GOVERNMENT CONTRACT CASES IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT: 1996 IN REVIEW

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INTRODUCTION

The United States Court of Appeals for the Federal Circuit issued a modest twenty-three precedential decisions concerning government contracts in 1996. By comparison, the court decided fifty-seven government contract cases in 1995, twenty-two in 1994, forty in 1993, thirty-one in 1992, and twenty-six in 1991. The decisions in 1996 indicate generally that the year primarily was one of consolidation rather than breaking new ground.

Thirteen of the twenty-three 1996 decisions came to the court on appeal from the United States Court of Federal Claims. Six decisions were appeals from the General Services Board of Contract Appeals,

five of which arose under the Board's recently repealed bid protest jurisdiction. Three decisions were on appeal from the Armed Services Board of Contract Appeals, and the United States District Court for the District of Columbia sent one case. The Federal Circuit affirmed the decision below in twelve cases, reversed in seven cases, and in four cases, the court affirmed-in-part and reversed-in-part. The Government prevailed in nineteen cases, while the court ruled in favor of the contractor in only three cases. In one case, the contractor prevailed on the merits, but the court ruled for the Government on the damages issue. A unanimous panel decided twenty of the twenty-three 1996 decisions.

This Article presents a summary and analysis of each of the twenty-three precedential government contract decisions decided by the Federal Circuit in 1996. Part I addresses those decisions in which jurisdiction was the central issue. Part II covers the cases concerning contract formation, mostly bid protest decisions. Part III examines decisions that turned on issues of contract interpretation, performance, or administration. Finally, Part IV discusses cases involving breach and termination claims.

I. JURISDICTION

A. Definition of Contractor "Claim" Issue Still Persists

To invoke the jurisdiction of either a Board of Contract Appeals ("BCA"), or the United States Court of Federal Claims ("CFC"),[1] a government contractor must assert a "claim" that complies with statutory, regulatory and common law requirements. To be heard in the Court of Federal Claims, the contractor must bring an action on a valid Contract Dispute Act ("CDA")[2] claim within twelve months of a contracting officer's final decision.[3] The CDA states 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."[4]

The Federal Acquisition Regulation ("FAR"), the regulatory implementation of the CDA, defines a "claim" as:

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1. Effective October 29, 1992, the United States Claims Court was renamed the United States Court of Federal Claims. *See* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516 (codified as amended at 28 U.S.C. § 1491 (1994)). The authors will use the current name of the court throughout this Article.
2. Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1994).
3. *See id.* § 609(a).
4. *Id.* § 605(a).

> [A] written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. . . . A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer . . . if it is disputed either as to liability or amount or is not acted upon in a reasonable time.[5]

The definition of what constitutes a "claim" has, in recent years, been the subject of more wasteful and confusing government contract litigation than any other aspect of the CDA.[6] More than four years of this protracted litigation resulted from the "in dispute" gloss applied to the CDA's claim language in *Dawco Construction, Inc. v. United States*.[7] The Federal Circuit in *Dawco* ruled that the CDA and its implementing regulations require that a claim arise from a request for payment that is in dispute.[8]

The *in banc* court overruled *Dawco*, however, in *Reflectone, Inc. v. Dalton*.[9] Distinguishing between "routine" and "non-routine" requests for payment, the Federal Circuit in *Reflectone* held that the FAR "sets forth the only three requirements of a non-routine 'claim' for money: that it be (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain."[10] The court in *Reflectone* determined that nothing in the FAR suggested that "other written demands seeking payment of a sum certain as a matter of right, i.e., those demands that are not 'routine request[s] for payment,' also

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5. 48 C.F.R. § 33.201 (1996).

6. Congress ultimately resolved two vexing problems. One involved the certification requirement of the CDA after the Federal Circuit's decision in *United States v. Grumman Aerospace Corp.*, 927 F.2d 575 (Fed. Cir. 1991), which held that a contracting officer is not obliged to make a final decision on any claim exceeding $100,000 that is not certified by the person duly authorized to bind the contractor with respect to the claim. *See* 41 U.S.C. § 605(c)(6)-(7). The other problem stemming from *Overall Roofing & Construction Inc. v. United States*, 929 F.2d 687 (Fed. Cir. 1991), involved the lack of the jurisdiction over appeals from termination for defaults not associated with monetary claims, *see* Federal Courts Administration Act of 1992, § 907(b) (codified as amended at 28 U.S.C. § 1491(a)(2)) (expanding CFC's jurisdiction to include "a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act").

7. 930 F.2d 872, 878 (Fed. Cir. 1991) (holding that for claim to be valid, contractor and agency must "already be *in dispute* over the amount requested") (emphasis added).

8. *See* Dawco Constr., Inc. v. United States, 930 F.2d 872, 878 (Fed. Cir. 1991).

9. 60 F.3d 1572, 1575-76 (Fed. Cir. 1995) (in banc) (holding that equitable adjustment was nonroutine request for payment that did not have to be "in dispute" in order to constitute CDA "claim").

10. Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (in banc).

must be already in dispute to constitute a 'claim.'"[11] Thus, *Reflectone* clarified that non-routine submissions had no "in dispute" requirement.[12] Under this new framework, a routine request for payment must be converted to a CDA claim when it is disputed, while a non-routine request constitutes a CDA claim when first submitted.[13]

The court in *Reflectone* left for later contemplation the resolution of the parameters of what constitutes a non-routine submission. The court held that a request for equitable adjustment ("REA") clearly is an example of a non-routine submission because it is a remedy invoked only when "unforeseen or unintended circumstances" cause an increase in contract performance costs.[14] The court used as examples Government modification of the contract, differing site conditions, defective or late-delivered government property, and issuance of a stop work order.[15] The court, however, did not mention claims submitted under the Termination for Convenience clause.[16] Whether a Termination for Convenience is a routine or non-routine submission became the central issue on appeal to the Federal Circuit in *James M. Ellett Construction Co. v. United States.*[17]

The facts and procedural history of *Ellett* aptly illustrate how the Government, through jurisdictional attack, can delay a case for years before the merits, if ever, are addressed in court. Ellett entered into a contract with the Forest Service in July 1988 to construct a logging road.[18] On September 30, 1988, the agency terminated the contract for its convenience because of legislation limiting entry into the area where Ellett was supposed to construct the road.[19] Ellett sent the contracting officer a letter dated November 17, 1988, purporting to "file formal notice of claim pursuant to the CDA of 1978" for an equitable adjustment, and for unforeseen security costs and lost profits.[20] The contracting officer responded by letter of December 2, 1988, that FAR Part 49 governs settlement of termination proposals

11. *Id.* at 1576.
12. *See id.* at 1577.
13. *See id.* at 1578.
14. *See id.* at 1577 (citation omitted).
15. *See id.*
16. *See id.* (allowing government to terminate a contract for its convenience before completion of the terms of the contract and providing procedures through which the contractor and the government's contracting officer may settle payment and termination issues (citing 48 C.F.R. § 52.249.2 (1996))).
17. 93 F.3d 1537 (Fed. Cir. 1996).
18. *See* James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1540 (Fed. Cir. 1996).
19. *See id.*
20. *See id.*

and requests for contract modification, and that Ellett needed to submit a settlement proposal on Standard Forms 1436 and 1439.[21]

On March 3, 1989, Ellett submitted a settlement proposal on the required forms, requesting a net payment of $494,826.[22] The parties thereafter began negotiating a mutually agreeable settlement.[23] By June 25, 1990, Ellett had rejected the agency's settlement offer, the agency had rejected Ellett's counteroffer, and the contracting officer issued a document entitled "Contracting Officer's Findings and Determination."[24] In that determination document, the contracting officer evaluated the termination settlement proposal and concluded that Ellett was entitled to termination costs of $416,144.01, less progress payments the agency had already made, for a net of only $22,779.01.[25]

On July 13, 1990, Ellett filed a complaint in the United States Court of Federal Claims seeking $451,084 plus interest, costs, and attorney fees.[26] The government responded by filing a motion to dismiss for lack of subject matter jurisdiction, claiming that Ellett's letter dated November 17, 1988, did not qualify as a "claim" under the CDA, and that even if it were a claim, it was not properly certified.[27] The court dismissed the suit, agreeing that the letter was not properly certified.[28] In an unpublished decision, the Federal Circuit reversed, finding that Ellett's November 17, 1988 claim was properly certified.[29]

On remand, the government filed another motion to dismiss, arguing that Ellett had yet to submit a claim complying with the CDA.[30] The Court of Federal Claims, relying, *inter alia*, on *Dawco*, granted the motion on the basis that there was no pre-existing dispute for any of Ellett's claims.[31] Ellett again appealed to the Federal

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21. *See id.*
22. *See id.*
23. *See id.*
24. *See id.* at 1540-41.
25. *See id.* at 1541.
26. *See id.*
27. *See id.* The CDA requires that every claim in excess of $100,000 be certified by someone authorized to bind the contractor with respect to the claim. *See* 41 U.S.C. § 605(c) (1994). A person "duly authorized to bind the contractor with respect" to claims over $100,000 must "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.*
28. *See Ellett*, 93 F.3d at 1541 (citing James M. Ellett Constr. Co. v. United States, No. 90-641 C (Cl. Ct. Feb. 6, 1991), *rev'd*, 965 F.2d 1065 (Fed. Cir. 1992)).
29. *See id.* (citing James M. Ellett Constr. Co. v. United States, No. 91-5071, 1992 WL 82447 (Fed. Cir. Apr. 24, 1992)).
30. *See id.*
31. *See id.*

Circuit.[32] Before the Federal Circuit heard the contractor's appeal, all of the cases on which the Court of Federal Claims had relied in dismissing Ellett's complaint were overruled by *Reflectone*.[33] The main issue on appeal before the Federal Circuit was whether the contractor submitted a proper claim on which the contracting officer had issued a decision.[34] The court stated that the critical distinction in identifying a "claim" after *Reflectone* was whether the particular submission was routine or non-routine.[35] A "demand for compensation for unforeseen or unintended circumstances cannot be characterized as 'routine.'"[36] *Reflectone* had ruled that an equitable adjustment was "anything but a 'routine request for payment.'"[37] Examples of routine requests for payment included "vouchers, invoices, and similar requests for payment . . . 'submitted for work done or equipment delivered by the contractor in accordance with the expected or scheduled progression of contract performance.'"[38]

The government attempted to distinguish *Reflectone*, arguing that Ellett's termination settlement proposal was a routine submission, and therefore that Ellett's proposal had to be in dispute when submitted to constitute a claim.[39] Squarely rejecting this argument, the court ruled that "it is difficult to conceive of a less routine demand for payment than one which is submitted when the government terminates a contract for its convenience."[40] The court determined that such a demand, which occurs only in a fraction of government contracts, is certainly less routine than a request for equitable adjustment, several of which a contractor might submit on any one contract.[41] Moreover, but for the termination for convenience clause, the government would breach the contract, and it would be liable for damages resulting from its action.[42] The parties intended that Ellett construct the entire logging road, but because of unforeseen legislation, the government decided to invoke its right to terminate the contract.[43] The court ruled that Ellett's submission of

32. *See id.*
33. *See id.* at 1541 n.2.
34. *See id.* at 1542.
35. *See id.*
36. *See* Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1577 (Fed. Cir. 1995).
37. *Id.*
38. *See Ellett*, 93 F.3d at 1542 (quoting *Reflectone*, 60 F.3d at 1577).
39. *See id.* (citing 48 C.F.R. § 33.201 (1995); *Reflectone*, 60 F.3d at 1576).
40. *Id.*
41. *See id.*
42. *See id.* (citing G.L. Christian & Assocs. v. United States, 312 F.2d 418, 423 (Ct. Cl. 1963)).
43. *See id.* at 1543.

a demand for compensation under such circumstances "can hardly be considered routine."[44]

Satisfied that Ellett's termination settlement proposal qualified as a CDA "claim," the Federal Circuit next considered whether Ellett had submitted this claim to the contracting officer for a decision, as required by the CDA.[45] The court clarified that a contractor need not explicitly request a final decision "'as long as what the contractor desires by its submissions is a final decision . . . .'"[46] The court recognized that "'a request for a final decision can be implied from the context of the submission.'"[47] Applying these standards, the court determined that when Ellett initially submitted its termination settlement proposal, after the contract had been terminated for convenience, it was for the purpose of negotiation, not for a contracting officer's decision.[48] The parties had contractually agreed to reach a mutually agreeable settlement.[49] If they failed to do so, the FAR required the contracting officer to issue a final decision,[50] which Ellett could then appeal either to the Court of Federal Claims or to the agency board.[51] Consequently, because Ellett did not submit its termination settlement proposal to the contracting officer for a decision, the proposal was not a claim at the time of submission, even though it met the FAR's definition of a claim.[52]

Once negotiations reached an impasse, the proposal, by the terms of the FAR and the contract, was submitted for decision.[53] After ten months of fruitless negotiations, Ellett explicitly requested that the contracting officer settle its claim.[54] This demand was tantamount to an express request for a contracting officer's decision.[55] Hence, after the subsequent exchange of offers and counteroffers, the contracting officer settled Ellett's proposal by determination and Ellett filed suit.[56]

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44. *Id.*
45. *See id.* (citing 41 U.S.C. § 605(a) (1994)).
46. *Id.* (quoting Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992)).
47. *Id.* (quoting Heyl & Patterson, Inc. v. O'Keefe, 986 F.2d 480, 483 (Fed. Cir. 1993)).
48. *See id.* at 1543-44 (citing 48 C.F.R. § 49.001 (1995)).
49. *See id.* at 1544.
50. *See id.* (citing 48 C.F.R. §§ 49.103, 49.105(a)(4), 52.249-2(f) (Alternate I)).
51. *See* 48 C.F.R. § 52.249-2(i).
52. *See Ellett*, 93 F.3d at 1544.
53. *See id.*
54. *See id.*
55. *See id.*
56. *See id.* (stating that the fact "[t]hat the termination settlement proposal would ripen into a claim requiring the contracting officer to issue a unilateral settlement determination was contemplated by the contract and the FAR").

The rule fashioned by the court in *Ellett* is that a contractor, seeking compensation following a termination for convenience, must file a termination settlement proposal and negotiate with the contracting officer until an "impasse" is reached, at which time the contractor can either expressly request a decision, or such request will be inferred from the circumstances.[57]

In addition, the court in *Ellett* determined that a contractor is not entitled to CDA interest[58] until the termination settlement proposal "ripens" into a claim.[59] The court also ruled that certification of Ellett's termination settlement proposal was not a subject of the litigation until after the effective date of the new statute.[60] The court concluded that the Court of Federal Claims had jurisdiction over Ellett's termination settlement proposal.[61]

The court then considered Ellett's November 17, 1988 claim submission. Ellett argued that it was entitled to CDA interest from the date it filed these claims.[62] The court determined that this submission met all CDA requirements because it was a non-routine claim, containing a written demand seeking as a matter of right a sum certain.[63] The court rejected the government's argument that the submission failed because it closed with a remark that Ellett would be pleased to meet with the contracting officer to discuss the adjustment of the claim.[64] The court concluded that this statement "is nothing more than a cordial closing and does not compromise the letter's status as a claim."[65]

The government also argued that when it terminates a contract for convenience, all claims a contractor might have, including equitable adjustments, are subsumed within the termination settlement proposal.[66] The court rejected this argument, ruling that a contractor is entitled to file valid requests for equitable adjustment independent of a termination settlement proposal after the government

57. *See id.*

58. *See id.* at 1545 (citing Contract Disputes Act of 1978, 41 U.S.C. § 611 (1994) (providing that contractor is entitled to interest, accrued from the date contracting officer receives claim until date of payment, on amounts found due to him under claim)).

59. *See id.*

60. *See id.* at 1545-46 (citing Federal Courts Improvement Act of 1992, Pub. L. No. 102-572, § 907(a)(2), 106 Stat. 4506, 4518 (codified as amended at 28 U.S.C. § 1491 (1994)). A contractor must correct, however, a defective certification before the entry of final judgment or decision. *See id.* (citing 41 U.S.C. § 605(c)(6)).

61. *See id.* at 1546.

62. *See id.*

63. *See id.*

64. *See id.*

65. *Id.*

66. *See id.*

terminates a contract for convenience.[67] The court noted that "[i]t does not stand to reason that the government can avoid a statutory right to interest on a claim by simply terminating the contract for convenience."[68] The court reasoned that because the contractor is not entitled to recover CDA interest on a termination settlement proposal (before it ripens into a claim), the contractor may, through a validly filed request for equitable adjustment, recover CDA interest at least regarding that amount.[69] In short, the court concluded that the trial court also had jurisdiction over the contractor's request for equitable adjustment filed before its termination settlement proposal.[70]

Since the Federal Circuit's issuance of *Ellett*, decisions in the contract appeal boards and the Court of Federal Claims have applied *Ellett* to termination settlement proposals submitted during the pendency of a challenge of a default termination. In one such case, the CFC ruled that, in such an obviously adversarial context, an "impasse existed between the parties once the contracting officer received the filing."[71] Thus, the submission was immediately a valid claim for jurisdiction and recovery of interest purposes.

B. Contracting Officer Final Decision—Linchpin of Jurisdiction

As discussed above, not only must a contractor have a valid CDA claim before it may later invoke the jurisdiction of either a contract appeal board or the Court of Federal Claims, but the contractor also must submit the claim to the contracting officer for decision,[72] and the contracting officer must issue a final decision.[73] There remain numerous pitfalls regarding the final decision requirement. The cases discussed below address whether the context of a contractor's

67. *See id.* at 1546-47.
68. *Id.* at 1547.
69. *See id.*
70. *See id.* at 1548.
71. McDonnell Douglas Corp. v. United States, 37 Fed. Cl. 285, 292 (1997); *see also* Balimoy Mfg. Co. of Venice, Inc., 96-2 B.C.A. (CCH) ¶ 28,605, at 142, 811 (A.S.B.C.A. Oct. 7, 1996) (finding that contractor submitted claim for decision by contracting officer when it submitted demand for termination settlement costs during pendency of its appeal for termination of default).
72. The CDA states 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." 41 U.S.C. § 605(a) (1994).
73. As a prerequisite to establishing jurisdiction in the Court of Federal Claims, a contractor must bring an action on a valid CDA claim within twelve months of a contracting officer's final decision. *See* 41 U.S.C. § 609(a).

submission may invalidate a purported final decision of a contracting officer.[74]

1. Inclusion of fraud ground in termination letter does not invalidate final decision to terminate for default

In the curious case of *Daff v. United States*,[75] the Federal Circuit addressed a contractor's challenge to jurisdiction of the Court of Federal Claims over the contractor's own claims and the government's counterclaim.[76] The contractor based its jurisdictional challenge on the theory that the contracting officer's purported final decision terminating the contract for default was defective because the contracting officer lacked authority to issue a CDA-type termination decision based on fraud allegations by the government.[77] The contractor founded its theory in part on proscriptions in the CDA forbidding agency heads from settling, compromising, paying or otherwise adjusting any claim involving fraud,[78] and FAR provisions that remove authority from the contracting officer to settle or decide fraud claims.[79] The contractor argued that the contracting officer had improperly terminated the contract because of alleged fraud on the contractor's part.[80]

The argument failed because the contracting officer's termination letter, though based in part on an allegation of fraud, also "set forth a ground for the termination that the contracting officer was authorized to assert, i.e., failure to perform according to the terms of the contract."[81] The court then determined that because the Court of Federal Claims had jurisdiction to hear the contractor's challenge to the termination for default, it had jurisdiction to adjudicate the government's fraud counterclaims based on 28 U.S.C. sections 1503 and 2508.[82] The court also recognized that a contracting officer

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74. The CDA envisions two types of final decisions for claims: those in which the contracting officer actually issues a final decision, and those where the contracting officer fails to act within sixty days of receipt of the claim, which the CDA considers to be "deemed denied." 41 U.S.C. § 605(c).

75. 78 F.3d 1566 (Fed. Cir. 1996).

76. *See* Daff v. United States, 78 F.3d 1566, 1571 (Fed. Cir. 1996).

77. *See id.*

78. *See id.* (citing 41 U.S.C. § 605(a)).

79. *See id.* (citing 48 C.F.R. § 33.010 (1984)).

80. *See id.*

81. *Id.* at 1572. The court declined to "address the question of whether a jurisdictional defect would have existed if the termination for default letter had asserted fraud, and nothing more, as the ground for the termination." *Id.* at 1572 n.9.

82. *See id.* at 1573. Section 2508 authorizes the Court of Federal Claims to

> enter judgment in favor of the United States against a plaintiff in the amount in which the plaintiff is found to be indebted to the United States as a result of any "set-off, counterclaim, claim for damages, or other demand [that] is set up on the part of the

need not render a final decision for the Court of Federal Claims to have jurisdiction over the government's assertion of a counterclaim under the False Claims Act.[83]

The contractor next attempted to attack the trial court's finding that it had defrauded the government by, among other things, using RA flux when RMA flux was required.[84] Regarding the use of RA flux, the contractor argued that a general provision in the contract permitted the use of RA flux.[85] The court, however, rejected this argument because a specific contract provision required the use of RMA flux and "specific contract provisions prevail over general provisions."[86] The court found no merit in the contractor's other challenges to the Court of Federal Claims' factual findings.[87]

In addition, the court affirmed the Court of Federal Claims' dismissal for lack of jurisdiction over the contractor's claim against the government for contract inventory in the government's possession.[88] The court found that the contractor never submitted the claim to the contracting officer for a decision.[89]

2. *Divestiture of authority of contracting officer to issue a final decision by 28 U.S.C. § 516—identicality of "claims"*

Whenever a contractor submits a claim under a specific contract to the contracting officer after having filed a complaint before the Court of Federal Claims or a contract appeal board, one weapon in the government's arsenal is 28 U.S.C. § 516, which gives exclusive control

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United States against any plaintiff making claim against the United States in said court. . . ."

Id. (quoting 28 U.S.C. § 2508 (1994)) (alteration in original). Section 1503 grants the Court of Federal Claims jurisdiction "'to render judgment upon any setoff or demand by the United States against any plaintiff in such court.'" *Id.* (quoting 28 U.S.C. § 1503).

83. *See id.* at 1573 n.11 (citing Simko Constr., Inc. v. United States, 852 F.2d 540, 547-48 (Fed. Cir. 1988)).

84. *See id.* The contract at issue in *Daff* involved production of TOW Missile Vehicle Power Conditioners ("TVPCs") for the Army. *See id.* at 1569. A TOW missile will remain in contact with its source by means of a wire. *See id.* A TVPC is a device that allows a TOW missile to interface with a vehicle. *See id.* It must be weatherproof because it is exposed to the elements. *See id.* Flux is a material which is used when constructing TVPC's to clean corrosion and residue from metal parts. *See id.* The contract in *Daff* required that Rosin Mildly Activated ("RMA") flux be used when assembling the TVPCs, rather than Rosin Activated ("RA") flux, because it is milder and would not corrode the underlying metal. *See id.* Type RA flux was not to be used on the type of assembly at issue in *Daff*, but the contractor used it anyway, leading to the government's allegation that the contractor had committed fraud. *See id.* at 1570.

85. *See id.* at 1573.

86. *Id.* at 1574 (citing Hol-Gar Mfg. Corp. v. United States, 351 F.2d 972, 980 (Ct. Cl. 1965)).

87. *See id.*

88. *See id.* at 1574-75.

