AREA SUMMARIES

SURVEY OF GOVERNMENT CONTRACT CASES IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT: 1997 IN REVIEW

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INTRODUCTION

The United States Court of Appeals for the Federal Circuit decided 108 government contract cases in 1997.[1] In comparison, the Federal Circuit issued twenty-three government contract decisions in 1996,[2]

1. Although this figure at first seems high, it represents the total number of government contract cases decided by the Federal Circuit, including those cases from the Court of Federal Claims and the various Boards of Contract Appeals. These figures were originally obtained from the Clerk's Office of the Federal Circuit. They were then compared with the figures available at the test Web site <http://www.sittingbull.com/fedcir/97.htm>.

2. *See* C. Stanley Dees & David A. Churchill, *Government Contract Cases in the United States Court of Appeals for the Federal Circuit: 1996 in Review*, 46 AM. U. L. REV. 1807, 1808 (1997).

fifty-seven in 1995,[3] twenty-two in 1994,[4] forty in 1993,[5] twenty-one in 1992,[6] thirty-one in 1991,[7] and more than thirty decisions in 1990.[8] Thirty of the 108 decisions in 1997 were appeals from the Court of Federal Claims;[9] seventy-six came from the Boards of Contract Appeals.[10] By a substantial margin, most (forty-nine) of the appeals from agency boards were from the Armed Services Board of Contract

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3. *See* Thomas F. Williamson et al., *Government Contract Cases in the United States Court of Appeals for the Federal Circuit: 1995 in Review*, 45 AM. U. L. REV. 1657, 1658 (1996).

4. *See* David R. Johnson et al., *A Survey of Government Contract Cases Decided by the United States Court of Appeals for the Federal Circuit in 1994*, 44 AM. U. L. REV. 2115, 2116 (1995).

5. *See* Richard B. Clifford, Jr. et al., *Government Contract Cases Before the United States Court of Appeals for the Federal Circuit*, 43 AM. U. L. REV. 1417, 1418 (1994).

6. *See* Victor J. Zupa & Brian J. Siebel, *Government Contracts: 1992 Analysis and Summary*, 42 AM. U. L. REV. 1109, 1110 (1993).

7. *See* Lynda Troutman O'Sullivan & Martin P. Willard, *Government Contracts: 1991 Analysis and Summary*, 41 AM. U. L. REV. 911, 912 (1992).

8. *See* Giovanna M. Cinelli, *The United States Court of Appeals for the Federal Circuit: Government Contracts 1990 Summary*, 40 AM. U. L. REV. 1117, 1118 (1991).

9. *See* Bareback Kraft AB & Empresa Nacional Del Uranio S.A. v. United States, 121 F.3d 1475 (Fed. Cir. 1997); Neal & Co. v. United States, 121 F.3d 683 (Fed. Cir. 1997); New Valley Corp. v. United States, 119 F.3d 1576 (Fed. Cir. 1997); National Sur. Corp. v. United States, 118 F.3d 1542 (Fed. Cir. 1997); Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569 (Fed. Cir. 1997); San Carlos Irrigation & Drainage Dist. v. United States, 111 F.3d 1557 (Fed. Cir. 1997); Massachusetts Bay Transp. Auth. v. United States, 109 F.3d 746 (Fed. Cir. 1997); United Int'l Investigative Serv. v. United States, 109 F.3d 734 (Fed. Cir. 1997); National Leased Hous. Ass'n v. United States; 105 F.3d 1423 (Fed. Cir. 1997); Trauma Serv. Group v. United States, 104 F.3d 1321 (Fed. Cir. 1997); Total Med. Management v. United States, 104 F.3d 1314 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 156 (1997); Courthouse Square Dev. Corp. v. United States No. 97-5025, 1997 U.S. App. LEXIS 35421 (Fed. Cir. Nov. 25, 1997) (unpublished table decision); Azure v. United States, No. 96-5054, 1997 U.S. App. LEXIS 29365 (Fed. Cir. Oct. 24, 1997) (unpublished table decision); Day & Zimmerman Serv. v. United States, No. 97-5147, 1997 U.S. App. LEXIS 31815 (Fed. Cir. Oct. 15, 1997) (unpublished table decision); Brother's Cleaning Serv. v. United States, No. 97-5109, 1997 U.S. App. LEXIS 28027 (Fed. Cir. Sept. 24, 1997) (unpublished table decision); Ampetrol, Inc. v. United States, No. 97-5078, 1997 U.S. App. LEXIS 23872 (Fed. Cir. Aug. 20, 1997) (unpublished table decision); K & S Constr. v. United States, No. 97-5029, 1997 U.S. App. LEXIS 22474 (Fed. Cir. Aug. 7, 1997); Roy v. United States, No. 97-5073, 1997 U.S. App. LEXIS 21684 (Fed. Cir. July 10, 1997) (unpublished table decision); Hubsch Industrieanlagen Spezialbau, Gmbh v. United States, No. 96-5119, 1997 U.S. App. LEXIS 15004 (Fed. Cir. June 20, 1997) (unpublished table decision); St. Paul Fire & Marine Ins. Co. v. United States, No. 96-5129, 1997 U.S. App. LEXIS 20350 (Fed. Cir. June 12, 1997) (unpublished table decision); Athens Gardens Ltd. v. United States No. 95-5135, 1997 U.S. App. LEXIS 16941 (Fed. Cir. May 30, 1997) (unpublished table decision); First Interstate Bank of Billings v. United States, No. 96-5105, 1997 U.S. App. LEXIS 12062 (Fed. Cir. May 27, 1997) (unpublished table decision); Heathman, Inc. v. United States, No. 96-5032, 1997 U.S. App. LEXIS 17641 (Fed. Cir. May 13, 1997) (unpublished table decision); Desciose v. United States, No. 96-5072, 1997 U.S. App. LEXIS 6921 (Fed. Cir. Apr. 9, 1997) (unpublished table decision); Hydro Eng'g, Inc. v. United States, No. 97-5024, 1997 U.S. App. LEXIS 10012 (Fed. Cir. Apr. 8, 1997) (unpublished table decision); Seville Constr., Inc. v. United States, No. 96-5101, 1997 U.S. App. LEXIS 5155 (Fed. Cir. Mar. 13, 1997) (unpublished table decision); KMS Fusion, Inc. v. United States, No. 96-5117, 1997 U.S. App. LEXIS 4833 (Fed. Cir. Mar. 6, 1997) (unpublished table decision); Amertex Enters. v. United States, No. 96-5070, 1997 U.S. App. LEXIS 9915 (Fed. Cir. Feb. 24, 1997) (unpublished table decision), *cert. denied*, 118 S. Ct. 851 (1998); American Sports Kids Ass'n v. United States, No. 97-5016, 1997 U.S. App. LEXIS 1329 (Fed. Cir. Jan. 10, 1997) (unpublished table decision).

10. *See infra* notes 11-18 (listing government contract cases before agency boards of contract appeals).

Appeals ("ASBCA"),[11] while fourteen came from the General Services Board of Contract Appeals ("GSBCA"),[12] three from the Corps of En-

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11. *See* ITT Fed. Servs. Corp. v. Widnall, 132 F.3d 1448 (Fed. Cir. 1997); AAA Eng'g & Drafting, Inc. v. Widnall, 129 F.3d 602 (Fed. Cir. 1997); Cessna Aircraft Co. v. Dalton, 126 F.3d 1442 (Fed. Cir. 1997); Motorola, Inc. v. West, 125 F.3d 1470 (Fed. Cir. 1997); Whittaker Elec. Sys. v. Dalton, 124 F.3d 1443 (Fed. Cir. 1997); Dalton v. Southwest Marine, Inc., 120 F.3d 1249 (Fed. Cir. 1997); Ingalls Shipbuilding, Inc. v. Dalton, 119 F.3d 972 (Fed. Cir. 1997); Delta Constr. Co. v. Widnall, 114 F.3d 1206 (Fed. Cir. 1997); Lockheed Corp. v. Widnall, 113 F.3d 1225 (Fed. Cir. 1997); Rockwell Int'l Corp. v. Widnall, 109 F.3d 1579 (Fed. Cir. 1997); Lockheed Martin IR Imaging Sys., Inc. v. West, 108 F.3d 319 (Fed. Cir. 1997); Advanced Materials, Inc. v. Perry, 108 F.3d 307 (Fed. Cir. 1997); Burnside-Ott Aviation Training Ctr. v. Dalton, 107 F.3d 854 (Fed. Cir. 1997); Satellite Elec. Co. v. Dalton, 105 F.3d 1418 (Fed. Cir. 1997); Precision Std., Inc. v. Widnall, No. 97-1096, 1997 U.S. App. LEXIS 36490 (Fed. Cir. Dec. 30, 1997); Black River Ltd. v. West, 1997 U.S. App. LEXIS 38119 (Fed. Cir. Dec. 22, 1997); Saf Eng'g, Inc. v. Cohen, No. 97-1579, 1997 U.S. App. LEXIS 36193 (Fed. Cir. Dec. 4, 1997); Triax Pacific, Inc. v. West, No. 97-1067, 1997 U.S. App LEXIS 33963 (Fed. Cir. Dec. 3, 1997); Titan Corp. v. West, No. 97-1299, 1997 U.S. App. LEXIS 33333 (Fed. Cir. Nov. 24, 1997); McCoy, Inc. v. West, No. 96-1228, 1997 U.S. App. LEXIS 35422 (Fed. Cir. Nov. 24, 1997); Caesar Constr. Co. v. West, No. 97-1312, 1997 U.S. App. LEXIS 33302 (Fed. Cir. Nov. 10, 1997); Mac's Cleaning & Repair Serv. v. Dalton, No. 97-1293, 1997 U.S. App. LEXIS 30468 (Fed. Cir. Nov. 7, 1997); D.E.W., Inc. v. West, No. 97-1142, 1997 LEXIS 32209 (Fed. Cir. Oct. 8, 1997) (unpublished table decision); Swanson Group v. West, No. 98-1040, 1997 U.S. App. LEXIS 28003 (Fed. Cir. Sept. 22, 1997); West v. Red Samm Constr., Inc., No. 97-1032, 1997 LEXIS 22466 (Fed. Cir. Aug. 25, 1997) (unpublished table decision); Aydin Corp. v. Widnall, No. 96-1267, 1997 U.S. App. LEXIS 18959 (Fed. Cir. July 24, 1997); Coastal Gov't Servs., Inc. v. Cohen, No. 97-1359, 1997 U.S. App. LEXIS 22553 (Fed. Cir. July 21, 1997); McDonnell Douglas Elecs. Sys. Co. v. West, No. 96-1517, 1997 U.S. App. LEXIS 21661 (Fed. Cir. July 18, 1997); Gramoll Constr. Co. v. West, No. 96-1216, 1997 U.S. App. LEXIS 19827 (Fed. Cir. July 15, 1997); Planned Sys. Int'l Inc. v. Widnall, No. 97-1319, 1997 U.S. App. LEXIS 19185 (Fed. Cir. June 26, 1997) (unpublished table decision); Pizzagalli Constr. Co. v. Dalton, No. 97-1336, 1997 U.S. App. LEXIS 19177 (Fed. Cir. June 20, 1997) (unpublished table decision); Monde Constr. Co. v. Dalton, No. 96-1505, 1997 LEXIS 14822 (Fed. Cir. June 19, 1997) (unpublished table decision); McRae Indus. v. Cohen, No. 97-1034, 1997 LEXIS 15551 (Fed. Cir. June 9, 1997) (unpublished table decision); Honig Indus. Diamond Wheel, Inc. v. West, No. 96-1241, 1997 LEXIS 12659 (Fed. Cir. May 21, 1997) (unpublished table decision); Rosinka Joint Venture v. Albright, No. 97-1216, 1997 U.S. App. LEXIS 12256 (Fed. Cir. Apr. 29, 1997) (unpublished table decision); Rehabilitation Servs. v. Perry, No. 96-1530, 1997 LEXIS 12257 (Fed. Cir. Apr. 28, 1997) (unpublished table decision); Bath Iron Works Corp. v. Dalton, No. 96-1546, 1997 LEXIS 8569 (Fed. Cir. Apr. 25, 1997) (unpublished table decision); Phoenix Petroleum Co. v. Department of Defense, No. 96-1487, 1997 U.S. App. LEXIS 7575 (Fed. Cir. Apr. 11, 1997); Strand Hunt Constr., Inc. v. West, No. 96-1323, 1997 LEXIS 5424 (Fed. Cir. Mar. 21, 1997) (unpublished table decision); Union Boiler Works v. West, No. 96-1542, 1997 U.S. App. LEXIS 7688 (Fed. Cir. Mar. 20, 1997); Turner-Mak (JV) v. West, No. 96-1412, 1997 LEXIS 4857 (Fed. Cir. Feb. 25, 1997) (unpublished table decision); Dalton v. Gaffny Corp., No. 96-1331, 1997 LEXIS 2387 (Fed. Cir. Feb. 13, 1997) (unpublished table decision); Orbas & Assocs. v. Widnall, No. 96-1363, 1997 LEXIS 2658 (Fed. Cir. Feb. 10, 1997) (unpublished table decision); Tempo, Inc. v. West, No. 95-1429, 1997 LEXIS 2201 (Fed. Cir. Feb. 6, 1997) (unpublished table decision), *cert. denied*, U.S. LEXIS 6336 (Oct. 20, 1997); Libby Corp. v. Dalton, No. 96-1351, 1997 LEXIS 2043 (Fed. Cir. Jan 29, 1997) (unpublished table decision); GKS Inc. v. Perry, No. 96-1269, 1997 LEXIS 2042 (Fed. Cir. Jan. 29, 1997) (unpublished table decision); Contact Int'l, Inc. v. Widnall No. 96-1133, 1997 LEXIS 548 (Fed. Cir. Jan. 15, 1997) (unpublished table decision); International Gunnery Range Servs. v. Widnall, No. 94-1444, 1995 LEXIS 24158 (Fed. Cir. Aug. 24, 1995) (unpublished table decision).

12. *See* Levitt v. 7 World Trade Co., 135 F.3d 775 (Fed. Cir. 1998); Michael Weller, Inc. v. Bavasi, 132 F.3d 53 (Fed. Cir. 1997); Cafritz Co. v. Barram, 129 F.3d 134 (Fed. Cir. 1997); Ed A. Wilson, Inc. v. GSA, 126 F.3d 1406 (Fed. Cir. 1997); Barram v. KMS Dev. Co., 124 F.3d 224 (Fed. Cir. 1997); Digital Equip. Corp. v. Barram, 119 F.3d 16 (Fed. Cir. 1997); GDE Sys., Inc. v. GSA, 119 F.3d 16 (Fed. Cir. 1997) (unpublished table decision); Environmental Data v. GSA,

gineers Board of Contract Appeals ("ENGBCA"),[13] two from the Department of Agriculture Board of Contract Appeals ("AGBCA"),[14] three from the Postal Service Board of Contract Appeals ("PSBCA"),[15] two each from the Department of Veterans Affairs Board of Contract Appeals ("VABCA")[16] and the Department of Transportation Board of Contract Appeals ("TRANSBCA"),[17] and one from the Department of Interior Board of Contract Appeals ("DOIBCA").[18] The Federal Circuit reversed, in whole or in part, twenty-two percent of the lower-court decisions.[19] Furthermore, well over half (fifty-eight percent) of the decisions were nonprecedential.[20]

This Article presents an analysis of the significant 1997 precedential cases decided by the Federal Circuit as well as a summary of the more significant unpublished cases. A summary of the precedential cases spans Parts I-V. Part I presents the cases in which jurisdiction was the principal issue. Part II discusses the appeals dealing with the formation of contracts. Similarly, Part III examines the appeals concerning the administration of contracts. Part IV addresses cases involving cost and pricing issues. Part V analyzes the cases resolving issues dealing with damages. Part VI summarizes many of the significant unpublished decisions issued in 1997. In conclusion, the Article summarizes the one government contract case decided in 1997 by the United States Supreme Court. In addition, this section provides a summary overview of the most significant government

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119 F.3d 15 (Fed. Cir. 1997); GLR Constructors, Inc. v. West, 114 F.3d 1206 (Fed. Cir. 1997); Omni Contractors, Inc. v. Barram, 116 F.3d 1496 (Fed. Cir. 1997) (unpublished table decision); A. S. McGaughan Co. Inc. v. Barram, 113 F.3d 1256 (Fed. Cir. 1997) (unpublished table decision); 9th & D Joint Venture v. GSA, 108 F.3d 1394 (Fed. Cir. 1997) (unpublished table decision); Rincon Ctr. Assocs. v. Johnson, 108 F.3d 1393 (Fed. Cir. 1997) (unpublished table decision); L.A. Sys. v. West, 106 F.3d 426 (Fed. Cir. 1997).

13. *See* D. L. Braughler Co. v. West, 127 F.3d 1476 (Fed. Cir. 1997); ACMAT Corp. v. Rhode, No. 95-1466, 1997 U.S. App. LEXIS 31466 (Fed Cir. Nov. 10, 1997), *reh'g denied*, 1997 U.S. App. LEXIS 35661 (Fed. Cir. Dec. 8, 1997); Reddy-Buffaloes Pump, Inc. v. West, No. 96-1219, 1997 U.S. App. LEXIS 7657 (Fed. Cir. Apr. 7, 1997).

14. *See* LDG Timber Enters. v. Glickman, 114 F.3d 1140 (Fed. Cir. 1997), *cert. denied*, 1997 U.S. LEXIS 6078 (Oct. 14, 1997); PLB Grain Storage Corp. v. Glickman, No. 95-1169, 1997 U.S. App. LEXIS 17639 (Fed. Cir. May 12, 1997).

15. *See* Diamond Plaza, Inc. v. Runyon, No. 97-1395, 1997 U.S. App. LEXIS 31827 (Fed. Cir. Oct. 22, 1997); Roach v. Runyon, No. 97-1330, 1997 U.S. App. LEXIS 23874 (Fed. Cir. Aug. 20, 1997); Hendlish v. United States Postal Serv., No. 96-1474, 1997 U.S. App. LEXIS 7573 (Fed. Cir. Apr. 14, 1997).

16. *See* Penn Envtl. Control, Inc. v. Brown, No. 96-1289, 1997 U.S. App. LEXIS 11114 (Fed. Cir. May 14, 1997); Conner Bros. Constr. Co. v. Brown, Nos. 95-1336, 96-1154, 1997 U.S. App. LEXIS 10100 (Fed. Cir. Apr. 30, 1997).

17. *See* T. Brown Constructors, Inc. v. Peña, 132 F.3d 724 (Fed. Cir. 1997); Dick Enters., Inc. v. Reno, No. 97-1019, 1997 U.S. App. LEXIS 15548 (Fed. Cir. June 5, 1997).

18. *See* Phoenix Control Sys., Inc. v. Babbitt, 113 F.3d 1255 (Fed. Cir. 1997), *cert. denied*, 1997 U.S. LEXIS 5522 (Oct. 6, 1997).

19. *See generally http://www.sittingbull.com/fedcir/97.htm.* (visited Aug. 1, 1998).

20. *See id.*

contract decisions issued by the Federal Circuit in 1997. Finally, in a prospective, the Article provides some comments and recommendations for government contract practitioners before the Federal Circuit.

I. JURISDICTION

To obtain administrative redress before a Board of Contract Appeals ("BCA") or judicial redress before the Court of Federal Claims ("CFC") for a government contract matter, either the administrative board or the court must have legal authority to adjudicate the dispute. In other words, the court must have jurisdiction.[21] In the realm of government procurement, however, there is a unique wrinkle to jurisdiction because the request for redress is against the United States Government, or more simply, against the United States.[22] Pursuant to the doctrine of sovereign immunity, the United States may not be sued unless it has specifically agreed to be subject to suit by statutory provision.[23] Accordingly, the Federal Circuit generally examines jurisdictional issues with much scrutiny.

A. Waiver of Sovereign Immunity

Since 1887, the Tucker Act has provided the statutory basis for jurisdiction to sue the government for any claim against the federal government to recover damages founded on the Constitution, a statute, a regulation, or an express or implied-in-fact contract.[24] For a suit in the CFC under the Tucker Act, the government has waived

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21. *See* United States v. Testan, 424 U.S. 392, 399-401 (1976) (stating that the Tucker Act merely confers jurisdiction upon the court, but does not create a substantive right against the United States).

22. *See* William R. Hartl, Note, *Sovereign Immunity: An Outdated Doctrine Faces Demise in a Changing Judicial Arena*, 69 N.D. L. REV. 401, 404-05 (1993) (discussing the role of sovereign immunity in American judicial history).

23. *See generally* ROBERT D. WATKINS, THE STATE AS A PARTY LITIGANT 7 (1927). As generally understood, sovereign immunity in the American tradition follows the English monarchial convention that the King can do no wrong. *Id.* The tenet behind the English theory maintained that, as the King created the courts and as the courts acted subject to the King, the King could not be subject to the courts. *See* William S. Holdsworth, *The History of Remedies Against the Crown*, 38 L. Q. REV. 141, 142 (1922).

24. In 1855, Congress first created a court in which a party could sue the United States based on contract claims. *See* Act of Feb. 24, 1855, ch. 1222, 10 Stat. 612 (1855) (creating the Court of Claims); *see also* 2 WILSON COWEN ET AL., THE UNITED STATES COURT OF CLAIMS: A HISTORY 2 (1979) (describing development of Court of Claims and its jurisdiction, one of the two predecessor courts of the Federal Circuit). In 1887, Congress passed the Tucker Act, which today still represents the statutory authorization to sue the United States for a contract claim. *See* The Tucker Act, ch. 359, 24 Stat. 505 (1887) ("[T]he Court of Claims shall have jurisdiction to hear and determine the following matters .... All claims founded upon ... any contract, expressed or implied, with the Government of the United States"); *see also* COWEN, *supra*, at 39-40 (discussing history of Tucker Act).

sovereign immunity and agreed to be sued in that forum.[25] However, the Tucker Act generally limits the CFC's jurisdiction to cases in which the court's judgments are paid from appropriated funds.[26]

In *Lee v. United States*,[27] the Federal Circuit considered the jurisdiction of the CFC over a claim that the government asserted inured from a nonappropriated fund instrumentality ("NAFI"). Megan Han Lee was a two-year-old child who was injured while under the care of the Family Child Care ("FCC") program of the United States Army.[28] Pursuant to the FCC program, Lee and her mother filed a complaint in district court against the individuals responsible for the injuries sustained by Lee, Sergeant and Mrs. Garner.[29] The Garners responded that the U.S. Army's Risk Management Program ("RIMP") was responsible for the damages pursuant to an insurance agreement under the FCC program.[30] The court rejected the defense and found the Garners liable for more than $700,000.[31]

The Garners subsequently assigned their rights under the RIMP to the Lees, and the Lees then brought suit in the CFC.[32] The government argued that the CFC lacked jurisdiction because the RIMP was a NAFI, but the court rejected this contention.[33] The CFC did, however, grant summary judgment to the government.[34]

On appeal, the Federal Circuit reconsidered the jurisdictional issue regarding the NAFI.[35] Although the court recognized that the RIMP was a NAFI, it also noted that, under the authority of National Defense Authorization Act of 1990 and 1991, the Department of Defense was authorized to use appropriated funds for military child care programs pursuant to the Military Child Care Act of 1989

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25. *See* 28 U.S.C. § 1491 (1994) (The Tucker Act).

26. *See* United States v. General Elec. Corp., 727 F.2d 1567, 1570 (Fed. Cir. 1984) (noting limitations on jurisdiction). "Appropriated funds" simply refer to funds that have been appropriated for disbursement by Congress. *See id.*

27. 124 F.3d 1291 (Fed. Cir. 1997).

28. *See id.* at 1292. At the time of the injury, Lee was under the care of Sgt. and Mrs. Boyce Garner. Mrs. Garner was a child care provider for the FCC program. *See id.*

29. *See id.* at 1293. While Mrs. Garner was away, Sgt. Garner was bathing Lee. He held the child in hot bathwater which resulted in injuries to the child. *See id.* Sgt. Garner was not authorized under the FCC program to care for children. *See id.*

30. *See id.*

31. *See id.* The insurance coverage under the RIMP included $500,000 per claim based on the death or injury of a child under the care of a FCC program provider. *See id.* (including portions of the Garners' statement of understanding).

32. *See id.*

33. *See id.* (indicating that CFC found the United States was not immune from suit on that ground).

34. *See id.* at 1294. The CFC granted summary judgment because "Sgt. Garner's criminal act was 'an intervening event' that caused the injury, 'thereby superseding [any] original negligence.'" *Id.* (internal citation omitted).

35. *See id.*

("MCCA").[36] Thus, because payments made to satisfy FCC claims may derive, at least in part, from appropriated funds, the Federal Circuit concluded that the RIMP was not entirely a NAFI.[37] Nevertheless, the government asserted that, because any payment to Lee would be based on a claim preceding the MCCA, the "bona fide needs" rule would render the MCCA inapplicable.[38] The Federal Circuit noted the relevance of the bona fide needs rule, but found the rule out of context for purposes of satisfying a judgment of the CFC.[39]

Explaining that any such judgment must be reimbursed by ongoing programs, the court held that the reimbursement provision of the Contract Disputes Act ("CDA") shifts the source of funds to current appropriations and thus renders the bona fide needs rule inapplicable.[40] It is worth noting that despite this rather lengthy jurisdictional analysis, the Federal Circuit still affirmed the CFC's ruling that the Lees were not entitled to recovery under the FCC program.[41]

In its motion for reconsideration, the government again contended that the CFC had no jurisdiction over a claim based on a NAFI.[42] In particular, the government alleged that the Federal Circuit had erred by referencing section 612(c) of the CDA because the

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36. *See id.* (citing the Military Child Care Act of 1989, 103 Stat. 1352, 1590, and acknowledging that the Department of Defense is authorized to use appropriated funds in this situation).

37. *See id.* at 1294, 1295. The court emphasized that "[t]he government acknowledges that if an agency is authorized to use both appropriated funds and nonappropriated funds to support its activities, the NAFI doctrine precluding Court of Federal Claims jurisdiction does not apply." *Id.* at 1294-95.

38. *See id.* at 1295. In regard to the FCC program, the "bona fide needs rule" provides that "any liability arising from an FCC insurance agreement may not be discharged with funds appropriated in a fiscal year other than the fiscal year in which the agreement was entered into and performed." *Id.*

39. *See id.* The court explained that "[t]he 'bona fide needs' rule stands for the proposition that appropriations for a particular year are to be obligated by an agency only to meet legitimate needs arising in the year of appropriation" and further noted that "the rule is intended to 'prevent agencies which do not have funds on hand for a particular purpose from committing the Government to make payments at some future time and thereby, in effect, coercing the Congress into making an appropriation to cover the commitment.'" *Id.* (quoting *Matter of GSA – Multiple Award Schedule Multiyear Contracting*, 63 COMP. GEN. 129, 130-31 (1983)).

40. *See id.* If a party recovers a claim for contract damages against the United States, the judgment is paid from the "judgment fund." *See generally* Lopez v. A.C. & S., Inc., 858 F.2d 712, 716 (Fed. Cir. 1988) (describing the general "judgment fund" from which contract damages are paid). According to the Contract Disputes Act, however, "'the agency whose appropriations were used for the contract' must reimburse the judgment fund either out of available funds or by obtaining additional appropriations to cover the reimbursement expense.'" *Lee*, 124 F.3d at 1295 (quoting 41 U.S.C. § 612(c)). The purpose of this reimbursement requirement is to induce the agency to resolve disputes. *See id.* (citing the legislative history of reimbursement requirement).

41. *See Lee*, 124 F.3d at 1297. As previously held by the CFC, the Federal Circuit found there was no liability under the FCC program resulting from the negligence of Mrs. Garner in allowing her husband, Sgt. Garner, to care for Lee. *See id.* at 1297.

42. *See* Lee v. United States, 129 F.3d 1482 (Fed. Cir. 1997).

contract at issue was not subject to the Act.[43] The Federal Circuit granted rehearing for the limited purpose of issuing a supplemental opinion, explaining that the CDA was indeed not applicable.[44] The court, however, denied the motion as to the jurisdictional issue.[45] Because the "judgment fund" is available to pay judgments awarded by the CFC, the court concluded that "[t]he government has not pointed us to any authority holding that the judgment fund could not be used to pay a judgment arising from a contract that the RIMP entered into before appropriated funds became available to support it."[46]

Therefore, in a significant limitation of its initial decision, the Federal Circuit specifically affirmed the jurisdiction of the CFC based on a very strict, and limited application of the NAFI exception to the Tucker Act.[47]

B. Claim as Jurisdictional Prerequisite

In *Reflectone, Inc. v. Dalton*,[48] the Federal Circuit explained that a final decision by a contracting officer on a claim is a prerequisite for jurisdiction before a BCA or in the CFC.[49] In so holding, the Federal Circuit overruled *Dawco Construction, Inc. v. United States*,[50] which established a dispute requirement for any claim submitted to a contracting officer.[51] The claim requirement persists, however, and includes "(1) a written demand, (2) seeking, as a matter of right,

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43. *See id.* at 1484.
44. *See id.* at 1483.
45. *See id.* at 1484.
46. *Id.*
47. *See id.* On reconsideration, the Federal Circuit noted: "[t]he 'non-appropriated fund instrumentality' exception to Tucker Act jurisdiction is a narrow one." *Id.* The court of appeals confirmed: "As our predecessor court explained, '[j]urisdiction under the Tucker Act must be exercised absent a firm indication from Congress that it intended to absolve the appropriated funds of the United States from liability' for acts of the alleged non-appropriated fund instrumentality." *Id.* (quoting L'Enfant Plaza Properties, Inc. v. United States, 668 F.2d 1211, 1212 (Ct. Cl. 1982)). The court then concluded: "'[t]he non-appropriated funds doctrine applies only if the activity was specifically intended to operate without using appropriated funds.'" *Id.* (quoting United States v. General Elec. Corp., 727 F.2d 1567, 1570 (Fed. Cir. 1984)).
48. 60 F.3d 1572, 1575 (Fed. Cir. 1995).
49. *See* 41 U.S.C. § 605(a) (1994) (stating that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision").
50. 930 F.2d 872 (Fed. Cir. 1991). The Federal Circuit overruled *Dawco* based on a belief that it improperly reasoned that a CDA claim, as defined by FAR 33.201, required the amount of the written demand to be in dispute. *See Reflectone*, 60 F.3d at 1575.
51. The court in *Dawco* believed that the FAR clearly "mandates that . . . a claim must seek payment of a sum certain as to which a dispute exists at the time of submission." *Dawco Constr., Inc.*, 930 F.2d at 878.

(3) the payment of money in a sum certain."[52] Thus, in many ways like the old dispute requirement, the claim requirement allows the government to entangle unwary contractors in a mass jurisdictional web.

In *D.L. Braughler Co. v. West*,[53] a contractor demonstrated that it is not only the government that attempts to use the claim requirements of *Reflectone* to its benefit. Braughler had contracted with the Army Corps of Engineers ("Corps") to perform remedial work on a dam in West Virginia.[54] During the performance of the contract, Braughler asserted that the Corps unreasonably delayed the approval of certain shop drawings.[55] Although the Corps had extended the term for contract performance, it refused to pay for the delay costs.[56]

Braughler subsequently submitted a certified claim to the resident engineer, who was the authorized representative of the contracting officer, but the resident engineer denied the claim and informed Braughler of his appeal rights.[57] Braughler then contacted the contracting officer, who also denied the claim and again informed Braughler of his appeal rights.[58] After Braughler failed to appeal within the allotted time,[59] the Corps requested that he close the contract.[60] Braughler refused, noting that he had not submitted a proper claim to the contracting officer, and therefore, the contracting officer's denial was not valid.[61] Braughler then requested that the contracting officer issue a final decision based on a "proper claim."[62] The contracting officer refused and Braughler brought suit before the ENGBCA.[63]

Before the ENGBCA, the Corps filed a motion to dismiss, arguing that Braughler had submitted an untimely appeal of the contracting officer's final decision.[64] The ENGBCA agreed with the Corps and

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52. *Reflectone*, 60 F.3d at 1575-76.
53. 127 F.3d 1476 (Fed. Cir. 1997).
54. *See id.* at 1477.
55. *See id.* at 1478.
56. *See id.* The Corps approved an extension of the term of the contract by 180 days. *See id.*
57. *See id.* Braughler had submitted a claim in the amount of $137,648.04. *See id.*
58. *See id.* at 1479.
59. Pursuant to the CDA, a contractor may appeal the final decision of a contracting officer to the respective board of contract appeals within ninety days or to the CFC within twelve months. *See* 41 U.S.C. § 606 (1994).
60. *See Braughler*, 127 F.3d at 1479.
61. *See id.* at 1479.
62. *See id.*
63. *See id.*
64. *See id.* (citing the Corps' argument that ENGBCA lacked jurisdiction because the appeal was untimely).

granted the motion.[65] As to Braughler's argument that he had not submitted a valid claim to the contracting officer, the Board stated that "it offends logic if [Braughler's] specific request for a [contracting officer's decision] following its certified claim [to the resident engineer] did not establish a CDA claim."[66] Braughler appealed the dismissal to the Federal Circuit.[67]

On appeal, Braughler argued that (1) the submission to the resident engineer did not constitute a claim submitted to the contracting officer and (2) that the submission of the same claim to the contracting officer was improper because it had a defective certification.[68] As to the latter, Braughler alleged that a proper certification required execution contemporaneous with the claim.[69]

The Federal Circuit agreed as to the first contention.[70] The court noted that because Braughler did not request that the claim submitted to the project engineer be forwarded to the contracting officer, the claim did not satisfy the requirements of the CDA.[71] The court, however, disagreed with Braughler's second argument.[72] In rejecting his argument, the court concluded that, because Braughler had not altered the claim between its submission to the project engineer and its submission to the contracting officer, no new certification was needed.[73] The court distinguished *Santa Fe Engineers, Inc. v. Garrett*,[74] noting that that case involved a claim that had been altered between the initial submission and a later submission.[75] Accordingly, the Fed-

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65. *See id.* (finding lack of jurisdiction due to failure to file timely appeal). If an appeal is not made, a contracting officer's decision "shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency." 41 U.S.C. § 605(b) (1994). Therefore, if an appeal is not made to the board within ninety days, the board has no jurisdiction. *See generally* Cosmic Constr. Co. v. United States, 697 F.2d 1389, 1390 (Fed. Cir. 1982) (discussing the ninety day limit).

66. *Braughler*, 127 F.3d at 1479.

67. *See id.*

68. *See id.* at 1481.

69. *See id.* (noting Braughler's arguments on appeal). For the relevant time period, although currently not a strict requirement, the CDA had also required that any claim to the contracting officer be "certified." *Id.* at 1480. The certification requirement mandated that the contractor "certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable." *Id.* (citing 41 U.S.C. § 605(c)(1) (1988)).

70. *See id.* at 1481.

71. *See id.* The Federal Circuit explained that "the letter [submitted to the project engineer] gave no indication that Braughler was seeking a final decision from the contracting officer, and the letter was not forwarded to the contracting officer." *Id.* at 1481-82.

72. *See id.* at 1482.

