

AREA SUMMARIES

A SURVEY OF GOVERNMENT CONTRACT CASES DECIDED BY THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT IN 1994*

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INTRODUCTION

The year 1994 was a modestly productive, if not momentous, year for the Court of Appeals for the Federal Circuit in the Government contracts area. The Federal Circuit issued twenty-two precedential decisions concerning Government contracts in 1994, compared to forty decisions in 1993,¹ thirty-one decisions in 1992² and twenty-six decisions in 1991.³ While no single 1994 decision was a precedential bombshell, collectively these twenty-two precedential decisions covered a wide variety of Government contracts issues and will contribute to

1. See Richard B. Clifford, Jr. et al., *Government Contract Cases Before the Court of Appeals for the Federal Circuit*, 43 AM. U. L. REV. 1417, 1418 (1994) (mentioning number of important cases in 1993).

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

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

the body of modern federal Government contracts law. Fortunately, more of the court's attention in 1994 was devoted to issues of substance, and less to fine points of jurisdiction and procedure, than in some past years.

Half of the Federal Circuit's twenty-two precedential Government contracts decisions during 1994 came to the court from the United States Court of Federal Claims⁴ and half came from one of three boards of contract appeals.⁵ In fourteen cases, the Federal Circuit affirmed the decision below;⁶ in six cases it reversed or vacated;⁷ and in two cases it affirmed in part and reversed in part.⁸ The Government fared considerably better in 1994 than did private parties, prevailing in fourteen cases,⁹ losing in seven cases,¹⁰ and splitting the difference in one case.¹¹

A reasonable degree of harmony prevailed at the Federal Circuit in its Government contracts decisions during 1994. Seventeen of the twenty-two precedential decisions drew no dissenting opinion at all.

4. See *A-Transport Northwest Co. v. United States*, 36 F.3d 1576 (Fed. Cir. 1994); *Parcel 49C Ltd. Partnership v. United States*, 31 F.3d 1147 (Fed. Cir. 1994); *City of Tacoma v. United States*, 31 F.3d 1130 (Fed. Cir. 1994); *Wilner v. United States*, 24 F.3d 1397 (Fed. Cir. 1994); *Bank of Am. v. United States*, 23 F.3d 380 (Fed. Cir. 1994); *Bath Iron Works, Corp. v. United States*, 20 F.3d 1567 (Fed. Cir. 1994); *Hoskins Lumber Co. v. United States*, 20 F.3d 1144 (Fed. Cir. 1994); *Dairyland Power Coop. v. United States*, 16 F.3d 1197 (Fed. Cir. 1994); *Young-Montenay, Inc. v. United States*, 15 F.3d 1040 (Fed. Cir. 1994).

5. See *Cleveland Telecommunications Corp. v. Goldin*, 43 F.3d 655 (Fed. Cir. 1994); *West Coast Gen. v. Dalton*, 39 F.3d 312 (Fed. Cir. 1994); *Reflectone, Inc. v. Kelso*, 34 F.3d 1031 (Fed. Cir. 1994); *M. Bianchi of Cal. v. Perry*, 31 F.3d 1163 (Fed. Cir. 1994); *Interwest Constr. v. Brown*, 29 F.3d 611 (Fed. Cir. 1994); *Arnold M. Diamond, Inc. v. Dalton*, 25 F.3d 1006 (Fed. Cir. 1994); *General Motors Corp. v. Aspin*, 24 F.3d 1376 (Fed. Cir. 1994); *Santa Fe Eng'rs, Inc. v. Kelso*, 19 F.3d 39 (Fed. Cir. 1994); *Sterling Fed. Sys., Inc. v. Goldin*, 16 F.3d 1177 (Fed. Cir. 1994); *Kelso v. Kirk Bros. Mechanical Contractors, Inc.*, 16 F.3d 1173 (Fed. Cir. 1994); *Grumman Data Sys. Corp. v. Widnall*, 15 F.3d 1044 (Fed. Cir. 1994); *Kimbrell v. Fischer*, 15 F.3d 175 (Fed. Cir. 1994); *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574 (Fed. Cir. 1994).

6. See *Cleveland Telecommunications*, 43 F.3d at 655; *Bonneville Assocs. v. United States*, 43 F.3d 649 (Fed. Cir. 1994); *Hercules Painting Co. v. Widnall*, 40 F.3d 1230 (Fed. Cir. 1994); *West Coast Gen. v. Dalton*, 39 F.3d 312 (Fed. Cir. 1994); *A-Transport*, 36 F.3d at 1576; *City of Tacoma*, 31 F.3d at 1130; *Interwest Construction*, 29 F.3d at 611; *Hercules, Inc. v. United States*, 24 F.3d 188 (Fed. Cir. 1994); *Bath Iron Works*, 20 F.3d at 1567; *Dairyland Power*, 16 F.3d at 1197; *Grumman Data Systems*, 15 F.3d at 1044; *Kimbrell*, 15 F.3d at 175; *Young-Montenay*, 15 F.3d at 1040; *Wickham*, 12 F.3d at 1574.

7. See *Bianchi*, 31 F.3d at 1163; *Diamond*, 25 F.3d at 1006; *Wilner*, 24 F.3d at 1397; *General Motors*, 24 F.3d at 1376; *Bank of America*, 23 F.3d at 380; *Sterling Federal*, 16 F.3d at 1177.

8. See *Hoskins*, 20 F.3d at 1144; *Kirk Brothers*, 16 F.3d at 1173.

9. See *Cleveland Telecommunications*, 43 F.3d at 655; *Bonneville Associates*, 43 F.3d at 649; *Hercules Painting*, 40 F.3d at 1230; *West Coast Gen.*, 39 F.3d at 312; *A-Transport*, 36 F.3d at 1576; *Bianchi*, 31 F.3d at 1163; *General Motors*, 24 F.3d at 1376; *Hercules*, 24 F.3d at 188; *Hoskins*, 20 F.3d at 1144; *Dairyland Power*, 16 F.3d at 1197; *Kirk Brothers*, 16 F.3d at 1173; *Grumman Data Systems*, 15 F.3d at 1044; *Young-Montenay*, 15 F.3d at 1040; *Kimbrell*, 15 F.3d at 175; *Wickham*, 12 F.3d at 1574.

10. See *Parcel 49C*, 31 F.3d at 1147; *Interwest Construction*, 29 F.3d at 611; *Diamond*, 25 F.3d at 1006; *Wilner*, 24 F.3d at 1397; *Bank of America*, 23 F.3d at 380; *Bath Iron Works*, 20 F.3d at 1567; *Sterling Federal*, 16 F.3d at 1177.

11. See *City of Tacoma*, 31 F.3d at 1130.

Of the five cases decided by a divided court, four cases were decided by two-to-one margins.¹² The court's single en banc decision this year, which reversed a precedent of almost thirty years' standing, drew two dissents.¹³ Judge Newman found herself to be an independent thinker on Government contracts topics more often than any other judge on the Federal Circuit; she filed dissenting opinions in four cases decided during 1994.¹⁴

Part I of this Article examines seven decisions that addressed issues of contract formation. Part II analyzes eight cases that posed issues of interpretation, performance or contract administration (one of these cases overlaps with issues discussed in Part I). Part III discusses two opinions that concern contract breach and termination, and Part IV addresses six decisions that concern procedural issues that arise in the dispute resolution procedures that are unique to the context of government contracting.

I. CONTRACT FORMATION

A. *Government's Duty to Conduct a Fair Procurement*

Since the Court of Claims' decision in *Heyer Products Co. v. United States*,¹⁵ the courts have recognized that the Government owes a legal duty to prospective contractors to conduct a fair procurement.¹⁶ By issuing a solicitation and inviting bidders to invest their time and money in preparing bids, the Government implicitly promises that it will honestly, fairly, and impartially consider each bid.¹⁷ Subsequent court decisions have reaffirmed and applied the holding of *Heyer Products* in a variety of contexts. Even in the face of the judicial presumption that government officials properly perform their official

12. See *Hercules Painting*, 40 F.3d at 1230; *West Coast General*, 39 F.3d at 312; *Interwest Construction*, 29 F.3d at 611; *Hercules*, 24 F.3d at 188; *Hoskins*, 20 F.3d. at 1144.

13. See *Wilner*, 24 F.3d at 1397.

14. See *West Coast General*, 39 F.3d at 312; *Interwest Construction*, 29 F.3d at 611; *Wilner*, 24 F.3d at 1397; *Hoskins*, 20 F.3d. at 1144.

15. 140 F. Supp. 409 (Ct. Cl. 1956).

16. See *Heyer Prods. Co. v. United States*, 140 F. Supp. 409, 413 (Ct. Cl. 1956) (stating that prospective contractor has right to have bid honestly reviewed).

17. See *id.* (holding that Government has obligation to consider honestly and fairly all bids because of costs incurred by prospective contractors in bid preparation). In the end, Heyer lost its case, because it could not prove that the Government had acted arbitrarily, capriciously, or in bad faith. See *Heyer Prods. Co. v. United States*, 177 F. Supp. 251, 252 (Ct. Cl. 1959). The Court of Claims found that the Government's rejection of Heyer's bid did not reflect an arbitrary, capricious, or unreasonable act because the bid did not comply with the specifications in the solicitation. *Id.* at 253-57.

duties, courts have sometimes held that the Government breached its duty to conduct a fair procurement.¹⁸

In *Parcel 49C Limited Partnership v. United States*,¹⁹ the Federal Circuit held that the Government's pretextual cancellation of a solicitation violated its duty to conduct a fair procurement.²⁰ The solicitation, issued by the General Services Administration (GSA), sought building space for relocating the headquarters of the Federal Communications Commission (FCC).²¹ The solicitation set forth the FCC's needs as to square footage, occupancy dates, and geographical areas.²² At the time, the FCC was located in a "fashionable district" of northwest Washington, D.C.²³ During the course of the procurement, the FCC asked the GSA to cancel the solicitation and to restrict the geographical area, thereby excluding "the less desirable southwest quadrant of Washington, D.C."²⁴ where Parcel 49C's site was located.²⁵ The FCC stated that it preferred to remain close to the offices of communications industry representatives.²⁶ The GSA refused to revise the solicitation.²⁷

The FCC did not give up. It tried, without success, to persuade the GSA to award the contract to another offeror, even though the offeror's rent exceeded the authorized ceiling and its square footage

18. See *Prineville Sawmill Co. v. United States*, 859 F.2d 905, 915 (Fed. Cir. 1988) (holding that Government's rejection of all bids after completing live auction for sale of timber was arbitrary and capricious). The United States Forest Service overestimated the number of trees available and therefore sought to reject all bids and resolicit new bids for the correct number of trees. *Id.* at 908. The Federal Circuit held that the Forest Service's rejection of all bids, resulting from its own error concerning the number of trees, constituted an abuse of discretion, as well as an unreasonable and capricious act. *Id.* at 911-15; see also *Keco Indus. v. United States*, 428 F.2d 1233, 1239 (Ct. Cl. 1970) (denying Government's motion for summary judgment because Government allegedly had actual or constructive knowledge that successful bidder's air conditioning units would not work). Because the successful bidder's model would not work, the Government would, by accepting this bid, eventually have to pay more than the original contract price to receive a workable model. *Id.* at 1239-40. The Court of Claims reasoned that this constituted an arbitrary and capricious action because the Government should have rejected this faulty bid as unresponsive because it did not comply with the specifications in the solicitation. *Id.* Like *Heyer*, *Keco* ultimately lost its case for failure of proof because it failed to establish that the Government actually knew that the competitor's model was unworkable. *Keco Indus. v. United States*, 492 F.2d 1200, 1202 (Ct. Cl. 1974).

19. 31 F.3d 1147 (Fed. Cir.), *affg in part and modifying in part*, 39 Cont. Cas. Fed. (CCH) ¶ 76,689, at 89,357 (Ct. Fed. Cl. 1994).

20. See *Parcel 49C Ltd. Partnership v. United States*, 31 F.3d 1147, 1151-52 (Fed. Cir. 1994) (upholding Court of Federal Claims' determination that Government lacked valid reasons for cancellation of contract and therefore breached its duty to conduct fair procurements).

21. *Id.* at 1148.

22. *Id.* at 1148-49.

23. *Id.* at 1149.

24. *Id.* at 1153.

25. *Id.*

26. *Id.* at 1149.

27. *Id.*

barely met the FCC's stated needs.²⁸ After the FCC learned that the GSA had selected Parcel 49C's offer, the "FCC responded with a campaign to scuttle the procurement."²⁹ To this end, the FCC conceded error in a pending Government Accounting Office (GAO) protest, which had challenged the solicitation's mandatory occupancy dates.³⁰ One week later, the FCC formally advised the GSA that its space requirements had increased, and on that basis the GSA canceled the solicitation.³¹

Parcel 49C challenged the GSA's action in the Court of Federal Claims.³² After a bench trial, the court found that the GSA's stated reason for canceling the solicitation was merely a pretext for allowing the FCC to scuttle the selected site³³ at Parcel 49C. The trial court held that the GSA abused its discretion in canceling the solicitation³⁴ and enjoined the GSA to complete the procurement in accordance with the solicitation.³⁵

The Federal Circuit affirmed, finding that the Government's arguments were mere "attempts to preserve its ill-gotten gain."³⁶ The Federal Circuit found that the record amply supported the lower court's conclusion that the GSA's "pretextual and incredible"³⁷ justifications for canceling the procurement violated the notions of fair procurement.³⁸ The Federal Circuit determined that, not only did the Government lack a valid reason to cancel the procurement,³⁹ but also the solicitation's cancellation was permeated with illegality.⁴⁰ The GSA and other government officials did not have discretionary power to yield to the FCC's pressure.⁴¹ Under the circumstances of

28. *Id.* Warner Theater Associates' offer to rent the Warner Building, located on Pennsylvania Avenue, comprised the other bid in the solicitation. *Id.* at 1149. The FCC desired the Warner Building over the building space offered by Parcel 49C because of the Warner Building's location in northwest Washington, D.C., but the space in the Warner Building barely met the FCC's requirements. *Id.*

29. *Id.*

30. *Id.* An offeror whose bid was rejected as nonresponsive instigated the protest because it contended that the date for occupancy constituted too restrictive a solicitation. *Id.* Upon hearing of the award of the contract to Parcel 49C, the FCC only conceded that the solicitation requiring such urgent occupancy dates was indeed too restrictive. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 1151.

34. *Id.* at 1150-51.

35. *Id.* at 1149.

36. *Id.* at 1153.

37. *Id.* at 1151.

38. *Id.*

39. *Id.*

40. *See id.* at 1153 (declaring that procurement law does not allow administrative officials' "personal predilections" to affect process).

41. *Id.* at 1153-54.

this case, the Federal Circuit agreed that the Government's actions constituted arbitrary and capricious action, and, therefore, violated its implied contractual duty to conduct a fair procurement.⁴² The Federal Circuit preferred injunctive relief, rather than resolicitation, as the appropriate remedy.⁴³

Parcel 49C unequivocally reaffirms the Government's duty to consider all bids fairly and honestly. In an era when the costs of responding to a federal solicitation are soaring, and some disillusioned contractors are abandoning the federal marketplace altogether, this decision is timely in restating the requirement that the Government must conduct its procurements fairly.⁴⁴

Parcel 49C also fills a needed gap in the case law concerning the cancellation of solicitations.⁴⁵ Such a cancellation can be a manipulative tool when in the hands of a result-oriented contracting officer, and the limited "reasonableness" review afforded by the GAO seldom permits the fairness of the cancellation to be considered.⁴⁶ The Federal Circuit's opinion is also noteworthy in demonstrating a lack of patience for legal arguments that attempt to justify a result that simply does not pass the court's "smell test." Only time will tell whether the GAO applies the *Parcel 49C* holding with the same vigor with which the Court of Federal Claims and the Federal Circuit decided the case.

B. Contractual Validity—Offer and Acceptance

The essence of a common law contract is "a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."⁴⁷ The bargain normally manifests itself in an "offer"⁴⁸ and

42. *Id.* at 1153.

43. *Id.* Neither the Court of Federal Claims nor the Federal Circuit ordered that the contract be awarded to *Parcel 49C*, even though the GSA had selected that bidder. The Federal Circuit ordered injunctive relief in an attempt to restore this solicitation and contract award to the realm of a lawful proceeding. *Id.* The Federal Circuit believed that resolicitation would not accomplish its goals of providing a fair system of acquisition and would amount to nothing more than an admonishment of the FCC's and the GSA's behavior. *Id.* at 1154. The court viewed the injunction as a tool to remove all traces of illegality surrounding the solicitation without interfering with the process of bid selection. *Id.*

44. See John Cibinic, *Cancellation of Solicitations: Are Bids and Proposals Sweeter the Second Time Around?*, 7 NASH & CIBINIC REP. ¶ 36, at 102 (1993) (stating that cancellation and resolicitation should be used cautiously, mindful of time and expense concerns).

45. See generally *id.* at 98-102 (describing and distinguishing mandatory and discretionary standards for cancellation of solicitations set out in regulations).

46. See Anvan Realty & Management Co., Comp. Gen. B-214295, 84-1 CPD ¶ 548 (1984) (dismissing protest against geographical gerrymandering by GSA as "academic" once GSA canceled solicitation).

47. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981) [hereinafter RESTATEMENT].

48. See *id.* § 24 (defining "offer" as clearly demonstrated intent to enter into bargain).

an "acceptance."⁴⁹ In government contracting under the Federal Acquisition Regulation (FAR),⁵⁰ the process of offer and acceptance usually involves (1) the Government's issuance of an invitation for bids or a request for proposals; (2) the contractor's making a bid or a proposal; and (3) the Government's acceptance by issuing a formal notice of award.⁵¹ Because some government procurements do not fit this model, such as certain contracts for transportation services, the FAR does not always apply.⁵² In these situations, the Government solicits an offer or "tender" of services from a carrier and, during the term of that tender, issues a Government Bill of Lading (GBL) for the services required.⁵³ In some instances, the GBL constitutes the contract,⁵⁴ while in other situations, the courts find that contract formation occurred at some earlier point in the parties' dealings.⁵⁵

In *A-Transport Northwest Co. v. United States*,⁵⁶ the Federal Circuit held that a tender agreement executed by a carrier constituted a binding "conventional requirements contract" between the parties.⁵⁷ The Government's solicitation sought tenders from Seattle-based trucking firms to transport perishable goods to government installations in the Pacific Northwest during a twenty-four-month period.⁵⁸

49. See *id.* § 50 (defining "acceptance" as either intent or action that demonstrates to other party intent to accept terms of offer).

50. See generally Federal Acquisition Regulation (FAR), 48 C.F.R. ch. 1 (1994). The FAR System attempts to establish uniform procedures of acquisition throughout federal agencies. This system consists of the FAR, the central document that sets out the regulations regarding acquisitions, and supplemental regulations of the individual agencies. RALPH C. NASH, JR. & STEVEN L. SCHOONER, *THE GOVERNMENT CONTRACTS REFERENCE BOOK* 172-73 (1992) [hereinafter NASH & SCHOONER].

51. See 48 C.F.R. §§ 14.201 to .408-2, 15.400 to .416, 15.600 to .613, 15.1002 (1994) (advancing regulations concerning solicitation of bids, negotiations in procurement, and source selection).

52. See *id.* § 47.200(b)(2)-(3) (stating that usual system of acquisition does not apply to freight transportation requiring bills of lading).

53. See *id.* §§ 47.200 to .207-9 (setting out regulations of transportation contracts).

54. See, e.g., *Southern Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342 (1982) (stating that transportation contract consisted of bill of lading and that terms of bill bound all parties involved); *Baggett Transp. Co. v. United States*, 23 Cl. Ct. 263, 271 (1991) (declaring that terms of parties' contractual relationship, as between carrier and shipper, consisted of tender and tariff representing offer and GBL representing acceptance), *aff'd*, 969 F.2d 1028 (Fed. Cir. 1992); *C & H Transp. Co. v. United States*, 436 F.2d 480 (Cl. Ct. 1971) (holding that shipper's tenders constituted continuing offers to Government and therefore became binding on Government's acceptance).

55. See *Port Arthur Towing Co.*, ASBCA No. 37516, 89-3 B.C.A. (CCH) ¶ 22,004, at 110,629-30 (1989) (jurisdictional decision) (noting that GBLs represent part of payment scheme of contract), *appeal denied*, 90-2 B.C.A. (CCH) ¶ 22,857, at 114,822 (1990) (merits decision); *In re Federal Transp., Inc.* 68 Comp. Gen. 451, B-233393.3, 89-1 CPD ¶ 542 (1989) (declaring that rate tenders represent offers to perform transportation).

56. 36 F.3d 1576 (Fed. Cir. 1994), *aff'g* 27 Cl. Ct. 206 (1992).

57. See *A-Transport Northwest Co. v. United States*, 36 F.3d 1576, 1581 (Fed. Cir. 1994).

58. *Id.* at 1577.

The solicitation included a formal Tender Agreement to be executed by firms that submitted a tender.⁵⁹

A-Transport submitted its tender together with an executed copy of the Tender Agreement.⁶⁰ The Government selected A-Transport as the primary carrier for twenty-three routes and notified the firm of its acceptance of the tender for those routes.⁶¹ Thereafter, the Government and A-Transport executed a no-cost modification of the Tender Agreement to revise loading and delivery schedules.⁶² When the Government tried to obtain a second no-cost modification, A-Transport refused.⁶³ The Government decided to revoke the tenders it had awarded, resolicit its requirements, and award new tenders for the balance of the original two-year period.⁶⁴

After A-Transport received five fewer routes than it had received from the original Government tender, it submitted a claim for lost profits, alleging that the Government's resolicitation breached the Tender Agreement.⁶⁵ A-Transport also alleged that the Government's actions reflected a bad faith attempt to eliminate A-Transport as a government contractor.⁶⁶ When the Government refused to grant the claim, A-Transport sued in the Court of Federal Claims, challenging the Government's right to resolicit tenders without breaching the contracts previously awarded.⁶⁷ The Government argued, among other things, that the Tender Agreement did not constitute an enforceable contract, and that the Government was contractually bound if, and only to the extent that, it issued GBLs.⁶⁸ On cross-motions for summary judgment, the Court of Federal Claims found that the Tender Agreement constituted a binding contract, but found no breach by the Government.⁶⁹

The Federal Circuit affirmed the Court of Federal Claims' grant of summary judgment to the Government.⁷⁰ In doing so, the Federal Circuit agreed with the lower court's analysis, holding that the Tender

59. *Id.*

60. *Id.*

61. *Id.* at 1578.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 1579.

67. *Id.* at 1578.

68. *See id.* at 1581 (explaining that Government viewed Tender Agreement as continuing offer and not contract).

69. *See id.* at 1584 (holding that Government did not breach contract because terms allowed modification when Government's requirements were altered).

70. *Id.* at 1585.

Agreement constituted a binding contract between the parties.⁷¹ The Government argued that the Tender Agreement was merely a continuing offer by A-Transport to perform services on the stated terms, and that the carrier's offer was only accepted when the Government issued a GBL.⁷² The Government further argued against finding that the Tender Agreement was a contract by asserting that the process of establishing and enforcing the Tender Agreement did not reflect FAR-like procedures because the Tender Agreement lacked many of the traditional indicia of government contracting, as well as any obligation on the part of the Government.⁷³

The Federal Circuit, "[o]n the facts of this case,"⁷⁴ disagreed with the Government's argument, viewing the solicitation as a clear invitation for the carrier to bid.⁷⁵ Upon receipt of the carrier's tender, the Government had the power to create a contract by accepting A-Transport's offer.⁷⁶ The Government accepted that offer by informing the carriers of their specific routes and installations.⁷⁷ The court found that these actions by the Government formed a binding contract.⁷⁸

The Federal Circuit rejected the Government's argument that the conventional trappings of Government contracting were lacking:

For one thing, the procurement was accomplished through formal procedures not unlike those of FAR. For another, the dispositive issue is whether there was an "offer" and an "acceptance," i.e., a meeting of the minds from an objective standpoint, supported by mutuality of consideration . . . not whether every conceivable detail had been spelled out in the contract.⁷⁹

The court also found a mutuality of consideration because the contract, which was a conventional requirements contract, provided adequate consideration in the Government's obligation to use the carrier on an exclusive basis for the routes in question.⁸⁰ The fact that the Government had not issued GBLs did not mean that a predecessor document, such as the Tender Agreement, could not

71. *Id.* at 1581.

72. *Id.*

73. *Id.* (highlighting Government's arguments on proper characterization of Tender Agreement).

74. *Id.* at 1581, 1584.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

itself comprise a binding contract,⁸¹ although the court noted that GBLs may also impose additional contractual obligations on the parties.⁸²

The court's opinion in *A-Transport* validates prior decisions of the Armed Services Board of Contract Appeals (ASBCA) and the GAO, upon which the Federal Circuit relied.⁸³ *A-Transport* is remarkable only because the case was litigated in the first place, and therefore the opinion had to be written. It breaks no new legal ground; indeed, it almost mechanically applies hornbook principles of "offer" and "acceptance." *A-Transport* illustrates that by fixating upon the regulatory aspects of government contracting, one can forget that government contracts law is, at bottom, *contracts* law.

C. Contractual Validity—The Duty to Negotiate in Good Faith

Under general contract law, a "promise" that does not really obligate the "promisor" to do anything is illusory and cannot serve as consideration to support a contract.⁸⁴ Such a flaw in contract formation undermines the validity of a contract, unless the court interprets the illusory promise to have some substance⁸⁵ or implies another promise to rescue the contract from attack for failure of consideration.⁸⁶ One of the principal doctrines by which courts spare contracts from invalidity has been the implied duty of good faith and fair dealing. For commercial contracts, the Uniform Commercial Code (UCC) recognizes that duty by statute,⁸⁷ and the *Restatement (Second) of Contracts* reflects the recognition of that duty at

81. *Id.*

82. *Id.*

83. See *supra* notes 56-69 and accompanying text (maintaining that actions involving tenders and GBLs can create valid contracts).

84. See RESTATEMENT, *supra* note 47, § 77 (explaining illusory promises as apparent promises that do not bind promisor).

85. See E. ALLAN FARNSWORTH, CONTRACTS § 2.13 (1990) (stating that courts have interpreted illusory promises to confer nonillusory meaning so as to make contracts enforceable where parties have established clear intent to enter into contract).

86. See *Wood v. Lucy, Lady Duff Gordon*, 118 N.E. 214, 215 (N.Y. 1917) (Cardozo, J.) (interpreting exclusive marketing contract as containing implied obligation to make reasonable efforts to market products in question).

87. See U.C.C. § 1-203 (1989) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.").

common law.⁸⁸ The implied duty of good faith has also achieved substantial recognition in government contract decisions.⁸⁹

In *City of Tacoma v. United States*,⁹⁰ the Federal Circuit held that a utility service contract containing a rate renegotiation clause was not illusory, and thus was not invalid, because the challenged clause impliedly required the Government to conduct negotiations with the contractor in good faith.⁹¹ The contract established initial electrical service rates by which the City of Tacoma, Washington, sold electricity to McChord Air Force Base, Washington, and provided a mechanism allowing either party to renegotiate the rate with reasonable cause.⁹² Between 1973 and 1987, the Air Force and Tacoma renegotiated the contract nine times.⁹³ In 1988, however, Tacoma passed an ordinance increasing the rates for the Air Force's customer category and ultimately placed the Air Force in its own rate category.⁹⁴ The Air Force refused to pay the new rates without renegotiation of the contract.⁹⁵

When Tacoma and the Air Force could not agree on rates, Tacoma submitted a certified claim under the Contract Disputes Act of 1978 (CDA)⁹⁶ seeking to terminate the contract because of the parties' failure to reach an agreement.⁹⁷ The contracting officer denied the claim, and Tacoma brought suit in the Court of Federal Claims.⁹⁸ Tacoma alleged that the change of rates clause rendered the contract illusory because it allowed the Government arbitrarily to refuse to pay

88. See RESTATEMENT, *supra* note 47, § 205 (stating that every contract imposes duties of good faith and fair dealing on parties with respect to contract's performance and enforcement); see, e.g., *International Fidelity Ins. Co. v. United States*, 25 Cl. Ct. 469, 480 (1992) (holding good faith and fair dealing requirement implicit in every government contract); *Solar Turbines, Inc. v. United States*, 26 Cl. Ct. 1249, 1273-74 (1992) (agreeing that Restatement's good faith and fair dealing requirement is implicitly part of contract).

