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2012 Government Contract Law Decisions of the Federal Circuit

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2012 GOVERNMENT CONTRACT LAW DECISIONS OF THE FEDERAL CIRCUIT*

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* The views expressed in this Article are solely those of the authors, and do not necessarily represent the views of Booz | Allen | Hamilton, the U.S. Department of Justice, the *University of Maryland*, or any other client or entity with which the Authors are affiliated.

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INTRODUCTION

The Supreme Court of the United States has observed that "[i]n constitutional adjudication, as in the common law, rules of law often develop incrementally as earlier decisions are applied to new factual situations."[1] The same comment accurately describes the Federal Circuit's government contracts decisions from this past year; with (arguably) limited exception, the decisions discussed below reflect incremental development of the law, rather than any sea changes.

Two exceptions to that generalization—*Minesen Co. v. McHugh*[2] and *Scott Timber Co. v. United States*[3]—both engendered significant dissenting opinions, suggesting that the issues addressed therein may well be the subject of a future en banc case. In yet a third case,

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1. Williams v. Taylor, 529 U.S. 362, 384–85 (2000).
2. 671 F.3d 1332 (Fed. Cir. 2012).
3. 692 F.3d 1365 (Fed. Cir. 2012).

VanDesande v. United States,[4] the court specifically noted that it was addressing a matter of first impression.

In the remaining cases, however, the Federal Circuit does not appear to have broken radical new ground, but rather relied upon well-established precedent to resolve the new conflicts before the court. Nevertheless, such incremental development of the law as a result of new factual situations benefits not only the litigants involved in those cases, but also future, would-be litigants (and, in this context, the Government) all of whom will have a better sense of the legal landscape governing their contracts and disputes. In that sense, then, each of these cases represents a valuable contribution to the government contracts field and warrants careful, if not equal, attention.

I. BID PROTEST CASES

Much like in 2011, the Federal Circuit published only a few bid protest decisions in 2012: *Comint Systems Corp. v. United States*,[5] *Systems Application & Technologies, Inc. v. United States*,[6] and *Digitalis Education Solutions, Inc. v. United States*.[7] In all three cases, the Federal Circuit affirmed the decision of the U.S. Court of Federal Claims (COFC). In *Comint*, the COFC upheld the agency's denial of Comint's protest; the court held that Comint waived its ability to object, and thus lacked standing in the protest. The Federal Circuit affirmed and, in its decision, extended the waiver rule from *Blue & Gold Fleet, L.P. v. United States*[8] to apply to *all* opportunities where a bidder could have challenged a bid prior to the award. In *Systems Application & Technologies*, the Government appealed the COFC decision that granted injunctive relief for the Army's arbitrary and capricious corrective action; the Federal Circuit agreed with the COFC and affirmed. The Federal Circuit, here, relied on its decision in *Turner Construction Co. v. United States*[9] (*Turner III*), where it held that the Government's decision to take corrective action following the Government Accountability Office's (GAO's) recommendation was unreasonable.[10] Lastly, in *Digitalis*, both the COFC and the Federal Circuit agreed that a bidder who lacks standing as an interested party also lacks standing to challenge the reasonableness of

4. 673 F.3d 1342 (Fed. Cir. 2012).
5. 700 F.3d 1377 (Fed. Cir. 2012).
6. 691 F.3d 1374 (Fed. Cir. 2012).
7. 664 F.3d 1380 (Fed. Cir. 2012).
8. 492 F.3d 1308 (Fed. Cir. 2007).
9. 645 F.3d 1377 (Fed. Cir. 2011).
10. *Id.* at 1379.

a response period. Here, the Federal Circuit extended the interested party rule from *Rex Service Corp. v. United States*[11] to apply to sole-source protests.

A. Comint Systems Corp. v. United States

In *Comint Systems Corp. v. United States*,[12] the Federal Circuit upheld the COFC's dismissal of the case, and extended the application of *Blue & Gold* to include cases where a bidder had an opportunity to challenge a bid prior to award, but failed to do so.[13] Here, the bidder, Comint Systems Corporation, submitted a bid in response to a solicitation seeking offers for a multiple award, indefinite delivery/indefinite contract for information technology services. The solicitation asked "bidders to submit separate bids for the Basic Contract, Task Order 1, and Task Order 2"; the agency, in turn, first would evaluate offers that presented the best value for the Basic Contract.[14] In response, Comint submitted bids for all three.[15] In the midst of the bidding period, the agency decided it would limit the initial award to the Basic Contract.[16] Accordingly, the agency issued Amendment 5 to the solicitation to indicate that the task orders would not be awarded concurrently with the Basic Contract.[17] Amendment 5 further provided that the agency would use the bidders' submitted proposals for the task orders when evaluating the pricing factor for the award of the Basic Contract; any revisions to the proposals would not be accepted.[18]