89. *See id.* at 1575.

over a CDA claim in litigation in the CFC to the Department of Justice.[90] An invalid contracting officer's decision may not serve as the basis for a CDA action.[91] If a CDA claim is already in litigation, the contracting officer lacks authority under 28 U.S.C. § 516 to issue a final decision.[92] Without a valid final decision, the Court of Federal Claims or contract appeals board lacks jurisdiction under the CDA over a claim.[93]

The Federal Circuit, in *Sharman Co. v. United States*,[94] found that two claims were the same and, therefore, the Court of Federal Claims lacked jurisdiction over the latter claim submitted to the contracting officer while the former claim was already in litigation.[95] The court in *Sharman* generally held that 28 U.S.C. §§ 516-520 act to deprive a contracting officer of authority to decide a CDA claim only if that same claim, containing the same relief sought based on the same underlying facts, has already been raised by either party before the Court of Federal Claims.[96] Specifically, the court in *Sharman* ruled that a claim is the "same" as a claim in litigation when it "alleges entitlement to the same money based on the same partial performance, only under a different legal label."[97] Subsequent case law in the Court of Federal Claims has distinguished *Sharman* to determine that a party may properly add a termination for convenience claim to a suit after a complaint has been filed challenging a default termination.[98] The rationale is that while the original claim is a challenge to the government's default termination, the contractor's affirmative claim for termination of convenience is separate and distinct.

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90. *See* 28 U.S.C. § 516 (1994) (reserving to officers of Department of Justice, under Attorney General's direction, conduct of all litigation in which United States is party or is interested).

91. *See* 41 U.S.C. § 605 (1994).

92. *See id.*

93. *See id.* §§ 607, 609.

94. 2 F.3d 1564 (Fed. Cir. 1993), *overruled on other grounds by* Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed Cir. 1995).

95. *See* Sharman Co. v. United States, 2 F.3d 1564, 1573 (Fed. Cir. 1993), *overruled on other grounds by* Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed Cir. 1995).

96. *See id.* at 1571.

97. *Id.*

98. *See, e.g.*, McDonnell Douglas Corp. v. United States, 37 Fed. Cl. 285, 292 (1997) (finding that termination for convenience cost recovery is distinct from government's claim following default termination for return of unliquidated progress payments); Cincinnati Elecs. Corp. v. United States, 32 Fed. Cl. 496, 504 (1994) (holding that termination for convenience claim that "seeks recovery of money which cannot be had under" earlier filed complaint challenging default termination was not the "same" claim); Boeing Co. v. United States, 31 Fed. Cl. 289, 292-93 (1994) (stating that termination for convenience claim was not the "same" claim "even if [it] and the complaint [seeking reversal of a termination for default] involve common questions of law and fact").

The Federal Circuit, in *Case, Inc. v. United States*,[99] similarly determined that two claims were not "mirror images" because they did not involve "precisely" the same money based on the same partial performance, and thus 28 U.S.C. § 516 did not divest the contracting officer of authority to issue a final decision on the second claim.[100]

In the first suit,[101] the contractor challenged the government's termination for default of a contract to manufacture fire resistant coveralls and the government's demand for the return of unliquidated progress payments by asserting in its complaint that the delivery schedule was unreasonable and that it had been waived.[102] While *Case I* was pending, the contractor filed a separate suit challenging the contracting officer's deemed denial of the contractor's claim based on alleged defective specifications and overly strict government inspection.[103] The claim sought an equitable adjustment, over and above the progress payments at issue in *Case I*, and lost profits.[104]

After the trial court dismissed *Case I* on the government's motion for summary judgment, the government argued that the court had no jurisdiction over the contractor's claim in *Case II* because *Case I* had put "in litigation" the contractor's allegations of defective specifications, and thus had divested the contracting officer of authority to issue a final decision on the claim in *Case II*.[105] The trial court rejected the government's argument, but nevertheless dismissed *Case II* as "moot," finding that the contractor's claim for an equitable adjustment based on defective specifications had been denied when the court dismissed *Case I*.[106] On appeal, the Federal Circuit affirmed the trial court's assertion of jurisdiction over *Case II* and its subsequent dismissal.[107]

Distinguishing *Sharman*, the court agreed with the trial court that the claims in *Case I* and *Case II* were not "mirror images" because they

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99. 88 F.3d 1004 (Fed. Cir. 1996).

100. *See* Case, Inc. v. United States, 88 F.3d 1004, 1010-11 (Fed. Cir. 1996) [hereinafter *Case II*].

101. *See* Case, Inc. v. United States, 25 Cl. Ct. 379 (1992) [hereinafter *Case I*].

102. *See Case II*, 88 F.3d at 1006.

103. *See id.* The contractor submitted the claim to the contracting officer after filing its complaint in *Case I*, and filed the complaint in *Case II* after the contracting officer failed to issue a final decision on the claim. *See id.* at 1006-07.

104. *See id.* at 1006. The complaint in *Case I* challenged the government's demand for the return of unliquidated progress payments in the principal amount of approximately $2.8 million. The claim at issue in *Case II* requested an equitable adjustment and lost profits totaling more than $1.8 million. *See id.* at 1006-07.

105. *See id.* at 1008.

106. *See id.*

107. *See id.* at 1011-12. The court noted that it read the trial court's dismissal of *Case II* as "moot" as holding that the claim presented in *Case II* was barred by the doctrine of *res judicata*. *See id.* at 1008.

sought different amounts of money and were based on different legal theories.[108] The court stated, moreover, that a "claim," as used in the CDA, refers to "each claim under the CDA for money that is one part of a divisible case."[109] The court further emphasized that just because both cases "arose out of the same underlying facts and involved allegations of defective specifications does not alter the fact that the two cases involved different claims."[110] Thus, *Case I* did not place the contractor's claim in *Case II* "in litigation" for purposes of 28 U.S.C. § 516, and the trial court properly asserted jurisdiction over the denied claim.[111]

The Federal Circuit also affirmed the Court of Federal Claims' dismissal of *Case II* as barred by the doctrine of *res judicata* because the claim was subject to the same accord and satisfaction that was fully adjudicated in *Case I*.[112] In upholding the termination for default in *Case I*, the trial court found that the contractor had entered into a contract modification with the government that stated that the contractor's delinquency in performance was inexcusable.[113] Although the contractor's challenge to the default termination was based on an allegedly unreasonable and waived schedule, the trial court adjudicated the issue of allegedly defective specifications by finding that the parties had addressed the issue through the contract modification, and thus Case's claim was barred by the doctrine of accord and satisfaction.[114] The Federal Circuit noted that Case had not appealed this ruling, and agreed that the "not excusable" language in the contract modification was sufficiently broad to encompass an excuse based on defective specifications.[115] The court, therefore, affirmed the Court of Federal Claims' ruling that the claim in *Case II* was barred by *res judicata* because it was subject to the same accord and satisfaction that was fully adjudicated in *Case I*.[116]

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108. *See id.* at 1010-11; *see also supra* notes 102-04 and accompanying text.

109. *Id.* at 1010 (citing Joseph Morton Co. v. United States, 757 F.2d 1273, 1281 (Fed. Cir. 1985)).

110. *Id.*

111. *See id.* at 1011. In so ruling, the court stated that "we are mindful of the admonition . . . that the statutory scheme granting the Department of Justice exclusive and plenary power to supervise and conduct all litigation to which the United States is a party is 'broadly inclusive' and, as such, 'must be narrowly construed.'" *Id.* (quoting Hughes Aircraft Co. v. United States, 534 F.2d 889, 901 (Ct. Cl. 1976)).

112. *See id.* at 1011-12.

113. *See id.* at 1011.

114. *See id.*

115. *See id.* at 1011-12.

116. *See id.* at 1012. The Federal Circuit explained that a claim is discharged by the doctrine of accord and satisfaction when "'some performance different from that which was claimed as due is rendered and such substituted performance is accepted by the claimant as full satisfaction of his claim.'" *Id.* at 1011 n.7 (quoting Community Heating & Plumbing Co. v. Kelso, 987 F.2d

Case II offers both a word of encouragement and of warning to a contractor who is considering filing multiple suits arising under the same contract. On the one hand, *Case II* represents the Federal Circuit's continuing refusal to apply *Sharman* strictly against a contractor when determining whether two claims are "mirror images." This further weakens the government's ability to use 28 U.S.C. § 516 as a blunt jurisdictional weapon. *Case II* also shows, however, that just because a later-filed claim is not sufficiently identical to a previous claim so as to prevent a trial court from exercising jurisdiction over the later claim does not mean that all jurisdictional obstacles have been hurdled. A contractor must remain aware of the multitude of jurisdictional requirements and pitfalls when filing multiple complaints based on the same contract.

3. Timeliness of appeal from a contracting officer's final decision

The CDA contains two separate periods for contractor appeals from adverse decisions of contracting officers. The CDA prescribes a ninety-day limitation period for appealing to agency contract appeal boards,[117] and a one-year limitation period for the Court of Federal Claims.[118] The CDA requires that a contracting officer, when issuing a final decision, "shall inform the contractor of his rights."[119]

The FAR requires a contracting officer to insert language "substantially" similar to language provided in the regulation in a decision on a claim implementing this requirement.[120] When notice is properly

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1575, 1581 (Fed. Cir. 1993)).

117. *See* 41 U.S.C. § 606 (1994).

118. *See id.* § 609(a)(3).

119. *Id.* § 605(a).

120. *See* 48 C.F.R. § 33.211(a)(4)(v) (1996).

> [T]he contracting officer shall— . . . (4) Prepare a written decision that shall include a— . . . (v) Paragraph substantially as follows;
>
> This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's small claim procedure for claims of $50,000 or less or its accelerated procedure for claims of $100,000 or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision.

Id.

given, these statutes of limitations are jurisdictional and cannot be waived.[121]

The Federal Circuit has held that a contracting officer's failure to insert language substantially similar to the regulation rendered the decision procedurally defective and ineffective to start the time running on the applicable statute of limitations.[122] The Federal Circuit, in *Decker & Co. v. West*,[123] has now clearly added the requirement, which had been required by some boards of contract appeals,[124] that a contractor must show that it detrimentally relied on the omission of such language from the notice of appeal rights.[125] In *Decker*, the contracting officer terminated the construction contract for default on August 3, 1988.[126] The decision was a "'pure' default termination," because it did not contain monetary issues.[127] The termination decision "advised Decker of his option, to either appeal to the Board within ninety days, or to the Court of Federal Claims within one year."[128] When the decision was issued, however, the Court of Federal Claims did not have "jurisdiction over 'pure' default terminations under the Tucker Act, 28 U.S.C. § 1491."[129] The notice was defective because it advised Decker of appeal rights to the Court of Federal Claims that the contractor did not have.[130]

Decker eventually challenged the propriety of the default termination at the Armed Services Board of Contract Appeals ("ASBCA"), but not until almost two years after the notice of the termination for default.[131] The government argued that the Board lacked jurisdiction to review the default termination because Decker had not

121. *See* Cosmic Constr. Co. v. United States, 697 F.2d 1389, 1391 (Fed. Cir. 1982).

122. *See* Pathman Constr. Co. v. United States, 817 F.2d 1573, 1578 (Fed. Cir. 1987) ("A contracting officer's final decision that does not give the contractor adequate notice of its appeal rights is defective and therefore does not trigger the running of the limitations period.").

123. 76 F.3d 1573 (Fed. Cir. 1996).

124. *See, e.g.*, Renic Gov't Sys., Inc., HUDBCA Nos. 94-C-147-C7, 94-C-148-C8, 95-1 BCA ¶ 27,557 (requiring contractor to show it was prejudiced by defect in notice of appeal rights).

125. *See* Decker & Co. v. West, 76 F.3d 1573, 1583 (Fed. Cir. 1996) (finding that Board had erred by not requiring contractor to show detrimental reliance).

126. *See id.* at 1577.

127. *See id.*

128. *See id.* (indicating that notice that Decker could appeal to Court of Federal Claims was erroneous due to lack of jurisdiction).

129. *Id.* (citing Overall Roofing & Constr. Inc. v. United States, 929 F.2d 687 (Fed. Cir. 1991)). "Congress subsequently amended the Tucker Act to provide for jurisdiction in the Court of Federal Claims over nonmonetary contract disputes, such as pure default terminations." *Id.* at 1577 n.3 (citing Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907(b)(1), 106 Stat. 3921, 4519 (codified as amended at 28 U.S.C. § 1491(a)(2) (1994))).

130. *See id.*

131. *See id.* at 1577-78.

complied with the statutory ninety-day period.[132] The Board ruled that it had jurisdiction because the August 3, 1988 termination notice incorrectly stated that Decker could appeal to the Court of Federal Claims; therefore, the notice failed to trigger the ninety-day filing requirement.[133]

The government appealed to the Federal Circuit, where it argued that Decker must show detrimental reliance on an error in the notice of appeal rights to avoid a time bar.[134] The Federal Circuit agreed with the government, ruling that "[t]he Board erred in finding that incorrect advice of appeal rights prevented the limitation period from commencing without requiring a showing of detrimental reliance by Decker."[135] The court explained that "[a] contractor in Decker's position must demonstrate that the fact that it was informed of non-existent appeal rights, in addition to being told of its true appeal rights, actually prejudiced its ability to prosecute its timely appeal before the limitation period will be held not to have begun."[136] The court ruled that the record did not address this issue,[137] and determined that although ordinarily it would be appropriate to remand to the Board in this circumstance, a remand here was unnecessary because even if Decker showed detrimental reliance and the Board took jurisdiction, Decker would lose on the merits.[138]

The Federal Circuit has since applied *Decker* in *Florida Department of Insurance v. United States*,[139] ruling that a contracting officer's failure to address the contractor's appeal rights in the termination notice was harmless.[140] The party in *Florida Department of Insurance* failed to show that it detrimentally relied on this failure, especially because contemporaneous correspondence from the contracting officer informed the party of its appeal rights.[141] In *Florida Department of*

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132. *See id.* at 1578 (citing 41 U.S.C. § 606 (1994); Cosmic Constr. Co. v. United States, 697 F.2d 1389 (Fed. Cir. 1982)).

133. *See id.*

134. *See id.* at 1579. The main authority the government relied upon was *Philadelphia Regent Builders, Inc. v. United States*, 634 F.2d 569 (Ct. Cl. 1980).

135. *Decker*, 76 F.3d at 1579.

136. *Id.* at 1580.

137. *See id.* (noting that Decker's counsel admitted the absence of any such evidence on record at oral argument). Decker's counsel, however, suggested that Decker's filing itself, made a considerable time after the 90-day appeal period, demonstrated reliance. *See id.*

138. *See id.*

139. 81 F.3d 1093 (Fed. Cir. 1996).

140. *See* Florida Dep't of Ins. v. United States, 81 F.3d 1093, 1098-99 (Fed. Cir. 1996). In *Florida Department of Insurance*, the party on appeal was the Department of Insurance (for the State of Florida) which pursued the case in the Court of Federal Claims after the contractor's surety went bankrupt. *See id.* at 1096.

141. *See id.* at 1098.

Insurance, the court distinguished *Kisco Co. v. United States*,[142] in which the Court of Claims had overturned a default termination because of procedural irregularities.[143] In *Kisco*, not only had the termination notice failed to provide the contractor its appeal rights in the termination notice, but it also "failed to comply with the contractual cure period and was 'internally confusing' to an extent that the contractor may not have understood that the notice constituted a final decision."[144]

After *Decker* and *Florida Department of Insurance*, it is clear that a contracting officer's failure to include notice of appeal rights in a termination decision will not stop the clock from running on the applicable statute of limitations unless the contractor can prove that it relied on the improper notice.[145] More broadly, these cases affirm the principle that a procedural error by a contracting officer in terminating a contract for default can result in the conversion of the termination into one for the government's convenience if the contractor can show harm or detrimental reliance. Subsequent case law should clarify which types of procedural errors must result in conversion of a default termination into one for the government's convenience.

II. CONTRACT FORMATION

A. Scope of GSBCA Bid Protest Review

In three reported opinions, the Federal Circuit clarified the proper standard the General Services Board of Contract Appeals ("GSBCA") should use when reviewing agency procurement decisions. The GSBCA's authority to hear bid protests[146] was repealed by the Information Technology Management Reform Act of 1996, effective August 8, 1996.[147] The legal principles set forth in these decisions

142. 610 F.2d 742 (Ct. Cl. 1979).

143. *See Florida Dep't of Ins.*, 81 F.3d at 1098-99.

144. *Id.* (quoting Kisco Co. v. United States, 610 F.2d 742, 752 (Ct. Cl. 1979)).

145. *See id.*; Decker & Co. v. West, 76 F.3d 1573, 1583 (Fed. Cir. 1996).

146. GSBCA review of an agency's procurement decision for automatic data processing equipment was governed by the Competition in Contracting Act of 1984 ("CICA"), 40 U.S.C. § 759(f) (1994) (repealed 1996):

> If the board determines that a challenged agency action violates a statute or regulation or the conditions of any delegation of procurement authority issued pursuant to this section, the board may suspend, revoke, or revise the procurement authority of the Administrator or the Administrator's delegation of procurement authority applicable to the challenged procurement.

Id. § 759(f)(5)(B).

147. National Defense Authorization Act, Pub. L. No. 104-106, § 5101, 110 Stat. 186, 680 (1996).

remain important, however, especially for the Court of Federal Claims, because of Congress' recent expansion of that court's protest jurisdiction to include all procurement actions.[148] The principles laid down by the Federal Circuit in its review of GSBCA protests will provide contractors valuable guidance regarding the standards that will emerge in the Court of Federal Claims' review of bid protests. The main message from these three decisions is that the reviewing tribunal must give proper deference to an agency's procurement decisions.

The protests in the three reported opinions involved "best value" procurements, which accord source selection authorities ("SSA")[149] broad discretion to make judgmental tradeoffs between cost and other factors.[150] The court announced that the appropriate standard of review is to determine whether an agency's procurement decision is grounded in reason.[151] The Federal Circuit clarified and emphasized that when applying the "grounded in reason" standard, reviewing tribunals must not substitute their judgment for that of the procuring agency officials.

In *Widnall v. B3H Corp.*,[152] the court reversed the GSBCA's grant of a disappointed bidder's protest of a best value procurement.[153] The court held that the Board went beyond its task of determining whether the agency's procurement decision was "grounded in reason."[154] "Once the Board determines that the agency's selection is so grounded," that court stated, "it then defers to the agency's decision even if the Board itself might have chosen a different proposal."[155] The court noted that "[e]ven if GSBCA disagrees with

148. *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874-75 (to be codified at 28 U.S.C. § 1491) [hereinafter ADR Act of 1996].

149. *See* 48 C.F.R. § 15.601 (1996). Source selection authority refers to the particular government official in charge of selecting a source. *See id.*

150. *See id.* § 15.605(c) (noting that because estimates are not always accurate predictors of actual costs, "[t]he primary consideration should be which offeror can perform the contract in a manner most advantageous to the Government").

151. The "grounded in reason" test was used in reviews of GSBCA decisions, and according to the Federal Circuit's decision in *Widnall v. B3H Corp.*, was dictated by the precedent of cases decided under CICA. *See* Widnall v. B3H Corp., 75 F.3d 1577, 1580 (Fed. Cir. 1996). The comparable standard for the Court of Federal Claims under the amended Tucker Act, 28 U.S.C. § 1491(b)(1) (1994), presumably will be whether the agency decision had "a rational basis." *See, e.g.*, Rogers v. United States, 14 Cl. Ct. 39, 45 (1987) (emphasizing that court's review of agency decision is governed by the Administrative Procedure Act standard of whether the decision was based on relevant factors, lacked a rational basis, or represents a clear error in judgment (citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285 (1974))).

152. 75 F.3d 1577 (Fed. Cir. 1996).

153. *See* Widnall v. B3H Corp., 75 F.3d 1577, 1585 (Fed. Cir. 1996).

154. *Id.* at 1580.

155. *Id.* (citing Oakcreek Funding Corp., GSBCA No. 11244-P, 91-3 B.C.A. (CCH) ¶ 24,200, at 121,041 (1991)).

the reasonableness of a portion of an agency's justification, it will accept agency procurement decisions if the remaining agency analysis can stand on its own."[156]

The court also addressed the parties' arguments regarding whether a recent Federal Circuit decision had changed the "grounded in reason" standard.[157] The court clearly ruled that in using the words "reasonable certainty" in *Lockheed Missiles & Space Co. v. Bentsen*,[158] it had not created a heightened standard of proof, and it had not shifted the burden of proof to the government.[159] The court determined that the record revealed that the SSA in the instant action gave a reasoned explanation why it selected the higher cost proposal.[160] Therefore, the Board erred by not following its "clear line of precedent" that required it to defer to the SSA's reasonable decision.[161]

The protest in *B3H* concerned a best value procurement for technical support at Wright-Patterson Air Force Base.[162] The solicitation stated that technical, managerial, and cost factors would be evaluated, respectively, in order of importance.[163] The Source Selection Evaluation Board ("SSEB") evaluated offers from, among others, LOGTEC, Aries Systems International, Inc., and B3H.[164] The SSEB judged LOGTEC's offer higher on the technical and managerial factors, but it was also fifteen percent more expensive than B3H's offer.[165] The Air Force formed a price/technical tradeoff working group ("PTTO Group") to evaluate the proposals further.[166] The PTTO Group identified one quantified and six non-quantified discriminators, and determined that B3H's proposal was less efficient and of lower quality.[167] Relying on this analysis, the

156. *Id.*

157. *See id.* at 1584. The Air Force argued, and the court agreed, that the burden of proof had not been shifted to agencies during protest proceedings. *See id.*

158. 4 F.3d 955 (Fed. Cir. 1993) [hereinafter *Lockheed III*].

159. *See B3H*, 75 F.3d at 1584.

160. *See id.* Yet, rather than deferring to the SSA's explanation, the Board criticized the weight given to various non-quantified discriminators. *See id.*

161. *See id.*

162. *See id.* at 1578-79 (commenting that this contract would be on "indefinite delivery/indefinite quantity basis").

163. *See id.* at 1579 (noting that issue was those portions of solicitation reserved for small businesses).

164. *See id.* (omitting names of other companies submitting proposals).

165. *See id.* at 1582 (adding that Aries' offer was 8.8% higher than B3H).

166. *See id.*

167. *See id.* at 1582-83. The quantified discriminator took into account the risk that the bidder would require expending additional funds for providing trained personnel that had not originally been accounted for in the bid. *See id.* The six non-quantified discriminators took into account experience with the relevant hardware and software involved, the location of nearby offices, and the bidder's subcontractor control plan. *See id.* at 1583.

SSA selected LOGTEC's offer as the best value to the government.[168]

At the protest hearing before the Board, the SSA gave extensive testimony explaining the rationale behind his best value decision.[169] The SSA determined that B3H's lower ratings in the technical and managerial categories would lead to unnecessary cost overruns and a strong likelihood existed that it would actually cost more than the other proposals, justifying award to the two higher cost proposals.[170] The Board found no fault with the methodology of the SSA's decision except for one non-quantified discriminator that the Board found did not have a rational basis.[171] The Board disagreed, however, with the SSA's emphasis on two non-quantified discriminators over the others.[172] Despite the SSA's lengthy and detailed testimony, the Board upheld B3H's protest.[173]

On appeal, the court agreed with the Air Force's contention that the Board committed legal error by applying a standard of review based on a misinterpretation of the court's opinion in *Lockheed III*.[174] In that protest, the Board initially refused to accept an agency's procurement decision based on the lack of a reasoned explanation for the decision.[175] After the agency formed a working group that performed a price/technical tradeoff analysis which supported the agency's initial decision, the Board denied the protest.[176] The Federal Circuit affirmed the Board's judgment, stating that "a proposal which is one point better than another but costs millions of dollars more may be selected if the agency can demonstrate within a *reasonable certainty* that the added value of the proposal is worth the higher price."[177]

In *B3H*, the court found that the Board committed legal error "by reading into the words 'reasonable certainty' in *Lockheed III* a

168. *See id.* (noting that SSA also selected Aries).