73. *See id.*

74. 991 F.2d 1579, 1583 (Fed. Cir. 1993).

75. *See Braughler*, 127 F.3d at 1482-83. The Federal Circuit explained: "[In *Santa Fe*] after making its claim submission, the contractor submitted additional supporting data for which it provided no certification, thus violating the requirement that 'to properly certify a claim a con-

eral Circuit affirmed the decision of the ENGBCA.

C. *Privity of Contract*

For jurisdiction over a government contract, privity of contract must exist between the party seeking jurisdiction and the United States.[76] In *National Leased Housing Ass'n v. United States*,[77] the Federal Circuit considered the scope of the privity of contract requirement. The National Leased Housing Association ("NLHA"), comprising of a group of developers and present and former owners of rental housing projects,[78] sued the United States in the CFC under section 8 of the United States Housing Act of 1937 ("USHA"),[79] which provides for government rent subsidies for low income individuals and families living in non-government-owned housing.[80] The members of the NLHA and the other plaintiffs had all entered into long-term Housing Assistance Payment contracts ("HAP contracts") to provide subsidized housing to low-income tenants pursuant to the USHA. Significantly, some plaintiffs had contracted with the Department of Housing and Urban Development ("HUD") directly, while other plaintiffs contracted directly with the local public housing agency ("PHA"), which was subject to other obligations.[81]

The USHA requires that the government make "automatic annual adjustments" ("AAAs") to the quantum of the rent based on "automatic annual adjustment factors" ("AAAFs").[82] Eventually, HUD realized that the AAAs were resulting in overvaluation of the rental housing projects and attempted to limit the AAAs based on the AAAFs by the use of comparability studies.[83] Before the CFC, the plaintiffs argued that these comparability studies were improper based on the Due Process Clause of the Constitution, the Administrative Procedures Act ("APA") and the Freedom of Information Act ("FOIA"),

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tractor must make a statement which simultaneously makes all the assertions required by' [the certification statute]." *Id.* at 1483 (quoting 41 U.S.C. § 605(c)(1) (1988)).

76. *See* United States v. Johnson Controls, Inc., 713 F.2d 1541, 1550 (Fed. Cir. 1983) (defining privity of contract as simply "evidence of the existence of some type of contract between the party and the United States"); JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 963 (2d ed. 1986) (describing privity of contract requirement for subcontractor claim).

77. 105 F.3d 1423 (Fed. Cir. 1997).

78. *See id.* at 1425. The plaintiffs in the case consisted of not only the membership of the NLHA but also 189 other individuals, who owned rental housing properties. *See id.*

79. 42 U.S.C. § 1437(f) (1994).

80. *See National Leased Housing Ass'n.*, 105 F.3d at 1425.

81. *See id.*

82. *See id.*

83. *See id.* at 1426 (describing HUD's attempts to bring contract rents back in line with comparable unassisted units).

and that use of such studies constituted a breach of contract.[84] The government, in contrast, argued that the CFC lacked jurisdiction over the plaintiffs who had contracted with the PHAs, absent a showing of privity of contract with the United States, and denied liability as to the other plaintiffs.[85] In a series of four decisions, the CFC ruled for the government.[86]

On appeal, the Federal Circuit addressed six issues from the four CFC decisions,[87] five of which concerned the contract dispute.[88] The Supreme Court had previously addressed many of these issues in *Cisneros v. Alpine Ridge Group*;[89] however, the Federal Circuit found no merit in the contract-based arguments.[90] The sixth issue involved privity of contract, namely, "whether the Court of Federal Claims had jurisdiction over those owners who entered into HAP contracts with

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84. *See id.* In at least one case, the Court of Appeals for the Ninth Circuit has ruled that the limitation of AAAs based on comparability studies was improper. *See* Rainier View Assocs. v. United States, 848 F.2d 988 (9th Cir. 1988) (holding that the limitation provision was a limitation on calculation of a formula employed to determine rent and not an independent basis for determining annual rent adjustments).

85. *See National Leased Housing Ass'n*, 105 F.3d at 1428-29.

86. *See* National Leased Housing Ass'n v. United States, 32 Fed. Cl. 762 (1995), *aff'd*, 105 F.3d 1423 (Fed. Cir. 1997) (NLHA IV); National Leased Housing Ass'n v. United States, 32 Fed. Cl. 454 (1994) (NLHA III) (holding that the court lacked jurisdiction to consider claims by plaintiffs who did not enter into HAP contracts directly with HUD and that the overall limitation provision in the HAP contract allows HUD to employ comparability studies to decrease contract rents to eliminate any material differences between rents charged for assisted and comparable unassisted units); National Leased Housing Ass'n v. United States, 24 Cl. Ct. 647 (1991) (NLHA II) (holding that court lacked jurisdiction over APA and FOIA claims except to extent that such claims involved a breach of contract and that pursuant to overall limitation provision, rent adjustments may not lead to differences in rents charged for comparable unassisted units); National Leased Housing Ass'n v. United States, 22 Cl. Ct. 649 (1991) (NLHA I) (holding that the provision of HUD Reform Act establishing a formula for calculating rent adjustments did not repeal CFC's jurisdiction under the Tucker Act over challenges to the calculation of rent adjustments and that the overall limitation provision of HAP contracts permitted HUD to use comparability studies and then modify the period rent adjustments accordingly).

87. *See National Leased Housing Ass'n IV*, 105 F.3d at 1430. The issues included:

> whether their due process rights were violated by the way the Government proceeded to make these periodic rent adjustments; (2) in making them, whether the Government was obligated to comply with the APA and FOIA; (3) whether the Government, under any theory of the contract provisions, in making an annual adjustment could lower rents below that of the preceding year; (4) whether the 'differences' that must be maintained under the proviso in section 1.8d of the contracts is measured in dollars or in a percentage; (5) the proper measure of damages for the Government's breaches; and (6) whether there is privity of contract with the Government for those who contracted through a PHA.

Id. The Federal Circuit addressed all but the fifth issue. *See id.*

88. *See id.*

89. 508 U.S. 10 (1993) (holding that respondents did not have contractual rights to formula-based rent adjustments and that comparability studies are permitted).

90. *See National Leased Housing Ass'n IV*, 105 F.3d at 1429-31 (citing the Supreme Court's holding that HUD's use of comparability studies was contractually authorized). The Federal Circuit also determined that no violation had occurred pertaining to the APA or the FOIA. *See id.* at 1431-33. In addition, the court concluded that HUD had properly computed the "initial difference" for purposes of the AAAF. *See id.* at 1434-35.

the PHAs rather than with HUD directly."[91] As grounds for jurisdiction over the PHA plaintiffs, appellants argued that the PHAs were "agents" of the United States and that the PHAs were third-party beneficiaries of the contracts between the PHAs and HUD.[92]

As to the agency argument, the Federal Circuit applied the same law used when subcontractors have privity of contract with the government[93] and concluded that the HAP contracts did not contain "the type of direct, unavoidable contractual liability necessary to trigger a waiver of sovereign immunity."[94] The court also rejected plaintiff's third-party beneficiary argument,[95] suggesting that if any party had claim to third-party beneficiary status, that party would be the group of low-income tenants.[96] Accordingly, the Federal Circuit affirmed the rulings of the CFC.[97]

In *National Surety Corp. v. United States*,[98] the Federal Circuit revisited the issue of whether a third-party beneficiary has justiciable rights in a government contract.[99] National Surety had issued a performance and payment bond to Dugdale Construction Company for a contract with the Department of Veteran Affairs ("VA") for the construction of a water distribution system.[100] The contract required that the VA retain ten percent of all progress payments, unless Dugdale submitted a project arrow diagram.[101] Although Dugdale never sub-

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91. *See id.* at 1435.

92. *See id.* at 1436.

93. For an "agent" to have privity of contract with the government (usually considered in terms of a subcontractor having privity of contract with the government), three prerequisites must be satisfied: (1) the prime contractor "act[ed] as a purchasing agent for the government; (2) the agency relationship between the government and the prime contractor was established by clear contractual consent; and (3) the contract stated that the government would be directly liable to the vendors for the purchase price." *Id.* (quoting United States v. Johnson Controls, Inc., 713 F.2d 1541, 1551 (Fed. Cir. 1983)). The Federal Circuit rejected plaintiffs' "agent" argument, explaining that the PHA plaintiffs could not satisfy the third prerequisite. *See id.*

94. *Id.* The Federal Circuit explained:

> In the case before us, the liability of the United States, if any, is contingent upon their acquiescence. This is not the direct, uncontested liability that is required to fit within this narrow exception to the general rule that the CFC does not have jurisdiction over sub-contractor's claims against the United States.

Id. at 1436-37.

95. *See id.* at 1436-37.

96. *See id.* at 1436.

97. *See id.* at 1437.

98. 118 F.3d 1542 (Fed. Cir. 1997).

99. For the benchmark case on the jurisdiction of a third-party beneficiary status under a government contract, see *Fireman's Fund Insurance Co. v. United States*, 909 F.2d 495, 499 (Fed. Cir. 1990) (explaining that in order to attain third-party beneficiary status, a third-party must establish the existence of an independent contract between the government and third-party).

100. *See National Sur. Corp.*, 118 F.3d at 1543.

101. *See id.* A project arrow diagram is a detailed schedule of the critical path for performing a contract. *See id.*

mitted the diagram, the VA released the retainage.[102] When Dugdale abandoned the project, National Surety completed the project pursuant to the bond and sued the VA for the wrongful release of the retainage.[103] When the VA refused to act on the claim, National Surety brought suit in the CFC. On a motion for summary judgment, the court concluded that National Surety was a third-party beneficiary of the contract.[104] Based on its third-party beneficiary status, the CFC held the government liable to National Surety for the release of the retainage.[105]

On appeal, the Federal Circuit considered the capacity of a surety to litigate a contract between a contractor and the government.[106] With a split panel, the majority affirmed but concluded that surety law, not third-party beneficiary law, controlled in the case.[107] Looking to the sources of surety law, the court of appeals referenced the *Restatement (Third) of Suretyship & Guarantee*, which states that the surety has a contractual right against the parties to the bond for any retainage provided in the bond.[108] On the basis of surety law, and subrogation,[109] the Federal Circuit affirmed the ruling of the CFC.[110] How-

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102. *See id.* at 1543-44.

103. *See id.* at 1544. The amount of the retainage claim totaled $126,333, less the liquidated damages. *See id.*

104. *See id.*

105. *See id.* The Federal Circuit awarded the amount that should have been retained, $97,742, plus interest. *See id.*

106. *See id.*

107. *See id.*; *see also* Balboa Ins. Co. v. United States, 775 F.2d 1158, 1160 (Fed. Cir. 1985) (noting that "suretyship is the result of a three-party agreement").

108. *See National Sur. Corp.*, 118 F.3d at 1544-45 (citing RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTEE § 37 (1996)).

109. *See id.* at 1544-48 The CFC had rejected a subrogation argument based on *Fireman's Fund*, which held that "the government as obligee owes no equitable duty to a surety . . . unless the surety notifies the government that the principle has defaulted under the bond." *Id.* at 1547. Courts have cited this requirement from *Fireman's Fund* as limiting the availability of subrogation by sureties. *See* Transamerica Premier Ins. Co. v. United States, 32 Fed. Cl. 308, 314 (1994) (rejecting defendant's argument that *Fireman's Fund* defines the rule applicable to all subrogation actions and holding that the decision in *Fireman's Fund* was intended to address the specifics of that case); National Sur. Corp. v. United States, 31 Fed. Cl. 565, 570-76 (1994) (stating that *Fireman's Fund* indicates that "the scope of the government's discretion to promote performance depends on the terms the government has contracted for"). However, the Federal Circuit majority in *National Surety* directly limits the effect of *Fireman's Fund*, by noting that "[t]he holding in *Fireman's Fund* did not change the rules of subrogation, but simply dealt with the rights and obligations of the parties on the conditions of the case." *National Sur. Corp.*, 118 F.3d at 1547. Thus, although National Surety did not notify the government of Dugdale's default, the Federal Circuit allowed the surety to avail itself of remedies through subrogation. *See id.* at 1547-48.

110. *See id.* at 1548. The government had argued that Dugdale and the VA had agreed to the release of the retainage and that the agreement resulted in a modification of the contract. *See id.* at 1546. The Federal Circuit rejected this contention, because the contract required a written change order for modifications, and no written change order was issued. *See id.* at 1546-47. The court emphasized: "Surety bonds are integral to the government contracting process . . . . Contract terms that provide security for the bonded performance can not be ignored,

ever, because subrogation entails equitable considerations, the court remanded the case to determine if any mitigating circumstances existed that should offset recovery.[111]

D. Contracting Away Jurisdiction.

As explained above, in order for the CFC or a board of contract appeals to have jurisdiction over a contract dispute between a contractor and the government, the contractor must generally first submit the contract dispute to the appropriate agency (via the contracting officer), after which the contractor may appeal an adverse decision pursuant to the CDA.[112] For the appeal stage, the CDA states that the findings of fact by the agency "shall not be binding in any subsequent proceeding"[113] and that the subsequent proceeding "shall proceed de novo in accordance with the rules of the appropriate court."[114]

In *Burnside-Ott Aviation Training Center v. Dalton*,[115] the Federal Circuit considered the scope of a contractor's rights to appeal an agency decision under the CDA. Burnside-Ott had entered into a cost-plus-award-fee ("CPAF") contract with the Navy for aircraft maintenance, repair, and overhaul at six naval air stations.[116] The CPAF contract provided that Burnside-Ott would receive all its costs plus an award fee based on performance, but the contract failed to specify the manner for computing the fee.[117] During the performance of the contract, the Navy computed the fee amounts based on a performance conversion chart, but Burnside-Ott argued that the Navy had to

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waived, or modified without consideration of the surety's interests." *Id.* at 1547; *see also Decisions in Brief*, 68 Fed. Cont. Rep. 166, 166 (August 18, 1997) (citing the opinion for the proposition that "the surety bond embodies the contract principle that any material change in the bonded contract that increases the surety's risk or obligation without the surety's consent affects the surety relationship").

111. *See National Sur. Corp.*, 118 F.3d at 1548. In the dissent, Chief Judge (now Senior Judge) Archer asserted that the majority had confused two areas of the law, subrogation and discharge. *See id.* at 1548-49 (Archer, C.J., dissenting). With regard to subrogation, Chief Judge Archer argued that there is indeed a requirement that surety give notice before a liability may arise, thus advocating the *Fireman's Fund* rule. *See id.* at 1550-51. With regard to discharge, Chief Judge Archer contended that the government had effectively waived the requirement of a progress arrow diagram. *See id.* at 1552-53. It should be noted that the dispute among the members of this panel over the *Fireman's Fund* rule may present an issue eventually requiring resolution by an en banc proceeding.

112. *See* Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1994) (setting out requirements for filing complaints and seeking ADR, judicial review of decisions, and payment of claims).

113. *See id.* § 605(a).

114. *See id.* § 609(a)(3).

115. 107 F.3d 854 (Fed. Cir. 1997).

116. *See id.* at 856.

117. *See id.*

award a fee based on a one-to-one ratio.[118] The Navy refused, and Burnside-Ott appealed.[119]

Before the ASBCA, the government argued that no jurisdiction existed over the dispute, because the CPAF contract specified that the fee award "is not subject to the 'DISPUTES' clause."[120] In contrast, Burnside-Ott asserted that a contract clause could not destroy jurisdiction under the CDA and contended further that the Board had to review the dispute under the CDA's de novo standard of review.[121] The ASBCA rejected both positions and held that it had jurisdiction, but concluded that it would review the dispute under the arbitrary and capricious standard of review.[122] Based on that standard, the ASBCA denied the claim.[123]

On appeal to the Federal Circuit, the government seemingly withdrew its jurisdictional argument.[124] Further, the government contended that the Board indeed had *de novo* review of the dispute and sought a ruling on the merits pursuant to that standard of review.[125] Nevertheless, because parties cannot consent to jurisdiction, the Federal Circuit considered the jurisdictional issue.[126] In so doing, the court of appeals concluded that contracting parties may not agree to avoid the jurisdiction of the CDA: "Thus, any attempt to deprive the Board of power to hear a contract dispute that otherwise falls under the CDA conflicts with the normal *de novo* review mandated by the CDA and subverts the purpose of the CDA."[127]

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118. *See id.* Under a 1-to-1 calculation, the award fee would range from zero to 100 percent of the award pool, as determined by the spread of performance ratings of zero to 100; thus, a performance rating of ten would result in a award fee of ten percent of the award pool. *See id.* at 856-57. Burnside-Ott had received performance rating of 93.65 but only received 84.15 percent of the available award pool. *See id.* at 857.

119. *See Burnside-Ott Aviation Training Ctr.*, ASBCA No. 43,184, 96-1 B.C.A. ¶ 28,102 (Dec. 14, 1995).

120. *Burnside-Ott Aviation Training Ctr.*, 107 F.3d at 856 (quoting FAR 16.404-2(a)). Contract clause H-21 stated the award fee would be determined according to FAR 16.404-2(a), which states that "[t]he amount of the award fee to be paid is determined by the Government's judgmental evaluation of the contractor's performance in terms of the criteria stated in the contract. This determination is made unilaterally by the Government and is not subject to the Disputes clause." *Id.* (quoting FAR 16.404-2(a)).

121. *See id.* at 857.

122. *See id.* (explaining that ASBCA adopted the Wunderlich Act standard of review for instances in which parties seem to have contracted away their full CDA *de novo* review rights).

123. *See id.*

124. *See id.* at 858. The court noted that, while the government asserted a jurisdictional argument in its brief, the government no longer maintained the argument during oral argument before the court. *See id.*

125. *See id.*

126. *See id.*

127. *Id.* at 858; *see also* Michael W. Clancy, *Contract Disputes Act Jurisdiction: Contract Clause Does Not Divest ASBCA of Jurisdiction Over Award Fee Determination*, 7 FED. CIR. B.J. 77, 78 (1997) (commenting that contract provisions cannot remove appeals jurisdiction of boards such as ASBCA). The Federal Circuit also considered a related jurisdictional argument in *Emerald*

After deciding the jurisdictional issue, the Federal Circuit considered the question of which standard of review to apply: *de novo* or arbitrary and capricious.[128] The court determined that both applied, but because the contract had made the fee award final, the contract required deference to the fee award decision, except in the instance of arbitrary and capricious conduct.[129] Based on this standard of review, which the ASBCA had applied (albeit for the wrong reasons), the Federal Circuit found that the Board had ruled properly because the contract granted the government unilateral discretion in the determination of the award fee and because no evidence existed that the agency had acted arbitrarily or capriciously in computing the fee.[130] Accordingly, the Federal Circuit affirmed the ASBCA's ruling.[131]

E. Venue

In government procurement cases, the venue or forum issue frequently arises if the government argues that one of two fora has jurisdiction.[132] If a case is brought in the wrong forum, there is no jurisdiction for that court or board to adjudicate the issue.[133] In the most frequent (and frustrating) of these circumstances, the government plays a game of "jurisdictional ping-pong" between the district court and the CFC.[134] *National Center for Manufacturing Sciences v.*

Maintenance, Inc. v. United States, 925 F.2d 1425 (Fed. Cir. 1991). In that case, the Federal Circuit had determined that the CDA did not apply to labor disputes covered by the Davis-Beacon Act. *See Burnside-OH Aviation Training Ctr.*, 107 F.3d at 859. The Federal Circuit explained: "[i]t is certainly true that a specific act of Congress may trump a more general act of Congress, as in *Emerald Maintenance*." *Id.* However, because no other Act of Congress trumped the CPAF contract, the Federal Circuit determined that *Emerald Maintenance* did not apply. *See id.*; *see also Contract Provision Cannot Deprive Board of Jurisdiction*, GOV'T CONT. REP., May 7, 1997, at 1 ("According to the court, although it was true that a specific act of Congress could 'trump' a more general act, such as the CDA, in this case, the contract provision depriving the court of jurisdiction was not a matter of statute primacy.").

128. *See Burnside-OH Aviation Training Ctr.*, 107 F.3d at 859.

129. *See id.* at 859-60. The Federal Circuit recognized that the Board had given deference to the agency's decision based on analogous cases, but found error in this analysis. *See id.* at 859. Instead, the court noted that the contract determined the proper standard of review. *See id.* at 860.

130. *See id.* at 860.

131. *See id.* (holding that Board's deference to award fee determination, although erroneous, did not warrant reversal).

132. *See* CIBINIC & NASH, *supra* note 76, at 1003 (describing venue issue with regard to government procurement issues).

133. *See* Consolidated Edison Co. v. O'Leary, 117 F.3d 538, 541 (Fed. Cir. 1997) (holding that the Federal Circuit Court does indeed have jurisdiction over cases arising under the Economic Stabilization Act).

134. *See, e.g.*, Hulsey v. United States, 28 Fed. Cl. 75, 77 (1993) (sympathizing with plaintiffs while refusing to extend its jurisdiction); Doko Farms v. United States, 21 Cl. Ct. 696, 699 (1990), *rev'd*, 956 F.2d 1136 (Fed. Cir. 1992) (finding district court erred in accepting jurisdiction after determining that suit was time barred); American Lifestyle Homes, Inc. v. United

United States[135] illustrates this all too common government litigation tactic. National Center for Manufacturing Sciences ("NCMS") entered into a cooperative agreement with the Air Force for a research and development project.[136] Under the agreement, although the government's share totaled $40 million, only $24,125,000 was allotted for award.[137] When the Air Force refused to distribute the remaining $15,875,000, NCMS sued in federal district court based on the authority of the Department of Defense Appropriations Act for Fiscal Year 1994.[138] The Air Force moved to dismiss the complaint for lack of jurisdiction, because the suit constituted a claim against the government in excess of $10,000.[139] The district court granted the motion, transferring the suit to the CFC.[140]

On appeal to the Federal Circuit, both parties seemed to agree that the CFC had jurisdiction over the suit.[141] In fact, the government even supported jurisdiction on the ground that a claim based on the Appropriations Act constituted a suit seeking monetary relief under a money-mandating statute, thus placing the claim within the jurisdiction of the CFC.[142] The Federal Circuit, however, recognized that if it granted jurisdiction, the government fully intended to present a contrary argument on remand. The argument on remand would be made pursuant to a motion for summary judgment based on the failure to state a claim, asserting that the Appropriations Act is not a money-mandating statute.[143] Pointing out the possibility of creating a "jurisprudential Flying Dutchman,"[144] the Federal Circuit quickly resolved that the CFC lacked jurisdiction over the suit.[145] Reasoning

States, 17 Cl. Ct. 711, 716 (1989) (explaining that justice warrants a retransfer to district court if CFC lacks jurisdiction).

135. 114 F.3d 196 (Fed. Cir. 1997).

136. *See id.* at 198.

137. *See id.*

138. *See id.* at 197-98. The amended complaint cited four counts: (1) mandamus, pursuant to 28 U.S.C. § 1361; (2) declaratory judgment, pursuant to 28 U.S.C. § 2201; (3) judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706; and (4) specific performance. *See id.* at 198.

139. *See id.* at 198. Under the Tucker Act, the CFC has exclusive jurisdiction over all claims against the government in excess of $10,000. *See* 28 U.S.C. § 1491 (1994).

140. *See National Ctr. for Mfg. Sciences*, 114 F.3d at 198. The district court transferred the case pursuant to the federal transfer statute, 28 U.S.C. § 1631. *See id.*

141. *See id.* at 199 (focusing on two possible obstacles to district court review). As described herein with regard to *Federal Deposit Insurance Corp. v. Maco Bancorp, Inc.*, although interlocutory rulings are generally not appealable, the Federal Circuit has jurisdiction over a transfer order made under 28 U.S.C. § 1631 pursuant to 28 U.S.C. § 1292(d)(4)(A). *See infra* notes 160-70 and accompanying text.

142. *See National Ctr. for Mfg. Sciences*, 114 F.3d at 199.

143. *See id.*

144. *See id.* If the CFC granted the motion for summary judgment, then NCMS would have to return to the district court and begin suit once again in that forum. *See id.*

145. *See id.* at 198. The Federal Circuit noted that the first three counts of the complaint

that an injunction would be necessary to effect a remedy under the Appropriations Act, the court held that the complaint was not seeking a "naked money judgment."[146] Notably, despite the favorable ruling for the government, the Federal Circuit provided a strong commentary on the government's distinctive and unusual litigation tactic regarding jurisdiction: "[N]othing is more wasteful than litigation about where to litigate, especially when all the options are courts within the same legal system that will apply the same law."[147]

Not surprisingly, such aggressive litigation tactics by the government are not limited merely to suits involving the CFC. For example, *Dalton v. Southwest Marine, Inc.*,[148] illustrates how this tactic is also used in cases before the BCAs. Northwest Marine had contracted with the Navy to repair the *USS Duluth*.[149] After performance of the contract, Northwest Marine filed for bankruptcy and was subsequently acquired by Southwest Marine.[150] The Navy later determined that it had overpaid Northwest Marine approximately $2.2 million, based on certain debt concessions pursuant to the acquisition by Southwest Marine.[151] Southwest Marine appealed this overpayment decision to the ASBCA, and the ASBCA granted summary judgment in favor of Southwest Marine.[152]

On appeal, however, the government asserted the issue of jurisdiction, arguing that only a district court has jurisdiction over a maritime contract.[153] The Federal Circuit concluded that there was no question that the contract was maritime, but proceeded to analyze whether a transfer to the district court was proper.[154] As an initial matter, the Federal Circuit determined that such a maritime case could properly be transferred from a court of appeals to a district court.[155]

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were not contract claims and were thus outside the jurisdiction of the court. *See id.* As for the last count, pertaining to specific performance, the Federal Circuit noted that the CFC lacked authority to grant such a remedy against the government. *See id.*

146. *See id.* at 201. The Federal Circuit noted that due to restrictions on allocation and use, it "seems reasonably clear that a simple money judgment issued by the Court of Federal Claims would not be an appropriate remedy." *Id.*

147. *Id.* at 197 (quoting Bowen v. Massachusetts, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting)).

148. 120 F.3d 1249 (Fed. Cir. 1997).

149. *See id.* at 1249.

150. *See id.* at 1249-50.

151. *See id.* at 1250.

152. *See id.*

153. *See id.* The government argued that under 28 U.S.C. § 1631, the matter should be transferred to district court for want of jurisdiction. *See id.*

154. *See id.*

155. *See id.* The Federal Circuit emphasized that "[t]he language of section 1631 draws no distinction between civil actions and appeals or between district courts and courts of appeal." *Id.*

The Federal Circuit next considered Southwest Marine's argument concerning the two-year statute of limitations under the Suits in Admiralty Act ("SIAA").[156] Southwest Marine argued that, if the Federal Circuit granted the transfer to the district court, the two-year statute of limitations would bar the claim under the CDA.[157] The Federal Circuit disagreed, noting that the contract claim arose under the CDA and that a transfer of the CDA claim to the district court would be consistent with the SIAA.[158] Significantly, the Federal Circuit explained that the two-year statute of limitations under the SIAA would not apply to claims brought under the CDA, stating that any other interpretation would turn the CDA "on its head."[159] Accordingly, the Federal Circuit granted the motion to transfer the case to the district court.

As demonstrated in *National Center* and *Southwest Marine*, the Federal Circuit will apply the jurisdictional statutes, despite the seemingly unfair (and even unjust) efforts of the government to use these laws to its advantage. In contrast to many contractors, the government has relatively unlimited resources and can cause litigation to linger endlessly. Consequently, the only refuge available for the litigant is to ensure that any claim against the government is indeed brought in the proper forum.

Fortunately, however, all jurisdictional issues regarding venue are not based on government chicanery. In *Federal Deposit Insurance Corp. v. Maco Bancorp, Inc.*,[160] for example, the Federal Circuit considered whether the court of appeals has jurisdiction over an interlocutory ruling by a district court transferring a matter to the CFC. The FDIC sued Maco in district court, alleging breach of contract for failure to make good faith attempts to invest in and acquire a failing thrift savings bank.[161] Soon after the filing of this suit, Maco filed a suit in the CFC, asserting a "Winstar claim" for breach of contract and a tak-

156. *See id.* at 1250-51 (citing 46 U.S.C.A. App. § 745 (West Supp. 1997)). The Suits in Admiralty Act, section 5, 46 U.S.C.A. App. § 745 (West Supp. 1997) ("SIAA") applies to all maritime cases. *See id.*

157. *See id.* at 1250-51.

158. *See id.* at 1251.

159. *See id.* at 1252. The Federal Circuit stated:

> If the court were to hold that the Suits in Admiralty Act's two-year statute of limitations accrues at the time a dispute arises, a party receiving an adverse decision would almost always lose the opportunity to file a civil action while the case was winding its way though the required administrative process. Application of the limitations period in this manner would clearly be inconsistent with the Contract Disputes Act and its procedures allowing for and governing review of ASBCA decisions.

Id.; *see also CDA Rather Than Admiralty Act Statute of Limitations Governs Suits Involving Maritime Contract Disputes*, 39 GOV'T CONTRACTOR ¶ 546, at 14, 15 (Nov. 12, 1997).

160. 125 F.3d 1446 (Fed. Cir. 1997).

161. *See id.* at 1447.

ing.[162] Subsequently, Maco filed a motion to transfer the district court case to the CFC.[163] The district court granted the motion, basing its decision on comity and the orderly administration of justice.[164] The FDIC appealed the transfer order.[165]

On appeal, the Federal Circuit immediately examined its jurisdiction over the interlocutory transfer order, for which the court generally lacks jurisdiction.[166] The Federal Circuit explained that, only if the transfer were made under 28 U.S.C. § 1631, would the court of appeals have jurisdiction pursuant to 28 U.S.C. § 1292(d)(4)(A).[167] 28 U.S.C. § 1631 provides that "[w]henever a civil action is filed in a court, . . . and that court finds there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other court in which the action or appeal could have been brought."[168] However, because the district court granted the transfer for reasons of comity and the orderly administration of justice, and thus not for want of jurisdiction, the Federal Circuit concluded that the transfer was not made pursuant to § 1631.[169] Accordingly, the Federal Circuit dismissed the appeal, concluding that the

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162. *See id.* A "Winstar claim" describes a claim that certain provisions of the Financial Institution Reform, Recovery and Enforcement Act of 1989 ("FIRREA") effected a breach of contract or a constitutional taking of property. *See* United States v. Winstar, 518 U.S. 839, 870 (1996) (holding that government breached "goodwill" agreements when its regulatory agencies barred the use of special accounting provisions, which negatively affected the net worth and capital of three financial institutions, and further exacerbated this breach by seizing and liquidating, for regulatory non-compliance, thrifts that three financial institutions had acquired).

163. *See Maco Bancorp, Inc.*, 125 F.3d at 1447.

164. *See id.* ("considerations of comity and orderly administration of justice dictat[e] that only one court hear the cases."). The district court originally denied the motion to transfer, but on a motion for reconsideration, the district court agreed to the transfer. *See id.*

165. *See id.* It is unclear from the Federal Circuit decision whether the FDIC had agreed to the transfer order in the district court action. *See id.* If it had agreed to the transfer, however, then this case would again demonstrate the government's litigation tactic of playing "jurisdictional ping-pong" by agreeing to the transfer, and then after the transfer is made, appealing the transfer.

166. *See id.* The Federal Circuit explained that "[g]enerally, a transfer order is interlocutory and thus not immediately appealable, but appealable only incident to a final judgment in a case." *Id.*; *see also* Katz v. Lear Siegler, Inc., 909 F.2d 1459, 1460-61 (Fed. Cir. 1990) (stating that "change of venue is not an appealable action"), *cited in Maco Bancorp, Inc.*, 125 F.3d at 1447.

167. *See Maco Bancorp., Inc.*, 125 F.3d at 1447-48. As recognized by the Federal Circuit, 28 U.S.C. § 1292(d)(4)(A) provides:

> The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States . . . granting or denying, in whole or in part, a motion to transfer an action to the United States CFC under [28 U.S.C.] section 1631 . . . .

Id. at 1447.

168. 28 U.S.C. § 1631 (1994).

169. *See Maco Bancorp, Inc.*, 125 F.3d at 1448. The Federal Circuit explained, "because the district court was not purporting to transfer the case on the ground that it lacked jurisdiction, it was not acting pursuant to section 1631 and therefore there is no jurisdiction for this court to review the district court's decision at this juncture." *Id.*

change in venue order was not subject to an interlocutory appeal.[170]

F. Statute of Limitations

If a party seeks to pursue a claim after the statute of limitations has expired, the claim is considered time-barred and non-justiciable.[171] Thus, if a claim accrues outside the scope of the statute of limitations, there would be no jurisdiction for a court to adjudicate the issue.[172] In *Brown Park Estates-Fairfield Development Co. v. United States*,[173] the Federal Circuit considered a common case where the contractor waited too long to seek judicial redress.[174] Brown, along with a number of other plaintiff entities, owned and operated rental apartment facilities subsidized by contracts made pursuant to the Housing and Community Development Act of 1974[175] ("HCDA"), known as the "Section 8" program.[176] Under the HAP contracts, HUD provided rent subsidies for low-income persons who lived in privately-owned dwellings.[177] According to the HAP contracts, HUD was to adjust the rental rates at least on an annual basis.[178] However, Brown alleged that between 1986 and 1988 and again in 1991, HUD failed to make the proper rent adjustments.[179] In 1994, Brown brought suit in the CFC, alleging a breach of the HAP contracts.[180]

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170. *See id.* Although not specified by the district court, the Federal Circuit noted that the transfer was most likely made pursuant to either 28 U.S.C. § 1404(a), "for convenience of parties and witnesses," or 28 U.S.C. § 1406, to cure wrong venue. *See id.* (citing 28 U.S.C. §§ 1404, 1406 (1994)).

171. *See* Soriano v. United States, 352 U.S. 270, 273-74 (1957) (deciding that the statute creating the Court of Claims created a strict six-year limitation). The Federal Circuit has explained that the statute of limitations is an express limitation on the Tucker Act's waiver of sovereign immunity. *See* Hart v. United States, 910 F.2d 815, 817 (Fed. Cir. 1990) (holding that conditions to waive sovereign immunity must be strictly construed). Indeed, for claims before the CFC, "every claim of which the United States CFC has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (1994).

172. *See* 28 U.S.C. § 2501. For purposes of section 2501, a claim accrues within the meaning of the statute of limitations "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *See* Brighton Village Assocs. v. United States, 52 F.3d 1056, 1060 (Fed. Cir. 1995) (quoting Kinsey v. United States, 852 F.2d 556, 557 (Fed. Cir. 1988)).

173. 127 F.3d 1449 (Fed. Cir. 1997).

174. *See id.* at 1449-53.

175. Pub. L. No. 93-383, 88 Stat. 633, 653-67 (1974).

176. *See Brown*, 127 F.3d at 1450-51 (citing Pub. L. No. 93-383, 88 Stat. 633, 653-67 (1974)). The HCDA actually amended the United States Housing Act of 1937. *See id.* at 1450 (citing 42 U.S.C. § 1437(f) (1994)). The "Section 8" program involves a housing program "[f]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing." *Id.* (citing 42 U.S.C. § 1437(f)(a)).

