

# GOVERNMENT CONTRACTS: 1992 ANALYSIS AND SUMMARY

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INTRODUCTION

This Article reviews decisions in the area of government contracts published in 1992 by the United States Court of Appeals for the Federal Circuit. This area of law governs the relationship and disputes between private parties and the United States with respect to the Government’s procurement of goods and services.<sup>1</sup> The Federal Circuit’s decisions in this area are based on appeals either from the United States Court of Federal Claims (the new name for the United States Claims Court)<sup>2</sup> or from the boards of contract appeals for various federal agencies.<sup>3</sup> For the most part, the decisions reviewed here adjudicate contract disputes brought under the Contract Disputes Act of 1978 (CDA),<sup>4</sup> or precontract bid protests brought under the Competition in Contracting Act of 1984 (CICA).<sup>5</sup> During 1992, the Federal Circuit published twenty-one decisions in the government contracts area, compared with thirty-one in 1991. Eleven of these decisions relate to substantive contractual issues or involve bid protests.<sup>6</sup> Seven address jurisdictional issues.<sup>7</sup> The other three discuss, respectively, the circumstances

1. See JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 1 (2d ed. 1986) (discussing distinct rules and procedures for government contracts which differ from those for contracts between purely private parties).

2. See Federal Courts Administration Act of 1992 (FCAA), Pub. L. No. 102-572, § 901, 106 Stat. 4506, 4516 (to be codified in scattered sections of 28 and 41 U.S.C.) (redesignating U.S. Claims Court as U.S. Court of Federal Claims).

3. See 28 U.S.C. § 1491 (1988) (specifying that Government and contractors have right to appeal decisions of Claims Court to Federal Circuit); 41 U.S.C. § 607(g)(1) (1988) (delineating rights of Government and contractors to appeal decisions of boards of contract appeals to Federal Circuit).

4. 41 U.S.C. §§ 601-613 (1988).

5. Pub. L. No. 98-369, 98 Stat. 1175 (codified in scattered sections of 28 and 41 U.S.C.).

6. Hills Materials Co. v. Rice, 982 F.2d 514 (Fed. Cir. 1992); Interstate Gen. Gov’t Contractors v. Stone, 980 F.2d 1433 (Fed. Cir. 1992); Modern Sys. Technology Corp. v. United States, 979 F.2d 200 (Fed. Cir. 1992); Roseburg Lumber Co. v. Madigan, 978 F.2d 660 (Fed. Cir. 1992); Stone Forest Indus. v. United States, 973 F.2d 1548 (Fed. Cir. 1992); Planning Research Corp. v. United States, 971 F.2d 736 (Fed. Cir. 1992); Medart, Inc. v. Austin, 967 F.2d 579 (Fed. Cir. 1992); Granite Constr. Co. v. United States, 962 F.2d 998 (Fed. Cir. 1992); Coflexip & Servs., Inc. v. United States, 961 F.2d 951 (Fed. Cir. 1992); Andersen Consulting v. United States, 959 F.2d 929 (Fed. Cir. 1992); Triax-Pacific v. Stone, 958 F.2d 351 (Fed. Cir. 1992).

7. Kiewit/Tulsa-Houston v. United States, 981 F.2d 531 (Fed. Cir. 1992); Universal Camera Corp. v. Stone, 975 F.2d 847 (Fed. Cir. 1992); Transamerica Ins. Corp. v. United States, 973 F.2d 1572 (Fed. Cir. 1992); G.E. Boggs & Assocs., Inc. v. Roskens, 969 F.2d 1023

under which the Eichleay formula may be used,<sup>8</sup> whether the Government has ordered "exclusive use" shipping,<sup>9</sup> and who may receive attorney's fees under the Equal Access to Justice Act.<sup>10</sup>

On a pure numbers basis, one might conclude from these twenty-one published cases that the Federal Circuit favors the Government more often than not. In each of the twelve cases where the court affirmed lower decisions, the Government prevailed. In the seven cases where lower decisions were reversed or vacated, the contractor won. In the two cases that involved partial affirmances, the Government prevailed in one and the contractor in the other. Thus, an overall scorecard might read: "Government 13, Contractors 8." It is interesting to note that the Government was the prevailing party before lower tribunals in twenty of the cases published, so one might interpret the seven reversals as suggesting a more balanced approach. Indeed, six of the seven reversals represent important victories for contractors.<sup>11</sup> Caution should be exercised in examining these results, however, because the sample for this analysis is based only on published opinions and does not include unpublished or per curiam decisions.

Part I of the Article reviews what has become the most interesting and frustrating area of the Federal Circuit's decisions: jurisdiction. Part II reviews three decisions in the precontractual bid protest area; Part III discusses an important case on the Eichleay formula; Part IV analyzes eight cases that address substantive contractual issues; Part V reviews the doctrine of exclusive use; and Part VI discusses a case that limits attorney's fees.

## I. JURISDICTION

### A. *Jurisdictional Problems in Appealing Contracting Officer Decisions on Contractor Claims*

In 1978, Congress passed the CDA in order to streamline and

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(Fed. Cir. 1992); *Ginsberg v. Austin*, 968 F.2d 1198 (Fed. Cir. 1992); *Essex Electro Eng'rs, Inc. v. United States*, 960 F.2d 1576 (Fed. Cir. 1992); *Scott Aviation v. United States*, 953 F.2d 1377 (Fed. Cir. 1992).

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

9. *Baggett Transp. Co. v. United States*, 969 F.2d 1028 (Fed. Cir. 1992).

10. *FDL Technologies, Inc. v. United States*, 967 F.2d 1578 (Fed. Cir. 1992).

11. Contractors won important decisions on the issues of jurisdiction, *Transamerica Ins. Co. v. United States*, 973 F.2d 1572 (Fed. Cir. 1992); recovery of bid preparation expenses, *Cofflexip & Serv., Inc. v. United States*, 961 F.2d 951 (Fed. Cir. 1992); standing to sue for back rent, *Ginsberg v. Austin*, 968 F.2d 1198 (Fed. Cir. 1992); government liability for insisting on strict compliance with specifications, *Granite Constr. Co. v. United States*, 962 F.2d 998 (Fed. Cir. 1992); breach of contract for failure to notify a contractor by prescribed procedures, *Stone Forest Indus. v. United States*, 973 F.2d 1548 (Fed. Cir. 1992); and government liability for a change in regulations, *Hills Materials Co. v. Rice*, 982 F.2d 514 (Fed. Cir. 1992).

simplify the adjudication of contractual claims against the Federal Government arising from its procurement of goods and services.<sup>12</sup> The CDA and its implementing regulations were intended, among other things, to define what constitutes a claim,<sup>13</sup> how a claim is filed with the Government or a contracting officer (CO),<sup>14</sup> how an appeal may be taken from an adverse decision by a CO,<sup>15</sup> and when interest will begin to accrue on a claim.<sup>16</sup> Jurisdictional questions arising from contractor appeals of CO decisions, while not infrequent during the first years of the CDA, usually involved the failure of a contractor who was unfamiliar with the disputes process to fulfill some technical requirement.<sup>17</sup> In the last several years, however, the Federal Circuit has rendered decisions that have radically changed the disputes process by altering the scope of jurisdiction of boards of contract appeals and the Claims Court to hear appeals by contractors from adverse decisions of COs.<sup>18</sup> These decisions created confusion and uncertainty in the disputes process, which prompted Congress to enact the Federal Courts Administration Act of 1992 (FCAA).<sup>19</sup>

In 1991, for example, in *United States v. Grumman Aerospace Corp.*,<sup>20</sup> the Federal Circuit strictly interpreted the Federal Acquisition Regulation (FAR) provision that defines who can properly certify a claim on behalf of a contractor under the CDA.<sup>21</sup> The court held that if

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12. See CIBINIC & NASH, *supra* note 1, at 944-45 (discussing how CDA restructured dispute resolution process).

13. 48 C.F.R. § 33.201 (1991) ("Claim . . . means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.") (emphasis in original). See *infra* notes 66-118 and accompanying text (discussing definition of "claim" under CDA).

14. 41 U.S.C. § 605 (1988).

15. *Id.* §§ 606, 609.

16. *Id.* § 611.

17. See, e.g., *Beacon Oil Co.*, EBCA Nos. 215-6-82, 216-6-82, 83-1 B.C.A. (CCH) ¶ 16,217, at 80,584 (1982) (dismissing for failure to certify claim to give Board proper jurisdiction); *Sellick*, ASBCA No. 27286, 83-1 B.C.A. (CCH) ¶ 16,198, at 80,472 (1982) (determining that res judicata precluded Board consideration of contractor default termination); *Logus Mfg. Co.*, ASBCA No. 26436, 82-2 B.C.A. (CCH) ¶ 16,025, at 79,416 (1982) (concluding that contractor's failure initially to submit claim to CO deprived Board of jurisdiction); *Spain & Assoc., Inc.*, ASBCA No. 25491, 82-2 B.C.A. (CCH) ¶ 16,022, at 79,049 (1982) (dismissing contractor's claim due to contractor's failure to respond to Board's orders).

18. See *infra* notes 20-36 and accompanying text (discussing 1991 Federal Circuit jurisdictional decisions).

19. Pub. L. No. 102-572, 106 Stat. 4506 (to be codified in scattered sections of 28 and 41 U.S.C.); see 138 CONG. REC. S17,252-53 (daily ed. Oct. 7, 1992) (statement of Sen. Heflin) (describing FCAA's goal to clarify jurisdictional confusion for contract claims against Government).

20. 927 F.2d 575 (Fed. Cir.), *cert. denied*, 112 S. Ct. 330 (1991).

21. *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 579-80 (Fed. Cir.), *cert. denied*, 112 S. Ct. 330 (1991); see 41 U.S.C. § 405(a) (1988) (requiring executive agencies to follow Federal Acquisition Regulation System as "single system of Government-wide procure-

the proper person does not certify a claim at the time it is submitted to a CO for decision, then the CO's final decision on that claim will be invalid because the claim itself is invalid.<sup>22</sup> According to the court, defective certification, by long-standing precedent, deprives the Court of Federal Claims or a board of contract appeals of jurisdiction over an appeal of a final CO decision.<sup>23</sup>

In the aftermath of *Grumman*, the issue of claim certification became of primary jurisdictional importance and led to the dismissal of dozens of appeals because the claims at issue were not properly certified. The *Grumman* decision's new and strict interpretation of the certification requirement overturned what had been the practice of contractors for more than ten years. For many contractors, the application of the *Grumman* standard to their cases meant loss of interest on their claims and added time and expense in resolving their claims.<sup>24</sup> For others it meant complete loss of the claim.<sup>25</sup> The FCAA remedied this situation by preventing an improper certification from acting as a jurisdictional bar.<sup>26</sup>

In 1991, the Federal Circuit also decided *Overall Roofing & Construction, Inc. v. United States*,<sup>27</sup> holding that the Claims Court has no jurisdiction to hear nonmonetary claims.<sup>28</sup> This decision was especially important to contractors because contractors frequently appeal final decisions of COs that terminate them for default.<sup>29</sup> Until

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ment regulations"); see also CIBINIC & NASH, *supra* note 1, at 9-12 (explaining history, structure, and purpose behind FARs).

22. *Grumman*, 927 F.2d at 579-80.

23. *Id.*

24. The CDA allows a contractor to collect interest on any amounts awarded on successful claims. 41 U.S.C. § 611 (1988). Interest is calculated from the date on which the CO receives a properly certified claim. *Id.* Contractors who certified claims based on pre-*Grumman* practices accordingly lost interest payments for the period between their original, defective filings and their corrective re filings.

25. Contractors who failed to discover defective certification before the statute of limitations had run lost their claims entirely. See, e.g., 10 U.S.C. § 2405 (1988) (setting 18-month limitation on claims by shipbuilders).

26. FCAA § 907(a), 106 Stat. at 4518 (to be codified at 41 U.S.C. § 605(a)); see *infra* notes 37-65 and accompanying text (discussing effect of FCAA certification provision).

27. 929 F.2d 687 (Fed. Cir. 1991).

28. *Overall Roofing & Constr., Inc. v. United States*, 929 F.2d 687, 688-90 (Fed. Cir. 1991).

29. See generally 48 C.F.R. § 52.249-8 (1991) (discussing U.S. Government's power to terminate procurement contracts for default, and consequences of such terminations). Generally, the Government may terminate for default when a contractor fails to (1) deliver supplies or perform before a date specified in the contract, (2) make sufficient progress in discharging its contractual obligations if the lack of progress endangers overall performance, or (3) perform under any contract provision. *Id.* When a contract is terminated for default, the contractor receives no payment under the contract and indeed may be liable to the Government for liquidated damages. JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 671 (1985). When a contract is terminated for convenience, by contrast, the contractor is reimbursed for costs incurred in performing, plus some profit. 48 C.F.R. § 52.250 (1991). Because of the differing consequences, contractors often seek to convert

the decision in *Overall Roofing*, both the boards of contract appeals and the Claims Court were understood to have jurisdiction in such matters, which was a particularly logical conclusion in light of the fact that under the CDA, a contractor can appeal a CO decision to either the Claims Court or a board of contract appeals.<sup>30</sup> *Overall Roofing* had the effect of suddenly changing the law in this area and resulted in the anomaly of placing jurisdiction of appeals from CO decisions involving nonmonetary claims only in the hands of the boards of contract appeals. In 1992, this ruling was reaffirmed by the Federal Circuit in *Scott Aviation v. United States*.<sup>31</sup> As with the certification issue, however, the FCAA remedied this illogical jurisdictional rule.<sup>32</sup>

Finally, in 1991 the Federal Circuit decided *Dawco Construction, Inc. v. United States*,<sup>33</sup> a case that at first received little attention as to its jurisdictional impact. In *Dawco*, the Federal Circuit held that a "dispute" must exist between the Government and a contractor before the latter can make a valid claim under the CDA.<sup>34</sup> Again, as with *Grumman*, the court based its decision on its interpretation of the FAR. Language in the *Dawco* decision has been interpreted by boards of contract appeals and the Claims Court as requiring, as a predicate to jurisdiction, that the parties have ceased all negotiations and in some cases that the submission be entitled a "claim."<sup>35</sup> As with the *Grumman* rule, this has resulted in the dismissal of appeals on jurisdictional grounds by both agency boards and the

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terminations for default into terminations for convenience, which is in fact their only remedy. *CIBINIC & NASH, supra*, at 671.

30. See 41 U.S.C. § 606 (1988) (granting contractors right to appeal adverse CO decisions to agency boards of contract appeals); *id.* § 609(a)(1) (granting contractors right to appeal adverse CO decisions to Claims Court in lieu of agency boards of contract appeals). Before the decision in *Overall Roofing*, the Federal Circuit decided in *Malone v. United States*, 849 F.2d 1441 (Fed. Cir. 1988), that boards of contract appeals had jurisdiction over nonmonetary claims, but declined to discuss prior Claims Court cases that ruled that the Claims Court had no such jurisdiction. *Id.* at 1444. Because it appears logical under the CDA that the Claims Court's jurisdiction to hear appeals from CO final decisions is coextensive with that of the boards of contract appeals, it was not surprising that four months after *Malone* the Claims Court ruled, on the basis of that case, that it too had jurisdiction. *Claude E. Atkins Enters., Inc. v. United States*, 15 Cl. Ct. 644, 649 (1988).