89. See Ralph C. Nash, *The Duty of Good Faith and Fair Dealing: An Emerging Concept?*, 3 NASH & CIBINIC REP. ¶ 78, 164-71 (1989) (providing study of good faith dealing in government contracts); Daniel E. Toomey et al., *Good Faith and Fair Dealing: The Well-Nigh Irrefragable Need for a New Standard in Public Contract Law*, 20 PUB. CONT. L.J. 87, 118 (1990) (indicating emerging trend requiring fair dealing and good faith in government contract negotiations).

90. 31 F.3d 1130 (Fed. Cir. 1994), *aff'g* 28 Cl. Ct. 637 (1993).

91. *City of Tacoma v. United States*, 31 F.3d 1130, 1132 (Fed. Cir. 1994).

92. See *City of Tacoma v. United States*, 28 Fed. Cl. 637, 639 (1993) (describing terms of contract, which contained "change of rate" clause providing for either party to renegotiate rates on electricity).

93. *Id.*

94. *Id.* at 640.

95. See *id.* (explaining that Government refused to pay for electricity at higher rate because contract did not incorporate these rate increases). The Government stated that the contract must be modified before it would pay at the increased rate. *Id.* In fact, the Government refused to pay for the electricity altogether. *Id.*

96. 41 U.S.C. §§ 609-613 (1988 & Supp. V 1993).

97. *City of Tacoma*, 28 Fed. Cl. at 641.

98. *Id.* at 642.

new rates indefinitely.⁹⁹ The Court of Federal Claims disagreed and granted summary judgment to the Government.¹⁰⁰ The Federal Circuit affirmed.¹⁰¹

Relying on its 1991 decision in *Aviation Contractor Employees, Inc. v. United States*,¹⁰² the Federal Circuit held that the contract at issue in *City of Tacoma* "impliedly places an obligation on the parties to negotiate in good faith."¹⁰³ The duty of good faith and the Government's obligation to abide by justified and reasonable rate changes established sufficient standards to determine whether or not the Government negotiated according to the contract.¹⁰⁴ The Federal Circuit observed that if the parties' negotiations reached a stalemate, formal dispute procedures under the CDA would assure the contractor that the Government's promises were not illusory.¹⁰⁵

The Federal Circuit's affirmance of the validity of the contract is consistent with what a commercial court would have done in similar circumstances. The holding in *City of Tacoma* adds one more decision to the growing body of federal common law that recognizes the duty of good faith and fair dealing, and the applicability of that duty to Government and contractors alike.¹⁰⁶

D. Best and Final Offers

Until the 1994 term, the Federal Circuit had not considered whether an agency, in issuing a request for Best and Final Offers (BAFOs), must explicitly state that discussions are complete and that offerors may now submit BAFOs. Pursuant to the FAR, an agency is required to conduct written or oral discussions prior to contract award with all offerors who are determined to be in the competitive

99. See *id.* at 645.

100. *Id.* (maintaining that contract was not illusory because change of rate clause merely allowed contract adaption for changed circumstances and viewing clause as contingency element in contract). The court continued this line of reasoning in stating that contract contingencies cause no concern as they are "respectable concepts." *Id.* The city also alleged that the contract violated state and federal law, contained latent ambiguities, and was an invalid perpetuity. *Id.* at 643-47. The Court of Federal Claims rejected each of these arguments. *Id.*

101. *City of Tacoma v. United States*, 31 F.3d 1130, 1132-35 (Fed. Cir. 1994), *aff'g* 28 Fed. Cl. 637 (1993).

102. 945 F.2d 1568 (Fed. Cir. 1991).

103. *City of Tacoma*, 31 F.3d at 1132 (quoting *Aviation Contractor Employees, Inc. v. United States*, 945 F.2d 1568, 1572 (Fed. Cir. 1991)).

104. *Id.*

105. See *id.* (declaring that CDA still provides contractor with avenue to challenge undesirable negotiations).

106. See *supra* note 88 and accompanying text (discussing that courts have found good faith and fair dealing requirement implicit in government contracts).

range.¹⁰⁷ Following such discussions, the agency must issue a request for BAFOs to all offerors in the competitive range indicating that discussions are complete and that offerors may submit BAFOs by a common cutoff date.¹⁰⁸ The Comptroller General has held that where a notice to offerors does not specifically request offerors to submit their BAFOs, "language giving notice to all offerors of a common cutoff date for receipt of offers has the intent and effect of a request for BAFOs."¹⁰⁹

In *Cleveland Telecommunications Corp. v. Goldin*,¹¹⁰ the Federal Circuit, following the decisions of the Comptroller General, held that an agency had given sufficient notice that an offeror would be permitted to submit a second BAFO, notwithstanding the agency's failure to use the phrase "Best and Final Offer" in its written notice.¹¹¹ Because the agency had "complied substantially, if not literally, with the regulations,"¹¹² the Federal Circuit concluded that this was sufficient.¹¹³

In this procurement, the agency in question, the National Aeronautics and Space Administration (NASA), after making a competitive range determination and receiving the first round of BAFOs, discovered that some of the bidders had misconstrued certain

107. See 48 C.F.R. § 15.610(b) (1994) (requiring contracting officer to conduct written or oral discussions with all responsible offerors whose proposals are in competitive range); see also *Israel Aircraft Indus.*, Comp. Gen. B-239211, 90-2 CPD ¶ 84 (1990) (same). Such discussions may take the form of an opportunity to submit revised proposals. See *American KAL Enters.*, Comp. Gen. B-232677.3, 89-1 CPD ¶ 112 (1989) (holding that language instructing offerors to submit revised proposals by specific cutoff date has effect of BAFO request).

108. 48 C.F.R. § 15.611 (1994); see also *Israel Aircraft*, 90-2 CPD ¶ 84, at 4 (stating that upon completion of discussions, contracting officer shall issue request for BAFOs to all offerors still within competitive range).

109. *Israel Aircraft*, 90-2 CPD ¶ 84; see also *Aerospace Design, Inc.*, Comp. Gen. B-247938, 92-2 CPD ¶ 33 (1992) (holding that amendment to solicitation that does not specifically request BAFOs but which gives notice to offerors of common cutoff date for receipt offers has intent and effect of request for BAFOs); *KMS Fusion, Inc.*, Comp. Gen. B-242529, 91-1 CPD ¶ 447 (1991) (holding that oral request for final submissions by a common cutoff date and subsequent confirmation by teletcopy complied with FAR requirements regarding requests for BAFOs); *VG Instruments, Inc.*, Comp. Gen. B-241484, 91-1 CPD ¶ 137 (1991) (concluding that notice that negotiations were to close with submission of revised proposals was adequate notice that BAFOs were being requested). The General Services Board of Contract Appeals (GSBCA) appears to have reached the same conclusion. See *Integrated Sys. Analysts, Inc.*, GSBCA No. 10750-P, 91-1 B.C.A. (CCH) ¶ 23,383, at 117,349 (1990) (noting that "[w]hile the [agency] should have expressly stated that it was requesting a second round of BAFOs, the [protestor's] conclusion that negotiations were still open was unreasonable given the statement that the [agency] did not intend to hold further discussions").

110. 43 F.3d 655 (Fed. Cir. 1994).

111. *Cleveland Telecommunications Corp. v. Goldin*, 43 F.3d 655, 658 (Fed. Cir. 1994).

112. *Id.* at 659.

113. *Id.* at 658-59.

information raised during discussions.¹¹⁴ As a result, the agency decided to reopen discussions and to provide the offerors with an opportunity to amend or submit new BAFOs.¹¹⁵ The agency provided this information to each of the bidders, including the protestor, both in writing and orally but, in its letter, failed to use the phrase "Best and Final Offer."¹¹⁶ The protestor chose not to amend its BAFO or to submit a new BAFO.¹¹⁷

In its protest, Cleveland Telecommunications contended that certain defects in the agency's letter prevented the company from submitting a new BAFO.¹¹⁸ Specifically, Cleveland Telecommunications, the protestor, alleged that the agency's notice was legally deficient because it failed to comply with sections 15.611(a) and (b) of the FAR and with the NASA FAR Supplement.¹¹⁹ Pursuant to these provisions, the protestor alleged that the agency's letter should have explicitly requested a second round of BAFOs and stated that the discussions were concluded and that this was an opportunity to submit a BAFO.¹²⁰ The General Services Board of Contract Appeals (GSBCA or the Board) held that the agency's notice complied with the regulations and that the protestor was given every opportunity to amend its BAFO or to file a second one.¹²¹

In affirming the decision of the GSBCA, the Federal Circuit concluded that the agency had complied substantially with the regulations and that the issues raised by the protestor were distinctions without differences.¹²² Rejecting Cleveland Telecommunication's arguments, the Federal Circuit held that the agency's letter provided the protestor with an opportunity to submit a BAFO and it was an inconsequential fact that the letter did not use the words "Best

114. *Id.* at 657 (discussing how some bidders had misconstrued NASA discussions to mean that proposals must be based on incumbent wage rates).

115. *Id.*

116. The letter stated:

Based on responses received from some offerors to the questions sent out by the Government during oral and written discussions, the Government has determined a need to conduct a second round of discussions. Therefore, while the Government has no further questions or need for clarification concerning your referenced proposal, you are hereby given the opportunity to submit any amendments you may have to your referenced proposal. The final cut-off for receipt of any amendments is 4:30 p.m., local time, August 25, 1993.

Id.

117. *Id.*

118. *Id.* at 658-59.

119. *See id.* at 657-68 (citing 48 C.F.R. § 1815.613-71 (1994)).

120. *Id.* at 658.

121. *Id.* at 658-59.

122. *Id.* at 658.

and Final Offer" or explicitly request a second round of BAFOs.¹²³ Properly construed, the court reasoned, the letter should be interpreted to mean that discussions were concluded and that offerors could submit a second BAFO or amend their earlier BAFOs.¹²⁴

The Federal Circuit also rejected the protestor's assertion that the letter was faulty because it did not state, as required by the regulations, that discussions were complete.¹²⁵ The Federal Circuit concluded that the Government made this point sufficiently clear when it stated in its letter that "the government has no further questions or need for clarification concerning your referenced proposal."¹²⁶ Moreover, the protestor should have known that, pursuant to the FAR, discussions were complete when the Government requested a BAFO.¹²⁷ Finally, the Federal Circuit concluded that the agency's failure to provide notice that any modifications or amendments were subject to the relevant solicitation provisions, as required by section 15.611(b)(4) of the FAR,¹²⁸ did not prejudice the protestor and, therefore, was harmless error.¹²⁹

The Federal Circuit's holding in this case was predictable and in accordance with the decisions of both the Comptroller General and the GSBICA. The law on this issue now appears to be clear—in notifying offerors that discussions are complete and BAFOs may be submitted, close enough is good enough.

E. Mutual Mistake

Mutual mistake is a flaw in contract formation that is often argued but seldom prevails.¹³⁰ Both commercial contract law¹³¹ and federal government contracts law¹³² require the party alleging mistake to

123. *Id.*

124. *Id.*

125. *Id.* at 659.

126. *Id.* (quoting letter sent to all bidders in competitive range).

127. *See id.* (providing that contracting officer shall issue request for BAFO "[u]pon completion of discussions") (citing 48 C.F.R. § 15.611(a) (1994)).

128. *See id.* (stating that BAFO notice "is subject to the Late Submissions, Modifications and Withdrawal of Proposals provisions of the Solicitation") (citing 48 C.F.R. § 15.611(b)(4) (1994)).

129. *Id.*

130. *See* RESTATEMENT, *supra* note 47, § 152, cmt. b (demonstrating that, in order to prevail, mutual mistake must constitute basic assumption on which both parties made contract).

131. *See* RESTATEMENT, *supra* note 47, § 152 (analyzing when mistake by both parties makes a contract voidable in commercial setting).

132. *See* Roseburg Lumber Co. v. Madigan, 978 F.2d 660 (Fed. Cir. 1992) (involving alleged mutual mistake of computational errors in pricing factor); Atlas Corp. v. United States, 895 F.2d 745 (Fed. Cir.) (concerning alleged mutual mistake regarding degree of radioactive waste health hazards and clean up costs eventually required), *cert. denied*, 498 U.S. 811 (1990). *See generally* Ralph C. Nash, *Postscript II: Mutual Mistake of Basic Assumption*, 8 NASH & CIBINIC REP. ¶ 47 (1994) (discussing effect of mutual mistake of basic assumption about existing facts that affect

establish four demanding elements: (1) both parties must have been mistaken in their belief regarding a fact existing at the time of contracting;¹³³ (2) the mistaken belief must have constituted a basic assumption on which the contract was made;¹³⁴ (3) the mistake must have had a material effect on the bargain;¹³⁵ and (4) the contract must not have placed the risk of the mistake on the party that is seeking relief.¹³⁶ Remedies available for mutual mistake include rescission and reformation.¹³⁷ Commercial contract law favors rescission,¹³⁸ while government contracts decisions favor reformation.¹³⁹

In *Dairyland Power Cooperative v. United States*,¹⁴⁰ the Federal Circuit held that the parties' erroneous belief as to the future business climate cannot constitute an existing fact at the time of contracting.¹⁴¹ The parties' original contract, executed in 1962, called for the Atomic Energy Commission (AEC) to construct a nuclear power reactor, and for Dairyland, a public utility, to operate that reactor at Dairyland's site.¹⁴² After several years of operations, AEC, in accordance with the 1962 contract, offered to sell the power plant to

future) [hereinafter *Postscript II*].

133. RESTATEMENT, *supra* note 47, § 152(1).

134. RESTATEMENT, *supra* note 47, § 152(1).

135. RESTATEMENT, *supra* note 47, § 152(1).

136. RESTATEMENT, *supra* note 47, § 152(1).

137. RESTATEMENT, *supra* note 47, § 152(2). Reformation is an equitable, court-ordered remedy to correct a written contract to cause it to reflect the proper intentions of the parties. BLACK'S LAW DICTIONARY 1281 (6th ed. 1990). On the other hand, rescission is one party's disaffirmance of a voidable contract and an "avoidance" of obligations thereunder. See FARNSWORTH, *supra* note 85, § 9.3, at 520 (mutual mistake); *cf. id.* § 4.15, at 426 (misrepresentation); § 9.4, at 532-33 (unilateral mistake).

138. Compare RESTATEMENT, *supra* note 47, § 152(1) (stating that "the contract is voidable by the adversely affected party") with RESTATEMENT, *supra* note 47, § 155 (allowing for revision, not rescission, where writing fails to express agreement because of mistake of both parties).

139. See *G.M. Shupe, Inc. v. United States*, 5 Cl. Ct. 662, 675 (1984) (reforming contract involving dam construction); *Higgs v. United States*, 546 F.2d 373, 376 (Ct. Cl. 1976) (reforming contract to provide for two parcels of land, rather than one, where both parties intended that sale involved two parcels); see also *McDonald Welding & Mach. Co., ASBCA No. 36284*, 94-3 B.C.A. (CCH) ¶ 27,181 (1994) (reforming mutual mistake regarding production facility and schedule); *Louisiana-Pacific Corp., ASBCA No. 80-186-3*, 81-1 B.C.A. (CCH) ¶ 14,928, at 73,865 (1981) (rectifying mutual mistake in timber renewal contract where mutual mistake was found); *In re Michaud, Comp. Gen. B-182299*, 75-1 CPD ¶ 52 (1975) (reforming contract involving mutual mistake regarding land amount).

140. 16 F.3d 1197 (Fed. Cir. 1994), *aff'g* 27 Fed. Cl. 805 (1993).

141. *Dairyland Power Coop. v. United States*, 16 F.3d 1197, 1202-03 (Fed. Cir. 1994) (holding that parties' contemplation of future availability of commercial reprocessing at time of contract does not constitute existing fact). The court held that the party seeking reformation of a contract based on a claim of mutual mistake of fact must demonstrate that both parties misapprehended an existing fact. *Id.* at 1202.

142. *Id.* at 1199.

Dairyland.¹⁴³ In 1973, in light of changing economic conditions in the nuclear power industry,¹⁴⁴ the parties agreed that Dairyland would purchase the plant for one dollar.¹⁴⁵ This 1973 sales contract, which Dairyland recognized as "a calculated risk," superceded the parties' original 1962 operations contract.¹⁴⁶

Dairyland continued to operate the nuclear power plant, but it was never able to obtain full-term operating licenses.¹⁴⁷ In addition, the market for reprocessing spent nuclear fuel collapsed,¹⁴⁸ and Dairyland's costs to store the plant's spent nuclear fuel assemblies on-site exceeded \$97 million.¹⁴⁹ In light of these adverse developments, Dairyland closed the plant in 1987 and decided to try to rescind its 1973 purchase of the plant.¹⁵⁰ It filed certified claims under the CDA with the contracting officer¹⁵¹ and later filed suit in the Court of Federal Claims for rescission of the 1973 sales contract, or in the alternative, for damages exceeding \$97 million.¹⁵² Among Dairyland's theories was mutual mistake of fact.¹⁵³

The Court of Federal Claims granted summary judgment to the Government.¹⁵⁴ It held that damages were precluded by release language contained in the 1973 sales contract, and that rescission was not authorized because Dairyland could not establish the fourth element of mutual mistake—that the utility had not assumed the risk of the parties' mistaken belief about the future availability of commercial reprocessing of spent nuclear fuel.¹⁵⁵ The Federal Circuit affirmed the trial court's grant of summary judgment to the Government, but it did so because of Dairyland's "inability as a matter of law to satisfy the first element of the doctrine of mutual mistake of

143. *Id.* (providing for sale at AEC's option to dismantle plant if not purchased at price of construction costs).

144. *Id.* at 1200 (noting that market fluctuations occurred until April 7, 1977, when President Carter indefinitely suspended commercial reprocessing of nuclear fuel).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* (noting that reprocessing industry never recovered from collapse despite President Reagan's lift of commercial reprocessing ban on October 8, 1981).

149. *Id.* at 1201.

150. *Id.* at 1200.

151. *Id.* As a dispute resolution mechanism, the CDA is not really even "violated." *Id.*

152. *Id.* at 1200-01.

153. *Id.* (arguing alternative theories of commercial impracticability and frustration of purpose).

154. *Id.* at 1201.

155. *Id.*

fact"¹⁵⁶—that the mistake must relate to an existing fact at the time of contracting.¹⁵⁷

The Federal Circuit reasoned that “[t]he availability of commercial reprocessing in the future cannot constitute an existing fact at the time of the 1973 sale contract.”¹⁵⁸ The Court relied on the *Restatement (Second) of Contracts*,¹⁵⁹ general commercial contract law,¹⁶⁰ and its own 1987 decision in *American Employers Insurance Co. v. United States*,¹⁶¹ to conclude that Dairyland “cannot establish mutual mistake of fact as a matter of law because the parties were not mistaken as to an existing fact.”¹⁶²

In *Dairyland Power*, the Federal Circuit reached a predictable result based on established legal principles, consistent with the general commercial law of mutual mistake, which seldom allows contractors to avoid the burdens of their obligations.¹⁶³ Nonetheless, the Federal Circuit and its predecessor, the Court of Claims, have not been entirely consistent in deciding or explaining their decisions about mutual mistakes that concern assumptions about the future.¹⁶⁴ The *Dairyland Power* decision, taken together with the Federal Circuit’s 1990 decision in *Atlas Corp. v. United States*,¹⁶⁵ indicates that the Federal Circuit is less willing today than it and the Court of Claims have been in the past to “stretch” the doctrine of mutual mistake to

156. *Id.* at 1202.

157. *Id.*

158. *Id.* at 1202-03.

159. *Id.* (citing RESTATEMENT, *supra* note 47, § 151 cmt. a (1981)).

160. *Id.* at 1201-03 (citing *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660 (Fed. Cir. 1992); *Atlas Corp. v. United States*, 895 F.2d 745 (Fed. Cir.), *cert. denied*, 498 U.S. 811 (1990)).

161. 812 F.2d 700 (Fed. Cir. 1987). The court held that the failure of the settlement agreement to contemplate the possibility of filing latent occupational injury claims years later did not constitute a mutual mistake of fact that could justify contract reformation. *American Employers Ins. Co. v. United States*, 812 F.2d 700, 705 (Fed. Cir. 1987).

162. *Dairyland*, 16 F.3d at 1203.

163. See *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 666-67 (Fed. Cir. 1992) (denying successful bidder on timber sale contract right to withdraw bid and reform contract); *Atlas Corp. v. United States*, 895 F.2d 745, 756-58 (Fed. Cir. 1990) (requiring uranium and thorium producers to pay for clean up costs and denying right to reform contract).

164. Compare *Atlas*, 895 F.2d at 752 (ruling that reformation is not proper remedy where parties negotiated uranium and thorium mill contract without knowledge of future occupational injury claims or without assuming such facts) with *Gould, Inc. v. United States*, 935 F.2d 1271, 1275-76 (Fed. Cir. 1991) (granting relief where Government had “superior knowledge” about possible future chemical reactions to storage conditions of contractor’s radios) and *National Presto Indus. v. United States*, 338 F.2d 99, 112 (Ct. Cl. 1964) (reforming contract for production of shells where Government had knowledge of extra costs associated with manufacturing processes) and *R.M. Hollingshead Corp. v. United States*, 111 F. Supp. 285, 286 (Ct. Cl. 1953) (reforming contract for DDT concentrate that was damaged because Government required storage in metal containers); see also *Postscript II*, *supra* note 132, at 123 (noting that although assumptions concerning future events are not about existing facts, some court cases grant relief for “mutual mistakes as to what will be encountered during performance”).

165. 895 F.2d 745 (Fed. Cir.), *cert. denied*, 498 U.S. 811 (1990).

cover assumptions about future events, however skillfully parties might plead.

F. Scope of GSBCA Bid Protest Review

By statute, the GSBCA has jurisdiction to review the decisions of contracting officers in procurements that are subject to the Brooks Act.¹⁶⁶ Although the law does not explicitly say that the GSBCA is authorized to conduct *de novo* review of agency evaluations,¹⁶⁷ the GSBCA has consistently asserted that right.¹⁶⁸ The Federal Circuit has never specifically endorsed or rejected the GSBCA's position in a precedential opinion,¹⁶⁹ although it has sharply criticized the GSBCA's second-guessing of agencies' determinations of their own procurement needs.¹⁷⁰ Because the Federal Circuit has never

166. See 40 U.S.C. § 759(f) (1988) (assigning to GSBCA bid protest authority covering automated data processing contracts). The general purpose of the Brooks Act is to provide the GSA with broad authority "to coordinate and provide for the economic and efficient purchase, lease, and maintenance of automatic data processing equipment by Federal agencies." *Electronic Data Sys. Fed. Corp. v. GSA Bd. Contract App.*, 792 F.2d 1569, 1581 (Fed. Cir. 1986).

167. See 40 U.S.C. § 759(h)(1) (1988) (stating that GSBCA's review of contracting officer decisions "shall be conducted under the standard applicable to review of contracting officer final decisions by boards of contract appeals"). In turn, the CDA states that "[s]pecific findings of fact [by a contracting officer] . . . if made, shall not be binding in any subsequent proceeding." 41 U.S.C. § 605(a) (1988 & Supp. V 1993). However, the CDA says nothing more explicit about the scope of review of a contracting officer's decision by a board of contract appeals. See *id.* § 607.

168. The seminal case is *Lanier Business Products*, GSBCA No. 7702-P, 85-2 B.C.A. ¶ 18,033, at 90,495-96, *reh'g denied*, 85-2 B.C.A. ¶ 18,101 (1985). The GSBCA asserted its right of *de novo* review with respect to a protest involving automatic data processing procurement agency determination. *Id.* at 90,496. Subsequent decisions state the proposition virtually as a truism, without further discussion or analysis. See, e.g., *OAQ Corp.*, GSBCA No. 10186-P, 90-1 B.C.A. (CCH) ¶ 22,332, at 112,234 (1989) (*per curiam*) (reviewing decision in automatic data processing professional support services contract on *de novo* basis); *Federal Sys. Group, Inc.*, GSBCA No. 9924-P, 89-2 B.C.A. (CCH) ¶ 21,758, at 109,499 (1989) (reviewing, *de novo*, contract of United States Railroad Retirement Board to purchase IBM terminals and finding violation of Federal Information Resources Management Regulation requirements); *Del Net, Inc.*, GSBCA No. 9178-P, 88-1 B.C.A. (CCH) ¶ 20,342, at 102,869 (1987) (reviewing contract decision regarding maintenance of data processing equipment on *de novo* basis), *aff'd per curiam*, 861 F.2d 728 (Fed. Cir. 1988); *Computer Lines*, GSBCA No. 8206-P, 86-1 B.C.A. ¶ 18,653, at 93,805 (1985) (reviewing automatic data processing procurement contract on *de novo* basis).

169. See *Del Net, Inc. v. United States*, 861 F.2d 728 (Fed. Cir. 1988) (affirming GSBCA decision that asserted its right of *de novo* review).

170. See *Data Gen. Corp. v. United States*, 915 F.2d 1544, 1552 (Fed. Cir. 1990) (lambasting board's actions for overly questioning judgment of agency in determining its needs). In *Data General*, the Federal Circuit criticized the GSBCA as being "driven by its own assessment of the agency's 'true' data processing needs," *id.* at 1547, and lectured the GSBCA that "the Brooks Act specifically prohibits the board from imposing on the agency its own views of the agency's data processing needs . . . [which was] precisely what happened here," *id.* at 1551. The court sharply concluded:

"Stupid" or not, the board has no warrant to question the agency's judgment or to revise its delegation of procurement authority to ensure that the agency's assessment of its "true" needs is in harmony with the board's. The board has neither the authority nor the expertise to second-guess the agency.

directly addressed the right of the GSBCA to conduct *de novo* review,¹⁷¹ the court has never analyzed the tension between conducting *de novo* review and avoiding substitution of judgment.

In *Grumman Data Systems Corp. v. Widnall*,¹⁷² the Federal Circuit, seemingly unaware of the novelty and complexity of the issues before it, held that the GSBCA may not only exercise *de novo* review, but also may conduct its own “best value” analysis without substituting its judgment for that of the agency, at least as long as the GSBCA reaches the same result as the agency.¹⁷³ The Air Force had issued a Request for Proposal (RFP) to purchase an office automation system for the Joint Chiefs of Staff.¹⁷⁴ The proposal that offered the “best overall value” to the Air Force was to receive the contract.¹⁷⁵ The Air Force evaluated competing proposals received from Grumman and Contel against each other on a “head-to-head” basis, in addition to evaluating them against absolute evaluation criteria, even though the former evaluation was arguably not authorized by the RFP.¹⁷⁶ The Air Force then selected Contel’s technically superior proposal, even though Contel’s cost was almost sixty percent higher than Grumman’s.¹⁷⁷

Grumman protested to the GSBCA, which found that the Air Force had not adequately analyzed cost/technical trade-off issues and remanded the matter to the Air Force.¹⁷⁸ After conducting an extensive best value analysis, the Air Force reaffirmed its selection of Contel, and Grumman protested again.¹⁷⁹ This time the GSBCA held that the Air Force’s best value analysis was flawed and embarked upon its own analysis.¹⁸⁰ In doing so, the GSBCA took into account evidence and expert testimony offered at the board hear-

Id. at 1552; *see also* *Andersen Consulting Co. v. United States*, 959 F.2d 929, 935 (Fed. Cir. 1992) (characterizing *Data General* case as meaning that “the board’s independent analysis of needs is both irrelevant and illegal”).

171. *See supra* note 168 (listing cases where GSBCA has asserted right of *de novo* review).

172. 15 F.3d 1044 (Fed. Cir. 1994).

173. *Grumman Data Sys. Corp. v. Widnall*, 15 F.3d 1044, 1046 (Fed. Cir. 1994) (citing *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987)).

174. *Id.*

175. *Id.* at 1047. *See generally* Carl J. Peckinpugh & Joseph M. Goldstein, *Best Value Source Selection—Contracting for Value, or Unfettered Agency Discretion?*, 22 PUB. CONT. L.J. 275, 336-38 (1993) (arguing for greater agency disclosure and consistency in evaluation of FAR determinations).

176. *Grumman Data Systems*, 15 F.3d at 1045-46.

177. *Id.*

178. *Id.* (noting that GSBCA directed Air Force to determine whether Contel’s technical enhancements justified almost 60% higher cost than competitor Grumman’s cost).