169. *See id.* (remarking that SSA's explanation covered forty-three pages of testimony and explained all seven discriminators).

170. *See id.*

171. *See id.* at 1584. This factor, whether the offeror had a nearby office already, was eliminated from the analysis. *See id.*

172. *See id.* These factors were the superiority of LOGTEC and Aries in software and data management experience. *See id.*

173. *See id.* (suggesting that Board upheld protest based on its refusal to defer to reasoning employed by SSA in its choice of LOGTEC and Aries).

174. *See id.* (citing *Lockheed III*, 4 F.3d 955 (Fed. Cir. 1993)).

175. *See id.* at 1581 (citing International Business Machs. Corp. and Lockheed Missiles & Space Co., GSBCA Nos. 11359-P, 11362-P, 94-2 B.C.A. ¶ 26,782 (1991) [hereinafter *Lockheed I*]).

176. *See id.* (citing Lockheed Missiles & Space Co. v. Department of Treasury, GSBCA Nos. 11776-P, 11777-P, 93-1 B.C.A. ¶ 25,401 (1992) [hereinafter *Lockheed II*), *aff'd*, 4 F.3d 955 (Fed. Cir. 1993)).

177. *Id.* at 1581-82 (quoting *Lockheed III*, 4 F.3d at 960) (emphasis added).

requirement that a measure of proof, beyond that found in precedent, is necessary in order to satisfy the grounded in reason test."[178] The Board's higher level of proof "would improperly shift the burden of proof to the agency . . . and would allow the Board to substitute its own judgment for that of an agency . . . ."[179] The court in *B3H* insisted that *Lockheed III* is consistent with the principle that "the Board's task upon review of a best value agency procurement is limited to independently determining if the agency's decision is grounded in reason."[180] The court stated that if it "wishes to alter such a longstanding principle, it will do so explicitly with supporting rationale."[181]

The court further noted that when the Board in *B3H* questioned the SSA's emphasis of certain non-quantified discriminators, it intruded on an analysis that is "exactly the type of decision the SSA is entrusted to make."[182] The court concluded that the SSA, "using his independent judgment and consistent with the solicitation's stipulation that cost was the least important factor," reasonably determined that LOGTEC's and Aries' proposals were the best value to the government despite their higher cost.[183] The Board should have deferred, the court held, to the SSA's reasonable determination.[184]

In *Grumman Data Systems Corp. v. Dalton*,[185] the court again affirmed that agency best value decisions are entitled to great deference

178. *Id.* at 1584.
179. *Id.*
180. *Id.*
181. *Id.* As further support for the continued validity of the "grounded in reason" test, the Court also cited *Grumman Data System Corp. v. Widnall*, 15 F.3d 1044 (Fed. Cir. 1994) [hereinafter *Grumman III*], which was decided after *Lockheed III*, as well as several post-*Grumman III* decisions. *See B3H*, 75 F.3d at 1582.
182. *B3H*, 75 F.3d at 1584 (concluding that because Board does not require assignment of precise monetary value to each discriminator, agency's judgment in giving weight to particular discriminator must be given deference).
183. *See id.* (distinguishing this case from many others where SSA employed identical formula and was given deference by Board).
184. *See id.* The court also upheld the Board's dismissal of B3H's claim that LOGTECH and the Air Force had engaged in improper post-solicitation discussions. *See id.* at 1584-85. The Board's rules, "which are designed to effectuate the fast-track nature of protest proceedings," require that "'a ground of protest be filed no later than 10 working days after the . . . ground is known or should have been known, whichever is earlier.'" *Id.* at 1585 (quoting 48 C.F.R. § 6101.5(b)(3)(ii) (1994)). In order to satisfy its burden of proving timeliness, a protester must "assert that: (1) he learned of the problem on date X; and (2) he filed the protest on date Y, which is 10 or less working days than date X." *Id.* (quoting 48 C.F.R. § 6101.5(b)(3)(ii)). The court found that, because B3H never stated the date on which it learned of the alleged improprieties, the Board properly dismissed the protest as untimely. *See id.*
185. 88 F.3d 990 (Fed. Cir. 1996).

and must be upheld when they are "grounded in reason."[186] The court rejected the protester's contention that the Federal Circuit's decision in *Lockheed III* placed a higher standard of proof on the agency to justify its procurement decision.[187] The court upheld the Board's determination that the SSA's decision to select the high technical low cost bidder was "grounded in reason."[188] Grumman alleged that the Navy's award on a best value basis of a computer contract to another bidder, Intergraph, was unreasonable in that it ignored the recommendations of one of the selection authorities.[189] The solicitation provided that the agency would balance technical and cost factors to determine the best value to the agency.[190] The solicitation required a SSEB and a Source Selection Advisory Council ("SSAC") to consider the submitted proposals and to make recommendations to the SSA, who had final selection authority.[191] The SSEB concluded that Intergraph's proposal offered the highest technical merit at the lowest price.[192]

The SSAC formed an Impact Analysis Working Group ("IAWG") to evaluate technical differences among the proposals.[193] The IAWG identified sixteen quantified and non-quantified discriminators.[194] After analyzing only four quantified discriminators, the IAWG concluded that Grumman's proposal would save the agency almost $100 million over the life of the contract.[195] The SSAC rejected both the initial and a follow-up IAWG report, giving detailed reasons for its belief that the IAWG quantified value determinations were not sufficiently compelling, and concluded that the claimed savings suggested by the IAWG report would not materialize.[196]

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186. *See* Grumman Data Sys. Corp. v. Dalton, 88 F.3d 990, 995-96 (Fed. Cir. 1996). This premise must be followed even if the Board would have selected an alternative proposal. *See id.* at 996.

187. *See id.* at 995 (citing *B3H*, 75 F.3d at 1577; *Lockheed III*, 4 F.3d at 958-59).

188. *Id.* at 996 (rejecting Grumman's argument that SSA's decision was unlawful).

189. *See id.* at 995-96 (ruling that rejection of recommendations as "not sufficiently comprehensive" was allowable).

190. *See id.* at 993. The solicitation also set forth 4000 minimum mandatory requirements ("MMRs"). *See id.*

191. *See id.* Four companies, including Grumman and Intergraph, responded to the solicitation. *See id.*

192. *See id.* (noting that Grumman ranked third in technical merit and second in price).

193. *See id.* (emphasizing that solicitation did not require SSEB to perform this task).

194. *See id.*

195. *See id.* at 994 (observing that further study by IAWG indicated savings between $98 million and $242 million).

196. *See id.* (remarking that SSAC gave four specific reasons for this rejection: (1) for the equipment of each offeror, only one operator completed the model exercise; (2) IAWG and OCBD each used different software versions for its analysis; (3) the relative simplicity of the task completed for IAWG process study resulted in less comprehensive offeror differentiation; and (4) for two discriminators, IAWG's process study "exercised" application representing one-third

The SSAC recommended to the SSA that Intergraph's proposal offered the best value.[197] The SSA studied the recommendation of the SSEB, examined the analyses offered by IAWG and SSAC, and selected Intergraph.[198] The SSA was not reasonably convinced that the IAWG study could reliably project the claimed dollar savings of Grumman's proposal for two reasons: first, because it was not "sufficiently comprehensive" in that only one software application was analyzed and only one simple task performed; and second, because the basis for the "entire quantification process study," the number of keystrokes, could be affected by numerous variables.[199] The Board rejected Grumman's protest, reasoning that the SSA's selection of Intergraph as the high technical low cost bidder was "a decision well within his authority to make," and that Grumman had failed to carry its burden to show that the best value decision was wrong.[200]

On appeal, the Federal Circuit cited *Lockheed III* and *B3H* for the standard of review that boards and courts must apply to an agency's best value procurement decision.[201] Not only did the court again proclaim the highly deferential "grounded-in-reason" test, but the court again rejected a protester's contention that *Lockheed III*'s "reasonable certainty" language placed the burden of proof on the agency to justify its decision.[202] The court also rejected Grumman's contention that the SSA erred by rejecting the best quantifiable information available to him that counseled for a best value decision.[203] Instead, the court held that the SSA was not required to accept the best value information when the SSA reasonably concludes, as he did here, that that information was "not sufficiently comprehensive."[204] The Board thus properly deferred to an agency decision that was grounded in reason.

Finally, in *TRW, Inc. v. Unisys Corp.*,[205] the Federal Circuit, following its earlier decision in *Widnall v. B3H Corp.*,[206] reiterated the "grounded-in-reason" standard.[207] The court emphasized that, in

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of total workload referenced in the solicitation).

197. *See id.* (noting that while both Intergraph and Grumman had high technical evaluations, Intergraph's price was much lower).

198. *See id.*

199. *See id.*

200. *See id.* at 995.

201. *See id.* at 995-96.

202. *See id.* at 996 & n.3.

203. *See id.* at 996.

204. *Id.*

205. 98 F.3d 1325 (Fed. Cir. 1996).

206. 75 F.3d 1577 (Fed. Cir. 1996).

207. *See* TRW, Inc. v. Unisys Corp., 98 F.3d 1325, 1327-28 (Fed. Cir. 1996) (citing Widnall v. B3H Corp., 75 F.3d 1577, 1580 (Fed. Cir. 1996)).

determining under the Competition in Contracting Act whether an agency's decision violates a statute, regulation, "or the conditions of any delegation of procurement authority," the Board may overturn an agency's decision only if it is wholly without reason.[208] Such a determination, the court said, is the same as finding that a decision is arbitrary or capricious in traditional administrative procedure terms.[209] In *TRW*, the court found that the Board gave only passing weight to the SSA's report and overturned the award on the basis of relatively minor contradictions in the SSA's trial testimony.[210] The court concluded that the record, which contained an "explication of the exhaustive administrative review process," established that the agency's decision was not arbitrary or capricious, but was grounded in reason.[211]

B. Award of Bid Preparation Costs in the Court of Federal Claims: The Government's Duty to Conduct a Fair Procurement

In the seminal decision of *Heyer Products Co. v. United States*,[212] the Court of Claims ruled that disappointed bidders have standing to bring claims for recovery of their bid preparation costs in the Court of Federal Claims.[213] Such claims are based on the theory that an implied contract[214] arises from the government procurement process which imposes upon the government a duty to consider all bids fairly and honestly, the breach of which entitles an unsuccessful bidder to recover its bid preparation costs.[215] To prove such a breach, the protester bears the heavy burden of proving that the government's conduct was arbitrary and capricious.[216]

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208. *See id.* at 1327 (citing *B3H*, 75 F.3d at 1580).
209. *See id.* at 1328.
210. *See id.*
211. *See id.*
212. 140 F. Supp. 409 (Ct. Cl. 1956).
213. *See* Heyer Prods. Co. v. United States, 140 F. Supp. 409, 413-14 (Ct. Cl. 1956).
214. The Tucker Act gives the Court of Federal Claims jurisdiction over "any claim against the United States founded . . . upon any express or implied contract with the United States . . . ." 28 U.S.C. § 1491(a)(1) (1994).
215. *See Heyer Prods.*, 140 F. Supp. at 409; *see also* National Forge Co. v. United States, 779 F.2d 665, 667 (Fed. Cir. 1985); United States v. John C. Grimberg Co., 702 F.2d 1362 (Fed. Cir. 1983); Keco Indus., Inc. v. United States, 492 F.2d 1200, 1203 (Ct. Cl. 1974). No specific statutory authority existed for any court to consider contract award controversies, however, until Congress granted equitable powers to the United States Claims Court, *see* Federal Courts Improvement Act of 1982 ("FCIA"), Pub. L. No. 97-164, § 127(a), 96 Stat. 25, 37-38 (pertinent section codified at 28 U.S.C. § 1491(a)(3)), which was interpreted to apply only to pre-award controversies. *See John C. Grimberg Co.*, 702 F.2d at 1372 ("[T]he statute and its legislative history leave no doubt that Congress intended the equitable power of the Claims Court to be exercised only before an award is made . . . ."). *But see infra* note 244 and accompanying text.
216. *See, e.g.*, CACI, Inc.-Fed. v. United States, 719 F.2d 1567, 1573 (Fed. Cir. 1983); Keco Indus., Inc. v. United States, 428 F.2d 1233, 1237 (Ct. Cl. 1970).

In *Keco Industry, Inc. v. United States*,[217] the Court of Claims set out four criteria to determine whether the government acted arbitrarily and capriciously in its source selection: (1) the existence of subjective bad faith by the procuring officials; (2) the reasonableness of the agency's decision; (3) the amount of discretion statutorily prescribed to the procurement officials; and (4) the violation of pertinent statutes or regulations.[218] The application of these criteria depends on the nature of the alleged error and whether the error occurred regarding the claimant's or a competitor's bid.[219]

Subsequent to those cases for recovery of bid and proposal costs, Congress gave the Claims Court authority to grant injunctive relief in pre-award bid protests based on the implied contract to consider all bids fairly and honestly.[220] The ADR Act of 1996 repealed and replaced this with broader and more straightforward authority to review and enjoin procurement decisions under the APA standard of review.[221] Despite this expansion of bid protest authority, *Keco's* rationale, based as it is on an implied contract theory, remains in effect as an alternative approach to recovering bid and proposal costs.

In *E.W. Bliss Co. v. United States*,[222] the Federal Circuit upheld the Court of Federal Claims' grant of summary judgment denying an unsuccessful bidder's claim for the recovery of its bid preparation costs.[223] The court determined that Bliss failed to prove, even assuming that the contract was awarded in violation of procurement regulations, that the government's procurement decision was arbitrary and capricious under the *Keco* standard.[224] Thus, Bliss was not entitled to recover its bid preparation costs.[225] Bliss unsuccessfully bid on a best-value contract to refurbish and remanufacture the United States Mint's coin presses.[226]

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217. 492 F.2d 1200 (Ct. Cl. 1974).

218. *See* Keco Indus., Inc. v. United States, 492 F.2d 1200, 1203-04 (Ct. Cl. 1974).

219. *See id.* at 1204.

220. *See* FCIA, § 127(a). The FCIA also divided the Court of Claims into a separate trial court, the United States Claims Court, and an appellate court, the United States Court of Appeals for the Federal Circuit.

221. *See supra* note 148 and accompanying text; *see also* 28 U.S.C. § 1491(a)(3) (1994), *repealed by* ADR Act of 1996, Pub. L. No. 104-320, § 12(a)(2), 110 Stat. 3874.

222. 77 F.3d 445 (Fed. Cir. 1996).

223. *See* E.W. Bliss Co. v. United States, 77 F.3d 445, 446 (Fed. Cir. 1996). Also, the court held that the Court of Federal Claims did not abuse its discretion in denying Bliss' motion to amend its complaint "almost seven months after Bliss had moved for summary judgment and at a time when decision on that motion was imminent." *Id.* at 450.

224. *See id.* at 449.

225. *See id.*

226. *See id.* at 446.

An amendment to the solicitation instructed bidders to "address a new crankshaft."[227] Bliss' suit for bid preparation costs alleged, *inter alia*, that the award was unreasonable because it was based on an ambiguous amendment, and, alternatively, that the successful bidder's proposal did not meet the requirements of an unambiguous amendment because it did not include the installation of a new crankshaft, thus violating procurement statutes.[228] The trial court found that (1) the Mint reasonably construed the amendment as requiring installation of a new crankshaft, (2) Bliss' proposal specifically so provided, (3) the successful bidder's proposal stated that it would "evaluate" all parts for replacement, and only referred to the crankshaft in an "options" section, and (4) the Mint construed the successful bidder's proposal as implicitly providing for a new crankshaft.[229] The trial court concluded that while the procurement process was not totally free from errors, Bliss had failed to prove that the award was arbitrary or capricious, and thus was not entitled to recover its bid preparation costs.[230]

On appeal, the court first rejected the trial court's conclusion that the amendment was ambiguous.[231] Read in the context of the entire solicitation, the court concluded that the amendment unambiguously required the installation of a new crankshaft.[232] The court also rejected Bliss' contention that the Mint's award of the contract to a bidder whose proposal did not conform to the unambiguous amendment entitled Bliss to recovery of its bid preparation costs.[233]

Although a contract award based on a proposal that fails to conform to the material terms and conditions of a solicitation violates procurement statutes and regulations, such a violation does not necessarily constitute arbitrary and capricious action under *Keco*.[234]

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227. *Id.*

228. *See id.* at 448.

229. *See* E.W. Bliss Co. v. United States, 33 Fed. Cl. 123 (1995), *aff'd*, 77 F.3d 445 (Fed. Cir. 1996). Bliss initially filed a post-award protest with the Comptroller General, which was denied. *See E.W. Bliss*, 77 F.3d at 446.

230. *See E.W. Bliss*, 77 F.3d at 446-47. Specifically, the trial court found that although the solicitation amendment was ambiguous, because the Mint could reasonably construe the successful bidder's proposal as providing for a new crankshaft, the ambiguity did not make the award arbitrary or capricious. *See id.* at 447. Moreover, even if the successful proposal did not meet the crankshaft requirement, Bliss failed to meet the heavy burden placed on it by the arbitrary and capricious standard. *See id.*

231. *See id.* at 448.

232. *See id.*

233. *See id.*

234. *See id.* ("[I]t may be that even a proven violation of some procurement regulation, in selecting the competitor, will not necessarily make a good claim. Not every regulation is established for the benefit of bidders as a class, and still fewer may create enforceable rights for the awardee's competitors." (citing Keco Indus., Inc. v. United States, 492 F.2d 1200, 1206 (Ct.

The court held that Bliss failed to meet even its initial burden of proving that the successful bidder's proposal was nonconforming.[235]

Furthermore, the court determined that Bliss failed to show that the award was arbitrary and capricious under the *Keco* criteria.[236] Bliss did not even allege bad faith by the government.[237] Bliss also failed to show that the provision of new crankshafts was of such significance that the Mint's award decision had "no reasonable basis."[238]

Finally, the court affirmed the rule that the decisions of procurement officials in awarding best-value contracts are given great deference on review.[239] The court concluded that Bliss failed to show that the Mint's procurement decision was arbitrary and capricious, and thus Bliss was not entitled to recover its bid preparation costs.[240]

C. Scope of Court of Federal Claims Review Limited to Proposed Debarments

As noted in the introduction to the previous section, a disappointed bidder may invoke the traditional jurisdiction of the Court of Federal Claims to award damages for breach of contract by alleging that the government, through arbitrary and capricious action, breached an implied contract to consider all bids fairly and honestly.[241] Prior to enactment of the ADR Act of 1996,[242] the court also had authority to grant injunctive relief for such a breach, but only if the breach occurred and the protest was filed before the contract was awarded.[243] With the enactment of the ADR Act, however, the court now has jurisdiction over both pre- and post-award challenges to agency

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Cl. 1974)).

235. *See id.* at 449. The court accepted the successful bidder's explanation that it intended to supply a new crankshaft, and that it in fact had already done so. *See id.*

236. *See id.*

237. *See id.*

238. *Id.*

239. *See id.* (citing *Lockheed III*, 4 F.3d 955, 958 (Fed. Cir. 1993)).

240. *See id.* The Federal Circuit refused to address Bliss' twelve other claims, finding that they either repeated the solicitation amendment argument or dealt with "the minutiae of the procurement process . . . which involve discretionary determinations of procurement officials that a court will not second guess." *Id.* (citing Grumman Data Sys. Corp. v. Widnall, 15 F.3d 1044, 1048 (Fed. Cir. 1994) ("Small errors made by the procuring agency are not sufficient grounds for rejecting an entire procurement."); *Lockheed III*, 4 F.3d at 958).

241. *See supra* note 215 and accompanying text.

242. Pub. L. No. 104-320, § 12, 110 Stat. 3870 (to be codified at 28 U.S.C. § 1491).

243. *See* Federal Courts Improvement Act of 1982, § 133(a), 96 Stat. 25, 39-40, *repealed by* ADR Act of 1996, Pub. L. No. 104-320, § 12(a)(2), 110 Stat. 3870.

procurement decisions, albeit on the basis of a statutory grant independent of the implied contract theory.[244]

In *IMCO, Inc. v. United States*,[245] the Federal Circuit held that the Court of Federal Claims did not have jurisdiction to review the propriety of the government's decision to debar[246] IMCO because the actual debarment occurred after the solicitation at issue was canceled.[247] Instead, the Court of Federal Claims could review the agency's action only in light of the proposed debarment, which occurred before the cancellation of the solicitation.[248] The Federal Circuit affirmed the dismissal of IMCO's protest on the grounds that the proposed debarment was not arbitrary or capricious.[249] IMCO was in line for the award of an Army contract when the government's pre-award survey team, which had determined that IMCO was not a "responsible contractor," recommended against awarding the contract to IMCO.[250] Even prior to this recommendation, however, an Army procurement official who had no responsibility for this particular procurement had recommended that IMCO be debarred.[251]

Prior to contract award, the Army's debarment official notified IMCO that it was proposed for debarment, rendering it ineligible to

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244. *See* 28 U.S.C.A. § 1491(b)(1)-(2) (West 1994 & Supp. 1996). The Act states:

> (b)(1) Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded. (2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

Id.

245. 97 F.3d 1422 (Fed. Cir. 1996).

246. Debarment is an "action taken by a designated agency official to exclude a contractor from government contracting and government-approved subcontracting for a specific period of time." COMMITTEE ON DEBARMENT AND SUSPENSION, SECTION OF PUBLIC CONTRACT LAW, AMERICAN BAR ASSOCIATION, THE PRACTITIONER'S GUIDE TO SUSPENSION AND DEBARMENT ii (2d ed. 1996).

247. *See* IMCO, Inc. v. United States, 97 F.3d 1422, 1426-27 (Fed. Cir. 1996). Ordinarily, a debarment decision must be challenged in federal district court under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1994). *See* ATL, Inc. v. United States, 736 F.2d 677, 682 (Fed. Cir. 1984) (holding that contractor generally would attack suspension in district court, although particular facts of case allowed Court of Federal Claims such jurisdiction).

248. *See IMCO*, 97 F.3d at 1426-27.

249. *See id.* at 1426.

250. *See id.* at 1423; *see also* FAR, 48 C.F.R. § 9.103 (1996) (requiring that contracts only be awarded to responsible contractors).

251. *See IMCO*, 97 F.3d at 1427.

receive the contract.[252] After determining that the remaining bids were unreasonably high, the contracting officer canceled the solicitation.[253] Although IMCO submitted a written response challenging the proposed debarment on several grounds, the Army, two months after canceling the solicitation, debarred IMCO.[254] IMCO, seeking to overturn the debarment and reinstate the solicitation, brought suit in the Court of Federal Claims, which held that the actual debarment decision was arbitrary and capricious and that the cancellation of the solicitation breached the government's duty to fairly and honestly consider IMCO's bid.[255]

On appeal, the question arose whether the Court of Federal Claims had jurisdiction to review the propriety of the actual debarment.[256] The court, while recognizing that it was the proposed debarment that eliminated IMCO from consideration and ultimately led to cancellation of the solicitation, asserted that "the validity of the debarment was 'inextricably linked' with the procurement, and that it would be unable to provide meaningful relief unless it considered the actual debarment."[257] The Federal Circuit rejected this reasoning and found that the cases relied on by IMCO did not allow the extension of the trial court's jurisdiction to review a debarment decision occurring after the challenged procurement action.[258] In *Electro-Methods, Inc. v. United States*,[259] one of the cases relied on by the trial court in *IMCO*, the court held that it had jurisdiction over claims stemming from an allegedly unfair suspension, but only over those claims related to contracts that had not yet been awarded.[260]

Similarly, in *ATL, Inc. v. United States*,[261] the court held that it "undoubtedly had jurisdiction" over a protester's complaint alleging constructive suspension, but again only because the contract at issue had not yet been awarded.[262] The court concluded from these cases

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252. *See id.* at 1424; *see also* 48 C.F.R. § 9.405(a), (d)(4) (1995) (noting firms proposed for debarment are precluded from receiving government contracts).