31. 953 F.2d 1377, 1378 (Fed. Cir. 1992).

32. FCAA § 907(b), 106 Stat. at 4519 (to be codified at 28 U.S.C. § 1491(a)(2)); see *infra* notes 119-32 and accompanying text (discussing effect of FCAA expansion of Claims Court's jurisdiction to cover nonmonetary claims).

33. 930 F.2d 872 (Fed. Cir. 1991).

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

35. See, e.g., *Facilities Sys. Eng'g Corp. v. United States*, 25 Cl. Ct. 761, 765-66 (1992) (holding that contractor's communications to Government were invitations to negotiate, falling short of CDA requirement that for "dispute" to exist there must be impasse in negotiations); *Sun Eagle v. United States*, 23 Cl. Ct. 465, 473 (1991) (holding that disagreement alone was insufficient and that intent to discontinue negotiations is also required in order to confer jurisdiction on court under CDA).

Claims Court.<sup>36</sup> The holding in *Dawco* has much greater potential for confusion and uncertainty than the one in *Grumman*, however, because *Dawco* deals with the amorphous question of whether a dispute exists between the parties rather than the simpler issue of whether a particular person is the proper party to certify a claim.

### 1. Claim certification

In 1991, the Federal Circuit's decisions in *United States v. Grumman Aerospace Corp.*<sup>37</sup> and *United States v. Newport News Shipbuilding & Dry Dock Co.*,<sup>38</sup> indicated that the court's primary jurisdictional focus under the CDA was on the issue of claim certification. The court's stringent jurisdictional requirements, as set forth in *Grumman*,<sup>39</sup> generated dissent within the Federal Circuit<sup>40</sup> as well as considerable furor in the contracting community.<sup>41</sup> In response to the confusion, Congress passed the FCAA, which largely stripped claim certification of its jurisdictional implications by providing that, *inter alia*, defective certification is no bar to jurisdiction before a court or an agency board of contract appeals.<sup>42</sup> Such defective certification may (and must) be corrected on appeal, and a claim may be certified by "any person duly authorized to bind the contractor with respect to the claim."<sup>43</sup>

In 1992, only two published Federal Circuit decisions focused on defective claim certification. The holding of the first case, *Universal Canvas, Inc. v. Stone*,<sup>44</sup> now appears moot under the newly enacted FCAA. Nevertheless, this case presents an interesting twist in that the contractor repudiated its own certification and used it as a sword to counter an adverse decision of the Armed Services Board of Con-

36. See, e.g., *supra* note 35 (citing Claims Court decisions dismissing jurisdiction based on *Dawco's* dispute requirement); see also *Hero, Inc.*, ASBCA Nos. 43258, 43259, 92-3 B.C.A. (CCH) ¶ 25,048, at 124,847 (1992) (holding no jurisdiction because letter from contractor to CO did not seek fund that was in dispute when submitted and therefore was not "claim" under CDA).

37. 927 F.2d 575 (Fed. Cir.), *cert. denied*, 112 S. Ct. 330 (1991).

38. 933 F.2d 996 (Fed. Cir. 1991).

39. *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 579-80 (Fed. Cir.), *cert. denied*, 112 S. Ct. 330 (1991); see also *supra* notes 20-23 and accompanying text (describing elements of proper certification under *Grumman*).

40. See *Grumman*, 927 F.2d at 581-84 (providing four judges' dissent from court's denial of motion to rehear case *in banc* on issue of claim certification).

41. See, e.g., Lynda T. O'Sullivan & Mark P. Willard, *Government Contracts: 1991 Analysis and Summary*, 41 AM. U. L. REV. 911, 916-17 (1991) (criticizing *Grumman* decision and describing movement in government contracts arena to have decision's effects overturned legislatively).

42. FCAA § 907(a), 106 Stat. at 4518 (to be codified at 41 U.S.C. § 605(c)).

43. *Id.*

44. 975 F.2d 847 (Fed. Cir. 1992).

tract Appeals (ASBCA).<sup>45</sup>

Universal Canvas had submitted a claim to recoup costs stemming from problems associated with government-furnished material to be sewn into tents for the Army.<sup>46</sup> After the ASBCA denied Universal Canvas' claim on the merits,<sup>47</sup> the contractor moved to vacate the judgment on the ground that the corporate officer who signed its claim, a vice president of accounting at Universal Canvas, was not the proper person to certify it.<sup>48</sup> The ASBCA denied the motion to vacate, and the contractor appealed.<sup>49</sup> The Federal Circuit, relying on *Grumman*<sup>50</sup> and *Ball, Ball & Brosamer, Inc. v. United States*,<sup>51</sup> dismissed the claim for lack of jurisdiction, agreeing with the contractor that Universal Canvas' vice president was not qualified to certify the claim because (1) he was not physically present at the location where the contract was performed, and (2) there was no evidence that he had sufficient "overall authority" to certify the claim.<sup>52</sup> As to the second point, the court stated mechanically: "There must be proof that a vice president for accounting has overall responsibility before his certification can be sufficient."<sup>53</sup> The reason there was no proof, however, was that Universal Canvas had failed to provide it.<sup>54</sup> As Judge Cowen noted in dissent, during eleven days of hearings and two post-hearing letters (one of which was written nine months after *Ball, Ball & Brosamer* was decided and the other eleven days after the *Grumman* decision was issued), no one at Universal Canvas ever suggested that its vice president of accounting lacked overall authority to certify the claim.<sup>55</sup> Universal Canvas only became interested in its vice president's qualifications after final judgment was entered by the ASBCA.<sup>56</sup>

The *Universal Canvas* decision will likely have little impact because under the newly enacted FCAA, a contractor's error does not impose a jurisdictional bar.<sup>57</sup> Yet, although the law states that "a de-

45. *Universal Canvas, Inc. v. Stone*, 975 F.2d 847, 848 (Fed. Cir. 1992).

46. *Id.*

47. *Id.*

48. *Id.* at 848-49.

49. *Id.* at 849.

50. 927 F.2d 575 (Fed. Cir.), *cert. denied*, 112 S. Ct. 330 (1991).

51. 878 F.2d 1426 (Fed. Cir. 1989).

52. *Universal Canvas*, 975 F.2d at 849-50.

53. *Id.* at 850.

54. *Id.* at 851 (Cowen, J., dissenting).

55. *Id.*

56. Of course, it is certainly not unusual for claim certification issues to arise for the first time after a judgment on the merits. The Government has often failed to raise the issue until then. *Cf. United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 577 (Fed. Cir.) (dismissing claim for improper certification although not raised by either party on appeal), *cert. denied*, 112 S. Ct. 330 (1991).

57. *See* FCAA § 907(a), 106 Stat. at 4518 (to be codified at 41 U.S.C. § 605(c)) (stating



fect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim,"<sup>58</sup> it also states that prior to entry of final judgment, "the court or agency board shall require a defective certification to be corrected."<sup>59</sup> What if an error in certification is not discovered until after final judgment? What if, at that point, the contractor refuses to correct its certification? Can it then sue to vacate judgment because of improper certification, as the contractor did in *Universal Canvas*? The commonsense answer to this question is "no," but the Federal Circuit's decisions in the area of claim certification have not always followed common sense.

In the other 1992 decision on claim certification, *Kiewit/Tulsa-Houston v. United States*,<sup>60</sup> the Federal Circuit affirmed a Claims Court decision dismissing seven counts of a plaintiff's complaint for improper certification.<sup>61</sup> The plaintiff's claims were signed by an officer who held various titles with both Kiewit Industrial Co. and the joint venture between Kiewit and Tulsa-Houston, Inc. named Kiewit/Tulsa-Houston (KTH).<sup>62</sup> The Federal Circuit held that the officer lacked the requisite overall responsibility for conduct of the contractor's affairs because, contrary to written agreements between the joint venturers, he was never granted written authority to sign certifications on behalf of KTH.<sup>63</sup>

As with *Universal Canvas*, the newly enacted FCAA appears to moot the precedential value of *Kiewit/Tulsa-Houston* because claim certification is no longer a jurisdictional issue.<sup>64</sup> Nevertheless, *Kiewit/Tulsa-Houston* is perhaps a first indication that the Federal Circuit will likely apply a strict interpretation to language in the new law permitting certification by "any person duly authorized to bind the contractor with respect to the claim."<sup>65</sup> The officer in *Kiewit/Tulsa-Houston* did not possess authority to bind the joint venture,

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that claim certification is not jurisdictional and allowing contractors to cure defective certifications).

58. *Id.*

59. *Id.*

60. 981 F.2d 531 (Fed. Cir. 1992).

61. *Kiewit/Tulsa-Houston v. United States*, 981 F.2d 531, 532 (Fed. Cir. 1992).

62. *Id.* at 532-33.

63. *Id.* at 534.

64. See FCAA § 907(a), 106 Stat. at 4518 (to be codified at 41 U.S.C. § 605(c)) (stating that faulty claim certification does not deprive court of jurisdiction). The new law was not applied because the contractor's claim had already been appealed to the Claims Court, and the FCAA's rules on claim certification apply to "all claims filed before, on, or after the date of the enactment of this Act, except for those claims which, before such date of enactment, have been the subject of an appeal to an agency board of contract appeals or a suit in the United States Claims Court." *Id.* § 907(a)(2), 106 Stat. at 4518 (to be codified at 41 U.S.C. § 605(c)).

65. *Id.* § 907(a), 106 Stat. at 4518 (to be codified at 41 U.S.C. § 605(c)).

and that conclusion would not appear to be changed by the new language. What will change, however, is the ability of joint ventures like KTH to authorize someone to certify its claims after the claims have been appealed.

## 2. *When is a claim a claim?*

With defective claim certification now receding in importance, the most significant jurisdictional question taken up by the Federal Circuit in 1992 was whether a contractor has submitted a "claim" at all.<sup>66</sup> In 1992, the Federal Circuit published two decisions addressing different aspects of this question: *Essex Electro Engineers, Inc. v. United States*<sup>67</sup> and *Transamerica Insurance Corp. v. United States*.<sup>68</sup> The two cases are not entirely consistent with each other and together suggest that the court is still struggling to present a coherent, workable approach to jurisdictional disputes.

In *Essex*, which was decided first, a contractor appealed a decision by the Claims Court dismissing its claims for lack of jurisdiction on the ground that no dispute existed between the Government and the contractor at the time the claims were made.<sup>69</sup> The contractor had sought recovery of interest on its costs of performing three change orders issued by the Government on a contract with the Naval Regional Contracting Center to overhaul and reconfigure 122 mobile electric power plants.<sup>70</sup> The Claims Court dismissed *Essex's*

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66. Section 604 of the CDA requires all claims against the Government to be submitted first to a CO for a decision. 41 U.S.C. § 604 (1988). Because a claim must be filed prior to the granting of any award, the definition of "claim" is critical. The CDA itself does not define the term, but the FAR that implements the CDA does at § 33-1(c). See 48 C.F.R. § 33.201(c) (1991) (defining "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract").

67. 960 F.2d 1576 (Fed. Cir.), cert. denied, 113 S. Ct. 408 (1992).

68. 973 F.2d 1572 (Fed. Cir. 1992).

69. *Essex Electro Eng'rs, Inc. v. United States*, 960 F.2d 1576, 1579 (Fed. Cir.), cert. denied, 113 S. Ct. 408 (1992).

70. *Id.* Each change order followed a similar sequence of events. The Government's CO requested *Essex* to supply a cost proposal for the change in early 1986. *Id.* at 1577-79. *Essex* issued its cost proposal shortly thereafter, which it subsequently revised. *Id.* The revised cost proposal for the first change was dated April 13, 1987; the second revised cost proposal was dated April 15, 1987. *Id.* at 1578-79. Each letter contained a certification but did not formally request a final decision. *Id.* In early 1988, the parties fixed the costs for the additional work, at which point the contract was formally amended. *Id.* at 1578. *Essex* then submitted an invoice for payment and the Government paid the invoiced amount. *Id.* The only difference with the third change was that it stemmed from a unilateral modification issued by the CO in which he asked *Essex* to propose additional repairs to the power units. *Id.* at 1579. Each proposed additional repair contained a cost estimate by *Essex*. *Id.* at 1578-79. After the CO informed *Essex* that the additional work could not be the subject of a claim, *Essex* filed suit in the U.S. Claims Court. *Id.* at 1579.

claims based on the new jurisdictional hurdles set forth in *Dawco*.<sup>71</sup> Specifically, the *Dawco* court had held that before a contractor's submission could qualify as a claim,

[a] contractor and the government-contracting agency must already be *in dispute* over the amount requested [in the contractor's claim]. Unilateral cost proposals or correspondence suggesting disagreement during negotiations, while they may ultimately lead to a dispute, do not, for purposes of the [CDA], satisfy the clear requirement that the request be *in dispute*.<sup>72</sup>

This language, which requires a dispute to exist prior to a contractor's submitting its claim, had already been cited in numerous decisions of boards of contract appeals and the Claims Court as the basis for dismissing contractor claims.<sup>73</sup> The court in *Dawco* had also appeared to hold that while a matter is "in negotiation" between a contractor and the Government, it cannot simultaneously be "in dispute."<sup>74</sup> The Claims Court in *Essex* held that the three different cost proposals submitted by Essex Electro Engineers did not satisfy these rigid *Dawco* standards.<sup>75</sup>

The Federal Circuit affirmed the Claims Court's dismissal for lack of jurisdiction but rejected that court's analysis, which was founded on lack of a dispute.<sup>76</sup> Instead the Federal Circuit found that the contractor had not claimed its money as a matter of right, which, the court held, is required under the definition of "claim" found in the FAR.<sup>77</sup> Accordingly, the Federal Circuit did not need to reach the jurisdictional question of whether a dispute had already arisen.

71. *Essex Electro Eng'rs, Inc.*, 22 Cl. Ct. 757, 765, *complaint dismissed*, 23 Cl. Ct. 573 (1992), *vacated*, 953 F.2d 1377 (Fed. Cir. 1992).

