which could not have been known at the time the release was executed.[723] As it pertains to the interpretation of release clauses in particular, *Bell BCI* may have the unfortunate effect of complicating the negotiation of change orders, as contractors struggle to comprehend just what they may be giving up when they agree to a specific adjustment for a given modification.

721. S. REP. NO. 95-1118, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5235.
722. *Daewoo Eng'g*, 557 F.3d at 1338.
723. *See, e.g.*, Augustine Med., Inc. v. Progressive Dynamics, Inc., 194 F.3d 1367, 1373 (Fed. Cir. 1999) (quoting Johnson, Drake & Piper, Inc. v. United States, 531 F.2d 1037, 1047 (Ct. Cl. 1976)) ("The rule for releases is that . . . a general release bars claims based on events occurring prior to the date of the release"). "The test is not the state of the plaintiff's knowledge, but the availability of information which, properly digested, could reasonably be expected to acquaint plaintiff with the existence of a reimbursable cost." *Johnson, Drake, & Piper*, 531 F.2d at 1048 (quoting U.S. Rubber Co. v. United States, 160 F. Supp. 492, 496 (Ct. Cl. 1958)). It follows that "the critical inquiry in determining whether a release operates on a particular claim or right is whether the claim or right can be said to exist such that a party is capable of waiving or preserving it." 76 C.J.S. *Release* § 76 (2007).

Finally, contracting parties, the Boards, and the COFC will have their work cut out for them applying the two-part test for recovery of defense and settlement costs established in *Tecom*.[724] Unquestionably, the Federal Circuit faced a serious dilemma in that appeal—on the one hand, the Government should not reimburse contractors for settling meritorious sexual harassment cases, while on the other hand, the Government should not force contractors to defend meritless cases and incur allowable costs that exceed the cost of settlement. The Federal Circuit appears to have determined that the former goal is paramount, to be accomplished at the expense of the latter.

In practice, *Tecom* adds several layers of complexity to what previously was a pure business decision for government contractors. When faced with third-party litigation, the settlement calculus now must include the possibility that a future contracting officer will determine that the plaintiff had more than a "very little likelihood of success on the merits" and disallow the defense and settlement costs. As such, many contractors may be inclined to seek pre-approval from the contracting officer before settling third-party litigation. Yet such communications likely would require counsel to reveal their assessment of the litigation's merits and could risk jeopardizing attorney-client privilege or disclosing attorney work product to the government. In the end, *Tecom* illustrates why some issues are better dealt with through the regulatory process, namely a Federal Acquisition Regulation rule-making, which is better equipped to take practical ramifications into account to create a framework that both protects the government from egregious charges and provides a reasonable, predictable standard for contractors.

724. 566 F.3d 1037, 1041 (Fed. Cir. 2009).