177. *See id.* at 1451. The subsidies received under the Section 8 program were based on the rental price, which was based on fair market value as initially set by HUD. *See id.*

178. *See id.* (citing 42 U.S.C. § 1437(f)(c)(2)(A)).

179. *See id.* at 1453.

180. *See id.*

Before the CFC, the government moved to dismiss the suit on the ground that plaintiffs' claims had accrued more than six years prior to the filing of the suit.[181] Brown opposed the motion, arguing that its suit was proper under the continuing claims doctrine.[182] The CFC granted the motion to dismiss with the exception of the 1991 adjustment claim.[183]

In reviewing Brown's continuing claims doctrine argument, the court applied the two-part test described in *Polite v. United States*.[184] Applying this test, the court found that the claims were (1) not "entrusted to an administrative officer or tribunal for determination,"[185] and (2) indicative of the "exercise of expertise and discretion."[186] Accordingly, the CFC deemed the doctrine inapplicable.[187]

On appeal, Brown argued that the government had been under a continuing duty to make proper rent adjustments for the 1986-88 periods and the contracts were, therefore, subject to the continuing claims doctrine.[188] Under this theory, even though HUD made proper adjustments after 1988, the later rent adjustments were never proper because they were all based on erroneous adjustments during the 1986-88 periods.[189] The Federal Circuit rejected this analysis out of hand.[190] The court noted that for Brown to prevail, each alleged failure by HUD to make a proper rent adjustment had to give rise to a new claim.[191] Because the allegedly improper rent adjustments were all based on events that took place between 1986 and 1988 and that

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181. *See id.* For all plaintiffs who had contracted directly with HUD, the government argued that the suit was barred by the statute of limitations, citing 28 U.S.C. § 2501. *See id.* The government further demanded that, as the claims first arose in 1986, more than six years had passed since the basis for the claims occurred. *See id.* at 1454. In addition, for the one plaintiff who had contracted with a local entity, Stone Vista Apartments, the government argued that there was no privity of contract and, thus, no jurisdiction. *See id.* at 1453; *see also supra* notes 77-97 and accompanying text (discussing *National Leased Housing Association v. United States*).

182. *See Brown*, 127 F.3d at 1454. For a definition of the doctrine, see *infra* note 191.

183. *See id.* (stating that CFC found the statute of limitations to apply).

184. 24 Cl. Ct. 508, 510 (1991). The two-part *Polite* test provides that: "First, the subject matter of the claim must not be one which Congress has entrusted to an administrative officer or tribunal for a determination of claimant's eligibility for the pay sought. Second, the case should involve narrow factual issues and should not involve the exercise of expertise and discretion." *Brown*, 127 F.3d at 1454.

185. *Brown*, 127 F.3d at 1454.

186. *See id.*

187. *See id.* The CFC also dismissed the claim by Stone Vista, noting that there was no privity of contract and that it therefore lacked jurisdiction. *See id.*

188. *See id.* at 1455.

189. *See id.*

190. *See id.* Notably, the Federal Circuit did not reach the issue of the appeal by Stone Vista regarding privity of contract. *See id.*

191. *See id.* at 1456. In *Friedman v. United States*, 310 F.2d 381, 384-85 (Ct. Cl. 1962), the Court of Claims noted that the continuing claims doctrine allowed certain "periodic pay claims" to avoid the statute of limitations. *See Brown*, 127 F.3d at 1456 (citing *Friedman*, 310 F.2d at 384).

did not continue beyond February 1988, the court found no basis to apply the continuing claims doctrine.[192] Thus, because the suit was not filed until October, 1994, more than six years after the adjustments, the Federal Circuit concluded that the statute of limitations applied and affirmed the CFC's dismissal.[193]

In contrast to the above situation, sometimes the contractor attempts to benefit from the statute of limitations. Indeed, in *Motorola, Inc. v. West*,[194] a contractor attempted to use the statute of limitations to block a claim submitted by the government.[195] In the name of the prime contractor, Motorola, the subcontractor, Aydin Corporation ("Aydin"), appealed a price reduction based on a dispute over the computation methodology used for general and administrative ("G&A") expenses.[196] In 1986, the Defense Contract Audit Agency ("DCAA") audited a proposal by Aydin, in which Aydin had included a G&A rate of 45 percent.[197] Two years later, in 1988, the DCAA audited Aydin and, in 1991, issued an audit report reducing the allowable G&A rate from 45 percent to 24 percent,[198] resulting in a recommended price reduction of $933,787.[199] Although the contracting officer eventually reduced the recommended price reduction to $784,219,[200] Aydin appealed to the ASBCA, which affirmed the price reduction.[201]

On appeal to the Federal Circuit, Aydin asserted that either of two statutes of limitations barred the government's claim for a price reduction: (1) the statute of limitations at 28 U.S.C. § 2415(a) concerning actions for money damages brought by the United States or (2) the statute of limitations added by the Federal Acquisition Streamlining Act of 1994 ("FASA")[202] to the CDA.[203] The court re-

192. *See id.* at 1457. The Federal Circuit stated that "[a]s far as the six years prior to filing suit are concerned, appellants do not contend that HUD failed to make rent adjustments during those years." *Id.*

193. *See id.* at 1452, 1458-59 (stating that "claims arising from HUD's failure to make rent adjustments in earlier years . . . accrued when each such failure occurred").

194. 125 F.3d 1470 (Fed. Cir. 1997).

195. *See id.* at 1471.

196. *See id.* at 1471-72.

197. *See id.* at 1472. Aydin had submitted a subcontract proposal to Motorola pursuant to a Motorola contract with the Army. *See id.* In the proposal, Aydin refused to disclose its costs data, which included its G&A rate. *See id.*

198. *See id.*

199. *See id.* at 1472. The price reduction dealt with the facilities capital charge. *See id.* During the original audit, this charge had not been discovered, but following the subsequent audit, the charge was disallowed, resulting in the recommended price reduction. *See id.*

200. *See id.* The difference between the $993,787 recommended price reduction and the $784,219 price reduction involved a change in the baseline, which was computed by the contracting officer before imposing the actual price reduction. *See id.*

201. *See id.*

202. Pub. L. No. 103-355, 108 Stat. 3243 (1994) (setting the statute of limitations at 180

jected application of 28 U.S.C. § 2415(a), holding that a price reduction is not an "action for money damages."[204] The Federal Circuit also rejected application of the statute of limitations in the FASA, recognizing that the FAR mandates that the FASA statute of limitations only applies prospectively.[205] Thus, in the absence of any other rationale to challenge the price reduction, the Federal Circuit affirmed the ruling of the ASBCA.[206]

G. Finality

For the Federal Circuit to have jurisdiction over an appeal, the decision on which the appeal is based must be a final decision of the court below.[207] In *AAA Engineering & Drafting, Inc. v. Widnall*,[208] the Federal Circuit emphasized the requirement of finality, stating that a board ruling must be final both as to liability and damages before the appellate court can entertain jurisdiction.[209]

In *AAA Engineering*, AAA Engineering ("AAAE") had a service option contract with the Air Force to provide storage, maintenance, and processing of historical and negative files.[210] The contract required that AAAE develop a computerized negative storage system pursuant to certain technical specifications.[211] After performance of the contract, the Air Force paid the contract price in full.[212] Thereafter,

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days).

203. *See Motorola*, 125 F.3d at 1472-74.

204. *Id.* at 1473. The Federal Circuit explained: "[T]he challenged ["CDA"] action is not an 'action for money damages brought by the United States,' as expressly required by the statute. Instead, it is an administrative appeal by a contractor from a contracting officer's decision that the contractor owes the Government the amount of certain disallowed costs." *Id.* (citing S.E.R., Jobs for Progress, Inc. v. United States, 759 F.2d 1, 5 (Fed. Cir. 1985)).

205. *See id.* In resolving this issue, the Federal Circuit cited FAR 33.206(b): "The 6-year period [for a claim initiated against a contractor] shall not apply to contracts awarded prior to October 1, 1995." 48 C.F.R. § 33.206(b) (1996); *see also Following Up . . .*, 39 GOV'T CONTRACTOR ¶ 490, at 17 (Oct. 8, 1997) (reciting holding of Federal Circuit regarding statute of limitations and FASA).

206. *See Motorola*, 125 F.3d at 1474 (explaining that Federal Acquisition Streamlining Act's six-year statute of limitations did not apply retroactively and that Motorola did not satisfy obligations under the Truth in Negotiations Act to submit subcontractor's cost data).

207. *See* Flanagan v. United States, 465 U.S. 259, 263 (1984) (reversing the Court of Appeals because no jurisdiction existed before the final order). The doctrine of finality also applies to cases before the boards of contract appeals. *See* 28 U.S.C. § 1295(a)(10) (1994) (providing for appellate review "of an appeal from a final decision of an agency board of contract appeals . . .").

208. 129 F.3d 602 (Fed. Cir. 1997).

209. *See id.* at 605.

210. *See id.* at 602.

211. *See id.* The contract required that the storage system be compatible with the Air Force's Z-248 computer system and that the storage program be compatible with MS DOS, Word Star Professional Word Processing Software, and Dbase III (Database Management Software). *See id.*

212. *See id.* at 603. The contract price was $28,350. *See id.*

when AAAE did not receive the follow-on contract, the Air Force instructed AAAE to deliver the storage system to the new contractor.[213] AAAE refused and the Air Force had to send government personnel to pack and ship the equipment.[214] At that time, the Air Force discovered that the system did not meet the technical specifications defined in the prior contract and accordingly demanded a refund of the price of the system.[215] AAAE appealed, but the contracting officer denied the appeal, finding AAAE liable for $121,809.50.[216] Next, AAAE appealed to the ASBCA, which found AAAE liable and remanded the matter to the parties for negotiation of the quantum on damages.[217]

On appeal, the Federal Circuit considered its jurisdiction over a board decision for which a ruling on liability had issued but no ruling had been made as to damages.[218] Citing *Teller Environmental Systems, Inc. v. United States*,[219] the Federal Circuit held that if a contracting officer issues a decision based on both liability and quantum, an appeal cannot be final until adjudication of both the liability and the damages issues.[220] The court of appeals further explained:

> The doctrine of "finality," under the historical federal rule, has generally allowed appellate review only when a judgment has wholly disposed of a case, adjudicating all rights and ending the litigation on the merits. Thus a judgment encompassing both liability and damages, as a general rule, has been the prerequisite of appellate review.[221]

Observing that "[t]his case is on all fours with *Teller*," the Federal Circuit concluded that it had no jurisdiction over the appeal.[222] Notably, AAAE had argued that the court of appeals could consider the issue of the storage system separately from other segregable issues in the appeal, but the Federal Circuit specifically rejected this argu-

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213. *See id.*
214. *See id.*
215. *See id.* Instead of the Dbase program, AAAE used the Data Flex program, which was not only contrary to the contract but also incompatible with the Dbase program used by the Air Force. *See id.*
216. *See id.* Because the storage system was incompatible with the technical specifications, the Air Force had to contract for a replacement system. *See id.* The amount demanded by the Air Force also reflected the charges of shipping and moving the AAAE equipment to the new contractor. *See id.*
217. *See id.*
218. *See id.*
219. 802 F.2d 1385, 1388 (Fed. Cir. 1986) (holding that finality is satisfied "where a judgment has wholly disposed of a case").
220. *See AAA Eng'g*, 129 F.3d at 603.
221. *Id.* at 604 (citations omitted).
222. *See id.* (finding that the lack of finality defeated the court's jurisdiction).

ment.[223]

H. Dismissal or Summary Judgment

As discussed above, to establish jurisdiction of the CFC, a party must show compliance with the Tucker Act.[224] The government frequently responds to a claim brought under the Tucker Act by filing a motion to dismiss for either lack of jurisdiction under Rule 12(b)(1) of the Rules of the CFC ("RCFC") or for failure to state a claim under RCFC 12(b)(4).[225] On occasion, the CFC has summarily granted these motions in their entirety, a practice that has been criticized by the Federal Circuit.[226]

In *Trauma Service Group v. United States*,[227] the Federal Circuit reviewed yet another case from the CFC involving the grant of a motion to dismiss based alternatively on arguments of lack of jurisdiction and failure to state a claim.[228] Trauma Service Group ("TSG") had entered into a "Memorandum of Agreement" ("MOA") with the Winn Army Community Hospital ("WACH"), for the provision of certain health care services under the Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS").[229] The MOA specifically required that TSG provide "[t]wo physicians, one RN, one LPN, one appointment clerk/receptionist, one billing clerk, a Xerox machine and, office supplies during duty hours."[230] During the term of the MOA, TSG terminated the agreement and, thereafter, submitted a claim for reimbursement to the WACH.[231] TSG subsequently

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223. *See id.* at 604-05. In disposing of AAAE's segregability argument, the Federal Circuit concluded: "To [consider the issues separately] would suggest that the historical requirement of finality, expressly imposed by Congress, was subject to individual exception and judicial waiver." *Id.* at 605. Notably, the Federal Circuit explained that this rule of finality does not apply in certain circumstances, such as "those classes of cases in which Congress has created an explicit waiver to the finality rule such as, for example, appeals over orders 'granting, continuing, modifying, refusing or dissolving injunctions,' certified appeals, and appeals from judgments in patent infringement cases that are 'final except for an accounting.'" *Id.* (citations omitted).

224. *See generally* Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988) (asserting that an employee's claim that she was serving pursuant to a contract in the complaint would be enough to satisfy Tucker Act).

225. Rule 12(b)(1) of the Court of Federal Claims parallels Federal Rule of Civil Procedure 12(b)(1) (lack of jurisdiction), and Court of Federal Claims Rule 12(b)(4) parallels Federal Rule of Civil Procedure Rule 12(b)(6) (failure to state a claim upon which relief can be granted).

226. *See* Gould, Inc. v. United States, 67 F.3d 925, 931 (Fed. Cir. 1995) (warning that "[j]ustice delayed is indeed justice denied").

227. 104 F.3d 1321 (Fed. Cir. 1997).

228. *See id.* at 1324.

229. *See id.* at 1323.

230. *Id.* at 1324.

231. *See id.* The first MOA began on August 20, 1990, and expired on June 30, 1992. *See id.* The second MOA extended the terms of the MOA through September 30, 1994. *See id.* How-

sought to recover the costs associated with providing an x-ray technician, a position allegedly required by WACH under the MOA.[232] Before the CFC, the government moved to dismiss the case for lack of jurisdiction under RCFC 12(b)(1), or alternatively, failure to state a claim under RCFC 12(b)(4).[233] The CFC, however, granted the government's motion on *both* grounds.[234]

On appeal, the Federal Circuit quickly rejected the CFC's dismissal for lack of jurisdiction.[235] Citing *Spruill v. Merit Systems Protection Board*,[236] the Federal Circuit noted that "[a] well-pleaded allegation in the complaint is sufficient to overcome challenges to jurisdiction."[237] Because TSG had alleged a proper basis for subject matter jurisdiction, the court of appeals found the dismissal legally erroneous.[238]

The Federal Circuit found the dismissal for failure to state a claim to be proper.[239] The court noted that, to state a claim upon which relief could be granted, TSG had to allege either an express or implied-in-fact contract and a breach thereof. The court determined that TSG could allege neither.[240] With regard to the express contract, the Federal Circuit concluded that TSG could not allege a breach, and without a breach, the issue of a valid contract was moot.[241] The court further concluded that TSG could not allege the proper authority for an implied-in-fact contract.[242] Therefore, although the court found that the dismissal for lack of jurisdiction was indeed improper, it concluded that the dismissal for the failure to state a claim was proper and, accordingly, affirmed the CFC's ruling.[243]

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ever, on December 8, 1993, TSG instructed WACH that the MOA would terminate on March 8, 1994. *See id.*

232. *See id.* TSG sought to recover the costs of the x-ray technician for the years 1990 through 1993, for a total claim of $95,816.71. *See id.*

233. *See id.*

234. *See id.* (stating that court based its decision to dismiss on both lack of subject matter jurisdiction and failure to state a claim).

235. *See id.* at 1325.

236. 978 F.2d 679, 686 (Fed. Cir. 1992).

237. *Trauma Service*, 104 F.3d at 1325.

238. *See id.* (holding that TSG's allegation was sufficient to grant subject matter jurisdiction to CFC); *see also* Gould, Inc. v. United States, 67 F.3d 925, 929 (Fed. Cir. 1995) ("[t]he distinction between lack of jurisdiction and failure to state a claim upon which relief can be granted, is an important one: '[T]he court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief.'") (quoting Do-Well Mach. Shop, Inc. v. United States, 870 F.2d 637, 639-40 (Fed. Cir. 1989)) (citation omitted).

239. *See Trauma Service*, 104 F.3d at 1325.

240. *See id.*

241. *See id.* at 1325 (explaining that breach was not possible because TSG alleged no contractual obligations which defendant failed to perform).

242. *See id.* at 1325-27 (explaining that to establish implied-in-fact contract, a contractor must show that contract was entered into with an authorized agent of government).

243. *See id.* at 1328.

In *Total Medical Management, Inc. v. United States*,[244] the Federal Circuit reviewed a factually similar case in which the government had submitted a motion to dismiss for lack of jurisdiction or, alternatively, for failure to state a claim. Total Medical Management ("TMM") had entered into a "Memorandum of Understanding" ("MOU") with the Army for the provision of primary and pediatric care for Army dependents.[245] Although the MOU called for the Army to reimburse TMM for medical costs based on "75% of the current CHAMPUS prevailing rate,"[246] the Army only compensated TMM based on the prevailing rates as listed in the Medicare Economic Index (MEI).[247] TMM protested the lower payments, but the Army contended that it authorized payment at either the 75 percent rate or the MEI, whichever rate was lower.[248] TMM subsequently filed a claim for $52,742.28 with the Army, representing the difference between the contract rate and the MEI, but the Army denied authority to adjudicate the claim.[249] TMM then filed an action in the CFC. The court granted summary judgment for TMM, finding that the Army had breached the contract by using the MEI instead of the rate specified in the contract.[250]

On appeal, the government raised a jurisdictional issue for the first time, arguing that the CFC lacked jurisdiction because there was no enforceable contract between TMM and the Army.[251] Once again citing *Spruill v. Merit Systems Protection Board*,[252] the Federal Circuit rejected this argument, noting that "the law is clear that, for the CFC to have jurisdiction, a valid contract must only be pleaded, not ultimately proven."[253] Accordingly, the Federal Circuit concluded that the actual issue regarded the existence of a claim upon which relief

244. 104 F.3d 1314 (Fed. Cir. 1997).

245. *See id.* at 1316-17. In 1956, Congress established a health plan for the dependents of members of the uniformed services, which was implemented through the Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS"). *See id.* at 1316. Under the plan, military hospitals and private health care companies were allowed to create facility-sharing arrangements, called either "Memoranda of Understanding" ("MOU") or "Memoranda of Agreement" ("MOA"). *See id.*

246. *See id.* at 1317.

247. *See id.* at 1316-17. Technically, TMM processed all requests for reimbursement through a fiscal intermediary (here, the Associated Group) for the processing and payment of claims, but for simplicity, this Article simply refers to the Army. *See id.*

248. *See id.* at 1318.

249. *See id.* (stating that the Army recognized TMM's contract allegations, but denied the existence of a contract).

250. *See id.* at 1318-19.

251. *See id.* at 1319.

252. 978 F.2d 679, 686-87 (Fed. Cir. 1992) (explaining that jurisdiction is not defeated by the mere possibility that a complaint may ultimately fail to state a cause of action).

253. *Total Medical*, 104 F.3d at 1319. The Federal Circuit explained, "[t]here is no question that TMM pleaded the existence of a valid contract here." *Id.*

could be granted.[254]

To determine whether TMM had presented a claim upon which relief could be granted, the court turned its attention to the contract itself. Although it determined that a contract existed between TMM and the Army,[255] the court nevertheless held that the contracts were void.[256] The court noted that the applicable regulations clearly designated that the reimbursement to health care providers would equal the lowest of the billed charge, the prevailing rate, or the MEI.[257] As the MOUs obtained by TMM did not conform with this regulatory requirement, the MOUs were illegal and void *ab initio*.[258] Subsequently, the court reversed and remanded the suit with instructions to dismiss based on TMM's failure to state a valid claim.[259]

In both *Trauma Service Group* and *Total Medical Management*, the Federal Circuit rejected government motions to dismiss for lack of jurisdiction and granted government motions to dismiss for failure to state a claim upon which relief could be granted. As explained in these cases, if a valid contract is pleaded, then jurisdiction exists, per *Spruill v. Merit Systems Protection Board*. *Trauma Service Group* and *Total Medical Management* stand for the proposition that the disposition of alternative motions to dismiss for lack of jurisdiction or failure to state a claim are not legally proper. The only question is how long it will take for the CFC to recognize these clear rulings and dispose of the typical alternative motions proffered by the government for virtually every contract case.[260]

II. CONTRACT FORMATION

In government procurement, the formation of a contract deals with the contractual relationship created between the United States and a second party, the contractor.[261] Because one party to this government procurement contract is the United States, there are many special considerations for the establishment of this unique two-party

254. *See id.*

255. *See id.* at 1320. The Federal Circuit reasoned that "the MOU was ratified by a government representative with the authority to bind the United States in contract. Thus, we hold all elements for a contract were met by the MOUs." *Id.*

256. *See id.* (finding that MOUs met basic requirements for a government contract, but violated CHAMPUS regulations).

257. *See id.*

258. *See id.* at 1320-21.

259. *See id.* at 1321. Notably, the court explains that TMM had actual notice of the regulatory requirements, requiring reimbursement of the lowest rate (including MEI). *See id.*

260. *See* Maniere v. United States, 31 Fed. Cl. 410, 414 (1994) (discussing different views of dismissal under 12(b)(1)).

261. *See* CIBINIC & NASH, *supra* note 76, at 1 (discussing rights of parties to government contracts).

relationship.[262]

A. Bids and Proposals

The most basic component of contract formation deals with the solicitation and establishment of a contract.[263] In government procurement, a contract is generally solicited by one of two methods: an invitation for bids ("IFB") or a request for proposals ("RFP").[264] Frequently, disputes—known as "bid protests—arise with regard to the procedures concerning an IFB or an RFP."[265] One frequent basis for a bid protest is a mistake in the bid, either by the contractor or the government.[266]

In *McClure Electrical Constructors, Inc. v. Dalton*,[267] the Federal Circuit explained the options available to a contractor in the event the contractor makes a mistake in a bid. The Navy had issued an IFB for the construction of an electrical substation at a naval center in Louisville, KY.[268] McClure submitted the lowest bid at $145,000.[269] Based on performance requirements, the Navy had estimated the contract would cost $282,869.[270] Because of the disparity between McClure's bid and the government estimate, the Navy requested verification of the $145,000 bid price.[271] The request for verification included a list of the other bids as well as the government estimate.[272] McClure confirmed the accuracy of the bid and the Navy awarded it the contract.[273]

After completion of the contract, McClure determined that it had lost money on the contract and reviewed its bid calculations.[274] At that time, McClure first discovered that it had made a mistake in calculating the bid and then requested reformation of the contract.[275] The contracting officer rejected the reformation request, and the ASBCA upheld the contracting officer's decision.[276]

On appeal, the Federal Circuit considered the requirements for

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262. *See id.*
263. *See id.* at 151.
264. *See id.* at 387, 522.
265. *See id.* at 1005.
266. *See id.* at 480.
267. 132 F.3d 709 (Fed. Cir. 1997).
268. *See id.* at 710-11.
269. *See id.*
270. *See id.*
271. *See id.*
272. *See id.*
273. *See id.*
274. *See id.*
275. *See id.*
276. *See id.*

recovery based on a unilateral mistake in a bid.[277] Explaining that the recovery for a mistake in a bid depends upon five items of proof,[278] the court noted that this appeal only involved one item of proof, the adequacy of the government's request for verification.[279] McClure argued that the Navy's request for verification was inadequate because it did not specify a suspected error in the bid.[280] McClure also asserted that the Navy frequently sends requests for verification as a matter of "standard operating procedure."[281] The court rejected McClure's arguments, ruling that a request for verification containing the government's estimated contract price as well as the other competing bids would sufficiently enable a contractor to discover any likely bid mistake.[282] Accordingly, the Federal Circuit affirmed the ASBCA.[283]

B. Authority

The most frequently disputed precept in the formation of a government contract concerns the presence or absence of authority, of both the government official to enter into a contract and the government itself to enter into a specific contract.[284] Authority is exceedingly important in government procurement cases because if a contractual transaction occurs without proper authority, the government is not held responsible and thus not liable, regardless of the equities.[285] In *LDG Timber Enterprises, Inc. v. Glickman*,[286] the Federal Circuit considered which party has the burden of proving whether a government official had the requisite authority. LDG had contracted

277. *See id.*

278. To obtain reformation of a contract, the contractor must show by clear and convincing evidence that: (1) a mistake in fact occurred prior to award of contract; (2) the mistake was a clear-cut mathematical or clerical error; (3) prior to the award of the contract the government knew or should have known that a mistake had been made in the bid; (4) the government did not request bid verification or the request was inadequate; and (5) proof of the intended bid is established. *See id.* at 711.

279. *See id.*

280. *See id.*

281. *See id.* The contracting officer denied such a practice. *See id.*

282. *See id.* at 712. The Federal Circuit explained that, because the contracting officer did not have a copy of the contractor's worksheets, the contracting officer could not have known of the bid mistake. *See id.* The court noted that in such circumstances, the contracting officer can only send the contractor a request for verification, along with a copy of the government's estimate of the contract price and the competing bids. *See id.*

283. *See id.*

284. *See* CIBINIC & NASH, *supra* note 76, at 62-63.

285. *See* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947) (explaining that a contractor who enters into an agreement with an agent of the government bears the risk that the agent is acting outside the bounds of his or her authority, even when the agent is unaware of limitation to his or her authority).

286. 114 F.3d 1140 (Fed. Cir. 1997).

with the Forest Service to harvest certain quantities of timber, pursuant to the "Blackstone Timber Sale" in the Sierra National Forest and the "Boundary Timber Sale" in the Sequoia National Forest.[287] While LDG was logging the Blackstone area, a fire occurred in the Boundary area, and the Forest Service requested that LDG move its operations from the Blackstone area to the Boundary area to harvest the timber in the fire-affected areas.[288] LDG agreed to the transfer after the Forest Service promised to extend any logging deadlines in the Blackstone area based on the number of days spent at the Boundary area.[289] When LDG sought these extensions, however, the Forest Service refused, and LDG appealed to the AGBCA,[290] which denied LDG's claim for damages.[291]

On appeal to the Federal Circuit, the government argued that the contracting officer had no authority to promise an extension of time for logging in the Blackstone area.[292] The government further argued that LDG had the burden of proving that the contracting officer had the requisite authority, and absent such proof, the government must prevail under *Federal Crop Insurance Corp. v. Merrill*.[293] The court rejected the government's argument and distinguished *Federal Crop Insurance*:

> When the actions of the contracting officer are within the authority that pertains to the subject matter of the contract, and no statute or regulation limits that authority, as in *Federal Crop Insurance*, the agency bears the burden of coming forward with evidence of lack of authority for the actions of the contracting officer.[294]

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287. *See id.* at 1141.

288. *See id.*

289. *See id.* Under the contract, the Blackstone Timber Sale required completion by June 25, 1988, and the Boundary Timber Sale required completion by March 31, 1992. *Id.*

290. *See id.* at 1142.

291. *See id.* LDG initially sued seeking specific performance, but the AGBCA does not have jurisdiction over claims not seeking money damages. *See id.* Accordingly, LDG filed a new suit for damages, based on the failure to extend the time for logging in the Blackstone area. *See id.*

292. *See id.*

293. *See id.* (citing Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947)) (explaining that anyone who enters into an arrangement with the government assumes the risk of having accurately ascertained that the person acting on behalf of the government is acting within his or her authority and holding that Wheat Crop Insurance Regulations are binding regardless of actual knowledge of what is in the regulations or of hardship resulting from innocent ignorance).

294. *See LDG Timber Enters.*, 114 F.3d at 1143. The Federal Circuit emphasized that "[w]hen the contracting officer administers a contract with which the officer is charged, the promises and representation made by the officer, when within the scope of the subject matter of the contract can not be avoided by simply disclaiming the contracting officer's authority when the contract reaches litigation." *Id.* The court also indicated frustration with the government's use of the authority argument in virtually every contract case: "This burden [of coming forward with evidence of lack of authority] is not met simply by attorney allegation in a litigation context." *Id.* Thus, under the court's ruling, the government must come forward with positive evidence of a lack of authority to satisfy its burden. *See id.* This ruling appears to place a critical limita-

Ironically, despite the favorable ruling on authority, the ruling of the AGBCA was affirmed on other grounds.[295]

In *American Telephone & Telegraph Co. v. United States*,[296] however, the ruling of the Federal Circuit was anything but favorable to the contractor on the issue of authority. In 1987, AT&T had purportedly entered into a $19 million fixed-price contract with the Navy to develop and produce a new ship-towed, undersea surveillance system known as the "Reduced Diameter Array" ("RDA").[297] After AT&T completed the contract, it submitted a claim for approximately $60 million based on higher contract costs.[298]

In the suit before the CFC, the parties submitted cross-motions for summary judgment, and the CFC ruled that the contract was invalid for lack of authority.[299] In particular, the court held that the contract was illegal pursuant to the 1987 Department of Defense Appropriations Act,[300] which forbade any fixed-price contract in excess of $10 million.[301] Although the court suggested that AT&T could still recover under quantum meruit, the CFC nevertheless immediately certified the case for an interlocutory appeal.[302]

On appeal, the Federal Circuit reviewed the relevant provision of the Appropriations Act, which stated that "[n]one of the funds provided for in this Act may be obligated or expended for fixed-price type contracts in excess of $10,000,000 for the development of a major system or subsystem."[303] AT&T argued that the Act rendered the contract invalid, while the government contended that the Act did not apply.[304] Indeed, the government argued that because the con-

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tion on the application of *Federal Crop Insurance*.

295. *See id.* at 1143-44 (concluding that the Forest Service met its commitment). Although the government failed to prove that the contracting officer did not have authority to extend the term of the logging contract, the Federal Circuit concluded that the Forest Service had nevertheless provided extensions equal to the requisite term of any extension. *See id.*

296. 124 F.3d 1471 (Fed. Cir. 1997).

297. *See id.* at 1472. The RDA is part of the "Surveillance Towed-Array Sensor System" ("SURTASS"), which provides undersea surveillance of submarines. *See id.*

298. *See id.* at 1473. The initial ceiling price of the Navy contract was $19 million. *See id.* The price was eventually raised to $34.5 million, but AT&T claimed that the contract cost over $60 million, significantly more than the $34.5 million contract price. *See id.*

299. *See id.* (noting that the trial court found it had jurisdiction to award relief for unjust enrichment).

300. Pub. L. No. 100-202, § 8118, 101 Stat. 1329-84 (1987).

301. *See AT&T*, 124 F.3d at 1473.

302. *See id.*; *see also* 28 U.S.C. § 1292(d)(2) (1994 & Supp. 1998) (describing the provision for an interlocutory appeal).

303. *AT&T*, 124 F.3d at 1472-73.

304. *See id.* AT&T argued that the contract was void pursuant to the 1987 DOD Appropriations Act in an apparent attempt to obtain a reformation of the contract as a cost-type contract. *See id.* If the court had agreed with this argument, the Federal Circuit postulated that AT&T would have been entitled to recover all of its costs on the contract. *See id.* The government, on the other hand, took the position that the contract was valid, in an attempt to forestall any addi-

tract did not pertain to the development of a "major system" pursuant to the Act, the contract was valid.[305] After a thorough review of the Act and the legislative history, the Federal Circuit disagreed, concluding that the $19 million contract was clearly "a major system or subsystem" under the Act.[306] Accordingly, the court concluded that the contract was void from its inception[307] and affirmed the CFC's ruling.[308]

Absent authority for the fully performed contract, the Federal Circuit next considered what other relief might be available to AT&T.[309] Surprisingly, if not incredibly, the court concluded that no relief was apparent.[310] The CFC had concluded that, in view of the completed contract, AT&T was entitled to recover for quantum meruit[311] as an implied-in-fact contract. The Federal Circuit, however, reversed this ruling, explaining that "[a]n implied-in-fact contract arises when, in the absence of an express contract, the parties' behavior leaves no doubt that what was intended was a contractual relationship permitted by law."[312] The court concluded that because there was no authority for the contract under the Department of Defense Appropriations Act, there was no contractual relationship permitted by law.[313] Thus, in a split decision with one dissent, the court granted

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tional recovery by AT&T. *See id.* However, it is quite unlikely that the government anticipated that AT&T would have no right to any compensation for the performance of the completed contract. *See id.*

305. *See id.* at 1474 (noting that the Act only prohibits major system or subsystem fixed price contracts in excess of $10 million).

306. *See id.* at 1477.

307. *See id.* The Federal Circuit reasoned that, "[n]o valid contract was or could be entered into in [the] face of the express congressional prohibition [in the 1987 DOD Appropriations Act]." *Id.* at 1478.

308. *See id.*

309. *See id.*

310. *See id.* The court qualified this in the last paragraph of the decision when it offered: "This is not to say that AT&T is without any remedy." *Id.* at 1480. However, the majority was unable to muster any further basis for AT&T to recover for its performance of a multi-million dollar contract: "Whether AT&T may replevy the goods, or bring an appropriate action for the value of its wrongful retention and use by the Government, is not before us." *Id.* at 1482.

311. *See id.* As explained in the decision, "[q]uantum meruit is the name given to an implied-in-law remedy for unjust enrichment." *Id.*

312. *Id.*

313. *See id.* As authority for its ruling on quantum meruit, the CFC cited *United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986). *See id.* at 1478. In *Amdahl*, the Federal Circuit explained:

> Where a benefit has been conferred by the contractor on the government in the form of goods or service, which it accepted, a contractor may recover at least on a *quantum valebant* or *quantum meruit* basis for the value of the conforming goods received by the government prior to the rescission of the contract for invalidity.

Amdahl, 786 F.3d at 393. The Federal Circuit found this case unhelpful, however, explaining that "*Amdahl* is distinguishable from plaintiff's situation because contracting authority was not at issue in the case." *AT&T*, 124 F.3d at 1482. This holding seems to conflict with *Gould, Inc. v. United States*, 67 F.3d 925 (Fed. Cir. 1994). In *Gould*, the author of the *AT&T* decision ex-

judgment in favor of the government on the ground that AT&T had failed to state a claim upon which relief could be granted.[314] As the dissent emphasized, *AT&T* seems to stand for the proposition that a contractor is responsible for knowing whether the government has authority to enter into a government contract.[315] Notably, the dissenting judge in *AT&T* authored the decision in *LDG Timber*, which may explain the apparent inconsistency of these cases.

As *AT&T* illustrates, the single issue of authority cannot only invalidate a contract but can also leave a contractor without any practical remedy for a properly and fully performed contract.[316] As such, a contractor should consider the ramifications of asserting that a government contract was void from its inception.