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

73. *See, e.g.*, *Facilities Sys. Eng'g Corp. v. United States*, 25 Cl. Ct. 761, 765 (1992) (holding that no "dispute" as to amount contractor requested meant there was no "claim" to give court jurisdiction); *Service Alliance Sys.*, ASBCA Nos. 43568, 43569, 43855, 43856, 92-3 B.C.A. (CCH) ¶ 25,020, at 124,720-21 (1992) (holding that because CO never expressed disagreement with contractor's request for equitable adjustment, it did not amount to "claim" that rendered decision by CO "legal nullity" from which contractor had no right of appeal); *Hero, Inc.*, ASBCA Nos. 43258, 43259, 92-3 B.C.A. (CCH) ¶ 25,048, at 124,847 (1992) (holding jurisdiction lacking because letter from contractor to CO did not request sum in "dispute" when submitted, meaning that it was not proper "claim" under CDA); *Santa Fe Eng'r, Inc.*, ASBCA No. 36292, 92-2 B.C.A. (CCH) ¶ 24,795, at 123,681 (1992) (dismissing case and holding that unilateral declaration by contractor that "dispute" existed did not make it so). The "existing dispute" language has even been interpreted by one board to require the Government and the contractor to be in dispute as to the specific amount requested on a constructive change claim before a claim can exist. *Reflectone, Inc.*, No. 43081, 1992 ASBCA LEXIS 437, at \*8-9 (Oct. 19, 1992).

74. *Dawco*, 930 F.2d at 879. This holding has been expressly adopted by the U.S. Claims Court in *Facilities Sys. Eng'g Corp.*, 25 Cl. Ct. at 765; *B.E.S. Envtl. Specialists, Inc. v. United States*, 23 Cl. Ct. 751, 753 (1991); and *Sun Eagle v. United States*, 23 Cl. Ct. 465, 473 (1991).

75. *Essex*, 22 Cl. Ct. at 764-66.

76. *Essex Electro Eng'rs, Inc. v. United States*, 960 F.2d 1576, 1582 (Fed. Cir. 1992).

77. *Id.* at 1580 (citing 48 C.F.R. § 33.201 (1991)).

To decide whether Essex had filed a claim under the CDA, the Federal Circuit looked first to the language of the CDA.<sup>78</sup> The statute does not define the word "claim," however. It merely states that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision."<sup>79</sup> To find a definition of the word "claim," the court looked to the FAR implementing the CDA, which states:

*Claim*, as used in this subpart, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.<sup>80</sup>

Based on this language, which the court upheld as a reasonable interpretation of the CDA,<sup>81</sup> the Federal Circuit concluded that three requirements must be met before a contractor's submission seeking money may qualify as a "claim": "(1) the demand or assertion must be in writing, (2) the money must be sought as a matter of right, and (3) the writing must set forth a sum certain."<sup>82</sup> Essex failed the second of these requirements because the "claims" it submitted were merely "proposals" for "work to be performed."<sup>83</sup> Because such work was to be done in the future, "payment for any services subsequently approved could not possibly have been asserted as a matter of right" and therefore could not have been claims.<sup>84</sup> Dismissing the Claims Court's *Dawco* analysis, the Federal Circuit added: "Whereas, here, the first three regulatory requirements themselves are not met, there is no need to discern whether a dispute exists."<sup>85</sup>

It is unclear why the Federal Circuit adopted this analysis instead of the Claims Court's analysis based on *Dawco* because, like the contractor submissions in that case, the "proposals" put forward by Essex were unilateral cost proposals that were not in dispute at the time they were submitted and hence were not claims. One theory that might explain the Federal Circuit's choice is that intense litigation before boards of contract appeals and the Claims Court over whether there was a "dispute" under *Dawco* signaled to the Federal Circuit that that decision had created a problem of equal signifi-

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78. *Id.*

79. *Id.* (quoting 41 U.S.C. § 605(a) (1988)).

80. 48 C.F.R. § 33.201 (1991).

81. *Essex*, 960 F.2d at 1581.

82. *Id.*

83. *Id.* at 1581-82.

84. *Id.* at 1582.

85. *Id.*

cance to *Grumman*. Thus, the court may have begun to withdraw from the formalistic requirements of *Dawco*.

On the other hand, some may interpret *Essex* as precluding a claim for estimated or future costs, because such costs, until they are incurred, cannot be sought as a matter of right. If this is the holding of *Essex*, it would cause contractors significant difficulty in pursuing claims with ongoing costs or in pricing any claim by use of estimates. Most claims are based on estimates, which is permitted by the Government's own DCAA Audit Manual.<sup>86</sup> Could the *Essex* court really have meant that to include in a claim any costs that have not yet been incurred may sink the whole claim? This does not appear to be a viable interpretation because, in addition to the inconsistencies just mentioned, it would directly contradict the Federal Circuit's 1991 decision in *Servidone Construction Corp. v. United States*.<sup>87</sup> The court held in *Servidone* that a contractor's costs, including interest, can accrue from the date it files its claim, even though on that date the contractor has not yet incurred all of the costs it will later recover.<sup>88</sup> The *Servidone* decision was not mentioned by the court in *Essex*, however.

In *Transamerica Insurance Corp. v. United States*,<sup>89</sup> the Federal Circuit applied a "common sense analysis" to decide whether a contractor's submission qualified as a "claim" under the CDA.<sup>90</sup> The case appears to reject the rigid formalism of *Dawco*, although it does not even mention the earlier opinion. *Transamerica* may therefore hold promise for contractors struggling with the court's jurisdictional requirements.

The claim sued on by *Transamerica* arose from a contract to build an elementary school for the U.S. Army.<sup>91</sup> The original contractor had entered into a subcontract to construct the roof of the school; after beginning work, however, the subcontractor realized that an error in the Government's drawings had caused it to underestimate drastically the cost of building the roof.<sup>92</sup> The subcontractor in-

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86. See CIBINIC & NASH, *supra* note 29, at 510-14 (describing use of estimates to compute claim amounts). The DCAA Contract Audit Manual recognizes explicitly that contractors often will not have maintained pertinent cost records in detail adequate to allow reliable determination of actual additional costs incurred. DEFENSE CONTRACT AUDIT AGENCY, U.S. DEP'T OF DEFENSE, 2 DCAA CONTRACT AUDIT MANUAL ¶ 14-2051(b), at 1428 (1992). The manual also devotes an entire section to surveying, assessing, and auditing contractors' direct and indirect cost estimating systems. 1 *id.*, ¶ 9-1100 to -1128, at 980-1000.

87. 931 F.2d 860 (Fed. Cir. 1991).

88. *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 862-63 (Fed. Cir. 1991).

89. 973 F.2d 1572 (Fed. Cir. 1992).

90. *Transamerica Ins. Corp. v. United States*, 973 F.2d 1572, 1579 (Fed. Cir. 1992).

91. *Id.* at 1574.

92. *Id.*

formed a CO of the problem, but the CO considered the problem to be the responsibility of the contractor.<sup>93</sup> The prime contractor then submitted a letter to the CO along with a request for equitable adjustment certified by the prime contractor's president.<sup>94</sup> After submitting this "claim," the contractor abandoned the project, which obliged Transamerica, as bondholder, to come in and complete the school.<sup>95</sup> Throughout this time the subcontractor continued to press the CO for a decision on its claim.<sup>96</sup> After completion of the project, the CO did adjust the contract price upward, but by an amount less than the requested figure.<sup>97</sup> Transamerica and the subcontractor then filed a complaint in the Claims Court for the balance.<sup>98</sup> The Claims Court dismissed Transamerica's claim from the bench, finding that the prime contractor's letter to the CO requesting equitable adjustment did not constitute a claim under the CDA because it did not specifically request a final decision from the CO.<sup>99</sup> In the alternative, the court found that the claim was improperly certified.<sup>100</sup>

The Federal Circuit reversed, holding that there is no requirement for a contractor specifically to request a final decision from a CO in order for its submission to qualify as a claim.<sup>101</sup> The court held that certain "magic words" need not be used because the intent of the claim governs.<sup>102</sup> For a claim to be valid, it only needs to be in writing, be submitted to the CO for a decision, request payment of a sum certain, and give adequate notice of the basis and the amount of the claim.<sup>103</sup> Because a dispute as to entitlement had already arisen in *Transamerica*, the Federal Circuit had no doubt that the contractor in the case intended to submit a claim.<sup>104</sup>

In applying a "common sense analysis" to evaluate whether contractor submissions qualify as "claims" under the CDA, the court leaned heavily on a 1987 decision, *Contract Cleaning Maintenance, Inc.*

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93. *Id.*

94. *Id.* at 1574-75.

95. *Id.* at 1575.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 1578.

102. *Id.*

103. *Id.*

104. *Id.* The court distinguished *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987), an earlier Federal Circuit decision relied on by the Claims Court, which held that certain letters from a contractor to a CO that expressed intent to file a claim were indeed not claims, on the basis that the contractor in *Mingus* had signed a release. *Transamerica*, 973 F.2d at 1577.

*v. United States*,<sup>105</sup> which also applied a common sense analysis to the CDA.<sup>106</sup> The court in *Contract Cleaning* stated that there is nothing in the language of the CDA that calls for a "claim" to be submitted in any particular form or use any particular language.<sup>107</sup> So long as the contractor submits in writing to the CO "adequate notice of the basis and amount of the claim," that is sufficient.<sup>108</sup> These simple requirements stand in stark contrast to the formalistic analysis of *Dawco*.<sup>109</sup>

The court in *Transamerica* also made clear another point that had originally been made in *Contract Cleaning*: "There is no necessary inconsistency between the existence of a valid CDA claim and an expressed desire to continue to mutually work toward a claim's resolution."<sup>110</sup> In other words, parties do not have to break off negotiations before a dispute can exist over a contractor's "claim."<sup>111</sup> This holding directly contradicts language in *Dawco*, although *Dawco* is, as already mentioned, not cited by the Federal Circuit in *Transamerica*. The Federal Circuit did single out *Sun Eagle Corp. v. United States*,<sup>112</sup> however, a Claims Court decision relying on *Dawco*, to express its disagreement with the notion that negotiations must be broken off to submit a claim.<sup>113</sup>

It remains to be seen whether the Federal Circuit will expand on the "common sense analysis" of *Transamerica* and thereby clarify the issue. The issue is now more clouded than ever. Few lower court or board decisions have seized on *Transamerica*'s more relaxed approach;<sup>114</sup> cases that cite *Dawco* are too numerous.<sup>115</sup> Given *Dawco*'s continued viability, it appears that a contractor's submission will only qualify as a claim if it is in writing, is submitted to the con-

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105. 811 F.2d 586 (Fed. Cir. 1987).

106. *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987).

107. *Id.*

108. *Id.*

109. See *supra* notes 33-35 and accompanying text (discussing claim requirements set forth in *Dawco*).

110. *Transamerica*, 973 F.2d at 1579; see *Contract Cleaning*, 811 F.2d at 592 (finding that letters from party seeking recompense from U.S. Government constituted valid claims despite language in letters suggesting meeting between parties to settle dispute).

111. *Transamerica*, 973 F.2d at 1579.

112. 23 Cl. Ct. 465 (1991).

113. *Transamerica*, 973 F.2d at 1577-79.

114. One exception to this is *Defense Systems Corp.*, Nos. 42939, 42940, 43530, 43705, 44131, and 44835, 1992 ASBCA LEXIS 419, at \*4-5 (Sept. 21, 1992) (holding that contractor's submission qualified as claim). The ASBCA cited *Transamerica* for the proposition that "the claims procedure is not to be converted into a game of 'Simple Simon Says' where magic words are necessary, and arcane procedure governs over basic substance." *Id.* (citing *Transamerica*, 973 F.2d at 1579).

115. See *supra* note 73 and accompanying text (providing several examples of lower court decisions employing claim requirements in *Dawco*).

tracting officer for a decision, requests payment of a sum certain, and gives the contracting officer adequate notice of the basis and amount of the claim. The contractor must also seek payment as a matter of right, and, perhaps most importantly, the matter must be in dispute. Given the unresolved conflict between *Dawco* and *Trans-america*, it is unclear whether existence of continuing negotiations will indicate that a matter is not in dispute. Finally, the claim must be certified, although with the FCAA in place, this requirement is not a jurisdictional obstacle. It appears now, however, that as Congress had to remedy the results of *Grumman*<sup>116</sup> and *Overall Roofing*,<sup>117</sup> it will also have to remedy the results of *Dawco*. Indeed there is movement in that regard by the Public Contract Section of the American Bar Association.<sup>118</sup>

### 3. Declaratory judgments

*Scott Aviation v. United States*<sup>119</sup> reaffirmed the Federal Circuit's 1991 decision in *Overall Roofing & Construction, Inc. v. United States*,<sup>120</sup> holding that for a claim to fall within the Claims Court's jurisdiction, it must seek money damages presently due.<sup>121</sup> The *Overall Roofing* decision, as with the certification issue, has been altered by the FCAA. Under that Act, the new Court of Federal Claims will have jurisdiction over nonmonetary claims brought under the CDA.<sup>122</sup> Despite this, *Scott Aviation* may not be affected because under the

116. See *supra* notes 37-65 and accompanying text (discussing holding in *Grumman*, its effect on contract claim certification, and action taken by Congress in response).

117. See *infra* notes 119-30 (reviewing *Overall Roofing*, its effect on jurisdiction of Claims Court over nonmonetary claims, and congressional response).

118. See *ABA Section Urging New FAR Definition To State That Matter Need Not Be 'in Dispute,'* 59 *Fed. Cont. Rep.* (BNA) 181-82 (Feb. 15, 1993) (reporting draft revisions of FAR 33.201, not yet implemented in C.F.R.).

119. 953 F.2d 1377 (Fed. Cir. 1992).

120. 929 F.2d 687 (Fed. Cir. 1991).

121. *Scott Aviation v. United States*, 953 F.2d 1377, 1378 (Fed. Cir. 1992).

122. See Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907(b), 106 Stat. 4506, 4519 (to be codified at 28 U.S.C. § 1491(a)(2)) (amending last sentence of 28 U.S.C. § 1491(a)(2) (1988), which states that "[t]he Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978," and now including jurisdiction over "dispute[s] concerning termination of a contract, rights in tangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of [the CDA]").

It remains to be seen how this new language setting broadened jurisdiction will be interpreted. In *L. Addison & Assocs. v. United States*, No. 91-1388C, 1992 U.S. Cl. Ct. LEXIS 534, at \*3-6 (Nov. 30, 1992), Judge Weinstein of the Court of Federal Claims ordered additional briefing on the effect of the new law on a motion to dismiss a nonmonetary claim. *Id.* Judge Weinstein posed the question whether the requirements of *Essex Electro Eng'rs, Inc. v. United States*, 960 F.2d 1576, 1580 (Fed. Cir. 1992), that a "claim" must seek a "sum certain" "as a matter of right" and be presented to a CO for a decision, are still jurisdictional prerequisites for the Court of Federal Claims in CDA cases. *Addison*, No. 91-1388C, 1992 Cl. Ct. LEXIS 534, at \*4.



new Act, jurisdiction would still appear to be limited by the requirement that a CO must have issued a decision.<sup>123</sup>

In *Scott Aviation*, the U.S. Army awarded Scott a contract in June 1987 to produce protective face masks.<sup>124</sup> The contract set a deadline that Scott did not meet, and as a result, the Army terminated a portion of Scott's contract for default in May 1989.<sup>125</sup> Scott chose not to exercise its right to appeal the CO's final decision to the ASBCA.<sup>126</sup> Instead, nearly a year later, Scott filed a claim with the CO for costs.<sup>127</sup> Two days after that, Scott filed a complaint in the Claims Court requesting a conversion of the termination for default into a termination for convenience with costs.<sup>128</sup> The Claims Court dismissed Scott's complaint for lack of jurisdiction, reasoning that Scott had not given the CO the requisite sixty days to issue a final decision.<sup>129</sup>

The Federal Circuit agreed, holding that because there was no final decision from the CO, Scott's complaint essentially sought a declaratory judgment, over which the Claims Court has no jurisdiction.<sup>130</sup> Although the Court of Federal Claims has jurisdiction over a "dispute concerning termination of a contract,"<sup>131</sup> the new law appears to limit this jurisdiction to those cases "on which a decision of the contracting officer has been issued under section 6 of [the CDA]."<sup>132</sup> In light of the fact that the CO did not issue a final decision in this case, the result would appear to be the same under the new law.