179. *Id.*

180. *Id.* at 1048 (noting that Air Force deviated from standard accounting principles in conducting best value analysis).

ing—information that the Air Force had not considered.¹⁸¹ The GSBCA concluded that the Air Force had reached the right result for the wrong reasons and upheld the award to Contel.¹⁸²

In affirming the GSBCA, the Federal Circuit stated that an “agency’s procurement selection is reviewed *de novo* by the board,”¹⁸³ thereby upholding the GSBCA’s previously unendorsed position on that issue.¹⁸⁴ After acknowledging prior decisions in which it had cautioned the GSBCA “not [to] second guess an agency’s procurement decision and/or substitute its own judgment for that of the government,”¹⁸⁵ the Federal Circuit concluded that no such substitution of judgment had occurred because the GSBCA had reached the same conclusion as the Air Force:

The board cannot be accused of substituting its own procurement opinion because it upheld the Air Force’s selection of the Contel proposal. While it is true that the board based its decision upon a different best value analysis than that relied upon by the Air Force, such action is entirely permissible under a *de novo* standard of review because the reviewing board is not limited to the findings made by the agency or contained in the initial decision.¹⁸⁶

The Federal Circuit finessed the hard question with which the GSBCA had grappled, of how to interpret the RFP’s evaluation criteria, finding that Grumman waived its right to argue that issue by having raised it too late.¹⁸⁷ Finally, the court refused to overturn the award on account of the GSBCA’s finding that the Air Force’s methodology “may have violated some technical accounting principles,”¹⁸⁸ because “small errors made by the procuring agency are not sufficient grounds for rejecting an entire procurement.”¹⁸⁹

Whether or not the Federal Circuit reached the right result in *Grumman Data Systems*, the court’s opinion is far from satisfying. The

181. *Id.* (considering testimony regarding accounting principles offered by parties’ respective technical experts).

182. *Id.* (concluding that mistakes in accounting constituted only minimal error and did not affect Air Force’s ultimate decision).

183. *Id.* at 1046 (citing 41 U.S.C. § 609(b) (1988)).

184. *Id.*

185. *Id.* (citing *SMS Data Prods., Inc. v. United States*, 111 S. Ct. 2011 (1991); *Anderson Consulting Co. v. United States*, 959 F.2d 929, 932 (Fed. Cir. 1992); *Data Gen. Corp. v. United States*, 915 F.2d 1544, 1551-52 (Fed. Cir. 1990)).

186. *Id.* at 1046-47 (citing *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987)).

187. *Id.* at 1047 (holding that Grumman’s arguments were untimely because they were raised after bids were submitted).

188. *Id.* at 1048 (citing *Grumman Data Sys. Corp., GSBCA No. 11939-P, 93-2 B.C.A. (CCH)* ¶ 25,776, at 128,279 (1993)).

189. *Id.*

court's one-paragraph endorsement of *de novo* review by the GSBCA,¹⁹⁰ together with the court's citation to an inapplicable statutory provision in support of that conclusion,¹⁹¹ suggest that the court did not fully appreciate the significance of this issue or give it the attention that it deserved. Furthermore, the Federal Circuit's determination that *de novo* review by the GSBCA does not constitute an improper substitution of judgment when the GSBCA agrees with an agency's award¹⁹² begs the question of whether *de novo* review that reaches a different conclusion constitutes impermissible second-guessing. This issue will remain open for future consideration by the GSBCA and the Federal Circuit. Finally, the court's avoidance of the thorny question involving how to interpret the RFP, when the GSBCA did not evade addressing this critical issue on the merits,¹⁹³ reflects an unadmirable penchant for deciding cases on procedural rather than substantive grounds.

G. Award of GSBCA Bid Protest Costs

The Competition in Contracting Act of 1984 (CICA),¹⁹⁴ which authorized the GSBCA to hear bid protests of Brooks Act procurements,¹⁹⁵ also authorized the GSBCA to award a prevailing protestor "the costs of—(i) filing and pursuing the protest, including reasonable attorney's fees, and (ii) bid and proposal preparation."¹⁹⁶ The GSBCA had interpreted this statutory authority broadly to include "all necessary and reasonable expenses incurred" in the filing and pursuit of a protest.¹⁹⁷ In May 1992, however, based on the Supreme Court's decision in *West Virginia University Hospitals, Inc. v.*

190. *Id.* at 1046.

191. *Id.* (citing 41 U.S.C. § 609(b) as support for its conclusion). Section 609(b) governs the scope of judicial review of board of contract appeals decisions, not the scope of review of contracting officer decisions. See 41 U.S.C. § 609(b) (1988) (stating "the decision of the agency board on any question of law shall not be final or conclusive").

192. *Grumman Data Systems*, 15 F.3d at 1046-47.

193. *Id.* at 1047 (citing *Grumman Data Sys. Corp.* GSBCA No. 11939-P, 93-2 B.C.A. (CCH) ¶ 25,776, at 128,277 (1993)).

194. 40 U.S.C. § 759(f) (1988).

195. *Id.* § 759(f)(3)(A).

196. *Id.* § 759(f)(5)(C). See generally Ralph C. Nash, *Recovery of Protest Costs: Confusing and Conflicting Rules*, 6 NASH & CIBINIC REP. ¶ 58, at 150 (1992) (suggesting that broad language of Brooks Act conflicts with other specific statutory provisions awarding attorney fees, expert witness fees, and salaries of protesting offeror's employees).

197. See *Sterling Fed. Sys., Inc. v. NASA*, GSBCA No. 10000-C (9835-P), 92-3 B.C.A. (CCH) ¶ 25,118, at 125,219 (1992) (awarding reasonable fees for expenses incurred pursuing protest, including expert and attorney fees, to contractor), *vacated*, 16 F.3d 1177, 79 Cont. Cas. Fed. (CCH) 76,615 (Fed. Cir. 1994).

Casey,¹⁹⁸ the GSBCA reinterpreted CICA's protest cost provisions narrowly in *Sterling Federal Systems, Inc. v. NASA*.¹⁹⁹ The GSBCA, in *Sterling*, denied a prevailing protestor the recovery of the fees and expenses of nontestifying expert consultants and the salaries of in-house personnel who had worked on the successful protest.²⁰⁰ On appeal in *Sterling Federal Systems, Inc. v. Goldin*,²⁰¹ the Federal Circuit held that the GSBCA is statutorily authorized, although not required, to award expert consultant fees and in-house personnel salaries to a prevailing protestor,²⁰² and that the Supreme Court's decision in *West Virginia* did not undermine the "unique and innovative" protest provisions of CICA.²⁰³

Sterling successfully protested a procurement action by NASA and then filed with the GSBCA a request for the reimbursement of approximately \$600,000 of costs it had incurred in filing and pursuing the protest.²⁰⁴ Sterling's claim included \$94,000 for the fees and expenses of expert consultants its counsel retained to help analyze technical issues in the protest because the GSBCA's protective order did not permit Sterling's own employees to have access to protected material.²⁰⁵ Sterling's claim also included \$47,000 for in-house labor costs of employees who had testified in the protest.²⁰⁶

The GSBCA recognized that, under its prior decisions, it had awarded both of these types of expenses to successful protestors,²⁰⁷ but the Board felt constrained to reexamine the issue in light of the Supreme Court's decision in *West Virginia University Hospitals*.²⁰⁸ In that case, the Supreme Court held that the statutory authorization for federal courts to award "a reasonable attorney's fee" to a prevailing party under the Civil Rights Act²⁰⁹ did not impliedly repeal the statutory limitations of 28 U.S.C. §§ 1821 and 1920, which do not authorize the payment of "fees for services rendered by an expert

198. 499 U.S. 83 (1991) (holding that expert fees in civil rights litigation may not be shifted to losing party as part of reasonable attorney's fees).

199. *Sterling*, 92-3 B.C.A. (CCH), at 125,219.

200. *Id.* at 125,220-21.

201. 16 F.3d 1177 (Fed. Cir. 1994), *vacating and remanding Sterling Fed. Sys., Inc. v. NASA*, 92-3 B.C.A. (CCH) ¶ 25,118 (1992).

202. *Id.* at 1188.

203. *Id.* at 1187 (quoting H.R. REP. NO. 861, 98th Cong., 1st Sess. 1431 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2119, 2119).

204. *Sterling Fed. Sys., Inc. v. Goldin*, 16 F.3d 1177, 1187 (Fed. Cir. 1994).

205. *Id.* at 1179-80.

206. *Id.*

207. *Id.* at 1180 (citing *Sterling Fed. Sys., Inc. v. NASA*, GSBCA No. 10000-C (9335-P) 92-3 B.C.A. (CCH) ¶ 25,118, at 125,219 (1994)).

208. *Id.* (citing *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991)).

209. 42 U.S.C. § 1988 (1988).

employed by a party in a nontestimonial advisory capacity."²¹⁰ Considering the question en banc, the GSBCA construed its statutory fee-shifting authority together with the Supreme Court's decision in *West Virginia University Hospitals*.²¹¹ The GSBCA found that the language of the Brooks Act was "fundamentally akin to that construed by the [Supreme] Court in *West Virginia*."²¹² Consequently, the GSBCA held that the types of costs it could impose on the Government under the Brooks Act were limited to the kinds of witness fees that federal courts were authorized to award under 28 U.S.C. §§ 1821 and 1920.²¹³ The GSBCA also denied the reimbursement of the salaries of in-house witnesses in excess of \$30 per day plus government-level per diems, by analogy to cases under the Equal Access to Justice Act (EAJA).²¹⁴

Based upon its reading of *West Virginia University Hospitals*, the GSBCA felt compelled to depart from its own precedents and denied Sterling reimbursement of its nontestimonial expert and in-house labor costs.²¹⁵ Four GSBCA judges dissented in part, submitting two different opinions.²¹⁶ One opinion argued that 28 U.S.C. §§ 1821 and 1920 do not apply to the GSBCA,²¹⁷ and the other opinion emphasized the statutory discretion that CICA conferred on the board to award costs to successful protestors.²¹⁸

The Federal Circuit vacated the GSBCA's decision, holding that *West Virginia University Hospitals* and 28 U.S.C. § 1920 do not prevent the GSBCA from awarding salaries or expert fees associated with the filing and pursuit of a protest, nor does CICA require the GSBCA to do so.²¹⁹ The Federal Circuit agreed with a dissenting opinion of the Board that 28 U.S.C. §§ 1821 and 1920, by their terms, do not

210. *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 87 (1991).

211. *See Sterling Fed. Sys., Inc. v. NASA*, 92-3 B.C.A. (CCH) ¶ 25,118, at 125,216 (1992) (reasoning that because expert witness fees should not be recoverable as attorney's fees under Supreme Court's *West Virginia University Hospitals* decision, expert consulting fees are not reimbursable to successful protestor as cost of filing and pursuing protest).

212. *Id.* at 125,220.

213. *Id.* at 125,217-18 (listing costs that may be reimbursed under 28 U.S.C. §§ 1821 and 1920, such as clerk, marshall, court report, and witness fee, interpreters fees, and travel fees for witnesses).

214. *Id.* (discussing 5 U.S.C. § 504, administrative counterpart to Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, to justify denial of expert witness fees).

215. *Id.*

216. *See id.* at 125,222.

217. *Id.* at 125,222-23 (William & LaBella, Bd. JJ., dissenting in part).

218. *Id.* at 125,223-25 (Vergilio & LaBella, Bd. JJ., Suchanek, Chief Bd. J., dissenting in part).

219. *See Sterling Fed. Sys., Inc. v. Goldin*, 16 F.3d 1177, 1188 (Fed. Cir. 1994) (finding *West Virginia* and 28 U.S.C. § 1920 nonbinding on GSBCA).

apply directly to the GSBCA.²²⁰ The Federal Circuit also found that the term “costs” in § 1920 was not a term of art that merely codified a “traditional definition of costs” or simply meant only the costs listed in that statute.²²¹ Instead, the court interpreted § 1920 as one of many statutory sources that authorized or limited “taxable litigation costs.”²²² The Federal Circuit did not believe that the rationale of *West Virginia University Hospitals* controlled this case because “CICA alone” provides the Board’s statutory authority to order cost-shifting in Brooks Act protests, and that CICA’s authority is “entirely apart from section 1920.”²²³

The Federal Circuit read the EAJA as supporting a broad reading of the GSBCA’s authority, not the narrow reading that the Board’s majority had given it below, because Congress failed to incorporate 28 U.S.C. § 1920 into CICA, as it had into the EAJA.²²⁴ The Federal Circuit refused to do what it called “contort[ing] the language” of CICA simply to honor the principle that waivers of sovereign immunity should be strictly construed: “The rule requiring strict construction of waivers of sovereign immunity is not a talisman that permits the government to avoid liability in all cases.”²²⁵ Finally, the court rejected the GSBCA’s view that the Board could never have greater power than that of the federal courts.²²⁶ The issue, as the Federal Circuit saw it, was merely that “the board’s authority was different.”²²⁷

Having decided that CICA permits the GSBCA to award costs other than those which the federal courts may award under 28 U.S.C. §§ 1821 and 1920, the Federal Circuit then proceeded to address the issue of what costs the Board should award. The court found that “Congress has entrusted the GSBCA with some discretion to define precisely what those costs are,”²²⁸ but the court did not “perceive the GSBCA’s law on what it had previously allowed as well settled.”²²⁹ Consequently, the Federal Circuit remanded the case to

220. *Id.* at 1182 (stating that 28 U.S.C. §§ 1920 and 1821 “authorize the ‘court[s] of the United States’ to tax certain items as costs” and that “GSBCA is not a ‘court of the United States’”) (citing 28 U.S.C. §§ 1821, 1920).

221. *Id.* at 1183.

222. *Id.*

223. *Id.* at 1184.

224. *Id.* at 1185 (stating that “Congress’s failure in the administrative EAJA § 504 to incorporate 28 U.S.C. § 1920, as it did in EAJA § 2412, indicates Congress’s deliberate choice not to have section 1920 apply in the agency context”).

225. *Id.*

226. *Id.*

227. *Id.* at 1186.

228. *Id.* at 1187.

229. *Id.* at 1188.

the GSBCA for a decision whether nontestimonial expert and employee costs should be allowed, advising the GSBCA that it "must either distinguish these costs from those awarded under previous [GSBCA] cases or justify a change in practice."²³⁰

Sterling reflects a sensible construction of CICA, and reasonably distinguishes the Supreme Court's decision in *West Virginia University Hospitals* as inapplicable to the GSBCA bid protests. The logic of the decision has been reinforced, and the result codified, by federal procurement reform legislation enacted by the last Congress in the Federal Acquisition Streamlining Act of 1994 (FASA).²³¹ FASA authorizes both the GSBCA and the GAO to award interested parties the costs of filing and pursuing protests, including reasonable attorneys' fees "and consultant and expert witness fees."²³² Unfortunately for protestors, what FASA gave with one hand, it took with the other, by capping the Government's reimbursement of attorneys' fees at \$150 per hour and, except for small business concerns, limiting its reimbursement of consultant and expert witness fees at the highest rate of compensation for expert witnesses paid by the Government.²³³

II. INTERPRETATION, PERFORMANCE, AND ADMINISTRATION

A. Contract Interpretation

"A contract is ambiguous if its terms are susceptible to more than one reasonable interpretation."²³⁴ Ambiguities in government contracts take one of two forms—latent or patent.²³⁵ Latent ambi-

230. *Id.* As of the date of this Article, the GSBCA had not issued a decision on remand. The board had, however, cited the Federal Circuit's decision as authority for the proposition that it has discretion to define reimbursable protest costs. See *Science Applications Int'l Corp. v. Department of the Navy*, 94-3 B.C.A. (CCH) ¶ 27,262 (1994) (stating that the Federal Circuit in *Sterling* "noted that we have generally awarded expert fees").

231. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10 U.S.C. and 40 U.S.C.) [hereinafter FASA].

232. *Id.* § 1403(b)(2). Section 1403 of the FASA applies to decisions of protests by the GAO, and § 1435 applies to awards of costs by the GAO. See *id.* §§ 1403, 1435. The GAO provision is codified at 31 U.S.C. § 3554(c)(1)(A) and the GSBCA provision will be codified at 40 U.S.C. § 759(f)(5)(C).

233. FASA, *supra* note 231, §§ 1403(b)(2), 1435(a).

234. *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1579 (Fed. Cir. 1993); see also *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986) (stating rule is so "generally established" that it requires no citation of authority).

235. *NASH & SCHOONER*, *supra* note 50, at 20 (defining ambiguity as "[c]ontract language that is capable of being understood to have more than one meaning"). The test for ambiguity is "whether reasonable persons would find the contract subject to more than one interpretation." *Id.* See generally JOHN CIBINIC, JR. & RALPH C. NASH, JR., *ADMINISTRATION OF GOVERNMENT CONTRACTS* 102-77 (2d ed. 1986) (discussing various approaches to government contract interpretation) [hereinafter CIBINIC & NASH].

guities result when contract terms are seemingly precise on their face, but due to factors extrinsic to the contract, are susceptible to more than one interpretation.²³⁶ Patent ambiguities, on the other hand, are deemed to be facially obvious, resulting from unclear or unintelligible contract language.²³⁷ Latent ambiguities are normally interpreted against the drafter so long as the interpretation of the party who seeks recovery is reasonable.²³⁸ This rule of interpreting ambiguous contracts against the drafter, known as *contra proferentem*, however, does not apply to patent ambiguities,²³⁹ for patent ambiguities place a duty of inquiry on a contractor who will eventually seek additional compensation on account of the ambiguity.²⁴⁰ This duty of inquiry requires the contractor to raise and resolve the ambiguity with the Government prior to submitting a bid in circumstances where the contractor was aware or should have been aware of the ambiguity.²⁴¹ Failure to inquire into a patent ambiguity will defeat a later claim for equitable adjustment, regardless of the reasonableness of the contractor's interpretation of the ambiguous term.²⁴²

236. NASH & SCHOONER, *supra* note 50, at 20.

237. NASH & SCHOONER, *supra* note 50, at 20.

238. *Interstate Gen. Gov't Contractors, Inc. v. Stone*, 980 F.2d 1433, 1434 (Fed. Cir. 1992) (finding that contract contained latent ambiguity and consequently, should be interpreted against drafter); *see also United States v. Turner Constr. Co.*, 819 F.2d 283, 285 (Fed. Cir. 1987) (noting that where contract contains latent ambiguity, courts inquire into reasonableness of interpretation by non-drafting party).

239. *Interstate Gen. Gov't Contractors*, 980 F.2d at 1434-35; *see also Interwest Constr. v. Brown*, 29 F.3d 611, 614 (Fed. Cir. 1994) (instructing courts reviewing government contracts to first determine whether ambiguity is patent so as to impose duty to seek clarification); *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1579 (Fed. Cir. 1993) (holding patent ambiguities not automatically resolved against drafter, rather such ambiguities place a clarification requirement on contractor); *Fortec Constructors v. United States*, 760 F.2d 1288, 1291 (Fed. Cir. 1985) (discussing resolution of patent and latent ambiguities in contracts).

240. *Community Heating*, 987 F.2d at 1579 (discussing duty to inquire and seek clarification of contract where patent ambiguity exists); *see also Interstate Gen. Gov't Contractors*, 980 F.2d at 1434-35 (stating duty of inquiry exists when patent ambiguity appears in contract); *Turner Constr. Co.*, 819 F.2d at 285 (stating that appropriate focus centers on whether present ambiguity was patent, thereby raising duty to inquire, and if not patent ambiguity, "whether the interpretation of the contract by [the nonwriting party] was reasonable"); *Fortec Constructors*, 760 F.2d at 1291 (asserting that patent ambiguities create duty of inquiry "regardless of the reasonableness of the contractor's interpretation").

241. *See Community Heating*, 987 F.2d at 1579-80 (holding that it is not enough for contractor to make initial inquiry, but that contractor must pursue inquiry until ambiguity is clarified); *see also Interstate Gen. Gov't Contractors*, 980 F.2d at 1434-35 (stating that duty of inquiry "requires the contractor to 'inquire of the contracting officer the true meaning of the contract before submitting a bid'" (quoting *Newson v. United States*, 676 F.2d 647, 649 (Cl. Ct. 1982)); *CIBINIC & NASH*, *supra* note 235, at 170-71 (discussing contractor's duty to seek pre-bid submission clarification of patent ambiguities of which it knew or should have known).

242. *See Community Heating*, 987 F.2d at 1580 (holding that where party did not fully inquire into patently ambiguous contract, party "acted at its own risk when it proceeded to perform on the contract"); *see also Fortec Constructors*, 760 F.2d at 1291-92 (holding that where patent ambiguity existed and party did not seek clarification, party should be denied equitable relief).

The Federal Circuit in *Interwest Construction v. Brown*²⁴³ applied these principles and found that a contract for the supply of air conditioning equipment was unambiguous.²⁴⁴ The contract required delivery of an air conditioning system with a specified cooling capacity that could be converted for use with different refrigerants.²⁴⁵ Interwest's system, while capable of operating at the required capacity using the refrigerant supplied by the manufacturer upon delivery, could not operate at the required capacity following conversion.²⁴⁶

Interwest complied with the Government's interpretation of the contract by upgrading the delivered equipment and then sought an equitable adjustment from the Veterans Affairs Board to cover the associated costs.²⁴⁷ Interwest argued that the contract was ambiguous because the contract did not expressly set forth the post-conversion capacity requirement.²⁴⁸ Moreover, Interwest argued that it was "technically and commercially infeasible" to convert equipment "without sacrificing performance."²⁴⁹ The contracting officer denied Interwest's request for an equitable adjustment.²⁵⁰ The Veterans Administration Board of Contract Appeals (VABCA) upheld the decision of the contracting officer, concluding that the contract was not ambiguous.²⁵¹ Moreover, because the ambiguity was patent, Interwest should have sought clarification from the Government.²⁵² The Federal Circuit affirmed the VABCA's decision, adding that even if the ambiguity was latent, Interwest still could not recover because its interpretation was unreasonable.²⁵³

The Federal Circuit found that the specified system characteristics, including the required capacity, were performance criteria that set forth "unqualified" specifications and "established a minimum that must be met."²⁵⁴ To find that the performance specifications only applied prior to conversion, and not after, would leave the post-

243. 29 F.3d 611 (Fed. Cir. 1994).

244. *Interwest Constr. v. Brown*, 29 F.3d 611, 613-14 (Fed. Cir. 1994).

245. *Id.* at 613.

246. *Id.*

247. *Id.* at 614.

248. *Id.* at 613-14.

249. *Id.* at 614.

250. *Id.*

251. *Id.*

252. *Id.* at 614-16.

253. *Id.*

254. *Id.* at 615. The court also stated that "[p]erformance type specifications advise the contractor what the final product must be capable of accomplishing." *Id.* (quoting JOHN CIBINIC, JR. & RALPH C. NASH, JR., *FORMATION OF GOVERNMENT CONTRACTS* 341 (2d ed. 1986)).

conversion cooling capacity requirement “entirely up to the bidders.”²⁵⁵ The court therefore found that Interwest’s interpretation was “clearly unreasonable and contrary to common sense.”²⁵⁶

In reaching this result, the Federal Circuit refused to consider extrinsic evidence including: (1) the commercial or technical feasibility of the Government’s requirements; or (2) the fact that documentation clearly stating the performance requirements for the converted equipment was omitted from the solicitation.²⁵⁷ The court concluded that all of this evidence was extrinsic and, therefore, refused to consider it or any other evidence that could create an ambiguity where none otherwise existed.²⁵⁸

Moreover, the court found that even if one accepted that the contract was ambiguous, the ambiguity was patent.²⁵⁹ The court based this conclusion on the facts that Interwest knew that its equipment, following conversion, could not meet the Government’s performance specifications, and that Interwest had not sought clarification of the Government’s performance requirements.²⁶⁰ Consequently, Interwest did not meet its duty to inquire and therefore, was not entitled to an equitable adjustment.²⁶¹

In a persuasive dissent, Judge Pauline Newman found that the contract was ambiguous, that the ambiguity was latent, and that Interwest’s interpretation was reasonable.²⁶² The difference in opinion between Judge Newman and the majority stems from Judge Newman’s willingness to use extrinsic evidence to determine whether the contract was ambiguous.²⁶³ Judge Newman believed that “the trade standards and practices of the relevant business community” must be given weight when determining what bargain the parties struck.²⁶⁴ Judge Newman was also willing to consider extrinsic evidence to determine whether Interwest’s interpretation was reasonable.²⁶⁵ If it was reasonable, then the contract was ambiguous

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 616.

262. *Id.* at 616-18 (Newman, J., dissenting).

263. *See id.* at 617 (Newman, J., dissenting).

264. *Id.* (Newman, J., dissenting) (quoting *Alfred A. Altimont, Inc. v. United States*, 579 F.2d 622, 625 (Ct. Cl. 1978)).

265. *See id.* (examining trade practices, contemporaneous readings of specifications, and other bidders’ interpretations in determining ambiguity and/or reasonableness of interpretation of contract).

because it was capable of two different and reasonable interpretations, each of which was consistent with the contract language.²⁶⁶

Judge Newman was persuaded by the fact that none of the other bidders interpreted the solicitation in the same manner as the Government²⁶⁷ and that it was questionable whether the Government was requiring a significantly more expensive chiller “simply to provide for the remote contingency of conversion.”²⁶⁸ Consequently, Judge Newman found Interwest’s interpretation to be both reasonable and economical.²⁶⁹ In light of the interpretation of other bidders, Judge Newman also found the contractual ambiguity to be latent.²⁷⁰

Certain prior decisions of the Federal Circuit support Judge Newman’s approach, allowing consideration of extrinsic evidence to determine whether a contract is ambiguous,²⁷¹ while other decisions simply look to the four corners of the contract to satisfy this inquiry.²⁷² Still other decisions consider the mere fact that a dispute exists to be evidence of ambiguity.²⁷³

In *Interwest*, it seems clear that the majority’s failure to consider extrinsic evidence in determining whether the contract was ambiguous led to an unfair result. Interwest was denied relief despite the fact that all bidders interpreted the bid in the same manner as

266. See *id.* (Newman, J., dissenting) (noting that “all of the prospective subcontractors bid in the same way” which was not consistent with Government’s later interpretation of specifications).

267. *Id.* (Newman, J., dissenting). As Judge Newman pointed out, none of the other bidders bid the more expensive equipment demanded by the Government. *Id.* (Newman, J., dissenting).

268. *Id.* at 618 (Newman, J., dissenting).

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

270. See *id.* (Newman, J., dissenting) (stating that “[w]hen those in the trade all read a specification the same way and see no need to inquire, it is unwarranted for a court to decide that an ambiguity, when it appears, is other than latent”).

271. See *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1579 (1993) (considering interpretation of other bidders to determine whether specifications at issue were ambiguous); see also *Fortec Constructors v. United States*, 760 F.2d 1288, 1291 (Fed. Cir. 1985) (finding it proper to consider trade standards and practices of business community to determine meaning of contract containing patent ambiguity, after court found contract to be patently ambiguous as matter of law).

272. See *Interstate Cent. Gov’t Contractors, Inc. v. Stone*, 980 F.2d 1433, 1434-36 (Fed. Cir. 1992) (examining only language of contract but not extrinsic evidence). See also *Halifax Eng’g v. United States*, No. 92-1121, 1991 U.S. App. LEXIS 23622, at *2-*3 (Fed. Cir. Oct. 8, 1991) (examining only contract language); see also *infra* note 274 and accompanying text (discussing various methods of contract interpretation).

273. See *T.F. Powers Constr. Co. v. United States*, 918 F.2d 187, 1990 U.S. App. LEXIS 18065, at *7 (Fed. Cir. Oct. 15, 1990) (finding that ambiguity existed because both parties would agree that contract was unambiguous and each was convinced of propriety of their position and complete error of other party); *United States v. Turner Constr. Co.*, 819 F.2d 283, 283 (Fed. Cir. 1987) (finding contract to be ambiguous because if it were truly clear, dispute would not likely have been “before this court”).