In *Whittaker Electronic Systems v. Dalton*,[317] REL, Inc. ("REL") had initially agreed to design, fabricate, and test a simulator of certain Soviet long-range radar for the Air Force under an "individual option contract," pursuant to 10 U.S.C. § 2304.[318] Whittaker later acquired REL and thus acquired the obligations under the contract.[319] Due to various delays, the cost of the contract exceeded both parties' expecta-

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plained that "a contractor can be compensated under an implied-in-fact contract when the contractor confers a benefit to the government in the course of performing a government contract that is subsequently declared invalid." *Gould*, 67 F.3d at 930 (citing *Amdahl*, 786 F.3d at 395).

314. *See AT&T*, 124 F.3d at 1480. In a well-reasoned dissent, Circuit Judge Newman empathized with the dilemma faced by AT&T. *See id.* (Newman, J., dissenting) Judge Newman opined that the majority improperly held AT&T responsible for the Navy's failure to abide by the 1987 DOD Appropriations Act. *See id.* Further, Judge Newman argued that it was simply inappropriate to render the contract invalid: "Not every violation of a statute or regulation, nor the failure to comply with a congressional request for reports and internal approvals, renders a contract void or invalid." *Id.* Finally, Judge Newman asserted that the majority improperly construed the Act, noting that legislative intent could surely not render the result imposed by the court, thus denying AT&T any remedy after full performance. *See id.* at 1481. Judge Newman then concluded:

> The panel majority's retroactive invalidation of the Reduced Diameter Array contract is contrary to the rules of contract, contrary to precedent, and contrary to the statute on which the majority relies. The contract was not illegal, and it was fully performed. Thus I must, respectfully, dissent from the majority's ruling.

Id. at 1482.

315. *See Federal Circuit Voids Fixed-Price R&D Contract C Remedy in Doubt*, 39 GOV'T CONTRACTOR ¶ 502, at 6 (Oct. 22, 1997). Given this onerous burden on contractors, as well as the curious lack of remedies available to AT&T pursuant to this contract rendered void from inception, one can only hope that the Federal Circuit will revisit this ruling on reconsideration or in an *en banc* proceeding. *See Federal Circuit Voids AT&T SURTASS Contract, Cites Section 8118 Bar on Fixed-Price R&D*, 68 FEDERAL CONTRACTS REP. 9, 10 (1997) (explaining that AT&T has submitted a motion for reconsideration or in banc proceedings).

316. *See* John Cibinic, Jr., *Invalid Contracts: What Are a Contractor's Remedies?*, 11 NASH & CIBINIC REP. § 61, at 5, 8-9 (1997).

317. *See* 124 F.3d 1443 (Fed. Cir. 1997).

318. *See id.* at 1444 (citing 10 U.S.C. § 2304(a) (1994)). The contract included a compensation scheme based on a fixed price plus incentive fee contract. *See id.*

319. *See id.*

tions, and Whittaker sought an equitable adjustment.[320] The ASBCA denied the claim, and Whittaker appealed.[321]

On appeal to the Federal Circuit, Whittaker asserted that the contract was void *ab initio* and hoped to obtain reformation after performance.[322] In support of his position, Whittaker presented three arguments relating to the government's authority to enter into the contract: (1) that the contract violated 10 U.S.C. § 2304; (2) that the contract violated DAR 1-1502; and (3) that the contract violated DOD Directive 5000.1 or DAR 1-334.[323]

Whittaker first argued that 10 U.S.C. § 2304 only allowed the development of a system, not the integration of a test system into a working system.[324] The court quickly rejected this contention as too narrow a reading of the statute.[325] Whittaker next argued that DAR 1-1502 prohibited the use of options in contracts with "undue risks."[326] The court, ruled, however, that because Whittaker, by its acquisition of REL, had accepted the terms of the contract and the contract's obligations without protest, it had waived any right to object under this regulation.[327] Finally, Whittaker argued the option provisions violated DOD Directive 5000.1 or DAR 1-334.[328] The court again rejected Whittaker's argument, finding both the DOD directive and the DAR provision wholly inapplicable.[329] Accordingly, finding no basis for the challenge to the government's authority to enter into the above contract, the court affirmed the ASBCA's ruling.[330] Given the

320. *See id.* at 1445.

321. *See id.*

322. *See id.*

323. *See id.* at 1445-47 (noting that 10 U.S.C. § 2304 requires an advertising and bidding process; DAR 1-1502 limits the use of options; and DAR 1-334 limits the inclusion of ceiling priced production options).

324. *See id.* at 1445 (citing 10 U.S.C. § 2304(a) (1988)); *see also* Defense Indus. v. United States, 38 Fed. Cl. 489, 493 n.9 (1997) (explaining that section 2304 results in a contracting officer choosing a procurement method which causes a part of system to be purchased at a noncompetitive price).

325. *See Whittaker*, 124 F.3d at 1445-46 (holding that statutory language encompasses a new integrated system).

326. *See id.* at 1446. DAR 1-1502(b)(ii) provides in relevant part: "Option clauses shall not be included in contracts, and options provisions shall not be included in solicitations if . . . the contractor would be required to incur undue risks (e.g., the price or availability or necessary materials or labor is not reasonably foreseeable)." DAR 1-1502(b)(ii).

327. *See Whittaker*, 124 F.3d at 1446; *see also Federal Circuit Upholds Air Force's Inclusion of Production Options in Fixed-Price R&D Contract*, 68 Fed. Cont. Rep. 11, 11-12 (1997) (discussing waiver aspects of this case and noting that by completing the contract, Whittaker waived grounds to void the contract on the basis of a regulatory violation).

328. *See Whittaker*, 124 F.3d at 1446.

329. *See id.* The Federal Circuit deemed the DOD directive inapplicable because the directive did not even mention options. *See id.* The court found the DAR regulations inapplicable because they applied only to "major systems." *See id.* (citing DAR 1-334).

330. *See id.* Whittaker also presented two other arguments: (1) that the Air Force had misrepresented the capabilities of the Soviet radar and (2) that the Air Force had breached its duty

possibility of an outcome like that in *AT&T*, Whittaker may be satisfied with this affirmance.

C. Anti-Deficiency Act

Neither a federal employee nor a governmental entity may enter into a contract for the future payment of money in excess of existing appropriations, pursuant to the Antideficiency Act.[331] Any contract that conflicts with this Act will be deemed void.[332] In *Cessna Aircraft Co. v. Dalton*,[333] the Federal Circuit considered the application of the Antideficiency Act. Beginning in 1984, Cessna had a contract with the U.S. Navel Air Station in Pensacola, Florida to provide training and related technical and maintenance support for undergraduate naval flight officers for five program years.[334] Upon the expiration of the first contract in 1988, the contract provided for a three year option, which the Navy had to exercise by the beginning of that fiscal year, October 1, 1988.[335] Because October 1, 1988 fell on a Saturday, the Navy requested permission to exercise the option on October 3, but Cessna refused.[336] On October 1, 1988, the Navy exercised the option, "CONTINGENT ON CONGRESSIONAL PASSAGE OF THE FY89 APPROPRIATION ACT."[337] Because the Navy exercised the option without funding, Cessna asserted that the exercise of the option was in violation of the Antideficiency Act and thus void.[338] Accordingly, Cessna filed a claim for compensation based on work per-

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of cooperation. *See id.* at 1446-47. Although there was evidence that the Air Force had not fully disclosed the extent of the Soviet capabilities, the Federal Circuit concluded that no misrepresentation had occurred. *See id.* Further, the court of appeals noted that Whittaker had submitted an inadequate showing of a breach of the duty to cooperate. *See id.*

331. 31 U.S.C. § 1341 (1994). The Antideficiency Act provides:

> An officer or employee of the United States Government or of the District of Columbia may not (A) make or authorize expenditure or obligation exceeding amount available in appropriation or fund for the expenditure or obligation; (B) involve either government in a contract or obligation for the payment of money before appropriation is made unless authorized by law.

Id. § 1341(a)(1)(A)-(B); *see also* CIBINIC & NASH, *supra* note 76, at 31 (describing role of Antideficiency Act in government procurement).

332. *See, e.g.*, Hercules Inc. v. United States, 516 U.S. 417 (1996) (explaining that the Act also applies to contracts by implication); Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539, 542 n.4 (Ct. Cl. 1980) (explaining that contract provision stating that government's liability was dependent on accessibility of appropriated monies from which full payment could be satisfied was designed to protect against Anti-Deficiency Act violation).

333. 126 F.3d 1442 (Fed. Cir. 1997).

334. *See id.* at 1444.

335. *See id.* Each option ran for a period of one year based on a typical fiscal year, thus from October 1 through September 30. *See id.*

336. *See id.* at 1444-45.

337. *See id.* at 1445. The Navy faxed the execution of the option to Cessna on Saturday, October 1, 1988, which Cessna discovered on Monday, October 3, 1988. *See id.*

338. *See id.*

formed in the absence of a valid contract. The ASBCA denied the claim, finding that the Navy had properly executed the option.[339]

On appeal to the Federal Circuit, the primary consideration involved the role of the Antideficiency Act.[340] The court noted that, although the Antideficiency Act generally prohibits multi-year contracts, a special statutory provision permits the government to enter into special military contracts with performance periods of five years, plus three years in options.[341] Continuing, the court observed that the Act dictates that if funds are not appropriated for a term of such a contract in a given year, the "contract shall be canceled or terminated."[342] Although conceding that the Navy contract was properly established under the Act, Cessna contended that the option was improperly exercised by the Navy before the approval of appropriations for the option year.[343] The court disagreed, reasoning that "the relevant statutory provisions do not prohibit government agencies from incurring contractual obligations before completing the apportionment process."[344] Accordingly, the Federal Circuit affirmed the ASBCA.

D. Third-Party Beneficiary

In contracts with the government, third parties sometimes claim entitlement to certain rights provided by government contracts.[345] In

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339. *See id.* at 1446. After the completion of the contract, Cessna submitted a claim to the contracting officer for $25.7 million, based on the costs of the work performed under the contract. *See id.* When the contracting officer did not issue a decision within sixty days, Cessna filed a claim in the ASBCA. *See id.*

340. *See id.* at 1448-49. The Federal Circuit explained that "the Antideficiency Act finds its origins in a statute enacted in 1870, known as the Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251." *Id.* at 1449. The court further noted:

> The statute addressed the problem that Executive Branch officials were obligating funds before they were appropriated by Congress, and then making deficiency requests for appropriations that Congress had little choice in deciding because government agencies had basically committed the United States to make good on its promises.

Id. at 1448-49.

341. *See id.* at 1449-50 (citing 10 U.S.C. § 2306(g) (1994)).

342. *See id.* (citing 10 U.S.C. § 2306(g)(3) (1998)).

343. *See id.* Cessna cited a number of sources for the proposition that an obligation may not be established by the government prior to the appropriation of funds, including 10 U.S.C. § 1512 (requiring appropriated funds); 10 U.S.C. § 1517 (prohibiting obligation of funds that exceed appropriations); Department of Defense Accounting Manual § 4a, at 22-6 (providing that appropriations are required before obligation of funds); and NAVY COMPTROLLER MANUAL §§ 073002(2), 073100 (establishing a funding process, first requiring appropriation, then allowing obligation of funds). *See Cessna Aircraft*, 126 F.3d at 1449-50.

344. *Id.* at 1450. The Federal Circuit concluded: "Thus, we hold that the CO's exercise of the option did not violate the Antideficiency Act even though funds were obligated before they were apportioned." *Id.* at 1452.

345. *See* GEORGE W. SCHWARTZ, GOVERNMENT CONTRACTS § 1.1 at 1-13 (1994).

such situations, the principal issue is whether these parties are able to claim a "third-party beneficiary status" under the government contract.[346] Two cases have generally guided the CFC's analysis and consideration of third-party beneficiary status, *Baudier Marine Electronics v. United States*[347] and *Schuerman v. United States*.[348] Unfortunately, these two cases espoused different tests, and the CFC had since provided little guidance.

In *Montana v. United States*,[349] the Federal Circuit finally resolved the analytical conflict between *Baudier* and *Schuerman*. Great Western Sugar Co. ("Great Western") operated sugar processing plants in Montana and provided self-insurance for its workers as allowed under the Montana Workers' Compensation Act.[350] The Commodity Credit Corporation ("CCC"), an agency of the United States,[351] had approved a number of price support loans to Great Western based on quantities of sugar beets as collateral. When Great Western subsequently declared bankruptcy, however, the bankruptcy court sold the sugar beets to offset corporate debts.[352] Montana asserted a first lien against the proceeds of the sugar beets sale, but pursuant to a settlement agreement between the CCC and the bank lenders, the CCC obtained a superior lien to the sale proceeds.[353]

Based on claims made by injured workers at Great Western, Montana subsequently brought suit in the CFC to recover funds expended in workers compensation claims.[354] Montana's principal ar-

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346. *See id.*

347. 6 Cl. Ct. 246, 249-50 (1984) (dismissing plaintiff's motion for summary judgment for failing to show they were intended third-party beneficiaries and stating that no express or implied warranty in the contract guaranteed the subcontractor's payment). The two-part *Baudier* test for third-party beneficiary status examines: (1) whether the contract reflects the intent to benefit the third-party; and (2) whether the contract gives the third-party the direct right to compensation or to enforce that right to compensation against the promissor. *See id.* at 249. The *Baudier* court based the second part of the test on the right of members of the public to bring suit to obtain public services. *See* H.F. Orchards v. United States, 4 Cl. Ct. 601, 609-10 (1984) (suggesting that members of public must have more than injury from a contract which benefits them; rather, some manifestation of intent between contracting parties that members of public will be directly compensated by defaulting party is required).

348. 30 Fed. Cl. 420 (1994) (holding that although plaintiffs satisfied the intended beneficiary test, they failed to meet other contract terms that were conditions precedent). The *Schuerman* test for third-party beneficiary status involved only the first part of the *Baudier* two-part analysis. *See id.* at 433.

349. 124 F.3d 1269 (Fed. Cir. 1997).

350. *See id.* at 1270-71.

351. *See id.* at 1271. Pursuant to the Commodity Credit Corporation Charter Act, 15 U.S.C. § 714 (1994), the CCC provides price support to producers or farmers of agricultural commodities. *See* 7 C.F.R. § 1435.37 (1983) (explaining CCC's loan program regulations).

352. *See* 124 F.3d at 1271 (noting that sale of sugar beets netted $3,182,390).

353. *See id.* at 1272. Under the settlement agreement, the CCC received $28,136,427.47, plus interest. *See id.*

354. *See id.* (seeking money damages in the amount of $667,759.63, plus interest, representing the amount paid by Montana to the workers who filed worker compensation claims).

gument was that it was a third-party beneficiary under the terms of the settlement agreement.[355] The CFC rejected this argument and granted summary judgment to the government, concluding that the settlement agreement did not make Montana a third-party beneficiary.[356]

On appeal, the Federal Circuit considered whether the *Baudier* test or the *Schuerman* test was the proper test for determining third-party beneficiary status.[357] The court concluded that the *Schuerman* test was the proper test and that under this test, a party may only qualify as a third-party beneficiary if the contract reflects the express or implied intention of the parties to the contract to benefit the third-party.[358] The court further clarified the new standard: "The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefited thereby."[359]

Pursuant to the *Schuerman* test, the court next considered whether the settlement agreement contained language that gave rise to such a "clear intent" to benefit Montana.[360] Concluding that both the settlement agreement and the implementing regulations of the CCC indicated that the CCC was to have priority on any liens against federal and state entities, the court ruled that Montana could not have been a third-party beneficiary to the settlement agreement.[361] Accordingly, the ruling of the CFC was affirmed.

III. CONTRACT ADMINISTRATION

The cornerstone of contract administration in government procurement involves interpretation of the terms of the contract.[362] In the construction or interpretation of a contract, the Federal Circuit

355. *See id.*

356. *See id.* (holding that Montana was not an intended third-party beneficiary of the settlement agreement because CCC's lien took priority under congressionally mandated statutes and regulations).

357. *See id.* at 1273.

358. *See id.*

359. *Id.*

360. *See id.* at 1274.

361. *See id.* at 1275 (explaining that regulatory provisions providing that no liens or encumbrances may be placed on sugar once a loan is approved, and stipulation that any local or state regulations inconsistent with this are inapplicable, mean that Montana laws cannot be used to usurp priority of CCC's lien). Montana had argued that Montana state law provided a basis for its third-party beneficiary argument. The Federal Circuit disagreed, explaining that "[t]he statute provides that state law shall not apply to 'contracts or agreements of the Corporation or the parties thereto.' State law is therefore not applicable to the contracts of CCC or, in the alternative, to the parties to such contracts." *Id.* at 1276 (citation omitted).

362. *See* CIBINIC & NASH, *supra* note 76, at 102.

exercises plenary or *de novo* review on an appeal.[363] Therefore, the court owes no deference to the interpretation given the contract by the lower tribunal.[364]

In interpreting any contract, the Federal Circuit first looks for the plain meaning of the contract.[365] If the provisions of the contract are clear, the court is obliged to give the contract its "plain and ordinary meaning."[366] However, if the terms are ambiguous and a judicial interpretation must be made, the court will interpret the contract "as a whole" and "in a manner which gives reasonable meaning to all its parts and avoids conflict or surplusage of its provisions."[367]

A. Interpretation (Ambiguity)

If a government contract is ambiguous, the interpretation of its terms is more difficult.[368] To mitigate this difficulty, courts have developed a judicial rule distinguishing two forms of ambiguity, each involving different invocations of responsibility for the ambiguity.[369] In cases of a latent ambiguity, the government maintains responsibility for the ambiguity. In such cases, courts will interpret the ambiguity against the drafter (the government) if the interpretation of the non-drafter is reasonable,[370] and apply the rule of *contra proferentem.*[371]

In cases of a patent (or plain) ambiguity, the contractor maintains the responsibility for the ambiguity.[372] In such a case, the contractor has the burden to inquire of the government, regarding the ambiguous language, before even bidding on the contract.[373] If the contrac-

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363. *See* Aerolineas Argentinas v. United States, 77 F.3d 1564, 1576 (Fed. Cir. 1996) (noting that the interpretation of contracts is why circuit courts exercise plenary review on appeal).

364. *See id.*

365. *See* McAbee Constr., Inc. v. United States, 97 F.3d 1431, 1435 (Fed. Cir. 1996) ("A contract is read in accordance with its terms and the plain meaning thereof.").

366. *See* Alaska Lumber & Pulp Co. v. Madigan, 2 F.3d 389, 392 (Fed. Cir. 1993) (holding that the plain language of contract is controlling).

367. *See* Granite Constr. Co. v. United States, 962 F.2d 998, 1003 (Fed. Cir. 1992) (referring to this rule as a "well-established rule of judicial interpretation").

368. *See* CIBINIC & NASH, *supra* note 76, at 162.

369. *See id.*

370. *See* Interstate Gen. Govt. Contractors, Inc. v. Stone, 980 F.2d 1433, 1434 (Fed. Cir. 1992) (stating that it is well-settled that ambiguities in contracts are resolved against the drafter).

371. *See* CIBINIC & NASH, *supra* note 76, at 162. As explained below, however, the Federal Circuit has now described a latent ambiguity as "the general rule" and a patent ambiguity as "an exception to that general rule." *See infra* notes 403-419 and accompanying text (discussing *Triax Pacific, Inc. v. West* and explaining the legal test for ambiguity).

372. *See* Beacon Constr. Co. v. United States, 314 F.2d 501, 504 (Ct. Cl. 1963) (explaining that if contractor interprets ambiguity for its benefit, it does so at its own peril).

373. *See* Dalton v. Cessna Aircraft Co., 98 F.3d 1298, 1306 (Fed. Cir. 1996) (asserting that patent ambiguity creates a duty of inquiry irrespective of a contractor's reasonable interpretation); *see also* Fortec Constructors v. United States, 760 F.2d 1288, 1291 (Fed. Cir. 1985) (discussing the duty of inquiry and stating that consideration of trade standards and practices of

tor fails to abide by this duty of inquiry, the ambiguity is construed against the contractor.[374]

In *United International Investigative Services v. United States*,[375] the Federal Circuit considered a typical dispute involving an ambiguity in a contract. United International Investigative Services ("UIIS") had contracted with the Air Force to provide security services at the New Boston Air Force Tracking Station in Amherst, New Hampshire.[376] The "Performance Work Statement" ("PWS") for the contract elaborated: "This is not a contract for night-watchmen or minimal guard services; it is a contract for a fully trained security police force .... Actual police service, as in the Armed Forces of the United States or in the police force of a civilian governmental unit in the United States, is required."[377] Another provision in the contract, however, described "comparable civilian experience," which UIIS interpreted to mean two years of experience, either as a police officer or as a security officer.[378]

When the Air Force insisted on actual police experience, UIIS brought suit in the CFC alleging an ambiguity between the two clauses in the contract and seeking an additional $494,315.67.[379] The CFC ruled that the contract contained a latent ambiguity. Noting that the contractor had espoused a reasonable interpretation of the disputed contractual provisions, the court applied the doctrine of *contra proferentem* and construed the contract against the government.[380]

On appeal, the Federal Circuit completely disagreed with the interpretation rendered by the CFC.[381] Questioning the CFC's finding of an ambiguity, the court observed that "[t]he Scope of Work stated in clear and unambiguous terms that 'actual police service' was required .... It is difficult to imagine a clearer statement, and we

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the relevant business community is proper in cases of patent ambiguity).

374. *See* CIBINIC & NASH, *supra* note 76.

375. 109 F.3d 734 (Fed. Cir. 1997).

376. *See id.* at 735. At the time of contract formation, UIIS was known as United Security Unlimited, Inc. ("USUI"), but during the performance of the contract, it changed its name to UIIS. *See id.*

377. *Id.* at 736. In the context of this contract, the PWS is the same as a "Scope of Work" clause. *See id.*

378. *See id.*

379. *See id.* UIIS had allegedly bid on the contract anticipating the use of a two year experience requirement for police officers or security officers, but the Air Force required actual police experience. *See id.* at 736. Because of this requirement, UIIS sustained greater costs. *See id.*

380. *See id.* The CFC did not, however, award any damages. Although the court concluded that the contract indeed contained a latent ambiguity, the court also found that UIIS had failed to prove that the ambiguity had resulted in any damages. *See id.*

381. *See id.* at 737-38.

commend the drafters for including it."[382] The court similarly dismissed UIIS' interpretation of the contract, explaining that "'comparable civilian service' simply means actual police experience."[383]

The court, however, focused its criticism on the CFC's analysis of latent ambiguity.[384] In its analysis, the court set forth the two-step process for determining whether an ambiguity exists: (1) is there an ambiguity (that is, do both parties proffer a reasonable interpretation of the disputed contract provision?); and (2) is the ambiguity patent (that is, is the ambiguity plain, obvious, or glaring?).[385] Noting that the CFC had confused and intermingled these two steps, the court ruled that the disputed contract provisions were not ambiguous, and because the contractor had not proffered a reasonable interpretation of the contract terms, there was no reason to even consider the existence of a patent or latent ambiguity.[386] Accordingly, the court reversed the ruling of the CFC.[387]

In *Lockheed Martin IR Imaging Systems, Inc. v. United States*,[388] the Federal Circuit considered another common dispute over an ambiguity in a government contract. In response to an IFB, Lockheed Martin IR Imaging Systems, Inc. ("LMIR") bid a 100% option to fabricate and deliver a quantity of 779 detector cooler assemblies and 779 accompanying warranties of supplies to the United States Army Communications Electronics Command ("CECOM").[389] The 100% option included a unit price of $9,415 for each detector cooler assembly and $389 for each warranty of supplies.[390] The bid did not contain terms for lesser quantities or varying option prices.[391] CECOM accepted the bid, but later sent LMIR a "supplemental contract addendum," which stated that the contract was not for a 100% option but for a quantity up to the 100% option.[392] Subsequently, CECOM ordered only 135 units at a unit price of $9,415.[393] Contend-

382. *Id.* at 738.
383. *See id.*
384. *See id.*
385. *See id.* (citing Grumman Data Sys. Corp. v. Dalton, 88 F.3d 990, 997 (Fed. Cir. 1996)).
386. *See id.* Nevertheless, to the extent that any ambiguity existed, the Federal Circuit emphasized that it was patent. *See id.* Because a patent ambiguity requires a duty to seek clarification, the court explained that UIIS was not entitled to rely upon its interpretation of the disputed contract provision. *See id.*
387. *See United Int'l Investigative Servs.*, 109 F.3d at 738.
388. 108 F.3d 319 (Fed. Cir. 1997).
389. *See id.* at 320. Under the original contract, the offeror was Loral Infrared & Imaging Systems ("Loral"), but LMIR succeeded to the interest of Loral in this claim. *See id.*
390. *See id.* at 321.
391. *See id.*
392. *See id.* Notably, CECOM sent this supplemental addendum to LMIR after CECOM had accepted the bid at the 100% option. *See id.*
393. *See id.*

ing that CECOM had changed the terms of the contract, LMIR submitted a claim to the contracting officer for additional compensation.[394] The contracting officer denied the claim based on a contract term that allegedly required bidders to include quantities of less than 100% in the bids.[395] On appeal, the ASBCA agreed that the contract required less than a 100% option.[396]

On appeal, the Federal Circuit considered whether the contract provided for the right to offer a 100% option.[397] CECOM argued that the terms of the contract were patently ambiguous, while LMIR argued that, if any ambiguity existed, it was latent.[398] The court concluded that, when reading the contract as a whole, the terms clearly indicated a right to offer a 100% option.[399] Accordingly, the court held that the contract terms were not patently ambiguous:

> A contract provision is deemed to be patently ambiguous if it is susceptible of two different yet reasonable interpretations, each of which is consistent with the contract language and with the other provisions of the contract, and if the ambiguity would be apparent to a reasonable person in the claimant's position.[400]

The court also noted that CECOM attempted to resolve any ambiguity that may have existed with the "supplemental contract addendum," but concluded that this addendum failed to remedy the flawed solicitation.[401] Accordingly, through the application of a somewhat

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394. *See id.* at 321-22.

395. *See id.* at 322 (stating the Army's argument that notification was provided by section M-2 of solicitation, which stated that the contract was not a 100% option).

396. *See id.* (explaining that ASBCA agreed that the contract was not for a 100% option and that any quantity could have been ordered at the same unit price that Loral had offered for a 100% option).

397. *See id.*

398. *See id.* at 322-23.

399. *See id.* at 323. The Federal Circuit described the contract dispute as follows:

> The solicitation included a line item for a 100% option. Loral bid a 100% option. Section H-4a, . . . provided that the government could 'require' delivery of the option 'identified in Section B,' which was the 100% option, while section M-2 stated that a bidder 'may' offer additional option prices for varying option quantities and order dates. Loral reasonably read the solicitation as not requiring it to offer other than a 100% option, and did not do so. When the Army awarded the contract to Loral, Loral's bid terms were accepted.

Id.; *see also* Michael W. Clancy, *Contract Options: Options Must Be Exercised in Exact Accord with Their Terms*, 7 FED. CIR. B.J. 78, 79 (1997) (citing *Lockheed's* affirmance of contract options principle).

400. *Lockheed Martin*, 108 F.3d at 323.

401. *See id.* The Federal Circuit explained: "The regulations permit no additions or changes after the bid is opened." *Id.* (citing FAR 14.101(d)). Thus, the court reasoned that CECOM's attempt to remedy the ambiguity with the "supplemental contract addendum," constituted a material change in the terms of the contract. *See id.*; *see also Addendum Impermissibly Changes Terms of Sealed Bid Solicitation*, Gov't Cont. Rep. (CCH) 2 (May 23, 1997). Accordingly, the court concluded that a constructive change had occurred. *See id.*; *see also Loral Entitled to Price Adjustment for Partial Exercise of 100% Option, Federal Circuit Rules*, 67 Fed. Cont. Rep. 308,

different legal approach than used in *United International Investigative*, the court concluded that "if there is no facial ambiguity, the criterion is whether the contractor reasonably interpreted the contract, applying the usual rule of *contra proferentem* against the contract drafter."[402] Because the contractor applied a reasonable interpretation of the contract, the Federal Circuit reversed the ruling of the ASBCA.

Both *United International Investigative* and *Lockheed Martin IR* demonstrate similar analyses of cases involving conflicting contractual terms. In both cases, the Federal Circuit resolved the disputes by finding that no ambiguity existed. Yet, in reaching these conclusions, the court relied on seemingly conflicting recitations of law to determine whether an ambiguity existed.

In *Triax Pacific, Inc. v. West*,[403] the Federal Circuit attempted to resolve this conflict by expressly setting forth the applicable legal test for ambiguity.[404] Triax Pacific, Inc. ("Triax") contracted with the Army for the renovation of twenty-one military housing units at Fort Shafter, Hawaii.[405] Because Triax submitted a bid of $1,593,500, which was well below the government estimate, the Army requested and received verification of the bid price.[406] During the performance of the contract, however, a dispute arose over the painting requirements of the contract.[407] Ultimately, Triax agreed to paint the disputed areas and later seek an equitable adjustment.[408] When the contracting officer denied the request for an equitable adjustment, Triax appealed to the ASBCA, claiming that the painting requirements of the contract were ambiguous.[409] The ASBCA held that the contract was not ambiguous and sustained the interpretation of the Army.[410]

On appeal to the Federal Circuit, the Army again argued that the contract was not ambiguous, while Triax argued that the contract was

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308-09 (1997) (briefing the Federal Circuit decision in *Lockheed Martin*).

402. *Lockheed Martin*, 108 F.3d at 322.

403. 130 F.3d 1469 (Fed. Cir. 1997).

404. *See id.* at 1475.

405. *See id.* at 1471. The contract required the construction of new lanais (covered, screened patios) on each housing unit, consisting of a concrete construction with a wooden roof. *See id.*

406. *See id.* The government's estimated cost of the project was $1.9 million. *See id.*

407. *See id.* The Army interpreted the contract as requiring the painting of the concrete and wood roof beams for the lanais, but Triax had interpreted the contract as not requiring any painting of these areas pursuant to customary commercial practice. *See id.* at 1471-72.

408. *See id.* at 1472.

409. *See* Appeal of Triax Pacific, Inc., ASBCA No. 44,645, 96-2 B.C.A. (CCH) ¶ 28,468 (1996), *aff'd sub nom.* Triax Pacific, Inc. v. West, 130 F.3d 1469 (Fed. Cir. 1997). Because the contract included certain curing requirements for the concrete, Triax argued that the contract was ambiguous: If the concrete had to be painted, the curing time requirements and the painting time requirements could not be read consistently. *See id.* Triax further explained that painting of the roof wood beams was contrary to customary commercial practice. *See id.*

410. *See id.*

ambiguous, contending that the terms of the contract clearly could not require the scope of painting asserted by the Army.[411] The court, however, rejected both arguments, observing that "[w]e are left with a situation in which neither Triax nor the government can harmonize all provisions of the contract."[412] In such a scenario, the Federal Circuit concluded that the contract would have to be read against one of the parties.[413] The court then considered whether the ambiguity was patent and subject to the contractor's duty of inquiry, or latent and subject to the doctrine of *contra proferentem*.[414]

Significantly, the court emphasized that if a contract contains an ambiguity, it is not the general rule to interpret such ambiguity as patent.[415] In this case, however, the court determined that the ambiguities in the contract were "so apparent" that a patent ambiguity was clear and application of the duty of inquiry was unavoidable.[416] Accordingly, though on other grounds, the Federal Circuit affirmed the ruling of the ASBCA.[417]

In *Triax*, the Federal Circuit explained that if a contract contains an ambiguity, the ambiguity will be considered a latent ambiguity as a "general rule" and the doctrine of *contra proferentem* will apply.[418] The court further emphasized that finding a patent ambiguity (and application of the duty of inquiry) is "an exception to that general rule."[419] Consequently, in future cases dealing with ambiguities in govern-

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411. *See id.* at 1473-74.

412. *Id.* at 1474.

413. *See id.* (explaining that neither the government's nor Triax's interpretation was satisfactory and concluding that contract terms could not be reconciled with one another).

414. *See id.* at 1475. The Federal Circuit explained:

> The patent ambiguity doctrine is a court-made rule that is designed to ensure, to the greatest extent possible, that all parties bidding on a contract share a common understanding of the scope of the project. That objective is particularly important in government contracts, in which significant post-award modifications are limited by the government's obligation to use competitive bidding procedures and by the risk of prejudice to other potential contractors.

Id. The court also described the contractor's duty of inquiry: "[T]he duty of inquiry prevents contractors from taking advantage of ambiguities in government contracts by adopting narrow interpretations in preparing their bids and then, after the award, seeking equitable adjustments to perform the additional work the government actually wanted." *Id.*

415. *See id.* (stating that the patent ambiguity doctrine is only to be applied to contract ambiguities meeting the "patent" and "glaring" standard).

416. *See id.* Notably, the Federal Circuit emphasized that "the presence or absence of a patent ambiguity is not determined by the contractor's actual knowledge, but rather by what a reasonable contractor would have perceived in studying the bid packet." *Id.* Thus, even if Triax had not noticed the ambiguity, the duty of inquiry would still apply, as "a reasonable contractor studying the specifications" would have noticed the ambiguity. *Id.*

417. *See id.* (explaining that the contract was patently ambiguous and therefore must be construed against Triax).

418. *See id.* at 1474-75 (explaining that subtle ambiguities are latent and therefore interpreted in favor of contractor).

419. *See id.* at 1474.

ment contracts, this application of a "general rule" and the "exception" regarding ambiguities will likely be relied upon by contractors.

However, the Federal Circuit in *T. Brown Constructors, Inc. v. Pena*[420] established that, regardless of whether a latent or a patent ambiguity exists in a government contract, the party must have actually relied on the ambiguity. T. Brown Constructors ("Brown") contracted with the Federal Highway Administration ("FHWA") for the construction of a two-lane highway in the Lincoln National Forest, near Cloudcroft, New Mexico.[421] In part, payment under the contract depended on the result of gradation tests that established the quality of material used to construct the highway.[422] The FHWA took five tests and established a pay factor based on the lowest mean pay factor.[423] Brown objected to this computation methodology and filed a claim with the contracting officer.[424] When the contracting officer rejected the claim based on the lower methodology, Brown appealed to the Department of Transportation Board of Contract Appeals ("DOTBCA").[425]

The DOTBCA held that the contract term concerning the use of the gradation test to establish a pay factor was patently ambiguous and ruled that Brown had a duty to inquire regarding the pay methodology.[426] Because Brown failed to inquire about the methodology for computing the pay factor, the DOTBCA sustained the decision of the contracting officer.[427]

On appeal to the Federal Circuit, Brown asserted that the ASBCA had improperly relied on an older version of the contract specification in making its contract interpretation analysis.[428] The Federal Circuit, however, focused on another component of the Board's holding: that Brown had neither relied upon, nor proven reliance

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420. 132 F.3d 724 (Fed. Cir. 1997).

421. *See id.* at 726.

422. *See id.* at 735 (describing gradation test for highway construction whereby subject material is passed through successively smaller sieves to determine its composition).

423. *See id.* After the FHWA performed gradation tests on five subplots, it computed a pay factor for each gradation size, averaged the sizes, and computed an arithmetic mean for the five subplots. *See id.* The FHWA then took the lowest of the mean pay factors to determine the overall pay factor. *See id.*

424. *See id.* (outlining the methodology forwarded by Brown that averaged mean pay factors to produce the average pay factor).