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123. See FCAA § 907(b), 106 Stat. at 4519 (to be codified at 28 U.S.C. § 1491(a)(2)) (extending jurisdiction to "other nonmonetary disputes on which a *decision of the contracting officer has been issued*") (emphasis added).

124. *Scott Aviation v. United States*, 953 F.2d 1377, 1377 (Fed. Cir. 1992).

125. *Id.* at 1378; see *supra* note 29 (discussing power of U.S. Government to terminate contracts for default).

126. *Scott Aviation*, 953 F.2d at 1378.

127. *Id.*

128. *Id.*; see *supra* note 29 (explaining different consequences of terminations for convenience and default, and noting that only remedy for wrongful termination for default is conversion into termination for convenience).

129. *Scott Aviation v. United States*, 21 Cl. Ct. 782, 787 (1990), *aff'd*, 960 F.2d 1576 (Fed. Cir.), *cert. denied*, 113 S. Ct. 408 (1992). On the Government's motion for reconsideration requesting the court to vacate the jurisdictional dismissal and to dismiss with prejudice (which was later withdrawn), the Claims Court granted the motion and dismissed with prejudice. *Scott Aviation*, 953 F.2d at 1378. This aspect of the Claims Court's decision was reversed on appeal because the Claims Court did not have jurisdiction over the cause of action and thus could not dismiss with prejudice, as such a result would amount to a decision on the merits. *Id.*

130. *Scott Aviation*, 953 F.2d at 1378.

131. FCAA § 907(b), 106 Stat. at 4519 (to be codified at 28 U.S.C. § 1491(a)(2)).

132. *Id.*

*B. Other Decisions on Jurisdiction**1. Scope of the Contract Disputes Act*

*G.E. Boggs & Associates v. Roskens*<sup>133</sup> involved the jurisdictional question of whether a "host country contract," funded through a loan agreement between the Agency for International Development (AID) and Syria and later adopted by AID when Congress terminated assistance programs to Syria, is a contract under the CDA.<sup>134</sup> The ASBCA found that it was not, but the Federal Circuit affirmed and transferred the case to the Claims Court.<sup>135</sup>

The original contracts, which were signed in 1982, were between G.E. Boggs and Syria and provided that G.E. Boggs would build a waterworks in Syria.<sup>136</sup> The contracts were funded by a loan agreement between AID and Syria.<sup>137</sup> In 1983, after terrorist attacks on U.S. servicemen in Beirut, Congress decided to cut off the AID program and permitted AID to adopt as a contract of the United States any contract with a U.S. firm that would otherwise be terminated.<sup>138</sup> In March 1984, the AID administrator decided to adopt Syria's contract with G.E. Boggs, and Boggs agreed.<sup>139</sup> The parties then negotiated the amount due Boggs for termination, and, when Boggs was unsatisfied with AID's offer, it filed a claim before the ASBCA.<sup>140</sup> The Board found that it did not have jurisdiction under the CDA because the contracts were not agreements between Boggs and an executive agency of the United States Government for the procurement of property.<sup>141</sup>

The Federal Circuit agreed, holding that it has no jurisdiction to hear an appeal from a final decision of a board of contract appeals unless that decision is based on the CDA.<sup>142</sup> The court found that the CDA, in turn, only applies to contracts entered into by an 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

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133. 969 F.2d 1023 (Fed. Cir. 1992).

134. *G.E. Boggs & Assocs. v. Roskens*, 969 F.2d 1023, 1026 (Fed. Cir. 1992).

135. *Id.* at 1024.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 1025.

140. *Id.*

141. *Id.*

142. *Id.* at 1026.

(4) the disposal of personal property.”<sup>143</sup>

The contract as adopted by AID did not fall into any of these categories, and although it was a “contract of the United States,” there was no traditional buyer-seller relationship between AID and G.E. Boggs because AID was not required to adopt G.E. Boggs’ contracts.<sup>144</sup> AID’s sole purpose in doing so was to mitigate G.E. Boggs’ loss on the terminated contracts, not to acquire property, goods, or services.<sup>145</sup> Finally, the court found that the policy supporting the CDA, which was designed to encourage contractors to supply quality goods and services to the U.S. Government, was not affected by excluding this type of contract from the reach of the CDA.<sup>146</sup>

## 2. *Standing to sue for back rent*

In *Ginsberg v. Austin*,<sup>147</sup> the Federal Circuit reversed a General Services Board of Contract Appeals (GSBCA) decision that denied standing to a former landlord who had filed a claim for back rent on a government-leased building just one day before he transferred without reservation his entire “right, title and interest” in the property, including tenant leases, to another company.<sup>148</sup> The question before the court was whether rights to back rent are presumed transferred unless expressly reserved.<sup>149</sup> If such rights are presumed transferred, then Ginsberg, the former landlord, would no longer retain an interest in back rent on property he sold, would lack privity with the Government after the General Services Administration (GSA) accepted assignment of the leases, and would therefore no longer be a contractor under the CDA.<sup>150</sup> Based on this reasoning, the CO and the GSBCA dismissed Ginsberg’s claim due to lack of standing.<sup>151</sup>

After concluding that no federal law exists on this precise issue, the Federal Circuit looked to state law and other sources.<sup>152</sup> It found these sources to be in unison: The “‘transfer of . . . real estate subject to the lease does not carry with it any right to accrued

143. *Id.* (quoting 41 U.S.C. § 602(a) (1988)).

144. *G.E. Boggs*, 969 F.2d at 1026.

145. *Id.* at 1027.

146. *Id.* at 1028.

147. 968 F.2d 1198 (Fed. Cir. 1992).

148. *Ginsberg v. Austin*, 968 F.2d 1198, 1199 (Fed. Cir. 1992).

149. *Id.* at 1200.

150. *Id.*

151. *Id.*

152. *Id.* at 1200-01 (citing state law pronouncements in *Gray v. Callahan*, 199 So. 396 (Fla. 1940); *Velishka v. Laurendeau*, 118 A.2d 600 (N.H. 1955); *Williams v. Martin*, 82 N.E.2d 547 (Ohio Ct. App. 1948); *Rives v. James*, 3 S.W.2d 932 (Tex. Civ. App. 1928)).

rents then unpaid. These belong to the person who was the landlord at the time of their accrual and not to the grantee, unless assigned to him [or her].'<sup>153</sup> After finding that this rule comports with contract law and has previously been followed by the GSA itself, the court adopted it as federal law and found for the contractor.<sup>154</sup>

## II. BID PROTESTS AND BID PREPARATION EXPENSES

### A. De Minimus Errors in Contract Procurement

In *Andersen Consulting v. United States*,<sup>155</sup> which involved the Financial Management Service's (FMS)<sup>156</sup> procurement of a computer processing upgrade, the Federal Circuit tackled the important issue of whether errors in a procurement require a board of contract appeals to grant a disappointed bidder's bid protest.<sup>157</sup> The court also addressed the issue of whether the Government engaged in improper discussions with the winning bidder after contractors had submitted their best and final offers (BAFOs).<sup>158</sup>

FMS's solicitation for a computer processing upgrade required bidders to run their hardware and software through an unwitnessed performance benchmark prior to submitting their proposals.<sup>159</sup> After submission but before the BAFO, if a bidder changed its software, another benchmark was required.<sup>160</sup> After selection of an apparent awardee, the contractor would be required to run yet another benchmark, this time with government witnesses present.<sup>161</sup> Three contractors submitted bids: Andersen Consulting, Computer Sciences Corp. (CSC), and Grumman Data Systems.<sup>162</sup> CSC had the lowest price by far because it used reconditioned hardware and had technical scores above Andersen's but slightly below Grumman's.<sup>163</sup> CSC was awarded the contract and Andersen protested,<sup>164</sup> complaining of three errors in the procurement. First, Andersen argued

153. *Ginsberg*, 968 F.2d at 1201 (quoting *Velishka v. Laurendeau*, 118 A.2d 600, 602 (N.H. 1955)).

154. *Id.*

155. 959 F.2d 929 (Fed. Cir. 1992).

156. FMS is part of the Department of Treasury. See FEDERAL YELLOW BOOK 431 (Mary Forscher ed., Winter 1993) (listing structure and organization of Financial Management Service within Department of Treasury).

157. *Andersen Consulting v. United States*, 959 F.2d 929, 932 (Fed. Cir. 1992).

158. *Id.*

159. *Id.* at 930.

160. *Id.* at 931.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

that one of CSC's software products was not "commercially available," as was required under the contract; second, FMS did not require CSC to run a second unwitnessed benchmark, even though CSC had changed software between its initial proposal and its BAFO; and third, prior to the government-witnessed benchmark, CSC had not developed the capability to upload one of its software products in mainframe code.<sup>165</sup> The GSBCA found these errors to be insignificant and denied Andersen's bid protest.<sup>166</sup>

The Federal Circuit affirmed.<sup>167</sup> The Competition in Contracting Act of 1984 (CICA) states that a board "may" suspend a procurement if an agency errs.<sup>168</sup> "The use of the permissive 'may' instead of the mandatory 'shall' authorizes the board to employ its discretion in determining how to handle errors in procurement."<sup>169</sup> Moreover, the CICA also directs boards to accord due weight to the goals of "economic and efficient procurement."<sup>170</sup> Accordingly, boards must consider whether errors are significant when reviewing bid protests. The court affirmed the GSBCA's conclusion that the errors complained of by Andersen were *de minimus* and not sufficient to justify overturning the award.<sup>171</sup>

Andersen also complained that improper discussions had taken place after the contractors submitted their BAFOs.<sup>172</sup> At the government-witnessed benchmark run, the Government had asked about discrepancies between CSC's benchmark software certification and the software inventory list submitted with CSC's BAFO.<sup>173</sup> CSC claimed that its error in preparing the BAFO list was clerical, and the GSBCA agreed.<sup>174</sup> The Federal Circuit found this point to be critical because under federal acquisition regulations, clerical mistakes in a BAFO may be corrected without reopening negotiations.<sup>175</sup> The Federal Circuit therefore upheld the Board's findings on this issue as well.<sup>176</sup>

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165. *Id.*

166. *Id.* at 931-32.

167. *Id.* at 932.

168. 40 U.S.C. § 759(f)(5)(B) (1988).

169. *Andersen Consulting*, 959 F.2d at 932.

170. 40 U.S.C. § 759(f)(5)(A) (1988).

171. *Andersen Consulting*, 959 F.2d at 933-34.

172. *Id.* at 933.

173. *Id.*

174. *Id.*

175. *Id.* at 933-34 (citing 48 C.F.R. § 15.607(c) (1991)).

176. *Andersen Consulting*, 959 F.2d at 934. The court also distinguished *Data Gen. Corp. v. United States*, 915 F.2d 1544 (Fed. Cir. 1990), where the court held that the GSBCA had no right to second-guess an agency's assessment of its true needs. *Data Gen.*, 915 F.2d at 1552. Here, the Board deferred to the FMS's analysis of its true needs by upholding the award. *Andersen Consulting*, 959 F.2d at 934.

*B. Excessive Post-Award Hiring*

In another bid protest involving computer equipment, *Planning Research Corp. v. United States*,<sup>177</sup> the Federal Circuit affirmed a GSBICA decision sustaining a protest on the ground that the winning contractor engaged in excessive post-award hiring in violation of the solicitation.<sup>178</sup> The court, however, reversed the GSBICA's decision terminating the contract at no cost to the Government as beyond the Board's jurisdiction.<sup>179</sup>

The Government's solicitation for management and support of the Energy Information Administration's (EIA) computer facilities required bidders to supply a steady, stable work force to complete the contract in two years.<sup>180</sup> The Government sought to prevent delays caused by the training of new personnel.<sup>181</sup> Only two companies submitted bids, and the winning bidder, Planning Research, made fallacious claims about the personnel it intended to use.<sup>182</sup> After the contract award, Planning Research made numerous substitutions of key personnel and openly advertised for positions to support its new contract.<sup>183</sup> The court distinguished two Comptroller General decisions which had established a general rule that substitution of personnel after contract award falls within the responsibility of the CO.<sup>184</sup> In this case, the court found that the personnel changes were so numerous and so antithetical to the original solicitation that they tainted the bidding process.<sup>185</sup> As for the Board's decision to terminate the contract at no cost to the Government, the Federal Circuit reversed, quoting *United States v. Amdahl Corp.*,<sup>186</sup> which held that a board may determine whether a contract award is legal but may not " 'settle the rights of a terminated contractor vis-a-vis the government,' " <sup>187</sup> as this is outside its jurisdiction.

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177. 971 F.2d 736 (Fed. Cir. 1992).

178. *Planning Research Corp. v. United States*, 971 F.2d 736, 743 (Fed. Cir. 1992).

179. *Id.*

180. *Id.* at 737. To evaluate each bidder, EIA required contractors to submit résumés for 19 key and 82 nonkey personnel required by the contract. *Id.* EIA also required each company to state the extent to which these employees would be used on the contract. *Id.*

181. *Id.* at 737-38.

182. *Id.*

183. *Id.*

184. *Id.* at 740 (citing *A.B. Dick Co.*, Comp. Gen. B-233142, 89-1 CPD ¶ 106, at 5 (Jan. 31, 1989); *Applications Research Corp.*, Comp. Gen. B-230097, 88-1 CPD ¶ 499, at 7 (May 25, 1989)).

185. *Id.* at 740-42.

186. 786 F.2d 387, 395 (Fed. Cir. 1986).