253. *See IMCO*, 97 F.3d at 1424.

254. *See id.*

255. *See* IMCO, Inc. v. United States, 33 Fed. Cl. 312 (1995), *aff'd*, 97 F.3d 1422 (Fed. Cir. 1996).

256. *See IMCO*, 97 F.3d at 1424.

257. *Id.* at 1425 (quoting *IMCO*, 33 Fed. Cl. at 316).

258. *See id.* at 1425-26; *see also* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988) (stating that it is an "age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists").

259. 728 F.2d 1471 (Fed. Cir. 1984).

260. *See* Electro-Methods, Inc. v. United States, 728 F.2d 1471, 1476 (Fed. Cir. 1984). The fact that the court had jurisdiction over at least some of the claims allowed it to review the propriety of the suspension. *See id.*

261. 736 F.2d 677 (Fed. Cir. 1984).

262. *See* ATL, Inc. v. United States, 736 F.2d 677, 677 (Fed. Cir. 1984).

that only actions before the cancellation of the solicitation could have deprived IMCO's bid of fair and honest consideration and invoked the jurisdiction of the Court of Federal Claims; thus, that court erred in extending its review to encompass the legality of the actual debarment which occurred well after cancellation.[263]

In other words, even if an actual debarment is arbitrary and capricious, it cannot invalidate a contract award or solicitation cancellation that occurred previously.[264] As for the validity of the proposed debarment, the Federal Circuit concluded that IMCO had not met its burden of proving that the decision was arbitrary and capricious.[265]

The premise of the Federal Circuit's limitation in *IMCO* of the Court of Federal Claims' review is based on the then limited jurisdiction of the court to hear only pre-award protests.[266] Now that the Court of Federal Claims has jurisdiction over pre- and post-award protests,[267] *IMCO's* rationale is no longer valid. In future decisions, the Court of Federal Claims arguably should consider a debarment decision, pre- or post-award, as long as the review is in the context of an alleged violation of a statute or regulation in connection with a procurement or proposed procurement.[268]

D. Burden of Proof on Protester to Show it Suffers Prejudice from Alleged Procurement Errors

It has long been well established that in order to challenge successfully an agency's procurement decision, the protester must show not only a significant error in the procurement process, but also that the error prejudiced the bidder's interests.[269] Court and board decisions, however, have used a wide variety of terminology to describe what constitutes a prejudicial error. For example, more than a decade ago in *CACI, Inc.-Fed. v. United States*,[270] the Federal Circuit stated that a disappointed bidder must show that "there was a

263. *See IMCO*, 97 F.3d at 1426-27.
264. *See id.* at 1426.
265. *See id.* at 1427. First, while there was evidence that the Army official who initially recommended debarment did so for an impermissibly punitive purpose, there was no evidence that the debarment official who made the decision had any such motive. *See id.* The court also rejected IMCO's due process arguments because the debarment decision was made in accordance with the procedures set out at 48 C.F.R. § 9.406, and because IMCO had the opportunity to and did respond to the notice of proposed debarment. *See id.*
266. *See id.* at 1425.
267. *See supra* note 244 and accompanying text.
268. *See id.*
269. *See* Central Ark. Maintenance, Inc. v. United States, 68 F.3d 1388, 1389 (Fed. Cir. 1995).
270. 719 F.2d 1567 (Fed. Cir. 1983).

substantial chance that [it] would receive an award . . . ."[271] Other forums looked for error that "adversely affected plaintiff's chances of selection"[272] or for "any actual adverse effect on the procurement process."[273]

Most recently, in *Data General Corp. v. Johnson*,[274] the Federal Circuit reformulated its definition of prejudice:

> We think that the appropriate standard is that, to establish prejudice, a protester must show that, had it not been for the alleged error in the procurement process, there was a *reasonable likelihood* that the protester would have been awarded the contract.[275]

The court called this a "refinement and clarification" of the "substantial chance" language of *CACI*.[276] The court further explained that this language strikes a reasonable balance between the need for efficiency in the procurement process versus the need for fairness and integrity in the process.[277]

In this case, Data General failed to show prejudicial error because it did not establish that, absent the alleged errors in the procurement process, there was a reasonable likelihood that it would have been awarded the contract.[278] Data General, along with four other companies, had submitted competitive bids for a best-value procurement of automated data processing equipment.[279] The solicitation stated that technical factors would be significantly more important than cost.[280] Upon noticing several pricing discrepancies in IBM's best and final offer ("BAFO"), the contracting officer asked IBM two questions about the discrepancies, the answers to which substantially lowered IBM's bid price.[281] Because Data General's BAFO price was significantly higher than IBM's as revised, while its technical score was only slightly higher than IBM's, the General Services Administration

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271. CACI, Inc.-Fed. v. United States, 719 F.2d 1567, 1574-75 (Fed. Cir. 1983) (citing Morgan Bus. Assocs., Inc. v. United States, 619 F.2d 892, 896 (Ct. Cl. 1980)).

272. TRW Envtl. Safety Sys., Inc. v. United States, 18 Cl. Ct. 33, 69 (1989).

273. TRW Inc., GSBCA No. 11309-P, 92-1 B.C.A. (CCH) ¶ 24,389, at 121,789 (1991).

274. 78 F.3d 1556 (Fed. Cir. 1996).

275. Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed. Cir. 1996) (emphasis added).

276. *See id.* at 1563.

277. *See id.* ("The standard reflects a reasonable balance between the importance of (1) averting unwarranted interruptions of and interferences with the procurement process and (2) ensuring that protesters who have been adversely affected by allegedly significant error in the procurement process have a forum available to vent their grievances.").

278. *See id.*

279. *See id.* at 1558 (specifying that equipment was for use by United States Forest Service).

280. *See id.*

281. *See id.* at 1558-59 (noting that GSA then determined that "IBM provide[d] the best overall value to satisfy the government's needs").

("GSA") awarded the contract to IBM.[282] One disappointed bidder filed a protest with GSBCA in which Data General and another bidder intervened, but Data General later voluntarily withdrew.[283] GSA then moved to dismiss the protest with prejudice, stipulating that the contract had been awarded in violation of the FAR.[284] Upon dismissal, GSA terminated the IBM contract for the convenience of the government.[285]

Thereafter, based on the analysis of the bids in the initial procurement and a subsequent cost technical tradeoff report, GSA "reinstated" the original contract with IBM.[286] In response, Data General filed a protest on the grounds that the contracting officer's post-BAFO inquiry about IBM's price discrepancies was an impermissible discussion that allowed IBM, but not Data General, the opportunity to revise its bid.[287] Once bidders have submitted their BAFOs, the government may seek "clarification"[288] of a bid, but "discussions"[289] with a particular bidder are forbidden so as to prevent that bidder from gaining an unfair advantage over other bidders by making its bid more favorable.[290] The Board did not reach the issue of whether the contracting officer's communication with IBM was a clarification or a discussion, however, because it concluded that "[a]ny

282. *See id.* at 1559.

283. *See id.*

284. *See id.* Specifically, GSA stipulated that the contract award to IBM violated Federal Acquisition Regulation § 15.612(d), which requires, *inter alia*, supporting documentation that provides the basis and reasons for the selection decision. *See id.* at 1564 (citing 48 C.F.R. § 15.612(d) (1994)).

285. *See id.* at 1559.

286. *See id.*

287. *See id.* at 1559-60. Because GSA had stipulated in the previous protest that the IBM contract was awarded in violation of the FAR, Data General also argued that GSA should be judicially estopped from denying that the reinstated IBM contract was also illegally awarded. *See id.* at 1564-65. The court rejected this argument, explaining that judicial estoppel is intended to protect the court, not the litigants, from the perversion of the judicial process, and thus a court may exercise discretion in deciding whether to invoke the doctrine. *See id.* at 1565. Here, the board did not abuse that discretion because (1) the earlier protest and GSA's stipulation did not relate to the propriety of the selection of IBM over Data General, and (2) GSA relied on additional information in reinstating the award that it did not have when it made the original award. *See id.*

288. *See* 48 C.F.R. § 15.601 (defining "clarification" in this context to mean "communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal. . . . [C]larification does not give the offeror an opportunity to revise or modify its proposal").

289. *See id.* (defining "discussion" to mean "any oral or written communication between the Government and an offeror . . . that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal").

290. *See Data Gen. Corp.*, 78 F.3d at 1561.

improprieties in the clarification/discussion process have not prejudiced [Data General]."[291]

The Federal Circuit agreed.[292] The court rejected Data General's argument that, had the contracting officer not contacted IBM but instead had selected an awardee based on IBM's original higher prices, Data General would have had a reasonable chance of receiving the contract.[293] The court insisted that in order to show the requisite prejudice, Data General had to prove that, absent the communications, it would have had a reasonable likelihood of being awarded the contract.[294] This burden, according to the court, had not been met.[295]

First, Data General's BAFO price was substantially higher than even IBM's original higher prices, and the SSA testified that his determination would not have changed had he evaluated the BAFOs without revising IBM's original bid.[296] Also, the Federal Circuit held that even if GSA had reopened discussions to communicate with all bidders, Data General would not have had reason to lower its price because (1) it did not know of IBM's lower price, and (2) it admitted that its strategy was to provide a higher performance product at higher cost.[297] Therefore, the court concluded that Data General had failed to establish a reasonable likelihood of receiving the contract in the absence of the contracting officer's communications with IBM.[298] Data General had failed to state a claim that the government had breached the implied contract to consider its bid fairly and honestly, and thus the company had established no grounds for recovery.

Judge Newman issued a strong dissent in *Data General* arguing that after the contract was terminated, it could not simply be reinstated as if nothing had ever happened.[299] The dissent pointed out that the

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291. *Id.*

292. *See id.* at 1562. The court also agreed with the Board's decision that because the adverse agency action that prompted the protest was the reinstatement and not the original award of the contract, the protest was timely when it was filed within 10 days of the reinstatement. *See id.* at 1560. Although the communications occurred prior to the original award, the court stated that "those actions are now placed in the new context of the recent adverse agency action, the reselection of IBM." *Id.*

293. *See id.* at 1563.

294. *See id.* at 1562.

295. *See id.* ("Data General presented no evidence . . . that . . . it would have reduced its price to compete more effectively with IBM.").

296. *See id.*

297. *See id.*

298. *See id.*

299. *See id.* at 1566 (Newman, J., dissenting) (stating that in her view, "the agency's violation of law [should] not be simply ignored").

regulation relied on by the government as authority for reinstating the contract only contemplates reinstatement of a partially terminated contract later determined to have been improvidently terminated.[300] More important, the dissent urged that Data General should have been required to show only that it would have had a "substantial chance" of receiving the contract.[301] The dissent found that Data General had made such a showing, particularly in view of the fact that the technology in the initial bids was already obsolete when IBM's contract was reinstated and a new procurement could well have been on a different basis.[302] Judge Newman summarized, "[t]he contract was over, and its immediate re-award, with no further procurement, was improper, and was validly protested by a competitor who had a substantial chance of success in a new procurement."[303]

Another 1996 case, *Statistica, Inc. v. Christopher*,[304] presented the Federal Circuit with an opportunity to restate its prejudice standard. Significantly, the court recognized that "[t]his is a matter of continuing vitality in other forums, beyond the particularity of the Brooks Act. So it is worthy of more than passing consideration notwithstanding the loss of the board's protest authority."[305]

The court again explained that it adopted the "reasonable likelihood" test in an effort unify the various verbal formulations used by the Court of Federal Claims and the GSBCA in their compliance with the controlling "substantial chance" test.[306] The court stressed that the "reasonable likelihood" standard was nothing more than a "refinement and clarification" of the "substantial chance" test because that test could only be changed or overruled by in banc consideration.[307] The court thus rejected Statistica's interpretation, which echoed that of some commentators, that the "reasonable likelihood" test imposed a more onerous standard on a protester than did the

300. *See id.* (Newman, J., dissenting) (citing 48 C.F.R. § 49.102(d) (1994)).

301. *See id.* (Newman, J., dissenting).

302. *See id.* (Newman, J., dissenting) ("After the government voided the initial award, there was no evidence whatsoever to suggest that Data General might not have succeeded in a new procurement.")

303. *Id.* (Newman, J., dissenting).

304. 102 F.3d 1577 (Fed. Cir. 1996).

305. Statistica, Inc. v. Christopher, 102 F.3d 1577, 1580 (Fed. Cir. 1996) (referencing Brooks Automatic Data Processing Act, 40 U.S.C. § 759 (1994), *amended by* Pub. L. No. 103-355, §§ 1431-1439, 108 Stat. 3234, 3292-94 (1994) (to be codified as amended to 40 U.S.C. § 759(f))).

306. *See id.* at 1581. The court further noted that the GAO, even though not required to do so, just prior to *Data General* had harmonized its prejudice standard with the "substantial chance" test. *See id.* (holding that GAO "will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's action, it would have had a substantial chance of receiving the award" (citing McDonald-Bradley, B-270126, 96-1 CPD ¶ 54)).

307. *See id.* at 1581-82.

"substantial chance" test.[308] The court explained that while a "likelihood" generally connotes a higher probability than a "chance," the modifier "reasonable" connotes a lower standard than "substantial."[309]

Thus, the court concluded, the two standards represent equal burdens for establishing prejudice.[310] In order to remove any doubt about the court's intentions, the court firmly stated: "Rather than engage in verbal gymnastics, . . . suffice it to say that *Data General* did not, as it could not, replace the 'substantial chance' standard with a more demanding one. *Morgan Business* and *CACI* remain controlling."[311]

On the facts of the case, the court affirmed the Board's determination that Statistica had not established the requisite showing of prejudicial error in order to justify relief.[312] The services contract at issue required the contractor to provide personnel for various positions, and established minimum wage rates according to job classifications.[313] The contracting officer issued an amendment seeking to clarify which personnel positions in the contract correlated to which classification wage rates, but Statistica and Orkand, the eventual winner, did not interpret the amendment in the same way.[314]

On appeal, the court rejected Statistica's argument that Orkand's bid failed to comply with the amendment's mandatory requirements regarding wage rates.[315] The court held that the amendment was patently ambiguous as to whether the requirements were mandatory, and that because Statistica had failed to meet its duty to seek clarification it was precluded from arguing that Orkand's bid was noncompliant.[316] The court also rejected Statistica's argument that the contracting officer misled it into believing that its interpretation was correct by requesting the submission of BAFOs even though he knew that Statistica and Orkand had interpreted the amendment

308. *See id.* at 1582; *see also Defense Procurement*, 38 THE GOVERNMENT CONTRACTOR ¶ 147 (Mar. 27, 1996) (noting that *Data General* "appears to substantially increase the protester's burden").

309. *See Statistica*, 102 F.3d at 1582.

310. *See id.*

311. *Id.*

312. *See id.* (stating that Statistica must have been able to prove that "there was a substantial chance it would have received the contract award but for [the relevant] error").

313. *See id.* at 1579.

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

315. *See id.* at 1582.

316. *See id.*; *see also infra* Part III.A (providing in-depth discussion of other 1996 Federal Circuit cases regarding patent ambiguities).

differently.[317] This holding also was based on Statistica's failure to seek clarification.[318]

Finally, the court rejected Statistica's argument that the contracting officer committed prejudicial error by failing to include a FAR clause that allegedly would have allowed Statistica to submit a lower bid.[319] Relying on the SSA's testimony, the court found that even if the clause had been included, Statistica would not have lowered its bid enough to give it a "reasonable likelihood" of receiving the award.[320] Although the court agreed that the resulting decreased price difference could have "raise[d] the chance that Statistica might have received the award, the chance was not substantial."[321] Thus, the court held that Statistica failed to meet the Federal Circuit's standard for prejudice necessary to prevail in a bid protest.[322]

E. Contractual Validity—Offer and Acceptance—Unilateral Contracts

Under long-standing principles of contract law, three familiar elements are typically required for the formation of a contract: offer, acceptance, and consideration.[323] An offer is defined as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."[324] An offeree may accept the offer by "a manifestation of assent to the terms thereof . . . in a manner invited or required by the offer."[325] To render an offeror's promise enforceable, however, an offeree must provide consideration, which is some "performance or return promise . . . sought by the promisor in exchange for his promise."[326] A unilateral contract is formed by an offer, the consideration for which is the performance of an act or forbearance to act.[327]

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317. *See Statistica*, 102 F.3d at 1583 (stating that Statistica had not demonstrated that errors involved were prejudicial).
318. *See id.*
319. *See id.*
320. *See id.*
321. *Id.* (noting that "Statistica's technical advantage was slight").
322. *See id.*
323. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 17(1), 22(1) (1981) [hereinafter RESTATEMENT].
324. *Id.* § 24.
325. *Id.* § 50.
326. *Id.* § 71(2).
327. *See id.* §§ 30, 45, 45 cmt. a, 71 (defining a unilateral contract as a contract wherein an offer does not invite promissory acceptance but instead calls for the other party to accept by rendering performance); ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1.23, at 89 (Joseph M. Perillo rev. ed. 1993) (determining that when an offeror seeks performance rather than a return promise, the offeror proposes a unilateral contract).

In *Wells Fargo Bank v. United States*,[328] the Federal Circuit affirmed the applicability of these principles to government contracts law. The court affirmed the lower court's ruling that the Farmers Home Administration ("FmHA") had made a conditional commitment constituting a unilateral contract to guarantee a loan that Wells Fargo had accepted by performing the conditions specified and by beginning performance by making the loan.[329] The court rejected the government's argument that no unilateral contract was formed, noting that the Conditional Commitment stated that "when these conditions are met, [the Administration] will issue a loan note guarantee."[330] Before the FmHA would issue the guarantee, the Conditional Commitment required that Wells Fargo certify that it "had no knowledge of any adverse change, financial or otherwise, in the Borrower, his business, or any parent, subsidiaries, or affiliates since it requested a Loan Note Guarantee."[331] Because Wells Fargo provided that certification, and satisfied all other conditions, the court ruled that the FmHA was required to issue the loan guarantee and FmHA's refusal to do so constituted a breach of contract.[332]

Wells Fargo represents another line of Federal Circuit precedent in which the court has refused to permit the government to escape its contractual obligations.[333] Significantly, the court cited to its 1995 *in banc* decision in *Winstar*, which at the time *Wells Fargo* was decided was still pending before the United States Supreme Court, for the proposition that "[w]hen the plaintiffs satisfied the conditions imposed on them by the contracts, the government's contractual obligations became effective . . . ."[334] Subsequently, the Supreme Court affirmed *Winstar*'s ruling that when the government abrogates its contractual promises through post-contract legislation, it must compensate the contractor.[335]

The trend in the Federal Circuit, at least as represented in *Wells Fargo* and *Winstar*, has been to protect contractors from attempts by

328. 88 F.3d 1012 (Fed. Cir. 1996).
329. Wells Fargo Bank v. United States, 88 F.3d 1012, 1018 (Fed. Cir. 1996).
330. *Id.* at 1020.
331. *Id.*
332. *See id.* at 1021 (citing Winstar Corp. v. United States, 64 F.3d 1531, 1545 (Fed. Cir. 1995) (in banc) ("When the plaintiffs satisfied the conditions imposed on them by the contracts, the government's contractual obligations became effective . . . ."), *aff'd*, 116 S. Ct. 2432 (1996)).
333. *See generally Winstar*, 64 F.3d at 1531. *But see infra* Part IV.B (providing discussion of line of decisions culminating in *Krygoski* that have construed narrowly the *Torncello* plurality's "changed circumstances" limitation on government's right to terminate contract for convenience and thereby limiting that decision to its facts).
334. *Wells Fargo*, 88 F.3d at 1021 (citing *Winstar*, 64 F.3d at 1545).
335. *See* United States v. Winstar Corp., 116 S. Ct. 2432, 2459 (1996) (plurality opinion); *see also id.* at 2473 (Breyer, J., concurring).

the government to avoid granting the contractors the benefit of the bargain by escaping its contractual obligations.[336] Nonetheless, as discussed below in Section IV.C., the restrictive approach the Federal Circuit has taken on the issue of recoverable damages has limited the impact of the court's liability determination by scaling back severely the amount contractors can recover.[337]

III. CONTRACT INTERPRETATION, PERFORMANCE, AND ADMINISTRATION

A. Interpreting Contracts with Ambiguous Terms

A contract term is "ambiguous" when it is subject to more than one reasonable interpretation.[338] Before finding that a contract is ambiguous, courts should ascertain whether the differing interpretations proffered by the parties, either at the time of contract formation or at other pre-dispute times, are reasonably consistent with the contract language.[339] Generally, courts should apply this and other rules of contract interpretation whenever possible to avoid potential conflicts and ambiguities in contract language.[340] If an ambiguity persists after applying these rules, the court should then determine

336. *See generally Wells Fargo*, 88 F.3d at 1012 (holding that government failed to honor its commitment to bank); *Winstar*, 64 F.3d at 1531 (holding that United States breached contract with financial institutions).

337. *See infra* notes 694-700 and accompanying text.

338. *See* H & M Moving, Inc. v. United States, 499 F.2d 660, 667 (Ct. Cl. 1974) ("[T]he rule has long been established that a provision in a contract which is unclear and capable of being interpreted in at least two reasonable ways is ambiguous.").

339. *See* Edward R. Marden Corp. v. United States, 803 F.2d 701, 705 (Fed. Cir. 1986) (noting that ambiguous contracts are generally construed according to the parties' construction, as demonstrated by their conduct before a conflict arises); Firestone Tire & Rubber Co. v. United States, 444 F.2d 547, 551 (Ct. Cl. 1971) (commenting on the general rules of contract interpretation, including the precept that the parties' interpretations control the analysis), *quoted in* Beta Sys., Inc. v. United States, 838 F.2d 1179, 1185 (Fed. Cir. 1988); *see also* Tacoma v. United States, 31 F.3d 1130, 1134 (Fed. Cir. 1994) (relying on pre-dispute extrinsic evidence to rule that intent of parties controlled and rendered contract unambiguous); RESTATEMENT, *supra* note 323, § 215.

340. *See, e.g.*, Hills Materials Co. v. Rice, 982 F.2d 514, 517 (Fed. Cir. 1992) (construing specific term to control over general term to avoid potential conflict and ambiguity); United States v. Johnson Controls, Inc., 713 F.2d 1541, 1555 (Fed. Cir. 1983) (harmonizing two potentially conflicting contract terms to avoid finding ambiguity); *see also* RESTATEMENT, *supra* note 323, § 203(d) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."); 3 A. CORBIN, CORBIN ON CONTRACTS § 547 (1960) ("The concrete is more readily understandable than the abstract and more likely to be accurately expressed."); 4 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 619 (3d ed. 1961) ("[W]here possible all the language used should be given a reasonable meaning.").

whether the ambiguity is latent or patent, and apply the appropriate rules applicable to each.[341]

If a court determines an ambiguity is latent, it should invoke the rule of *contra proferentem* and interpret the ambiguity in favor of the nondrafting party if that party's interpretation is reasonable.[342] If, however, the ambiguity is obvious and therefore patent, the court will determine whether the contractor satisfied the resulting duty to inquire.[343] If the contractor failed to inquire, the court will bar the contractor from challenging the government's interpretation of the ambiguity if the government's interpretation is reasonable.[344]

In perhaps its most controversial government contracts decision of 1996, a divided Federal Circuit panel in *Dalton v. Cessna Aircraft Co.*[345] applied the above-stated rules to find a patent ambiguity and rule in favor of the government despite findings of fact by the ASBCA that the pre-dispute intent of the parties belied the existence of an ambiguity.[346] It is too early to tell whether *Cessna Aircraft* will signal a trend on the court's part to accept readily the government's increasingly used "patent ambiguity" argument to deny contractors the right to recover on valid claims.