425. *See* T. Brown Constructors, Inc., DOT CAB No.1986, 95-2 B.C.A. (CCH) ¶ 27,870, at 138,972 (1995), *aff'd in part and rev'd in part sub nom.* T. Brown Constructors, Inc. v. Peña, 132 F.3d 724 (Fed. Cir. 1997).

426. *See id.* at 139,026 (noting several reasonable interpretations of contract language).

427. *See id.* (arguing that failure to inquire shows no reliance on Brown's interpretation of contract pay factor meaning).

428. *See T. Brown Constructors, Inc.*, 132 F.3d at 735. The Federal Circuit seemingly agreed with Brown, noting that the Board had relied on older specifications. *See id.* The court, however, explained that this in itself was not dispositive of the question. *See id.*

on, the disputed ambiguity.[429] The court ruled that, regardless of the version of the contract cited by the Board, Brown could not recover for an ambiguity in a contract if it could not establish that it had relied on the ambiguity.[430] Noting that the DOTBCA's ruling that Brown had not relied on the alleged ambiguity was "virtually unassailable since it is based on an assessment of Mr. Brown's credibility,"[431] the court affirmed the ruling of the DOTBCA.[432]

In some cases, the resolution of asserted contract ambiguity does not involve a complicated legal analysis, but rather a simple matter of contract interpretation, at times based on quite implausible arguments. For example, in *Barsebäck Kraft AB v. United States*,[433] the plaintiff, with little other basis to challenge a contract term, asserted a contract ambiguity. Barsebäck Kraft, a Swedish energy company, purchased uranium enrichment services from the United States pursuant to a treaty dealing with peaceful uses of nuclear power.[434] In 1984, Barsebäck Kraft entered into a thirty-year contract for enriched uranium administered by the Department of Energy ("DOE").[435]

The contract established the price of the uranium "in accordance with the established DOE pricing policy for such services."[436] Pursuant to the Energy Policy Act of 1992, however, Congress substantially revised the manner by which the United States provided uranium enrichment services to third parties.[437] The Act transferred uranium enrichment responsibilities from the DOE to a new entity, the United States Enrichment Services Corporation ("USEC"), and allowed the USEC to make a profit on its enrichment services.[438] In light of these

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429. *See id.* ("Brown, however, fails to address the other independent basis for the Board's decision—lack of reliance.").

430. *See id.* ("In order for Brown to prevail on its claim it must have relied on its interpretation when bidding the contract.").

431. *See id.*

432. This case also involved a number of other claims based on this contract. *See id.* at 726 (citing differing site condition, subgrade tolerance, traffic control, tree and stump removal, and delay claims). The DOTBCA had denied all the claims submitted by Brown, but the Federal Circuit reversed some and affirmed others. *See id.* at 726-27, 735 (reversing the site conditions and tree and stump removal claims and affirming all others). Nevertheless, except to Brown, of course, the decision based on the reliance on an ambiguous term in a contract is the only ruling of legal significance.

433. 121 F.3d 1475 (Fed. Cir. 1997).

434. *See id.* at 1477. The case also included a similar claim submitted by Empresa Nacional del Uranio, S.A. ("ENUSA"), a nuclear fuel cycle company owned and operated by Spain, which also purchased uranium enrichment services from the United States pursuant to an international treaty. *See id.* The arguments made by ENUSA were identical to those made by Barsebäck Kraft and thus the discussion is limited to Barsebäck Kraft. *See id.* at 1479 n.3.

435. *See id.* at 1477.

436. *Id.* at 1478. At the time that the parties entered into the contract, the established DOE pricing policy involved only recovery of government costs. *See id.*

437. *See id.*

438. *See id.* The Energy Policy Act also created the Uranium Enrichment Decontamination

changes, Barsebäck Kraft brought suit in the CFC,[439] claiming, *inter alia*, that the USEC's prices for uranium enrichment services violated the contract because the USEC had failed to set prices in accordance with the cost-recovery methodology in place at the time of the contract.[440] The CFC granted summary judgment for the United States.[441]

On appeal to the Federal Circuit, Barsebäck Kraft proffered three arguments in support of its position that the contract terms regarding enrichment services were ambiguous.[442] First, it argued that the many references to the DOE in the contract made any assertion of authority by the USEC ambiguous. Second, Barsebäck Kraft argued that the use of the word "any" in the pricing provisions was ambiguous in the context of a pricing policy reflecting "any policy established by DOE." Third, the company argued that certain recital clauses in the contracting of the pricing provision were ambiguous, making reference to DOE (but not to USEC).[443] The Federal Circuit, however, rejected all of these positions.[444] Recognizing Barsebäck Kraft's veiled attempt to avoid the terms of the Energy Policy Act of 1992, the court explained that the Act properly transferred the responsibility of uranium enrichment services from the DOE to the new USEC.[445] Accordingly, the court found no ambiguity in the con-

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and Decommissioning Fund ("UEDDF"), a fund administered by the DOE (and not the USEC). *See id.* For a case dealing with the UEDDF, see *infra* notes 497-498 and accompanying text.

439. *See* Barsebäck Kraft AB v. United States, 36 Fed. Cl. 691, 698 (1996), *aff'd*, 121 F.3d 1475 (Fed. Cir. 1997). Barseback Kraft also claimed damages for (1) costs incurred by the USEC in applying a pricing method not founded on the USEC's costs, (2) the difference between the market price of the USEC's services and the prices actually charged, and (3) the USEC's "double-charging" of plaintiffs. *See id.* Before filing a claim in the CFC Barsebäck Kraft submitted similar claims to the contracting officer pursuant to the dispute clause of the contract. *See id.* The contracting officer denied all the claims *in toto*. *See id.*

440. *See id.* Barsebäck Kraft also presented two other arguments: first, that the new uncompetitive and discriminatory pricing policies breached the international agreement between Sweden and the United States regarding uranium enrichment services; and second, that the new Act improperly allowed double recovery of costs for the UEDDF. *See id.*

441. *See id.* at 708.

442. *See Barsebäck Kraft AB*, 121 F.3d at 1480 (noting that Baresbäck specifically alleged contract ambiguity on appeal).

443. *See id.* at 1480-81.

444. *See id.* Baresbäck Kraft's assertions of contract ambiguity did not persuade the Federal Circuit, which commented: "Although framed as arguments that the contracts are ambiguous, Barsebäck and ENUSA essentially argue, in part, that USEC's pricing policy breaches their contracts." *Id.* at 1480 n.5.

445. *See id.* at 1480-81. The Federal Circuit explained that this case "is the other side of the *Winstar* coin." *See id.* at 1481. In *United States v. Winstar, Inc.*, 518 U.S. 839 (1996), the Supreme Court affirmed a ruling by the Federal Circuit, that a government contract placed the risk of loss due to later legislation on the government. *See id.* at 888-89. In contrast, in *Barsebäck Kraft*, the Federal Circuit explained that the contract placed the risk of loss due to later legislation on the contractor. *See Barsebäck Kraft*, 121 F.3d at 1481; *see also Contractors Assumed Risk of Statutory Change in Uranium Enrichment Pricing Policy*, 39 GOV'T CONTRACTOR ¶473, at 16-17 (Oct. 1, 1997) (discussing *Winstar* ruling with regard to *Barsebäck Kraft*).

tract and thus affirmed the ruling of the CFC.[446]

B. Claim (Adhering to Contract Requirements)

If the government demands a change in a government contract that results in additional costs to the contractor, the contractor may assert a "claim" to recover the increased costs, plus a proportional profit, on the additional work.[447] For example, in *Advanced Materials, Inc. v. Perry*,[448] the Federal Circuit considered a typical claim for increased costs. Advanced Materials entered into a costs plus fixed fee ("CPFF") contract with the Army to design and develop decontamination kits.[449] The contract contained a "Limitations of Cost" provision, which provided that the government would not be obligated to reimburse the contractor for any costs in excess of the estimated cost.[450] The contract estimated the total cost of the contract at $825,262, which the government later raised to $1,085,712.[451]

After delivery of the kits to the Army, but before completing performance of the contract, Advanced Materials informed the contracting officer that a cost overrun had occurred on the contract due to accounting exigencies.[452] The contracting officer refused to approve the overrun because Advanced Materials had not presented information regarding the overrun in writing.[453] After the completion date of the contract, Advanced Materials submitted written notification of the overruns, but the contracting officer indicated that no additional money would be paid under the contract.[454] Advanced Materials then appealed the decision to the ASBCA, but the Board denied the claim, ruling that the Limitations of Cost provision barred recovery.[455]

On appeal, the Federal Circuit reviewed the terms of the contract

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446. *See Barsebäck Kraft*, 121 F.3d at 1480 (finding that "any" connotes "all" or "every" and is not restricted to DOE pricing policy and that recital clauses only express desires of DOE, not contractual commitments). The court disposed of Barsebäck Kraft's argument based on the international treaty violations, by noting that nothing in the treaties guaranteed a certain price for the uranium enrichment services. *See id.* at 1482. Similarly, the court noted that the DOE (and not the USEC) collects the assessments and receives appropriations for the UEDDF and accordingly rejected the argument that, by charging a higher price for uranium services paid to the USEC, the DOE somehow received additional monies for the UEDDF. *See id.* at 1483.

447. *See* CIBINIC & NASH, *supra* note 76, at 967.

448. 108 F.3d 307 (Fed. Cir. 1997).

449. *See id.* at 308.

450. *See id.* (citing FAR, 48 C.F.R. § 52.232-20).

451. *See id.* at 308.

452. *See id.* at 309.

453. *See id.*

454. *See id.* Advanced Materials sought an additional $191,053. *See id.*

455. *See* Advanced Materials, Inc., ASBCA No.47,014, 96-1 B.C.A. (CCH) ¶ 28,002, at 139, 851-52 (1995) (finding that the appellant failed to establish the required elements for estopping respondent's reliance on the limitations of the cost clause), *aff'd*, 108 F.3d 307 (Fed. Cir. 1997).

and detailed the various contractual provisions, focusing in particular on the Limitations of Cost provision.[456]

Recognizing that Advanced Materials failed to adhere to the contractual requirements for increasing the Limitations of Cost provision, the court affirmed the decision of the ASBCA.[457] Advanced Materials argued that its inexperience with accounting practices for government contracts contributed to its noncompliance with the contractual requirements.[458] Not surprisingly, this argument did not impress the Federal Circuit.[459]

C. Change (Exhaustion of Administrative Remedies)

Generally, a contractor asserts a claim for an equitable adjustment based on changes required by the government under the "Changes Clause" of the contract.[460] In addition, where a contract contains provisions dealing with obtaining relief for a claim against the government, the "doctrine of the exhaustion of administrative remedies" requires that the contractor first exhaust all administrative remedies before seeking a judicial remedy.[461] The purpose of the exhaustion requirement is to provide an opportunity for the parties to resolve a dispute in an administrative setting before resorting to judicial redress.[462]

In *New Valley Corp. v. United States*,[463] the Federal Circuit reviewed a decision dismissing a contractor's claim for, *inter alia*, failing to ex-

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456. *See Advanced Materials, Inc.*, 108 F.3d at 308-10. Under the terms of the contract, the contract price was the cost of performance plus a fixed fee and included a schedule showing the estimated total cost of performance, which if exceeded by the contractor, the government was not obligated to reimburse. *See id.*

457. *See id.* (noting that nothing prevented Advanced Materials from following contractual provisions for pursuing additional funding). The contract allowed for an increase in the estimated cost, provided that (1) the contractor notifies the contracting officer in writing of an anticipated cost overrun within sixty days of reaching seventy-five percent of the estimated total cost, (2) the contracting officer notifies the contractor in writing that the total estimated cost has been increased, and (3) the contractor does not incur costs above the total estimated cost before the contracting officer gives notice of an increase. *See id.* at 310. The Federal Circuit determined that the three requirements had not been satisfied. *See id.*

458. *See id.* at 311 ("Advanced Materials recognized the inadequacy of its accounting system, and should have adjusted its cost calculations to reflect the impact of postponed and canceled contracts.").

459. *See id.* Advanced Materials also made estoppel and waiver arguments pertaining to the actions of the contracting officer, but the Federal Circuit quickly disposed of these arguments as well. *See id.* at 311-12 (stating that Advanced Materials failed to satisfy elements of an estoppel claim and that government's letters indicate that it did not waive the cost provision).

460. *See* CIBINIC & NASH, *supra* note 76, at 280.

461. *See* Crown Coat Front Co. v. United States, 386 U.S. 503, 511-12 (1967) (arguing that relief from a court is barred when no administrative remedy has been sought).

462. *See* United States v. Joseph A. Holpuch Co., 328 U.S. 234, 239-40 (1946) (citing mitigation and avoidance of large damages as benefits of administrative proceedings).

463. 119 F.3d 1576 (Fed. Cir. 1997).

haust the administrative remedies. Similar to the contractors in *Hughes Communications Galaxy, Inc. v. United States*[464] and *American Satellite Co. v. United States*,[465] New Valley had executed a "Launch Services Agreement" ("LSA"), whereby the National Aeronautics and Space Administration ("NASA") agreed to launch certain of its commercial satellites.[466] The LSA provided that NASA would only terminate the launch agreement "for Reasons Beyond NASA's control."[467] Following the Challenger accident on January 28, 1986, however, President Reagan terminated the LSAs for all satellites not requiring a manned vehicle, or necessary for national security or foreign policy reasons.[468] NASA subsequently advised New Valley that its LSA had been terminated, and New Valley soon thereafter submitted a claim to NASA for $58,596,964.[469] When NASA agreed to refund only the $4,783,264 that had been paid to NASA for the launch services, New Valley submitted a claim to the Associate Administrator for Space Flight, as required by the LSA.[470] When the Associate Administrator failed to respond,[471] New Valley submitted a claim to the NASA Administrator.[472] Receiving no answer from the NASA Administrator af-

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464. 998 F.2d 953 (Fed. Cir. 1993). Hughes had a Launch Services Agreement ("LSA") with NASA for the launch of ten commercial satellites. *See id.* at 955. After the Challenger accident, President Reagan reduced the shuttle fleet to three and restricted its use to "Shuttle Unique" and "National Security and Foreign Policy" categories. *See id.* at 956. Due to this restriction, NASA informed Hughes that its satellites would not be launched because they did not fall into either category. *See id.* at 957. Hughes sued in the CFC for breach of contract. *See* Hughes Communications Galaxy, Inc. v. United States, 26 Cl. Ct. 123 (1992). The court denied the claim based on the "sovereign acts doctrine." *See id.* at 144 (holding that the decision to change the use of shuttles was a sovereign act because it did not carry security or foreign policy implications). On appeal, the Federal Circuit reversed, explaining that NASA had simply breached the LSA contract, a contract that NASA had entered into pursuant to its capacity as "government-as-contractor." *See id.* at 958-59.

465. 998 F.2d 950, 952-53 (Fed. Cir. 1993) (finding that for the reasons set forth in *Hughes*, NASA breached a LSA with American Satellite).

466. *New Valley*, 119 F.3d at 1577. The LSA with New Valley, known then as Western Union Telegraph Company, provided for the launch of two commercial satellites. *See id.*

467. *See id.* at 1578. "Reasons Beyond NASA's Control" were defined as "acts of the United States Government other than NASA, in either its sovereign or contractual capacity." *Id.* However, should a dispute arise, the contract required that the dispute first be presented to NASA's Associate Administrator of Space Flight, and if a decision was not availing, that the dispute must then be presented to the NASA Administrator. *See id.*

468. *See id.*

469. *See id.* at 1579. This figure represented $4,783,264 paid to NASA for launch services, $12,063,700 for preparing the satellite for launch, $29,750,000 for increased launch expenses due to NASA delays, and $12,000,000 for the loss of capital investment. *See id.*

470. *See id.* The claim emphasized that, in light of the rulings in *Hughes* and *American Satellite*, NASA should seriously consider the claim. *See id.* The claim further stated, that if no decision was made within sixty days, New Valley would file a claim in the CFC. *See id.*

471. *See id.* Initially, the Associate Administrator responded that if New Valley established that it succeeded to the rights of Western Union, he would consider the claim. *See id.* New Valley submitted evidence of the name change, but the Associate Administrator never responded. *See id.*

472. *See id.* (stating that unless the Administrator agreed to meet with New Valley within

ter sixty days, New Valley filed an action in the CFC.[473]

Before the CFC, New Valley alleged a breach of contract and a taking without just compensation.[474] The government countered by asserting that New Valley had failed to exhaust administrative remedies and accordingly moved for summary judgment. The CFC agreed and granted the government's motion to dismiss.[475] The court alternatively held that, even if New Valley had exhausted its administrative remedies, it had waived any claim for a breach of contract based on the LSA.[476] Finally, the court ruled that NASA had properly terminated the LSA with New Valley.[477]

On appeal, the Federal Circuit carefully addressed, and subsequently reversed, each of the alternative rulings of the CFC.[478] The court first considered the CFC's ruling that New Valley had failed to exhaust its administrative remedies because the letters submitted to NASA did not constitute a "dispute."[479] In some detail, the court repudiated what it viewed to be the CFC's *Dawco*-like approach to the exhaustion issue.[480] The court explained that a *Dawco*-like analysis—requiring a pre-existing suit prior to the filing of a claim—was erroneous because the LSA at issue was not subject to the CDA.[481] The court concluded that "[r]egardless of whether that letter [to the Associate Administrator] concerned an existing dispute when submitted, or even whether an existing dispute was a prerequisite, there is no

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sixty days, New Valley would consider the dispute process exhausted).

473. *See* New Valley Corp. v. United States, 34 Fed. Cl. 703 (1996), *rev'd*, 119 F.3d 1576 (Fed. Cir. 1997).

474. *See id.* at 705 (alleging damages for the government's failure to launch satellites).

475. *See id.* at 710-11 (finding that none of New Valley's submissions satisfied the contract's dispute clause).

476. *See id.* at 712 (determining that, from the express language of contract, the parties intended to waive all judicial claims).

477. *See id.* at 711-12 (holding that the President's revision of national space policy terminated the contract and precluded a damage claim).

478. *See New Valley*, 119 F.3d at 1584. (declaring that the court is charged with interpreting the LSA in a manner that preserves its integrity and does not destroy it). A dissenting opinion was filed by Circuit Judge Lourie. *See id.* at 1584 (Lourie, J. dissenting).

479. *See New Valley*, 34 Fed. Cl. at 710-11.

480. *See* Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991), *overruled by* Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995). In *Dawco*, the Federal Circuit imposed a burdensome requirement that any claim submitted to the government be based on a pre-existing dispute. *See Dawco*, 930 F.2d at 877-78 (holding that the plain language of FAR regulations mandate that to have a valid claim, there must be a pre-existing amount in dispute). After several years of governmental abuse of this precedent, the Federal Circuit corrected itself in *Reflectone*. *See Reflectone*, 60 F.3d at 1579-80 (holding that the requirement of pre-existing dispute be applied only to "routine" requests for payment and that the contractor's request for equitable adjustment was "non-routine"). It seems quite interesting that the CFC would attempt to revive such a stolid and unfair doctrine for the purpose of analysis for the doctrine of exhaustion of administrative remedies. Fortunately, the Federal Circuit specifically rejected this approach. *See New Valley*, 119 F.3d at 1581.

481. *See New Valley* 119 F.3d at 1581 n.3.

doubt that the parties ultimately disputed whether NASA had breached the LSA."[482]

The court next considered the issues of wavier and termination, noting that, for the most part, *Hughes* and *American Satellite* were controlling.[483] In the end, the court warned that if it had accepted the ruling of the CFC, "[i]t would come perilously close to, if not shove the contract over, the cliff of voidness."[484] As a result, in a tone implying frustration over the CFC's ruling, the Federal Circuit reversed.[485]

D. Change (Sovereign Acts and Unmistakability)

In 1996, the United States Supreme Court addressed the sovereign acts doctrine[486] and the unmistakability doctrine[487] in *United States v. Winstar Corp.*[488] Discussing the sovereign acts doctrine,[489] the Court explained that the government has two roles in federal procurement matters, the role of contractor and the role of sovereign.[490] For sovereign acts by the government-as-contractor, the normal rules of government procurement apply, but for sovereign acts by the government-as-sovereign, the government may take actions for which it cannot be held liable.[491]

Under the unmistakability doctrine, the Court explained that "a contract with [the government] will not be read to include an unstated term exempting the other contracting party from the applica-

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482. *Id.* at 1581 (concluding that New Valley's written submission of a dispute concerning a question of law or fact facially complied with the procedures in the Disputes Clause).

483. *See id.* at 1582-84; *supra* notes 464-65 (discussing *Hughes* and *American Satellite*). The government also argued that, by accepting a partial refund, New Valley had waived all judicial claims. *See New Valley*, 119 F.3d at 1583. The Federal Circuit noted that this argument was completely contrary to the facts in the case. *See id.* (acknowledging that both parties reserved any and all claims or rights they may have had with regard to damages). In rejecting the termination argument, the Federal Circuit further pointed out that NASA never terminated the LSA and instead, made continued representations to the contrary. *See id.* at 1582 (noting that on January 29, 1987, NASA wrote a letter specifically stating that the LSA was still in existence).

484. *New Valley*, 119 F.3d at 1584 (citing Torncello v. United States, 681 F.2d 756, 760 (Ct. Cl. 1982) ("[A] party may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void.")); *see also Federal Circuit Reverses COFC, Says Satellite Firm Exhausted Remedies, Didn't Waive Claims Under LSA*, 68 Fed. Cont. Rep. 109, 109-10 (1997) (summarizing the Federal Circuit's reversal of CFC's ruling in *New Valley*).

485. *See New Valley*, 119 F.3d at 1584 (asserting that affirming the CFC would "do violence to," and render superfluous the termination provision in the LSA).

486. *See infra* note 489 for a definition of sovereign acts doctrine.

487. *See infra* notes 492-93 and accompanying text.

488. 518 U.S. 839 (1996).

489. The sovereign acts doctrine maintains that "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *See* Horowitz v. United States, 267 U.S. 458, 461 (1925); *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 145-46 (1982) (examining the powers of a sovereign tribe over lessors of reservation land).

490. *See Winstar*, 518 U.S. at 892.

491. *See id.* at 892-93.

tion of a subsequent [governmental] act (including an Act of Congress)."[492] Thus, the unmistakability doctrine identifies the "rule that applies when the Government... has surrendered a sovereign power," such that "[t]he application of the doctrine turns on whether enforcement of the contractual obligation would block the exercise of a sovereign power of the Government."[493]

In *Yankee Atomic Electric Co. v. United States*,[494] the Federal Circuit had occasion to apply the sovereign acts doctrine for the first time following the *Winstar* ruling. Yankee Atomic consisted of an association of utility companies organized in 1954 that produced electricity using nuclear fuels.[495] In 1963, Yankee Atomic begun purchasing uranium enrichment services from the United States.[496] In 1992, Congress passed the Energy Policy Act of 1992, which established the Uranium Enrichment Decontamination and Decommissioning Fund ("UEDDF") to decommission old uranium enrichment plants.[497] To fund the UEDDF, Congress enacted a special assessment against utility companies that previously purchased uranium enrichment services from the United States.[498] Even though Yankee Atomic had shut down prior to the passage of the Energy Policy Act, the government nevertheless required that Yankee Atomic pay the special assessment.[499] After making payment, Yankee Atomic brought suit for a refund in the CFC. On cross-motions for summary judgment, the court granted summary judgment for Yankee Atomic on the refund.[500]

On appeal, the Federal Circuit first considered the dual arguments pertaining to the sovereign acts doctrine: whether the passage of the Energy Policy Act constituted a sovereign act by the government-

492. *Id.* at 878. It should be noted that this quoted formulation of the unmistakability doctrine was that of only a plurality of the Supreme Court.

493. *Id.* at 879.

494. 112 F.3d 1569 (Fed. Cir. 1997).

495. *See id.* at 1572.

496. *See id.*

497. *See id.*

498. *See id.* (noting that almost two-thirds of the funding came from congressional appropriation). Under the Energy Policy Act, the amount of the special assessment for the UEDDF was determined by a computation of work units, which represented the percentage of the uranium enrichment services procured from the government. *See id.*

499. *See id.* at 1573. Yankee Atomic paid approximately $3,000,000 to the special assessment. *See id.*

500. *See* Yankee Atomic Elec. Co. v. United States, 33 Fed. Cl. 580, 586 (1995), *rev'd*, 112 F.3d 1569 (Fed. Cir. 1997). On cross-motions for summary judgment, the CFC granted Yankee Atomic's motion based on an application of a sovereign act by the government-as-contractor analysis. *See id.* at 584. The government proffered the opposite argument, that it had acted according to the government-as-sovereign analysis. *See id.* at 585. The CFC concluded that the assessment constituted nothing more than a retroactive price increase of the contract terms and accordingly held that annual assessments for contract purchases were to be refunded with interest. *See id.* at 586.

as-contractor or a sovereign act by the government-as-sovereign.[501] Yankee Atomic argued that the assessment required under the Act constituted a sovereign act by the government-as-contractor striving to reconstruct the terms of the enrichment services contracts.[502] Conversely, the government argued that the assessment constituted a sovereign act by the government-as-sovereign and applied not only to the utilities that had contracted with the government, but also to utilities that had obtained enrichment services on the secondary market.[503]

Concluding that the assessment approximated "a general tax that falls proportionally on all utilities," the Federal Circuit ruled that the assessment constituted a sovereign act by the government-as-sovereign.[504]

Having found a sovereign act, the Federal Circuit next considered the application of the unmistakability doctrine, examining "whether the contracts between Yankee Atomic and the Government unmistakably precluded the Government from subsequently exercising its sovereign power to assess a tax."[505] Concluding that any exception to the assessment for Yankee Power would effectively block the exercise of the sovereign power to raise money (by the sovereign power to tax), the Federal Circuit concluded that the unmistakability doctrine applied.[506] Accordingly, the Federal Circuit reversed the ruling of the CFC.[507]

In a compelling dissent, Circuit Judge (now Chief Judge) Mayer argued that the majority improperly ignored the fixed-price nature of the contracts between Yankee Atomic and the government.[508] Be-

501. *See Yankee Atomic*, 112 F.3d 1574-77.

502. *See id.* at 1573, 1575.

503. *See id.* at 1573, 1575-76.

504. *See id.* at 1576; *see also Assessment on Utilities That Used Uranium Enrichment Services Valid*, Gov't Cont. Rep. (CCH) 4-5 (June 18, 1997).

505. *See Yankee Atomic*, 112 F.3d at 1579.

506. *See id.* at 1579-80 (explaining that if Yankee Power prevailed, a refund would essentially constitute a tax rebate, which would block exercise of the sovereign power to tax). In making its ruling on the issue of unmistakability, the Federal Circuit reviewed the contracts and found nothing indicating that a future assessment would not be made against Yankee Atomic. *See id.* As a result, the court concluded that Yankee Atomic was precluded from avoiding application of the unmistakability doctrine. *See id.* at 1581.

507. *See id.* at 1581-82. The Federal Circuit explained that a special assessment is a sovereign act designed to spread the costs associated with decontamination and decommissioning over all utilities. The court then held that the contract between Yankee Atomic and the government did not contain an unmistakable promise that precluded the government from exercising this sovereign power and that Yankee Atomic was not exempt from the special assessment simply because it had ceased operations before the Act's passage. *See id.*

508. *See id.* at 1582-83 (Mayer, J., dissenting); *see also id.* at 1582 ("Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties arise.") (quoting *United States v.*

cause these contracts had been satisfactorily performed, Judge Mayer pointed out that an assessment based on a fully performed contract would constitute a retroactive price increase.[509] Judge Mayer further reasoned that neither the sovereign acts nor the unmistakability doctrines would be applicable, as both doctrines apply to contract claims.[510] Judge Mayer concluded that the assessment against Yankee Atomic constituted nothing less than a taking under the Fifth Amendment.[511]

Therefore, as demonstrated by the majority and dissenting opinions and despite the recent ruling of the Supreme Court in *Winstar*, questions involving the application of the sovereign acts doctrine and the unmistakability doctrine continue to haunt the government procurement community.[512]

IV. COST AND PRICING

In government procurement, the government allows contractors to recover certain costs from certain government contracts.[513] In order to recover such costs, however, the contractor has an obligation to establish properly that it is entitled to these costs, as illustrated by *Titan Corp. v. West*.[514] Titan had entered into a CPFF contract with the Army Corps of Engineers for the research and development of services concerning the effects of explosions on geological materials.[515] The contract contained a "Limitations of Costs" clause, which limited cost recovery to the amount of the contract's original estimate, unless the contractor notified the government of potential cost overruns

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Spearin, 248 U.S. 132, 136 (1918)).

509. *See id.* at 1583 (Mayer, J., dissenting).

510. *See id.* at 1583-85 (arguing that the action was not a contract claim, but rather an action seeking reimbursement for an improper abrogation of vested property rights which happened to arise out of completed contracts).

511. *See id.* at 1584-85. Judge Mayer explained that Congress made the former contracting parties pay for something which they had no contractual obligation to pay. *See id.* at 1584. As such, the assessments could only be regarded as a taking under the Fifth Amendment. *See id.* at 1585.

512. *See generally Federal Circuit Panel Applies* Winstar, *Rules That Special Assessment Imposed on Utility Was Sovereign Act, Does Not Abrogate Fixed Price Uranium Enrichment Contracts*, 67 Fed. Cont. Rep. (BNA) 561-63 (May 12, 1997) (discussing the still uncertain application of the sovereign acts doctrine and unmistakability doctrine following *Winstar*).

513. *See* JOHN CIBINIC, JR. & RALPH C. NASH, JR., COST REIMBURSEMENT CONTRACTING 1 (2d ed. 1993) (explaining that for a cost reimbursement contract to be enforceable against the government, it must comply with the same legal requirements that apply to all federal government contracts). The types of contracts for which the government generally reimburses costs are referred to as "cost-reimbursement contracts." *See id.*

514. 129 F.3d 1479, 1482 (Fed. Cir. 1997) (referring to companies' responsibilities when contracting with the federal government).

515. *See id.* at 1480.

and obtained authorization to incur the increased costs.[516] Following the performance of the Titan contract, the DCAA audited a subcontractor that Titan had used, showing costs in excess of the original government estimate.[517] Based on the audit, Titan filed a claim with the contracting officer requesting reimbursement of the additional costs, but the contracting officer denied the claim.[518] The ASBCA sustained the decision of the contracting officer and denied the claim, chastising Titan for failing to monitor its costs properly.[519]

On appeal, the Federal Circuit noted that the Limitations of Costs clause allowed for increased costs in the absence of notice to the government, if the costs were unforeseeable.[520] To benefit from this exception, however, the court stated that the contractor must present evidence to show that the costs were actually unforeseeable.[521] Citing the findings of the ASBCA, the Federal Circuit concluded that Titan had not satisfied its burden of proof.[522]

In situations where the costs were foreseeable, the court emphasized the importance of the Limitations of Costs clause: "There is sound reason for the notice requirement of the Limitation of Costs provision. It protects the contractor by either providing assurance of reimbursement or permitting the contractor to cease performance. It protects the government from paying more than it had expected for the project."[523] The court further emphasized that the government, not the contractor, controls the decision whether or not to incur cost overruns.[524] Thus, because Titan had failed to adhere to

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516. *See id.* at 1480-81 (citing 48 C.F.R. § 52.232-20(b), (d)(2)). The original estimated cost of the Titan contract was $108,737, and the fixed fee was $9,678. *See id.* at 1480. If any cost overruns are anticipated, the Limitations of Costs clause provides that the contractor must notify the government contracting officer in writing sixty days before the date when the exceptional costs are to be incurred. *See id.* (quoting 48 C.F.R. § 52.232-20(b)).

517. *See id.* at 1481. The DCAA audit showed that the subcontractor incurred $11,624.82 more in costs than provided for in the contract's original estimate. *See id.* Additionally, the subcontractor claimed $2,025.49 in direct costs. *See id.*

518. *See id.* Titan alleged entitlement to the additional costs because of the "generally accepted accounting principle that provisional costs are not deemed final until after an audit." *Id.*

519. *See id.* The ASBCA ruled that Titan had not proven the unforeseeability of its cost overruns for the original contract work or for work due to changes allegedly requested by the government. *See id.*

520. *See id.* (citing RMI, Inc. v. United States, 800 F.2d 246, 248 (Fed. Cir. 1986)) (finding that a contractor does not have to give notice if there is no reason to think that a cost overrun will occur immediately).

521. *See id.*

522. *See id.* at 1480. The court also summarily rejected Titan's argument that the stress of fulfilling the contract had inhibited proper accounting methodologies. *See id.* at 1482 ("Although relatively small entities may well encounter disproportionate burdens in dealing with the government, the obligations of the relationship cannot be unilaterally waived.").

523. *Id.*

524. *See id.* at 1482.

these requirements and did not properly monitor its costs during contract performance, the Federal Circuit affirmed the ASBCA's decision.[525]

Assuming conformance with the ruling in *Titan*, it is possible for a contractor to show proper entitlement to the recovery of costs.[526] The government, however, places two general sets of limitations on the specific types of costs for which a contractor may seek reimbursement: Cost Accounting Standards[527] and Cost Principles.[528] In addition to such limitations on the types of costs, the government also places certain obligations on contractors who recover costs under government contracts, including the Truth in Negotiations Act ("TINA").[529]

A. Cost Accounting Standards ("CAS")

In certain circumstances, a government contract may be subject to the CAS,[530] which provide specific accounting methodologies to which a contractor must adhere to recover costs.[531] In the 1997 term, the Federal Circuit did not issue any precedential cases relating specifically to an issue dealing with the CAS.[532]

B. Cost Principles

Recovery of costs from the government pursuant to a government contract is considered "allowable" provided there is no specific prohibition on recovery of the cost.[533] If there is such a prohibition, the cost is deemed unallowable.[534] In essence then, the Cost Principles are a group of regulatory principles that define and distinguish those

525. *See id.* (finding that Titan could have foreseen cost overruns).

526. *See id.* (explaining that the notification requirement gives contractors assurance of reimbursement for properly reported and approved cost overruns, or provides the option of stopping performance until cost overruns are approved by government).

527. *See* 48 C.F.R. §§ 30.000-.603 (1996).

528. *See id.* §§ 31.000-.703.

529. *See* 10 U.S.C. § 2306(a) (1994) (requiring government contractors to utilize certain accounting and certification of costs practices).

530. *See* Richard C. Walters, *The Matter of Interest in Federal Government Contracting*, 14 PUB. CONT. L.J. 96, 105 (1983) (describing the history and purpose of CAS).

531. *See id.* The first CAS were promulgated in 1970 by the original Cost Accounting Standards Board. *See id.*

532. In *Motorola Inc. v. West*, however, the Federal Circuit did issue an interesting nonprecedential opinion relating to the CAS. *See supra* notes 194-206 and accompanying text (discussing *Motorola*); *see also Federal Circuit Reverses Where ASBCA Exceeded Remand on Aydin's Foreign Selling Costs Claim*, 68 Fed. Cont. Rep. (BNA) 108, 108-09 (1997) (discussing the allocation of foreign selling costs to CAS 402 and CAS 410).