Interwest, and none of the bidders asked if their interpretation was correct prior to contract award.²⁷⁴

B. Government Bad Faith

Accusing the Government of bad faith is one thing; proving it is quite another. Federal courts presume that government officials act in good faith when they perform their contractual duties.²⁷⁵ Moreover, the legal standard articulated by the Federal Circuit's predecessor court, the Court of Claims, that "it takes, and should take, well-nigh irrefragable proof"²⁷⁶ to overcome the presumption of good faith, is as alive and well today as it was when the Court of Claims coined that awkward phrase more than forty years ago. In *A-Transport*, as discussed previously in terms of contract formation,²⁷⁷ the Federal Circuit held that the contractor's "scant evidence" of the Government's bad faith was insufficient to proceed to trial²⁷⁸ and affirmed the Court of Federal Claims' grant of summary judgment to the Government.²⁷⁹

A-Transport alleged that the Government had acted in bad faith by revoking acceptance of its tenders for transportation services and resoliciting new tenders, actions that caused A-Transport to lose five carrier routes.²⁸⁰ A-Transport's evidence was the inconsistency between the Government's assertion that it had the right to change the terms of the tender agreement unilaterally, and the Government's simultaneous decision to cancel and resolicit tenders because A-Transport would not consent to the proposed changes.²⁸¹ On this basis, A-Transport alleged that the Government's resolicitation was

274. The Federal Circuit issued two other opinions during the 1994 term that support the general principles of contract interpretation set forth in *Interwest*. See *A-Transport Northwest Co. v. United States*, 36 F.3d 1576, 1583-84 (Fed. Cir. 1994) (looking only to language of contract and stating that "when provisions in a contract are clear and fit the case, they should be given their plain and ordinary meaning"); see also *City of Tacoma v. United States*, 31 F.3d 1130, 1134 (Fed. Cir. 1994) (stating that clear contract provisions should be given their plain meaning and that contract is ambiguous only when it supports more than one reasonable interpretation). Moreover, both of these decisions support the majority's approach in *Interwest*, i.e., excluding extrinsic evidence when initially determining whether a contract is ambiguous. "[E]xtrinsic evidence . . . may not be considered unless an ambiguity is identified in the contract language." *Id.*

275. See *Torncello v. United States*, 681 F.2d 756, 771 (Ct. Cl. 1982) (stating that with respect to government officials, good faith is presumed and only actions "motivated by a specific intent to harm the plaintiff" will be prevented). See generally *Toomey et al.*, *supra* note 89, at 91-95 (chronicling past decisions establishing presumption of good faith).

276. *Knotts v. United States*, 121 F. Supp. 630, 631 (Ct. Cl. 1954).

277. See *supra* notes 56-82 and accompanying text.

278. *A-Transport*, 36 F.3d at 1585.

279. *Id.*

280. *Id.* at 1578.

281. *Id.*

pretextual and that its real purpose was to eliminate A-Transport as a contractor.²⁸²

The Federal Circuit held that this evidence was insufficient to overcome the presumption of good faith by the Government.²⁸³ The court noted that there were alternative, reasonable explanations for the Government's confused and somewhat inconsistent actions and added that the Government ultimately selected A-Transport as primary carrier for more routes than any other carrier, a fact that "significantly undercuts A-Transport's theory."²⁸⁴ *A-Transport* reaffirms that contractors who accuse the Government of acting in bad faith bear an extremely heavy evidentiary burden. Without significant evidence of government misconduct in hand, summary dismissal of bad faith allegations should be expected.

C. Costing Government-Caused Delays

Contractors suffering compensable damages stemming from government-caused performance delays have, over the years, sought recovery of unabsorbed "home office overhead"²⁸⁵ based on a myriad of calculation methods.²⁸⁶ The *Eichleay* formula, which was

282. *Id.* at 1579.

283. *Id.* at 1585.

284. *Id.*

285. Home office overhead expenses are those costs that are incurred by a contractor "for the benefit of the business as a whole and which usually accrue over time." *Wickham Contracting Co. v. Fisher*, 12 F.3d 1574, 1579 (Fed. Cir. 1994) (citing *Wickham Contracting Co. v. GSA*, GSBCA No. 8675, 92-3 B.C.A. ¶ 25,040, at 124,818 (1992)). Home office overhead costs, as opposed to those overhead expenses incurred by a construction contractor at a job site, such as field office equipment purchases, field supervisory and clerical salaries and payroll taxes, cannot be specifically identified to any one contract. *See id.* at 1576 (describing assignment of overhead expenses). Moreover, a contractor incurs home office overhead expenses even in the event of a government imposed delay. *Id.* (acknowledging existence of unabsorbed overhead costs but rejecting contractors claim for reimbursement of such costs) (citing *Wickham*, 92-3 B.C.A. (CCH), at 124,818 (1992)).

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, fifty years ago in *Fred R. Comb Co. v. United States*, 103 Ct. Cl. 174, 183-84 (1945). Although the standard in determining entitlement to the same costs in the supply context is not as clearly established, such costs are frequently included in the price adjustments negotiated by the Government and approved by the boards of contract appeals. *See Aydin Corp.*, ASBCA No. 42,760, 94-2 B.C.A. (CCH) ¶ 26,899, at 133,918, 133,924 (1994) (upholding contract that included specific terms for paying contractor's costs); *Carteret Work Uniforms*, 6 Cont. Cas. Fed. (CCH), ASBCA No. 1647, ¶ 61,561, at 52,254 (1954).

286. *See Bridgewater Constr. Corp.*, VABCA No. 2956, 91-3 B.C.A. (CCH) ¶ 24,272, at 121,345 (1991) (rejecting contractor's use of daily rate calculations method rather than *Eichleay* formula); *Stephenson Assocs., Inc.*, GSBCA No. 6573, 86-3 B.C.A. (CCH), ¶ 19,071, at 96,351 (1986) (discussing contractor's proposal to use "simulated work" formula); *G.S. & L. Mechanical Constr.*, DOT CAB No. 1640, 86-3 B.C.A. (CCH) ¶ 19,026, at 96,098 (1986) (refusing contractor's use of "modified *Eichleay* formula").

developed in 1960,²⁸⁷ is generally accepted, however, as the appropriate measure of such damages. Nevertheless, certain decisions by the boards of contract appeals, as well as court holdings since 1978, have cast some doubt upon the propriety of the *Eichleay* formula to determine a contractor's recovery of unabsorbed home office overhead expenses.²⁸⁸ Now, in *Wickham Contracting Co. v. Fischer*,²⁸⁹ the Federal Circuit has held that the *Eichleay* formula is the *only acceptable* method of calculation of unabsorbed home office overhead costs when the *Eichleay* requirements are satisfied.²⁹⁰

In *Wickham*, the Federal Circuit concluded that when a contractor suffers compensable delay and is prevented from taking any additional

287. See *Eichleay Corp.*, ASBCA No. 5183, 60-2 B.C.A. (CCH) ¶ 2688, at 13,574-76 (1960) (computing overhead expenses during delay as product of daily overhead amount and agreed length of delay), *aff'd on reconsideration*, 61-1 B.C.A. (CCH) ¶ 2894 (1960). Calculating unabsorbed home office overhead using the *Eichleay* formula entails the following three-step process: (1) determination of overhead (indirect cost) by multiplying the "ratio of contract billings to total billings for the actual contract period . . . by total overhead for the contract period;" (2) dividing the total number of days of actual contract performance into the allocable overhead, which provides the "daily contract overhead;" and (3) multiplying the daily contract overhead by the number of days of contract delay, the result being the unabsorbed overhead amount. NASH & SCHOONER, *supra* note 50, at 153.

288. See *Berley Indus., Inc. v. City of New York*, 385 N.E.2d 281, 284 (N.Y. 1978) (reversing jury verdict granting unabsorbed overhead expenses calculated utilizing *Eichleay* formula and criticizing use of formula because of "chance relationship" between damages derived from such formula and actual damages); see also *Guy James Constr. Co. v. Trinity Indus.*, 644 F.2d 525, 533 (5th Cir.) (reversing lower court award based on *Eichleay* formula and holding that contractor must prove incurrence of additional overhead costs resulting from government-caused delay in order for contractor to recover damages), *modified*, 650 F.2d 93 (5th Cir. 1981); *Capital Elec. Co.*, GSBCA Nos. 5316, 5317, 83-2 B.C.A. (CCH) ¶ 16,548, at 82,314 (holding that unabsorbed overhead cannot be measured accurately through use of *Eichleay* formula), *rev'd*, 729 F.2d 743 (Fed. Cir. 1983); *Savoy Constr. Co. v. United States*, 2 Cl. Ct. 338, 342 (1983) (affirming board's denial of extended home office expense), *rev'd*, 732 F.2d 167 (Fed. Cir. 1984).

289. 12 F.3d 1574 (Fed. Cir. 1994).

290. See *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1581 (Fed. Cir. 1994) (stating that *Eichleay* formula is "exclusive means" for determining contractor's compensation). *Wickham* is the latest of five recent decisions by the Federal Circuit addressing the calculation of unabsorbed home office expense. See *Interstate Gen. Gov't Contractors, Inc. v. United States*, 12 F.3d 1053, 1059 (Fed. Cir. 1993) (adopting utilization of *Eichleay* formula as applied in previous cases); *Daly Constr., Inc. v. Garrett*, 5 F.3d 520, 522 (Fed. Cir. 1993) (upholding utilization of *Eichleay* formula when contractor meets requirements); *Capital Elec. Co. v. United States*, 729 F.2d 743, 746-47 (Fed. Cir. 1984) (approving use of *Eichleay* formula to calculate unabsorbed home office overhead expenses as accurate and well-established method of determining judgments). But see *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1582 (Fed. Cir. 1993) (restricting use of *Eichleay* formula to cases where contractor can demonstrate that delay prevented contractor from accepting other jobs and where Government can show that contractor would suffer no loss by using fixed percentage mark up formula); *C.B.C. Enters., Inc. v. United States*, 978 F.2d 669, 674 (Fed. Cir. 1992) (refusing to expand *Eichleay* formula by requiring "element of uncertainty before formula can be used to calculate extended home office overhead").

To invoke the *Eichleay* formula, it must be shown that: (1) the contractor has suffered a compensable delay, and (2) it is impossible to assess the amount of unabsorbed home office overhead directly attributable to a specific contract and resulting from the delay. *Wickham*, 12 F.3d at 1577.

work during the delay to mitigate its unabsorbed costs, the formula is the “exclusive means available for calculating unabsorbed overhead to the delayed contract.”²⁹¹ The court stated that where the amount of unabsorbed home office overhead expense specifically caused by the delay of a project cannot be determined, utilization of a daily rate of overhead expense as required by the “*Eichleay* formula fairly distributes” such expense.²⁹² The *Wickham* court further stated that unabsorbed overhead expense cannot contain any costs that are directly attributable to a particular project, including the delayed project,²⁹³ and that home office overhead expenses, by their very nature, cannot be traced to a particular job.²⁹⁴

In its claim for additional unabsorbed home office overhead expenses, over and above that awarded previously by the contracting officer based on the *Eichleay* formula, *Wickham*, a construction contractor, argued that eighty percent of its home office overhead costs were “directly attributable to” or caused by the delayed contract because eighty percent of the home office activity was in support of the delayed contract.²⁹⁵ Therefore, *Wickham* argued that the *Eichleay* formula, which distributes unabsorbed home office overhead expense on a pro-rata share among all of the contracts, resulted in too little of such costs being absorbed by the delayed contract.²⁹⁶ The Federal Circuit, affirming the decision of the GSBCA, denied the contractor’s claim and found that the contractor had confused direct costs with home office overhead expenses, which are incurred regardless of what jobs are undertaken by a contractor.²⁹⁷ In cases

291. *Wickham*, 12 F.3d at 1580.

292. *Id.*

293. *Id.* at 1581.

294. *Id.* at 1579.

295. *Id.* at 1578.

296. *Id.*

297. *Id.* at 1580-81. The Federal Circuit in *Wickham* also held that the contractor did not meet its burden of proof to establish that the contractor would have finished early absent a government-caused delay that resulted in a larger negotiated amount of unabsorbed overhead. *Id.* at 1582. In addition, the court affirmed the Board of Contract Appeals’ decision and did not allow the contractor to recover interest on equity capital that, according to the contractor, was borrowed and used to finance additional costs caused by the Government’s delays. *Id.* The court held that 28 U.S.C. § 2516(a) (1988) generally prohibits the award of interest except where specifically legislated by Congress. *Id.* at 1582-83. Finally, the court held that although interest paid on monies borrowed to cover additional expenses caused by a government delay are recoverable, in this case, the contractor failed to prove that any of the funds borrowed by the company during the relevant time period were actually utilized on this particular government contract. *Id.* at 1583.

The Federal Circuit rejected the “jury verdict” method of calculating the amount of a contractor’s unabsorbed home office expense as improper. *Id.* at 1580. Under this method, the facts and circumstances surrounding a government-caused delay are considered to determine the appropriate amount of compensation for unabsorbed overhead. See *Miles Constr., VABCA No. 1674, 84-1 B.C.A. (CCH) ¶ 16,967, at 84,375 (1983)* (utilizing “jury verdict” method in

subsequent to *Wickham*, the courts and boards of contract appeals continue to refine and restate the criteria for use of the *Eichleay* formula to compute unabsorbed home office overhead expense.²⁹⁸

Although *Wickham* answers the question of which method of calculation of unabsorbed home office overhead expenses is proper when a construction contractor meets the *Eichleay* criteria, several unanswered questions remain. What is the preferred method to be utilized when these criteria are not met by a construction contractor? Can a contractor simply choose the most advantageous method? What method should be utilized when appropriate and necessary financial records have not been kept by the contractor? Is it more appropriate, in such situations, to deny the contractor's claim? What is the correct method to calculate unabsorbed home office overhead in the supply context where some commentators have suggested that utilization of the *Eichleay* formula is like fitting a "square peg in a round hole?"²⁹⁹ What of the well-established principle that unabsorbed overhead expenses cannot be recovered in termination for convenience settlements despite the fact that such costs exist due to the reduction in direct labor dollars? And, finally, will the practice of allowing such costs in the delay context in any way affect the well-accepted prohibition on reimbursing such costs in termination situations?

D. Product Liability Issues

Since the Supreme Court's decision in *Boyle v. United Technologies Corp.*,³⁰⁰ contractors have invoked the "government contractor defense" to shield themselves from third party liability arising in connection with government contract performance.³⁰¹ Contractors

finding "reasonable determination" of excess costs).

298. See *Eurostyle, Inc. v. GSA*, GSCBA No. 12,084, 94-2 B.C.A. (CCH) ¶ 26,891, at 133,857 (1994) (stating that *Eichleay* formula is not appropriate where contractor suffered no decrease in direct labor costs as result of extension of contract performance, and concluding that contractor suffered no compensable delay as required by *Eichleay* formula).

299. Ralph C. Nash & John Cibinic, *Unabsorbed Overhead on Supply Contracts: An Idea Whose Time Has Come*, 8 NASH & CIBINIC REP. ¶ 45, at 114 (1994).

300. 487 U.S. 500 (1988).

301. The "government contractor defense" has played a substantive role in twenty separate opinions by the U.S. Courts of Appeals. See generally *Landgraf v. McDonnell Douglas Helicopter Co.*, 993 F.2d 558 (6th Cir.), cert. denied, 114 S. Ct. 553 (1993); *Carley v. Wheeled Coach*, 991 F.2d 1117 (3d Cir.), cert. denied, 114 S. Ct. 191 (1993); *Lewis v. Babcock Indus., Inc.*, 985 F.2d 83 (2d Cir.), cert. denied, 113 S. Ct. 3041 (1993); *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831 (2d Cir. 1992); *Glassco v. Miller Equip. Co.*, 966 F.2d 641 (11th Cir. 1992); *In re Hawaii Fed. Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992); *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir.), cert. denied, 502 U.S. 981 (1991); *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242 (5th Cir. 1990); *Chapman v. Westinghouse Elec. Corp.*, 911 F.2d 267 (9th Cir. 1990); *Dorse v. Eagle-Picher Indus., Inc.*, 898 F.2d 1487 (11th Cir. 1990); *In re Joint E. & S. Dist. New York Asbestos*

meeting established criteria may not be held liable under state law for design defects in products developed in accordance with "reasonably precise specifications" provided to the contractor by the Government.³⁰² This extension of the Government's immunity can effectively shield contractors from tremendous liability.

In *Hercules Inc. v. United States*,³⁰³ however, the Government, instead of the contractor, relied on this defense to shield itself from such liability. In *Hercules*, the Federal Circuit affirmed the decision of the Court of Federal Claims, granting summary judgment in favor of the Government and denying the requests of two manufacturers of Agent Orange for government indemnification.³⁰⁴

The manufacturers, Hercules Inc. (Hercules) and Wm. T. Thompson Co. (Thompson), sought recovery of sums that each had contributed to a fund established in connection with the 1984 settlement of a class action suit brought by Vietnam veterans and their families for injuries and death caused by the Government's use of Agent Orange in the Vietnam War.³⁰⁵ Hercules and Thompson

Litig., 897 F.2d 626 (2d Cir. 1990); *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450 (9th Cir. 1990); *Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698 (4th Cir. 1989), *cert. denied*, 495 U.S. 953 (1990); *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990); *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989); *Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir.), *cert. denied*, 493 U.S. 935 (1989); *Garner v. Santoro*, 865 F.2d 629 (5th Cir. 1989); *Lopez v. A.C. & S., Inc.*, 858 F.2d 712 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 904 (1989); *McGonigal v. Gearhart Indus., Inc.*, 851 F.2d 774 (5th Cir. 1988).

302. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988) (setting forth test determining when liability cannot be imposed). The Court decided that state law regarding military design defects cannot be imposed where "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 512.

303. 24 F.3d 188 (Fed. Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3388 (U.S. Nov. 4, 1994) (No. 90-391c). On April 3, 1995, the Supreme Court granted certiorari in this case. *Hercules, Inc. v. United States*, 115 S. Ct. 1425 (1995). ED.

304. *Hercules Inc. v. United States*, 24 F.3d 188, 204 (Fed. Cir. 1994) (rejecting claim that Government was required to indemnify Agent Orange contractors), *petition for cert. filed*, 63 U.S.L.W. 3388 (U.S. Nov. 4, 1994) (No. 90-391c).

305. *Id.* at 202. Prior to the 1984 settlement, in a 1982 hearing, the district court stated that the manufacturers would be entitled to summary judgment based on the government contractor defense if they could prove that: (1) the Government had established the specifications for the chemical; (2) the chemical produced by the manufacturers met the Government's specifications; and (3) the Government knew as much or more than the manufacturers about the hazards presented to humans by the chemical. *In re "Agent Orange" Prod. Liab. Litig.*, 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982). After finding that the chemical manufacturers met all of these criteria, the district court thereafter granted summary judgment. *In re "Agent Orange" Prod. Liab. Litig.*, 565 F. Supp. 1263, 1278 (E.D.N.Y. 1983). The summary judgment entered in favor of the manufacturers was reconsidered, however, by a different judge to whom the case was transferred prior to the entry of a judgment of dismissal. *See Hercules*, 24 F.3d at 192 (discussing procedural history of Agent Orange litigation) (citing *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 753 (E.D.N.Y. 1984)). This judge denied the manufacturers' motions for summary judgment, and thus effectively reversed the prior decision. *In re "Agent Orange"*, 597

sought settlement costs and litigation expenses from the Government under a number of theories, all of which were based on the Government's breach of various implied contractual warranties to them, resulting in increased costs for the manufacturers.³⁰⁶

1. *Implied warranty of specifications*

Both manufacturers argued that the Government had breached an implied contractual obligation to establish manufacturing specifications sufficient to ensure that Agent Orange, if produced in accordance with such specifications, would be safe for its unprecedented yet intended use.³⁰⁷ Under this theory, the court stated that the manufacturers must prove, as in all breach of warranty actions, that a valid warranty existed, that the warranty was breached, and that the damages sought were caused by the breach.³⁰⁸

The court denied the relief sought by the manufacturers.³⁰⁹ Relying on earlier decisions by the district court finding that the government contractor defense applied to shield Hercules and Thompson from liability,³¹⁰ the Federal Circuit stated that both manufacturers were immune from the veterans' claims.³¹¹ If the manufacturers had not settled and had gone to trial,³¹² this defense would have protected them from any liability.³¹³ The court reasoned, therefore, that the damages sought by the contractors were not caused by defective Government specifications, but instead by the voluntary settlement action taken by the manufacturers.³¹⁴

F. Supp. at 753. On the day that trial was to begin, the manufacturers settled, establishing the fund for the class defendants. *Hercules*, 24 F.3d at 192.

306. See generally *In re "Agent Orange,"* 534 F. Supp. at 1054-56 (discussing government contract defense). Cases dealing with product liability and contractor indemnification by the Government are fairly unique to the Federal Circuit. Very few cases decided by the Federal Circuit set forth the bases upon which a contractor may obtain indemnification from the Government for damages that the contractor incurs as a result of its performance of a government contract. See also *Lopez v. A.C. & S., Inc.*, 858 F.2d 712 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 904 (1989).

307. *Hercules*, 24 F.3d at 197 (stating manufacturers' claims). The manufacturers relied on *United States v. Spearin*, 248 U.S. 132 (1918) and its progeny. *Id.* In *Spearin*, the court held that where the Government provides detailed specifications to a contractor, it warrants to that contractor that a product produced in accordance with such specifications will not be defective. *Id.* (citing *United States v. Spearin*, 248 U.S. 132, 136-37 (1918)). If the product is nevertheless actually defective or unsafe, the contractor will not be liable to third parties. *Id.*

308. *Id.*

309. *Id.* at 199.

310. See *id.* at 200 (citing *In re "Agent Orange" Prod. Liab. Litig.*, 565 F. Supp. 1263, 1273-74 (E.D.N.Y. 1983), and *In re "Agent Orange,"* 611 F. Supp. 1223, 1263 (E.D.N.Y. 1985)).

311. *Id.*

312. See *id.* (stating that if case had proceeded to trial, it was highly unlikely that any liability would have been imposed on manufacturers).

313. *Id.*

314. *Id.*

As pointed out by the dissent, the government contractor defense was still evolving when the contractors entered into the settlement of the Agent Orange litigation in 1984.³¹⁵ Indeed, the settlement of this litigation was finalized some four years prior to the Supreme Court's decision in *Boyle*.³¹⁶ The dissent, therefore, found the majority's holding that the "evolving" government contractor defense would "clearly dictate the outcome" in the original suits to be unpersuasive.³¹⁷

Moreover, the dissent also noted that the district court judge to whom the case was transferred and who reconsidered the motion for summary judgment in the original Agent Orange litigation "must have believed that there was a valid on-going case or controversy"³¹⁸ even in light of the government contractor defense. Otherwise, the court would have left standing the earlier grant of the summary judgment motion, instead of effectively reversing it.³¹⁹

2. *Implied reverse warranty*

The Government had refused to allow Hercules to attach their customary warning labels to the barrels of Agent Orange delivered to the military.³²⁰ Hercules, therefore, argued that the Government had impliedly warranted that it would not utilize Agent Orange in any manner that would subject military personnel to increased risk or Hercules to subsequent tort actions.³²¹ Once again, the court held that, in view of the valid government contractor defense, Hercules could not prove that the Government's alleged breach of the reverse warranty caused the settlement costs or litigation expenses.³²²

3. *Implied warranty of superior knowledge and implied obligation to indemnify*

Both manufacturers also argued that the Government breached an implied contractual obligation to: (1) inform each manufacturer of the superior knowledge possessed by the Government of the dangers of dioxin, a chemical contained in Agent Orange,³²³ and (2) to

315. *Id.* at 207 (Player, J., dissenting).

316. *See id.* at 206 (Player, J., dissenting) (challenging majority's use of *Boyle* in determining liability).

317. *Id.* at 207 (Player, J., dissenting).

318. *Id.* at 206 (Player, J., dissenting).

319. *Id.* (Player, J., dissenting).

320. *Id.* at 200.

321. *Id.* at 201.

322. *Id.* at 202.

323. *Id.* at 196-97. If the Government fails to provide a contractor with "vital knowledge" which is known by the Government and which affects the costs incurred or the time required

indemnify them in accordance with the Defense Production Act pursuant to which both companies were compelled by law to produce Agent Orange.³²⁴ The Federal Circuit denied relief under both theories.³²⁵

Despite the multitude of arguments offered, the manufacturers were unable to pass any of the costs or expenses that they incurred in the settlement with the Vietnam veterans and their families onto the Government.³²⁶ The contractors failed to obtain any assistance from the Government despite the fact that the Government had required the companies to perform, and indeed, had provided the formula and specifications that dictated, to some extent, how the chemical was to be prepared.³²⁷ Because the companies failed to avail themselves of a defense that they were unsure would prevail at the time—the government contractor defense—the Federal Circuit denied relief to the manufacturers.

This denial of relief for failure to raise the government contractor defense is particularly interesting for two reasons. First, the court did not independently analyze the test articulated and refined by the Supreme Court in *Boyle* to determine whether the government contractor defense truly should apply to shield Hercules and Thompson. Instead, the Federal Circuit relied on earlier Second Circuit holdings decided prior to *Boyle* to find that the government contractor defense applied.³²⁸

This is significant because in *Boyle*, the Supreme Court refined the three-part government contractor defense test and made it clear that such a defense will only be available to contractors to whom the

to perform, the Government may be liable for breach damages. *Id.* at 196.

324. *Id.* at 202 (citing Defense Production Act, 50 U.S.C. app. § 2071(a) (1964)).

325. *Id.* at 197. The court was unwilling to extend the doctrine of superior knowledge to cover costs that it believed were incurred "post-performance," such as settlement and litigation expenses. *Id.* Concerning the manufacturers' claim that the Government was required to indemnify them under the Defense Production Act, the Federal Circuit affirmed the lower court's decision and held that the Act authorized the President to dictate that performance of government contracts entered into pursuant to the Act would be given preference over all other contracts. *Id.* at 203. The court therefore held that the Defense Production Act provided protection only against the risk that it created—that another commercial customer might sue a government contractor for breach resulting from the preference given to the military contract. *Id.*

326. *Id.* at 204 (refusing to allow companies to recover costs for Agent Orange litigation).

327. *Id.* at 191 (noting that Government supplied company with chemical specifications). See also *id.* at 203 (recognizing that Government can compel contract acceptance and performance).

328. See *Hercules*, 24 F.3d at 193 (citing *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1229 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), to justify court's reliance on government contractor defense); see also *id.* (citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987), in support of court's acceptance of government contractor defense).

Government has provided *design specifications*.³²⁹ In *Boyle*, the Court stated that the contractor will not be liable for "design defects" if, among other things, the Government "approved reasonably precise specifications."³³⁰

Prior to *Boyle*, however, the criteria for application of the defense stated that a contractor might be shielded from liability if the Government had "established the specifications for 'Agent Orange.'"³³¹ This criterion does not seem to draw any distinction between "design specifications" and "performance specifications."

By relying on prior holdings that the government contractor defense would have protected the manufacturers from all liability, without applying the newer standard articulated by the Supreme Court in *Boyle*, the Federal Circuit in *Hercules* appears to have ratified an earlier, outdated test that did not differentiate between design and performance specifications.

It is unclear whether the manufacturers of Agent Orange were given design or performance specifications, although they were given a formula and specifications in order to manufacture Agent Orange.³³² If these specifications did not rise to the level of design specifications, but were instead performance specifications, the Federal Circuit's reliance on the government contractor defense to dispose of the manufacturer's arguments as to implied warranty of specifications and reverse warranty was clearly misplaced. This reliance, in turn, may have led to an incorrect analysis and outcome in this case.³³³

The second interesting aspect of *Hercules* is whether subsequent courts will interpret the holding narrowly or broadly. *Hercules* may be cited in subsequent case law for the broad proposition that the Government will simply not indemnify a contractor if that contractor could have relied on, but instead waived, the government contractor defense. Only time will determine if contractors must, in the future,

329. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988) (enumerating three-part test for determining whether manufacturer is liable).

330. *Id.*

331. *Hercules*, 24 F.3d at 192.

332. *Id.* at 191 (stating that military "supplied the formula and specifications for manufacturing Agent Orange").

333. The Second Circuit has stated that its decisions finding that the government contractor defense applied to the Agent Orange manufacturers failed to require that the "government specifications be 'reasonably precise.'" *In re Joint E. & S. Dist. New York Asbestos Litig. v. Eagle-Picher Indus., Inc.*, 897 F.2d 626, 635 (2d Cir. 1990) (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187, 191 (2d Cir. 1987)). This failure limits the value of the Second Circuit's decisions because of the court's failure to require "the more exacting standard a military contractor must satisfy after *Boyle* to establish the military contractor defense." *Id.*

guess as to whether they should assert the government contractor defense.

After *Hercules*, contractors cannot be certain whether or not appellate courts will prevent them from passing on damages to the Government if they opt for settlement instead of pursuing a viable government contractor defense at trial. Such a result would seemingly dictate trial in lieu of settlement in cases where it is simply too difficult to determine if the government contractor defense applies.

E. Value Engineering Change Proposals

The purpose of the "value engineering change" clause contained in most contracts is to motivate contractors to develop and propose ideas to the Government that the contractor believes will reduce the overall cost of contract performance without affecting the essential requirements dictated by the Government's specifications. Recent decisions by the Federal Circuit, however, have all but eliminated any incentive that the clause may provide to contractors to expend the effort and funds necessary to develop and propose such cost-saving ideas.