The primary dispute in *Cessna Aircraft* centered around whether Cessna was entitled to an equitable adjustment under its flight training services contract for an alleged change the Navy made to the contract's requirements syllabus.[347] The change increased the number of hours of training Cessna was required to give each student from fifty-eight to seventy-eight hours in order to use the maximum number of training hours available under the contract per year.[348]

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341. *See H & M Moving*, 499 F.2d at 671-72. The distinction between a latent and patent ambiguity is that the latter is "obvious, gross [or] glaring." *Id.* at 671 (stating that where ambiguity is patent, contractor has duty to inquire about it).

342. *See, e.g.*, WPC Enters., Inc. v. United States, 323 F.2d 874, 876 (Ct. Cl. 1963) (applying rule of *contra proferentem* against the government as drafter because nondrafting party's interpretation was within zone of reasonableness).

343. *See id.* at 876-77. The nondrafting party's duty to inquire arises because, when the nondrafting party knew or should have known of the ambiguity, the nondrafting party was in the position to avoid the dispute. *See* S.O.G. of Ark. v. United States, 212 Ct. Cl. 125, 131 (1976) (explaining that the principle obviates unnecessary disputes and advances the goal of informed bidding).

344. *See* Interwest Constr. v. Brown, 29 F.3d 611, 615 (Fed. Cir. 1994) (holding that burden is on contractor to seek clarification of patent ambiguities); Newsom v. United States, 676 F.2d 647, 651 (Ct. Cl. 1982) (emphasizing the "value and importance of a duty of inquiry in achieving fair and expeditious administration of government contracts").

345. 98 F.3d 1298 (Fed. Cir. 1996). One of the authors of this Article was counsel for appellee.

346. Dalton v. Cessna Aircraft Co., 98 F.3d 1298, 1306 (Fed. Cir. 1996) (finding that Cessna did not meet its obligation of inquiry).

347. *See id.* at 1299.

348. *See id.* at 1302.

Cessna entered into a firm fixed-price services contract to assist in radar and navigation training for undergraduate naval flight officers over a five-year span.[349] The Navy's Request for Information ("RFI") stated that the training system should be designed to support from 300-350 students per year, and that "for planning purposes," the estimated flying hours needed to conduct the training would range from 12,000-17,000 hours per year.[350] The RFI did not specify any limit on the number of flight training hours per student.[351]

In response to questions regarding the rate of flight training services posed by potential bidders at a pre-solicitation conference, the Navy stated that it did not intend to modify the training syllabus and referred the bidders to the upcoming Request for Quotations ("RFQ").[352] The RFQ stated in two different sections that the services to be provided under the contract "shall consist of an annual rate of 17,000 airborne training service hours (approximately 58 airborne training service hours per graduated student)."[353] In response to questions regarding the rate of flight training services posed by bidders at a post-solicitation conference, the Navy stated repeatedly that the contractor should propose the annual rate for services based on the RFQ requirements.[354] Cessna based both its proposal and its BAFO on the training syllabus attached to the RFQ and on the 58-hour per student provision.[355] Three years into contract performance, after realizing that it was not using 17,000 hours of training per year, the Navy changed the training syllabus in the contract to increase the number of hours per student from fifty-eight to seventy-eight hours of flight training per year.[356]

Cessna filed a claim for an equitable adjustment for this work and subsequently appealed to the ASBCA.[357] The Board rejected the Navy's argument that it had contracted for an unqualified 17,000 hours of training per year, instead finding that the Navy expressly promised Cessna that it would require no more than approximately

349. *See id.*
350. *See id.*
351. *See id.* at 1299-1300.
352. *See id.* at 1300.
353. *Id.*
354. *See id.* (noting that Cessna stated these facts specifically in its proposal and BAFO).
355. *See id.* at 1302.
356. *See id.* The Navy also changed the scope of services it used under the contract, requiring Cessna to transport non-student passengers, and to perform rescue and target flights. The Navy did not appeal the board's ruling that Cessna was entitled to an equitable adjustment for this work. *See id.* at 1303.
357. *See id.* at 1302.

fifty-eight hours of training per student.[358] The Board also found that the Navy had breached its promise to not modify the requirements of the training syllabus.[359] The Board concluded that the 58-hour provision in the contract precluded the Navy from increasing the number of hours per student beyond fifty-eight without some type of price adjustment.[360]

The government appealed to the Federal Circuit, arguing that the Board erred by interpreting the 58-hour provision to qualify the 17,000-hour provision.[361] The government alleged that the 58-hour provision was only a non-binding estimate.[362] Alternatively, the government asserted that Cessna was barred from recovery because Cessna's interpretation created a patent ambiguity giving rise to a duty to seek clarification prior to submitting its proposal, which it failed to do.[363] Cessna responded that the Board correctly interpreted the contract, and that any ambiguity in the contract was latent, requiring the contract to be interpreted in Cessna's favor under the doctrine of *contra proferentem* because its interpretation was reasonable.[364]

A divided panel of the Federal Circuit, ruling in the government's favor, first concluded that the Navy reasonably interpreted the 58-hour provision to constitute a non-binding estimate.[365] Moreover, the panel majority, with questionable logic, applied the common law order of precedence rule that specific terms control over general terms and concluded that the 17,000-hour provision was a *specific* provision that controlled over the *general* 58-hour per student provision.[366] Finally, the majority ruled that even if Cessna reasonably construed the 58-hour provision to qualify the 17,000-hour requirement, this construction gave rise to a "patent ambiguity."[367] Because Cessna did not satisfy its obligation to seek clarification prior to submitting its proposal, the panel majority barred Cessna from relying on its interpretation and from claiming any right to an equitable price adjustment.[368]

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358. *See id.* at 1302-03.
359. *See id.*
360. *See id.* at 1303.
361. *See id.* (summarizing government's appellate arguments).
362. *See id.*
363. *See id.*
364. *See id.*
365. *See id.* at 1305.
366. *See id.* (citing Hills Material Co. v. Rice, 982 F.2d 514, 517 (Fed. Cir. 1992)). The panel majority provides no rationale for why the 17,000 hour provision is a specific term and the 58 hour per student provision is a general term. The authors posit that a reverse approach is a more reasonable interpretation.
367. *See id.*
368. *See id.* at 1306.

In dissent, Judge Newman noted that the panel majority's approach contravened the well established tenet of contract interpretation that the parties' intent revealed by pre-dispute interpretations should govern over *post hoc*, litigation-induced interpretations.[369] Judge Newman emphasized the high level of deference that the court was required to pay to the Board's findings of fact, and that none of the statutory conditions for reversal had been met.[370] The Board, after hearing testimony from both sides, had determined that the 17,000-hour limit was understood the same way by both sides when the contract was bid.[371] Specifically, both sides testified that their understanding was that the 17,000-hour figure was a maximum that Cessna was required to provide only if the Navy increased the number of students in the training program.[372] The Board held that the Navy was bound, however, by its representations in the training syllabus, the pre-bid explanations, and the contract itself that Cessna would not be required to provide more than fifty-eight flight hours of training per student.[373] Judge Newman found no error justifying a reversal of these findings.[374]

Judge Newman further took issue with the "strange" consequence that arose from the court's finding that the ambiguity in the RFQ was patent.[375] Not only did the court accept as reasonable the Navy's litigation-induced interpretation, but the court also precluded Cessna from challenging that interpretation and reversed the Board's holding "on the quixotic ground that the contractor should have foreseen and resolved the dispute before bidding on the contract."[376] To the extent that it effectively barred from judicial review the merits of the contract interpretation issue, Judge Newman viewed the majority's opinion as frustrating the court's role in providing for the "fair and just resolution of contract disputes."[377]

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369. *See id.* at 1306-08 (Newman, J., dissenting).

370. *See id.* at 1307-08 (Newman, J., dissenting); *see also* 41 U.S.C. § 609(b) (1994) (relating that court may overturn board's factual findings where a decision is "fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence").

371. *See Dalton*, 98 F.3d at 1307 (Newman, J., dissenting).

372. *See id.* (Newman, J., dissenting).

373. *See id.* (Newman, J., dissenting).

374. *See id.* at 1308 (Newman, J., dissenting).

375. *See id.* (Newman, J., dissenting) (noting that panel majority refused to consider merits of Cessna's contract interpretation argument).

376. *Id.* (Newman, J., dissenting).

377. *Id.* (Newman, J., dissenting).

A fundamental precept of contract law is that the contracting parties' intent determines the proper interpretation of their contract.[378] When called upon to resolve a dispute over contract interpretation, "the avowed purpose and primary function of the court is the ascertainment of the intention of the parties."[379] By characterizing the Navy's post-dispute interpretation as reasonable, the majority violated the rule that a party's interpretation when no controversy existed is the most reliable means of determining the parties' intent.[380] Only by characterizing the Navy's post-dispute interpretation as "reasonable," and ignoring the Navy's pre-dispute interpretation, could the majority find an ambiguity.

Having created this ambiguity, the majority concluded that the ambiguity was patent and barred Cessna from relief because it failed to inquire regarding the ambiguity during the contract's formation. As the Board found, however, both Cessna and the Navy at the time of contract formation interpreted the contract in the same way.[381] The majority's analysis thus succeeds in permitting the government to interject a litigation-induced, *post hoc* interpretation of the contract, thereby creating a fictional patent ambiguity to bar the contractor from challenging the government's position. Judge Newman's dissent concluded that "the panel majority, in barring the contractor from the opportunity to challenge the government's current interpretation, disserves the nation in its dependence on private contractors to meet governmental needs."[382]

The Federal Circuit also addressed an ambiguity issue in *Grumman Data Systems Corp. v. Dalton*,[383] a decision devoid of the myriad problems addressed in the above discussion of *Cessna Aircraft*. The court in *Grumman Data* upheld the GSBCA's finding that both the contract provision at issue and the Navy's answer to a bidder's post-

378. *See* Edward R. Marden Corp. v. United States, 803 F.2d 701, 705 (Fed. Cir. 1986) (discussing fundamental contract principles and importance of parties' intent in construing ambiguous contracts).

379. Alvin, Ltd. v. USPS, 816 F.2d 1562, 1565 (Fed. Cir. 1987) (quoting 4 WILLISTON, *supra* note 340, § 601, at 304).

380. *See* 4 WILLISTON, *supra* note 340, § 623, at 811.

381. *See Dalton*, 98 F.3d at 1307 (Newman, J., dissenting) (stating that Board ruled in favor of Cessna after hearing testimony to effect that both parties interpreted contract in same manner at contract formation).

382. *Id.* at 1308 (Newman, J., dissenting) (observing that "'punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of the public as well as private debtors'" (quoting United States v. Winstar Corp., 116 S. Ct. 2432, 2459-60 (1996) (plurality opinion) (citation omitted)).

383. 88 F.3d 990 (Fed. Cir. 1996). For a more thorough summary of the facts of this case and a discussion of the scope of review issue, see *supra* Part II.A.

solicitation question regarding the provision were patently ambiguous.[384] The GSBCA had held that Grumman's failure to seek clarification of either (1) a patently ambiguous contract provision, or (2) the Navy's patently ambiguous answer, barred the contractor from arguing the correctness of its interpretation of the provision.[385]

Grumman challenged the Navy's award of a computer contract to another bidder, Intergraph, on the grounds that, *inter alia*, Intergraph's proposal failed to meet one of the solicitation's minimum mandatory requirements ("MMR").[386] The solicitation stated that the Simulation Accelerator "'shall simulate . . . at least (1) million evaluations per second.'"[387] Grumman argued that this required the simulator to be able to carry out a complete simulation algorithm at least one million times per second, which Intergraph's system concededly could not do.[388] Intergraph and the Navy, however, interpreted the MMR to mean that the simulator only had to be able to record at least one million changes per second.[389]

The Board found both interpretations plausible, but found that Grumman had failed to carry its burden of showing by a preponderance of the evidence that Intergraph's and the Navy's interpretation was wrong.[390] On appeal, Grumman argued alternatively (1) that the simulator requirement was unambiguous and that Grumman's interpretation must prevail; (2) that any ambiguity was latent, and thus Grumman's interpretation controlled under the doctrine of *contra proferentem*; and (3) that Intergraph's proposal did not meet even Intergraph's interpretation of the simulator requirement.[391]

The court first decided, giving the Board's conclusion of law "careful consideration and great respect," that the simulator requirement was ambiguous.[392] The court then considered whether the ambiguity was patent so as to impose a duty to seek clarification.[393]

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384. *See* Grumman Data Sys. Corp. v. Dalton, 88 F.3d 990, 998 (Fed. Cir. 1996).
385. *See id.*
386. *See id.* at 995.
387. *Id.* at 996 (recounting alleged ambiguity of MMR at issue).
388. *See id.*
389. *See id.*
390. *See id.*
391. *See id.* at 996-97.
392. *See id.* at 997 (citing Community Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1579 (Fed. Cir. 1993)). Although Grumman pointed to a statement in Intergraph's own user's guide that supported Grumman's interpretation, the Navy cited testimony by two witnesses—one testified that he had never heard the term "evaluations per second" used as a simulator performance measure, and another testified that the term "evaluations" is rarely used because its meaning is vague without more context. *See id.*
393. *See id.*

A patent ambiguity is one that is "obvious, gross, [or] glaring."[394] Grumman offered no evidence to support its "bare assertion" that the ambiguity, if any, was latent.[395] In light of testimony that the term "evaluations per second" was either unheard of or at least rarely used in the industry in this context, and that at least one bidder specifically inquired about the meaning of the provision, the court concluded that the term was patently ambiguous.[396] As for the consequent duty to seek clarification, there was "no dispute" that Grumman had not sought clarification of the term prior to submitting its proposal, which barred Grumman from arguing that its interpretation was proper.[397] *Grumman Data*, in sum, follows recognized principles and does not alter the jurisprudence of the Federal Circuit regarding rules of construction and interpretation.

B. Parol Evidence Rule

The parol evidence rule is neither a rule of evidence nor one of contract interpretation, but is instead a rule of substantive law that defines the subject matter of interpretation.[398] In general, the parol evidence rule precludes a party from presenting evidence of prior written or oral agreements that contradict or are inconsistent with an integrated agreement.[399] A "completely integrated" agreement is one "adopted by the parties as a complete and exclusive statement of the terms of the agreement."[400] An agreement is only partially integrated if it "omits a consistent additional agreed term which is (a) agreed to for separate consideration, or (b) such a term as in the circumstances might naturally be omitted from the writing."[401]

Parol evidence is admissible to show whether and to what extent a written agreement is integrated, to add consistent additional terms to partially integrated agreements, and to resolve ambiguities whether the agreement is integrated or not.[402] A court, using the general rules of contract interpretation, may find that no ambiguity exists and

394. *Id.* (quoting H & M Moving Co. v. United States, 499 F.2d 660, 671 (Ct. Cl. 1974)).
395. *See id.* at 998 (recounting that Grumman did not argue or point to evidence in record to support its assertion).
396. *See id.*
397. *See id.* In addition, as noted above, one bidder did submit a post-solicitation inquiry as to the meaning of "one million evaluations per second"; the court found, however, that the Navy's response was also patently ambiguous, and that neither Grumman nor another bidder inquired to clarify the Navy's ambiguous answer. *See id.*
398. *See* RESTATEMENT, *supra* note 323, § 213 cmt. a.
399. *See id.* § 213 cmt. b.
400. *Id.*
401. *Id.* § 216.
402. *See id.* § 214.

thus exclude extrinsic evidence, or it may find an ambiguity and look to parol evidence for a resolution.[403] Although some jurisdictions have allowed the admission of parol evidence to establish that a seemingly unambiguous term is ambiguous, the Federal Circuit has never subscribed to this rule.[404]

In *McAbee Construction, Inc. v. United States*,[405] the court determined that the contract at issue was fully integrated and unambiguous.[406] Based on this predicate, the court reversed the trial court, which had considered extrinsic evidence to resolve an alleged ambiguity.[407] The court stated that it would not hear extrinsic evidence proffered to establish an ambiguity when the contract terms are clear and unambiguous on their face.[408]

The contract at issue in *McAbee* granted an easement to the United States Army Corps of Engineers ("Corps").[409] The easement permitted the Corps "to deposit, fill, spoil and waste material [on McAbee's land] . . . and to perform any other work necessary and incident to the construction [project]."[410] The easement also contained an integration clause stating that "[a]ll terms and conditions with respect to this [contract] are expressly contained herein," and that no representative of the United States had made any representation or promise to McAbee that was not expressly contained in the contract.[411]

Upon expiration of the easement, McAbee sued the Corps for waste and trespass, complaining that the Corps had breached the parties' agreement to return the land at no higher than 165 feet above sea level.[412] The trial court recognized that the contract specified no height limitation, but nonetheless concluded that the lack of such a term created an ambiguity.[413] Therefore, the court admitted extrinsic evidence to find that the parties had agreed to a height limit and that the Corps had breached this agreement, entitling McAbee to damages for diminished property value.[414]

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403. *See id.* § 214 cmt. b.
404. *See* Grumman Data Sys. Corp. v. Dalton, 88 F.3d 990, 997 (Fed. Cir. 1996).
405. 97 F.3d 1431 (Fed. Cir. 1996).
406. *See* McAbee Constr., Inc. v. United States, 97 F.3d 1431, 1434-35 (Fed. Cir. 1996).
407. *See id.* at 1435 (finding that trial court incorrectly found contract terms ambiguous).
408. *See id.* ("Extrinsic evidence . . . should not be used to introduce an ambiguity where none exists." (quoting Interwest Constr. v. Brown, 29 F.3d 611, 615 (Fed. Cir. 1994))).
409. *See id.* at 1433.
410. *Id.*
411. *See id.*
412. *See id.*
413. *See id.*
414. *See id.* The court awarded McAbee $328,000 for the diminution in fair market value of the property. *See id.*

The Federal Circuit, on appeal, first addressed the issue of whether the contract was fully integrated.[415] The court found that the clear and unequivocal language in the integration clause created a "strong presumption that the contract was . . . a fully-integrated agreement."[416] This placed "an extremely heavy burden" on McAbee to prove otherwise.[417] The evidence showed that the parties executed the agreement after months of negotiations during which McAbee had suggested a height limit, but no height limit agreement was ever reached.[418] Both the writing itself and the circumstances surrounding its execution demonstrated that the contract was fully integrated.[419] Moreover, the parol evidence rule prohibited the use of extrinsic evidence to add to or modify the terms of the contract unless an ambiguity existed.[420]

Addressing the alleged ambiguity, the court invoked familiar canons of contract interpretation: that interpretation begins with a contract's plain meaning, and that courts must interpret a contract to give meaning to all of its provisions.[421] The court reaffirmed its view that extrinsic evidence is inadmissible to establish an ambiguity when the terms of a contract are clear on their face.[422]

The contract language permitting the Corps to deposit fill and waste on McAbee's land, and to perform any other work "necessary and incident" to the project was not susceptible of more than one reasonable interpretation.[423] No provision of the contract limited the amount of material that the Corps could deposit on McAbee's land or addressed a height limitation.[424] The court, therefore,

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415. The Federal Circuit is bound by Court of Claims precedent which requires parol evidence to be "admissible on the extent to which a written agreement is integrated, for . . . the writing cannot prove its own integration." Sylvania Elec. Prods., Inc. v. United States, 458 F.2d 994 (Ct. Cl. 1972).

416. *McAbee*, 97 F.3d at 1434.

417. *See id.* The court, citing *United States v. Winstar*, 116 S. Ct. 2432, 2448-53, 2472 (1996), suggested that the parties could have incorporated into the contract, through the integration clause, any evidence of a height limitation agreement.

418. *See McAbee*, 97 F.3d at 1434.

419. *See id.*

420. *See id.* The court also rejected McAbee's argument that if the contract was only partially integrated, extrinsic evidence was admissible to interpret the "necessary and incident" language. *See id.* The court ruled that extrinsic evidence can be introduced only to add consistent additional terms to a partially integrated contract. *See id.* Thus, the only viable argument McAbee could make to allow the introduction of extrinsic evidence was to claim that the contract language was ambiguous. *See id.*

421. *See id.* at 1435.

422. *See id.* This view differs with the one held previously by the court. *See* Blackburn v. United States, 116 F. Supp. 584, 586 (Ct. Cl. 1953) (stating that no contract term is unambiguous until the intent of the parties, which "is the essence of any contract," is established, and admitting extrinsic evidence to determine parties' intent).

423. *See McAbee*, 97 F.3d at 1435.

424. *See id.*

rejected the trial court's finding of an ambiguity, and held that the trial court's admission of extrinsic evidence was in error.[425]

McAbee reaffirms the Federal Circuit's strict application of the parol evidence rule to prevent reliance on extrinsic evidence to establish an ambiguity when the meaning of contract terms are clear on their face. While the vitality and force of the parol evidence rule has been eroded to varying degrees in many jurisdictions, the Federal Circuit still wields the doctrine as a powerful tool of contract interpretation.

C. *Controlling Statutory Language Takes Precedence and Renders Invalid Conflicting Contract Provisions*

Article I, section 8 of the United States Constitution gives Congress the "power of the purse."[426] The principle of separation of powers requires that the executive and the judiciary respect any restriction placed by Congress on the expenditure of federal funds.[427] An example of one such restriction on the government's ability to contract is the Anti-Deficiency Act.[428] This Act prohibits a federal employee or a federal agency from entering into a contract for the future payment of money in excess of, or in advance of, an existing appropriation unless otherwise authorized by law.[429] Another similar restriction prohibits the government from making advance payments to its contractors unless specifically authorized by statute.[430]

In 1996, the Federal Circuit resolved a dispute concerning the proper application of this restriction in the context of the government purchase of commercial airline tickets. In *American Airlines, Inc. v. Austin*,[431] the court ruled that the government was entitled to recoup advance payments made to airlines for unused tickets even though the terms stated on the tickets limited the time allowed for

425. *See id.*

426. U.S. CONST. art. I, § 8.

427. *See* Schweiker v. Hansen, 450 U.S. 785, 788 (1981) (holding that it is "the duty of all courts to observe the conditions defined by Congress for charging the public treasury").

428. 31 U.S.C. § 1341 (1994).

429. *See* Hercules, Inc. v. United States, 116 S. Ct. 981, 987-88 (1996) (holding that the Anti-Deficiency Act prohibits government procurement agencies from entering into contracts with "open-ended indemnity for third-party liability"). *See generally* Michael T. Janik & Margaret C. Rhodes, Gould, Inc. v. United States: *Contractor Claims for Relief Under Illegal Contracts with the Government*, 45 AM. U. L. REV. 1976 (1996) ("The Anti-Deficiency Act protects the process by which funds are appropriated and shields the Treasury from unauthorized debts incurred by government representatives.").

430. *See* 31 U.S.C. § 3324 ("[A] payment under a contract to provide a service . . . for the United States Government may not be more than the value of the service already provided" unless authorized by a specific law.").