533. *See* 48 C.F.R. § 31.201-202 (1997) (explaining the standards for determining whether costs are allowable).

534. *See id.* § 31.201-206 (identifying the reasons for unallowability).

costs which are allowable from those which are unallowable.[535]

1. Cost Principle: FAR 31.205-6

Cost Principle 31.205-6, which pertains to compensation for personal services, states that the question of "[s]everence to be allowable . . . depend[s] upon whether the severance is normal or abnormal."[536] In *ITT Federal Services Corp. v. Widnall*,[537] the Federal Circuit considered whether a contractor with a firm, fixed-price ("FFP") contract could recover the cost of severance pay, even though the severance pay was abnormal.[538] ITT had an FFP contract with the Air Force to provide data support services at the Phillips Laboratory at Edwards Air Force Base in California.[539] Upon the conclusion of the contract and the termination of related work, ITT placed all but six employees in other positions, and provided severance pay to those unplaced employees according to corporate practice.[540] ITT sought reimbursement for the abnormal severance pay, asserting that the Air Force should pay "its fair share" of the costs pursuant to FAR 31.205-6(g)(2)(iii).[541] After the contracting officer denied the claim,[542] ITT appealed to the ASBCA, which affirmed the contracting officer's decision, noting that cost reimbursement pursuant to FAR 31.205-6 was not available for a FFP contract.[543]

On appeal to the Federal Circuit, ITT conceded that the severance payments constituted abnormal severance pay under FAR 31.205-6

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535. *See id.* §§ 31.201-.252 (laying out Cost Principles). Prior to April 1, 1984, the Cost Principles were located in the Defense Acquisition Regulation for DOD contracts, the Federal Procurement Regulation for civilian contracts, and the NASA Procurement Regulations for NASA contracts. *See* CIBINIC & NASH, *supra* note 513, at 613. After April 1, 1984, however, all the Cost Principles were centralized in Part 31 of the FAR, which is located in Title 48 of the CFR. *See id.*

536. *See* 48 C.F.R. § 31.205-6(g)(2) (1997). FAR 31.205-6(g) states that normal severance pay consists of "payments . . . allocated to all work performed in the contractor's plant, or where the contractor provides for accrual of pay for normal severances" and provides that abnormal severance pay consists of costs too speculative to accrue accurately and fairly. *See id.* § 31.205-06(g)(2)(ii) (iii).

537. 132 F.3d 1448 (Fed. Cir. 1997).

538. *See id.* at 1449.

539. *See id.* at 1450.

540. *See id.* at 1449-50. The contract in question was the third in a series of consecutive, five-year contracts for the data support services at the Phillips Laboratory. *See id.* at 1450. ITT had not anticipated that the contract would end after this third five-year contract. *See id.* at 1451.

541. *See id.* at 1450. FAR 31.205-6(g)(2)(iii) provides:

Abnormal or mass severance pay is of such a conjectural nature that measurement of costs by means of an accrual will not achieve equity to both parties. Thus, accruals for this purpose are not allowable. *However, the Government recognizes its obligation to participate, to the extent of its fair share, in any specific payment. Thus, allowability will be considered on a case-by-case basis.*

48 C.F.R. § 31.205-6(g)(2)(iii) (1996) (emphasis added).

542. *See ITT Fed. Servs. Corp*, 132 F.3d at 1450.

543. *See id.* (noting that FFP contracts require the contractor to pay all costs unless the actual contract provides for government cost overrun reimbursement).

but asserted that the costs were nevertheless reimbursable.[544] Although FAR 31.205-6 normally excludes abnormal severance pay, ITT noted that the cost principle also provides an exception for extraordinary abnormal severance payments on a case-by-case basis.[545] Based on this exception, ITT asserted entitlement under FAR 31.205-6(g)(2)(iii).[546] The Federal Circuit, however, rejected this position and ruled that ITT had not proven the "extraordinary circumstances" necessary to assert the exception to recovery of abnormal severance pay described in FAR 31.205-6(g)(2)(iii).[547] Somewhat surprisingly, the Federal Circuit did not reject the argument that FAR 31.205 prohibits the recovery of abnormal severance pay for FFP contracts.[548] Instead, the court only concluded that ITT had not established entitlement under the facts of the case,[549] and accordingly affirmed the ruling of the ASBCA.[550]

2. *Cost Principle: FAR 31.205-15*

Cost Principle 31.205-15 provides that "[c]osts of fines and penalties resulting from violations of . . . laws and regulations, are unallowable."[551] In *Ingalls Shipbuilding, Inc. v. Dalton*,[552] the Federal Circuit considered whether payments under the Longshore and Harbor Workers' Compensation Act ("LHWCA")[553] constitute unallowable

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544. *See id.*; *supra* note 541 (quoting FAR 31.205-6(g)(2)(iii)).

545. *See ITT Fed. Servs. Corp*, 132 F.3d at 1451 (presenting ITT's argument based on FAR 31.205-6(g)(2)(iii) that the government should reimburse "its fair share" of abnormal or mass severance costs).

546. *See id.*

547. *See id.* (finding that ITT's contract had expired normally, according to its terms, and that no other situation existed that would necessitate reimbursement under FAR 31-205-6(g)(2)(iii)).

548. *See id.* The Federal Circuit stated that "[a]ssuming, *without deciding*, that FAR 31.205-6(g)(2)(iii) is a remedy-granting provision, absent extraordinary circumstances, not present here, abnormal or mass severance within the contemplation of that clause does not occur when a contract expires in accordance with its terms." *Id.* (emphasis added).

549. *See id.* The court explained that under the facts of the case, "the severance payments were normal severance when viewed in the context of the expiration of the contract, a foreseeable and expected event when a firm, fixed-price contract is entered into." *Id.*

550. *See id.* ITT presented another argument based on the "Continuity of Services" clause, arguing that the severance payments were recoverable under the "phase-in, phase-out" provisions of FAR 52.237-3. *See id.* at 1451-52. Concluding that severance payments were not phase-in, phase-out costs, however, the Federal Circuit likewise rejected this argument. *See id.* at 1452.

551. 48 C.F.R. § 31.205-15(a) (1997). In whole, FAR 31.205-15(a) provides:

> Costs of fines and penalties resulting from violations of, or failure of the contractor to comply with, Federal, State, local, or foreign laws and regulations, are unallowable except when incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer.

Id.

552. 119 F.3d 972 (Fed. Cir. 1997).

553. 33 U.S.C. § 914(e) (1994) (establishing a time schedule for compensating injured employees under LHWCA and providing penalties for employer noncompliance).

"fines and penalties" under FAR 31.205-15.[554] Ingalls Shipbuilding ("Ingalls") frequently contracted with the Navy for the construction, repair, and overhaul of surface combat ships.[555] Pursuant to sixty-six of these contracts, several thousand injury claims were filed against Ingalls.[556] To save costs, Ingalls chose not pay the LHWCA pre-award installments but to answer generically the claims.[557] Subsequent court proceedings[558] determined that the answers provided were inadequate and Ingalls was forced to make payments to the successful claimants pursuant to the LHWCA. Ingalls then charged these payments to its Navy contracts.[559] A DCAA audit determined that these costs were improper, and the contracting officer similarly rejected the costs as unallowable under FAR 31.205-15.[560] When Ingalls appealed to the ASBCA, the Board also concluded that the costs were unallowable under FAR 31.207-15.[561]

On appeal, the Federal Circuit noted that no court had previously considered FAR 31.205-15.[562] As such, the court conceded that there was little statutory or judicial indication of the meaning of "fines and penalties," as used in the cost principle.[563] The court then reviewed the statutory scheme for the LHWCA and concluded that payments due under the LHWCA were not akin to "fines and penalties."[564] Ac-

554. *See Ingalls Shipbuilding*, 119 F.3d at 973.

555. *See id.*

556. *See id.* at 974.

557. *See id.* (describing LHWCA procedures for reimbursing injured employees and fines that accrue against employers who do not pay within the specified time and who do not receive a valid excuse from the Deputy Commissioner).

558. *See id.* at 974; *see also* Ingalls Shipbuilding, Inc. v. Director, 976 F.2d 934, 935-37 (5th Cir. 1992) (discussing Ingall's LHWCA proceedings); Ingalls Shipbuilding, Inc. v. Director, 898 F.2d 1088, 1095-96 (5th Cir. 1990).

559. *See Ingalls Shipbuilding*, 119 F.3d at 974 (noting that Ingall's payments totaled $190,598.54).

560. *See id.* at 974-75. The contracting officer deemed the costs unallowable based on FAR 31.205-15 (defining certain fines, penalties, and mischarging costs as unallowable) and FAR 31.205-20 (defining certain interest and other financial costs as unallowable). *See id.* at 975.

561. *See id.* The Board did not address FAR 31.205-20. *See id.*

562. *See id.* at 976 (explaining that in order to construe section 914(e) and decide whether it creates a penalty, it is necessary to look to the statutory scheme of which it is a part, the LHWCA). The Federal Circuit did note, however, that boards of contract appeals had considered the scope of the regulation but that no board decision had addressed the section of the LHWCA raised by the *Ingalls* case. *See id.*

563. *See id.* (noting that nothing in any provision of the FAR specifically defines the words "fines and penalties").

564. *See id.* at 977. The court explained that section 914(e) of the LHWCA "does not use the word fine or penalty. Thus, within the framework of the LHWCA, it appears that Congress did not intend section 914(e) payments to be treated as fines or penalties." *Id.* The court also cited with approval *Huntington v. Attrill*, 146 U.S. 657 (1892). *See id.* at 978. Relying on *Huntington*, the court described the three elements necessary for a cost to represent a penalty: (1) the absence of an association between the costs imposed and the actual harm done; (2) the extent to which the state benefits from the proceeds; and (3) whether the wrong sought to be redressed is a wrong to the public or a wrong to an individual. *See id.* As section 914(e) of the

cordingly, the Federal Circuit reversed the ASBCA's decision.[565]

3. Cost Principle: FAR 31.205-20

Cost Principle FAR 31.205-20[566] provides that "[i]nterest on borrowings (however represented)" are unallowable costs.[567] In *Lockheed Corp. v. United States*,[568] the Federal Circuit considered whether a tax liability constitutes a "borrowing" under DAR 15-207.17 (currently FAR 31.205-20). Lockheed filed and paid federal income tax to the federal government and state franchise tax to the State of California for the years 1973 and 1974.[569] In 1982, however, the Internal Revenue Service audited those tax years and determined that several deductions were impermissible, resulting in a larger taxable income for Lockheed.[570] Due to operating losses, the upward adjustment in taxable income did not result in additional federal taxes, but did result in additional state tax liability.[571] In accounting for these taxes, Lockheed allocated the payments (both tax and interest) to its residual corporate overhead.[572] In a corporate overhead review, however, the contracting officer rejected this allocation, citing the prohibition against "interest on borrowings" in DAR 15-205.17.[573] Following a final decision by the contracting officer, Lockheed appealed to the

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LHWCA did not satisfy these elements, Ingall's LHWCA costs were not penalties. *See id.* at 979.

565. *See id.* The government alternatively argued that the costs were unallowable pursuant to FAR 31.205-20 as "interest on borrowings." *See id.* at 978. The Federal Circuit recited the government's theory regarding FAR 31.205-20 as follows: "[The government] argues that because the § [sic] 914(e) payments provide additional compensation to replace money that claimants were wrongly denied, they may be considered a form of interest." *Id.* The court rebuffed the argument, exclaiming that "[t]his argument has so little merit that we are surprised to find it presented to us." *Id.*

566. 48 C.F.R. § 31.205-20 (1997).

567. *Id.* In whole, FAR 31.205-20 provides:

> Interest and Other Financial Costs. Interest on borrowings (however represented), bond discounts, costs of financing and refinancing capital (net worth plus long-term liabilities), legal and professional fees paid in connection with preparing prospectuses, costs of preparing and issuing stock rights, and directly associated costs, are unallowable except for interest assessed by State and local taxing authorities under the conditions specified in 31.205-41.

Id. In 1984, the Federal Acquisition Regulation superseded the DAR, *see* Lockheed Corp. v. United States, 113 F.3d 1225, 1226 n.3 (Fed. Cir. 1997), and DAR 15-205.17 became FAR 31.205-20. *See Lockheed*, 113 F.3d at 1228.

568. 113 F.3d 1225 (Fed. Cir. 1997).

569. *See id.*

570. *See id.*

571. *See id.* at 1225-26. The upward adjustment resulted in $708,397 in additional state tax liability and $645,226 in interest. *See id.* at 1226. For the $645,226 in interest, Lockheed initially claimed $15,706 in interest as the amount allocated to its corporate residual expense pool, but subsequently reduced its claim to $8,260. *See id.* at 1226 n.2.

572. *See id.* at 1226 (characterizing Lockheed's decision as complying with normal corporate accounting methods).

573. *See id.* (citing DAR because, at the time of the audit, the FAR had not yet superseded the DAR).

ASBCA.[574] In a 3-2 decision, the Board affirmed the decision of the contracting officer.[575]

On appeal to the Federal Circuit, Lockheed argued that the ASBCA improperly focused on the word "interest" and emphasized that DAR 15-205.17 concerned not merely "interest" but "interest on borrowings."[576] In contrast, the government argued that the Board ruled correctly, noting that the cost principle not only states "interest on borrowings" but also specifies "(however represented)."[577] The Federal Circuit ruled that the cost principle only applied to interest on borrowings in the sense of a loan.[578] Because Lockheed did not intend to obtain a loan from the State of California, the court concluded that the tax payments did not constitute "interest on borrowings."[579] Although the court explained that further analysis was unnecessary because the reading of the cost principle was clear, it nevertheless noted that the regulatory history supported the court's interpretation.[580] Accordingly, the Federal Circuit reversed the judgment of the ASBCA.[581]

4. Cost Principle: FAR 31.205-41

Cost principle 31.205-41 provides that "federal income and excess profits taxes" are unallowable costs.[582] In *Rockwell International Corp. v. Widnall*,[583] the Federal Circuit considered whether a tax imposed on all corporate taxpayers constituted an income tax pursuant to FAR

574. *See id.* The contracting officer selected two contracts as test vehicles so that Lockheed could obtain an appealable final decision on the DAR 15-205.17 issue. *See id.*

575. *See id.* The ASBCA majority held that DAR 15-205.17 specifically prohibited the reimbursement of costs based on borrowings, and that a tax constitutes a borrowing. *See id.* The majority concluded that the only exception to DAR 15-205.17 was DAR 15-205.41, which is specifically mentioned in DAR 15-205.17. *See id.* (citing DAR 15-205.17).

576. *See id.* at 1226-27 (discussing Lockheed's argument that ASBCA had applied too broad a construction of the cost principle).

577. *See id.* at 1227.

578. *See id.* (construing DAR 15-205.17 as prohibiting interest paid on capital-providing loans). As the construction of a regulation is a matter of law for the court to decide, the Federal Circuit reviewed the cost principle *de novo*. *See id.* The court concluded that, by its plain meaning, DAR 15-205.17 only applied to borrowings in the sense of a loan. *See id.* The court reasoned that this construction of the cost principle made the most sense because all the borrowings cited in DAR 15-205.17 regarded methods of raising capital. *See id.*

579. *See id.* (explaining that "[a]n inadvertent tax deficiency is not generally a method of raising capital").

580. *See id.* As described by the court, the original draft of the cost principle applied broadly to "interest," but drafters narrowed the final draft of the regulation to only include "interest on borrowings." *See id.* The court noted that this change indicated an intent to limit the type of interest covered by the cost principle to interest on borrowings. *See id.* at 1227-28.

581. *See id.*

582. *See* 48 C.F.R. § 31.205.41(b)(1) (1996).

583. 109 F.3d 1579 (Fed. Cir. 1997).

31.205-41.[584] Rockwell had entered into a cost-reimbursement contract with the Air Force in 1987.[585] One year earlier, Congress had enacted the Superfund Amendments and Reauthorization Act of 1986,[586] which created the "Superfund tax," an environmental income tax imposed on all corporate taxpayers.[587] In 1990, Rockwell decided to treat this tax as an allowable cost and submitted a claim for reimbursement of the Superfund taxes it had paid in 1988, 1989, and 1990.[588] The contracting officer, however, denied the claim, alleging that the tax was an income tax and thus an unallowable cost pursuant to FAR 31.205-41(b).[589] Rockwell appealed to the ASBCA, but the Board concurred that the Superfund tax was an unallowable cost.[590]

On appeal, the Federal Circuit observed that all indications favored a conclusion that the Superfund tax was indeed an income tax and thus an unallowable cost.[591] Rockwell argued that, despite the fact that the Superfund tax was designated as an income tax, the tax should be treated otherwise, because it actually operated as an excise tax.[592] Although, the court conceded that the tax acted as an excise tax, it nonetheless rejected Rockwell's argument due to the "strong evidence of congressional intent to create an income tax."[593]

Rockwell further argued that, because the FAR was later amended to include the Superfund tax as an allowable cost under FAR 31.205-

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584. *See id.* at 1579-80.

585. *See id.* at 1580.

586. Pub. L. No. 99-499, 100 Stat. 1613.

587. *See Rockwell Int'l Corp.*, 109 F.3d at 1580. The Superfund tax was to pay for a trust fund that would defray the expenses arising from the environmental effects of hazardous substances. *See id.* The tax rate totaled 0.12 percent of all "modified alternative minimum taxable income exceeding two million dollars." *Id.*

588. *See id.*

589. *See id.* FAR 31.205-41(b) states "[t]he following types of costs are not allowable: (1) Federal income and excess profits taxes." 48 C.F.R. § 31.205-41(b) to -41(b)(1) (1996).

590. *See Rockwell Int'l Corp.*, 109 F.3d at 1580 (noting that the ASBCA extensively analyzed the cost provision's legislative and administrative background in reaching its decision).

591. *See id.* at 1581. The court noted that the Superfund tax was located in the "Income Tax" portion of the Internal Revenue Code and that the legislative history of the tax indicated that Congress considered it akin to an income tax. *See id.* at 1581-82.

592. *See id.* at 1582. *See generally* Vournas v. United States, 10 Cl. Ct. 591, 593 (1986) (defining an excise tax as "all internal taxes that are not property taxes assessed by virtue of ownership alone").

593. *See Rockwell Int'l Corp.*, 109 F.3d at 1582-83. Rockwell also presented other similar arguments, including the argument that because the Superfund tax was deductible from corporate gross income, it should not be regarded as an income tax. *See id.* at 1583. The Federal Circuit refused to attach great weight to the deductibility status of a tax, noting that "deductibility alone does not convert what otherwise would be an income tax into some other form of tax." *Id.* Rockwell also asserted that the reference to "federal income taxes" in FAR 31.205-41(b)(1) cannot be interpreted to include all income taxes because such an interpretation would make the phrase "excess profits tax" superfluous. *See id.* The court also rejected this argument. *See id.* at 1584 (holding that Superfund taxes are federal income taxes that are not allowable as costs of performance).

41,[594] the regulatory amendment should have a retroactive effect.[595] Conversely, the government argued that, because the cost issue involving the Superfund tax required an amendment of the FAR, the tax was not initially meant to be an allowable cost.[596] To resolve these conflicting positions, the Federal Circuit referenced a memorandum from the Defense Acquisition Regulatory Council ("DARC"), which explained that the FAR amendment was not intended to affect the interpretation of the cost issue for earlier years.[597] Based on this memorandum, the court considered the issue independent of the amendment and concluded that the Superfund tax was indeed an income tax for purposes of FAR 31.205-41.[598] The court accordingly affirmed the decision of the ASBCA.[599]

C. TINA

The Truth in Negotiations Act ("TINA")[600] mandates that contractors[601] supply cost and pricing data for government contracts in excess of $500,000 and requires certification of the accuracy, completeness, and timeliness of the data.[602] In *Motorola, Inc. v. West*,[603] the Federal Circuit reiterated the government contractor's obligation to abide by the disclosure requirements in the TINA.[604] Aydin was a subcontractor for Motorola and refused to submit its cost data to Motorola due to proprietary concerns.[605] Instead, Aydin submitted the cost data directly to the DCAA, but failed to "specifically identify" the relevant

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594. 48 C.F.R. § 31.205-41(a)(4) (1997).

595. *See Rockwell Int'l Corp.*, 109 F.3d at 1584 (citing 55 Fed. Reg. 52,782 (1990)) (describing an amendment to the FAR which defined the Superfund tax as an allowable cost under FAR 31.205-41); 54 Fed. Reg. 43,032 (1989) (discussing a proposed amendment to designate the Superfund tax as allowable cost).

596. *See id.* (contrasting Rockwell's and the government's interpretations of the FAR amendment).

597. *See id.* at 1585. The DARC memorandum stated that: "'The old rule must stand on its own. The new rule is not intended to influence the interpretation of the old one as to whether the 'Superfund Tax' is an 'income tax' or an 'excise tax.'" *Id.* (citing DARC Memorandum, Cost Principles Committee (undated)).

598. *See id.* at 1585.

599. *See id. See generally Superfund Tax Was Federal Income Tax Under FAR, Was Not Allowable Cost, CAFC Rules*, 67 Fed. Cont. Rep. (BNA) 510-12 (Apr. 28, 1997) (analyzing the *Rockwell* ruling on allowable costs).

600. 10 U.S.C. § 2306(a) (1994).

601. *See id.* § 2306a(a)(1)(A) (placing obligations on "offerors, contractors, and subcontractors").

602. *See id.* § 2306a(a)(2).

603. 125 F.3d 1470 (Fed. Cir. 1997); *see also supra* notes 194-206 (discussing the facts of this case).

604. *See id.* at 1474.

605. *See id.* at 1471 (observing that Aydin and Motorola were competitors in certain areas of production).

data.[606] The DCAA subsequently audited Aydin and recommended a price reduction based, in part, on Aydin's failure to make proper TINA disclosures.[607] The ASBCA confirmed that the submission violated the disclosure requirements of the TINA.[608]

On appeal, the Federal Circuit also concluded that Aydin had failed to satisfy the TINA requirements.[609] The court observed that Aydin seemed to believe that the mere submission of data would satisfy the TINA.[610] The court specifically rejected such a contention: "The mere deposit of books and records does not meet the requirement of identifying cost information for reasonable access by the contracting officer."[611] Accordingly, the court affirmed the price reduction against Aydin based, in part, on its failure to adhere to the TINA requirements.[612]

V. DAMAGES

Under the common law, if a party breaches a contract, that party must pay damages sufficient to restore the injured party to a position equivalent to that in which he or she would have been had the breaching party honored the contract.[613] In government procurement law, the same rule applies, but due to the special nature of contractual relationships with the United States, special limitations and rules frequently restrict the scope of this general rule.[614]

A. No Speculative Damages

The measure of damages recoverable from the government involves the same issues and considerations found in private transactions. However, whereas speculative damages are generally not recoverable against private parties, this rule is strictly enforced in

606. *See id.* at 1474 (noting that Aydin submitted "financial statements," operational statements, and "general ledger[s]," but did not accompany data with explanations).

607. *See id.* at 1472 (explaining that without clarification from Aydin, auditor was unable to determine the source of certain costs).

608. *See id.* (finding that Aydin's procedural failings detrimentally affected the government).

609. *See id.* at 1474 (chastising Aydin for not offering proper data to either Motorola or the government).

610. *See id.*

611. *Id.* Citing FAR 31.804-6(d), the Federal Circuit noted that "[t]here is a clear distinction between submitting cost or pricing data and merely making available books, records, and other documents without identification. The latter does not constitute "submission" of cost or pricing data." *Id.* (quoting 48 C.F.R. § 15.804-6(d) (1996)).

612. *See id.*

613. *See* Estate of Berg v. United States, 687 F.2d 377, 379 (Ct. Cl. 1982) (deciding a breach of contract case involving the value of government bonds that the government failed to redeem).

614. *See* CIBINIC & NASH, *supra* note 76, at 498-99.

government transactions.[615] *San Carlos Irrigation and Drainage District v. United States,*[616] provides an excellent example of this principle.

The San Carlos Irrigation & Drainage District ("SCIDD") contracted with the Department of the Interior ("DOI") for the provision of power and water from the Coolidge Dam across the Gila River in Arizona.[617] After a storm and subsequent flood damaged the dam and interrupted access to power and water, SCIDD sued for the temporary loss of power and water.[618] The CFC (then, the Claims Court) denied the claim,[619] but the Federal Circuit reversed, holding that the DOI had a contractual duty to keep the dam in good repair.[620] The Federal Circuit then remanded the case for a determination as to damages.[621] On remand, the CFC found that the contract entitled SCIDD to "at-cost" groundwater pumping power charges, rather than the more costly electricity purchased from other non-Coolidge Dam sources, and accordingly awarded $667,021 for the power claim (later revised to $770,900).[622] The court, however, awarded no damages for the water claim.[623]

On appeal to the Federal Circuit, SCIDD challenged the damage award as to both power and water.[624] SCIDD sought an increase in the power-related damages, asserting that the DOI's failure to maintain the dam resulted in consequential damages based on the $4.7

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615. *See* Northern Helex Co. v. United States, 524 F.2d 707, 720 (Ct. Cl. 1975) ("[R]emote and consequential damages are not recoverable in a common-law suit for breach of contract . . . especially . . . in suits against the United States for the recovery of common law damages[.]") (omissions in original), *quoted in* Wells Fargo Bank v. United States, 88 F.3d 1012, 1021 (Fed. Cir. 1996).

616. 111 F.3d 1557 (Fed. Cir. 1997).

617. *See id.* at 1560 (reporting that the first SCIDD contract took effect in 1931).

618. *See id.* at 1560-61 (describing the failure of dam spillways during storm, which prevented reservoir from holding more water and interrupted hydroelectric generation).

619. *See* San Carlos Irrigation and Drainage Dist. v. United States, 15 Cl. Ct. 197, 204 (1988) (finding no clear contractual duties upon which court could base damages).

620. *See San Carlos Irrigation and Drainage Dist.*, 877 F.2d 957, 959-60 (1989) (holding that government had a duty to maintain properly the spillways and take precaution against their failure).

621. *See id.* at 961 (holding that the lower court's grant of summary judgment failed to address the issues of breach, causation, and damages).

622. *See* San Carlos Irrigation and Drainage Dist. v. United States, 32 Fed. Cl. 200, 202 (1994).

623. *See id.* SCIID had originally sought $4,673,834 for the power claim. *See San Carlos Irrigation,* 111 F.3d at 1561. The CFC awarded no damages on the water claim, as the court held that SCIID had obtained its "contractual allocation of water." *See id.*

624. *See San Carlos Irrigation and Drainage,* 111 F.3d at 1561. On a cross-appeal, the government sought a reduction in the power-related damages awarded to SCIDD by the CFC. *See id.* at 1564. The government argued that SCIID was not entitled to damages on the power and water claims because it had failed to exhaust its administrative remedies under the Administrative Procedures Act ("APA"). The Federal Circuit quickly rejected this argument, noting that nothing in the contract made the provision or pricing of power or water contingent upon the APA. *See id.* (citing APA, 5 U.S.C. § 704 (1994)).

million cost of replacement power for the groundwater pumps.[625] The court, however, found that the contract required only that the DOI supply power for the pumps, not that it supply free power for the groundwater pumps.[626] The court concluded that the DOI properly required SCIDD to pay for the power obtained from other sources.[627]

SCIDD also argued that it was entitled to damages for lack of access to water because DOI had not properly maintained the dam.[628] The CFC ruled that, although the damage to the dam had in fact resulted in less availability of water, the DOI had not breached its contractual obligations.[629] The Federal Circuit disagreed,[630] concluding that a breach of contract had occurred, but that the damages claimed by SCIID for the loss of water were too speculative.[631] Indeed, SCIID conceded that it had obtained sufficient water immediately following the flood, but nevertheless sought damages based on water shortages in 1989 and 1990, several years after the dam failed.[632] In conclusion, the court explained that "[n]ot every injury resulting from a breach of contract is remediable in damages."[633] Accordingly, the court affirmed the judgment of the CFC.[634]

B. Eichleay *Damages*

If a suspension of work caused by the government occurs in a government contract, a contractor may recover the expenses incurred

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625. *See id.* at 1565 (noting SCIDD's claim of having expectation interests in the continued operation of the dam and explaining that before the storm in 1983, the dam was self-sufficient in terms of power and expenses, and therefore, SCIDD did not have to pay for pumping power).

626. *See id.* at 1565-66.

627. *See id.* at 1566 (rejecting SCIDD's claim that all costs of pumping should be assumed by government).

628. *See id.* at 1561.

629. *See id.* at 1562.

630. *See id.* (noting that one obligation of the government under the SCIDD contract was water storage for droughts, which was impaired when dam broke and reservoir could no longer function at full capacity).

631. *See id.* at 1562-63 (outlining various factors that could affect water availability, including weather, evaporation, and DOI discretion to sell surplus water). The Federal Circuit emphasized: "A plaintiff must show that but for the breach, the damage alleged would not have been suffered." *Id.* at 1563. SCIDD had also argued that damages were proper for the loss of water because the DOI could have sold the excess water and thereby decreased the costs of operation for the dam (and thus the cost of the power). *See id.* at 1562. The Federal Circuit was not persuaded by this argument and observed that nothing in the contract required that the DOI realize a profit on the sale of excess water in order to offset operating expenses. *See id.* at 1563.

632. *See id.* at 1562-63.

633. *Id.*

634. *See id.* at 1569 (finding a breach of duty by the government but upholding the Court of Claims' award of damages).

due to the delay pursuant to a computational formula called "the Eichleay formula."[635] Also known as *Eichleay damages*, this formula is used to compensate the contractor for other work that could not be performed due to the delay.[636] In *Satellite Electric Co. v. Dalton*,[637] the Federal Circuit reviewed the three elements necessary for obtaining *Eichleay* damages and specifically considered the respective burdens of proof for one of these three elements. Satellite Electric contracted with the Navy to install a power supply system at a Navy facility.[638] On two occasions, after Satellite Electric had completed 96.7 percent of the contract, the Navy required Satellite Electric to suspend work due to the unavailability of certain government-supplied parts.[639]

Due to the Navy's suspensions of work, Satellite Electric sought *Eichleay* damages based on its home office overhead costs during the periods of delay.[640] On appeal to the ASBCA, the Board set out the three elements required for *Eichleay* damages: (1) a government-imposed delay; (2) that the government required the contractor to remain available to proceed on the contract during the period of delay; and (3) that during the period of delay, the contractor was unable to perform additional work.[641] The government conceded that the Navy caused the delay, required Satellite Electric to remain able to perform the contract, but disputed that Satellite Electric was un-

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635. *See Eichleay Corp.*, ASBCA No. 5183, 60-2 B.C.A. (CCH) ¶ 2688 (1960), *aff'd on recon.*, ASBCA No.5183, 61-1 B.C.A. (CCH) ¶ 2894 (1960). The *Eichleay* formula comprises:

> an allocation of the total recorded main office expense to the contract in the ratio of contract billings to total billings for the period of performance. The resulting determination of a contract allocation is divided into a daily rate, which is multiplied by the number of days of delay to arrive at the amount of the claim.

Id. at 13,574. The Federal Circuit first approved the award of damages based on the *Eichleay* formula in *Capital Electric Co. v. United States*, 729 F.2d 743 (Fed. Cir. 1984) (stating that a prime contractor is to use the *Eichleay* formula in determining the amount of damages for extended overhead).

636. *See* Satellite Elec. Co. v. Dalton, 105 F.3d 1418, 1420 (Fed. Cir. 1997) (holding that evidence of contractor's ability to take on other work during suspensions prevented judgment for *Eichleay* damages). Generally, during the periods of delay pursuant to a suspension of work, the government requires that the contractor remain ready and able to resume work upon notification of the government. *See Eichleay*, 60-2 B.C.A. (CCH), at 13,574. As a result, the contractor is exposed to substantial losses for these periods of inactivity. *See generally id.* (determining amount of equitable adjustments owed a contractor under work suspension contract provisions).

637. 105 F.3d 1418 (Fed. Cir. 1997).

638. *See id.* at 1420 (explaining that part of the contract required the Navy to produce two items: batteries and an induction coil).

639. *See id.* at 1420 (reporting that the first suspension of work lasted 82 days, and the second suspension lasted 146 days due to Navy's inability to provide batteries and an induction coil).

640. *See id.* at 1420. "Home office overhead costs" comprise "those costs that are expended for the benefit of the whole business, which by their nature cannot be attributed or charged to any particular contract." Altmayer v. Johnson, 79 F.3d 1129, 1132 (Fed. Cir. 1996), *cited in Satellite Elec.*, 105 F.3d at 1421.

641. *See Satellite Elec. Co.*, 105 F.3d at 1421.

able to obtain and perform other work.[642] The ASBCA agreed that Satellite Electric could have obtained other work and denied its claim.[643]

On appeal, the Federal Circuit reviewed the single issue of whether Satellite Electric was able to obtain and perform other work during the delay.[644] In addressing this issue, the court emphasized that, although the government maintained the burden of "showing" all three elements to avoid the payment of *Eichleay* damages, the contractor nevertheless had to "prove" the inability to take on additional work.[645] In meeting its initial showing, the government indicated that Satellite Electric was able to bid on forty-nine jobs during the period of suspension and inferred that this indicated its ability to perform other work.[646] The court noted, however, that mere bidding does not necessarily demonstrate an ability to perform.[647] To determine whether Satellite Electric was able to perform another contract, the court examined various statements made by Satellite Electric before the ASBCA regarding its ability to perform.[648] In one such statement, the company's president admitted that "we probably could have [taken other work] if we had been able to find such."[649] Based in part on statements such as this, the Federal Circuit concluded that Satellite Electric could not "prove" an inability to take on other work and, therefore, was not eligible for *Eichleay* damages. The court, accordingly, affirmed the ruling of the ASBCA.[650]

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642. *See id.* at 1421-22.

643. *See* Satellite Elec. Co., ASBCA No. 46,935, 95-2 B.C.A. (CCH) ¶ 27,883, at 139,089 (1995) (explaining that the government was only required to show, not prove, Satellite Electronic's ability to take on additional work), *aff'd sub nom.* Satellite Elec. Co. v. Dalton, 105 F.3d 1418 (Fed. Cir. 1997).

644. *See Satellite Elec. Co.*, 105 F.3d at 1421.

645. *See id.* at 1422-23 (refusing to require the government to "prove" rather than "show" that Satellite was able to take on additional work). Historically, the contractor had the burden of proving all the requisite elements for *Eichleay* damages, but in *Mech-Con Corp. v. West*, 61 F.3d 883, 886 (Fed. Cir. 1995), the Federal Circuit shifted the initial burden to the government, if it wanted to avoid *Eichleay* damages. In *Mech-Con*, the issue of burdens comprised an important part of the Federal Circuit's decision, particularly in distinguishing the burden of "showing" a contractor's ability to take on additional work from the burden of "proving" the ability to take on additional work. Significantly, in *Satellite Electronic*, the Federal Circuit rejected an argument that the government had the burden to prove that the contractor could not take on additional work. *See Satellite Elec. Co.*, 105 F.3d at 1423.

646. *See id.* at 1422.