In the most recent of such cases, *M. Bianchi of California v. Perry*,³³⁴ the Federal Circuit held that absent an initial bad faith rejection of a value engineering change proposal (VECP) by the Government, a contractor is not entitled to share in the cost savings recognized by the Government.³³⁵ The contractor is denied any benefit resulting from the cost savings even though the Government subsequently incorporates the idea contained in the VECP into another contract.³³⁶

The Defense Logistics Agency (DLA) awarded M. Bianchi of California (MBOC) a contract to manufacture military garments.³³⁷ MBOC was to package these garments in boxes of five each.³³⁸ Realizing that savings could be achieved by packaging additional quantities of garments in each box, MBOC submitted two separate VECPs proposing that the individual box size be increased to hold additional quantities of the garments.³³⁹

334. 31 F.3d 1163 (Fed. Cir. 1994).

335. *M. Bianchi of Cal. v. Perry*, 31 F.3d 1163, 1168 (Fed. Cir. 1994) (rejecting argument that contractor should be entitled to share of government savings based on lack of privity between government and contractor at time of rejection of VECP).

336. *Id.*

337. *Id.* at 1164.

338. *Id.* at 1165.

339. *Id.*

Initially, the DLA rejected both proposals.³⁴⁰ Following the rejection of its VECPs, MBOC completed performance of its contract.³⁴¹ Once the MBOC contract expired, the DLA modified the contract of another vendor, VI-MIL, for the manufacture of military garments to incorporate the VECP idea originally proposed by MBOC.³⁴²

MBOC, alleging that DLA constructively accepted its idea by incorporating the VECP in the VI-MIL contract, submitted claims for royalties stemming from the cost savings to be recognized in the performance of the VI-MIL contract as well as other future and concurrent contracts for "essentially the same" item.³⁴³ In hearings conducted by the ASBCA, the Government's counsel conceded that MBOC's ideas were utilized in other DLA contracts.³⁴⁴ Moreover, the Government's counsel conceded that DLA had "constructively accepted" MBOC's VECP through the incorporation of this idea in subsequent DLA contracts.³⁴⁵

Despite these concessions, the ASBCA denied MBOC any royalties.³⁴⁶ The ASBCA, relying on *John J. Kirlin, Inc. v. United States*,³⁴⁷ held that MBOC's contractual relationship with the Government had ended prior to the incorporation of the VECP into VI-MIL's contract.³⁴⁸ Therefore, there existed no express or implied basis for any recovery by MBOC.³⁴⁹ In other words, the Government's express or constructive acceptance of a VECP must occur prior to the expiration or termination of the contractual relationship between the Government and the contractor proposing the VECP.³⁵⁰ The Federal Circuit affirmed the ASBCA's holding.³⁵¹ The court stated that there must be an express contractual relationship on which to base the recovery of royalties stemming from the incorporation of a VECP in concurrent or future contracts.³⁵²

340. *Id.*

341. *Id.*

342. *Id.* at 1166.

343. *Id.*

344. *Id.*

345. *Id.*

346. *M. Bianchi of Cal. v. Perry*, ASBCA Nos. 37,029, 37,071, 93-1 B.C.A. (CCH) ¶ 25,309, at 126,089-90 (1992).

347. 827 F.2d 1538 (Fed. Cir. 1987).

348. *Bianchi*, 93-1 B.C.A. (CCH), at 126,089.

349. *Id.* at 126,090.

350. *Id.* at 126,089.

351. *M. Bianchi of Cal. v. Perry*, 31 F.3d 1163, 1167 (Fed. Cir. 1994).

352. *Id.*

In *John J. Kirlin, Inc. v. United States*,³⁵³ the Federal Circuit faced essentially the same facts. In *Kirlin*, a contractor alleged that the Government, although it initially rejected the contractor's VECP, ultimately incorporated an idea from the VECP into another contractor's contract after the contract under which the VECP originally had been proposed expired.³⁵⁴ The Federal Circuit acknowledged the doctrine of constructive acceptance of a VECP by the Government, following the Government's initial rejection of the VECP.³⁵⁵ The court, however, stated that this doctrine was a basis for recovery only when the alleged constructive acceptance occurred under the same contract that contained the proposed VECP.³⁵⁶

The court in *Kirlin* stated that a contractor's right to recovery of royalties depended on an express contractual relationship.³⁵⁷ Once the contract ended, there was generally considered to be no basis for recovery.³⁵⁸ The court acknowledged, however, that should a contractor be able to prove a bad faith rejection of the idea by the Government, recovery could possibly be obtained.³⁵⁹ In addition, the Federal Circuit seemed to leave open the possibility that, had facts been present to support an implied contractual relationship, the court could have granted recovery to the originator of the idea based on constructive acceptance by the Government pursuant to an implied contract.³⁶⁰

In *Bianchi*, however, the Federal Circuit seems to have eliminated any such possibility. The court, in *Bianchi*, stated that constructive acceptance of a VECP is simply precluded following contract expiration³⁶¹ because, once the contract has ended, there is no privity between the contractor and the Government on which a contractual right can be based.³⁶² In so holding, the court apparently ignored the plain language of the VECP clause which states that "[t]he Contracting Officer may accept, in whole or in part, by contract modification either before or within a reasonable time after

353. 827 F.2d 1538 (Fed. Cir. 1987).

354. *John J. Kirlin, Inc. v. United States*, 827 F.2d 1538, 1540 (Fed. Cir. 1987).

355. *Id.* at 1541 (recognizing that "at least one board of contract appeals" has upheld doctrine of constructive acceptance).

356. *Id.* (rejecting claim that contractor should be awarded compensation on basis of "subsequent contract to which [contractor] was not a party").

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *M. Bianchi of Cal. v. Perry*, 31 F.3d 1163, 1167 (Fed. Cir. 1994).

362. *Id.*

performance has been completed under this contract any VECP submitted pursuant to this clause."³⁶³

The court stated, however, that its holding that a VECP must be expressly or constructively accepted prior to completion of the contract under which the VECP was offered does not conflict with the plain words of the VECP clause because the Government had formally rejected the VECP proposed by MBOC.³⁶⁴ The court apparently viewed this act of formal rejection as cutting off the right MBOC might otherwise have had pursuant to the clause to claim royalties from a VECP acceptance following contract completion. The court stated that, at most, the words of the VECP clause only allowed acceptance following contract completion so long as the Government had not acted prior to contract completion.³⁶⁵

This reasoning seems to be in conflict with the basis on which the case was decided. Recovery of damages was denied because the contract was complete so that there was no privity of contract between MBOC and the Government and therefore, no basis upon which to base any contractual recovery.³⁶⁶ The lack of privity relied upon by the court to deny relief to MBOC was effected by the completion of contract performance and not Government rejection.³⁶⁷ Action or inaction on the part of the Government with regard to the VECP had no effect on contract privity.³⁶⁸ Therefore, whether acceptance occurred following an initial rejection or simply inaction should be of no consequence. Acceptance of an idea after an initial rejection is no less an acceptance than if the idea had not been initially rejected. To be consistent with the court's lack-of-privity holding, it should only matter whether express or constructive acceptance occurred prior to contract completion.

Moreover, the court's theory that there existed no contractual basis to support recovery also seems flawed. By its very terms, the VECP clause survived termination or expiration of the contract for at least

363. *Id.* at 1164. Indeed, the court seems to have failed to follow its own holdings that an ambiguity will not be read into a contract where the words are clear and susceptible to only one reasonable interpretation. *See, e.g.,* A-Transport Northwest Co. v. United States, 36 F.3d 1576, 1584 (Fed. Cir. 1994) (adhering to "plain and ordinary meaning" interpretation of contract); City of Tacoma v. United States, 31 F.3d 1130, 1134 (Fed. Cir. 1994) (stating that contract clause was "not inherently ambiguous" because it was subject to "only one reasonable interpretation"); Interwest Constr. v. Brown, 29 F.3d 611, 615 (Fed. Cir. 1994) (upholding specific language of contract as unambiguous).

364. *Bianchi*, 31 F.3d at 1168.

365. *Id.* (interpreting VECP clause only to permit government to accept VECP after contract period which it had not previously acted).

366. *Id.*

367. *Id.*

368. *Id.*

a reasonable period of time.³⁶⁹ The clause expressly governed acceptance by the Government after contract completion.³⁷⁰

Indeed, the survival of the clause was not conditioned on the Government's failure to reject prior to award. The clause survived and required the payment of royalties so long as the VECP was accepted within a reasonable period of time following contract completion.³⁷¹

In addition to holding that there must be contractual privity to allow constructive acceptance, the court held that the submission of a VECP does not "confer any proprietary right in the 'concept' of the proposal."³⁷² Thus, the holding in *Bianchi* clearly opens the door for the Government to initially reject VECP ideas, wait until contract completion, and then utilize a contractor's VECP with no obligation to compensate the contractor. The Government can, of course, offer contractors a false sense of security by asserting that it is only permitted to reject in good faith.³⁷³ The difficulties in attempting to prove bad faith on the part of the Government mean, however, that contractors will gain very little comfort from this assurance. Without any comfort that they will be treated fairly, and because their ideas may not be accepted or compensated, it is doubtful that many contractors will be rushing forward with cost-saving ideas.³⁷⁴

F. Cost Accounting Standards

Contracts subject to the Cost Accounting Standards (CAS) require contractor compliance with these standards, written disclosure, and consistent adherence to disclosed cost accounting practices.³⁷⁵ Such contracts also require contractors to notify their Administrative

369. *See id.* at 1165.

370. *Id.* (reprinting VECP clause which allowed for acceptance of any VECP by Government "within a reasonable time after performance has been completed under [the] contract").

371. *Id.*

372. *Id.*

373. *See id.* at 1167 (noting that VECP was denied in good faith).

374. Perhaps a more equitable position would be that if the Government initially rejected a VECP in bad faith but later constructively accepts the idea through its incorporation into another contract, the contractor should be entitled to royalties. The fact that the contract has been completed or that a reasonable period of time has elapsed should have no bearing on the contractor's recovery.

Moreover, even absent bad faith, the clear words of the contract's value engineering clause should be followed. The contractor should receive royalties if the Government expressly or constructively accepts the VECP during contract performance or during a reasonable period of time thereafter, even if the Government initially rejected the idea in good faith.

375. *See* 41 U.S.C. § 422 (1994) (establishing cost accounting standards board); 48 C.F.R. § 52.230-2(a)(2) (1994) (establishing cost accounting standards); 48 C.F.R. § 52.230-3(a)(3)(i) (1994) (requiring contractor to consistently follow its cost accounting practices); 48 C.F.R. § 52.230-4 (1994) (requiring consistency in cost accounting standards).

Contracting Officer (ACO) and to submit a description of any voluntary change in their disclosed accounting practices at least sixty days in advance of implementing such changes.³⁷⁶

Where a contractor fails to disclose a change in accounting practice, it risks unilateral withholding by the Government on all of its CAS-covered contracts.³⁷⁷ In addition, the contractor faces a unilateral price adjustment of such contracts if the costs paid by the Government materially increase under the new, undisclosed accounting practice.³⁷⁸ Moreover, it is generally accepted that the correct measure of withholding and unilateral price adjustment to CAS-covered contracts equals the costs paid by the Government under the new, undisclosed accounting practice, over and above the costs that would have been paid by the Government under the previously disclosed practice.³⁷⁹ Although FAR and its predecessor regulations support this calculation, they fail to address whether the previously disclosed accounting method is to be utilized to determine the correct amount to be paid by the Government, when such previously disclosed practice is non-compliant.

In *General Motors Corp. v. Aspin*,³⁸⁰ the Federal Circuit recently answered this question. The Federal Circuit held that the increased cost paid by the Government should be the difference between the costs that General Motors allocated to the Government under a new, undisclosed practice and the costs that would have been paid by the Government under the previously disclosed accounting practice, regardless of whether the disclosed practice was compliant.³⁸¹

In 1975, General Motors submitted a revision to its disclosure statement, setting forth a change in the manner in which it directly allocated an Indiana state corporate income tax to one of its individual business segments in accordance with CAS 403.³⁸² The

376. See 48 C.F.R. § 30.602-3(b)(2) (1994); 48 C.F.R. § 52.230-2(a)(2) (1994); 48 C.F.R. § 52.230-5(a)(2) (1994) (setting forth contracting requirements).

377. See 48 C.F.R. § 30.602-3(d)(1) (1994) (providing remedial procedures where contractor does not submit accounting change description, dollar magnitude of change, or cost impact proposal as required); 48 C.F.R. § 52.230-5(c) (1994) (specifying amount entitled to be withheld by contracting officer where contractor deficient in filing required cost impact proposals or cost accounting changes).

378. 48 C.F.R. § 30.602-3(d)(2) (1994); 48 C.F.R. § 52.230-2(a)(5) (1994); 48 C.F.R. § 52.230-3(a)(4) (1994); 48 C.F.R. § 52.230-4 (1994); see also *Perry v. Martin Marietta Corp.*, 47 F.3d 1134, 1135 (Fed. Cir. 1995) (contending that internal corporate reorganization could result in adjustment to some CAS-covered contracts).

379. *Perry*, 47 F.3d at 1135.

380. 24 F.3d 1376 (Fed. Cir. 1994).

381. *General Motors Corp. v. Aspin*, 24 F.3d 1376, 1383 (Fed. Cir. 1994).

382. *Id.* at 1379-80. CAS 403 requires contractors to allocate home office expense to particular business segments to the maximum extent possible based upon a beneficial and causal relationship. *Id.* at 1380-81; see also *United States v. Lockheed Corp.*, 817 F.2d 1565, 1569-70

Government, found the proposed "composite rate method" to be unacceptable.³⁸³

Following the Government's rejection, General Motors did not reinstitute the "pre-1974 method,"³⁸⁴ the method previously utilized by General Motors. Instead, it instituted a new method, the "1975-1979 method," but it never disclosed this change to the Government.³⁸⁵ Under the 1975-1979 method, General Motors allocated more taxes to the Government than it would have under the pre-1974 method.³⁸⁶ In 1984, the ACO rendered its final decisions, holding that General Motors overallocated Indiana state income tax under the 1975-1979 method in violation of CAS 403.³⁸⁷

General Motors appealed this decision to the ASBCA.³⁸⁸ On appeal, the Government argued that it was entitled to a downward price adjustment, not only because the 1975-1979 method of allocation utilized by General Motors overallocated Indiana state tax to the Government, but also because General Motors violated its CAS disclosure obligations.³⁸⁹ The ASBCA agreed with the Government.³⁹⁰ Additionally, the ASBCA found that the pre-1974 method complied with CAS 403.³⁹¹

On appeal, the Federal Circuit held that CAS 403 requires direct allocation of home office expenses that can be specifically identified with a business segment, reversing the ASBCA's decision on this point.³⁹² The court also disagreed with the ASBCA regarding its conclusion that the pre-1974 method of allocation of Indiana state income taxes complied with CAS 403 while a newer "claim" method of allocation, which was first put forth by General Motors in its ASBCA appeal, did not.³⁹³ The Federal Circuit found that only the "claim" method correctly allocated the state income tax.³⁹⁴ The

(Fed. Cir. 1987) (requiring traceable relationship between expense and segment); *Boeing Co. v. United States*, 680 F.2d 132, 135 (Ct. Cl. 1982) *cert. denied*, 460 U.S. 1081 (1983) (recognizing CAS 403 provision requiring direct allocation of costs to segments).

383. *General Motors*, 24 F.3d at 1380.

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* CAS 403 requires contractors to disclose any change in cost accounting methods. 4 C.F.R. § 403 (1994). General Motors violated this requirement by not disclosing to the Government its change to the "1975-1979" method of cost accounting. *General Motors*, 24 F.3d at 1380.

390. *Id.*

391. *Id.*

392. *Id.* at 1381-82.

393. *Id.* at 1383.

394. *Id.*

Federal Circuit, however, did affirm the ASBCA's finding that the contractor violated its disclosure obligation when it changed the manner in which it allocated Indiana state income taxes.³⁹⁵

Despite its finding that the pre-1974 allocation method was non-compliant, the court held that the proper remedy for the contractor's failure to disclose a voluntary change in allocation methods was the difference between the higher costs paid by the Government under the non-compliant allocation method instituted by the contractor without disclosure and the non-compliant pre-1974 method.³⁹⁶ Notwithstanding this holding's effective reinstatement of the non-compliant pre-1974 method of allocation, the court stated that the proper remedy for the contractor's failure to disclose was not reinstatement of a non-compliant method of allocation.³⁹⁷ This is, however, exactly what the Federal Circuit effectively accomplished.

The measure of damages advocated by the Federal Circuit was the same measure advocated by the ASBCA.³⁹⁸ It is important to note, however, that the ASBCA found the pre-1974 method of allocation to be the only compliant method discussed in the ASBCA case.³⁹⁹ The ASBCA did not, therefore, effectively re-institute a non-compliant method of allocation through its calculation of damages. Instead, it re-instituted what it believed to be the only compliant method.⁴⁰⁰

The Federal Circuit's reliance on a non-compliant allocation method as the appropriate measure of damages for failure to disclose raises many questions concerning the calculation of such damages in future cases. How will the Federal Circuit calculate damages in a situation where a contractor changes from a previously disclosed non-compliant method to an undisclosed compliant method, resulting in an increase in allocation clearly allowed under CAS? Will the Federal Circuit effectively re-institute a non-compliant method over a

395. *Id.*

396. *Id.* The court relied upon the CAS clause contained in the relevant contract, which stated that a contractor "[a]gree[d] to an adjustment of the contract price or cost allowance, as appropriate," in the event that the contractor "fail[ed] to comply with an applicable Cost Accounting Standard[] or to follow any practice disclosed . . . and such failure result[s] in any increased costs paid by the United States." *Id.* General Motors failed to disclose its change in accounting practice from one non-compliant method to another non-compliant method, and such change increased the costs allocated to the Government. *Id.*

397. *Id.*

398. *See id.* (discussing proper method for measuring damages in cases where contractors fail to disclose properly changes in cost accounting procedures).

399. *See* General Motors Corp., ASBCA Nos. 30510, 31226, 31482, 36118, 93-2 B.C.A. (CCH) ¶ 25,753, at 128,150-52 (1993).

400. *Id.* Moreover, Federal Circuit Judge Helen Nies, concurring in part in the majority opinion, pointed out that the majority need not have remanded the case for determination of damages because the damages calculated by the court and the ASBCA were the same. *General Motors*, 24 F.3d at 1384.

compliant method and seek damages when in fact, no real damages have occurred because the contractor allocated costs in accordance with CAS? Preferably, such valuing of form over substance will end before a contractor is required to provide such a "remedy."

G. Contract Financing

During the last thirty years, the Federal Circuit has rarely considered issues relating to the Assignment of Claims Act.⁴⁰¹ In fact, since 1960, the court has ruled on only two Assignment of Claims Act cases.⁴⁰² In 1984, the Federal Circuit in *Security Bank & Trust Co. v. United States*,⁴⁰³ held that the Government's failure to give an assignee notice of the termination of the assigned contract did not render the Government liable to the assignee for the amounts loaned to the contractor.⁴⁰⁴ The following year, the Federal Circuit, in *Unity Bank & Trust Co. v. United States*,⁴⁰⁵ held that an assignee's claims did not take priority over the claims of the contractor's employees under the Davis-Bacon Act⁴⁰⁶ where the contractor failed to pay its employees the prevailing wage.⁴⁰⁷

In *Bank of America National Trust and Savings Association v. United States*,⁴⁰⁸ the Federal Circuit again considered the priority of an assignee's claims under the Assignment of Claims Act. The court held that the assignee had priority over the Small Business Administration (SBA)⁴⁰⁹ and, therefore, could recover from the Government amounts that the Government had paid to the contractor under a settlement agreement, notwithstanding the fact that the assignee had collected from the SBA amounts owed the assignee under two SBA guaranteed loans.⁴¹⁰

401. 31 U.S.C. § 3727 (1988). Under the Assignment of Claims Act, a contractor may assign to a bank, trust company, or other financing institution moneys due or to become due under a government contract as security for a loan to the contractor. FAR, 48 C.F.R. §§ 32.801, at 32.802. The purpose of the Assignment of Claims Act is to promote private financing of government contracts while still protecting the interests of the government. See generally Vickery & Paalborg, Assignment of Claims Act, 87-3 Briefing Papers (Feb. 1987). The Anti-Claims Act and the Anti-Assignment Act, 41 U.S.C. § 15 (1988), are customarily referred to as the Assignment of Claims Act.

402. See *infra* notes 403-07 and accompanying text (discussing cases involving Assignment of Claims Act).

403. 731 F.2d 861 (Fed. Cir. 1984).

404. *Security Bank & Trust Co. v. United States*, 731 F.2d 861, 866 (Fed. Cir. 1984).

405. 756 F.2d 870 (Fed. Cir. 1985).

406. 40 U.S.C. § 276a (1988).

407. *Unity Bank & Trust Co. v. United States*, 756 F.2d 870, 873 (Fed. Cir. 1985) (holding that employees are beneficiaries of Davis-Bacon Act).

408. 23 F.3d 380 (Fed. Cir. 1994).

409. *Bank of Am. Nat'l Trust & Sav. Ass'n v. United States*, 23 F.3d 380, 385 (Fed. Cir. 1994).

410. *Id.*

The contractor in *Bank of America* had entered into a security agreement with a bank and granted the bank a security interest in the proceeds of a series of government contracts.⁴¹¹ In accordance with the Assignment of Claims Act, the bank notified the Government of the assignment.⁴¹² The Government acknowledged and accepted the assignment and made payments under the contracts directly to the bank.⁴¹³ The contractor subsequently sought and received an SBA guarantee on two additional loans from the bank, each of which was secured by future receivables.⁴¹⁴

Soon after the contractor received the second SBA guarantee, the Government terminated two of the contractor's contracts for default.⁴¹⁵ As a result, the contractor defaulted on its loans to the bank, including both the SBA-guaranteed loans and the prior non-guaranteed loans.⁴¹⁶ Pursuant to the SBA loan guarantees, the bank obtained payment from the SBA and, in exchange, assigned its interest in the guaranteed loans to the SBA.⁴¹⁷ Meanwhile, the contractor brought a series of claims against the Government that the parties eventually settled.⁴¹⁸ Upon learning of the settlement, the bank, pursuant to the Assignment of Claims Act, requested that the Government pay the amount of the settlement to the bank.⁴¹⁹ The Government denied the request and, instead, unsuccessfully sought to recoup the payment it had made to the contractor.⁴²⁰ When the Government did not make payment to the bank, the bank filed an action in the Court of Federal Claims seeking payment of the settlement amount.⁴²¹ Holding for the Government, the Court of Federal Claims concluded that the bank had assigned its rights to the SBA, and, as a result, the bank had no further claim on any monies due to the contractor.⁴²²

The Federal Circuit reversed the Court of Federal Claims decision, because it concluded that, under the loan agreements, the bank's

411. *Id.* at 382.

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *Bank of Am. Nat'l Trust & Sav. Ass'n v. United States*, No. 90-3961C, 1992 WL 677195 (Cl. Ct. Oct. 16, 1992).

422. *Id.* at *2. The court also granted summary judgment for the Government on its claim against the contractor, holding that the contractor should reimburse the Government for the amounts paid under the settlement because the amounts had been paid erroneously. *Id.* at *3.

right to payment was superior to that of the Government.⁴²³ In reaching this decision, the Federal Circuit concluded that the rights of the SBA under the guaranteed loans had attached after the bank's interest under the earlier loans.⁴²⁴ The court reasoned that both loans were secured by the same collateral and that the SBA knew of the bank's senior interest in the contract payments.⁴²⁵ Thus, having received timely notice of the assignment, the Government paid the contractor under the settlement agreement at its peril.⁴²⁶ This payment, the court concluded, was a payment that should have gone to the bank under the assignment, as prescribed by the Assignment of Claims Act.⁴²⁷

Further, the Federal Circuit held that the Government had no right to set off the amount the contractor owed to the SBA against the amounts due to the bank.⁴²⁸ The contract between the Government and the contractor provided that an assignee's right to contract payments could not be reduced by any liability of the contractor to the Government that arose "independently" of the contract.⁴²⁹ The court explained that this clause was intended to promote the goals behind the Assignment of Claims Act by making it easier for contractors to obtain financing by assuring lenders that their security could not be affected by any extra-contractual obligations of the contractor to the Government.⁴³⁰ Although the Government can assert any defenses arising under the contract against the assignee, it cannot assert obligations of the contractor arising outside of the contract.⁴³¹ In this case, the contractor's liability to the Government on the SBA loans did not arise from the contracts but rather from the loan documents and, thus, was independent of the contracts.⁴³²

423. *Bank of America*, 23 F.3d at 384. The Federal Circuit also reversed the lower court's conclusion as to the contractor, holding that the Government could not renege on its settlement with the contractor. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.* at 385.

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.* In a concurring opinion, Judge Mayer concluded that the Court of Federal Claims was without jurisdiction to consider the Government's claim against the contractor because the claim arose out of the settlement agreement between the Government and the contractor and the settlement agreement was not a procurement covered by the Contract Disputes Act, 41 U.S.C. §§ 601-613 (1988). *Id.* at 385-86 (Mayer, J., concurring). Judge Mayer concluded that, if the Government desires to file a claim to recoup any allegedly erroneously made payments, it is required to file an independent action in federal district court. *Id.* at 388 (Mayer, J., concurring).

The Federal Circuit's holding in this case is consistent with general commercial principles and is in accordance with the letter and spirit of the Assignment of Claims Act.⁴³³

H. Tax Escalation

In *Kimbrell v. Fischer*,⁴³⁴ the Federal Circuit, for only the second time in ten years, examined a tax escalation clause contained in a contract for the lease and improvement of property.⁴³⁵ In *Kimbrell*, the court held that a lessor was not entitled to an equitable adjustment for increased taxes in the year following completion of improvements to the property because the property had not been fully assessed for tax purposes until after the completion of the improvements.⁴³⁶ Pursuant to the tax escalation clause in the contract, the Government was required to absorb any increases in real estate taxes levied after "the calendar year in which its lease commences (base year) If no full tax assessment is made during the calendar year in which the government lease commences, the base year will be the first year of a full assessment."⁴³⁷

The contract between the Kimbrells and the Government was executed on June 15, 1988, six months after the valuation date for the 1988 tax appraisal.⁴³⁸ After the commencement of the lease, the lessor constructed a building for use by the Government.⁴³⁹ The improved property, therefore, was not appraised for tax purposes until 1989.⁴⁴⁰ The taxes for 1989 reflected not merely the new building,

433. *Id.* at 385. In a nonprecedential decision concerning the FAR cost principles, the Federal Circuit affirmed an ASBCA decision whose reasoning is relevant to an issue that arises in many corporate transactions involving government contractors. In *Aspin v. Eaton Corp.*, 26 F.3d 140, No. 93-1559, 1994 WL 180329, at *1 (Fed. Cir. May 11, 1994) (per curiam), *aff'g* ASBCA No. 34,355, 93-2 B.C.A. (CCH) ¶ 25,743 (1993), the Federal Circuit agreed that the sale of a contractor's stock, rather than its assets, did not cause the contractor to realize any "gains" to credit the Government under FAR 31.205-16. The ASBCA reasoned that generally accepted accounting principles "recognize [] the stockholders and the company whose stock they hold as two separate accounting, as well as legal, entities." *Aspin v. Eaton Corp.*, ASBCA No. 34,335, 93-2 B.C.A. (CCH) ¶ 25,743, at 128,097. That same reasoning should apply to the Anti-Assignment Acts, to support the view that stock transactions do not affect transfers of Government contracts and thus are not subject to the novation requirements of FAR subpart 42.12. See Marcia G. Madsen & David R. Johnson, *Corporate Transactions Involving Government Contractors*, 57 FED. CONT. REP. (BNA) 444, 446-47 (1992) (arguing that changes in corporate stock ownership do not transfer corporation's government contracts and thus do not require novation).

434. 15 F.3d 175 (Fed. Cir. 1994).

435. *Kimbrell v. Fischer*, 15 F.3d 175, 175-76 (Fed. Cir. 1994).

436. *Id.* at 178.