431. 75 F.3d 1535 (Fed. Cir. 1996).

such recovery.[432] Because the contract terms regarding the refund time limits conflicted directly with the government's unrestricted statutory right to recoup such advance payments, the contractual time limits were held to be invalid.[433]

The dispute in *Austin* started when the GSA sent the airlines written demands to refund $2.5 million for tickets the government purchased, but did not use, between January 1985 and September 1989.[434] When GSA could not produce the unused tickets to the airlines, as required under the regulations, GSA limited its refund claims to tickets purchased between January 1985 and January 1986, totaling about $333,000.[435] Because GSA produced only a fraction of these tickets, the airlines denied GSA's refund request, prompting GSA to offset more than $300,000 in payments the government owed to the airlines.[436]

Filing suit in the U.S. District Court for the District of Columbia, the airlines sought to recover the offset amount.[437] The only issue on appeal was whether the district court properly granted the government summary judgment on the airlines' claim that GSA was not entitled to refunds because it had not sought them within the time limits stated on the tickets.[438] The court determined that "[a] provision in a government contract that violates or conflicts with a federal statute is invalid or void."[439] Thus, the issue was whether the refund time limits stated on the tickets violated or conflicted with any statutory right of the government reflected in the regulations that

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432. American Airlines, Inc. v. Austin, 75 F.3d 1535, 1541 (Fed. Cir. 1996) (concluding that Congress intended to preserve government's entitlement to refund).

433. *See id.*

434. *See id.* at 1537 (describing essential facts of case and noting that none were dispositive).

435. *See id.*

436. *See id.*

437. *See id.* The trial court found that the airlines issued tickets to the government in exchange for Government Transportation Requests ("GTR"), which state and incorporate the federal regulations governing refunds. *See id.* Because the airlines accepted the GTRs, they were bound by the federal regulations, not the contract terms stated on the tickets. *See id.* Because the district court earlier had granted summary judgment to the airlines on their claim that the refund demands for which GSA could not produce tickets violated federal regulations, the amount at issue on appeal was only $41,000. *See id.* at 1537 n.3.

438. *See id.* at 1537. The Federal Circuit had jurisdiction pursuant to 28 U.S.C. § 1295(a)(2) (1994), which provides for appeals to that court from federal district courts in specific instances, in conjunction with 28 U.S.C. § 1346(c), which grants federal district courts jurisdiction over set-offs and counterclaims by the federal government against private plaintiffs. *See Austin*, 75 F.3d at 1537.

439. *Id.* at 1538 (invalidating contract with clause adjusting prices in violation of federal law) (citing Urban Data Sys., Inc. v. United States, 699 F.2d 1147, 1150-53 (Fed. Cir. 1993)); Yosemite Park & Curry Co. v. United States, 582 F.2d 552, 560 (Ct. Cl. 1978) (determining that contract provisions violating federal procurement laws are unenforceable).

placed a ten-year limit on the government's right to recovery by offset.[440]

The court answered this question through analysis of the statutory construction and legislative history of the relevant transportation statutes, noting that the government has long been prohibited statutorily from making advance payments to contractors unless authorized by a specific law.[441] The Transportation Payment Act of 1972 ("TPA")[442] authorizes the government to make advance payments for passenger transportation services; however, the language also clearly grants the government the right to recoup, "by deduction or other means," advance payments for transportation services not received, and does not place a time limit on such recovery.[443] Analyzing this provision in the light of the whole statute "and the objects and policy of the law . . . and giv[ing] it such construction as will carry into execution the will of the legislature,"[444] the court concluded that "Congress did not intend to limit the government's ability to recover unused airline ticket refunds."[445]

The District Court concluded that Congress limited to three years the time within which the government can deduct overcharge amounts from subsequent bills due the carrier.[446] Congress also limited to three years the time within which a carrier may file with the government a claim for money owed to it.[447] In the absence of any time limitation on the government's right to recover advance payments for unused tickets, however, the court determined that Congress' intent was to grant the government an unrestricted right to such recovery.[448]

Analysis of the TPA and the Transportation Act of 1940 ("1940 Act"),[449] which the TPA amended, supports this interpretation. The 1940 Act addressed complaints by passenger and freight carriers about inordinate delays in receiving payment from the government by waiving the prohibition against payment to such contractors prior to

440. *See id.* The airlines conceded that all applicable regulations were incorporated by reference into the GTRs, but contended that the contract terms and the regulations were not in conflict. *See id.* at 1537.

441. *See id.* at 1538.

442. 31 U.S.C. § 3726 (1994) (originally codified at 49 U.S.C. § 66 (1940)).

443. *See Austin*, 75 F.3d at 1538-39 (quoting 31 U.S.C. § 3726(f)).

444. *Id.* at 1539 (quoting Kokoszka v. Bedford, 417 U.S. 642, 650 (1974)).

445. *Id.*

446. *See id.* (citing 31 U.S.C. § 3726(b)).

447. *See id.* (citing 31 U.S.C. § 3726(a)).

448. *See id.*

449. Transportation Act of 1940, Ch. 722, § 322, 54 Stat. 955, 955 (codified as amended at 31 U.S.C. § 3726 (1994)).

audit.[450] The 1940 Act also reserved to the government the right to deduct overcharges paid to carriers from subsequent bills.[451] In exchange for giving up the protective right to withhold payment on its transportation bills prior to an audit in the 1940 Act, the government acquired the protective right to deduct overcharges from subsequent bills.[452] Congress placed no time bar on this setoff right.[453]

The TPA amended the 1940 Act to allow the government to pay for passenger and freight transportation in advance of completion of the services.[454] Again, however, Congress protected the public fisc by reserving to the government the right to recover any advance payments made for services it did not receive by deduction or other means.[455] Congress intended this right to be the functional equivalent of the government's prior right to withhold payment altogether until after the carrier had provided the transportation service, just as the right to recover overcharges in the 1940 Act replaced the government's previous right to audit before making payment.[456]

In addition, the TPA placed no time limitations on the government's right to recover advance payments for unused services.[457] Although fully aware of the time limitations imposed by the 1958 amendments to the 1940 Act,[458] only in 1982 did Congress finally limit the government's right to administrative offset to ten years.[459] Because it is "the duty of all courts to observe the conditions defined by Congress for charging the public treasury,"[460] the Federal Circuit observed that the contractual time limits were in direct conflict with, and thus no bar to, the government's right to the refunds.[461]

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450. *See Austin*, 75 F.3d at 1539-40.

451. *See id.* (discussing 1940 Act as part of analysis of congressional intent in transportation statutes).

452. *See id.* at 1540.

453. *See id.* In 1958, however, Congress amended the 1940 Act to include the three-year time limitation noted above as codified at 31 U.S.C. § 3726(a)-(b). *See id.*

454. *See id.* (analyzing TPA in context of its changes to 1940 Act and legislative intent behind those changes).

455. *See id.* (citing S. REP. NO. 92-1026, at 2 (1972)).

456. *See id.* at 1540-41..

457. *See id.* at 1541.

458. *See id.* (citing Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) (noting general presumption that Congress knows about existing laws relating to legislation it enacts)).

459. *See id.* (citing Debt Collection Act of 1982, Pub. L. No. 97-365, § 10, 96 Stat. 1749, 1754 (codified at 31 U.S.C. § 3716(c)(1) (1994))).

460. *Id.* (quoting Schweiker v. Hansen, 450 U.S. 758, 788 (1981)).

461. *See id.* The court also rejected the airlines' argument based on *Missouri, Kansas & Texas Ry. Co. v. Harriman*, 227 U.S. 657 (1913), which held that, even where a federal statute prohibits contracts that exempt common carriers from liability for loss or damage, private parties "may limit or qualify [such] liability by special contract, provided the limitation is just and

Judge Bryson, in dissent, found no conflict between the ticket contract terms and the federal statutes and regulations.[462] He pointed out that under the majority's statutory analysis, a contractor could not enforce any contractual limitations on the government's right to a refund for an unused ticket, regardless of the reasonableness of the limitations or the concessions that the contractor may have made to obtain them.[463] Judge Bryson concluded:

> The better view [of the statutes] is that when the government purchases an airline ticket, it receives value in the form of the right to travel to a designated place at a designated time and the right to obtain a refund if the government does not use the ticket but satisfies the refund provision of the contract.[464]

In essence, the dissent agreed with the general principle in *Missouri, Kansas & Texas Railway Co. v. Harriman*,[465] that reasonable "contract terms limiting the time for bringing a claim under the contract bind the parties regardless of the more generous provisions of a general statute of limitations."[466] The dissent noted that the airlines are not required by any principle of law to grant refunds for unused tickets.[467] Furthermore, the time limits imposed by the airlines were "ample for any individual or organization with even a semblance of an orderly accounting system to prepare and file refund claims."[468] The dissent concluded that the majority opinion placed a "particularly distasteful" restriction on the freedom of contract.[469]

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reasonable." *Id.* at 1542. The majority determined that *Missouri, Kansas* did not apply because in that case the shipper chose to be bound by a shorter period within which to file suit for damages in exchange for a reduced fair. *See id.* Here, however, the federal regulations were "part of the parties' agreements and conflict[ed] with the airlines' unilaterally imposed time limitations." *Id.*

462. *See id.* at 1543 (Bryson, J., dissenting) (arguing that government should be held to contracts it makes).

463. *See id.* at 1544 (Bryson, J., dissenting). For example, the government's concession that it may not recover a refund for an unused "no-refund" ticket is inconsistent internally with the majority's analysis. *See id.* at 1543 (Bryson, J., dissenting). Similarly, following the majority's rationale, the regulation requiring the government to present the unused ticket to the carrier for a refund would appear to violate the statute. *See id.* at 1544 (Bryson, J., dissenting).

464. *Id.* at 1544 (Bryson, J., dissenting).

465. 227 U.S. 657 (1913).

466. *Austin*, 75 F.3d at 1544 (Bryson, J., dissenting) (arguing that existing transportation regulations fail to support government's position because precedent permits contracting for shorter time periods than those established by law (citing *Missouri, Kan.*, 227 U.S. at 672)).

467. *See id.* at 1545 (Bryson, J., dissenting) (noting that airlines may permit refunds if they choose, but permitting some refunds under some circumstances does not create right to refunds of unused tickets at any time).

468. *Id.* (Bryson, J., dissenting).

469. *See id.* (Bryson, J., dissenting) (concluding that majority's decision unacceptably shifts costs of government inefficiency to airlines).

D. Express Contractual Terms Control Extent of Review by Court of Federal Claims

Hoskins Lumber Co. v. United States[470] involved a dispute regarding the appropriate calculation of damages under a lumber contract's "no resale" clause.[471] The clause expressly stated that Hoskins, in the absence of a resale, had to pay damages to the government based on a set formula incorporating values derived from an appraisal developed under a standard Forest Service method.[472] On remand from a prior appeal, the Court of Federal Claims conducted a hearing to determine damages.[473] The court found insufficient evidence to determine how and to what extent the government was damaged, and dismissed the government's counterclaim for damages under the "no resale" clause.[474]

In this second appeal, the Federal Circuit held that the only question properly before the trial court on remand was whether the government complied with the standard appraisal method identified in the contract.[475] The terms of the "no resale" clause made it clear that Hoskins was entitled only to an appraisal "that complied in all material respects" with the standard Forest Service method in place at contract termination.[476] The court rejected the trial court's use of a "'fair' appraisal, an 'accurate' appraisal, a 'reasonable' appraisal, or any manner of appraisal other than the one indicated" in the "no-resale" clause.[477] The court held that the trial court "clearly erred" in finding that the government had not presented sufficient testimony to establish the appraisal's compliance with the contract terms.[478]

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470. 89 F.3d 816 (Fed. Cir. 1996).

471. *See* Hoskins Lumber Co. v. United States, 89 F.3d 816, 816 (Fed. Cir. 1996).

472. *See id.*

473. *See id.* at 816-17 (noting that in prior appeal, Federal Circuit affirmed Court of Federal Claims' grant of summary judgment for government on issue of Hoskin's default on contract (citing Hoskins Lumber Co. v. United States, 20 F.3d 1144, 1148 (Fed. Cir. 1994))). The court, however, reversed and remanded the issue of damages to the Court of Federal Claims for application of the contract's "no-resale" clause. *See id.* at 816 (instructing court to find in favor of government in amount of $229,557.37 plus interest).

474. *See id.*

475. *See id.* at 817 (observing that first appeal completely resolved questions of degree of harm to government).

476. *See id.* (emphasizing that contract did not entitle Hoskins to any other kind of appraisal).

477. *See id.* (establishing Forest Service standard as only measure of accuracy or reliability under "no-resale" contract clause).

478. *See id.* (rejecting trial court's determination that cross-examination of government witnesses undermined their testimony).

E. Liquidated Damages Clauses Are Enforceable Unless Not Objectively Reasonable

Liquidated damages clauses are enforceable so long as (1) the amount fixed by the clause is reasonable in light of the amount of loss anticipated to be caused by the breach, and (2) the harm caused by the breach is not susceptible to accurate estimation.[479] Whether a particular liquidated damages clause is a reasonable forecast of loss depends on whether the government, at contract formation, reasonably could have anticipated harm flowing from a breach of the contract, and whether the stipulated amount was a reasonable estimate of the anticipated harm.[480] The party challenging a liquidated damages clause bears the burden of proving the clause is unreasonable and therefore unenforceable.[481]

Courts look to the circumstances at the time of contract formation, not the time of breach, when evaluating the reasonableness of the government's forecast of liquidated damages.[482] As a result, courts have enforced liquidated damages clauses when the amount awarded was substantially greater than the actual damages suffered[483] and when the government incurred no actual damages.[484]

Courts will not enforce a liquidated damages clause when the challenging party satisfies its burden and proves that the government could not reasonably have anticipated incurring any actual damages from a breach of the contract.[485] In addition, a party can satisfy its

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479. *See* RESTATEMENT, *supra* note 323, § 356(1). Testimony by a government witness asserting that the government could not estimate accurately the amount of damages usually satisfies this second prong, and thus the issue rarely is dispositive. *See* JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 1058-59 (3d ed. 1995).

480. *See* Wise v. United States, 249 U.S. 361, 365 (1919) (discussing circumstances under which liquidated damages are enforceable).

481. *See* Jennie-O Foods, Inc. v. United States, 580 F.2d 400, 414 (Ct. Cl. 1978) (enforcing liquidated damages clause where contractor failed to prove that damages amount was not reasonably related to government's probable loss).

482. *See* Sunflower Landscaping & Garden Ctr., AGBCA Nos. 87-342-1 & 87-343-1 91-3 B.C.A. (CCH) ¶ 24,182, at 120,945 (1987) (rejecting government's liquidated damages claim because damages amount was unreasonable at time of contract formation).

483. *See* Connell Rice & Sugar Co., AGBCA No. 85-483-1, 87-1 B.C.A. (CCH) ¶ 19,489, at 98,482-83 (1986) (enforcing liquidated damages provision where amount was reasonable at time of contract formation, even though actual damages suffered were lower than liquidated amount), *rev'd on other grounds*, 837 F.2d 1068 (Fed. Cir. 1988).

484. *See* Mit-Con, Inc., ASBCA No. 42884, 92-1 B.C.A. (CCH) ¶ 24,634, at 122,924 (1991) (rejecting contractor's argument that government was not damaged and assessing liquidated damages because clause was reasonable).

485. *See* Sunflower Garden & Landscaping Ctr., AGBCA No. 87-342-1, 91-3 B.C.A. (CCH) ¶ 24,182, at 120,946 (1991) (dismissing government's claim for liquidated damages because "there [was] no evidence of any specific inconvenience"); Garden State Painting Co., ASBCA No. 22248, 78-2 B.C.A. (CCH) ¶ 13,499, at 66,072-73 (1978) (denying government's claim to liquidated damages where government could not reasonably have anticipated cost for delay of

burden by proving that the stipulated damages amount is so unreasonably large in relation to the government's anticipated damages as to amount to an impermissible penalty.[486] Whether the stipulated amount represents a penalty instead of compensation is a highly fact-specific determination, and is the focus of much of the litigation in this area.[487]

In *DJ Manufacturing Corp. v. United States*,[488] the Federal Circuit applied the above rules to determine whether a liquidated damages clause was an impermissible penalty.[489] The court affirmed the trial court's enforcement of a liquidated damages clause even though the contracting officer's declaration admitted that the amount of damages was not calculated specifically for the contract.[490] The court applied an objective test to determine that the liquidated damages amount was reasonable for the contract at issue because the person proposing the rate engaged in a reasonable attempt to forecast damages, albeit without reference to the subject contract.[491]

DJ Manufacturing Corp. ("DJ") contracted to deliver combat field packs to support troops during Operation Desert Storm.[492] The contract assessed a liquidated damages rate of 1/15 (one-fifteenth) of 1 percent of the contract price for each day an article was delivered after the scheduled delivery date.[493] DJ missed several deadlines, and the government withheld about 8 percent of the contract price pursuant to the liquidated damages clause.[494] DJ filed suit in the Court of Federal Claims to recover the amount withheld, claiming that the clause amounted to an unenforceable penalty.[495] The government moved for summary judgment.[496]

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contracted labor); Ford Constr. Co., AGBCA No. 241, 72-1 B.C.A. (CCH) ¶ 9275, at 42,980-81 (1972) (refusing to award liquidated damages where government could not have reasonably anticipated incurring damages at time of contract formation).

486. *See* CIBINIC, JR. & NASH, JR., *supra* note 479, at 1052-53.

487. *See id.* at 1053 ("The decision of whether or not an award amounts to a penalty depends upon the facts and circumstances of each case.").

488. 86 F.3d 1130 (Fed. Cir. 1996).

489. *See* DJ Mfg. Corp. v. United States, 86 F.3d 1130, 1133-35 (Fed. Cir. 1996) (finding that, in light of federal court precedent, a liquidated damages clause is not an unenforceable penalty).

490. *See id.* at 1135 (noting that contracting officer's declaration was not enough to overturn liquidated damages clause).

491. *See id.* at 1137 ("[T]he liquidated damages clause will be enforced 'if the amount stipulated is reasonable for the particular agreement at the time it is made.'" (quoting Young Assocs. Inc. v. United States, 471 F.2d 618, 622 (Ct. Cl. 1973))).

492. *See id.* at 1132.

493. *See id.*

494. *See id.*

495. *See id.*

496. *See id.*

In support of the government's motion, the contracting officer submitted a declaration stating that all contracts for Desert Storm supplies contained liquidated damages clauses for late delivery because of the need to move war items to the troops quickly.[497] In response, DJ submitted an affidavit of its president asserting that the liquidated damages rate seemed to be a standard agency rate rather than one specifically related to the need for the contract items.[498] DJ asserted that a disputed material fact existed as to whether the contracting officer had made an attempt to forecast just compensation when proposing the liquidated damages amount.[499] The trial court granted the government's motion because DJ failed to carry its burden of proof to show that the liquidated damages amount was objectively unreasonable.[500]

The Federal Circuit affirmed, applying the rule that a party moving for summary judgment on an issue as to which the nonmovant bears the burden of proof may prevail merely by pointing to the absence of evidence supporting the nonmoving party's case.[501] As the party challenging the liquidated damages clause, DJ bore the burden of proving the clause unenforceable.[502] The court pointed out that such a burden "is an exacting one, because when damages are uncertain or hard to measure, it naturally follows that it is difficult to conclude that a particular liquidated damages amount or rate is an unreasonable projection of what those damages might be."[503] The court noted that damages that are likely to flow from delays in the delivery of goods are often difficult to assess, particularly when the goods are to be produced in the uncertain setting of wartime.[504] The court upheld the liquidated damages clause in part because the amount of damages at contract formation was too difficult to determine.[505] This approach saved the time and expense of litigat-

497. *See id.*
498. *See id.* at 1133.
499. *See id.*
500. *See id.* (reiterating rule that liquidated damages clauses are enforceable when forecasting exact amount of damages is difficult and amount of liquidated damages is reasonable).
501. *See id.* at 1135 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)).
502. *See id.* at 1134.
503. *Id.*
504. *See id.* at 1137. The trial court characterized this case as "'a paradigmatic example of a situation where accurate estimation of the damages resulting from delays in delivery is difficult, if not impossible.'" *Id.* at 1133 (quoting DJ Mfg. Corp. v. United States, 33 Fed. Cl. 357, 360 (1995), *aff'd*, 86 F.3d 1130 (Fed. Cir. 1996)).
505. *See id.* at 1137.

ing damages issues and upheld the parties' bargain that damages would be determined by a pre-set formula.[506]

The court rejected DJ's first argument that the contracting officer's statement about needing to get the items to the troops quickly showed that the liquidated damages clause was designed to "spur performance" and not for just compensation.[507] This was not a valid ground, the court ruled, because a liquidated damages clause is not unenforceable simply because the promisee hopes that it will encourage the promisor's prompt performance.[508] The court emphasized the fact that the policy against penalties is designed to prevent "a penal sanction that is so disproportionate to any damage that could be anticipated that it seeks 'to enforce performance of the main purpose of the contract by the compulsion of this very disproportion.'"[509] The evidence did not show that the clause had this purpose, and thus did not present a triable issue to avoid summary judgment.

The court also rejected DJ's argument that a triable issue existed because the regulations created a substantive rule of law requiring the contracting officer specifically to tailor the liquidated damages clause to the particular contract in advance.[510] The court read the regulation as providing advice and "internal guidance rather than [creating] rights in contracting parties."[511]

Finally, DJ failed to carry its burden of proving the unreasonableness of the liquidated damages rate on which the parties had agreed.[512] The court applied the presumption that liquidated damages clauses generally are enforceable because of the difficulty in assessing the injury caused by performance delays, especially in

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506. *See id.* Liquidated damages clauses will be enforced when damages are uncertain or difficult to measure as long as "'the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression.'" *Id.* (quoting Wise v. United States, 249 U.S. 361, 365 (1919)).

507. *See id.*

508. *See id.* at 1135-36 ("[A] provision giving liquidated damages for each day's delay is an appropriate means of inducing due performance, or of giving compensation, in case of failure to perform.") (citing Robinson v. United States, 261 U.S. 486, 488 (1923)). The court distinguished the situation where a liquidated damages clause served no compensatory function at all because there was no possibility that the breach at issue would result in any compensable loss. *See id.* (citing Priebe & Sons, Inc. v. United States, 332 U.S. 407, 413 (1947)).

509. *Id.* at 1136 (quoting 5 S. WILLISTON, *supra* note 340, § 776, at 668).

510. *See id.* The Code of Federal Regulations states that the "rate of liquidated damages used must be reasonable and considered on a case-by-case basis since liquidated damages fixed without reference to probable actual damages may be held to be a penalty, and therefore unenforceable." 48 C.F.R. § 12.202(b) (1996).

511. *DJ Mfg.*, 86 F.3d at 1136.

512. *See id.*

wartime.[513] In addition, the court found nothing "inherently unreasonable" in the reduction rate of 1/15th of 1 percent per day, which was not "so exorbitant in light of the prospective injury to the government that it is plainly penal in nature and therefore may not be enforced."[514] The court's decision in this case clearly illustrates the high level of proof that a party challenging the enforceability of a liquidated damages clause must meet just to avoid summary judgment.

F. Measuring Government-caused Delays—The Eichleay *Formula*

A contractor is entitled to recover unabsorbed home office overhead expenses as calculated under the *Eichleay* formula when (1) the contractor experienced government-caused performance delays, (2) the contractor remained on "standby" status, and (3) the contractor was unable to take on other work.[515] The Federal Circuit issued seven decisions between 1992 and 1996 in an attempt to clarify the proper application of the formula.[516]

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513. *See id.*

514. *Id.* at 1137-38.