647. *See id.* ("[T]he fact that the contractor may have bid on other contracts 'at the very end' of the subject contract, does not establish that it was able to reduce its overhead or take on other work during the delay.") (quoting Altmayer v. Johnson, 79 F.3d 1129, 1135 (Fed. Cir. 1996)).

648. *See id.* at 1422.

649. *See id.*

650. *See id.* at 1423. The court also noted that the fact that the contract was so near completion further indicated an ability to perform other contracts. *See id.* Satellite Electric had also argued that it was unable to perform other work because its outstanding contract with the Navy

C. *Lost Profits*

If the government is liable for damages to a contractor within the scope of a contract, a board or court must generally compute such damages based on the terms of the contract.[651] However, if the government is liable for damages outside the terms of a contract, such as damages for patent infringement, a court has greater discretion in awarding damages.[652] In *Gargoyles, Inc. v. United States*,[653] for example, the Federal Circuit considered the propriety of lost profits as a form of available damages in a patent infringement suit against the United States. In the 1970's, the Army sought to develop protective eyewear that soldiers would wear both on and off-duty.[654] The Army considered eyewear manufactured by Gargoyles,[655] which was the subject of U.S. Patent No. 4,741,611.[656] Although the eyewear contained the stylistic components desired by the Army, it was considered unfit for military purposes.[657] The Army then awarded a contract to various other entities for the production of the required eyewear.[658] Because the Army eyewear contained stylistic features similar to the Gargoyles product, Gargoyles brought suit in the CFC for patent infringement pursuant to 28 U.S.C. § 1498.[659] In the liability phase, the CFC found infringement,[660] and in the damages phase, awarded damages based on a reasonable royalty.[661]

On appeal of the damage award, Gargoyles sought damages in the

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made additional bonding unavailable. The court rejected this argument, noting that many of Satellite's bonding issues were due to the untimely submission of an invoice by Satellite Electric to the Navy. *See id.* at 1422.

651. *See* CIBINIC & NASH, *supra* note 76, at 499-501.

652. *See id.*; *see also* 28 U.S.C. § 1498(b) (1994) (explaining that a suit against the government for patent infringement is only available in CFC). *See generally* Lionel M. Lavenue, *Patent Infringement by the United States and Government Contractors under 28 U.S.C. § 1498 in the United States Court of Federal Claims*, 2 J. INTELL. PROP. L. 389 (1995) (providing a thorough overview of patent suits against the government pursuant to 28 U.S.C. § 1498).

653. 113 F.3d 1572 (Fed. Cir. 1997).

654. *See id.* at 1574.

655. *See id.* at 1573-74 (explaining that Gargoyles eyewear was considered for use by the Army because soldiers would readily use the eyewear both on and off duty due to its stylistic wrap configuration).

656. *See id.* at 1573.

657. *See id.*

658. *See id.* (detailing various contracts with American Optical, Genex, Inc., and Uvex Winter Optical, Inc.).

659. *See id.* at 1573-74.

660. *See id.* at 1574. The CFC had originally found noninfringement in *Gargoyles, Inc. v. United States*, 26 Cl. Ct. 1367, 1368 (1992), but the Federal Circuit vacated and remanded that ruling in *Gargoyles, Inc. v. United States*, 6 F.3d 787 (Fed. Cir. 1993) (unpublished table decision). On remand, the CFC found infringement, both literally and under the doctrine of equivalents. *See* Gargoyles, Inc. v. United States, 32 Fed. Cl. 157, 170 (1994).

661. *See Gargoyles*, 113 F.3d at 1574 (awarding Gargoyles a ten percent royalty on a base, representing the bulk of ballistic/laser protective glasses, and a fifty percent royalty on a minor portion of the development phase contract).

form of lost profits instead in the form of a reasonable royalty.[662] Citing *Rite-Hite Corp. v. Kelley Co.*,[663] Gargoyles argued that, but for the infringement of the government, there was a "reasonable probability" that it would have made the sales in question and, thus, claimed entitlement to lost profits.[664] The government responded that lost profits are not available for damages in patent infringement suits pursuant to 28 U.S.C. § 1498.[665] Even if lost profits were available, the government argued that under *Tektronix, Inc. v. United States*,[666] lost profits would be available only upon a showing of "strictest proof," and then only by "clear and convincing evidence."[667] In considering these conflicting arguments, the Federal Circuit indicated that "Gargoyles is reasonable in speculating on the continued viability of the vague language of 'strict proof' in *Tektronix* and the 'clear and convincing' proof standard discussed therein."[668] The court noted, however, that the standard and burden stated in *Tektronix* nevertheless "binds th[e] court until overruled."[669] In its final conclusion, the court did not resolve the issue of the continuing viability of the *Tektronix* standard because the court concluded that even under the lower "reasonable probability" standard, Gargoyles did not demonstrate entitlement to lost profits.[670] At the same time, the Federal Circuit clearly reiterated that "[s]ince both section 284 and section 1498 speak of 'compensation,' albeit 'adequate' compensation in the former and 'reasonable and entire' compensation in the latter, lost profits should be recoverable in at least some infringement actions against the government, even though the Fifth Amendment is implicated."[671] Accordingly, the

662. *See id.* at 1575.

663. 56 F.3d 1538 (Fed. Cir. 1995) (en banc).

664. *See Gargoyles*, 113 F.3d at 1575 (citing *Rite-Hite*, which explained that patentee need only show "reasonable probability" that sales would have occurred "but for" the infringement).

665. *See id.*

666. 552 F.2d 343, 348-49 (Ct. Cl. 1977).

667. *See Gargoyles*, 113 F.3d at 1575 (citing the *Tektronix* standard of proof). In *Tektronix*, the Court of Claims held: "If lost profits are ever to be awarded under § 1498, it should be only after the strictest proof that the patentee would actually have earned and retained those sums in its sales to the Government." *Tektronix*, 522 F.2d at 349. In *Gargoyles*, the government argued that, because a section 1498 action is considered akin to a taking, rather than a tortuous act, the proper remedy is a royalty, not lost profits. *See Gargoyles*, 113 F.3d at 1575.

668. *See Gargoyles*, 113 F.3d at 1575-76. The Federal Circuit explained that "the standard in private actions is that the 'patentee must establish, by a preponderance of evidence, that but for the infringement, he would have earned the profits he asserts were lost.'" *See id.* at 1576 (quoting Herbert v. Lisle Corp., 99 F.3d 1109, 1119 (Fed. Cir. 1996)).

669. *See id.* at 1576 (stating that decisions of CFC that are on point legally and factually are binding unless overruled by en banc decision of U.S. Court of Appeals).

670. *See id.* at 1576-77.

671. *Id.* at 1576. In a cross-appeal, the government also challenged the quantum of the award of damages based on a reasonable royalty. *See id.* at 1580. The CFC applied the fifteen-factor test as described in *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y.), *mod. and aff'd*, 446 F.2d 295 (2d Cir. 1971). *See Gargoyles*, 113 F.3d at 1580.

court of appeals affirmed the judgment of the CFC.[672]

D. Pre-Judgment Interest

In a recovery of damages against the United States, the damages computation typically includes both pre-judgment interest (interest on the amount of the claim from the date payment was due until the time that the payment obligation is adjudicated) and post-judgment interest (interest on the sum from the time that the liability was adjudicated as due until the time of payment).[673] However, while post-judgment interest is generally awarded as a matter of course,[674] specific authority, such as a contract, statute, or express consent of Congress, must exist for the recovery of pre-judgment interest.[675]

In *Doty v. United States*,[676] the Federal Circuit considered whether the Prompt Payment Act provided authority for the award of pre-judgment interest. On April 12, 1995, Doty obtained a judgment against the United States in the amount of $99,841.96.[677] The government, however, refused to pay Doty pre-judgment interest, despite the fact that section 14(c) of the Prompt Payment Act specifically requires the payment of pre-judgment interest "with respect to all obligations incurred on or after January 1, 1989."[678] The government argued that, although the obligation was incurred on April 12, 1995, section 14(c) did not apply because the basis of the claim was a contract executed prior to January 1, 1989.[679] The CFC agreed with the

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The Federal Circuit affirmed the lower court's damage calculation. *See id.* at 1581.

672. *See Gargoyles*, 113 F.3d at 1582.

673. *See* W. NOEL KEYES, GOVERNMENT CONTRACTS § 33.28(c), at 515-16 (1986).

674. *See* 28 U.S.C. § 1961(a) (1994) ("Interest shall be allowed on any money judgment in a civil case recovered in district court.").

675. *See* Library of Congress v. Shaw, 478 U.S. 310, 317 (1986) (upholding a "no interest rule" in claims against United States); *see also* Smith v. United States, 302 U.S. 329, 353 (1937) ("The rule is established that in the absence of contract or statute evincing a contrary intention, interest does not run upon claims against the Government even though there has been default in the payment of the principal.").

676. 109 F.3d 746 (Fed. Cir. 1997).

677. *See id.* at 747. Doty further argued that the government owed them interest on their claim. *See id.* They based their claim on 28 U.S.C. § 2516 which states that "[I]nterest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or act of Congress providing for payment thereof." 28 U.S.C. § 2516 (1994). Accordingly, Doty argued that interest was due under a farm support program agreement, administered by the Commodity Credit Corporation under the Agricultural Act of 1949 and reinforced by the Prompt Payment Act Amendments of 1988.

678. *See Doty*, 109 F.3d at 748. The Prompt Payment Act authorizes the payment of pre-judgment interest for farm support programs administered by the Commodity Credit Corporation. *See* 31 U.S.C. § 3902(h)(2)(A) (1994). The Federal Circuit recognized that Congress had specifically implored the Commodity Credit Corporation to pay pre-judgment interest in the 1988 amendments to the Prompt Payment Act. *See Doty*, 109 F.3d at 747-48 (citing Prompt Payment Act Amendments of 1988, Pub. L. No. 100-496, 102 Stat. 2455 (1988), (which applies the obligation to pay pre-judgment interest to all obligations incurred after January 1, 1989).

679. *See Doty*, 109 F.3d at 748.

government's position and denied the claim for pre-judgment interest.[680]

On appeal, the Federal Circuit reversed, finding that the plain meaning of section 14(c) pertains to "obligations" incurred after January 1, 1989, and not "contracts executed" after January 1, 1989.[681] In so holding, the court emphasized that "[t]here is no ambiguity concerning congressional intent. It is not reasonable to read section 14(c) as applying only to contracts awarded after the effective date, particularly in view of the words of section 14(b). The text 'obligations incurred' must be given effect."[682]

In a related issue, the Federal Circuit also ruled that the government must return the interest it assessed against Doty for payments that were made as representative of the $99,841.96 judgment.[683] After award of the judgment, the government refused to refund this assessment of interest, and the Federal Circuit was forced to resolve this wrongful collection issue.[684] In ruling against the government on this issue as well, the court exclaimed, "[t]he government has no right to retain the interest that was improperly collected."[685] Thus, the Federal Circuit ruled in favor of Doty on each issue appealed from the CFC.[686]

Similarly, in *Massachusetts Bay Transportation Authority v. United States*,[687] the Federal Circuit considered the scope of a type of pre-judgment interest under to the Intergovernmental Cooperation

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680. *See id.* at 746 (holding that the contract was executed prior to January 1, 1989, and therefore, constituted an obligation incurred prior to January 1, 1989).

681. *See id.* at 748.

682. *Id.*

683. *See id.* at 748-49 (holding that as the Dotys were entitled to the payments that were wrongly retrieved by the government, the interest the government charged them for the use of their own money should be returned).

684. *See id.* at 749 (reporting the total payment awarded to Doty).

685. *Id.* at 748.

686. *See id.* at 749. An additional issue in *Doty* regarding the payment of a judgment against the United States remained. As the government contested the right to interest on a judgment, it refused to verify that no further judicial review would be sought and thus withheld payment of the judgment. *See id.* at 747. The Federal Circuit disapproved of this action because the appeal had not encompassed the amount due under the judgment: "There is no discretion on the part of government counsel to delay the ministerial act of verifying to the Treasury that no further judicial review would be sought of the adjudicated amount for which payment had been requested." *Id.* Title 28, section 2517(a) of the United States Code governs the type of payments in question. This section states in relevant part:

> Except as provided by the Contracts Disputes Act of 1978, every final judgment rendered by the United States Court of Federal Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and the chief judge of the court.

28 U.S.C § 2517(a) (1994).

687. 129 F.3d 1226 (Fed. Cir. 1997).

Act.[688] Massachusetts Bay Transportation Authority ("MBTA") entered into an agreement with the Federal Railroad Administration ("FRA") to renovate South Station in Boston, Massachusetts.[689] Pursuant to the terms of the "South Station Transportation Center Project Cooperative Construction Agreement," the FRA agreed to fund 100 percent of the operational costs and fifty percent of the shared improvement costs, while the MBTA agreed to fund the other fifty percent of the shared improvement costs and 100 percent of the local improvement costs.[690] Under the agreement, the FRA also had responsibility for the design of the project.[691] After completion of the renovations, the construction contractor obtained from a state settlement more than $3.8 million: $1.9 million from the MBTA, $1.8 million from the design professionals, and $110,000 from Amtrak and Boston Edison.[692] Based on its portion of the liability, the MBTA brought suit in the CFC.[693] The CFC granted a motion for summary judgment for the FRA.[694]

On appeal, the Federal Circuit remanded or reversed virtually all the rulings made by the CFC.[695] In addition, because the MBTA sought a type of pre-judgment interest based on its claims against the FRA, the court also considered the scope of the interest provisions in the Intergovernmental Cooperation Act,[696] which entitles the states to recover interest for funds expended by them to fund programs based on Federal law, regulation, or other agreement.[697] The FRA

688. 31 U.S.C. §§ 6501-6503 (1994).

689. *See Massachusetts Bay Transp. Auth.*, 129 F.3d at 1228 (stating that renovation of South Station was a component of the Railroad Revitalization and Regulatory Act of 1976, codified at 45 U.S.C. §§ 801-836 (1994)). The MBTA owned South Station. *See id.*

690. *See id.* at 1229. The contract price for the renovations was $48.775 million. *See id.* at 1230.

691. *See id.* at 1229.

692. *See id.* at 1230 (explaining that due to design defects, the project was completed 956 days late at a cost of approximately $69 million, and that construction contractor, J.F. White, sought $23,680,228 in increased costs).

693. *See id.* The causes of action brought in the CFC included (1) a warranty claim, (2) a claim based on insurance endorsements, (3) a claim based on certain settlement costs relating to the allocation of contractor claims, (4) a claim based on the Terrazzo floors, and (5) a claim based on the Headhouse floors. *See id.* at 1230-35.

694. *See id.* at 1230 (holding that a warranty disclaimer shielded FRA from all liability for damages due to design error).

695. *See id.* at 1230-36. For example, the court remanded the claims concerning the insurance endorsements, the allocation of contractor costs, the Terrazzo floors, and the Headhouse floors. *See id.* The court reversed the CFC's decision concerning the warranty claim. *See id.* at 1230-36.

696. *See id.* at 1236 (citing 31 U.S.C. §§ 6501-6503 (1994)).

697. *See id.* The Act provides:

> If a State disburses its own funds for program purposes in accordance with Federal law, Federal regulation, or Federal-State agreement, the State shall be entitled to interest from the time the State's funds are paid out to redeem checks or warrants, or make payments by other means, until the Federal funds are deposited to the State's

argued that the Act did not include the MBTA because it was an "independent political subdivision."[698] Citing Massachusetts law, an opinion of the Massachusetts Attorney General, and a ruling of the Comptroller General, the MBTA argued that it was indeed a "state instrumentality" for purposes of the Act.[699] The Federal Circuit agreed,[700] noting that "FRA has not presented any cogent argument to the contrary."[701]

E. Costs, Attorney Fees, and Expenses

Following a recovery against the United States, a contractor frequently desires to recover the costs associated with bringing suit against the government, including the costs associated with filing the suit, attorney fees, and other expenses related to the litigation.[702] While the costs associated with filing the suit are almost always *de minimis* in an appeal, such costs can reach substantial sums during the initial proceeding before the forum of first instance.[703]

As demonstrated in *Neal & Co. v. United States*,[704] the CFC has wide discretion in the award of the costs associated with the filing of a suit. Neal & Co. ("Neal") sued the United States based on a contract with the U.S. Coast Guard.[705] Of nine claims, Neal prevailed on four and obtained an award of $792,143.83.[706] Despite this favorable ruling,

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bank account.
See 31 U.S.C. § 6503(d)(1) (1994).

698. *See Massachusetts Bay Transp. Auth.*, 129 F.3d at 1236 (explaining that while the Act includes "an instrumentality of a State," the Act specifically excludes "political subdivisions"); *see also* 31 U.S.C. § 6501(10) (1994) (stating that a "unit of general local government" means a county, city, town, village, or other general purpose political subdivision of a state).

699. *See Massachusetts Bay Transp. Auth.*, 129 F.3d at 1236 (citing MASS. GEN. LAWS ANN. ch. 161A, § 1, and Op. Mass. Att'y Gen. 9 (July 24, 1978), which found that Massachusetts Bay is a state agency and thus may retain interest on federal grant funds); *In re* Status of Transit Auth., 56 Comp. Gen. 353, 356 (1977) (describing Massachusetts Bay as a state instrumentality).

700. *See Massachusetts Bay Transp. Auth.*, 129 F.3d at 1237 (concluding that a reference to a "political subdivision" merely referred to "a local government of a State"); *see also* 31 U.S.C. § 6501(10) (1994).

701. *Massachusetts Bay Transp. Auth.*, 129 F.3d at 1237. Although cited here with regard to pre-judgment interest, this case is also of particular interest due to the manner by which the Federal Circuit roundly remanded and reversed every ruling of the CFC.

702. *See* KEYES, *supra* note 673, §§ 33.32-33.32(a), at 548-50. Under "The American rule," a party is generally responsible for its own attorney fees and expenses. *See id.* For government procurement, certain statutory provisions provide exceptions to this general rule, such as the Equal Access to Justice Act ("EAJA"). *See id.* § 33.32(a), at 551.

703. For an appeal, the only costs generally pertain to the filing costs. For the initial proceeding, however, these costs can total thousands of dollars.

704. 121 F.3d 683 (Fed. Cir. 1997).

705. *See id.* at 684. The contract was for the construction of thirty units of family housing at the U.S. Coast Guard Support Center on Kodiak Island, Alaska. *See id.* The suit arose due to alleged differing site conditions, delays, and other asserted breaches. *See id.*

706. *See id.*

the CFC did not award costs to Neal.[707] Neal thereafter filed a motion for an award of costs totaling approximately $90,000, but the CFC denied the motion without providing a written rationale.[708] The CFC similarly refused a motion for reconsideration.[709]

On appeal, the Federal Circuit analyzed the claim for costs, noting that the claim cited Rule 54(d) of the RCFC as authorization for the claim.[710] Because the Equal Access to Justice Act ("EAJA") governs all requests for costs by prevailing parties in the CFC, however, the Federal Circuit determined that the RCFC 54(d) was inapplicable to any claim in the CFC[711] and, accordingly, considered Neal's request for costs under the EAJA.[712] More specifically, the court examined whether "the trial court abused its discretion by declining to offer an explanation of its reasons for refusing costs [under the EAJA]."[713]

Significantly, although RCFC 54(d) creates a presumption requiring the award of costs to a prevailing party, the court described three reasons why the EAJA does not create a similar presumption.[714] First, unlike RCFC 54(d), the language of the EAJA describes the award of costs in a permissive, not mandatory, manner.[715] Based on the distinction between the mandatory "shall" in RCFC 54(d) and the permissive "may" in the EAJA, the court found the standards distinguishable for purposes of costs.[716]

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707. *See id.*

708. *See id.*

709. *See id.*

710. *See id.* Court of Federal Claims Rule 54(d) states:

> Except when express provision therefor is made either in statute of the United States or in these rules, costs shall be allowed as a matter of course to the prevailing party in any action not dismissed for lack of subject matter jurisdiction, unless the court otherwise directs; but costs against the United States shall be imposed only to the extent permitted by law.

Id. Note that this rule somewhat mirrors the language of Rule 54(d) of the Federal Rules of Civil Procedure.

711. *See id.* at 684-85. The EAJA provides that "a judgment for costs . . . may be awarded to the prevailing party in any civil action brought by or against the United States." 28 U.S.C. § 2412(a)(1) (1994). The Federal Circuit explained: "ARCFC 54(d) would not seem to apply to any case before that court unless 28 U.S.C. § 2412(a) [EAJA] was changed." *See Neal*, 121 F.3d at 685. In addition to the award of costs, the EAJA pertains to the award of attorney fees and other expenses. *See* 28 U.S.C. § 2412(d) (1994). However, whereas the recovery of costs under 28 U.S.C. § 2412(a) applies to all prevailing parties, the recovery of attorney fees and other expenses under 28 U.S.C. § 2412(d) requires that certain prerequisites be satisfied. *See* 28 U.S.C. § 2412(d)(2)(B) (1994) (describing the small entity status prerequisite).

712. *See Neal*, 121 F.3d at 686.

713. *Id.*

714. *See id.*

715. *See id.* The EAJA provides in relevant part: "[A] judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States . . . in any court having jurisdiction of such action." 28 U.S.C. § 2412(a)(1) (1994); *see also supra* note 710 (providing text of Court of Federal Claims Rule 54(d)).

716. *See Neal*, 121 F.3d at 686 ("The term 'may' in EAJA provides the Court of Federal

Second, the contrast of the language of EAJA making the award of attorney fees and expenses mandatory, with the permissive language in the EAJA regarding costs, further indicates the discretion allowed to a court in awarding costs.[717] The EAJA provides: "[A] court shall award to a prevailing party other than the United States fees and other expenses, . . . unless the court finds the position of the United States substantially justified."[718] Therefore, in contrast to this mandatory language regarding attorneys fees and expenses, the provision on costs uses permissive language, which the court of appeals cited as persuasive.[719]

Finally, the court noted that its restrictive reading of the EAJA was consistent with the requirement of a limited waiver of sovereign immunity.[720] Based on these three reasons, the Federal Circuit affirmed the ruling of the CFC, concluding that the CFC has wide discretion in the award of costs, which includes the discretion to deny costs without any explanation.[721]

Attorney fees and other litigation expenses generally comprise the bulk of the costs associated with bringing suit against the government.[722] In most cases, at least for small entities that prevail in their actions, these costs may be recovered from the government pursuant to the EAJA.[723] In *Ed A. Wilson, Inc. v. General Services Administration*,[724]

Claims wide discretion to award costs.").

717. *See id.*

718. *See id.* (citing 28 U.S.C. § 2412(d)(1)(A) (1994)).

719. *See id.* Although the recovery of costs seems subject to wide discretion, the Federal Circuit makes some strong statements regarding the award of attorney fees and expenses. For example, the court stated: "Thus in awarding attorney fees, the trial court has no choice, but the required conditions for award occur rarely." *Id.* With reference to these conditions, the court further explained: "Attorney fees and expenses must be awarded when the Government's position is not 'substantially justified.'" *Id.* Although this case will not result in an increase in the award of costs by the CFC, it may perhaps result in a greater likelihood of receiving an award of attorney fees and expenses. Indeed, although the recovery of these costs are only available upon petition to the court, the above citations should provide ample basis for a contractor to make such a petition. *See* 28 U.S.C. § 2412(d) (1994) (discussing petitions for th award of attorney fees and expenses).

720. *See Neal*, 121 F.3d at 687 (explaining that waiver of sovereign immunity is not to be "'enlarge[d] . . . beyond what the language requires'") (citing Eastern Transp. Co. v. United States, 272 U.S. 675, 686 (1927)).

721. *See id.* ("Without a presumption in favor of a costs award, the CFC is under no obligation to explain a deviation from the norm."). The court further explained that, in "awarding costs, the trial court has broad discretion to determine whether and how much to award a prevailing party." *Id.* at 686-87.

722. *See* KEYES, *supra* note 673, § 33.32(b), at 552. These costs are usually computed by reference to an hourly rate or a contingency fee. *See id.*

723. *See generally* 5 U.S.C. § 504 (1994 & Supp. 1997). The general rule for the recovery of attorney fees and expenses under the EAJA requires that the party have a net worth of less than $7,000,000 or less than 500 employees at the time the adversary adjudication was initiated. *See id.* § 504(b)(1)(B).

724. 126 F.3d 1406 (Fed. Cir. 1997).

the Federal Circuit considered which party must actually incur the legal fees to properly assert a claim to attorney fees under the EAJA. Ed A. Wilson, Inc. ("Wilson") entered into a fixed price contract with the General Services Administration ("GSA") for the remodeling of a federal building in Dallas, Texas.[725] During contract performance, a sprinkler line broke, causing damage to the building.[726] After the contracting officer refused a claim for the damage, Wilson filed a claim with its insurance company, Bituminous Casualty Corp. ("Bituminous"), which provided an interest-free loan to cover the damages in exchange for the right to pursue a claim against the GSA.[727] Bituminous then pursued a claim against the GSA in the name of Wilson and prevailed in an action before the GSBCA.[728] Thereafter, Bituminous filed a claim for the award of attorney fees pursuant to the EAJA, but the GSBCA denied the claim, holding that Wilson personally had not "incurred" any of the attorney fees or expenses as required by the language of the statute.[729]

On appeal, the Federal Circuit considered whether Wilson had incurred the legal fees associated with the suit before the GSBCA for purposes of the EAJA, even though Wilson's insurance company actually incurred the fees.[730] The court first considered the language of the statute:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.[731]

The court concluded that as there was no clear definition of "incurred," as used in the statute, the GSBCA's ruling was overly restrictive.[732] The court noted that precedent existed for allowing a party to

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725. *See id.* at 1407.

726. *See id.*

727. *See id.* Based on the broken sprinkler line, Wilson submitted a claim to the contracting officer for $26,293.62, which was denied. *See id.* Wilson then submitted an insurance claim to Bituminous, which provided Wilson with an interest-free loan in the amount of $21,445.33. *See id.* The loan was only to be repaid, if Wilson recovered any amount from a party liable for the damage. *See id.* Wilson then assigned all rights to such liability to Bituminous, including all litigation responsibilities. *See id.*

728. *See id.* (citing Ed A. Wilson, Inc. v. GSA, GSBCA No. 12596, 96-1 B.C.A. (CCH) ¶ 27,934, at 139,507 (1995)).

729. *See id.* at 1408.

730. *See id.*

731. *See id.* at 1408 (citing 5 U.S.C. § 504(a)(1) (1994)).

732. *See id.* at 1411. The court noted that "[t]he board held that fees and expenses are incurred when the prevailing party is either liable for, or subject to paying, them." *Id.* at 1409. The court, however, rejected this holding, observing that "[w]hile there is some allure to sim-

be represented by an attorney from another entity, such as a legal services organization or a union counsel.[733] As such, the court reasoned that there was no basis to deny the recovery of attorney fees and expenses by Wilson, even though its insurer had actually incurred the costs. Thus, the court reversed the ruling of the GSBCA.[734]

VI. OTHER DECISIONS

In addition to the decisions described above, in 1997, the Federal Circuit issued ninety-three unpublished government contract decisions. Forty-seven of these decisions involved a summary affirmance, commonly called "disposition by Rule 36."[735] The more significant

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plicity of the board's construction, it cannot stand in light of precedent and the purposes underlying the [EAJA]." *Id.* at 1409. The court further explained that "whether the linchpin to an award of attorney fees is the actual payment of attorney fees, the existence of an attorney-client relationship, or the incurrence of fees on behalf of an applicant, Wilson meets the standard." *Id.* at 1410. The court did, however, reject Wilson's (or its insurer) claim for $2,131 in labor costs associated with employees who monitored the litigation before the board. *See id.* at 1408 n.2.

733. *See id.* at 1409. The court emphasized: "[W]e are unable to discern any material distinction between the union cases and this one." *Id.* Moreover, the court observed that, if a party were not able to recovery attorney fees and expenses under circumstances such as these, it would defeat the purpose of the EAJA. *See id.* at 1410 ("Any contrary ruling would subvert the Act's purpose."). In further support of its decision, the court noted that the purposes of the EAJA included defending against unjustified government action as well as helping to refine and formulate public policy. *See id.*

In addition, the Federal Circuit seems to indicate that a non-attorney, *pro se* contractor may also be entitled to recovery of fees and expenses under the EAJA. *See id.* Currently, there is a split of opinion among the boards of contract appeals on this issue. *See* Simpson Contracting Corp., EBCA No. 9,602,190, 96-2 B.C.A. (CCH) ¶ 28,471 (1996) (holding that *pro se* litigants are not entitled to litigation expenditures if they are not expenses covered by the Act but that other boards have allowed such expenditures); *see also* Joseph R. DeClerk & Assocs., Inc., ASBCA No. 49,595, 97-2 B.C.A. (CCH) ¶ 29,268 (1997) (holding that the intent of EAJA is to encourage representation by an attorney, thus awarding attorney fees to a non-attorney would thwart the aim of the law). *See generally EAJA Allows Award of Legal Fees Paid by Contractor's Insurer—Federal Circuit Resolves Conflict Between Boards*, 39 GOV'T CONTRACTOR ¶ 520, at 18-19 (Oct. 29, 1997).

734. *See Wilson*, 126 F.3d at 1410-11. The Federal Circuit clearly indicated that Wilson had acted properly, stating:

> Denying a small business, which in its keen acumen has obtained insurance to insulate itself from liability for accidents during contract performance, and thus from potential insolvency, an award of fees for the attorney services that it procured as part of its policy would thwart the Act's purpose of deterring unreasonable governmental action.

Id. at 1410. Notably, however, the court only determined that Wilson was eligible to recover attorney fees and expenses, but that he still had to satisfy the other qualifications for the recovery of fees and expenses pursuant to the EAJA. *See id.* at 1408 n.3.

735. The Local Rules of the Federal Circuit provide for a summary affirmance. *See* FED. CIR. R. 36 (permitting a judgment in docket to constitute an entry of judgment, making an opinion unnecessary). In 1996, of the 726 decisions, the Federal Circuit issued 175 affirmances based on Rule 36.

In 1997, approximately 24 percent of the court's decisions were Rule 36 affirmances. *See, e.g.*, D.E.W., Inc v. West, 129 F.3d 134, (Fed. Cir. 1997) (unpublished table decision); West v. Red Samm Constr., Inc., 124 F.3d 227 (Fed. Cir. 1997) (unpublished table decision); Roach v.

cases of this group are presented below. Significantly, the Local Rules of the Federal Circuit prohibit citation to unpublished decisions as precedent.[736] Nevertheless, to provide a complete survey of all the significant decisions of the Federal Circuit for 1997, these unpublished decisions are cited and summarized solely for purposes of education and review.

A. Jurisdiction

In *Janicki Logging Co. v. United States*,[737] Janicki had submitted a claim in the CFC some fifty-four months after the contracting officer's final decision.[738] The CFC had denied the claim under the stat-

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Runyon, 124 F.3d 227 (Fed. Cir. 1997) (unpublished table decision); K & S Constr. v. United States, 121 F.3d 727 (Fed. Cir. 1997) (unpublished table decision); GDE Sys., Inc. v. GSA, 119 F.3d 16 (Fed. Cir. 1997) (unpublished table decision); Digital Equip. Corp. v. Barram, 119 F.3d 16 (Fed. Cir. 1997) (unpublished table decision); Planned Sys. Int'l v. Widnall, 119 F.3d 15 (Fed. Cir. 1997) (unpublished table decision); Pizzagalli Constr. Co. v. Dalton, 119 F.3d 15 (Fed. Cir. 1997) (unpublished table decision); Environmental Data Consultants, Inc. v. GSA, 119 F.3d 15 (Fed. Cir. 1997) (unpublished table decision); Hubsch Industrieanlagen Spezialbav Gmbh v. United States, 116 F.3d 1497 (Fed. Cir. 1997) (unpublished table decision); Monde Constr. Co. v. Dalton, 116 F.3d 1497 (Fed. Cir. 1997) (unpublished table decision); Honig Indus. Diamond Wheel, Inc. v. West, 116 F.3d 1496 (Fed. Cir. 1997) (unpublished table decision); OMNI, Inc. v. Barram, 116 F.3d 1496 (Fed. Cir. 1997) (unpublished table decision); St. Paul Fire & Marine Ins. Co. v. United States, 114 F.3d 1208 (Fed. Cir. 1997) (unpublished table decision); McRae Indus. v. Cohen, 114 F.3d 1207 (Fed. Cir. 1997) (unpublished table decision); Dick Enter. v. Reno, 114 F.3d 1206 (Fed. Cir. 1997) (unpublished table decision); First Interstate Bank v. United States, 114 F.3d 1206 (Fed. Cir. 1997) (unpublished table decision); GLR Constructors, Inc. v. Togo, 114 F.3d 1206 (Fed. Cir. 1997) (unpublished table decision); Penn. Envtl. Control, Inc. v. Brown, 113 F.3d 1258 (Fed. Cir. 1997) (unpublished table decision); Heathman, Inc. v. United States, 113 F.3d 1257 (Fed. Cir. 1997) (unpublished table decision); Conner Bros. Constr. Co. v. Brown, 113 F.3d 1256 (Fed. Cir. 1997) (unpublished table decision); Rosinka Joint Venture v. Albright, 113 F.3d 1256 (Fed. Cir. 1997) (unpublished table decision); Rehabilitation Servs. v. Perry, 113 F.3d 1256 (Fed. Cir. 1997) (unpublished table decision); Bath Iron Works Corp. v. Dalton, 113 F.3d 1256 (Fed. Cir. 1997) (unpublished table decision); A.S. McGaughan Co. v. Barrram, 113 F.3d 1256 (Fed. Cir. 1997) (unpublished table decision); Hendlish v. United States Postal Serv., 113 F.3d 1255 (Fed. Cir. 1997) (unpublished table decision); Desciose v. United States, 113 F.3d 1254 (Fed. Cir. 1997) (unpublished table decision); Hydro Eng'g, Inc. v. United States, 113 F.3d 1254 (Fed. Cir. 1997) (unpublished table decision); Reddy-Buffaloes Pump, Inc. v. West, 111 F.3d 144 (Fed. Cir. 1997) (unpublished table decision); Strand Hunt Constr., Inc. v. West, 111 F.3d 142 (Fed. Cir. 1997) (unpublished table decision); 9th & D Joint Venture v. GSA, 108 F.3d 1394 (Fed. Cir. 1997) (unpublished table decision); KMS Fusion, Inc. v. United States, 108 F.3d 1394 (Fed. Cir. 1997) (unpublished table decision); Rincon Ctr. Assocs. v. Johnson, 108 F.3d 1393 (Fed. Cir. 1997) (unpublished table decision); Turner-Mak v. West, 108 F.3d 1393 (Fed. Cir. 1997) (unpublished table decision); Amertex Enters., Ltd. v. United States, 108 F.3d 1392 (Fed. Cir. 1997) (unpublished table decision); Dalton v. Gaffny Corp., 108 F.3d 1391 (Fed. Cir. 1997) (unpublished table decision); Orbas & Assocs. v. Widnall, 108 F.3d 1391 (Fed. Cir. 1997) (unpublished table decision); Tempo, Inc. v. West, 108 F.3d 1391 (Fed. Cir. 1997) (unpublished table decision); Libby Corp. v. Widnall, 106 F.3d 427 (Fed. Cir. 1997) (unpublished table decision); GKS Inc. v. Perry, 106 F.3d 427 (Fed. Cir. 1997) (unpublished table decision).