437. *Id.* at 176. The contract also provided that in the event of any decrease in taxes, the rent would be adjusted downward. *Id.*

438. *Id.*

439. *Id.*

440. *Id.*

but also included a major increase in real estate tax rates.⁴⁴¹ As a result, the lessor sought an equitable adjustment under the tax escalation clause.⁴⁴² The Government denied the request and stated that although the lease had commenced in 1988, there was no full tax assessment until 1989.⁴⁴³ As a result, 1989 was the "base year" for tax adjustment purposes.⁴⁴⁴ In comparing taxes for the year 1990 with those for 1989, the base year, the Government took the position that it, rather than the lessor, was entitled to an adjustment because the amount of taxes paid by the lessor in 1990 had actually decreased between 1989 and 1990.⁴⁴⁵ On appeal from the Government's denial of the request for equitable adjustment, the GSBCA held for the Government and concluded that the base year for tax purposes was 1989.⁴⁴⁶

The Federal Circuit affirmed the GSBCA's decision, strictly interpreting the tax escalation clause.⁴⁴⁷ The Federal Circuit reasoned that the 1988 assessment, which was conducted prior to commencement of the lease, was based on the value of the unimproved land.⁴⁴⁸ The improvements, therefore, were not included in the tax assessment until 1989 and, under the tax escalation clause, there could be no "full assessment" of the property until all of the improvements were completed.⁴⁴⁹ As a result, the court concluded that "no tax increase between 1988 and 1989 passes through."⁴⁵⁰

The Federal Circuit's technical interpretation of the tax escalation clause misconstrues the apparent intent of the clause. The opinion notes that the clause "transfer[s] to the government the risk of increases in real estate taxes assessed during the term of the lease," but the court failed to apply the clause in light of this stated purpose.⁴⁵¹ In analyzing the case, the court focused almost entirely on increases in taxes resulting from the improvements to the property and dismissed the distinction drawn by the contractor between tax increases due to improvements and tax increases due to changes in

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.* at 178.

448. *Id.* at 177.

449. *Id.*

450. *Id.* at 178.

451. *Id.* at 176.

the tax rate.⁴⁵² The clause does not make this distinction, and it is not clear that the parties had considered the proper allocation of this risk. The court nevertheless read the clause as if the intended purpose was to pass on to the Government only those tax rate increases that occurred after the first year of full assessment.⁴⁵³

The Federal Circuit does not discuss why it was reasonable to interpret the clause as allocating to the Government only tax rate increases that occurred after the first year of full assessment but not those that occurred between the commencement of the lease and the first year of full assessment.⁴⁵⁴ If, as the court has stated, the purpose of the clause was to transfer to the Government increases in taxes assessed during the term of the lease but not those resulting from improvements to the property,⁴⁵⁵ it is unclear why the Government should not be liable for tax rate increases levied prior to the first year of full assessment.

III. BREACH AND TERMINATION

A. Breach Damages

For the second time in two years, the Federal Circuit addressed the issue of liquidated damages for a contractor's default where the Government has not actually incurred any damages.⁴⁵⁶ Under general principles of contract law, a non-breaching party is entitled to damages sufficient to compensate it for the other party's failure to fulfill its end of the bargain.⁴⁵⁷ Such damages may be determined after the fact or may be liquidated by the parties in the agreement itself.⁴⁵⁸ Whether the measure of damages is determined before or after the breach, that measure must be reasonable and should not

452. See *id.* at 177 (citing *Wetzel*, GSBCA No. 7466, 85-2 B.C.A. (CCH) ¶ 18,099, at 90,860 (1985), for proposition that "tax escalation clause is not to be interpreted to hold [the Government] responsible for tax increases, resulting from improvements"); see also *id.* (citing *Universal Dev. Corp. v. GSA*, GSBCA Nos. 12138, 12139, 93-3 B.C.A. (CCH) ¶ 26,100, at 129,740 (1993) (holding that "rent adjustments related to tax increases could not be made until after the tax assessment included the land and the buildings that were being leased by the government"))).

453. *Kimbrell*, 15 F.3d at 177.

454. *Id.*

455. *Id.* at 178.

456. See *infra* note 479 and accompanying text. This is one of the few times that the Federal Circuit has considered a liquidated damages clause on the merits; see also *Fred A. Arnold, Inc. v. United States*, No. 92-5008, 1992 WL 238365, at *2 (Fed. Cir. Sept. 28, 1992) (holding that liquidated damage clauses are enforceable if they constitute fair and reasonable estimate of government delay damages).

457. RESTATEMENT, *supra* note 47, § 347.

458. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 599-624 (1975).

serve as a penalty or a windfall.⁴⁵⁹ In the case of liquidated damages, the goal is to eliminate the need to prove damages. In this regard, liquidated damages clauses are enforced to the extent that "they represent fair and reasonable estimates of the damages" to be incurred.⁴⁶⁰

In *Hoskins Lumber Co. v. United States*,⁴⁶¹ the Federal Circuit held that the Government was entitled to damages for a contractor's default on a timber contract in accordance with the measure of damages set forth in the contract.⁴⁶² This damage provision was upheld notwithstanding the fact that the Government decided not to resell the timber but rather to preserve the timber lands as a protected habitat for the spotted owl.⁴⁶³ The agreement contained a mechanism for calculating damages due the Government in the event that the contractor failed to harvest timber and the Government did not resell the timber.⁴⁶⁴ Under this formula, the damages due the Government were to "be determined by subtracting the value established by [an] appraisal from the difference between Current Contract Value and Effective Purchaser Credit."⁴⁶⁵

After the commencement of the contract, the timber market collapsed.⁴⁶⁶ In response to the falling prices, the Government instituted the Multi-Sale Extension Program that permitted timber contractors to extend their contract termination dates by submitting appropriate requests by a certain date.⁴⁶⁷ The contractor in *Hoskins*, however, did not submit a request for an extension⁴⁶⁸ but, instead, joined with a number of other timber contractors in obtaining an injunction that prevented the Government from, *inter alia*, enforcing the parties' respective timber contracts.⁴⁶⁹ Upon dissolution of the injunction on appeal, but after the date originally set for filing its request, the contractor filed its request for a contract extension.⁴⁷⁰

459. *Id.* at 613-14.

460. *Fred A. Arnold, Inc. v. United States*, No. 92-5008, 1992 WL 238365, at *2 (Fed. Cir. Sep. 28, 1992) (citing *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947), and *Rex Trailer Co. v. United States*, 350 U.S. 148, 152 (1956)).

461. 20 F.3d 1144 (Fed. Cir. 1994).

462. *Hoskins Lumber Co. v. United States*, 20 F.3d 1144, 1147 (Fed. Cir. 1994).

463. *Id.* at 1147-48.

464. *Id.* at 1147.

465. *Id.*

466. *Id.* at 1145.

467. *Id.*

468. *Id.* at 1146.

469. *Id.*

470. *Id.*

The Government rejected the contractor's filing as untimely and notified the contractor that it was in default.⁴⁷¹

Relying on *Louisiana-Pacific Corp. v. United States*,⁴⁷² the Claims Court in *Hoskins* upheld the Government's termination for default but dismissed its counterclaim for damages.⁴⁷³ In *Louisiana-Pacific*, the Government had attempted unsuccessfully to renegotiate a contract to reduce the amount of timber required to be cut in order to preserve the timber indefinitely.⁴⁷⁴ Later, upon the contractor's default, the Claims Court held that the Government could not collect damages for the timber that it had no intention of reselling.⁴⁷⁵ Pursuant to *Louisiana-Pacific*, the Claims Court in *Hoskins* held that the Government could not collect both damages under the contract and the value of the standing timber as a preserve for the spotted owl.⁴⁷⁶ The court indicated that allowing such a recovery would be contrary to generally accepted contract principles.⁴⁷⁷

On appeal, the Federal Circuit affirmed the Claims Court as to the contractor's default, but reversed and remanded on the issue of damages.⁴⁷⁸ In reversing the lower court decision on damages, the Federal Circuit cited its recent ruling in *Madigan v. Hobin Lumber Co.*,⁴⁷⁹ which the Court characterized as "legally indistinguishable" from the case at bar.⁴⁸⁰ In *Hobin*, the Federal Circuit held that the Government was entitled to collect damages for the contractor's breach under the same damages formula set forth in the contract in *Hoskins*, notwithstanding the Government's decision not to resell the timber.⁴⁸¹ Relying on *Hobin*, the Federal Circuit in *Hoskins* remanded the issue of damages and instructed the lower court to apply the measure of damages provision set forth in the contract.⁴⁸²

471. *Id.*

472. 227 Ct. Cl. 756 (1981).

473. *Hoskins Lumber Co. v. United States*, 24 Cl. Ct. 259, 268 (1991), *aff'd*, 20 F.3d 1144 (Fed. Cir. 1994).

474. *Louisiana-Pacific Corp. v. United States*, 227 Ct. Cl. 756, 758 (1981).

475. *Id.*

476. *Hoskins*, 24 Cl. Ct. at 268.

477. *Id.*

478. *Hoskins Lumber Co. v. United States*, 20 F.3d 1144, 1146 (Fed. Cir. 1994).

479. 986 F.2d 1401 (Fed. Cir. 1993).

480. *Hoskins*, 20 F.3d at 1148.

481. *Madigan v. Hobin Lumber Co.*, 986 F.2d 1401, 1405-06 (Fed. Cir. 1993). The court in *Hobin* limited *Louisiana-Pacific* to its facts, concluding that, in order for the holding in *Louisiana-Pacific* to apply the Government must have (1) decided during the period of contract performance that it does not want all of the contract timber cut; (2) attempted to modify the contract during the period of contract performance to limit the timber the contractor is otherwise required to cut, and the contractor refused to modify the contract; and (3) subsequently sought to recover damages on the precise timber that the Government initially sought to limit. *Id.* at 1405.

482. *Hoskins*, 20 F.3d at 1148.

Judge Newman dissented from what she characterized as an "unwarranted and unfair ruling,"⁴⁸³ concluding that the contractor was not in default and that *Louisiana-Pacific* required affirmance of the lower court's judgment.⁴⁸⁴ In her dissent, Judge Newman noted that *Hobin* did not overrule *Louisiana-Pacific*, which would have required an en banc ruling of the Federal Circuit, and that, as a result, the *Hoskins* court was bound by *Louisiana-Pacific*.⁴⁸⁵ Judge Newman also stated that the Claims Court had correctly concluded, in accordance with *Louisiana-Pacific*, that the Government's decision that the best use of the affected timber lands was as a preservation for the spotted owl overrode the measure of damages provision contained in the contract.⁴⁸⁶ In Judge Newman's view, the Government should not be entitled to damages "based on a valuation that is contrary to fact, and in the absence of injury to the government."⁴⁸⁷ Indeed, Judge Newman noted:

It is irrational to require that although the nation now benefits from non-harvesting of the timber, *Hoskins* must pay damages as if the timber had been harvested during the period when harvesting was enjoined. On the panel majority's ruling the government obtains double recovery: both the dollar value of the timber as if it had been illegally cut, and the habitat value of the uncut timber.⁴⁸⁸

In the *Hoskins* case, the Federal Circuit had the opportunity to reexamine its conclusion in *Hobin* and to affirm the more equitable decisions of the Claims Court in both this case and *Louisiana-Pacific*. Instead, the court did precisely the opposite. As the dissent noted, both *Hobin* and *Hoskins* permit the Government to obtain a double recovery—a concept that is contrary to basic contract damages principles.⁴⁸⁹

483. *Id.* at 1153 (Newman, J., dissenting).

484. *Id.* at 1152 (Newman, J., dissenting).

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

486. *Id.* at 1151-52 (Newman, J., dissenting).

487. *Id.* at 1153 (Newman, J., dissenting) (citing *Louisiana-Pacific Corp. v. United States*, 227 Ct. Cl. 756 (1981)).

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

489. *Id.* at 1152-53 (Newman, J., dissenting); see also 3 DAN B. DOBBS, DOBBS LAW OF REMEDIES 23 (1993) (stating that goal behind money damages is to place nonbreaching party in "as good a position as he would have been in had the contract been performed, and no better") (emphasis in original) (citations omitted); *supra* notes 457-60, 477 and accompanying text discussing contract damage principles).

B. Termination for Default

The Government may justify the termination of a contract for default if there existed adequate cause at the time, even if this cause was not discovered until after the termination.⁴⁹⁰ There have been two decisions by the Federal Circuit during the current term where the Government, on appeal, has sought to justify a termination for default after the fact by pointing to violations of federal labor standards.⁴⁹¹ In both cases, the court made clear that it would hold the contractors strictly to the terms of these standards and would allow the Government to raise the issue later upon appeal.⁴⁹²

In the only reported decision, *Kelso v. Kirk Bros. Mechanical Contractors, Inc.*,⁴⁹³ the Federal Circuit held that a contractor's failure to retain certain records in accordance with federal labor standards justified the Government's decision to terminate the contractor for default.⁴⁹⁴ The court reached this determination notwithstanding the ASBCA's conclusion that the contractor's retention practices satisfied the "basic records" requirement of the federal labor reporting standards and the fact that the reporting standards did not relate to contract performance.⁴⁹⁵ The Government had terminated the contract for default after discovering certain performance deficiencies.⁴⁹⁶ The contract had no completion date, and the Government provided the contractor with no period within which to cure its default.⁴⁹⁷ On appeal before the ASBCA, the Government alleged for the first time, as an alternative basis for the termination, that the contractor's failure to comply with federal labor reporting standards justified the Government's earlier termination decision.⁴⁹⁸

The ASBCA held for the contractor and converted the default termination into a termination for the Government's convenience

490. See *Quality Granite Constr. Co. v. Aspin*, No. 93-1547, 1994 U.S. App. LEXIS 7755, at *1-*2 (Fed. Cir. Apr. 14, 1994) (stating that "a default termination can be justified on appeal on any ground that existed at the time of termination, whether or not the contracting officer (CO) knew of the ground at the time."); see also *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1277 (Fed. Cir. 1985) (holding that if fraud by contractor would support Government's termination of contract for default if discovered before termination, then such fraud can be used to terminate contract if discovered after termination).

491. See generally *Quality Granite*, 1994 U.S. App. LEXIS 7755; *Kelso v. Kirk Bros. Mechanical Contractors, Inc.*, 16 F.3d 1173 (Fed. Cir. 1994).

492. *Quality Granite*, 1994 U.S. App. LEXIS 7755, at *1; *Kirk Brothers*, 16 F.3d at 1176.

493. 16 F.3d 1173 (Fed. Cir. 1994).

494. *Kelso v. Kirk Bros. Mechanical Contractors, Inc.*, 16 F.3d 1173, 1177 (Fed. Cir. 1994).

495. *Id.* at 1175-76.

496. See *id.* (stating that reason for contract termination was failure to maintain basic records).

497. *Id.*

498. *Id.*

because the Government had failed to provide the contractor with an opportunity to cure its deficiencies.⁴⁹⁹ In addition, the ASBCA held that the contractor's violation of the federal labor reporting standards was not a basis for default because the contractor had satisfied the basic requirements of these standards.⁵⁰⁰

The Federal Circuit reversed, concluding that the Government had properly terminated the contract for default.⁵⁰¹ In upholding the default termination, the court emphasized the importance of the federal labor standards contract clauses and rejected the ASBCA's conclusion that the contractor's failure to comply with the federal labor standards was a mere technicality.⁵⁰² Instead, the court concluded that the contractor was bound by the strict terms of the contract clauses and that its violations were substantial.⁵⁰³ The contractor's failure to abide by the terms of these clauses justified the default termination, notwithstanding the fact that the Government raised this issue for the first time on appeal to the ASBCA and the fact that the labor standards did not relate to contract performance.⁵⁰⁴ The Federal Circuit's decision in *Kirk Brothers*, therefore, reaffirms both the Government's right to justify a default termination after the fact and its right to hold contractors to the strict terms of their contracts.

IV. DISPUTE RESOLUTION

A. Claim Certification

For claims against the Government of more than \$100,000, the CDA⁵⁰⁵ requires contractors to certify, *inter alia*, that the claim is

499. *Kirk Bros. Mechanical Contractors*, ASBCA Nos. 35771R, 39803, 40172, 40872, 92-3 B.C.A. (CCH) ¶ 25,144, at 125,344 (1992).

500. *Kirk Brothers*, 92-3 B.C.A. (CCH), at 125,344. The ASBCA also concluded that although the Government was partially to blame for the contractor's delay in performance, the contractor suffered no damages because of its own concurrent delay. *Id.*

501. *Kirk Brothers*, 16 F.3d at 1176-77. In addition, the Federal Circuit affirmed the ASBCA's conclusion that the contractor had suffered no damages as a result of the Government's delay. *Id.* at 1177. In this regard, the court concluded that, in circumstances where both parties share responsibility for the delay, damages should not be awarded unless they could be apportioned between the parties. *Id.* (citing *William F. Klingensmith, Inc. v. United States*, 731 F.2d 805, 808-09 (Fed. Cir. 1984)). In *Kirk Brothers*, the court held that the ASBCA correctly determined that there was no period during which the Government was the sole cause of the contractor's delay. *Id.*

502. *Id.*

503. *Id.*

504. *See id.*

505. 41 U.S.C. §§ 601-613 (1988 & Supp. V 1993); *see also supra* note 96 and accompanying text (discussing procedures allowing contractors to bring claims directly to federal court, rather than originating claim within agency jurisdiction).

made in "good faith."⁵⁰⁶ Although the jurisdictional impact of the certification requirement was diminished by the Federal Courts Administration Act of 1992,⁵⁰⁷ presentation of a certified claim by a contractor still remains an absolute prerequisite to the CDA jurisdiction of the courts and boards.⁵⁰⁸ The certification requirement has proved generally problematic for government contractors.⁵⁰⁹ The requirement is particularly troublesome in the claim-sponsorship context where the prime contractor does not entirely endorse the subcontractor's claim.⁵¹⁰

For a subcontractor to proceed with a claim against the Government under the CDA, it must obtain the prime contractor's consent and the appeal must be brought in the prime contractor's name.⁵¹¹ Congress, in enacting this "sponsorship" system, intended for prime contractors to review subcontractor claims in order to prevent the filing of false or fraudulent claims.⁵¹² When sponsoring a subcontractor's claim, prime contractors must independently certify the claim in accordance with the CDA.⁵¹³ Problems arise where the prime contractor is unwilling or unable to verify the basis and amount of the subcontractor's claim.⁵¹⁴ In this situation, the prime contractor may be faced with two undesirable choices: the contractor can

506. *Id.* § 605(c)(1). The CDA requires that a contractor certify that "the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable," and that the certifying official is duly authorized to certify the claim. *Id.* The dollar threshold for claim certifications was increased from \$50,000 to \$100,000 by the FASA, Pub. L. No. 103-355, § 2351(b), 108 Stat. 3243, 3322 (1994) (codified in scattered sections of 10 U.S.C.).

507. Pub. L. No. 102-572, § 907, 106 Stat. 4506, 4518 (1992), added subparagraph (6) to 41 U.S.C. § 605(c) (1988 & Supp. V 1993). This subparagraph states that a "defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim."

508. See Eurostyle, Inc., ASBCA No. 45934, 94-1 B.C.A. (CCH) ¶ 26,458, at 131,654-55 (1994) (denying monetary relief where contractor failed to specifically mention such in written claim).

509. See REQUEST FOR COMMENTS ON A PROPOSED AMENDMENT TO OFPP [OFFICE OF FEDERAL PROCUREMENT POLICY] POLICY LETTER 80-3, 57 Fed. Reg. 8495 (1992) (recognizing extensive drain on government, contractor, and judicial resources caused by claim certification litigation). See generally Robert H. Koehler, *Certifying Claims Under the Contract Disputes Act—The Ghost of Rickover Past*, 21 PUB. CONT. L.J. 25, 37-47 (1991) (discussing claim certification, amount of claim allowed, notification requirements, presumptions, and times of issuance under CDA).

510. See *supra* note 509 and accompanying text (discussing difficulties in claim sponsorship).

511. See Erickson Air Crane Co. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1984) (stating that subcontractors do not have direct standing to sue Government); *Johnson Controls v. United States*, 713 F.2d 1541, 1550-52 (Fed. Cir. 1983) (stating that subcontractors have no right of direct appeal under CDA).

512. See S. REP. NO. 1118, 95th Cong., 2d Sess. 16-17 (1978), reprinted in 1978 U.S.C.C.A.N. 5235, 5250-51.

513. 41 U.S.C. § 605(c) (1988 & Supp. V 1993); see also *United States v. Turner Constr. Co.*, 827 F.2d 1554, 1558-60 (Fed. Cir. 1987) (enforcing certification requirement upon prime contractors when certifying subcontractor's claims).

514. See *id.* at 1561.

either refuse to certify the claim and expose itself to suit from the subcontractor, or it can certify the claim and expose itself to potential criminal and civil liability to the Government.⁵¹⁵

The Federal Circuit has addressed the prime contractor's responsibility to independently certify subcontractor claims on two previous occasions in *Turner Construction Co. v. United States*,⁵¹⁶ and in *Transamerica Insurance Corp. v. United States*.⁵¹⁷ In *Turner*, the Federal Circuit held that the prime contractor's responsibility to independently certify the claim required the prime contractor merely to assert that there was "good ground" for the claim, not that the basis of the claim was certain.⁵¹⁸ In *Transamerica*, the Federal Circuit held that the prime contractor was in "substantial compliance" with the certification requirements of the CDA when it submitted a properly worded certification accompanied by a caveat that it could not verify the certified amount because it was prevented from reviewing the subcontractor's records.⁵¹⁹ Reinforcing *Turner*, the Federal Circuit accepted the certification despite the caveat because the prime contractor also stated that it had no reason to believe that the subcontractor's "cost figures and delay estimates" were erroneous.⁵²⁰ In the court's view, this statement demonstrated that the prime contractor possessed the necessary "good ground" for certifying the claim.⁵²¹

In *Arnold M. Diamond, Inc. v. Dalton*,⁵²² the Federal Circuit held that even where the prime contractor openly admits that it does not have a "good ground" belief in the subcontractor's claim, but executes a claim certification under the direction of a federal court order, it has satisfied the CDA requirement that a claim be certified in "good faith."⁵²³ The claim in *Diamond* arose out of extra work performed by Diamond's subcontractor on a pier improvement project at a New

515. See John Cibinic, *Subcontractor Claims: Contractor Caught Between a Rock and a Hard Place*, 3 NASH & CIBINIC REP. ¶ 74, at 157-58 (1989) (describing prime contractors' dilemma in liability issues); John Thrasher, *Subcontractor Dispute Remedies: Asserting Subcontractor Claims Against the Federal Government*, 23 PUB. CONT. L.J. 39, 85-93 (1993) (discussing consent provisions in CDA certification procedures).

516. 827 F.2d 1554 (Fed. Cir. 1987).

517. 973 F.2d 1572 (Fed. Cir. 1992).

518. *United States v. Turner Constr. Co.*, 827 F.2d 1554, 1561 (Fed. Cir. 1987) ("[T]he prime contractor should not, through the requirement that it certify subcontractor claims, be used as a substitute for the contracting officer or the board in determination of the merits of the submitted claims under the CDA.").

519. *Transamerica Ins. Corp. v. United States*, 973 F.2d 1572, 1580-81 (Fed. Cir. 1992).

520. *Id.* at 1580.

521. *Id.* at 1581.

522. 25 F.3d 1006 (Fed. Cir. 1994).

523. *Arnold M. Diamond, Inc. v. Dalton*, 25 F.3d 1006, 1010-11 (Fed. Cir. 1994).

Jersey Naval Weapons Station.⁵²⁴ During contract performance, barges owned by an unrelated government dredging contractor collided with the pier.⁵²⁵ As a result of the accident, the Navy directed Diamond to perform extra work under the contract.⁵²⁶

Subsequently, Diamond submitted an uncertified claim from its subcontractor, Perth Amboy Ironworks (PAI), for \$1.9 million in additional compensation.⁵²⁷ After the Navy returned the claim to Diamond for lack of certification, Diamond reviewed it and concluded that PAI was only entitled to \$44,000.⁵²⁸ Consequently, Diamond declined to certify the \$1.9 million claim and told PAI that to do so might constitute perjury.⁵²⁹ PAI subsequently declared chapter 11 bankruptcy.⁵³⁰ During the bankruptcy proceedings, the judge ordered Diamond to certify the claim in accordance with the CDA.⁵³¹ The judge based his order on the erroneous advice of a "special counsel" who advised the court that Diamond could rely on PAI's certification to pass through the claim to the Government.⁵³² Diamond complied with the court order, certified the claim and informed the Navy that it had certified the claim in response to the bankruptcy court's order.⁵³³ The contracting officer denied the claim, and Diamond appealed to the ASBCA.⁵³⁴

In the appeal, the Navy attacked Diamond's certification of the claim and moved to dismiss the claim for lack of subject matter jurisdiction on the ground that Diamond could not certify the claim in "good faith."⁵³⁵ Despite the fact that Diamond had submitted a properly worded certification, the ASBCA, after examining the circumstances underlying the certification, dismissed Diamond's claim without prejudice.⁵³⁶ In the Board's view, Diamond could not

524. *Id.* at 1007.

525. *Id.*

526. *Id.*

527. *Id.* at 1008.

528. *Id.*

529. *Id.*

530. *Id.*

531. *Id.*

532. *Id.* at 1010-11. The decisions relied on by the special counsel predated the enactment of the CDA. *Arnold M. Diamond, Inc.*, ASBCA No. 40885, 93-2 B.C.A. (CCH) ¶ 25,680, at 127,743 (1992).

533. *Diamond*, 25 F.3d at 1009.

534. *Diamond*, 93-2 B.C.A. (CCH), at 127,743 (dismissing appeal without prejudice), *reconsideration denied*, 93-3 B.C.A. (CCH) ¶ 26,083 (1992).

535. *Id.*

536. *Id.* The ASBCA considered Diamond's public rejection of PAI's claim to be unusual enough to justify a departure from its normal unwillingness to examine the accuracy of the statements contained in claim certifications. *Diamond*, 93-2 B.C.A. (CCH), at 127,742. The board usually declines to undertake such inquiries because they "would necessarily require an examination of the underlying basis and merits of the claim." *Id.* (quoting *Turner Construction*,

certify the claim in "good faith" because its statements to the subcontractor and the Bankruptcy Court that it could only verify \$44,000 of the subcontractor's \$1.9 million claim⁵³⁷ "demonstrated that it did not consider that there was *good ground* to support its subcontractor's claim."⁵³⁸ The Board also noted that the bankruptcy court's order could not overcome Diamond's responsibility to certify the claim in good faith, because, in the Board's view, the order violated the CDA.⁵³⁹ Diamond appealed to the Federal Circuit.⁵⁴⁰

In reversing the Board's decision, the Federal Circuit found that Diamond had fully complied with the congressional mandate that prime contractors review subcontractor claims prior to submission.⁵⁴¹ The court stated that it thought that "the Board erred in declining to give any weight to Diamond's compliance with the bankruptcy court's order in deciding the issue of Diamond's good faith."⁵⁴² In the court's view, compliance with the bankruptcy court's order provided the necessary "good ground" to certify the claim as required under *Turner Construction*.⁵⁴³ Finding no definition of "good faith" in the CDA, the court applied the common usage definition of "a state of mind denoting honesty of purpose, freedom from intent to defraud, and being faithful to one's duty or obligation."⁵⁴⁴ The court concluded that Diamond had no intention either to defraud or deceive the Government because it had made a "conscientious effort to meet its ethical, contractual and statutory obligations."⁵⁴⁵

827 F.2d at 1561); *see also* Blount Constr. Group, ASBCA No. 38998, 92-3 B.C.A. (CCH) ¶ 25,163, at 125,418 (1992) (denying Government's motion to dismiss); AAAA Enters., Inc., ASBCA No. 29041, 84-2 B.C.A. (CCH) ¶ 17,262, at 85,959 (1984) (denying Government's motion to dismiss); Mary Lou Fashions, ASBCA No. 29318, 84-2 B.C.A. (CCH) ¶ 17,483, at 87,100 (1984) (refusing to rule on substance of claims).

The Board recently stated that its decision to examine the underlying facts and circumstances of the certifications in *Diamond* did not alter its general practice of refusing to conduct such examinations in other than extraordinary circumstances. D.E.W., Inc., ASBCA Nos. 37232, 45512, 94-3 B.C.A. (CCH) ¶ 27,004 at 134,535 (1994).

537. *Diamond*, 93-2 B.C.A. (CCH), at 127,742-43.

538. *Id.* at 127,743. The Board further stated that "[h]onesty with a subcontractor or the baring of one's soul to the Bankruptcy Court is not the good faith envisioned by the CDA certification requirement. The claim must be submitted to the Government in good faith. There is ample evidence that was not done in this case." *Id.*

539. *Id.*

540. *Arnold M. Diamond, Inc. v. United States*, 25 F.3d 1006, 1007 (Fed. Cir. 1994).

541. *Id.*

542. *Id.* at 1010.

543. *Id.* at 1009 n.2 (citing *United States v. Turner Constr. Co.*, 827 F.2d 1554 (Fed. Cir. 1987)).

544. *Id.* at 1010.

545. *Id.* (quoting *Diamond*, 93-2 B.C.A. (CCH), at 127,743).