515. Eichleay Corp., ASBCA No. 5183, 60-2 B.C.A. (CCH) ¶ 2688 (1960) (determining overhead expenses during government-caused delay as product of daily overhead amount multiplied by agreed length of delay). Home office overhead expenses are those costs incurred by a contractor that, unlike overhead expenses incurred at a job site, cannot be allocated specifically to any one contract. *See* Wickham Contracting Co. v. Fischer, 12 F.3d 1574, 1579 (Fed. Cir. 1994). They are costs that are incurred by a contractor "for the benefit of the business as a whole and which usually accrue over time." *Id.* at 1579 (citing Wickham Contracting Co. v. GSA, GSBCA No. 8675, 92-3 B.C.A. (CCH) ¶ 25,040, at 124,818 (1992)). The significance is that when work on a contract is delayed or suspended, the costs cannot be reallocated to, or "absorbed" by, other cost objectives. *See id.* (explaining that overhead costs, unlike direct costs, are not attributable to any particular contract).

In contracting with the government, a company necessarily includes a portion of home office overhead expenses, which it calculates based on the contract's duration, in its estimate of costs to perform the contract. *See Wickham Contracting Co.*, 12 F.3d at 1577-78. Government delay or disruption that requires a contract to be extended reduces the contractor's stream of direct costs against which to charge its overhead costs. *See id.* Unless a contractor is able to reduce its overhead costs or take on additional work during the government-caused delay period, the government is liable for monetary loss caused by the contractor's reduced stream of income. *See id.*

516. *See* Altmayer v. Johnson, 79 F.3d 1129, 1132 (Fed. Cir. 1996) (permitting subcontractor to recover under *Eichleay*); Mech-Con Corp. v. West, 61 F.3d 883, 886 (Fed. Cir. 1995) (reversing Board and awarding contractor with damages pursuant to *Eichleay*); Wickham Contracting Co. v. Fisher, 12 F.3d 1574, 1577 (Fed. Cir. 1994) (relating that *Eichleay* formula is proper method of calculating home overhead costs); Interstate Gen. Gov't Contractors, Inc. v. West, 12 F.3d 1053, 1055 (Fed. Cir. 1993) (affirming Board's denial of plaintiff's request for damages under *Eichleay*); Daly Constr. Inc. v. Garrett, 5 F.3d 520, 521 (Fed. Cir. 1993) (finding contractor not entitled to *Eichleay* formula damages); Community Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1581 (Fed. Cir. 1993) (articulating that courts should calculate home office overhead expenses under *Eichleay*); C.B.C. Enters., Inc. v. United States, 978 F.3d 669, 675 (Fed. Cir. 1992) (emphasizing the element of the uncertainty engendered by delay); *see also* Satellite Elec. Co. v. Dalton, 105 F.3d 1418, 1419-20 (Fed. Cir. 1997) (affirming Board's denial of Eichleay damages).

In *C.B.C. Enterprises, Inc. v. United States*,[517] the Federal Circuit refused to make application of the *Eichleay* formula the rule for calculating unabsorbed home overhead whenever the contract performance period is extended.[518] Instead, the court emphasized that the *raison d'etre* of *Eichleay* is some measure of uncertainty engendered by government delay, disruption, or suspension such that the contractor is unable to take on additional work.[519]

In *Community Heating & Plumbing Co. v. Kelso*,[520] the court further illustrated the formula's proper application by declining to apply it when the contractor's claim arose from "continuous original and additional changes work" rather than from contract changes that delayed performance and required the contractor to stand by idly and suspend its work.[521] Soon thereafter, however, the court in *Interstate General Government Contractors, Inc. v. West*[522] noted that application of the formula does not require the contractor's work force to be idle, but instead focuses on the delay or disruption of contract performance for an uncertain duration during which the contractor must remain ready to perform.[523]

In *Wickham Contracting Co. v. Fischer*,[524] the court finally adopted the *Eichleay* formula as the exclusive means available for calculating unabsorbed home office overhead expenses.[525] Then, in its 1995 decision in *Mech-Con Corp. v. West*,[526] the Federal Circuit reversed a position it had taken just two years previously and held that when the contractor has proved the first two prongs of the test—Government-imposed delay and the contractor's "standby"

A contractor's entitlement to unallocated home office overhead costs resulting from compensable delays at the hands of the government was clearly established, at least in the construction arena, more than fifty years ago in *Fred R. Comb Co. v. United States*, 103 Ct. Cl. 174, 183-84 (1945). The Federal Circuit rejected the government's request to do away with the *Eichleay* test in *Capital Electric Co. v. United States*, 729 F.2d 743, 747 (Fed. Cir. 1984) (suggesting that decision to overrule use of *Eichleay* formula is best left to Congress).

517. 978 F.2d 669 (Fed. Cir. 1992).

518. *See* C.B.C. Enters., Inc. v. United States, 978 F.2d 669, 675 (Fed. Cir. 1992).

519. *See id.*

520. 987 F.2d 1575 (Fed. Cir. 1993).

521. *See* Community Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1582 (Fed. Cir. 1993).

522. 12 F.3d 1053 (Fed. Cir. 1993).

523. *See* Interstate Gen. Gov't Contractors, Inc. v. West, 12 F.3d 1053, 1057-58 (Fed. Cir. 1993) (discussing "standby" test). In a footnote, the court pointed out that sound public policy precludes requiring the contractor's work force to be idle since this would deter the contractor from mitigating damages, and thus would be highly inefficient. *See id.* at 1057 n.4 (stating that idleness of workers is evidence of, but not prerequisite to, contractor's "standby" status).

524. 12 F.3d 1574 (Fed. Cir. 1994).

525. *See* Wickham Contracting Co. v. West, 12 F.3d 1574, 1580-81 (Fed. Cir. 1994) (holding that *Eichleay* formula is "exclusive means for compensating a contractor for unabsorbed overhead" because it provides "an equitable method of compensating a contractor for unabsorbed overhead without costing taxpayers more than they should pay").

526. 61 F.3d 883 (Fed. Cir. 1995).

status—it has made a *prima facie* case that it is entitled to unabsorbed home office overhead costs as calculated under *Eichleay*.[527] The burden then shifted to the Government to show that the contractor either could have reduced its overhead or taken on additional work during the delay period to absorb such costs.[528]

In another attempt to clarify the confusion that had arisen surrounding the determination of whether a contractor is in "standby" status, the Federal Circuit in *Altmayer v. Johnson*[529] reiterated that the appropriate focus is on the uncertainty of the contract's duration occasioned by the government's delay or disruption.[530] The court in *Altmayer* also ruled that entitlement to damages does not require suspension of the contract, but only that it be extended for an uncertain duration.[531] The standby test therefore does not require that the contractor's work force remain idle during the delay period.[532]

In *Altmayer v. Johnson*, the GSA awarded Altmayer a contract to lease office space.[533] The contract required Altmayer to renovate the office space prior to lease commencement and Altmayer subcontracted the renovation work to Haas Construction, Inc. ("Hass").[534] Haas established a critical path schedule requiring the government to make final carpet and wood trim selections by a certain date in order for Haas to complete the contract on time.[535] Despite Altmayer's repeated reminders, GSA did not make its final carpet selection until one week after the originally-scheduled completion date.[536] After completing the renovations, Altmayer submitted a certified claim to

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527. *See* Mech-Con Corp. v. West, 61 F.3d 883, 886 (Fed. Cir. 1995) (shifting burden to government of showing that contractor could have taken on more work). As recently as *Daly Construction, Inc. v. Garrett*, 5 F.3d 520 (Fed. Cir. 1993), the court had taken the position that the contractor had the burden of establishing that it was unable to take on additional work during the delay. *See id.* at 522.

528. *See Mech-Con Corp.*, 61 F.3d at 886 ("[T]he burden then shifts to the government . . . [to] show that the contractor did not suffer or should not have suffered any loss.").

529. 79 F.3d 1129 (Fed. Cir. 1996).

530. *See* Altmayer v. Johnson, 79 F.3d 1129, 1133-34 (Fed. Cir. 1996) (observing that government actions "made the length of performance period extremely uncertain").

531. *See id.* at 1134 (stating that such circumstances may be enough to warrant recovery under *Eichleay*).

532. *See id.*

533. *See id.* at 1131.

534. *See id.* The contract initially called for Haas to perform the demolition work, but change orders were issued for each subsequent phase of the renovation. *See id.*

535. *See id.*

536. *See id.* GSA had furnished Haas with finish schedules twice, but had quickly canceled both of them. *See id.* In addition, prior to the completion date in the original contract, Altmayer twice requested a contract extension and a price adjustment due to the government's delay. The government finally granted a contract extension four days after the originally-scheduled completion date, but it denied the request for a price adjustment. *See id.* at 1131-32.

the contracting officer for amounts due to both Altmayer and Haas because of the delay.[537] The contracting officer denied the claim and Altmayer appealed to the GSBCA.[538]

The Board found that GSA's failure to select the carpet timely was the sole cause of the contract's late completion, explicitly rejecting any liability on Altmayer's part.[539] Although the GSBCA granted some damages—a percentage of Haas' supervisors' salaries and the associated direct costs to compensate for home office costs—the Board denied recovery of extended home office overhead as calculated under *Eichleay*.[540]

On appeal, the Federal Circuit focused on the second prong of the *Eichleay* test—the "standby" requirement.[541] The GSBCA had held that neither Altmayer nor Haas were ever on "standby," and that Haas had performed "additional work" which created a stream of income against which to charge extended home office costs.[542] The court found that the Board erred as a matter of law in holding that Haas was not on "standby," and that the Board's finding that Haas had performed "additional work" was not supported by substantial evidence.[543]

The court recited the rule that "[t]he proper standby test focuses on the delay . . . of contract performance for an uncertain duration, during which a contractor is required to remain ready to perform."[544] Thus, "the linchpin to entitlement under *Eichleay* is the uncertainty of contract duration occasioned by government delay or disruption."[545] The court found it "beyond serious question" that the government-caused delay made the length of the performance

537. *See id.* at 1132.
538. *See id.*
539. *See* Altmayer v. General Servs. Admin., GSBCA No. 12639, 95-1 B.C.A. (CCH) ¶ 27,515, at 137,116 (1995) ("[T]he Government's delay in giving ordering instructions held up the whole job.").
540. *See id.*
541. *See id.* at 1134 (clarifying that workforce need not be idle for contractor to be on standby status). The court found it "undisputed" that the government was the sole cause of the delay in contract performance. *See id.* at 1133. Recent case law suggests that the source of the government-caused delay is irrelevant to this prong of the test. *See* Wickham Contracting Co. v. West, 12 F.3d 1574, 1576 (Fed. Cir. 1994) (finding government-caused delay when government ordered delays in building renovation contract while it worked on the building's structural problems); Interstate Gen. Gov't Contractors v. West, 12 F.3d 1053, 1055 (Fed. Cir. 1993) (finding government-caused delay when government failed to issue timely notice to proceed because there had been a bid protest); Daly Constr., Inc. v. Garrett, 5 F.3d 520, 521 (Fed. Cir. 1993) (finding government-caused delay when government consumed significant amount of time clearing up defective specifications).
542. *See Altmayer*, 79 F.3d at 1133.
543. *See id.* at 1134.
544. *Id.* at 1133 (citing *Interstate*, 12 F.3d at 1057).
545. *Id.*

period "extremely uncertain."[546] The government "strung Haas along" for almost six months while never suspending the contract fully.[547] In addition, Haas' progress payment requests to Altmayer and the change orders to the renovation subcontract did not support the Board's finding that Haas had performed "additional work."[548] Instead, "they simply identified the work that Haas was to perform under those change orders."[549]

Significantly, the court ruled that despite Haas' continued performance of minor tasks during the delay period, the activity did not compromise Haas' entitlement to *Eichleay* damages.[550] The court concluded that suspension—idling a contractor's work force—was not a prerequisite to a finding that the contractor was on "standby," because the contractor's "stream of income" was still affected enough to invoke the rationale for applying the *Eichleay* formula.[551] The court explained that:

> Notwithstanding Haas' continuous work on minor contract items, the fact remains that the overall project income was spread over an additional three-month period; hence, less of that income was allocable to home office overhead costs. Therefore, Haas' work on minor contract items does not deprive it of recovery under the *Eichleay* formula.[552]

Having met the first two prongs of the *Eichleay* test, Haas established a *prima facie* case for entitlement to *Eichleay* damages.[553] At this point the court indicated that "[t]he burden . . . shifts to the government to present rebuttal evidence or argument showing that the contractor did not suffer or should not have suffered any loss because it was able to either reduce its overhead or take on other work during the delay."[554] None of the evidence presented by the government met this burden.[555] Specifically, the progress payment requests and change orders did not establish that "other work" was performed.[556] Neither the fact that Haas may have bid on other projects "at the very end" of the contract period, nor the fact that

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546. *Id.* at 1133-34.
547. *See id.* at 1134.
548. *See id.*
549. *Id.*
550. *See id.* (explaining that "standby test does not require that the contractor's work force be idle").
551. *See id.*
552. *Id.* (relating that Haas had satisfied standby test and that "government-imposed delay was for an uncertain duration").
553. *See id.*
554. *Id.* at 1135 (citing Mech-Con Corp. v. West, 61 F.3d 883, 886 (Fed. Cir. 1995)).
555. *See id.*
556. *See id.*

Haas had not reached its bonding capacity, precluded *Eichleay* recovery.[557] Thus, Haas had established its entitlement to its extended home office overhead costs under the *Eichleay* formula.

Given the evolution of the Federal Circuit's view on the appropriate application of the *Eichleay* formula, the next battleground would appear to be the final prong of the test. Specifically, the court can be expected to address the issue of what quantum of evidence the government needs to present in order to carry its burden of showing that the contractor could have taken on additional work.

G. Differing Site Conditions—Contractor May Recover Only for Conditions Existing at Time of Contracting

The Differing Site Conditions clause[558] and its predecessor, the Changed Conditions clause[559] have long been used in government contracts as a means to shift the risks associated with adverse subsurface and latent physical conditions from the contractor to the government.[560] The government allocates such risks to itself so that a bidder is not encouraged to inflate its bid price to account for the potential costs of unknown adverse conditions.[561] The clause does not shift the risk of all unanticipated adverse site conditions to the government, however, but only those risks that encourage more accurate bidding.[562]

Although not stated explicitly in the clause language, courts interpreting the clause have long imposed a temporal limitation on its applicability.[563] The clause applies only to those conditions that exist at the time the contract is executed and does not apply to conditions that develop during contract performance.[564] In addi-

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557. *See id.*

558. *See* 48 C.F.R. § 52.236-2 (1996).

559. *See id.*

560. *See* Foster Constr. C.A. v. United States, 435 F.2d 873, 887 (Ct. Cl. 1970). In *Foster*, the Court of Claims stated the policy underlying the Differing Site Conditions clause as follows:

> The purpose of the changed conditions clause is thus to take at least some of the gamble on subsurface conditions out of bidding. Bidders need not weigh the cost and ease of making their own borings against the risk of encountering an adverse subsurface, and they need not consider how large a contingency should be added to the bid to cover the risk. They will have no windfalls and no disasters. The Government benefits from more accurate bidding, without inflation for risks which may not eventuate. It pays for difficult subsurface work only when it is encountered and was not indicated in the logs.

Id.

561. *See id.*

562. *See* Olympus Corp. v. United States, 98 F.3d 1314, 1317 (Fed. Cir. 1996).

563. *See* CIBINIC, JR. & NASH, JR., *supra* note 479, at 489.

564. *See* John McShain, Inc. v. United States, 179 Ct. Cl. 632, 638 (1967) (holding that clause covers only a "condition existing at the time the contract was entered into and not one

tion, the clause applies only to "physical" conditions at the work site, but not to interference with contract performance by the government or third-parties.[565]

In *Olympus Corp. v. United States*,[566] the contractor argued that (1) because the Differing Site Conditions clause does not contain an express temporal limitation, interpreting such a limitation into the clause "impermissibly incorporates the government's subjective intent into the contract," and that (2) the Differing Site Conditions clause shifts to the government the risk of all unanticipated adverse site conditions.[567] In rejecting these arguments, the Federal Circuit pointed to the "weight of authority" that has interpreted the Differing Site Conditions clause in an unwavering fashion as "refer[ring] to a latent condition at the time of contracting not something discovered later."[568] In addition, the court looked to the "ordinary and commonly accepted meaning," of the clause from the vantage point of a "reasonable and prudent" contractor.[569] According to the court, such a contractor is or should be familiar with the long-standing temporal limitation on the applicability of the Differing Site Conditions clause.[570]

Applying this law to the facts of the case, the Federal Circuit affirmed the trial court's grant of summary judgment for the government and the dismissal of Olympus' complaint for an equitable adjustment to the contract price.[571] Olympus had entered into a fixed-price contract with the government to pave the plant yards at the Stratford Army Engine Plant.[572] The contract contained the standard Differing Site Conditions clause set forth in 48 C.F.R. § 52.236-2.[573] One month after receiving a Notice to Proceed from the contracting officer, the independent government contractor that operated the plant accidentally cut open an underground oil

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occurring thereafter").

565. *See* CIBINIC, JR. & NASH, JR., *supra* note 479, at 494.

566. 98 F.3d 1314 (Fed. Cir. 1996).

567. *See* Olympus Corp. v. United States, 98 F.3d 1314, 1316 (Fed. Cir. 1996).

568. *Id.* at 1317 (quoting John McShain, Inc. v. United States, 375 F.2d 829, 833 (Ct. Cl. 1967)).

569. *See id.* at 1318 (quoting Brunswick Corp. v. United States, 951 F.2d 334, 336 (Fed. Cir. 1991)).

570. *See id.* (imposing knowledge of a "reasonable and prudent contractor" on Olympus).

571. *See id.* On Olympus' request for an equitable adjustment, the contracting officer allowed a time extension, but granted only a small fraction of Olympus' request for an increase to the contract price. After Olympus submitted a claim for additional costs, which the contracting officer rejected, Olympus filed suit in the United States Court of Federal Claims seeking to recover all of its additional costs. *See id.* at 1315-16.

572. *See id.* at 1315.

573. *See id.*

pipe.[574] The oil contaminated the soil and prevented Olympus from paving the yard.[575] Soon thereafter, the independent contractor's employees went on strike, and picket lines prevented Olympus employees from gaining access to the yard for nearly two months.[576]

The court held that because neither the soil contamination nor the labor strike occurred until after the contract was executed, the delay attributable to these events was not subject to the Differing Site Conditions clause.[577] In addition, the court noted that the labor strike was an action by a third party, and as such was not a "physical" condition at the work site to which the clause applied.[578]

Thus, in *Olympus Corp.*, the Federal Circuit reinforced the limitations on the applicability of the Differing Site Conditions clause that are implicit in the risk-shifting policy that the clause is meant to effectuate.

H. Third-Party Beneficiaries & Contract Assignment

In *D & H Distributing Co. v. United States*,[579] the court found that a subcontractor had a third-party beneficiary relationship with the government when the contracting officer had modified the prime contract to make the contractor and the subcontractor joint payees.[580] In addition, despite the statutory prohibition on the assignment of rights in government contracts, the court found that the contract modification at issue could be viewed as a valid assignment of payment rights from the contractor to the subcontractor because the contracting officer assented to the assignment.[581] Under either theory, the government's subsequent failure to make payments according to the modified contract was a breach entitling the subcontractor to damages.[582]

The dispute in *D & H* arose when the contractor, Computer Integrated Management Corp. ("CIM"), failed to pay its subcontractor, D & H Distributing Co. ("D & H"), for goods that D & H had

574. *See id.*
575. *See id.*
576. *See id.* (noting that picket lines blocked all plant entrances).
577. *See id.* at 1318 (interpreting Differing Site Conditions clause to apply only to conditions existing at time of contract formation).
578. *See id.* (finding clause inapplicable to conditions created by third parties). The court did note that although *government* interference with a contractor's access to the work site may constitute a breach of the government's duty to cooperate, only a specific contract provision can create government liability for a third-party's actions that delay a contractor's performance; Olympus' contract contained no such provision. *See id.*
579. 102 F.3d 542 (Fed. Cir. 1996).
580. *See* D & H Distrib. Co. v. United States, 102 F.3d 542, 546-47 (Fed. Cir. 1996).
581. *See id.*
582. *See id.*

supplied to the government.[583] CIM contracted to supply the government with computer hard disks, and attempted to subcontract with D & H as the source for the disks.[584] When D & H expressed a reluctance to extend credit to CIM, CIM asked the government to modify the contract so that both CIM and D & H would be designated as payees on all payments made under the contract.[585] The contracting officer issued a modification of the contract in accordance with CIM's request.[586] D & H then delivered the hard disks to the government and billed CIM for the cost.[587] The government, contrary to the terms of the contract modification, issued a check for the contract price in CIM's name only and failed to indicate D & H's joint payee status on the check.[588] Subsequently CIM filed for bankruptcy, having made only a partial payment of its obligation to D & H.[589]

D & H filed suit against the United States in the Court of Federal Claims seeking to recover the unpaid portion of CIM's debt to D & H, plus interest.[590] D & H advanced two theories under which it argued that the government was obligated to pay that sum: either (1) D & H had entered an implied-in-fact contract with the government to become a joint payee along with CIM; or (2) D & H was a third-party beneficiary to the modified contract between the government and CIM.[591] Under either theory, D & H asserted that the government breached its promise to make D & H a joint payee under the contract and that the government was liable for D & H's loss caused by that breach.[592]

On appeal, the court approached the third-party beneficiary claim as two separate questions.[593] First, the court concluded that the

583. *See id.* at 544.
584. *See id.*
585. *See id.* CIM attached to its written request an unexecuted joint payment agreement. *See id.*
586. *See id.*
587. *See id.*
588. *See id.* at 544-45.
589. *See id.* at 545.
590. *See id.*
591. *See id.* The Court of Federal Claims held, and the Federal Circuit affirmed, that D & H failed to point to sufficient evidence to support finding an implied-in-fact contract between D & H and the government. *See id.* Specifically, no evidence indicated that the contract modification was intended to constitute the acceptance of an offer by D & H; instead, the government simply responded to a request by CIM. *See id.* The court stated that the "absence of a showing of mutuality of intent to contract between the government and D & H is fatal to D & H's claim." *Id.* (citing H.F. Allen Orchards v. United States, 749 F.2d 1571, 1575 (Fed. Cir. 1984)).
592. *See id.*
593. *See id.* at 546.

contract modification was valid and binding on the government.[594] The contracting officer assented to the change pursuant to CIM's request, and thus it was a bilateral modification.[595] Although bilateral modifications are required to be signed by both the government and the contractor, the absence of the contractor's signature on the modification was not significant here because the contracting officer told the contractor that its signature was not necessary.[596]

The court then addressed the issue of whether D & H, as a non-party to the contract, could enforce the contract modification against the government.[597] As a general principle of contract law, "a clause providing for the promisor to pay the proceeds of the contract to a third party is enforceable by the third party where the payment is intended to satisfy a present or future liability of the promisee to the third party."[598] Such "creditor beneficiaries" traditionally have been accorded full rights to sue under the original contract.[599] In cases involving joint payment agreements, courts generally view the agreement as making the non-party joint payee a third-party beneficiary of the contract with the right to sue the promisor for breach.[600]

The court further noted that, as the purpose for the joint payment agreement was to ensure that CIM's debt to D & H would be paid, the case "presents a particularly clear instance in which the third party beneficiary's interests, specifically protected by the contract, would be impaired if the beneficiary were not accorded the right to obtain relief against the promisor in the event of a breach."[601] Thus, D & H, as a third-party beneficiary, was entitled to recover from the government those damages occasioned by the government's breach of the contract modification making D & H a joint payee.[602]

The government, in turn, argued that the contract modification should be viewed as an attempted assignment of CIM's claims under the contract to D & H.[603] Considering the government's conten-

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594. *See id.*
595. *See id.*
596. *See id.* Moreover, CIM "submitted a signed request for precisely the change [made by] the modification." *Id.*
597. *See id.*
598. *Id.* at 547.
599. *See id.*
600. *See id.* The court also noted that the government often invokes this same principle when seeking to enforce a contract between private parties that included an undertaking by the promisor to pay a debt owed to the government by the promisee. *See id.*
601. *Id.*
602. *See id.*
603. *See id.* at 546.

tion, the court observed that such an assignment is barred by the statutory proscription against the assignment of government contract rights and claims.[604] The government can waive the statutory prohibition, however, when the contracting officer clearly assents to the assignment.[605] Here, the contracting officer gave clear assent to the assignment by executing the contract modification making D & H a joint payee.[606] D & H was therefore entitled to enforce the assignment against the government for its failure to make payment in accordance with the contract terms.[607] The court made it clear that

> [a] complete or partial assignment of the right to be paid the proceeds of the contract imposes an obligation on the promisor, once it has received notice of the assignment, to make payments under the contract in accordance with that assignment. The promisor can be held liable on that obligation to the assignee if the promisor makes payments to the assignor, rather than the assignee in accordance with the terms of the contract.[608]

The government, by executing the contract modification, knew of and assented to the assignment, and thus could be held liable for its breach of the contract terms.[609] In *D & H*, therefore, the Federal Circuit reaffirmed and clarified the principles of third-party beneficiary and contract assignment law.