187. *Planning Research*, 971 F.2d at 743 (quoting *United States v. Amdahl Corp.*, 786 F.2d 387, 395 (Fed. Cir. 1986)). Because the Board, under *Amdahl*, lacked jurisdiction to order the contract terminated, the Federal Circuit vacated the GSBICA's decision. *Id.*

*C. Recovery of Bid Preparation Expenses*

In *Coflexip & Services, Inc. v. United States*,<sup>188</sup> the Federal Circuit addressed the important question of whether a contractor can recover, based on the Government's improper conduct during procurement, the proposal preparation costs it incurs after submitting its proposal, where such costs are not required by the solicitation.<sup>189</sup> The court concluded that such costs are recoverable if they are incurred "pursuant to ongoing negotiations with the government and in support of a revised proposal."<sup>190</sup> Costs need not be required by a solicitation to be recoverable.<sup>191</sup>

Coflexip successfully prosecuted a bid protest on a contract for a flexible pipe system to deliver petroleum from a tanker anchored offshore to an onshore military facility.<sup>192</sup> After winning the protest, Coflexip submitted its bid preparation expenses to the contracting agency.<sup>193</sup> The agency allowed Coflexip to recover expenses that it had incurred prior to submitting its proposal, but disallowed all postsubmission costs, including \$146,302 that Coflexip had spent developing a prototype of its flexible piping system.<sup>194</sup> Coflexip then filed suit in the Claims Court, which dismissed its claim.<sup>195</sup>

On appeal, the Federal Circuit reversed.<sup>196</sup> Entitlement to recovery was not at issue, nor was it contested that Coflexip had in fact incurred its prototype expenses after submitting its initial proposal.<sup>197</sup> The court first looked at standard federal procurement regulations, which define proposal preparation costs as "including the development of engineering data and cost data necessary to support the contractor's bids or proposals."<sup>198</sup> These costs are allowable to the extent they are reasonable<sup>199</sup> and allocable.<sup>200</sup> The court found, however, that this language did not address whether post-

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188. 961 F.2d 951 (Fed. Cir. 1992).

189. *Coflexip & Servs., Inc. v. United States*, 961 F.2d 951, 952 (Fed. Cir. 1992).

190. *Id.* at 953.

191. *Id.*

192. *Id.* at 952.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 954.

197. *Id.* at 952.

198. *Id.* at 953 (quoting 41 C.F.R. § 1-15.205-3 (1991)).

199. *Id.* at 954 (quoting 41 C.F.R. § 1-15.201-3 (1991), which states that given cost is reasonable if "it does not exceed that which would be incurred by an ordinarily prudent person in the conduct of competitive business").

200. *Id.* (quoting 41 C.F.R. § 1-15.201-4 (1991), which states that a cost is allocable if it "is incurred specifically for the contract").

submission costs could be proposal preparation costs.<sup>201</sup>

What the Federal Circuit found important was that the solicitation involved a negotiated procurement.<sup>202</sup> Under the regulations for such procurements, if negotiations are being conducted with several offerors, each must have an equitable opportunity to submit revisions in their proposals that may arise from the negotiations.<sup>203</sup> "Therefore, in a negotiated procurement, the costs a contractor incurs *pursuant to ongoing negotiations* with the government and in support of a revised proposal, *i.e.*, post-submission costs, can be proposal preparation costs."<sup>204</sup> Contrasted with these costs, the court held, are costs that "do not support an initial or revised proposal,"<sup>205</sup> but rather are "incurred *in anticipation of* contract award,"<sup>206</sup> "in an effort to better position itself to perform any contract it should be awarded."<sup>207</sup> These costs are not recoverable.<sup>208</sup>

The Federal Circuit held that the Claims Court had erred in limiting allowable costs to those anticipated in the solicitation.<sup>209</sup> It remanded for two determinations: first, whether Coflexip had actually incurred its prototype-development costs pursuant to ongoing negotiations, and second, whether such costs were reasonable<sup>210</sup> and allocable.<sup>211</sup>

### III. USE OF THE EICHLEY FORMULA

In *C.B.C. Enterprises, Inc. v. United States*,<sup>212</sup> the Federal Circuit limited the circumstances under which contractors are entitled to use the Eichley formula to calculate home office overhead as a recoverable costs claim.<sup>213</sup> A contractor generally favors using the Eichley formula rather than an established overhead rate because it means recovering greater costs in its claims.<sup>214</sup>

201. *Coflexip*, 961 F.2d at 953.

202. *Id.* at 953-54.

203. *Id.* at 953 (quoting 41 C.F.R. § 1-3.805-1 (1984)).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 953-54 (citing 41 C.F.R. § 1-15.201-3 (1991)).

211. *Id.* at 954 (citing 41 C.F.R. § 1-15.201-4 (1991)). Based on the plain meaning of the regulatory definition, the court reasoned that Coflexip's prototype was clearly allocable. *Id.*

212. 978 F.2d 669 (Fed. Cir. 1992).

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

214. *Id.* at 671. The Eichley formula is used to calculate reimbursable home office overhead costs in the event of suspension of work on a contract when the suspension decreases the stream of direct costs against which a percentage rate for reimbursement may be assessed. *Id.* The formula provides a means by which constructive daily extended home office overhead



In September 1989, C.B.C. contracted with the Navy to build improvements at a Marine Corps air station, to be completed by July 1990.<sup>215</sup> During construction, the Navy modified the contract a number of times, and on several modifications the parties agreed to calculate additional home office overhead at 13.94% of direct costs, a rate that was fixed in the basic contract.<sup>216</sup> On the particular modification at issue in this case, which called for additional work with direct costs of \$10,846 and extended C.B.C.'s work schedule by twenty-four days, the parties disagreed as to the proper allocation of home office overhead.<sup>217</sup> The Navy unilaterally set overhead at 13.94% of direct costs, or \$1512,<sup>218</sup> but using the Eichleay formula, C.B.C. calculated home office overhead at \$15,317.54, or \$13,805.54 more than the Navy's award.<sup>219</sup> Accordingly, C.B.C. filed a claim, which was subsequently denied by both the CO and the Claims Court.<sup>220</sup>

In its ruling, the Claims Court interpreted the Federal Circuit's 1984 decision in *Capital Electric Co. v. United States*<sup>221</sup> as a general rule restricting use of the Eichleay formula to situations where there has been suspension of work, not additional work, that has caused direct costs to be reduced or eliminated.<sup>222</sup> Although the Federal Circuit held that this general rule was too restrictive, it also rejected C.B.C.'s interpretation of the law.<sup>223</sup> According to C.B.C., use of the Eichleay formula should be the rule for home office overhead, with only two exceptions: (1) in case of added work not extending the performance time, and (2) in case of "performance extensions involving added work equal to or greater than the original contract's daily rate of direct costs."<sup>224</sup> Only under these exceptions would use of the parties' agreed-upon percentage for daily home office overhead not result in reduced payments to the contractor, because the direct cost stream would not be lessened.<sup>225</sup>

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may be calculated using contract billings, total billings for the contract period, total overhead, days of contract performance, and days of delay. *Id.*

215. *Id.* at 670.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 671.

220. *Id.*

221. 729 F.2d 743, 747 (Fed. Cir. 1984) (holding that prime contractor is entitled to recover damages for extended overhead due to contract suspension and may calculate damages using Eichleay formula).

222. *C.B.C. Enters., Inc. v. United States*, 24 Cl. Ct. 187, 191 (1991), *aff'd*, 978 F.2d 669 (Fed. Cir. 1992).

223. *C.B.C. Enters.*, 978 F.2d at 670.

224. *Id.* at 671.

225. *Id.*

The Federal Circuit reviewed in some detail the long history of cases establishing the Eichleay formula and found a common thread.<sup>226</sup> “The *raison d’être* of Eichleay requires at least some element of *uncertainty* arising from suspension, disruption or delay of contract performance. Such delays are sudden, sporadic and of uncertain duration. As a result, it is impractical for the contractor to take on other work during these delays.”<sup>227</sup> C.B.C. could not meet this “uncertainty” standard because its contract extension issued by the Navy had involved a brief, finite period of time.<sup>228</sup> During that period, C.B.C.’s work was not suspended, the company was not idle, and there were no uncertain periods of delay.<sup>229</sup>

While it easy to see the facts of *Capital Electric* and *C.B.C.* as distinct, the former case involving 303 days of stop-and-start delay and the latter involving a twenty-four day extension during which the contractor efficiently completed the job, the real driving force behind the Federal Circuit’s decision in the latter case was its fear that to adopt C.B.C.’s inclusive rule would mean that the Eichleay formula would be applied to nearly all government-mandated contract extensions.<sup>230</sup> The court found this prospect no less extreme than the Government’s attempt in *Capital Electric* to abandon the Eichleay formula in all but the most limited of circumstances.<sup>231</sup> Accordingly, the court attempted to strike a balance between the two extremes. It is not yet clear, however, whether the new element of “uncertainty” will achieve that balance.<sup>232</sup>

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226. See *id.* at 674 (citing *Weaver-Bailey Contractors, Inc. v. United States*, 19 Cl. Ct. 474, 477 (1990) (stating that Government’s inaccurate calculation of home office overhead caused delay that was unforeseeable and beyond control of contractor); *A.A. Beiro Const. Co., ENGBCA No. 5103*, 91-3 B.C.A. (CCH) ¶ 24,149, at 120,844 (1991) (holding that uncertainty of delays did not allow contractor to divert resources to work); *Shirley Contracting Corp., ASBCA No. 185-1*, 85-1 B.C.A. (CCH) ¶ 17,858, at 89,399-400 (1984) (stating that Government’s inability to authorize project plans resulted in lengthy suspension of work and contractor uncertainty)).

227. *C.B.C. Enters.*, 978 F.2d at 675.

228. *Id.*

229. *Id.*

230. See *id.* (predicting that C.B.C.’s desire to extend availability of Eichleay formula to “pure” contract extensions would likely make formula applicable to nearly all contract extensions).

231. *Id.* (citing *Capital Elec. Co. v. United States*, 729 F.2d 743, 747 (Fed. Cir. 1984)).

232. Although this decision is presented as flowing naturally from *Capital Electric*, *id.* at 675, *Capital Electric* held that the contractor needed only to show that first, compensable delay had occurred, and second, that the contractor could not have taken on other jobs during a Government-granted extension to recover under the Eichleay formula. *Capital Elec.*, 729 F.2d at 747. The Government could rebut this evidence only by showing that the contractor would suffer no loss by using a fixed percentage mark-up formula. *Id.* It is not clear how the element of “uncertainty” introduced by the court in *C.B.C. Enterprises* fits into that analysis. Does it differ from requiring the contractor to show that it could not have taken on other jobs during the extension? The court does not provide an answer.

## IV. SUBSTANTIVE CONTRACT ISSUES AND INTERPRETATION

## A. Basic Price Agreements

In *Modern Systems Technology Corp. v. United States*,<sup>233</sup> the Federal Circuit addressed the issue of whether a Basic Pricing Agreement (BPA) between the United States Postal Service (USPS) and a contractor is in fact a binding contract.<sup>234</sup> The BPA at issue called for Modern Systems Technology Corp. (MSTC) to make required changes in the USPS's phone system during a two-year period.<sup>235</sup> These changes were to be supplied on an "as needed" basis.<sup>236</sup> During the two years, the USPS never placed any orders with MSTC, instead choosing to have its phone changes handled by another company.<sup>237</sup> MSTC sued in the Claims Court for breach of contract, and the Claims Court dismissed on the basis that no contract existed.<sup>238</sup> The Federal Circuit affirmed, expressly adopting as its own opinion the Claims Court's decision.<sup>239</sup>

In determining whether a contract had been formed, the Federal Circuit looked at two issues: First, did the parties intend to create a binding obligation? And second, were terms of the contract definite enough to permit the court to determine breach and remedies?<sup>240</sup> In answering the first question, the court relied primarily on the BPA itself, which stated flatly: "The Postal Service is obligated only to the extent of individual authorized orders actually placed under this agreement. Each order that the Postal Service places and the contractor accepts becomes an individual contract."<sup>241</sup> Looking beyond the BPA, the court reviewed the Postal Service Procurement Manual, other federal regulations,<sup>242</sup> and principal treatises and hornbooks on government contracts to show that all are in concur-

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233. 979 F.2d 200 (Fed. Cir. 1992).

234. *Modern Sys. Technology Corp. v. United States*, 979 F.2d 200, 202 (Fed. Cir. 1992).

235. *Id.* at 201.

236. *Id.*

237. *Id.*

238. *Id.* at 207.

239. *Id.* at 200.

240. *Id.* at 202.

241. *Id.* (quoting BPA).

242. *Id.* at 203-04 (likening BPA to "basic ordering agreement" (BOA), as described in 48 C.F.R. §§ 16.701-703 (1991), which defines BOA as agreement containing "contract clauses applying to future contracts between the parties during [the] term [of the contract]"). The difference between a BPA and a BOA is that ordering agreements are generally used for larger dollar amounts. *Id.* Neither, however, are contracts. *Modern Sys. Technology*, 979 F.2d at 204; see 48 C.F.R. § 16.703(a) (1991) (stating that "[a] basic ordering agreement is not a contract"). A BOA also describes the "goods or services to be furnished, the methods by which prices are determined, and the parties authorized to issue orders to the contractor." *Modern Sys. Technology*, 979 F.2d at 204.

rence that a BPA is not a contract in and of itself.<sup>243</sup> A BPA does not become a contract until individual orders are placed under it.<sup>244</sup>

The second issue in *Modern Systems* was whether the BPA was definite enough to allow the court to determine breach and/or remedies.<sup>245</sup> MSTC argued that it had a requirements contract with the USPS.<sup>246</sup> The Federal Circuit rejected this,<sup>247</sup> citing *Torncello v. United States*,<sup>248</sup> which held that if, in an alleged requirements contract, there is not a commitment for all of a party's needs, then the relationship is no different from that established by an indefinite quantities contract with no required minimum and thus is not a contract at all.<sup>249</sup>

### B. Requirements Contracts

In *Medart, Inc. v. Austin*,<sup>250</sup> the Federal Circuit reviewed the standard for government liability under requirements contracts. The contract at issue between the General Services Administration (GSA) and Medart called for Medart to supply on a requirements basis gray metal storage and wardrobe cabinets to several hundred federal agencies, including the military, and to ship the cabinets around the world.<sup>251</sup> GSA supplied an estimate of the quantities it expected to order, based on previous-year orders.<sup>252</sup> Actual orders, however, deviated significantly from the Government's estimates.<sup>253</sup> Medart's subsequent claim for costs was denied by the CO and the GSBCA.<sup>254</sup>

The Federal Circuit held that under the express terms of the federal acquisition regulations,<sup>255</sup> risks associated with variances be-

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243. See *Modern Sys. Technology*, 979 F.2d at 204 (citing W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATIONS § 16.61 (4th ed. 1986) (maintaining that BOA "is not a contract [but] contains items and clauses applying to future contracts"); EUGENE W. MASSENGALE, FUNDAMENTALS OF GOVERNMENT CONTRACTS 77 (1991) (stating that "basic ordering agreement is not a contract as such"); 2 JOHN C. MCBRIDE & THOMAS J. TOUHEY, GOVERNMENT CONTRACTS § 18.70 (3d ed. 1984) (explaining that "the basic agreement of itself is not a contract, and does not become a contract except to the extent orders are issued under it"))).

244. *Modern Sys. Technology*, 979 F.2d at 204.

245. *Id.* at 202, 205-06.

246. *Id.* at 205.

247. *Id.* at 206.