Unlike the ASBCA, the Federal Circuit viewed Diamond's actions as "a good faith effort to comply with the obligations with which it was confronted."⁵⁴⁶ Under the circumstances, compliance with the court order was the only viable alternative for a reasonable contractor to demonstrate good faith, and thus Diamond fully satisfied the CDA requirement that claims be certified in "good faith."⁵⁴⁷ The Federal Circuit also disagreed with the ASBCA regarding the bankruptcy court's powers, pointing out that the bankruptcy court had subject matter jurisdiction over PAI's claim, had obtained jurisdiction over Diamond, and had the authority to issue a civil contempt order if Diamond did not comply with the bankruptcy court's order to certify and sponsor PAI's claim.⁵⁴⁸ The Federal Circuit further noted that a failure to certify would have exposed Diamond to a damage suit from PAI or a citation for civil contempt.⁵⁴⁹

The impact of *Diamond* on the evolution of the copious certification jurisprudence of the CDA tribunals will be minimal because the Federal Courts Administration Act of 1992⁵⁵⁰ rendered certification defects non-jurisdictional.⁵⁵¹ The *Diamond* decision may, however, have some significance beyond that of a mere historical footnote in the jurisdictional quagmire of claims certification. The decision in *Diamond* reflects the willingness of some members of the Federal Circuit to move toward a "common sense" approach in resolving jurisdictional issues with regard to CDA claims. This "common sense" approach was most apparent in *Transamerica Insurance Corp.*⁵⁵² in which the Federal Circuit held that a contractor fulfilling claim and certification requirements "substantially complied" with the CDA.⁵⁵³

In *Diamond*, the Federal Circuit found jurisdiction because the prime contractor acted reasonably under the circumstances,⁵⁵⁴ whereas the ASBCA had dismissed the claim even after finding that

546. *Diamond*, 25 F.3d at 1011.

547. *Id.* at 1010.

548. *Id.*

549. *Id.* at 1011.

550. Pub. L. No. 102-572, § 907, 106 Stat. 4518 (codified as amended at 41 U.S.C. § 605 (Supp. V 1993)).

551. See Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907, 106 Stat. 4518 (codified as amended at 41 U.S.C. 605(c) (Supp. V. 1993)) (stating that certification defects do not deprive courts or agency boards of contract appeals of jurisdiction).

552. 973 F.2d 1572 (1992); see *supra* notes 519-22 and accompanying text (describing in detail court's treatment of "common sense" approach in *Transamerica*).

553. *Transamerica Ins. Corp. v. United States*, 973 F.2d 1572, 1580 (Fed. Cir. 1992); see *supra* notes 519-22 and accompanying text (discussing court's holding that prime contractor's certification that contained critical information required substantial compliance with certification requirement).

554. *Diamond*, 25 F.3d at 1010.

the prime contractor made "a conscientious effort" to comply with the CDA.⁵⁵⁵ Too often the jurisdictional prerequisites of the CDA have penalized contractors who make good faith efforts to comply. The "common sense" approach employed by the Court of Appeals for the Federal Circuit in *Diamond* should encourage the Court of Federal Claims and the boards of contract appeals to employ similar analyses, rather than the impractical and rigid approach these institutions have exhibited toward the certification requirement in the past (and continue to embrace in analyzing the "in dispute" and "sum certain" requirements of *Dawco Construction, Inc. v. United States*).⁵⁵⁶

B. Statutes of Limitations

The CDA contains two separate limitations periods for contractor appeals from adverse decisions of contracting officers. The CDA prescribes a ninety-day limitation period for appeals from contracting officer's decisions to the boards of contract appeals,⁵⁵⁷ and a one-year limitation period for appeals to the U.S. Court of Federal Claims.⁵⁵⁸ Shipbuilding contractors were faced with an additional limitation period of eighteen months for the filing of shipbuilding claims with the Government under the Defense Authorization Act of 1985.⁵⁵⁹ In contrast, other kinds of CDA claims were subject to no statutory limitation period for presentation to the contracting officer.⁵⁶⁰ These jurisdictional anomalies were addressed, in part, by

555. *Diamond*, ASBCA No. 40885, 93-2 B.C.A. (CCH) ¶ 25,680 at 127,743 (1992).

556. 930 F.2d 872, 878-79 (Fed. Cir. 1991) (stating that no jurisdiction exists where there is no "dispute" over "sum certain" prior to submission of claim to contracting officer); see also *Reflectone, Inc.*, ASBCA No. 43081, 93-1 B.C.A. (CCH) ¶ 25,512, *reconsideration denied*, 93-3 B.C.A. ¶ 25,966, at 129,135 (1993) (dismissing claim without pre-existing dispute regarding sum certain before the contractor filed its claim), *aff'd*, 34 F.3d 1031, 1031-39 (Fed. Cir.), *reh' en banc accepted, judg. vacated, and op. withdrawn*, 34 F.3d 1039, 1039 (Fed. Cir. 1994); Val S. McWhorter & Carl T. Hahn, *Disputing the Meaning of a Claim: The Fallout from Dawco Construction*, 23 PUB. CONT. L.J. 451, 459-60 (1994) (discussing implications of *Dawco's* rigid requirements).

557. 41 U.S.C. § 606 (1988).

558. *Id.* § 609(a)(3). This anomaly may not survive this year; the Office of Federal Procurement Policy and the Department of Defense recently proposed that the period for appeals to the Court of Federal Claims be shortened to ninety days. *OFPP-DOD Draft Bill Aims to Curb Litigation, Gut Brooks Act*, 63 FED. CONT. REP. (BNA) 117 (Jan. 30, 1995).

559. 10 U.S.C. § 2405 (1994). Section 2405(c) provides:

The Secretary of a military department may not adjust any price under a shipbuilding contract entered into after December 7, 1983, for an amount set forth in a claim, request for equitable adjustment, or demand for payment under the contract . . . arising out of events occurring more than 18 months before the submission of the claim, request, or demand.

Id. § 2405(a). The statute also provides that "a claim, request, or demand shall be considered to have been submitted only when the contractor has provided the certification required by . . . the Contract Disputes Act of 1978." *Id.* § 2405(b).

560. See *Board of Governors v. United States*, 10 Cl. Ct. 27, 30 (1986) (finding that limitations period under CDA runs from issuance of contracting officer's decision, or failure to

the recently enacted Federal Acquisition Streamlining Act of 1994,⁵⁶¹ which institutes a six-year limitation period for the presentation of claims for all contracts,⁵⁶² including shipbuilding contracts entered into after October 13, 1994.⁵⁶³

Even though it was enacted in 1984, the special limitation on shipbuilding contracts was not interpreted by the courts or boards until 1992 in *Peterson Builders, Inc. v. United States*.⁵⁶⁴ The Claims Court in *Peterson* treated the eighteen-month limitation as a statute of limitations depriving the court of jurisdiction.⁵⁶⁵ On the other hand, the ASBCA held that where such claims are untimely, § 2405 is an affirmative defense available to the Government rather than a jurisdictional statute of limitations.⁵⁶⁶

When the Federal Circuit addressed the issue in *Bath Iron Works v. United States*,⁵⁶⁷ it held that the eighteen-month limitation in § 2405 does not create either a jurisdictional bar or an affirmative defense to the prosecution of shipbuilding claims under the CDA in the U.S. Court of Federal Claims.⁵⁶⁸ Bath entered into a series of contracts with the Navy to construct Ticonderoga class cruisers in 1983 and 1984.⁵⁶⁹ During performance, the Navy issued several Engineering Change Proposals (ECPs) under the contracts.⁵⁷⁰ Bath subsequently filed claims for price adjustments under two of the contracts.⁵⁷¹ In June 1985, Bath first notified the Navy that it was incurring extra costs and would seek an equitable adjustment to the contract due to the ECPs.⁵⁷² After a period of dialogue, Bath submitted a certified claim to the contracting officer in November 1989.⁵⁷³ The claims

issue decision in timely manner, and CDA claim submitted after general six-year statute of limitations of 28 U.S.C. § 2501 or 28 U.S.C. § 2415(a) is not untimely if contractor first elected to certify claim with contracting officer).

561. Federal Acquisition Streamlining Act, Pub. L. No. 103-355, 108 Stat. 3243 (1994) (codified at 42 U.S.C. § 251 (1988)).

562. *Id.* § 2351(a), 108 Stat. at 3322.

563. *Id.* § 2302(a), 108 Stat. at 3321.

564. 26 Cl. Ct. 1227 (1992).

565. *Peterson Builders, Inc. v. United States*, 26 Cl. Ct. 1227, 1230-32 (1992).

566. See *Bath Iron Works, ASBCA No. 43,303, 93-2 B.C.A. (CCH) ¶ 25,792*, at 128,347-48 (1993), *reconsideration denied*, 93-3 B.C.A. ¶ 25,992, at 129,233 (1993) (stating that § 2405 does not operate as statute of limitations, but rather statutory affirmative defense whose terms address only agency's authority to enter claim).

567. 20 F.3d 1567 (Fed. Cir. 1994).

568. *Bath Iron Works v. United States*, 20 F.3d 1567, 1585 (1994).

569. *Bath Iron Works v. United States*, 27 Fed. Cl. 114, 116 (1992).

570. *Id.*

571. *Id.* at 117.

572. *Id.*

573. *Id.* at 119.

were denied by the Navy on the ground that, *inter alia*, the claims were time-barred by § 2405.⁵⁷⁴

Bath appealed to the Claims Court arguing that its claim was valid under the "Changes" clause of the contract and the CDA.⁵⁷⁵ The Government filed a motion to dismiss, arguing first that a failure to submit a claim within the eighteen-month limitation period of 10 U.S.C. § 2405 violated the CDA's jurisdictional requirement that a "properly certified" claim be submitted to the contracting officer;⁵⁷⁶ second, that § 2405 created an eighteen-month statute of limitation for all shipbuilding contract claims;⁵⁷⁷ and third, that even if § 2405 did not create a jurisdictional limitation, it created an affirmative defense to the contractor's claim.⁵⁷⁸

The Court of Federal Claims focused on whether the eighteen-month limitation requirement of § 2405 was a jurisdictional time bar.⁵⁷⁹ Examining the plain language of the statute, the court concluded that the statute was not jurisdictional in nature because it contained "no reference to the court's jurisdiction, let alone a specific limitation on that jurisdiction."⁵⁸⁰ The court determined that the statute "directs an impediment only at the Secretary of a military department's time limitation with respect to which he may make adjustments to certain shipbuilding contracts, and not to suits against the United States in the [Court of Federal Claims]."⁵⁸¹ The court concluded that § 2405 is "clearly a statute of limitations at the administrative level against [the contracting officer and] not an impediment to de novo jurisdiction in [the] court."⁵⁸² The Court of Federal Claims, by examining the legislative history of § 2405, also concluded that it limited only "Secretaries [of the military department] from *again* improvidently settling stale claims" and that the provision posed no jurisdictional bar to the court or a statute of limitations on the contractor.⁵⁸³

574. *Id.*

575. *Id.* at 120.

576. *Id.*; see also 41 U.S.C. § 605(c)(1) (1988 & Supp. V 1993) (stating certification requirements for claims over \$100,000).

577. *Bath Iron Works*, 27 Fed. Cl. at 120.

578. *Id.*

579. *Id.* at 121-29.

580. *Bath Iron Works v. United States*, 20 F.3d 1567, 1572 (1994).

581. *Bath Iron Works*, 27 Fed. Cl. at 124.

582. *Id.*

583. *Id.* at 128 (emphasis in original). The legislative history of § 2405, and particularly the testimony of Vice Admiral Hyman Rickover, reveals that Congress was specifically concerned about limiting the Government in repeating its settlement of many stale shipbuilding claims in 1978 for over \$2.7 billion. *Bath Iron Works*, 27 Fed. Cl. at 126-28 (citing *Hearings Before the Subcomm. of the Comm. on Appropriations*, 97th Cong., 1st Sess. 24 (1982) (statement of Admiral

On appeal, the Federal Circuit affirmed the Court of Federal Claims decision, holding that § 2405 applied only to the payment of adjustments at the administrative level.⁵⁸⁴ The court explored, in detail, the legislative history of § 2405, its enactment into law, and its regulatory implementation.⁵⁸⁵ The Federal Circuit noted that the Government abandoned its argument that § 2405 directly limited the Court of Federal Claims, and now asserted that the court lacked subject matter jurisdiction over the claim because Bath could not satisfy another jurisdictional prerequisite: a contracting officer's final decision.⁵⁸⁶ The Federal Circuit dismissed the Government's argument as "fundamentally flawed"⁵⁸⁷ because it equated the contracting officer's "authority to render a final decision with the authority to grant relief."⁵⁸⁸ Although the contracting officer was statutorily prohibited from granting relief on untimely claims, the contracting officer's determination to deny the claim qualified as a CDA final decision.⁵⁸⁹

The Federal Circuit also held that § 2405 did not create an affirmative defense because it "creates no time-based prohibition to consideration of the merits of a complaint"⁵⁹⁰ by the Court of Federal Claims; only amendments to § 609 of the CDA could impose such restrictions.⁵⁹¹ The court also disagreed with the ASBCA's holding in *Bath Iron Works*⁵⁹² that § 2405 creates an affirmative defense.⁵⁹³ Instead, the Federal Circuit concluded that § 2405 fails to create an affirmative defense because it "is applicable to neither contractual rights nor to the courts," not because it is statutory, rather than contractual, in nature.⁵⁹⁴

H.G. Rickover).

584. *Bath Iron Works*, 20 F.3d at 1599.

585. *Id.* at 1574-78 (discussing Congress' intent to prevent development of massive stale shipbuilding claims against Navy, which occurred in 1978, by selecting time period of eighteen months to maximize resolution of claims by negotiated settlement).

586. *Id.* at 1578; see also 41 U.S.C. § 609(a)(3) (1988) (stating that any appeal to U.S. Court of Federal Claims "shall be filed within twelve months from the date of receipt by the contractor of the decision of the contracting officer concerning the claim").

587. *Bath Iron Works*, 20 F.3d at 1579.

588. *Id.*

589. *Id.*

590. *Id.* at 1580.

591. See *supra* note 563 and accompanying text (stating that FASA modifies CDA, 41 U.S.C. § 609, creating six-year statute of limitations for presentation of all contracting claims).

592. *Bath Iron Works*, ASBCA No. 43303, 93-2 B.C.A. (CCH) ¶ 25,792, at 128,342 (1993). This case concerned a claim on a contract to construct the Guided Missile Destroyer ARLEIGH BURKE (DDG-51). *Id.* at 128,343.

593. *Id.* at 128,348.

594. *Bath Iron Works*, 20 F.3d at 1584.

Although important for shipbuilding contractors, *Bath Iron Works* has little significance for the rest of the government contracting community. *Bath Iron Works'* limited significance is further reduced by the elimination of the eighteen-month limitation period enacted by the FASA.⁵⁹⁵ *Bath Iron Works* does not advance the Federal Circuit's jurisprudence regarding statutory interpretation or its rulings regarding limitations periods generally. The most important part of the ruling may be the general affirmation by the Court that the central purpose of the CDA is to provide a mechanism for the review of federal contractor claims, and thus, it is the sole source of any jurisdictional limitations on the review of such claims.

C. Subject Matter Jurisdiction of the Boards—The Election Doctrine

The CDA provides contractors with two avenues of appeal from an adverse final decision of the contracting officer. The contractor may either appeal to a board of contract appeals within ninety days⁵⁹⁶ or the U.S. Court of Federal Claims within one year.⁵⁹⁷ The choice of forum is a decision that belongs entirely to the contractor. Once a proper "election" is made, however, the decision becomes irrevocable.⁵⁹⁸ Thus, if a contractor elects to appeal the decision to a board of contract appeals on the merits, the contractor may not later withdraw the board action, and bring suit on the same claim in the Court of Federal Claims.⁵⁹⁹

595. See *supra* note 561 and accompanying text; see also H.R. CONF. REP. NO. 712, 103d Cong., 2d Sess. 1, 202 (1994), reprinted in 1994 U.S.C.A.N. 2607, 2632 (noting that Congress amended 10 U.S.C. § 2405 to conform time permitted for filing of shipbuilding contract claims to same six-year time period allowed for other government contract claims). Note, however, that the Office of Federal Procurement Policy and the Department of Defense have proposed draft legislation which would directly overturn the Federal Circuits' holding in *Bath Iron Works* that the limitation period in 10 U.S.C. § 2405 is non-jurisdictional. See *OFPP-DOD Draft Bill Aims to Curb Litigation, Gut Brooks Act*, 63 FED. CONTR. REP. (BNA) 117 (Jan. 30, 1995). Section 108 would add to 10 U.S.C. § 2404(a): "No Court or Board shall have jurisdiction of any claim that was not submitted to the contracting officer for a decision within the period provided by this section." *Id.* at 139.

596. 41 U.S.C. § 606 (1988).

597. *Id.* § 609(a)(3).

598. See *National Neighbors, Inc. v. United States*, 839 F.2d 1539, 1542 (Fed. Cir. 1988) (stating that for election to be binding, originally chosen forum must have proper jurisdiction). In addition, to be binding the election must be "informed," "knowing," and "voluntary." *Prime Constr. Co. v. United States*, 231 Ct. Cl. 782, 783 (1982). These requirements are often satisfied by proper disclosure of the contractor's appeal rights in the contracting officer's final decision. See *Mark Smith Constr. Co. v. United States*, 10 Ct. Cl. 540, 545 (1986) (holding that contractor's appeal rights, clearly state in contracting officer's decision, satisfies informed election requirement).

599. See *id.* (stating that once contractor makes binding election in one forum, contractor can no longer pursue claim in alternate forum); *Santa Fe Eng'rs, Inc. v. United States*, 677 F.2d 876 (Ct. Cl. 1982) (holding that contractor, by electing to appeal to board, has foreclosed direct access to U.S. Court of Claims); see also *Stewart-Thomas Indus., Inc.*, ASBCA No. 38773, 90-1

In *Bonneville Associates v. United States*,⁶⁰⁰ the Federal Circuit held that the GSBCA had jurisdiction over a dispute under a GSA dual-purpose contract for the sale and repair of an office building, and thus, the contractor's appeal to the GSBCA was a binding choice of forum that deprived the Court of Federal Claims of jurisdiction over a subsequent appeal.⁶⁰¹ In *Bonneville*, the Federal Circuit examined the nature of the dispute under the dual-purpose contract to determine whether the GSBCA had jurisdiction over the contractor's initial appeal.⁶⁰² Determining that the dispute concerned the contract's maintenance provisions, rather than contract's sales provisions, the court concluded that the GSBCA did have proper jurisdiction, and thus, Bonneville's election of that forum was binding.⁶⁰³

The GSA entered into a contract with Bonneville for the purchase and subsequent repair and alteration of an office building in Las Vegas.⁶⁰⁴ Disputes arose, after title conveyance, concerning the building's structural integrity and its heating, ventilation, and air conditioning system (HVAC system).⁶⁰⁵ Subsequently, the GSA contracting officer issued a final decision demanding from Bonneville the cost of correcting the structural defects and improving the HVAC system.⁶⁰⁶ The contracting officer fixed damages for the structural defects based on the contract's warranty clause while deficient HVAC system damages were assessed according to provisions of the contract relating to repair and alteration work.⁶⁰⁷ Bonneville subsequently filed a timely notice of appeal with the GSBCA, which it withdrew three months later.⁶⁰⁸ The Board dismissed Bonneville's appeal without prejudice.⁶⁰⁹

Prior to dismissal by the GSBCA, Bonneville filed suit on the same claim in the Court of Federal Claims.⁶¹⁰ There, the Government

B.C.A. (CCH) ¶ 22,481, at 112,835 (1989) (stating that once contractor chooses to appeal to board of contract appeals, contractor waives right to bring action into claims court); *Bromley Contracting Co. v. United States*, 10 Cl. Ct. 668, 671 (1986) (stating that alternative forum is no longer available to contractor, once contractor makes binding election to Board of Contract Appeals).

600. 43 F.3d 649 (Fed. Cir. 1994).

601. *Bonneville Assocs. v. United States*, 43 F.3d 649, 655 (Fed. Cir. 1994).

602. *Id.* at 651-52.

603. *Id.* at 653-54.

604. *Id.* at 651.

605. *See id.*

606. *Id.*

607. *Id.*

608. *Id.*

609. *Id.*

610. *Bonneville Assocs. v. United States*, 30 Fed. Cl. 85 (1993).

moved to dismiss for lack of jurisdiction under the Election Doctrine, arguing that Bonneville's prior appeal to the GSBCA was a binding choice of forum that deprived the court of jurisdiction.⁶¹¹ Bonneville countered that the GSBCA lacked jurisdiction over its appeal because real property procurements are excluded from the Board's jurisdiction under § 602(a)(1) of CDA,⁶¹² and thus the Election Doctrine did not apply.⁶¹³ The Court of Federal Claims found the contract between Bonneville and the Government was a dual-purpose contract involving both repair and sale at the building, although the dispute centered on only the repair component.⁶¹⁴ The court concluded that contracts for the "repair" and "alteration" of real property are subject to the CDA, pursuant to § 602(a)(3),⁶¹⁵ and thus, because the GSBCA was vested with jurisdiction over Bonneville's appeal, the Election Doctrine required dismissal for lack of subject matter jurisdiction.⁶¹⁶

Bonneville appealed to the Federal Circuit, asserting that the Election Doctrine was inapplicable because the GSBCA lacked jurisdiction over its appeal.⁶¹⁷ Bonneville again argued that the GSBCA was deprived of CDA jurisdiction because the primary purpose of the contract "was to convey real property to the government" and the nature of the dispute "concerned the government's procurement of the building, not the building's repair and alteration."⁶¹⁸ Bonneville asserted that the "conveyance" nature of the dispute was

611. *Bonneville Assocs. v. United States*, 43 F.3d 649, 651 (Fed. Cir. 1994). The Election Doctrine provides that a contractor is precluded from pursuing an appeal to an adverse decision in more than one forum once a decision is made, despite the fact that the CDA provides for such a choice. See *Santa Fe Eng'rs v. United States*, 677 F.2d 876, 878 (Fed. Cir. 1982).

612. 41 U.S.C. § 602(a) (1988). Section 602 provides:

Applicability of law.

(a) Executive agency contracts. Unless otherwise specifically provided herein, this chapter applies to any express or implied contract . . . entered into by any executive agency for—

- (1) the procurement of property, other than real property in being;
- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair or maintenance of real property; or,
- (4) the disposal of personal property.

Id.

613. *Bonneville Assocs.*, 30 Fed. Cl. at 90.

614. *Id.* at 87-88.

615. See *supra* note 612 (quoting 41 U.S.C. § 602(a)(3) (1988)).

616. *Bonneville Assocs.*, 30 Fed. Cl. at 89-90.

617. *Bonneville Assocs.*, 43 F.3d at 652.

618. *Id.*

demonstrated by the contracting officer's partial reliance on the contract's warranty clause in assessing liability.⁶¹⁹

The Federal Circuit examined the nature of the dispute between the parties and concluded that it involved the repair and alteration, rather than the procurement of the real property, and consequently the GSBCA had jurisdiction under § 602(a)(3) of the CDA.⁶²⁰ The court rejected Bonneville's warranty clause argument, reasoning that "the warranty provision required Bonneville to repair any structural defects discovered by the government for a period of five years after the date of closing on the purchase of the building," and thus, the essence of the dispute "concerned the extent of Bonneville's duty to repair and alter the building."⁶²¹ In the court's view the "repair and alteration" nature of the dispute conferred jurisdiction on the Board pursuant to § 602(a)(3) of the CDA, and rendered Bonneville's appeal to the Board a binding election.⁶²²

Bonneville Associates reaffirms the vitality of the Election Doctrine and demonstrates that "the contractor's choice of forum is an important strategic decision" with significant consequences.⁶²³ The ruling demonstrates that the Court of Federal Claims and the boards of contract appeals will look beyond the purpose of the contract and examine the nature of the dispute in order to apply the doctrine. If the essence of the dispute is within the scope of § 602(a)(3), CDA jurisdiction will be conferred, and a contractor's election of either forum will be binding.

D. Counterclaims Under the False Claims Act

Since its decision in *Martin J. Simko Construction, Inc. v. United States*,⁶²⁴ the Federal Circuit has recognized the jurisdictional propriety of civil counterclaims under the False Claims Act (FCA)⁶²⁵ in CDA suits in the Court of Federal Claims.⁶²⁶ To prove a violation

619. *Id.* Bonneville argued that the warranty clause was "inextricably linked to the sale of the building," and thus the contracting officer's reliance on the clause rendered the essential nature of the dispute outside the scope of the CDA. *Id.*

620. *Id.* at 654.

621. *Id.*

622. *Id.* at 654-55. The court further noted that the dispute "did not involve such matters as title to the property, the consideration received for it, or other aspects of the conveyance, which would more clearly be disputes over the procurement of real property." *Id.* at 654.

623. *Id.* at 653.

624. 852 F.2d 540 (Fed. Cir. 1988).

625. 31 U.S.C. § 3729 (1988).

626. *Martin J. Simko Constr., Inc. v. United States*, 852 F.2d 540, 547-48 (Fed. Cir. 1988) (holding that Government's counterclaims pursuant to anti-fraud provision of CDA and False Claims Act and Government's special plea in fraud did not require a contracting officer's final decision as prerequisite to Claims Court's jurisdiction). Prior to enactment of the CDA, the

of the FCA, the Court of Claims held that the Government had to demonstrate that the contractor "present[ed] . . . for payment . . . any claim upon or against the Government . . . knowing such claim to be false."⁶²⁷ The FCA provides for a statutory penalty of \$5000 to \$10,000 for each violation, plus three times the amount of damages sustained by the Government.⁶²⁸

In *Young-Montenay, Inc. v. United States*,⁶²⁹ the Federal Circuit held that a contractor violated the FCA when submitting an inflated supplier invoice.⁶³⁰ This constituted a violation of the FCA, even though the contractor was eventually entitled to the inflated amount, because the Government was damaged by the payment of funds to the contractor before they were due⁶³¹ and by the loss of "financial incentives to assure timely completion" of the project.⁶³² The Federal Circuit upheld the Court of Federal Claims' award to the Government of larger-than-requested damages under the civil FCA, while adopting a four-part test for the recovery of FCA damages.⁶³³

Young-Montenay entered into a contract with the Department of Veterans Affairs (VA) for the renovation of boilers at a VA medical center in Texas.⁶³⁴ During contract performance, Young-Montenay placed an order for three sophisticated burners from a supplier and the supplier issued an invoice to Young-Montenay for \$104,000.⁶³⁵ Young-Montenay and the supplier subsequently disputed the price and scope of the order covered by the invoice.⁶³⁶ The supplier claimed an additional \$49,000 for delivery of a complete "burner package."⁶³⁷ Prior to paying the supplier the additional funds, Young-Montenay submitted a progress payment request to the Government supported by an altered invoice from the supplier.⁶³⁸

Court of Claims also exercised jurisdiction over False Claims Act counterclaims in contractor claim suits. See *Brown v. United States*, 524 F.2d 693, 703-04 (Ct. Cl. 1975) (noting that suits against Government may be met with counterclaims in same jurisdictional forum for purposes of convenience).

627. *Miller v. United States*, 550 F.2d 17, 22 (Ct. Cl. 1977) (emphasis in original) (finding Government False Claims Act counterclaim sustained where contractor's careless billing procedures resulted in overcharging to Government).

628. 31 U.S.C. § 3729(a) (1988).

629. 15 F.3d 1040 (Fed. Cir. 1994).

630. *Young-Montenay, Inc. v. United States*, 15 F.3d 1040, 1043 (Fed. Cir. 1994).

631. *Id.*; see also *id.* at n.3.

632. *Id.* at n.3.

633. *Id.* at 1043; see *infra* note 648 and accompanying text (discussing application of test for recovery of FCA damages).

634. *Young-Montenay*, 15 F.3d at 1041.

635. *Id.*

636. *Id.*

637. *Id.*

638. *Id.*

Young-Montenay's project manager testified in a deposition that he altered the original invoice by deleting \$104,000 from the bill and substituting \$153,000.⁶³⁹ The supplier later issued an invoice to Young-Montenay in the amount of \$153,000 for the burner package.⁶⁴⁰ Young-Montenay subsequently filed claims with the contracting officer for alleged government-caused delays.⁶⁴¹ The contracting officer denied the claim, and Young-Montenay appealed to the Court of Federal Claims.⁶⁴² There, the Government asserted counterclaims under the claim forfeiture statute⁶⁴³ and the civil False Claim Act against Young-Montenay for submission of the altered invoice.⁶⁴⁴

The Court of Federal Claims granted the Government's motion for summary judgment on its counterclaims and awarded both treble damages in the amount of \$147,000 and a statutory penalty of \$5000,⁶⁴⁵ even though the Government had only asserted entitlement to \$98,000 in damages under the Act.⁶⁴⁶ The court applied a four-part test for recovery of damages under the FCA, as laid out in *United States ex rel. Stinson v. Provident Life & Accident Insurance*.⁶⁴⁷ The court reasoned that Young-Montenay "may have been entitled to the money at a future date, but this did not give it license to submit an altered invoice for payment."⁶⁴⁸ The Court of Federal Claims rejected Young-Montenay's contention that the Government was entitled only to the interest on the extra \$49,000 for the time period it was deprived of the use of the funds,⁶⁴⁹ and awarded an amount equal to three times the \$49,000 extra payment, without explaining why it awarded significantly more than the Government requested.⁶⁵⁰

639. *Id.* at 1042.