IV. BREACH AND TERMINATION

A. Terminations for Default

A termination for default is a government claim.[610] When a contractor challenges a default termination, the government has the burden to prove that the contractor was in default.[611] Because a termination for default is a drastic sanction that subjects the contractor to forfeiture, courts strictly construe the surrounding government actions.[612] Accordingly, if the contracting officer does not reasonably exercise his discretion to terminate for default, courts will convert

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604. *See id.* (citing 31 U.S.C. § 3727 (1994); 41 U.S.C. § 15 (1994)).
605. *See id.*
606. *See id.*
607. *See id.* at 548.
608. *Id.* at 547 (citing Produce Factors Corp. v. United States, 467 F.2d 1343, 1349 (Ct. Cl. 1972)).
609. *See id.* at 546.
610. *See* Malone v. United States, 849 F.2d 1441, 1445 (Fed. Cir. 1988); Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 764-65 (Fed. Cir. 1987); Z.A.N. Co. v. United States, 6 Cl. Ct. 298, 305-06 (1984).
611. *See Lisbon Contractors*, 828 F.2d at 764-65.
612. *See* DeVito v. United States, 413 F.2d 1147, 1153 (Ct. Cl. 1969).

the default termination into a termination for the convenience of the government.[613] Furthermore, if the government carries its initial burden of proving that the contractor defaulted, the burden then shifts to the contractor to prove that it was not in default or that its default status is excusable, *i.e.*, that it arises from unforeseeable causes beyond the control and without the fault or negligence of itself, its suppliers, or its subcontractors.[614]

In *DCX, Inc. v. Perry*,[615] the Federal Circuit illustrated many of these principles in its review of the propriety of a default termination.[616] The two most important aspects of the decision affirming the ASBCA's upholding of the default termination concern: (1) whether a contracting officer's failure to consider one or more factors listed in the FAR[617] before exercising his discretion to terminate for default is fatal; and (2) when the operation of the Defense Priorities and Allocation System ("DPAS") may constitute a valid excuse for a contractor's default status.[618]

DCX contracted with the government to deliver light sets for use in medical tents.[619] The contract specified delivery of a First Article Test Report on a date certain on pain of default termination.[620] When DCX failed to deliver the test report on a revised date, the contracting officer terminated the contract for default.[621] DCX challenged the default termination before the ASBCA, which found that the government met its burden of proving that DCX did not perform in a timely fashion, and that DCX failed to meet its burden of proving that its nonperformance was excusable.[622]

DCX appealed to the Federal Circuit, where it argued that the operation of DPAS, not the negligence of DCX or its subcontractor, caused the delay in the delivery of the test report; that the contracting officer abused his discretion when he terminated the contract for default; and that the Board's decision was tainted by fraud committed by the government's attorneys.[623] The court rejected DCX's De-

613. *See* Darwin Constr. Co. v. United States, 811 F.2d 593, 598 (Fed. Cir. 1987); Schlesinger v. United States, 390 F.2d 702 (Ct. Cl. 1968); McDonnell Douglas Corp. v. United States, 35 Fed. Cl. 358, 368 (1996).

614. *See, e.g.*, 48 C.F.R. § 52.249-10(b) (1996) (supplying default termination clause for construction contracts).

615. 79 F.3d 132 (Fed. Cir.), *cert. denied*, 117 S. Ct. 480 (1996).

616. *See* DCX, Inc. v. Perry, 79 F.3d 132, 134 (Fed. Cir.), *cert. denied*, 117 S. Ct. 480 (1996).

617. 48 C.F.R. § 49.402-3(f).

618. *See DCX, Inc.*, 79 F.3d at 135.

619. *See id.* at 133.

620. *See id.*

621. *See id.*

622. *See id.* at 133-34.

623. *See id.* at 134.

fense Priorities and Allocation System argument based on the DPAS regulations themselves, which "require performance of a lower priority contract to be deferred only if 'required delivery dates [for the higher rated contract] cannot otherwise be met.'"[624] DCX argued that an "act of the Government" excused DCX's default status pursuant to the default clause.[625]

The court affirmed the Board's finding that DCX's failure to perform was attributable to its own negligence and that of its subcontractor, rather than to the operation of DPAS.[626] The court reasoned that DCX failed to prove that displacement of DCX's tests was necessary in order to meet the required delivery date of a higher priority contract.[627] Moreover, the court noted that DCX neither obtained a firm commitment from its subcontractor to deliver the test report by a date certain, nor made backup arrangements with another subcontractor in case its main subcontractor delayed or was unable to meet DCX's time of delivery requirements.[628]

The court also considered whether the contracting officer had acted arbitrarily or capriciously in terminating the contract for default.[629] DCX alleged that the contracting officer had failed to consider FAR default termination factors and obtain legal review of the termination notice.[630] The Federal Circuit upheld the ASBCA's finding that the contracting officer had complied with all required procedural regulations prior to terminating the contract.[631] Furthermore, the court noted that the FAR factors that a contracting officer must consider before terminating contracts "are not prerequisites to a valid termination," and do not confer rights on a contractor.[632] The court added, however, that:

> [C]ompliance or noncompliance with section 49.402-3(f) [which delineates the factors that contracting officers are required to consider when determining whether to default terminate a contract] may aid a Board of Contract Appeals or a court in determining whether a contracting officer has abused his discretion in terminating a contract for default.[633]

624. *Id.* at 134 (quoting 15 C.F.R. § 700.14(a)).
625. *See id.*
626. *See id.*
627. *See id.*
628. *See id.*
629. *See id.*
630. *See id.* at 135.
631. *See id.*
632. *See id.*
633. *Id.*

In sum, although the Federal Circuit has ruled definitively that the failure of a contracting officer to consider the FAR factors before terminating a contract for default will not by itself invalidate the termination decision, the manner in which the contracting officer complies with FAR 49.402-3(f) will constitute evidence regarding whether the contracting officer acted in an arbitrary or capricious manner, or abused his or her discretion in the termination process.[634]

In *Florida Department of Insurance v. United States*,[635] the Federal Circuit considered waiver of the right to terminate for default.[636] The court affirmed the Court of Federal Claims, finding that the threshold circumstances needed for a finding of waiver—the government permitting a contractor to continue substantial performance past a due date—were not present.[637] The court explained that the purpose of the waiver doctrine "is to protect contractors who are led to believe that time is no longer of the essence and undertake substantial efforts after the performance date specified in the contract has passed."[638] If a non-breaching party waives a deadline, the court held "it must set a new deadline for performance so that the parties understand when performance is required."[639]

The court found that the facts of the case provided no support whatsoever for the contractor's waiver allegation.[640] The Postal Service had initially contracted with Padula Construction Company to build a postal facility, but terminated the contract on October 18, 1988, for default for failure to make progress.[641] Padula's surety took over the contract pursuant to its performance bond agreement with Padula, promising to use its best efforts to complete the work in accordance with the terms of the original contract.[642] The Postal Service warned the surety that liquidated damages would begin to accrue once the contract's completion date passed.[643] After several months, the surety had advanced the project by no more than 10 percent.[644] The surety refused to provide the Postal Service with any

634. *See id.* at 135-36.
635. 81 F.3d 1093 (Fed. Cir. 1996).
636. *See* Florida Dep't of Ins. v. United States, 81 F.3d 1093, 1097 (Fed. Cir. 1996).
637. *See id.* at 1096 (citing DeVito v. United States, 413 F.2d 1147, 1153-54 (Ct. Cl. 1969)).
638. *Id.* (citing Olson Plumbing & Heating Co. v. United States, 602 F.2d 950, 955 (Ct. Cl. 1979)).
639. *Id.*
640. *See id.*
641. *See id.* at 1095.
642. *See id.*
643. *See id.* at 1096.
644. *See id.*

information regarding the status of its progress in April 1989.[645] The Postal Service learned in the same month that the Treasury Department would soon revoke the surety's authority to act as a federal bond surety because it had failed to meet the Department's minimum financial requirements to retain that status.[646]

The Postal Service terminated the surety's right to proceed in May 1989, for failure to make progress.[647] The surety failed to prove waiver of the schedule.[648] The Postal Service did not permit a deadline to pass and had continually reminded the surety that time was of the essence by pointing out that liquidated damages were continuing to accrue.[649] The court concluded that the surety "could not reasonably have believed that time was not of the essence or that its previous periods of delay had been excused."[650] The court also dismissed the surety's argument that it was improper for the Postal Service to terminate the contract when it did for failure to make progress.[651]

Florida Department of Insurance adds little to the Federal Circuit's jurisprudence regarding the waiver doctrine. Not surprisingly, the waiver doctrine does not apply when no deadline has passed and the government has reminded the contractor continually that time is of the essence.

B. Terminations For Convenience—Torncello *Limited*

The government has broad discretion in deciding when and under what circumstances to exercise its contractual right to terminate a contract under the termination for convenience clause.[652] One important exception seemingly was carved out in 1982, when the United States Court of Claims decided *Torncello v. United States.*[653]

The Navy awarded Torncello a requirements contract for pest control that obligated the government to procure all the pest control services it required from Torncello.[654] The Navy made the award despite its knowledge that a lower bid for one type of service was

645. *See id.*
646. *See id.*
647. *See id.*
648. *See id.*
649. *See id.* at 1097.
650. *Id.*
651. *See id.*
652. *See* Colonial Metals v. United States, 494 F.2d 1355, 1361 (Ct. Cl. 1974) (finding virtually no limitations on Government's right to terminate for convenience).
653. 681 F.2d 756 (Cl. Ct. 1982).
654. *See* Torncello v. United States, 681 F.2d 756, 758 (Ct. Cl. 1982).

submitted.[655] Subsequently, Torncello did not receive any work under the contract for that particular service because the Navy gave the work to the low bidder, the Navy Department of Public Works.[656]

In a subsequent suit for breach damages, a plurality of the court held that neither the bad faith nor the abuse of discretion restrictions sufficiently limited the government's right to invoke the termination for convenience clause.[657] The plurality concluded that the termination for convenience clause arose from the historically recognized right to settle contracts when the government no longer needed the items being purchased because of a change in the circumstances surrounding the contract.[658] The clause was intended "to allocate the risk of a change in the circumstances of the bargain or in the expectations of the parties" to the contractor.[659]

Although the Federal Circuit seems to have endorsed the "changed circumstances" test in one decision,[660] other Federal Circuit panels have limited *Torncello* to its facts and have concluded that *Torncello* merely applies the previously existing rule[661] that the government may not abuse its discretion or act in bad faith when it terminates a contract for convenience.[662] None of the recent cases, however, have addressed the issue dealt with by the plurality in *Torncello*—whether such limitations on the termination for convenience clause are sufficient to satisfy the common law requirement of consideration.

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655. *See id.*
656. *See id.*
657. *See id.* at 764-66.
658. *See id.*
659. *See id.* at 766.
660. *See* Maxima Corp. v. United States, 847 F.2d 1549, 1552 (Fed. Cir. 1988) (noting that the "fundamental purpose" of termination for convenience clause is "to reduce government liability for breach of contract, by allocating to contractor a share of the risk of unexpected change in circumstances"); *cf.* Salsbury Indus. v. United States, 985 F.2d 1518, 1522 (Fed. Cir. 1990) (recognizing that there had been "an unanticipated change in circumstances, not merely justifying but compelling termination of the contract").
661. *See, e.g.*, Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578, 1582 (Fed. Cir. 1995) (stating that bad faith "is a prerequisite for a *Torncello* claim"); *Salsbury Indus.*, 985 F.2d at 1521 (explaining that *Torncello* "stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the termination for convenience clause"); Advance Materials, Inc. v. United States, 34 Fed. Cl. 480, 482-83 (1995) (interpreting *Torncello* to require actual knowledge of an intent not to perform at the time of contract formation); Modern Sys. Tech. Corp. v. United States, 24 Cl. Ct. 699, 704 n.5 (limiting *Torncello* to instances in which government did not intend to honor contract when contract was made), *aff'd mem.*, 980 F.2d 745 (Fed. Cir. 1992).
662. *See* Kalvar Corp. v. United States, 543 F.2d 1298, 1302 (Ct. Cl. 1976) (enunciating rule that abuse of discretion or bad faith, which are evidenced by a specific intent to malign, are grounds to overturn convenience termination decisions).

Recently, the Federal Circuit again addressed and narrowly construed *Torncello* in *Krygoski Construction Co. v. United States.*[663] The panel in *Krygoski* found that the changed circumstances test was merely an application of the *Kalvar* bad faith test[664] and concluded that in *Torncello* the changed circumstances test had been "articulated in dicta."[665]

In *Krygoski,* the Army Corps of Engineers ("Corps") contracted for the demolition of an abandoned Air Force missile site.[666] The contract required removal and disposal of asbestos.[667] A Variation in Estimated Quantities ("VEQ") clause anticipated variations in asbestos quantity in certain areas.[668] While conducting a predemolition survey, Krygoski identified possibly significant additional quantities of asbestos that were not covered by the VEQ clause.[669] Corps experts estimated that removal of this additional quantity of asbestos would increase the asbestos removal cost from 10 percent of the total contract cost, which the parties contemplated originally, to about 50 percent.[670] Relying on an unwritten "rule of thumb," the contracting officer considered such a price increase to be a "cardinal change" in the contract.[671] The contracting officer terminated the contract for convenience and resolicited bids based on revised specifications.[672] Krygoski unsuccessfully bid on the new contract, and sued in the CFC for breach of the original contract.[673] The CFC, relying on *Torncello,* found no change of circumstances sufficient to justify the termination for convenience and, alternatively, that the government had abused its discretion under the test articulated in *Kalvar*[674] in terminating the contract.[675]

The Federal Circuit reversed, holding that the CFC incorrectly relied on dicta in the *Torncello* plurality decision. The *Torncello* "changed circumstances" language "applies only when the Government enters a contract with no intention of fulfilling its promis-

663. 94 F.3d 1537 (Fed. Cir. 1996), *cert. denied,* 117 S. Ct. 1691 (1997).
664. *See Kalvar,* 543 F.2d at 1302 (requiring showing that decision to terminate for convenience was motivated by "some specific intent to injure the plaintiff").
665. Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1541 (Fed. Cir. 1996).
666. *See id.* at 1538.
667. *See id.*
668. *See id.* at 1539.
669. *See id.*
670. *See id.*
671. *See id.*
672. *See id.* at 1540.
673. *See id.*
674. *See* Kalvar Corp. v. United States, 543 F.2d 1298, 1302 (Ct. Cl. 1976).
675. *See Krygoski,* 94 F.3d at 1540.

es."[676] Otherwise the case turns on the *Kalvar* bad faith/abuse of discretion test. The court determined that the Competition in Contracting Act ("CICA"),[677] which compels the promulgation of regulations and procedures to ensure full and open competition in contracting,[678] sufficiently addressed the concerns of the *Torncello* plurality regarding the Government's shopping for lower prices after the contract award.[679] CICA's competitive fairness requirement provides the additional restraint on a contracting officer's contract administration, under which contracting officers have no incentive to terminate a contract for convenience except to maintain full and open competition under CICA.[680]

The court found that the contracting officer did not act in bad faith or abuse his discretion because he had a reasonable basis for terminating the contract and conducting a competitive reprocurement: the increased asbestos removal constituted a cardinal change.[681] Krygoski's predemolition survey found that asbestos would need to be removed from large areas not contemplated by the contract, and that the contract had no provision to increase the cost of the contract to compensate for the additional work.[682] Recompetition permitted bidders to compete for a contract that depicted more accurately and allowed for variations in the required amount of asbestos removal.[683] Although the Federal Circuit denied Krygoski's petition for an in banc rehearing on November 7, 1996,[684] Krygoski filed a petition for a writ of certiorari in the Supreme Court on February 5, 1997.[685]

C. Breach of Contract—Common Law Damages Must Be Foreseeable

Once a tribunal has ruled that a party has breached a contract, the next issue is the measure of damages that the nonbreaching party is entitled to recover.[686] The common law generally limits recovery in

676. *Id.* at 1545.
677. 10 U.S.C. § 2304 (1994). The authors note, however, that CICA did not purport to change the language or meaning of the termination for convenience clause. *See generally* S. REP. NOS. 98-50 and 98-297 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2174-2221.
678. *See Krygoski*, 94 F.3d at 1542.
679. *See id.* at 1542-44.
680. *See id.* at 1543.
681. *See id.* at 1544-45.
682. *See id.*
683. *See id.*
684. *See* Krygoski Constr. Co. v. United States, 1996 U.S. App. LEXIS 30308 (Fed. Cir. Nov. 7, 1996).
685. *See* Krygoski Constr. Co. v. United States, 117 S. Ct. 1691 (1997), *denying cert. to* 94 F.3d 1537 (Fed. Cir. 1996).
686. *See* RESTATEMENT, *supra* note 324, § 326 (outlining remedies for contractual breaches).

such circumstances to an amount that would put the non-breaching party in the position he or she would have been in had the contract been performed,[687] including consequential damages that were "reasonably foreseeable as a probable result of the breach when the contract was made."[688]

As discussed above, the Federal Circuit ruled in *Wells Fargo Bank v. United States*,[689] that the government breached its contract with Wells Fargo by refusing to guarantee a loan that it had conditionally promised to guarantee after Wells Fargo had met the conditions and had performed by issuing the loan.[690] The trial court awarded Wells Fargo over $10.5 million in lost profits,[691] as well as $389,000 that Wells Fargo lost as a consequence of forgiving High Plains' indebtedness in return for proceeds of High Plains' public stock offering.[692]

The Federal Circuit reversed the trial court's ruling that awarded Wells Fargo the $10.5 million in lost profits.[693] The court determined that the entire amount could only have been earned by Wells Fargo through business transactions unrelated to the breached contract in question, and, as such, were not foreseeable to the government at the time of contracting.[694]

Although the Federal Circuit did not overrule the trial court's factual findings as clearly erroneous, the court rejected the trial court's finding that no intervening causal step existed between the government's breach and the lost profit damages claimed by Wells

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687. *See id.* § 347 cmt. a.

688. *Id.* § 35; *see also id.* § 351 cmt. c ("The party in breach is liable for the amount of any judgment against the injured party together with his reasonable expenditures in the litigation, if the party in breach had reason to foresee such expenditures as the probable result of his breach at the time he made the contract."); 5 A. CORBIN, CORBIN ON CONTRACTS § 1010, at 79 (1964); E. FARNSWORTH CONTRACTS § 12.14 (1982).

689. 88 F.3d 1012, 1022 (Fed. Cir. 1996) (defining consequential damages as what reasonable men in the parties' shoes would have foreseen at time of contracting), *cert. denied*, 117 S. Ct. 1245 (1997).

690. *See* Wells Fargo Bank v. United States, 88 F.3d 1012, 1016-18 (Fed. Cir. 1996), *cert. denied*, 117 S. Ct. 1245 (1997).

691. *See id.* at 1018. The lost profits consisted of amounts that Wells Fargo lost as a result of not being able to make loans because it had to charge off the amount it loaned to the debtor. *See id.* This resulted in an equal reduction in Wells Fargo's capital. *See id.* This capital reduction lessened the ability of Wells Fargo to make loans of up to 15 times the amount of the charge-off amount—which constituted the approximate capital leverage ratio for the bank at that time. *See id.* at 1022. According to Wells Fargo's expert, the lost income on the foregone loans totaled approximately over $6.85 million. *See id.* "In addition, the risky nature of its loan to the debtor precluded Wells Fargo from treating interest payments it received on the loan as income." *Id.* This additional capital would have permitted Wells Fargo, according to its expert, to earn over $3.65 million in interest income off of these additional loans. *See id.*

692. *See id.* at 1022.

693. *See id.* at 1022-23.

694. *See id.* at 1023-24.

Fargo.[695] Instead, the court found that the potential loans to third parties that Wells Fargo claimed it would have undertaken absent the loss in capital occasioned by the government's breach were "transactions not directly related to the contract that was breached."[696] Thus, interest earned on those loans was "too uncertain and remote to be taken into consideration as a part of the damages."[697] Despite the trial court's findings to the contrary, these damages were not foreseeable because the purpose of the guarantee was to enable Wells Fargo to make profits on the High Plains loan, not other loans unrelated to the transaction in issue.[698] For this reason, the court affirmed the trial court's ruling of the $389,000 that Wells Fargo wrote off as a direct result of the failure of the government to guarantee the loan.[699]

Although the Federal Circuit continues to protect contractors when the government breaches its obligations, contractors may be left without an adequate remedy as a result of this decision. Because the Federal Circuit did not take issue with the trial court's factual findings, the court apparently applied a special rule on damages recovered against the government. Under that rule, lost profits and other damages that may be recovered when commercial contracts are breached apparently may not be recovered when the government breaches its contracts.

CONCLUSION

For the Federal Circuit, 1996 was a year of consolidation in the area of government contract law. None of the 1996 cases individually represents a major landmark in the development of the law. The year's decisions, however, do reflect a notable development of trends established in prior years.

Most important, the Federal Circuit continued its resolve not to permit procedural or jurisdictional traps to distract the parties from the merits of dispute resolution. Cases decided both in favor of contractors and in favor of the government reflect a principled focus on the substantive merits of the dispute, rather than procedural formalities.

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695. *See id.*
696. *Id.* at 1022 (citing Roberts v. United States, 18 Cl. Ct. 351, 358 (1989) (collecting Court of Claims cases)).
697. *Id.* at 1023 (citing Ramsey v. United States, 121 Ct. Cl. 426 (1951)).
698. *See id.* at 1024.
699. *See id.* at 1024-25.

The Federal Circuit also reviewed a number of GSBCA appeals, affirming the deferential standard of review appropriate for bid protest tribunals. Although Congress has repealed the GSBCA's jurisdiction over such protests, these decisions will provide standards that presumably will be applied by the Court of Federal Claims and the federal district courts in their newly expanded protest jurisdiction.

In the areas of breach and terminations, the Federal Circuit put contractors on notice that they will have no legal remedy for a procedural error by the government absent a showing of prejudice.

Likewise, after the Federal Circuit revisited for the fourth time in six years the issue of the right of the government to terminate contracts for convenience, the impact of *Torncello* clearly has been limited—although to what extent most likely will be the subject of future litigation in the Federal Circuit.

Finally, the Federal Circuit indicated that contractors must meet stringent standards of proof to recover lost profits under breach of contract theories. The *Winstar*-related plaintiffs will have to prove that their lost profits damages were reasonably foreseeable from the outset. In sum, with the exception of the decision in *Krygoski*, 1996 was a year of refinement in the United States Court of Appeals for the Federal Circuit.