248. 681 F.2d 756 (Ct. Cl. 1982).

249. *Torncello v. United States*, 681 F.2d 756, 771 (Ct. Cl. 1982).

250. 967 F.2d 579 (Fed. Cir. 1992).

251. *Medart, Inc. v. Austin*, 967 F.2d 579, 580 (Fed. Cir. 1992).

252. *Id.*

253. *Id.* Actual orders on each one of the four stock items fell below the Government's estimates. *Id.* On two of the stock items the variance between estimated and actual orders was approximately 25%. *Id.* On the other two stock items, the deviation was almost 70%. *Id.*

254. *Id.* at 581.

255. See 48 C.F.R. § 16.503(a)(1) (1991) (requiring CO to estimate total quantity of items

tween actual purchases and estimated quantities under requirements contracts are allocated to the contractor.<sup>256</sup> Even significant variances from government estimates do not necessarily mean the Government is liable for a contractor's costs.<sup>257</sup> To avoid liability, the Government must act in good faith and with reasonable care in computing its estimated needs, however.<sup>258</sup> The court held that if the contractor can show by a preponderance of the evidence that estimates were "inadequately or negligently prepared, not in good faith, or grossly or unreasonably inadequate at the time [they were] made," then the Government may be liable.<sup>259</sup> The court found that GSA's reliance on previous-year orders was reasonable, however.<sup>260</sup> In fact, this method was specifically contemplated by the regulations.<sup>261</sup> The court therefore affirmed the GSBCA.<sup>262</sup>

### C. *Misrepresentation and Mutual Mistake*

In *Roseburg Lumber Co. v. Madigan*,<sup>263</sup> the Federal Circuit affirmed the judgment of the Agriculture Board of Contract Appeals (AGBCA) even though the Board had incorrectly found that a Forest Service misrepresentation during the bidding phase of a timber-sale contract had not materially affected the contract terms.<sup>264</sup> The contractor was not entitled to any recovery from the Forest Service's breach, the court held, because the contractor could not prove that the misrepresentation caused it any damage.<sup>265</sup> Nor could the contractor recover under a mutual mistake theory, because it could not show that the Government would have agreed to reform the contract if it had known the correct facts from the outset.<sup>266</sup>

At issue was a timber-sale contract won by Roseburg Lumber Co. through a competitive oral auction.<sup>267</sup> The sale area encompassed five species of timber, one of which was white fir.<sup>268</sup> Before the auc-

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in solicitation of bids and under resulting contract for benefit of offerors and contractors, but establishing also that estimate is not binding on Government).

256. *Medart*, 967 F.2d at 581.

257. *Id.*

258. *Id.*

259. *Id.* (quoting *Clearwater Forest Indus., Inc. v. United States*, 650 F.2d 233, 239 (Ct. Cl. 1981)).

260. *Id.* at 582.

261. *See* 48 C.F.R. § 16.503(a)(1) (1991) (suggesting possible methods to estimate magnitude of orders, including use of previous actual order numbers).

262. *Medart*, 962 F.2d at 582.

263. 978 F.2d 660 (Fed. Cir. 1992).

264. *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 669 (Fed. Cir. 1992).

265. *Id.* at 667.

266. *Id.* at 667-68.

267. *Id.* at 661.

268. *Id.*

tion, the Forest Service appraised the timber to establish a minimum stumpage rate for each species of timber.<sup>269</sup> The Forest Service may not sell the timber for less than this minimum price, which is known as the Minimum Acceptable Bid Rate (MABR).<sup>270</sup> In calculating the MABR, the Forest Service failed to subtract logging costs from the estimated value of each species of timber.<sup>271</sup> The Forest Service then published these erroneously calculated figures, which companies subsequently relied on in preparing their sealed bids.<sup>272</sup> In order for a company to be allowed by the Forest Service to participate in the oral auction, the company's sealed bid must necessarily exceed the MABR figures.<sup>273</sup>

At oral auction for the timber, bids were made on a lump-sum basis with the highest total winning the contract.<sup>274</sup> Once bid, however, Roseburg's actual payment to the Forest Service was based on the timber that it cut.<sup>275</sup> The board-feet of each type of cut timber was multiplied by the stumpage rate for that timber to determine the ultimate price of the contract.<sup>276</sup> Before cutting, however, Roseburg was required to set a stumpage rate for each species of timber by dividing its "bid premium," the dollar amount by which its bid exceeded the Government's MABR figure for the total sale, among the five species.<sup>277</sup> To do this, the contractor must multiply the Government's pre-bid estimate of the volume of each species in the timber sale area by the stumpage rate that it sets for each species, until the resultant number equals the total bid by the contractor.<sup>278</sup> This process allows the contractor, through manipulating stumpage rates based on its own estimate of the volume of each species, to obtain the timber for substantially less than its winning bid.<sup>279</sup> Roseburg attempted to do this by allocating its entire bid premium to white fir because, based on its own survey, less white fir existed in the sale area than the Government had estimated.<sup>280</sup>

Roseburg eventually discovered that the Government had miscalculated the MABR numbers for all species except white fir.<sup>281</sup> The

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269. *Id.*

270. *Id.* at 661-62.

271. *Id.* at 662.

272. *Id.*

273. *Id.*

274. *Id.* at 664. The advertised value of the bid was \$930,630. *Id.* Roseburg won the auction with a bid of \$3,171,000. *Id.*

275. *Id.* at 663.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

correct numbers would have resulted in substantially altered stumpage rates.<sup>282</sup> After learning of the error, however, the Forest Service refused to alter or cancel Roseburg's contract.<sup>283</sup> Roseburg submitted a claim based on the difference between the stumpage rate set in the contract and the rate that would have been set had the Forest Service correctly calculated the MABR figures.<sup>284</sup> Roseburg's claim was denied by the CO and by the AGBCA.<sup>285</sup>

On appeal, the Federal Circuit held that the AGBCA had erroneously decided that the Forest Service's misrepresentations did not materially affect the contract terms.<sup>286</sup> Because Roseburg was required to submit a bid above the MABR numbers, error in these numbers materially affected the ultimate contract terms.<sup>287</sup> Despite these misrepresentations, however, the court held that Roseburg was not entitled to a remedy because the contractor could not prove that it was injured.<sup>288</sup> The court reasoned that had correct MABR numbers been published, the effect would have been to increase final bids, not decrease them, because lower MABR numbers would have expanded the profit margin on the contract.<sup>289</sup> Also, Roseburg did not dispute the AGBCA finding that, had accurate MABR data been published, Roseburg would have been willing to bid up to \$5.3 million for the contract, almost \$900,11 more than the top bid it was prepared to pay under the incorrect numbers.<sup>290</sup> Moreover, the court found no evidence that Roseburg would have been the high bidder had correct numbers been used.<sup>291</sup> Accordingly, the court affirmed the judgment of the AGBCA dismissing the case.<sup>292</sup>

The Federal Circuit also rejected Roseburg's alternative argument, which was based on mutual mistake.<sup>293</sup> Two elements had to be proven by Roseburg under this theory: first, that the contract did not place the risk on the party seeking reformation, and second, that the party against whom reformation was sought would have agreed to reformation had it known the correct facts from the outset.<sup>294</sup> Roseburg could establish the first element, but not the second.<sup>295</sup>

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282. *Id.*

283. *Id.* at 664.

284. *Id.* at 665.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 667.

289. *Id.* at 668.

290. *Id.*

291. *Id.*

292. *Id.* at 669.

293. *Id.* at 668-69.

294. *Id.*

295. *Id.* at 669.

*D. Material Breach and Interest on Interest*

The Federal Circuit tackled two issues in *Stone Forest Industries, Inc. v. United States*.<sup>296</sup> First, when is a contract breach material? Second, can a contractor recover interest on interest due from the Government that remains unpaid? As with *Roseburg*, this case involved a timber sale administered by the Forest Service.

The original contract called for Stone Forest Industries (SFI) to remove timber from several tracts in California.<sup>297</sup> Before the termination date of this contract, however, Congress enacted the California Wilderness Act,<sup>298</sup> which barred timber harvesting on four of the tracts in the original contract.<sup>299</sup> SFI sought to delete these units from the contract and reduce the total price, but the Forest Service did not respond.<sup>300</sup> SFI then proposed cutting timber in two of these tracts, which the Forest Service barred in writing.<sup>301</sup> Two months later, however, the Forest Service reversed itself orally.<sup>302</sup> This new directive reversing the earlier bar was never confirmed in writing.<sup>303</sup> SFI, having cut no timber from the two tracts in question, sought a refund but was denied.<sup>304</sup> SFI then sued in the Claims Court, which ruled that the Forest Service's temporary denial of access to the contested tracts had not materially breached the contract.<sup>305</sup>

On appeal, the Federal Circuit reversed. First, it was clear to the court that the Forest Service had indeed breached the contract.<sup>306</sup> By law, the Forest Service is required to give written notice of its decisions to permit access to tracts of timber.<sup>307</sup> This requirement was also specified in the Forest Service's contract with SFI.<sup>308</sup> Accordingly, the oral notice that followed the Forest Service's written notice barring SFI from the two contested tracts was ineffective to restore SFI's obligation to harvest timber on those tracts.<sup>309</sup>

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296. 973 F.2d 1548 (Fed. Cir. 1992).

297. *Stone Forest Indus., Inc. v. United States*, 973 F.2d 1548, 1549 (Fed. Cir. 1992).

298. California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619 (codified at 16 U.S.C. §§ 1131-1132 (1988)).

299. *Stone Forest*, 973 F.2d at 1549-50.

300. *Id.* at 1550.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* The CO did permit recovery of \$111,768 on the two tracts that the Forest Service had removed from the sale. *Id.*

305. *Stone Forest Indus., Inc. v. United States*, 22 Cl. Ct. 489, 492, *rev'd*, 973 F.2d 1548 (Fed. Cir. 1992).

306. *Stone Forest*, 973 F.2d at 1552-53.

307. *Id.* at 1551.

308. *Id.*

309. *Id.*



To determine whether this breach was material the court looked to the total volume of timber rendered off-limits by the California Wilderness Act.<sup>310</sup> The court distinguished *Everett Plywood Corp. v. United States*,<sup>311</sup> a case in which the cancellation of the final 6.5% of lumber on a cutting contract did not relieve Everett Plywood of its obligation to perform road maintenance at the end of the contract.<sup>312</sup> In *Stone Forest*, by contrast, 15.89% of the timber was removed from the contract, which was enough, the court reasoned, to cause a material breach.<sup>313</sup> As the contract was not divisible, SFI was entitled to choose its remedy, including the option of obtaining a refund of its deposit on the two affected tracts.<sup>314</sup>

The second issue, regarding whether interest may be assessed on interest, was pressed by the contractor because the Government had failed to pay statutory interest pursuant to the CDA<sup>315</sup> on that part of SFI's claim that the CO had originally allowed.<sup>316</sup> The principal of \$111,768 was paid in three installments in late 1986 and early 1987, but no interest had been paid at the time of oral argument before the Federal Circuit in 1992, a failure for which the Government's attorney had no explanation.<sup>317</sup> Although the Federal Circuit sharply criticized the Government's negligence, the court stated that it was bound by precedent to hold that the CDA does not permit the payment of interest on an interest liability.<sup>318</sup>

### E. Waterstop Testing and Economic Waste

In an important case brought under the Wunderlich Act,<sup>319</sup> *Granite Construction Co. v. United States*,<sup>320</sup> the Federal Circuit held the U.S. Army Corps of Engineers (Corps) liable under a theory of economic waste for holding a contractor to strict compliance with government

310. *Id.*

311. 512 F.2d 1082 (Ct. Cl. 1975).

312. *Everett Plywood Corp. v. United States*, 512 F.2d 1082, 1093-94 (Ct. Cl. 1975).

313. *Stone Forest*, 973 F.2d at 1552. The court included the timber from all four tracts in making this calculation, thereby reversing the Claims Court. *Id.* The Claims Court initially found that the Forest Service had only "temporarily" barred access to two of the four tracts rendered off-limits by the Wilderness Act. *Stone Forest*, 22 Cl. Ct. at 495. Accordingly, it dismissed them from its calculations. *Id.* With respect to the remaining two tracts, which accounted for 7% of the total timber, the Claims Court found that the Forest Service's order denying access to these tracts was not a material breach. *Id.*

314. *Stone Forest*, 973 F.2d at 1553.

315. 41 U.S.C. § 611 (1988).

316. *Stone Forest*, 973 F.2d at 1553.

317. *Id.*

318. *Id.* (citing *ACS Constr. Co. v. United States*, 230 Ct. Cl. 845 (1982), which held that CDA does not authorize payment on interest liability).

319. 41 U.S.C. §§ 321-322 (1988).

320. 962 F.2d 998 (Fed. Cir. 1992).

specifications.<sup>321</sup> The court also found that the Corps breached its duty to test the contractor's installed product and was responsible for performance delays, although these breaches were counterbalanced by the contractor's failure to supply conformable goods and its failure to inform the Government that its goods did not meet specifications.<sup>322</sup> The case thus raises a number of substantive contractual issues.

The contract at issue called for Granite Construction to build, at Aberdeen, Mississippi, a dam and lock consisting of a series of concrete monoliths sixty feet high, forty-two feet long, and thirty feet wide.<sup>323</sup> The contract required Granite to install PVC waterstop in the vertical joints between monoliths to prevent water leakage.<sup>324</sup> After ten percent of the waterstop was permanently embedded in the monoliths, the Corps tested the waterstop, decided it failed to meet contract specifications, and ordered all of it removed and replaced.<sup>325</sup>

The noncomplying waterstop had been supplied by Granite's subcontractors in two deliveries.<sup>326</sup> Initially, the Corps had tested four samples from the first batch of waterstop and informed Granite that it met the Corps' specifications.<sup>327</sup> No other testing had been performed until after Granite had installed a significant amount of waterstop in the concrete.<sup>328</sup> The incident that prompted Granite to check the waterstop further was a different coloration in the second batch.<sup>329</sup> When the Corps finally tested that batch, four of five samples failed specifications.<sup>330</sup>

Subsequent to its removal of the noncomplying waterstop, Granite recovered \$400,11 from two subcontractors and obtained a default judgment for \$894,750 from two other subcontractors.<sup>331</sup> Granite then filed a claim for \$3.8 million with the CO.<sup>332</sup> On appeal, the Corps of Engineers Board of Contract Appeals held a trial

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321. Granite Constr. Co. v. United States, 962 F.2d 998, 1008 (Fed. Cir. 1992). The Wunderlich Act applied in this case because Granite entered the contract with the Government prior to the effective date of the CDA, and Granite had not elected CDA coverage. *Id.* at 1000.

322. *Id.* at 1006.

323. *Id.* at 1000.

324. *Id.*

325. *Id.*

326. *Id.* at 1002.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* at 1000.