736. FED. CIR. R. 47.6(b) (stating that opinions unanimously decided by panel as "not adding significantly to the body of law" are not citable as precedent).

737. No. 97-5006, 1997 WL 468285 (Fed. Cir. Aug. 18, 1997).

738. *See id.* at *1.

ute of limitations.[739] On appeal, the Federal Circuit affirmed, rejecting Janicki's assertion of entitlement to equitable tolling.[740]

In *Strand Hunt Construction, Inc. v. West*,[741] Strand Hunt Construction had submitted a claim to the ASBCA based on a construction contract with the Army Corps of Engineers. The ASBCA denied the claim, but on appeal, the Federal Circuit questioned whether it even had jurisdiction over the appeal.[742] Because the contract specifically provided that it was not subject to the CDA, and because the Federal Circuit only has jurisdiction over board cases based on the CDA, the Federal Circuit dismissed the appeal for lack of jurisdiction.[743]

In *Phoenix Control Systems, Inc. v. Babbit*,[744] the Federal Circuit addressed its standard of review for the factual findings of a BCA. Phoenix Control Systems challenged the board's factual findings, but the Federal Circuit affirmed, noting the "heavy burden" that the appellant has when challenging a board of contract appeals' factual findings.[745]

In *In re Sasco Electric*,[746] the CFC denied a subcontractor's right to intervene in an action, and the subcontractor submitted a writ of mandamus to the Federal Circuit.[747] Ruling that the CFC had properly rejected the request for intervention due to the lack of privity of contract between the subcontractor and the government, and citing the lack of a "clear and indisputable" right to the issuance of a writ of mandamus, the Federal Circuit affirmed the CFC's decision.[748]

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739. *See id.* The CDA provides that, after the contracting officer has rendered a final decision, the contractor has twelve months to appeal the decision to the CFC. *See* 41 U.S.C. § 609(a)(3) (1994).

740. *See Janicki*, 1997 WL 468285, at *1. As the Federal Circuit explained: "Equitable tolling permits a plaintiff to avoid the bar of the statute of limitations if, for example, despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." *Id.* (citing Weddel v. Secretary of Health & Human Servs., 100 F.3d 929, 931 (Fed. Cir. 1996)). In rejecting Janicki's argument, the court concluded that Janicki had not acted with due diligence. *See id.*

741. No. 96-1323, 1997 WL 130326 (Fed. Cir. Mar. 21, 1997).

742. *See id.* at *1.

743. *See id.* at *2 ("If the CDA does not apply to the contract at issue, then we lack jurisdiction.").

744. No. 96-1292, 1997 WL 196776 (Fed. Cir. Apr. 22, 1997).

745. *See id.* at *1 (noting that Phoenix has a "difficult row to hoe" when the basis of appeal is an attempt to overturn a board's factual findings); *see also* Fruin-Colnon Corp. v. United States, 912 F.2d 1426, 1429 (Fed. Cir. 1990) (noting that the appellant bears a "heavy burden in demonstrating that a board's factual findings should be overturned"); Blount Bros. Corp. v. United States, 872 F.2d 1003, 1005 (Fed. Cir. 1989) ("If there is conflicting testimony in the record, the Board's preference will, generally, not be disturbed . . . .") (citations omitted).

746. No. 509, 1997 WL 355315 (Fed. Cir. June 3, 1997).

747. *See id.* at *1. In denying its right to intervene, the CFC pointed out that the subcontractor's remedy was against the prime contractor, not the government. *See id.*

748. *See id.* The court explained, "[t]he remedy of mandamus in [sic] available only in extraordinary situations to correct a clear abuse of discretion or usurpation of judicial power." *Id.* The court continued: "A party seeking such a writ bears the burden of proving that it has no

In *Korczak v. United States*,[749] a unique case dealing with jurisdiction over secret contracts, Korczak submitted a contract claim for compensation to the CFC. Based on the 122-year-old case *Totten v. United States*,[750] the CFC dismissed the complaint, stating that it lacked jurisdiction over secret contracts.[751] On appeal, the Federal Circuit affirmed, citing the binding authority of *Totten*, which prohibits any judicial review of secret contracts with the government.[752]

B. Contract Formation

In *Mac's Cleaning & Repair Service v. Dalton*,[753] the Federal Circuit considered a typical dispute over the type of contract. Mac's Cleaning had a contract with the Navy, which provided for a FFP per month with a unit price for any additional work ordered under an indefinite quantity component.[754] Mac's Cleaning, however, asserted that the contract contained only a FFP component and sought to recover the maximum amount available under the contract.[755] On appeal, the Federal Circuit rejected this argument and held that the contract was a mixed contract, containing both a FFP component and an indefinite quantity component.[756]

In *Zacharin v. United States*,[757] a case involving the issue of authority, Zacharin sued the United States for patent infringement under 28 U.S.C. § 1498.[758] The government argued that the United States had an express license to use the invention, but Zacharin contended that a memorandum executed by a government representative concurrent with the license invalidated the express license.[759] The Federal

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means of attaining the relief desired, and that the right to issuance of the writ is 'clear and indisputable.'" *Id.* (quoting Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980)).

749. No. 96-5139, 1997 WL 488751 (Fed. Cir. Aug. 25, 1997).

750. 92 U.S. 105 (1875) (holding that suits cannot be maintained against the government in cases of contracts for secret or confidential services with the government).

751. *See Korczak*, 1997 WL 488751, at *1.

752. *See id.* In so holding, the court observed that "[t]he secrecy which such [secret] contracts impose precludes any action for their enforcement." *Id.* (citing *Totten*, 92 U.S. at 107). Apparently, Korczak did not refute the holding of *Totten*, but merely requested that the Federal Circuit review the rationale of the holding. *See id.* at *2. The court refused, noting that "[w]e are duty bound to follow the law given us by the Supreme Court unless and until it is changed." *Id.*

753. No. 97-1293, 1997 WL 697921 (Fed. Cir. Nov. 7, 1997).

754. *See id.* at *1.

755. *See id.* Whereas the government interpreted the contract to include a monthly payment of $3,813, Mac's Cleaning interpreted it to include a monthly payment of $9,530.99. *See id.*

756. *See id.* The court stated that as Mac's Cleaning had separately identified the two components in its bid, it expressly understood the dual nature of the mixed contract. *See id.*

757. No. 96-5076, 1997 WL 63177 (Fed. Cir. Feb. 14, 1997).

758. *See id.* at *1. *See generally* Lavenue, *supra* note 652, at 489 (describing the history and current application of 28 U.S.C. § 1498).

759. *See Zacharin*, 1997 WL 63177, at *1.

Circuit concluded that the government official did not have authority to invalidate the license but, because both instruments had been executed together, held that both the memorandum and license were void.[760] The court, accordingly, vacated the decision of the CFC and remanded for disposition in the absence of an express license.[761]

C. Contract Administration

In *A.S. McGaughan Co. v. Barram*,[762] the Federal Circuit reversed and remanded the ruling of the GSBCA, which had found that a contract term requiring a certain renovation requirement was unambiguous.[763] The Federal Circuit determined that the contract term was latently ambiguous and, pursuant to the doctrine of *contra proferentem*, concluded that the contractor should recover for the ambiguity.[764]

In *Conner Brothers Construction Co. v. Brown*,[765] the Federal Circuit affirmed a ruling of the VABCA finding a contract provision patently ambiguous. The court explained that "[w]hen a contract contains a patent ambiguity, the contractor is under a duty to seek clarification, and if no clarification is sought, the contractor cannot later argue that its interpretation is correct."[766]

In *Acmat Corp. v. Panama Canal Commission*,[767] however, the ambiguity dealt with a conflict between the contract and a regulation. The ENGBCA had denied a claim for an equitable adjustment based on an asserted conflict between the contract and regulations of the Occupational Safety and Health Administration ("OSHA").[768] The Federal Circuit conceded that the contract was "somewhat ambiguous,"

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760. *See id.* at *3-5 (explaining that since both components were executed together, they formed a single contract and noting that had express license been divisible or a separate contract entirely, it might have been enforceable).

761. *See id.* at *7-8.

762. No. 96-1315, 1997 WL 199464 (Fed. Cir. Apr. 25, 1997).

763. *See id.* at *1 (explaining GSBCA's holding that a contract requiring centering of the sprinkler heads in ceiling tiles was unambiguous regardless of whether or not the sprinkler heads constituted ceiling fixtures, which were required by contract to be centered).

764. *See id.* at *2. The Federal Circuit explained that "[a]n ambiguity exists, however, when more than one reasonable interpretation of a contract exists," but noted that "[t]his ambiguity, however, is not patent because it is not 'glaring.'" *Id.*

765. Nos. 95-1336, 96-1154, 1997 WL 225068 (Fed. Cir. Apr. 30, 1997).

766. *Id.* at *3. In addition to the ambiguity issue, the contractor also raised four other issues on appeal, all of which were rejected by the court of appeals. *See id.*

767. No. 95-1466, 1997 WL 696231 (Fed. Cir. Nov. 10, 1997).

768. *See id.* at *1. The dispute involved the use of a "glove bag" procedure for abating asbestos. *See id.* at *2. Initially, the government allowed the contractor to use the procedure for all piping, but later restricted the use of the procedure to piping of a certain size. *See id.* Acmat sought to recover the costs incurred for using the full containment method on the larger piping. *See id.* OSHA's regulations on the other hand, required full containment "wherever feasible" and provided an exception for the glove bag method only in limited circumstances. *See* 29 C.F.R. § 1926.58(e)(6)(i), (iv) (1991).

but, finding no conflict between the OSHA regulation and the contract terms, affirmed the ENGBCA.[769]

In some cases, such as *GLR Constructors, Inc. v. Togo*,[770] the contractor does not merely seek an equitable adjustment because of an ambiguity in a contract, but because the contract as written was impossible to perform.[771] The ENGBCA had determined that GLR had not proven impossibility of performance, and on appeal, the Federal Circuit affirmed the Board's decision.[772]

As in *Rincon Center Associates v. Johnson*,[773] the terms of a contract are so clear that seemingly no basis for an assertion of ambiguity exists. The contract in question specifically required that Rincon provide air conditioning for a computer room,[774] and the Federal Circuit did not believe that there was any possibility of an ambiguity in the contract.[775] To the extent that any ambiguity existed, the court resolved the question by relying on parole evidence.[776]

In *Contact International, Inc. v. Widnall*,[777] Contact International ("Contact") sued for an equitable adjustment following the completion of the contract, basing its claim alternatively on a constructive termination for convenience, a cardinal change, or a constructive

769. *See Acmat Corp.*, 1997 WL 696231, at *4. In a dissenting opinion, Judge Newman explained that the government initially interpreted the contract in the same way as the contractor and only later changed its interpretation. *See id.* (Newman, J., dissenting). In light of this, Judge Newman argued that the contractor must have had a reasonable basis for its interpretation, one that would have satisfied the OSHA regulations. *See id.*

770. No. 96-1422, 1997 WL 311543 (Fed. Cir. May 27, 1997).

771. *See id.* at *9.

772. *See id* at *10. The Federal Circuit concluded that, to demonstrate impossibility of performance, the contractor had to show that at least one other competent contractor could not achieve the result in question. *See id.* In reaching its decision, the court noted that GLR had failed to demonstrate such evidence for any of the eight contractors. *See id.* The court also affirmed a similar ruling, regarding an alleged failure of the government to cooperate. *See id.* at *7 (agreeing that Corps hindered and failed to cooperate in performance of contract).

773. No. 96-1284, 1997 WL 91431 (Fed. Cir. Mar. 5, 1997).

774. The contract provided that "One (1) computer room ... shall be provided with ... individually zoned HVAC .... The HVAC systems shall be provided to accommodate equipment and personnel .... The HVAC shall be maintained 24-hours and 7 days a week." *See id.* at *2. Rincon argued that the contract only required it to provide a 24-hour cooling system, not to run the system after hours without compensation. *See id.*

775. *See id.* at *3 (holding that the computer room provision in the contract required Rincon to maintain the HVAC 24 hours a day, 7 days a week, and further stating that "[i]t is quite clear that the computer room heating and cooling requirements are an exception to the general temperature requirements for the rest of the building .... These more specific provisions must be viewed as specific requirements beyond the more general provisions").

776. *See id.* at *3-4 (holding that parole evidence supported GSA's interpretation of the contract since the only person who supported Rincon's allegations that GSA agreed to pay an overtime rate was not found credible by GSBCA, whose determinations are unreviewable); *see also* Beta Sys., Inc. v. United States, 838 F.2d 1179, 1183 (Fed. Cir. 1988) (declaring that parole evidence is admissible for purposes of resolving an ambiguity in a contract).

777. No. 96-1133, 1997 WL 12922 (Fed. Cir. Jan. 15, 1997).

change.[778] In rejecting Contact's constructive termination for convenience argument, the Federal Circuit explained that "no decision has upheld retroactive application of a termination for convenience clause to a contract that has been fully performed in accordance with its terms."[779] As a basis for its cardinal change argument, Contact asserted that a change by the government had made a term of the contract uncertain.[780] The court, however, disagreed that the uncertainty constituted "an alternation in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for."[781] Finally, noting that "[a] constructive change occurs when 'a contractor performs work beyond the contract requirements, without a formal order under the changes clause, either by an informal order of the Government or by fault of the Government,'"[782] the court determined that Contact had not demonstrated such a change.[783] Thus, the Federal Circuit affirmed the ASBCA.

While the contractor in *Contact International* asserted numerous alternative arguments, the contractor in *Solar Turbines Inc. v. United States*[784] asserted even more alternative grounds for relief.[785] Despite such arguments, the Federal Circuit affirmed the CFC on all grounds.[786]

In *PLB Grain Storage Corp. v. Glickman*,[787] the contract issue concerned a termination for default. PLB Grain Storage argued that the termination was improper because the contracting officer had not independently made the default determination.[788] Although the Federal Circuit recognized that the contracting officer was "advised" to terminate the contract, it affirmed the ruling of the AGBCA, noting

778. *See id.* at *1.
779. *See id.* at *3 (quoting Maxima Corp. v. United States, 847 F.2d 1549 (Fed. Cir. 1988)).
780. *See id.* (detailing Contact's argument that the Air Force, by stating that an amended RFP would be issued, changed the contract to such an extent that Contact felt the contract was "in limbo").
781. *Id.* (quoting Allied Materials & Equip. Co., v. United States, 569 F.2d 562, 563-64 (Ct. Cl. 1978)).
782. *Id.* at *4 (quoting Miller Elevator v. United States, 30 Fed. Cl. 662, 678 (Ct. Cl. 1994)).
783. *See id.* (explaining that Contact failed to show that it was forced to engage in work that went beyond the scope of the contract).
784. No. 96-5088, 1997 WL 291971 (Fed. Cir. May 30, 1997).
785. *See id.* at *1. The contractor asserted the following grounds for a claim of breach of a cost-reimbursement contract: (1) superior knowledge, (2) misrepresentation, (3) breach of warranty, (4) estoppel, and (5) breach of express warranties. *See id.* at *3-6.
786. *See id.* at *6.
787. No. 95-1169, 1997 WL 242179 (Fed. Cir. May 12, 1997).
788. *See id.* at *2. Initially, a committee (called the REACT committee) had determined that the contract should be terminated for default. *See id.*; *see also* Schlesinger v. United States, 390 F.2d 702 (Ct. Cl. 1968) (explaining that a contracting officer must use his independent judgment when terminating a contract for default).

that the contracting officer had "reviewed, agreed with, and made revisions to the termination order before its execution."[789]

In *Amertex Enterprises, Ltd. v. United States*,[790] the Federal Circuit addressed the cardinal change issue. In a contract to produce chemical warfare protective suits, the government issued forty-two modifications and eight amendments to the contract, totaling over 100 changes to the specifications for the suits.[791] The government eventually terminated the contract for default.[792] Amertex argued that the modifications and amendments constituted a cardinal change, but the CFC rejected this argument.[793] On appeal, the Federal Circuit affirmed, noting that Amertex had agreed to each modification and amendment.[794]

In *West v. Red Samm Construction, Inc.*,[795] the ASBCA awarded an equitable adjustment to the contractor and the government appealed. The contractor obtained the award based on a government order to replace a subcontractor, for which the principal had been debarred.[796] On appeal, the government argued that, if the principal for a contractor is debarred, the debarment extends to the corporate

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789. *PLB Grain Storage*, 1997 WL 242179, at *2. The Federal Circuit concluded that "[t]his evidence supports the AGBCA's determination that the contracting officer was the final decision-maker and that he exercised independent, personal judgment." *Id.*

On a related note, a potential landmark case is currently before the CFC that seems factually similar to this decision. In *McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358 (1996), the CFC converted a termination for default into a termination for convenience because the contracting officer had not acted independently when issuing the termination for default. *See id.* at 369. In *PLB Grain*, albeit an unpublished decision, the Federal Circuit held that reviewing a termination decision, agreeing with it, and then executing it are "actions . . . sufficient to satisfy the requirement of a decision by the contracting officer to terminate and conclude that the termination . . . was legally effective." *PLB Grain Storage*, 1997 WL 242179, at *2. Yet the facts in the *McDonnell Douglas* case seem much more egregious than in this case.

790. No. 96-5070, 1997 WL 73789 (Fed. Cir. Feb. 24, 1997).

791. *See id.* at *1.

792. *See id.* At the time of termination, Amertex had delivered half of the chemsuits, over two years after the original deadline. *See id.*

793. *See id.* at *2 (holding that Amertex's cardinal change argument is "fatally undercut" because of bilateral nature of modifications).

794. *See id.* The Federal Circuit observed that a cardinal change

> occurs when the government effects an alteration in the duties so drastic that it effectively requires the contractor to perform duties materially different from those bargained for. By definition, then a cardinal change is so profound that it is not redressable under the contract, and thus renders the government in breach.

Id. (quoting AT&T Comms., Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993)).

In a dissent, Judge Newman expressed concern that the majority had injected a requirement of duress into the cardinal change doctrine: "The panel majority offers the theory that since Amertex did not allege duress in accepting the contract modification, it can not argue that it did not waive its claim." *Id.* at *5 (Newman, J., dissenting). Noting further that "[d]uress, alleged or not, is not at issue," Judge Newman concluded that "[a] business decision to continue to perform does not waive a contractor's recourse to remedy on a theory of cardinal change." *Id.*

795. No. 97-1032, 1997 WL 488745 (Fed. Cir. Aug. 25, 1997).

796. *See id.* at *1.

entity.[797] The Federal Circuit disagreed and affirmed the ASBCA.[798]

D. Cost and Pricing

In *Aydin Corp. (West) v. Widnall*,[799] Aydin appealed the decision of the ASBCA denying its request for reimbursement of commission costs on a foreign contract pursuant to CAS 410.[800] The Federal Circuit had addressed the issue under CAS 402 in an earlier ruling and remanded for the costs to be allowed, unless the Board could justify its earlier ruling.[801] On remand, the Board again rejected the costs, but this time under CAS 410.[802] The Federal Circuit reversed the ASBCA, holding that its ruling was outside the scope of its remand mandate pursuant to the law of the case doctrine.[803]

E. Damages

In *Azure v. United States*,[804] the Federal Circuit provides an excellent overview of the three methodologies used for the calculation of damages in government contract damage awards. Azure claimed that the government had constructively accelerated its contract and sought an equitable adjustment.[805] The CFC found an acceleration but denied any damages, citing the absence of any "method by which to award plaintiff the damages to which he may be entitled."[806]

On appeal, the Federal Circuit cited the three methods used to determine the quantum of damages: (1) actual costs, which require detailed documentation of the costs; (2) total costs, where an award is based on the difference between the original bid and the total costs incurred; and (3) the jury verdict, where the court arrives at a "rea-

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797. *See id.* at *1-2. The court emphasized the government's position: "In effect, the government advocates a bright-line rule in which an affiliate of a debarred subcontractor would be automatically debarred." *Id.* at *2.

798. *See id.* The Federal Circuit rejected the government's argument on the premise of "innocent until proven guilty" and FAR 9.06. *See id.* In addressing FAR 9.06, the court explained that "[t]he government's argument that all affiliates of a debarred entity are de facto ineligible is so broad as to swallow the notice requirements of FAR 9.06." *Id.*

799. No. 96-1267, 1997 WL 13329 (Fed. Cir. July 24, 1997).

800. *See id.* at *1 (citing CAS 410, 48 C.F.R. § 9904.410 (1997)).

801. *See id.* In *Aydin Corp. v. Widnall*, 61 F.3d 1571 (Fed. Cir. 1995), Aydin had sought the recovery of commission costs, but the ASBCA had denied the costs under CAS 402, *see id.* at 1579, which requires "similar treatment for similar costs." 48 C.F.R. § 9904.402 (1997). Because the Board had no basis, other than their size, to reject the commission costs, the Federal Circuit deemed the costs proper and remanded on that issue. *See Aydin*, 61 F.3d at 1579-80.

802. *See Aydin*, 1997 WL 13329, at *4.

803. *See id.* The government argued that, because the court had not addressed CAS 410, the Board was correct in considering that issue on remand. *See id.* at *3. The Federal Circuit rejected this contention, noting that it had specifically addressed CAS 410. *See id.*

804. No. 96-5054, 1997 WL 665763 (Fed. Cir. Oct. 24, 1997).

805. *See id.* at *3-4.

806. *Id.* at *6.

sonable equitable adjustment after receiving evidence from the parties."[807] The CFC had refused to base a damages award on the jury verdict method.[808] The Federal Circuit, however, ruled that such a general exclusion of damages based on the jury method was legal error and accordingly reversed.[809]

In *Penn Environmental Control, Inc. v. Brown*,[810] the Federal Circuit further demonstrated how it strives to ensure that contractors receive adequate compensation for damages. In this case, the VABCA awarded an equitable adjustment to Penn, but Penn appealed, seeking a greater award.[811] In an earlier ruling, the Federal Circuit had remanded with instructions to address the basis for the award in more detail.[812] In this second appeal, the Federal Circuit affirmed.[813] Although the Federal Circuit affirmed, this case nonetheless demonstrates how, on occasion, the court takes the lower courts to task to justify a ruling that may be open to dispute.

F. Rulings by the Supreme Court

Occasionally, the United States Supreme Court takes a government procurement case on *certiorari* review from the Federal Circuit. In 1997, the United States Supreme Court took one such case. In *Hughes Aircraft Co. v. United States*,[814] the Supreme Court considered the retroactivity of the *qui tam* provisions of the False Claims Act ("FCA"),[815] which permits suits by private parties on behalf of the

807. *See id.*

808. *See id.* at *1.

809. *See id.* at *6 ("The Court of Federal Claims erred in not employing the jury verdict method to award damages to Azure."). This ruling is very important for government contractors, but unfortunately, and inexplicably, this ruling is nonprecedential.

Another interesting component of the *Azure* case deals with the execution of a "release of claims" pursuant to FAR 52.232-5(H). 48 C.F.R. § 52.232-5(h) provides that the amount due the contractor will be paid by the government following a "release of all claims against the Government arising by virtue of [the] contract." Azure had not received its final payment because it refused to execute a release of claims under the contract. *See Azure*, 1997 WL 665763, at *8. In the appeal, the Federal Circuit held that this was improper, noting that Azure only had to reference its claim to the constructive acceleration in order to protect its claims and simultaneously obtain final payment. *See id.* ("To obtain the amounts due under the contract, all Azure has to do is to execute the release, excepting its claim and describing its claim with some particularity. Certainly a reference to this case number and the amounts claimed herein will suffice.").

810. No. 96-1289, 1997 WL 252322 (Fed. Cir. May 14, 1997).

811. *See id.* at *1. The Board had awarded Penn an equitable adjustment in the amount of $19,602.53. *See id.* On appeal, Penn sought an additional adjustment based on hours that were allegedly not included in the Board's calculation. *See id.*

812. *See* Clifton v. United States, 66 F.3d 345 (Fed. Cir. 1995).

813. *See Penn Envtl.*, 1997 WL 252322, at *2 (finding substantial evidence to support the Board's decision that the labor expended by Penn for speed tile was the total labor expended by Penn as required by contract and not extra work required by presence of speed tile).

814. 520 U.S. 939 (1997).

815. 31 U.S.C. § 3730(b) (1994).

United States against any persons who, or any entities which, have submitted a false claim to the government.[816]

Hughes had, pursuant to a government contract, received a subcontract from Northrop Corp. for the development of a radar to be used with the Air Force B-2 aircraft.[817] Thereafter, Hughes received another subcontract from McDonnell Douglas to upgrade the radar of another Air Force aircraft, the F-15.[818] With the approval of the Air Force, Hughes developed a joint component for both radar systems.[819] In allocating the costs of these two subcontracts, Hughes allowed certain costs for the B-2 subcontract to be allocated to the F-15 subcontract.[820] Following a government audit and the issuance of a series of audit reports between 1986 and 1988, the government initially decided to withhold $15.4 million from the B-2 contract because of this accounting practice.[821] However, after concluding that the practice actually saved the government money, the government allowed the accounting practice and paid the $15.4 million.[822]

In 1989, William Schumer, a former employee of Hughes, filed suit against Hughes under the *qui tam* provisions of the FCA based on the accounting practices used for the B-2 and F-15 contracts.[823] Schumer asserted that, between 1982 and 1984, Hughes had improperly charged costs under the radar contracts for the B-2 and the F-15.[824] Hughes requested the dismissal of the suit for lack of jurisdiction, arguing that, pursuant to the government audit, the suit was based on information that the government already possessed at the time the suit was initiated.[825] In response, Schumer asserted jurisdiction based

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816. *See id.*

817. *See Hughes Aircraft Co.*, 520 U.S. at 942. The B-2 contract was a cost-plus-award contract ("CPAC") that provided for Hughes to be reimbursed for its costs plus a reasonable profit. *See id.*

818. *See id.* The F-15 contract was an FFP contract that provided for Hughes to receive a fixed price, regardless of costs. *See id.*

819. *See id.*

820. *See id.* Because the B-2 contract was a CPAC contract and the F-15 subcontract was a FFP contract, Hughes would benefit by charging the most costs to the CPAC contract, as Hughes would receive reimbursement for those costs. *See id.*

821. *See id.*

822. *See id.*

823. *See id.* Schumer was formally the "Division Contracts Manager" for the B-2 contract. *See id.*

824. *See id.* Schumer's complaint asserted that the accounting practice had resulted in a $50 million net overcharge to the government and sought treble damages in the amount of $150 million. *See id.*

825. *See id.* For *qui tam* actions before 1986, the FCA did not permit any suit based on information that was already in the government's possession. *See* 31 U.S.C. § 3730(b)(4) (1982) ("Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.").

on retroactive application of the 1986 amendments to the FCA, which allowed a *qui tam* action based on information available to the government at the time the suit was initiated.[826] The district court denied Hughes's motion to dismiss on jurisdictional grounds, but later granted summary judgment to Hughes on the merits.[827]

On appeal, the Court of Appeals for the Ninth Circuit, affirmed the exercise of jurisdiction, concluding that the 1986 amendments to the FCA were retroactive to the actions allegedly made in 1982.[828] The court did, however, reverse the grant of summary judgment.[829] Although the Ninth Circuit held that Hughes had not committed fraud, it ruled that a genuine issue of material fact existed as to whether Hughes had entered into unauthorized agreements regarding its cost accounting practices.[830] The court reached this conclusion, in part, on the premise that a government audit is not a "public disclosure" for purposes of a *qui tam* jurisdiction pursuant to the FCA.[831]

The Supreme Court's review was limited to the retroactivity of the FCA.[832] For Schumer, attorney Laurence Gold asserted that, pursuant to *Landgraf v. USI Film Products*,[833] the 1986 amendments to the FCA did not satisfy the "influential definition . . . of impermissibly retroactive legislation."[834] The Court rejected this contention.[835] For

826. *See Hughes*, 520 U.S. at 942. (citing 31 U.S.C. § 3730(b)(4) (1982)). The 1986 amendments permit a *qui tam* suit based on information in the government's possession, except for information publicly disclosed and not brought by an original source of the information. *See* 31 U.S.C. § 3730(e)(4)(A) (1994). Hughes, of course, argued that the 1986 amendments were not retroactive. *See Hughes*, 520 U.S. at 943. Alternatively, Hughes asserted that there was no jurisdiction, even if the 1986 amendments applied, because the *qui tam* claim was based on an administrative audit, thus, "information publicly disclosed." *See id.*

827. *See Hughes*, 520 U.S. at 944.

828. *See id.*

829. *See id.* (explaining that the Ninth Circuit held that a material factual dispute existed as to whether Hughes had made misleading and incomplete disclosures about its commodity agreements).

830. *See id.*

831. *See id.*

832. *See id.* at 945. The specific issue was "whether a 1986 amendment to the FCA partially removing that bar applies retroactively to *qui tam* suits regarding allegedly false claims submitted prior to its enactment and, if so, whether this particular action meets the requirements of the amended Act." *Id.*

833. 511 U.S. 244 (1994).

834. *Hughes*, 520 U.S. at 946. The *Landgraf* court held that "'[e]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.'" *Id.* Relying on *Landgraf*, Schumer alleged that only statutes of such effect are subject to the presumption against retroactivity. *See id.*

835. *See id.* The Court explained: "[T]he Court has used various formulations to describe the functional conceptio[n] of legislative 'retroactivity,' and made no suggestion that Justice Story's formulation [in *Landgraf*] was the exclusive definition of presumptively impermissible retroactive legislation." *Id.*

Hughes, attorney Kenneth Starr argued that retroactive application of the 1986 amendments would not reflect the original understanding of the FCA.[836] The Court agreed, explaining, that "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good."[837] Accordingly, in a unanimous decision written by Justice Thomas, the Supreme Court denied retroactive application of the 1986 amendments to the FCA.[838] Explaining that Congress had made no provision for retroactive effect of the 1986 amendments, the Court applied the "time-honored presumption . . . against retroactive legislation."[839] Concluding that the Ninth Circuit had misread *Landgraf*, the Supreme Court vacated and remanded.[840]

Unfortunately, because the Supreme Court found that Schumer had no claim under the FCA, it did not address the issue of what constitutes a public disclosure.[841] Therefore, the Court did not have the opportunity to address whether a government audit constitutes a public disclosure under the FCA.[842] However, as a ruling was not necessary on this issue, the Court's silence was not surprising. Indeed, in cases before the Federal Circuit, the court similarly does not address all the issues currently facing the government contracts community, if resolution of the issue is not actually before the court.

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836. *See id.* at 951-52.

837. *See id.* The Court further explained that: "'[*Qui tam* statutes are] passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain.'" *Id.* (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.5 (1943)).

838. *See id.* at 952.

839. *See id.* (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 265, 268 (1994)). The Court concluded that the 1986 amendment "essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued." *Id.* at 950.

840. *See id.* The Court remanded the case to be dismissed, because the 1982 version of the FCA did not allow a *qui tam* action based on information known to the government when the action was instituted. *See id.* at 952.

841. With the Ninth Circuit's ruling that a government audit is not a public disclosure under the FCA, Hughes had argued that a resolution by the Supreme Court was needed, in view of a conflicting ruling in *United States v. John Doe Corp.*, 960 F.2d 318, 322-23 (2d Cir. 1992), in which the Second Circuit held that a public disclosure includes information divulged to "strangers to the fraud." The Ninth Circuit had dismissed the *John Doe* ruling as "unrealistic." *See* Hughes Aircraft Co. v. United States, 63 F.2d 1512, 1518 (9th Cir. 1994), *vacated*, 520 U.S. 939 (1997).

842. *See Hughes*, 520 U.S. at 945. The Court explained: "Because we conclude that the lower courts should not have applied the 1986 amendment and therefore that this action should have been dismissed, we express no opinion as to the Ninth Circuit's 'public disclosure' and 'public fisc' holdings, or as to the merits of respondents factual contentions." *Id.* In addition, the Supreme Court refused to consider the issue of the constitutionality of the *qui tam* suit as a general matter.

CONCLUSION

In 1997, the Federal Circuit made several important and notable rulings. With regard to jurisdiction, in *National Surety*, the Federal Circuit granted important new rights to sureties, such as extending jurisdiction to sue on a government contract by subrogation; thereby severely limiting *Fireman's Fund*. In *Southwest Marine*, the court ruled that the two-year statute of limitations for a maritime case under the SIAA does not apply to a CDA claim. Additionally, in *Trauma Service* and *Total Medical Management*, the court disapproved of the use of motions to dismiss for lack of jurisdiction where the issue was the failure to state a claim.

With regard to contract formation, in *LDG Timber*, the court held that the government has the burden of proving that it does not have the requisite authority, in an authority dispute seeming to limit *Federal Crop Insurance*. In *State of Montana*, the court finally resolved and established the applicable test for determining third-party beneficiary status, adopting the *Schuerman* test. In addition, in *AT&T*, the court also issued an incredible decision, ruling that, after a $34.5 million contract had been fully performed, the contract was void from the inception, and further, that there was no apparent basis for recovery of damages.

With regard to contract administration, the Federal Circuit in *Triax* made the astonishing announcement that a finding of a latent ambiguity and application of the doctrine of *contra proferentem* are "the general rule," whereas a finding of a patent ambiguity, and application of the duty of inquiry, is only "an exception." In *Yankee Atomic*, the court issued a controversial ruling applying both the sovereign acts doctrine and the unmistakability doctrine, considering these doctrines for the first time following the *Winstar* ruling by the Supreme Court.

With regard to cost and pricing, the Federal Circuit specifically considered the application of four cost principles: including FAR 15.205-6, FAR 15.205-15, DAR 15.205-17 (now FAR 15.205-20), and FAR 31.205-41.

With regard to damages, the court in *Satellite Electric* further refined the respective burdens of proof for obtaining *Eichleay* damages. In *Gargoyles*, the court confirmed that lost profits are an available damage remedy in patent infringement suits against the United States. In *Ed A. Wilson*, the court recognized a broad category of parties entitled to recover legal fees under the EAJA, perhaps even extending entitlement to pro se litigants.

Therefore, the 1997 term has resulted in many interesting as well

as important rulings from the Court of Appeals for the Federal Circuit.

PROSPECTIVE

Significantly, with 1998, a new era has begun at the Federal Circuit. Chief Judge Glenn L. Archer, Jr. stepped down as Chief Judge on December 24, 1997 and took Senior Judge status. In his place, Judge Robert Haldane Mayer succeeded as Chief Judge. Notably, Circuit Chief Judge Mayer was once a judge on the CFC, and that experience may inject some increased emphasis on government contract cases before the Federal Circuit. Indeed, under the tenure of Chief Judge Archer, the number of government contract cases heard by the court increased dramatically from earlier years. From 1994 to 1997, published government contract cases increased from twenty-two to 115, respectively. Under the tenure of Chief Judge Mayer, this trend is expected to continue. As this occurs, government contract practitioners may wish to become ever more active and visible in this court of appeals bar, a bar that has traditionally focused primarily on patent law. After all, due to the infrequency of Supreme Court review of government contract cases, the Federal Circuit represents the court of last resort for virtually all matters involving government contracts.