640. *Id.* at 1041 n.1.

641. *Id.* at 1041.

642. *Young-Montenay, Inc. v. United States*, 39 Cont. Cas. Fed. (CCH) ¶ 76,642, at 89,069 (Fed. Cl. Jan. 6, 1993).

643. 28 U.S.C. § 2514 (1988).

644. *Young-Montenay*, 39 Cont. Cas. Fed. (CCH), at 89,069.

645. *Id.* at 89,071.

646. *Young-Montenay*, 15 F.3d at 1043.

647. 721 F. Supp. 1247 (S.D. Fla. 1989). This four-part test requires that: (1) a claim be presented or caused to be presented to a government employee; (2) the claim was false; (3) the party presenting the claim knew the claim was false; and (4) the United States suffered damages. *Young-Montenay*, 39 Cont. Cas. Fed. (CCH) at 89,070 (citing *United States ex rel. Stinson v. Provident Life & Accident Ins.*, 721 F. Supp. 1247, 1258-59 (S.D. Fla. 1989)). The court held that the Government met its burden to prove a violation and receive treble damages. *Young-Montenay*, 15 F.3d at 1040.

648. *Young-Montenay*, 39 Cont. Cas. Fed. (CCH) at 89,071.

649. *Id.*

650. *Id.*

The Federal Circuit adopted the Court of Federal Claims' four-part test for the recovery of FCA damages,⁶⁵¹ and upheld the lower court's decision, reasoning that it was "immaterial whether [the project manager] believed Young-Montenay would *subsequently* owe [the supplier] \$153,000.00, for at the time of the submission of the invoice to the government, he knew Young-Montenay then owed [the supplier] only \$104,000.00."⁶⁵² The court further held that "the government was damaged by paying money before it was due to the contractor and that the trial court determined the proper amount of damages, which it lawfully trebled."⁶⁵³

Countering Young-Montenay's assertion that the Government was only entitled to lost interest on the inflated claim, the court reasoned that the Government was not only damaged by the lost use of the money paid under the inflated invoice, but also by the loss of leverage over the contractor to ensure timely and quality completion of the project.⁶⁵⁴ In justifying the lower court's damage award, the Federal Circuit noted that "[n]o authority has been cited to mandate acceptance of the contractor's arguments for lesser measures" and that three times the difference between the original and altered invoice constituted a "reasonable measure of damages."⁶⁵⁵

Young-Montenay reached a predictable result given the blatant admission of invoice alteration by the contractor's project manager. The case is significant because it clearly spells out the elements of a Government counterclaim for damages under the FCA, and espouses the view that the court may award the maximum amount of damages allowed under the FCA, even though the Government asks for less. The other noteworthy aspect of *Young-Montenay* is the novel idea advanced by the Federal Circuit that compensable damages under the FCA need not be purely monetary in nature; the loss of financial incentives over the contractor is sufficient to sustain damages.⁶⁵⁶ Thus, the Government may now be encouraged to bring spurious FCA counterclaims based on legitimate contractor activities which result in the loss of contract leverage, rather than fraudulent activities which

651. *Young-Montenay*, 15 F.3d at 1043. The Federal Circuit repeated the same four-part test as the Court of Federal Claims, but cited as authority the Court of Claims' decision in *Miller v. United States*, 550 F.2d 17, 23 (Ct. Cl. 1977), rather than *Stinson*, the case cited by the Court of Federal Claims. *Id.*

652. *Id.* at 1042 (emphasis in original).

653. *Id.* at 1043.

654. *Id.* at 1043 n.3.

655. *Id.* at 1043.

656. *Id.* at 1043 n.3.

cause actual monetary loss to the Government.⁶⁵⁷ The Federal Circuit obviously considered its pronouncements regarding the governmental interest in maintaining financial incentives to ensure timely contract completion important enough to reissue *Young-Montenay* as a precedential opinion.⁶⁵⁸

E. Scope of Appellate Review

The CDA requires that the contracting officer's decisions be reviewed *de novo* on appeal.⁶⁵⁹ The CDA also provides that the contracting officer's findings of fact "shall not be binding in any subsequent proceeding."⁶⁶⁰ Prior to enactment of the CDA, the Court of Claims considered the contracting officer's findings that favored the contractor to be admissions of government liability, subject to rebuttal.⁶⁶¹ Even after the CDA was enacted,⁶⁶² both the boards and the Court of Federal Claims continued to apply this presumption and utilize contracting officer's findings in reaching their decisions.⁶⁶³

In *Wilner v. United States*,⁶⁶⁴ the Federal Circuit, sitting en banc, held that the CDA's *de novo* review requirement prohibits the use of un rebutted contracting officer's findings of facts as evidentiary admissions of government liability.⁶⁶⁵ Wilner's contract with the Navy to construct a training facility at Camp Pendleton, California was

657. Cf. *Sterling Millwrights, Inc. v. United States*, 26 Cl. Ct. 49, 99 (1992) (dismissing Government FCA counterclaims based on legitimate contractor actions to maximize profits on fixed-price construction contract).

658. See *Trial Court Can Give Government Larger Judgment Against Contractor Than It Requested - Decision Made Precedential*, 36 GOVERNMENT CONTRACTOR ¶ 200 (Apr. 6, 1994) (summarizing reissued opinion); *Trial Court Can Give Government Larger Judgment Against Contractor Than It Requested*, 35 GOVERNMENT CONTRACTOR ¶ 734 (Dec. 1, 1993) (summarizing Federal Circuit's initial opinion).

659. 41 U.S.C. § 609(3) (1988).

660. *Id.* § 605(a); see also *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987) (holding that contracting officer's decision is entitled to no special deference on appeal).

661. See *D. Hedin Constr. Co. v. United States*, 347 F.2d 235, 245 (Ct. Cl. 1965) (stating that "the findings of the contracting officer have been said to constitute a strong presumption . . . or an evidentiary admission . . . of the extent of the Government's liability, but always subject to rebuttal") (citations omitted). Note, however, that *Hedin* was subsequently overruled. See *infra* note 667 and accompanying text.

662. Pub. L. No. 95-563, § 2, 92 Stat. 2383 (codified at 41 U.S.C. 601 (1988)).

663. See, e.g., *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 704 (Fed. Cir. 1986) (barring contractor's claim based on intent of parties); *Timberland Paving & Constr. Co. v. United States*, 18 Cl. Ct. 129, 141 (1989) (discussing contractor officer's determination); *Charles G. Williams Constr., Inc., ASBCA No. 33766, 89-2 B.C.A. (CCH) ¶ 21,733, at 109,249 (1989)* (evaluating, but dismissing, contracting officer's claims).

664. 24 F.3d 1397 (Fed. Cir. 1994).

665. See *Wilner v. United States*, 24 F.3d 1397, 1402-03 (Fed. Cir. 1994) (overruling *Hedin* by holding that plain language of CDA shall not make contracting officer's findings, in later proceedings, evidence of Government's liability).

delayed by 447 days.⁶⁶⁶ Subsequently, Wilner submitted a claim to the contracting officer alleging that the Government was responsible for the entire delay period.⁶⁶⁷ The contracting officer found that Wilner was entitled to only 260 days of compensable delay plus a net award of \$17,259.⁶⁶⁸ Wilner then appealed the decision to the Claims Court, alleging that the Government was responsible for the entire 447 days of delay.⁶⁶⁹

After a bench trial, the Claims Court determined that the evidence presented by Wilner only established that ninety-one days of government-caused delay were on the "critical path"⁶⁷⁰ of the project schedule.⁶⁷¹ Nevertheless, the court awarded Wilner 259 days of delay after hearing the contracting officer's testimony on behalf of the Government explaining the process used to arrive at the final decision, as well as the decision itself.⁶⁷² The Claims Court, citing *J.D. Hedin Construction Co. v. United States*,⁶⁷³ concluded that the findings of the contracting officer were "entitled to a strong presumption of validity, subject to rebuttal."⁶⁷⁴ The Claims Court considered the contracting officer's decision as "evidence before the court that must be considered and weighed."⁶⁷⁵ Recognizing that the Government did not rebut the contracting officer's findings, the Claims Court relied on both the contracting officer's formal determinations of critical path delays and the contracting officer's testimony that his conclusions were based on the technical analysis of his staff.⁶⁷⁶

The Government appealed to the Federal Circuit, arguing that the Court of Federal Claims failed to conduct a proper *de novo* review under the CDA.⁶⁷⁷ After a divided panel affirmed the lower court's

666. *Id.* at 1398.

667. *Id.*

668. *Id.*

669. *Wilner*, 24 F.3d at 1398.

670. See NASH & SCHOONER, *supra* note 50, at 116 (defining Critical Path Method). Critical Path Method (CPM) "represents the longest chain of interrelated activities in the project schedule diagram." *Id.* "[A] delay in completing an item on this critical path delays the entire project." *Id.* CPM "has become an accepted means of substantiating delay [claims] before the courts and boards of contract appeals." *Id.*

671. *Wilner*, 24 F.3d at 1399.

672. *Wilner*, 26 Cl. Ct. at 280-81.

673. 347 F.2d 235 (Ct. Cl. 1965).

674. *Wilner*, 26 Cl. Ct. at 277.

675. *Id.*

676. *Id.* at 279-80. The court stated that "[t]he problem that the court perceives is that its determinations thus far reflect the government-caused delays as proved by plaintiff at trial, rather than what the court perceives, but plaintiff failed to prove, to be the actual government-caused delays." *Id.* at 277.

677. *Wilner v. United States*, 994 F.2d 783, 786 (Fed. Cir. 1993).

decision in May 1993,⁶⁷⁸ the Government filed a petition for rehearing en banc.⁶⁷⁹ In August 1993, the Federal Circuit granted the petition for rehearing en banc, vacated the panel decision, and withdrew the panel opinion.⁶⁸⁰

On rehearing en banc, the Federal Circuit reversed the Claims Court's decision, concluding the *de novo* review requirement of the CDA demands that "once an action is brought following a contracting officer's decision, the parties start in court or before the board with a clean slate."⁶⁸¹ The Court's decision turned on its conclusion that Congress, in enacting the CDA, prohibited the use of favorable contracting officer findings as evidentiary admissions.⁶⁸² Relying on both the plain language of the CDA⁶⁸³ and its decision in *Assurance Co. v. United States*,⁶⁸⁴ the Court concluded that there is no deference to the contracting officer's decision under *de novo* review.⁶⁸⁵ In other words, the contracting officer's decision is not presumed correct.⁶⁸⁶ Under the facts of this case, the Federal Circuit noted that the Claims Court's award to Wilner was based solely on the fact that the contracting officer made an award to Wilner, not because evidence at trial supported Wilner's claim.⁶⁸⁷ The Federal Circuit added that the Claims Court used the contracting officer's decision to trump other evidence at trial and thus "allow[ed] [the contractor] to escape the consequences of his failure to meet his burden of proof."⁶⁸⁸

In his dissent, Senior Circuit Judge Bennett⁶⁸⁹ argued vigorously that enactment of the CDA did not overrule the holding of *J.D. Hedin Construction*.⁶⁹⁰ The dissent thoroughly examined the legislative

678. *Id.* at 788-89 (holding that Claims Court did not conduct proper *de novo* review of contracting officer's decision).

679. *Id.* at 792.

680. *Id.*

681. *Wilner*, 24 F.3d at 1402.

682. *Id.* at 1402-03.

683. 41 U.S.C. §§ 605(a), 609(a)(3) (1988) (proving that "[s]pecific findings of fact [by contracting officer] . . . shall not be binding in any subsequent proceeding" and that any action "shall proceed *de novo*").

684. 813 F.2d 1202, 1206 (Fed. Cir. 1987) (noting that CDA "itself suggests that, where an appeal is taken to a board or court, the contracting officer's award is not to be treated as if it were the unappealed determination of a lower tribunal which is owed special deference or acceptance on appeal").

685. *Wilner*, 24 F.3d at 1401.

686. *Id.*

687. *Id.*

688. *Id.* at 1402.

689. Judge Bennett authored the majority opinion in the panel decision, and was also the trial commissioner for *J.D. Hedin Constr. Co. v. United States*, 171 Cl. Ct. 70, 347 F.2d 235 (Fed. Cir. 1965). *Wilner*, 994 F.2d at 783; *Wilner*, 24 F.3d at 1408 n.7.

690. *Wilner*, 24 F.3d at 1403-13 (Bennett, J., dissenting).

history of the CDA and concluded that its enactment reaffirmed, rather than overruled, *J.D. Hedin Construction*.⁶⁹¹ The dissent argued that if Congress intended to overrule *J.D. Hedin Construction* by enacting the *de novo* review requirement of the CDA, it would have expressly stated its intent in the legislative history.⁶⁹² In addition, nothing in the CDA prohibits the use of the contracting officer's findings and conclusions as evidence in a subsequent *de novo* proceeding.⁶⁹³ In the dissent's view, the majority's literal interpretation of the *de novo* review requirement will "require[] relitigation of every fact, including facts not disputed by the agency and previously conceded," leading to increased expense for both contractors and the Government, and waste of judicial resources.⁶⁹⁴

Unfortunately, the "common sense" approach exhibited by the Court in *Transamerica Insurance Corp. v. United States*⁶⁹⁵ and *Arnold M. Diamond, Inc. v. Dalton*⁶⁹⁶ did not prevail in *Wilner Construction*. The Federal Circuit abandoned the "common sense" approach and "change[d] the law to place additional, if not impossible, burdens on contractors in resolving disputes with agencies."⁶⁹⁷ The elimination of the presumptive validity rule will significantly increase contractors' litigation expenses and provide greater leverage for the Government to settle claims before they reach litigation. The ultimate impact of *Wilner Construction* depends on how it is used by the Government in future disputes. This decision may allow the Government to force inequitable settlements on contractors at the administrative level, but it may also liberate contracting officers to make more findings in favor of contractors. What is certain, however, is that *Wilner Construc-*

691. *Id.* at 1407-11 (Bennett, J., dissenting).

692. *Id.* at 1409 (Bennett, J., dissenting). For example, the dissent pointed out that the legislative history of the CDA does not mention *J.D. Hedin Constr.*, while it does discuss and criticize *United States v. Anthony Grace & Sons*, 384 U.S. 424 (1966), and *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966), which limited the circumstances under which the Court of Claims could conduct *de novo* hearings. *Id.* The dissent also pointed out that these cases "have been recognized as overruled." *Id.*

693. *Wilner*, 24 F.3d at 1410. The dissent also argued that "[t]he mere fact that the contracting officer's decision is nonbinding on appeal to the Claims Court does not mean that it has no evidentiary value." *Id.* at 1404. The dissent further stated that "when factual findings are not contradicted on the appeal, they can be given probative weight without requiring the contractor to reprove the facts." *Id.*

694. *Id.* at 1403 (Bennett, J., dissenting).

695. *Transamerica Ins. Corp. v. United States*, 973 F.2d 1572, 1579 (Fed. Cir. 1992) (applying common sense analysis to interpretation of CDA requirement); see also *supra* notes 519-22 and accompanying text (discussing further court's treatment of *Transamerica's* "common sense" approach).

696. *Arnold M. Diamond, Inc. v. Dalton*, 25 F.3d 1006, 1007 (Fed. Cir. 1994); see *supra* notes 517-49 and accompanying text (discussing *Diamond* and corresponding effect of "common sense" approach on subsequent jurisprudence).

697. *Wilner*, 24 F.3d at 1403 (Bennett, J., dissenting).

tion will lead to more, if not necessarily fairer, settlements at the contracting agency level.

F. Timeliness of Appeal from Contracting Officer's Final Decision

As discussed above, the CDA contains two separate limitations periods for contractor appeals from adverse contracting officer decisions.⁶⁹⁸ The CDA proscribes a ninety-day statute of limitations for appeals from contracting officer's decisions to the boards of contract appeals,⁶⁹⁹ while providing for a one-year limitation period for appeals to the United States Court of Federal Claims.⁷⁰⁰ These provisions create a jurisdictional anomaly which may present a procedural snare to unwary contractors.

In *West Coast General Corp. v. Dalton*,⁷⁰¹ the Federal Circuit held that the ninety-day period for appeal of a contracting officer's decision to a board of contract appeals is not tolled by the disposition of a claim under the same contract in the Court of Federal Claims.⁷⁰² The Federal Circuit reasoned that a Court of Federal Claims decision "directed to one claim brought by a party does not create binding precedent for a separate claim—even a separate claim from the same party" under the same contract.⁷⁰³

West Coast received a construction contract from the Navy and encountered a differing site condition during performance that required relocation of a gas line.⁷⁰⁴ West Coast subsequently submitted a claim for extra costs relating to the gas line relocation in October 1988.⁷⁰⁵ Previously, in 1987, West Coast had filed a claim with the Navy under the same contract for extra road paving costs.⁷⁰⁶ West Coast submitted both claims to the Navy's Resident Officer in Charge of Construction (ROICC). The Navy denied the

698. See *supra* notes 557-63 and accompanying text (describing CDA's contractor appeal procedures and limitation periods).

699. 41 U.S.C. § 606 (1988).

700. *Id.* § 609(a)(3). Prior to enactment of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10 U.S.C.), contractor CDA claims were subject to no formal limitation period for presentation to the contracting officer. See *Board of Governors v. United States*, 10 Cl. Ct. 27, 30 n.3 (1986) (stating that CDA provides no limitations period for presentation of claims to contracting officer; CDA limitations periods govern exclusion of general six-year statute of limitations period of 28 U.S.C. § 2501). The FASA institutes a six-year limitations period for the presentation of claims for all contracts. Pub. L. No. 103-355, §§ 2302, 2351, 102 Stat. 3243, 3321-22 (1994) (codified in scattered sections of 10 U.S.C.).

701. 39 F.3d 312 (Fed. Cir. 1994).

702. *West Coast Gen. Corp. v. Dalton*, 39 F.3d 312, 315 (Fed. Cir. 1994).

703. *Id.*

704. *Id.* at 313.

705. *Id.* at 313-14.

706. *Id.* at 314.

paving claim in 1987 and West Coast appealed to the Claims Court.⁷⁰⁷ The Navy also denied the gas line claim in April 1989 by a written decision of the contracting officer that properly informed West Coast of its appeal rights, as well as the time-periods for appeal.⁷⁰⁸ West Coast allowed the ninety-day period for appeal of the April 1989 final decision to the ASBCA to run.⁷⁰⁹ During the ninety-day period, West Coast did not ask the Navy to reconsider the decision.⁷¹⁰ Nor was there any evidence that the Navy itself took any action to reconsider the decision during this period.⁷¹¹

In the Claims Court, the Government moved to dismiss West Coast's paving claim for lack of jurisdiction, arguing that because the claim was submitted to the ROICC it did not satisfy the CDA's requirement that a claim "be submitted to the contracting officer."⁷¹² The Court agreed with the Government and issued a decision in December 1989, dismissing West Coast's paving claim for failure to properly submit the claim to the contracting officer.⁷¹³

After the Claims Court decision, West Coast informed the Navy that the decision also invalidated the gas line claim because it was also submitted to the ROICC rather than to the contracting officer.⁷¹⁴ The Navy subsequently entered into discussions with West Coast regarding both claims, and indicated that if attempts at settlement were not successful, West Coast would have to resubmit its gas line claim to the contracting officer.⁷¹⁵ The settlement negotiations were unsuccessful, and in June 1990, West Coast resubmitted the gas line claim to the contracting officer for a decision.⁷¹⁶ The contracting officer responded that the April 1989 gas line decision issued was not invalidated by the Claims Court's decision in *West Coast I* and thus the decision remained in effect.⁷¹⁷ As a result, the contracting officer would not render a decision on West Coast's June 1990 resubmission.⁷¹⁸

707. *Id.*

708. *Id.*

709. *Id.*

710. *Id.*

711. West Coast Gen. Corp., ASBCA No. 44294, 93-3 B.C.A. (CCH) ¶ 26,242, at 130,551-52 (1993) (*West Coast II*).

712. *Id.* at 130,552.

713. West Coast Gen. Corp. v. United States, 19 Cl. Ct. 98, 101 (1989) (*West Coast I*). The 1994 Federal Circuit case affirmed the ASBCA decision.

714. West Coast Gen. Corp. v. Dalton, 39 F.3d 312, 314 (Fed. Cir. 1994).

715. *Id.*

716. *Id.*

717. *Id.*

718. *Id.*

In March 1992, West Coast appealed its June 1990 gas line claim to the ASBCA on a "deemed denial" basis.⁷¹⁹ The ASBCA granted the Government's motion to dismiss the appeal as untimely due to the Board's view that the ninety-day filing period could not be waived because "the decision met the requirements of the CDA, and there was no reconsideration [by the contracting officer] during the appeal period."⁷²⁰ The Board, citing the Federal Circuit's 1991 decision in *Dawco Construction, Inc. v. United States*,⁷²¹ believed the gas line claim was properly "submitted to the contracting officer for a decision" even though it was sent to the ROICC.⁷²² The ASBCA rejected West Coast's argument that "the Claims Court decision invalidated the 26 April 1989 gas line decision and revived its gas line claim" for three reasons.⁷²³ First, the "paving and gas line claims obviously were separate and distinct claims."⁷²⁴ Second, "the [] paving decision was issued nearly two years before [the] gas line decision."⁷²⁵ Third, the "claims [were not] consolidated before the appeal period expired on the gas line claim."⁷²⁶

A divided panel of the Federal Circuit upheld the ASBCA's decision.⁷²⁷ The majority found Claims Court decisions to constitute only persuasive authority.⁷²⁸ Thus, a decision directed to a particular party's claim is not binding for a separate claim, even a separate claim brought by the same party.⁷²⁹ The court held that West Coast "had no legal basis for its reliance on *West Coast I*" in foregoing an appeal of the contracting officer's gas line decision because the paving and gas line claims were distinct and separate claims, and "the trial court's refusal to take jurisdiction in *West Coast I* was incorrect."⁷³⁰

719. *Id.* If the contracting officer fails to render a decision within sixty days, the claim is deemed denied and the CDA enables the contractor to lodge an appeal in the appropriate forum. See NASH & SCHOONER, *supra* note 50, at 122.

720. West Coast Gen. Corp., ASBCA No. 44294, 93-3 B.C.A. (CCH) ¶ 26,242, at 130,552 (1993).

721. 930 F.2d 872, 880 (Fed. Cir. 1991) (rejecting Government's argument that contractor must address or deliver claim directly to contracting officer and holding contractor's submission to ROICC representative was valid). The Federal Circuit's decision in *Dawco Construction* "overruled the reasoning and result in *West Coast I*." *West Coast General*, 39 F.3d at 314.

722. *West Coast General*, 93-3 B.C.A. (CCH) at 130,552.

723. *Id.*

724. *Id.*

725. *Id.*

726. *Id.*

727. *Id.*

728. *Id.*

729. *West Coast Gen. Corp. v. United States*, 39 F.3d 312, 315 (Fed. Cir. 1994).

730. *Id.*

The dissent argued that West Coast was entitled to rely on the Court of Federal Claims decision in *West Coast I* given the circumstances of the case, and that the effect of the majority opinion was an improper retroactive application of *Dawco Construction*.⁷³¹ In the dissent's view, "West Coast's actions were reasonable and served to advance resolution of the merits of the claim."⁷³² The dissent also argued that affirming the Board would only encourage parties to ignore Court of Federal Claims decisions.⁷³³ The dissent applied the Supreme Court's decision in *Chevron Oil Co. v. Huson*⁷³⁴ to determine whether the retroactive application of *Dawco Construction* was proper and concluded that both the ASBCA's and majority's decisions were "contrary to the principles . . . of justice."⁷³⁵

The implications of *West Coast General* will not be as dire as those predicted by the dissent. The majority opinion reaffirms the statutory underpinnings of the CDA filing periods and warns contractor's to protect diligently their rights of appeal for each claim without regard to the disposition of other claims under the same contract. The majority reached a result that was both predictable and essentially correct. To have held otherwise would have allowed the contractor to proceed with a CDA claim at the Board almost two years after it unilaterally decided to let the ninety-day statutory filing period expire. Indeed, the majority and the dissent overlook the essential premise of the Board's decision: West Coast's appeal was untimely because the ninety-day filing period expired six months in advance of the Claims Court decision in *West Coast I*. When examined from this perspective, whether or not the contractor was entitled to rely on the subsequent court decision is irrelevant. *West Coast* reemphasizes that the jurisdictional requirements of the CDA rest on a contractor claim and a contracting officer's decision on that claim, and reiterates that claims under the same contract are separate and distinct unless

731. *Id.* at 317-18 (Newman, J., dissenting).

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

733. *Id.* at 317 (Newman, J., dissenting).

734. 404 U.S. 97, 106-07 (1971) (explaining that decision should apply retroactively if decision establishes new principles of law, does not produce inequitable results, and does not retard rule's operation).

735. *West Coast General*, 39 F.3d at 318 (Newman, J., dissenting). The dissent's contention that the Board applied *Dawco Construction* retroactively is mistaken. Rather than applying *Dawco* retroactively, the ASBCA may have been implicitly exercising its discretion to render decisions independent of the Court of Federal Claims. Decisions of the Court of Federal Claims are not binding on the Boards of Contract Appeals. See *Tomahawk Constr. Co.*, ASBCA No. 41717, 98-3 B.C.A. (CCH) ¶ 26,219 (1993); *Roy McGinnis & Co.*, ASBCA Nos. 40004, 40005, 91-1 B.C.A. (CCH) ¶ 23,395 (1990). Had West Coast appealed to the ASBCA after *West Coast I*, but prior to *Dawco*, the Board would not have been bound by the Court of Federal Claim's decision in *West Coast I* and could have reached the same result.

affirmatively consolidated. Thus, *West Coast General* warns contractors and contractor's counsel to take every available precaution to preserve claim appeal rights, no matter what promises of settlement are made by the Government.

CONCLUSION

None of the Federal Circuit's 1994 government contracts decisions was, individually, a landmark decision. None will likely find its way into a casebook or be recognized as a seminal decision in years to come. The court's 1994 docket stands in striking contrast to its anticipated docket for 1995, when the Federal Circuit is expected to issue at least two significant rulings that will make, and perhaps shatter, precedent.⁷³⁶

Like a vintage of wine that is good but not great, an appellate court's work in a modestly good year may be overshadowed by an adjacent year in which truly significant decisions were issued. Even though the Federal Circuit may not have changed the fundamental course of government contracts law during 1994, practitioners and scholars should applaud the court's work. The decisions discussed in this Article generally make valuable contributions to the law of Government contracts by breaking new ground in some cases and by refining long-standing legal principles in other cases.

The authors of this Article hope that they also detect a slightly greater interest on the part of the Federal Circuit during 1994 in deciding cases on the merits, rather than on increasingly fine points of jurisdiction and procedure. The former, not the latter, is what leads parties to hire lawyers and file protests, claims, and lawsuits to begin with. Tribunals that resolve Government contracts disputes owe it to the litigants, as well as to the legal process, to render decisions on substantive, rather than procedural, grounds whenever possible.

736. As of the date of this Article, en banc appeals were pending before the Federal Circuit in *Reflectone Inc. v. Department of the Navy*, 34 F.3d 1939 (Fed. Cir. 1994), and *Winstar Corp. v. United States*, 994 F.2d 797 (Fed. Cir. 1993). *Reflectone* poses the question whether the amount of a contractor's demand for payment must be "in dispute" before the demand will be considered a "claim" for purposes of jurisdiction under the CDA. Implicit in the court's en banc consideration of *Reflectone's* appeal is the question whether the Federal Circuit will overturn its controversial ruling in *Dawco Construction, Inc. v. United States*, 930 F.2d 872 (Fed. Cir. 1991), less than four years after the Federal Circuit decided that case. *Winstar* poses the question whether the Government will be held liable for breaching its contracts with savings and loan investors because Congress subsequently changed the law with respect to the accounting treatment of their investments. *Winstar* presents the fundamental tension between requiring the Government to honor its word just like any other contracting party, on the one hand, and recognizing the right of Congress to legislate in the public interest, on the other hand.