332. *Id.*

on liability and denied Granite's claim in its entirety.<sup>333</sup> Granite appealed this decision to the Claims Court, which dismissed it on a motion for summary judgment.<sup>334</sup> The Claims Court's dismissal was appealed to the Federal Circuit.<sup>335</sup>

The Federal Circuit first addressed whether the Corps was liable for its failure to test the waterstop periodically. Based on several clauses in the contract, the court held that the Government was responsible for testing the waterstop but that those technical provisions did not relieve Granite of its duty to supply waterstop meeting contract specifications.<sup>336</sup> Because Granite supplied nonconforming material, it was not entitled to recover direct costs of removing and replacing the defective waterstop.<sup>337</sup> The court noted that the Corps should be responsible for performance delays attributable to an unreasonable failure to test the waterstop, but it declined to hold the Corps liable on the contract because Granite had affirmatively represented to the Government that the waterstop conformed to specifications.<sup>338</sup> Several certifications received from Granite's suppliers and passed on to the Government had misled the Corps into believing that the waterstop met specifications.<sup>339</sup> Once this belief was challenged by the appearance of the waterstop differing from the original batch, the Corps promptly undertook tests and discovered the nonconforming waterstop.<sup>340</sup> On this basis, the court found that the Government acted reasonably and therefore should not be held liable for performance delays.<sup>341</sup>

The second issue addressed by the Federal Circuit was whether the Corps was responsible for requiring Granite to remove and replace all the implanted waterstop for failure to meet specification.<sup>342</sup> Prior to removal, Granite proposed several remedial measures that did not require replacement of the waterstop.<sup>343</sup> Although Granite admitted that the waterstop embedded in ten percent of the dam did not literally meet specifications, the contractor contended that this type of waterstop was more than adequate for its required use.<sup>344</sup>

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333. *Id.*

334. *Granite Constr. Co. v. United States*, 22 Cl. Ct. 831, 832, *rev'd*, 962 F.2d 998 (Fed. Cir. 1992), *cert. denied*, 113 S. Ct. 965 (1993).

335. *Granite Constr.*, 962 F.2d at 1000.

336. *Id.* at 1002-04.

337. *Id.* at 1003-04.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at 1004.

342. *Id.* at 1004-05.

343. *Id.* at 1005.

344. *Id.*

Granite was unsuccessful, however, in persuading the Government to accept the installed waterstop at a reduced price.<sup>345</sup>

The Federal Circuit found that the Government's insistence on complete waterstop removal, without any evaluation of the technical necessity for rework, was arbitrary and capricious.<sup>346</sup> The contractor had submitted evidence from an expert who testified that the installed waterstop exceeded the actual needs of the Aberdeen dam and lock project, and the Government offered no rebuttal.<sup>347</sup> The court therefore reversed the Board's finding that Granite had failed to prove substantial compliance with waterstop specifications as not supported by substantial evidence.<sup>348</sup>

Relying on the doctrine of economic waste, the Federal Circuit held that the Government is liable for ordering replacement work in situations where the cost of correction is economically wasteful and the work is otherwise adequate for its intended purpose.<sup>349</sup> In such circumstances, the Government is only entitled to a downward adjustment in the contract price.<sup>350</sup> Accordingly, the court held that Granite was entitled to an equitable adjustment for costs of removing and replacing the waterstop based on the Government's constructive change in the contract.<sup>351</sup> The court added, however, that Granite's recovery against the Government must be reduced by the reasonable cost the contractor would have incurred if it had been permitted to repair the waterstop in the way it had originally suggested.<sup>352</sup>

#### F. Responsibility for Delay Costs

In *Triax-Pacific v. Stone*,<sup>353</sup> the Federal Circuit affirmed an ASBCA decision dismissing a contractor's claim for delay costs on a housing improvements contract.<sup>354</sup> The contract was divided into three phases,<sup>355</sup> with phase I to start ten days after Triax received a notice to proceed and phase II to start within sixty days of the notice to proceed on phase I.<sup>356</sup> Triax was sixty days late in completing work

345. *Id.* at 1004.

346. *Id.* at 1005.

347. *Id.* at 1005-06.

348. *Id.*

349. *Id.* at 1007.

350. *Id.* at 1007-08.

351. *Id.* at 1008.

352. *Id.*

353. 958 F.2d 351 (Fed. Cir. 1992).

354. *Triax-Pacific v. Stone*, 958 F.2d 351, 359 (Fed. Cir. 1992).

355. *Id.* at 352 (stating that Triax was required in all three phases to commence work within 10 days of receiving notice to proceed from Government).

356. *Id.*

on an earlier contract,<sup>357</sup> which meant that families living in phase II housing had nowhere to move until Triax completed its work.<sup>358</sup> As a result, the Government did not notify Triax to begin work on phase II until fifty-three days after the deadline in the contract.<sup>359</sup> Triax submitted a certified claim for additional costs caused by the delay, which the Board subsequently denied, finding that the Government's delay was Triax's fault.<sup>360</sup>

The Federal Circuit, citing *Johnson & Sons Erectors Co. v. United States*,<sup>361</sup> first held that Triax could not support a breach of contract claim where the contract contained provisions for equitable adjustment.<sup>362</sup> Nor could Triax support its argument that the contract's "Changes" clause applied, because the late issuance of the Government's notice resulted in a delay of work rather than a change of work.<sup>363</sup> For Triax to recover, it was required to proceed under the "Suspension of Work" clause of the contract.<sup>364</sup> To recover under the "Suspension of Work" clause, however, a contractor must show that "the government's actions are the sole proximate cause of the contractor's additional loss, and the contractor would not have been delayed for *any other reason* during that period."<sup>365</sup> In this case, Triax, by running sixty days late on its earlier contract, was at least partially the cause for the Government's delay because work on phase II could not begin until all families were vacated from that housing.<sup>366</sup> Accordingly, Triax could not recover for the delay.<sup>367</sup>

Finally, Triax argued that it had already compensated the Government for its earlier delay by paying liquidated damages and that to prevent it from recovering for the phase II delay would be to penalize it twice.<sup>368</sup> The court rejected this argument for two reasons. First, Triax's payment for its earlier delay did not excuse it from acting as a cause of the later delay, and second, if Triax were al-

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357. *Id.* at 352 (requiring Triax to pay \$33,335 in liquidated damages for this late work).

358. *Id.* at 353.

359. *Id.*

360. Triax-Pacific, ASBCA No. 3653, 91-2 B.C.A. (CCH) ¶ 23,724, at 118,747 (1991), *aff'd*, 958 F.2d 351 (Fed. Cir. 1992).

361. 231 Ct. Cl. 753, 757-58 (holding that contract clauses providing for equitable adjustments remove contractor's obligation to declare contract at end and cease performance to avoid waiver and save its rights, but limiting breach of contract claims to equitable adjustment solely), *cert. denied*, 459 U.S. 971 (1982).

362. *Triax-Pacific*, 958 F.2d at 353-54.

363. *Id.* at 354.

364. *Id.*

365. *Id.* The suspension clause stated that the contractor would not be entitled to an equitable adjustment "to the extent that [the contractor's] performance would have been so . . . delayed . . . by any other cause." *Id.* (quoting contract).

366. *Id.*

367. *Id.*

368. *Id.*

lowed to recover for the phase II delay, this might cancel out the liquidated damages paid on the earlier contract.<sup>369</sup>

### G. Patent Ambiguity in a Contract

In *Interstate General Government Contractors, Inc. v. Stone*,<sup>370</sup> the Federal Circuit affirmed an award of summary judgment denying a contractor's claim for equitable adjustment because the contractor had failed to seek clarification of an ambiguity in the contract before it bid on and won the job.<sup>371</sup> The contract required Interstate General Government Contractors (IGGC) to replace heating and air-conditioning equipment and install an air-handling system in three buildings at Fort Gordon, Georgia.<sup>372</sup> After winning the job but prior to installation, IGGC submitted a material approval list to the Government that indicated its intent to use conventional motor starters in the air-handling system instead of more expensive variable-speed fan power controllers (VSPCs).<sup>373</sup> The CO rejected this approach and informed IGGC that the more expensive VSPCs were required under the contract.<sup>374</sup> Accordingly, IGGC installed VSPCs at an additional cost of \$48,186 and then filed a claim for equitable adjustment in this amount.<sup>375</sup> The ASBCA granted summary judgment on the claim to the Government, concluding that the contract called for VSPCs.<sup>376</sup>

On appeal, IGGC argued that the contract made numerous references to both motor starters and VSPCs and was therefore ambiguous.<sup>377</sup> Because an ambiguity in a contract should be construed against its drafter, in this case the Government, and because IGGC's use of motor starters was reasonable, IGGC argued that it should prevail.<sup>378</sup> The Government countered that the contract unequivocally called for VSPCs to be used.<sup>379</sup>

The Federal Circuit affirmed the ASBCA, but on different grounds.<sup>380</sup> The court disagreed with the Board's factual conclu-

369. *Id.*

370. 980 F.2d 1433 (Fed. Cir. 1992).

371. *Interstate Gen. Gov't Contractors, Inc. v. Stone*, 980 F.2d 1433, 1434 (Fed. Cir. 1992).

372. *Id.* at 1434.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Interstate Gen. Gov't Contractors, Inc.*, ASBCA No. 42742, 91-3 B.C.A. (CCH) ¶ 24,280, at 121,370 (1991), *aff'd*, 980 F.2d 1433 (Fed. Cir. 1992).

377. *Interstate Gen.*, 980 F.2d at 1434.

378. *Id.*

379. *Id.*

380. *Id.*

sion that VSPCs were required and found instead that the contract was ambiguous.<sup>381</sup> Under such circumstances, IGGC normally would have won because an ambiguity must be construed against the drafter, and a reasonable interpretation followed by the contractor must succeed.<sup>382</sup> IGGC did not win, however, because the Federal Circuit applied an exception to that rule, which provides that where an ambiguity in a contract is patent, the contractor has a duty to inquire of the CO the true meaning of the contract prior to submitting its bid.<sup>383</sup> In light of the fact that IGGC did not attempt to clarify whether motor starters or VSPCs were required before it submitted its bid, it could not recover after the contract had been awarded.<sup>384</sup> The court, citing *Beacon Construction Co. v. United States*,<sup>385</sup> held that the contract was patently ambiguous because a reasonable finder of fact, viewing the contract as a whole, *could not find* that references to motor starters and VSPCs were intended to refer to the same type of device.<sup>386</sup>

The court's approach in this case, while seemingly straightforward, may leave contractors in a difficult situation. Although the Federal Circuit considered this contract to be patently ambiguous, neither the CO nor the ASBCA found the contract to be ambiguous, much less patently ambiguous.<sup>387</sup> Because a contractor cannot correct its failure to inquire about patent ambiguities after bidding, it must err on the side of inquiry prior to submitting its bid.

#### H. Government Responsibility for Change in Regulation

In *Hills Materials Co. v. Rice*,<sup>388</sup> the Federal Circuit reversed an ASBCA decision that had upheld the Government's interpretation of two clauses in an excavation contract: the accident prevention clause, and the permits and responsibilities clause.<sup>389</sup> The controversy arose when, after contract award, the Occupational Safety and Health Administration (OSHA) issued final regulations that sub-

381. *Id.*

382. *Id.* (citing *United Pac. Ins. Co. v. United States*, 497 F.2d 1402, 1407 (Ct. Cl. 1974)).

383. *Id.* (citing *Fortec Constructors v. United States*, 760 F.2d 1288, 1291 (Fed. Cir. 1985), and *Newsom v. United States*, 676 F.2d 647, 649 (Ct. Cl. 1982)).

384. *Id.* at 1435.

385. 314 F.2d 501, 504 (Ct. Cl. 1963) (finding that patent ambiguity can be in form of "obvious omission, inconsistency or discrepancy of significance").

386. *Interstate Gen.*, 980 F.2d at 1435.

387. See *Interstate Gen. Gov't Contractors, Inc.*, ASBCA No. 42742, 91-3 B.C.A. (CCH) ¶ 24,280, at 121,370 (1991), *aff'd*, 980 F.2d 1433 (Fed. Cir. 1992) (concluding that specifications on contract drawings indicated that only VSPCs were required and that contractor should not receive equitable adjustment for supplying both VSPCs and motor starters).

388. 982 F.2d 514 (Fed. Cir. 1992).

389. *Hills Materials Co. v. Rice*, 982 F.2d 514, 516-17 (Fed. Cir. 1992).

stantially changed 29 C.F.R. § 1926.652 governing the grading and sloping of ditches.<sup>390</sup> This change caused Hills Materials to undertake extensive unanticipated excavation efforts to complete its contract.<sup>391</sup> Hills Materials filed a request for equitable adjustment, and later a formal claim, to recoup its additional costs, but these requests were denied by the CO and ASBCA.<sup>392</sup>

The issue in the case was which party should assume liability for the extra costs associated with the changed OSHA regulations. Resolution of this question hinged on an interpretation of two clauses in the contract. The accident prevention clause required the contractor to “[c]omply with the standards *issued* by the Secretary of Labor at 29 CFR part 1926.”<sup>393</sup> The permits and responsibilities clause provided that “‘the Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work.’”<sup>394</sup>

The contractor argued that the word “issued” was used in the past tense, and thus the accident prevention clause only obligated Hills Materials to meet the OSHA regulations in effect at the time the contract was awarded, not those that might be “issued” in the future.<sup>395</sup> The Government countered that the permits and responsibilities clause required Hills Materials to comply with any changes in federal, state, or local law, including changes “issued” in connection with OSHA’s ditch and trench regulations at 29 C.F.R. § 1926.652.<sup>396</sup> The Federal Circuit concluded that both interpretations of the contract were reasonable.<sup>397</sup>

Faced with two “reasonable” but different interpretations of the contract, the court held that the contract was ambiguous, and applied the longstanding rule of contractual interpretation known as *contra proferentum* that construes an ambiguous term against its drafter, in this case the Government.<sup>398</sup> The court also held that the ambiguity was “latent,” not “patent,” and thus Hills Materials had no duty to ask for clarification.<sup>399</sup> Accordingly, the court upheld

390. *Id.* at 515 & n.1.

391. *Id.*

392. *Id.*

393. *Id.* at 516 (emphasis supplied by appeals court) (quoting 48 C.F.R. § 52.236-13(a)(2) (1992)).

394. *Id.* (quoting 48 C.F.R. § 52.236-7 (1992)).

395. *Id.*

396. *Id.*

397. *Id.* at 516-17.

398. *Id.*

399. *Id.* at 516 & n.3. For a discussion of “patent” ambiguities, see *supra* notes 370-87



Hills Materials' interpretation of the contract and remanded for a calculation of its equitable adjustment.<sup>400</sup>

The interesting point about *Hills Materials* is the manner in which its outcome was reached. The contractor's argument, that "issued," if given its plain meaning, would stand only for the past tense, seems somewhat stretched. The word "issued" by itself does not indicate whether it refers to something that has been issued or will be issued. Nevertheless, based on nothing more than a simple rule of contract interpretation, the Federal Circuit concluded that "issued" had been used in the contract to refer only to the past tense.<sup>401</sup> This case illustrates how the Federal Circuit can use a rule of contract interpretation to reach a fair result.

## V. EXCLUSIVE USE

In *Baggett Transportation Co. v. United States*,<sup>402</sup> the Federal Circuit helped define what specific language must be stated before the Government is conclusively understood to have requested "exclusive use" of a shipper's containers to transport government property.<sup>403</sup> Where exclusive use is requested, a carrier may charge a higher rate because it is shipping only partially filled containers or trucks.<sup>404</sup> In *Baggett*, the carriers had initially shipped the government's goods without charging for exclusive use, but more than a year later, they submitted supplemental bills that included the extra charge.<sup>405</sup> The Government refused to pay, and the matter ended up in the Claims Court, which rejected the shippers' claims.<sup>406</sup> The Claims Court held that for exclusive-use charges to apply, there must be some evidence that exclusive use was in fact performed, and there must be "substantial compliance" with the tender<sup>407</sup> or tariff<sup>408</sup> by annotating the bill of lading<sup>409</sup> to request exclusive use.<sup>410</sup>

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and accompanying text (describing *Interstate Gen. Gov't Contractors, Inc. v. Stone*, 980 F.2d 1433 (Fed. Cir. 1992), which held that ambiguity must be construed against drafter).

400. *Hills Materials*, 982 F.2d at 517.

401. *Id.* at 516.

402. 969 F.2d 1028 (Fed. Cir. 1992).

403. *Baggett Transp. Co. v. United States*, 969 F.2d 1028, 1029 (Fed. Cir. 1992).

404. *Id.*

405. *Id.* at 1029-30.

406. *Baggett Transp. Co. v. United States*, 23 Cl. Ct. 263, 275-76, *aff'd*, 969 F.2d 1028 (Fed. Cir. 1992).

407. *Id.* at 271 (stating that "tender" is carrier's continuing offer to perform transport services for stated prices).

408. *Id.* (explaining that "tariff" sheet is on file with Interstate Commerce Commission, sets forth carrier's rates, and is incorporated by reference in "tender").

409. *Id.* (explaining that "bill of lading," issued by Government, is often annotated with instructions to carrier).

410. *Id.* at 270.

On appeal, the Federal Circuit affirmed. The main question was whether the following notation, which appeared on the Government's bills of lading, amounted to a request for exclusive use:

SHIPPER SEAL(S) APPLIED. CARRIER MAY REMOVE SEAL(S) AND REPLACE WITH EQUIVALENT SEAL(S) ON PRIOR CONSENT OF CONSIGNOR. IF SEALS ARE BROKEN IN EMERGENCIES, NOTIFY CONSIGNOR AS SOON AS POSSIBLE. CARRIER MUST ANNOTATE SEAL CHANGES ON [BILL OF LADING]. APPLICATION OF SHIPPER SEALS DOES NOT CONSTITUTE A REQUEST FOR EXCLUSIVE USE OF VEHICLE/CONTAINER.<sup>411</sup>

The court distinguished this bill of lading notation from ones involved in a Court of Claims case, *Campbell "66" Express, Inc. v. United States*,<sup>412</sup> and a decision of the Comptroller General, *American Farm Lines, Inc.*<sup>413</sup> In both cases, the Government had attached notations with the language "DO NOT BREAK SEALS" to the bills of lading.<sup>414</sup> This language was not considered significant in *Campbell* because three of four bills of lading also specifically stated: "Exclusive Use of Vehicle Requested By The Government."<sup>415</sup> The fourth omitted that language, but had a certificate attached to it, to be signed by the carrier, certifying that "Exclusive Vehicle Service" was used.<sup>416</sup> The court in *Campbell* held that all four bills of lading required exclusive use because each contained "some written notation, which reasonably apprises the carrier that the shipper is requesting the exclusive use of its vehicle."<sup>417</sup> In *American Farm Lines*, the Comptroller General held that the "DO NOT BREAK SEALS" language amounted to a request for exclusive use because the language reasonably apprised the carrier that "exclusive use" was what the shipper wanted.<sup>418</sup> After the decision in *American Farm Lines*, however, the Government replaced the "DO NOT BREAK SEALS" language with the notations in question in *Baggett*.<sup>419</sup>

The Federal Circuit rejected the appellants' claim in *Baggett* for

411. *Baggett Transp.*, 969 F.2d at 1030.

412. 302 F.2d 270 (Ct. Cl. 1962).

413. Nos. B-203805, B-204113, 1981 WL 22956 (Comp. Gen. Dec. 24, 1981).

414. *Campbell "66" Express, Inc. v. United States*, 302 F.2d 270, 270 (Ct. Cl. 1962); *American Farm Lines, Inc.*, Nos. B-203805, B-204113, 1981 WL 22956 at \*2 (Comp. Gen. Dec. 24, 1981).

415. *Campbell "66" Express*, 302 F.2d at 272.

416. *Id.*

417. *Id.* With respect to the fourth bill of lading, the Court of Claims held that even though a tariff provision required the statement "exclusive use of vehicle requested" to be on the bill of lading, and it was not there, this provision was not to be read to exclude other language that reasonably apprised the carrier that exclusive use was requested. *Id.*

418. *American Farm Lines*, Nos. B-203805, B-204113, 1981 WL 22956 at \*2-3.

419. *Baggett Transp.*, 969 F.2d at 1031.

three reasons. First, there was no statement on the bill of lading requesting exclusive use; second, the bill of lading stated explicitly that "application of shipper seals does not constitute a request for exclusive use"; and third, the carriers obviously did not believe that the bill of lading called for exclusive use because they had consistently billed the Government at the regular rate.<sup>420</sup> The court held, moreover, that the mere fact that the Government uses cable seal locks and wire twist seals is not significant because the substantial compliance test requires written notation on the bill of lading.<sup>421</sup>

## VI. ATTORNEY'S FEES

*FDL Technologies, Inc. v. United States*<sup>422</sup> presented two issues. First, under the Equal Access to Justice Act (EAJA),<sup>423</sup> which party receives an award of attorney's fees, the client or the attorney? Second, may interest be collected under the Prompt Payment Act<sup>424</sup> on late payment of attorneys' fees? The court strictly construed the language of § 504(a)(1) of the EAJA<sup>425</sup> to hold that the "prevailing party," not the prevailing party's attorney, is entitled to receive fee awards.<sup>426</sup> On this point, Judge Newman filed a sharp dissent.<sup>427</sup> On the second issue, the court held that because attorney's fees are not "property or service" under the Prompt Payment Act, interest may not be recovered on their delayed payment.<sup>428</sup>

The case arose when the Army terminated a contract for default with FDL Technologies.<sup>429</sup> The ASBCA ruled the Army's action improper in May 1990, and, as prevailing party, FDL submitted a claim under the EAJA for \$26,731.59 in attorney's fees and costs.<sup>430</sup> FDL subsequently filed for bankruptcy in July 1990.<sup>431</sup> The Army did not

420. *Id.* at 1032-33.

421. *Id.* The court rejected the contention that the use of cable seal locks and wire twist seals amounted to a constructive request by the Government for exclusive use, which is a more expensive means of shipping, and stated that a written notation that reasonably apprises the carrier of the shipper's request for exclusive use is necessary. *Id.*

422. 967 F.2d 1578 (Fed. Cir. 1992).

423. 5 U.S.C. § 504(a)(1) (1988).

424. 31 U.S.C. §§ 3901-3907 (1988).

425. *See* 5 U.S.C. § 504(a)(1) (1988) (requiring that agency conducting adversary proceeding must award to prevailing party, other than United States, fees and expenses incurred in relation to proceeding).

426. *FDL Technologies, Inc. v. United States*, 967 F.2d 1578, 1580 (Fed. Cir. 1992).

427. *Id.* at 1582-86 (Newman, J., dissenting); *see infra* notes 449-51 (preferring common-sense approach to statutory construction as encouraging meritorious suits).

428. *Id.* at 1579; *see* 31 U.S.C. § 3902(a) (1988) (requiring that "head of an agency acquiring property or service from business concern, who does not pay this concern for each complete delivered item of property or service by required payment date, shall pay interest penalty to the concern on the amount of the payment due").

429. *FDL Technologies*, 967 F.2d at 1579.

430. *Id.* (noting that FDL filed claim under 5 U.S.C. § 504(a)(1) (1988)).

431. *Id.*

contest the fees-and-costs application.<sup>432</sup> In September 1990, the CO issued a contract modification to increase the contract price by the requested amount, and, because of this informal change, the ASBCA never issued an order awarding attorney's fees.<sup>433</sup> When payment of the money was not forthcoming, FDL filed a complaint in the Claims Court in November 1990.<sup>434</sup> The Army asserted that it issued a check to FDL in December 1990.<sup>435</sup> This check was not cashed, however, and the Army issued a new check in June 1991.<sup>436</sup> The Claims Court rejected FDL's claim that the money should have been paid directly to FDL's attorney.<sup>437</sup> It also denied interest on the payment.<sup>438</sup>

On appeal, the Federal Circuit affirmed the Claims Court. Interpreting the EAJA, the majority relied on the language of § 504(a)(1), stating: " 'An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding . . . . ' " <sup>439</sup> By its plain language, the court held, the statute indicates that the prevailing party, not that party's attorney, is entitled to fees.<sup>440</sup> The majority also relied on its 1991 opinion in *Phillips v. General Services Administration*,<sup>441</sup> which construed a different provision of the EAJA,<sup>442</sup> to reach the same result.<sup>443</sup> Finally, the majority distinguished a 1988 Federal Circuit opinion, *Jensen v. Department of Transportation*,<sup>444</sup> where it had held that an attorney's fees award under the Civil Service Reform Act<sup>445</sup> must be paid to counsel.<sup>446</sup> Not only were the facts of that case different in that Jensen had relinquished his right to recover any fee in return

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432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

437. *FDL Technologies, Inc. v. United States*, 26 Cl. Ct. 484, 484, *aff'd*, 967 F.2d 1578 (Fed. Cir. 1992).

438. *Id.*

439. *FDL Technologies*, 967 F.2d at 1580 (quoting 5 U.S.C. § 504(a)(1) (1988)).

440. *Id.*

441. 924 F.2d 1577 (Fed. Cir. 1991).

442. *See Phillips v. General Servs. Admin.*, 924 F.2d 1577, 1582 (Fed. Cir. 1991) (holding that fee award is payable to prevailing party, and that under EAJA, 28 U.S.C. § 2412(d)(1)(A) (1988), prevailing party's attorney cannot directly claim or be entitled to award).

443. *FDL Technologies*, 967 F.2d at 1580. In a footnote, the majority opinion distinguished the holding by the Federal Circuit in *Phillips* that required Phillips to turn the fee award over to her attorney, *Phillips*, 924 F.2d at 1582, as being an interpretation of a fee arrangement between Phillips and her attorney and not an interpretation of the EAJA. *FDL Technologies*, 967 F.2d at 1580 n.1.

444. 858 F.2d 721 (Fed. Cir. 1988).

445. 5 U.S.C. § 7701(g)(1) (1988).

446. *Jensen v. Department of Transp.*, 858 F.2d 721, 723 (Fed. Cir. 1988).

for his attorney's waiving part of the fee,<sup>447</sup> but the language of the statute was different as well, providing that "the Board . . . may require payment by the agency involved of reasonable attorney fees incurred by an employee . . . if the employee . . . is the prevailing party."<sup>448</sup>

Judge Newman, in dissent, took sharp exception to the majority's splitting-hairs approach. In her view, the most important consideration is an equitable one, namely that the purpose of the statute is to encourage members of the bar to take on meritorious suits even though the client may be in precarious financial condition.<sup>449</sup> The equities in this case weighed strongly in favor of the attorney's recovering, because denying him or her recovery permits a party that did not incur the fees, i.e., the trustee in bankruptcy, to reap a "windfall."<sup>450</sup> Newman argued that courts have consistently used a common sense approach and directed that fees be paid to the attorney when the circumstances show that an improper windfall would otherwise result.<sup>451</sup>

On the second issue, the Federal Circuit held that FDL was not entitled to interest on its attorney's fees award.<sup>452</sup> The Prompt Payment Act requires interest on late payment "for each complete delivered item of property or service" purchased from a business concern.<sup>453</sup> The majority concluded that the terms "property or service" do not include attorney's fees.<sup>454</sup>

### CONCLUSION

In the private sector, it is a fundamental principle of contract law that legitimate expectations of parties should be honored.<sup>455</sup> Re-

447. *Id.*

448. *Id.* at 723 (citing 5 U.S.C. § 7701(g)(1) (1988)).

449. *FDL Technologies*, 967 F.2d at 1582 (Newman, J., dissenting).

450. *Id.* at 1582-83.

451. *See id.* (citing *Jensen v. Department of Transp.*, 858 F.2d 721, 723 (Fed. Cir. 1988)) (stating that attorney's fees awarded under Civil Service Reform Act, 5 U.S.C. § 7701(g)(1) (1988), must be paid directly to attorney to assure that attorney receives fees and that others do not receive unearned windfall); *Rodriguez v. Taylon*, 569 F.2d 1231, 1245 (3d Cir. 1977) (explaining that because object of fee awards is not to provide windfall to individual plaintiffs, fee awards must accrue to counsel), *cert. denied*, 436 U.S. 913 (1978); *Brandenburger v. Thompson*, 494 F.2d 885, 889 (9th Cir. 1974) (holding that attorney's fees awarded in 42 U.S.C. § 1983 action shall be paid directly to legal services organization to avoid windfall to litigant).

452. *FDL Technologies*, 967 F.2d at 1581.

453. 31 U.S.C. § 3902(a) (1988).

454. *FDL Technologies*, 967 F.2d at 1581. The court also noted that interest cannot be recovered against the Government unless such a remedy has been specifically provided for by Congress. *Id.*

455. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981) (concluding that expectation interest of party to contract requires, in case of breach, that nonbreaching party receive

grettably, in the government contracts arena, the Federal Circuit seems to proceed on a directly contrary principle. Time and again, the Federal Circuit has come up with new readings of statutes and regulations that run counter to legislative intent, to parties' long-standing expectation and reliance interests, and even to the Federal Circuit's own prior decisions. Even when there exists a clear statement of policy by Congress, the Federal Circuit has adopted contrary, and counterintuitive, interpretations of statutory language. Many practitioners have suggested that the problem may stem from the Federal Circuit's lack of significant government contracts background and experience.

Recent Federal Circuit decisions have been particularly damaging with regard to the issue of jurisdiction over appeals from COs' final decisions under the CDA. Government contractors who have filed claims in accordance with well-established practice often find that their claims are dismissed for failing to comply with novel and highly technical jurisdictional requirements that have little to do with discernible congressional intent. Despite Congress' clear goal of making appeals available whenever common sense would conclude that there is a "claim," the Federal Circuit has studded the field with landmines that are traps not only for the unwary, but for the experienced practitioner as well.

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benefit of bargain by being put in as good position as would have been in if contract had been performed).