The Source Selection Evaluation evaluated the proposals according to the factors in the solicitation; it listed "Quality/Capability" as the most important factor.[19] The solicitation also stated that one weakness in a proposal (without one or more offsetting strengths) would warrant a "marginal" rating in this category.[20] When the contracting officer reviewed Comint's proposal, the contracting officer found that Comint made an erroneous pricing assumption.[21]

11. 448 F.3d 1305 (Fed. Cir. 2006).
12. 700 F.3d 1377 (Fed. Cir. 2012).
13. *Id.*
14. *Id.* at 1379–80.
15. *Id.* at 1380.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*

Accordingly, it deemed Comint ineligible to receive the award for the Basic Contract.[22]

Following the awards, Comint submitted a bid protest to the agency, which it subsequently denied.[23] Comint then brought suit in the COFC arguing that Amendment 5 "changed the solicitation so substantially that the agency was required to either cancel the solicitation or permit offerors to submit revised proposals" pursuant to 48 C.F.R. § 15.206(a) and (e).[24] To succeed in its protest, Comint needed to show it was prejudiced in order to establish it had standing to challenge the procurement. The required prejudice exists when a bidder shows that it had a "substantial chance" of receiving the contract.[25] The COFC held that Comint did not have a substantial chance of receiving the contract, and thus lacked standing, noting that "Comint's proposal 'ranked, at best, ninth based upon its Quality/Capability factor rating,' and that the awardees all obtained 'outstanding' ratings."[26] Comint appealed.

On appeal, the Federal Circuit first considered Comint's challenge to Amendment 5 of the solicitation. The Government argued in the COFC that Comint waived its right to challenge Amendment 5 "by failing to raise it until *after* the contract was awarded to other bidders."[27] The COFC agreed and dismissed Comint's protest for lack of standing, and the Federal Circuit affirmed.[28]

In its decision, the Federal Circuit relied on *Blue & Gold*, where it held that a party with the opportunity to object to the Government's terms containing a patent error, but that fails to do so prior to the close of bidding, "waives its ability to raise the same objection afterwards in a § 1491(b) action in the [COFC]."[29] Comint argued that *Blue & Gold* did not apply, as Comint did not have the opportunity to challenge Amendment 5 prior to the close of the bidding process because the amendment was adopted after the bidding closed.[30] Even so, the Federal Circuit held that the "reasoning of *Blue & Gold* applies to *all* situations in which the

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22. *Id.*
23. *See id.* (deeming the protest "untimely and lacking merit").
24. *Id.* at 1380–81; *see also* 48 C.F.R. § 15.206(a), (e) (2012).
25. *Comint Sys. Corp.*, 700 F.3d at 1381 (citing Joint Venture of Comint Sys. Corp. v. United States, 102 Fed. Cl. 235, 250–51 (2011), *aff'd sub nom. Comint Sys. Corp.*, 700 F.3d 1377).
26. *Id.* at 1381 (citing *Joint Venture of Comint Sys. Corp.*, 102 Fed. Cl. at 252).
27. *Id.* (emphasis added).
28. *Id.*
29. *Id.* at 1382 (quoting Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1315 (Fed. Cir. 2007)).
30. *Id.*

protesting party had the opportunity to challenge a solicitation before the award and failed to do so."[31] Furthermore, the court of appeals noted that Comint had the opportunity to challenge the solicitation before award, as contracting officers are required to "consider all protests . . . *whether protests are submitted before or after the award*."[32] In addition, if the party is unsuccessful in obtaining relief from the contracting officer, the Tucker Act specifically allows for pre-award challenges.[33] As the Federal Circuit noted, *Blue & Gold* supports the extension of the waiver rule to "all pre-award situations."[34] It explained in *Blue & Gold* that "[i]n the absence of a waiver rule, a contractor with knowledge of a solicitation defect could choose to stay silent . . . . If its [ ] proposal loses to another bidder, the contactor could then come forward with the defect to restart the bidding process, perhaps with increased knowledge of its competitors."[35] Thus, a waiver rule avoids costly "after-the-fact-litigation" and helps prevent contractors from taking advantage of the Government and other bidders.[36]

The Federal Circuit noted that it might not be "practicable" to bring a challenge prior to the award, so a challenge may be brought afterward.[37] However, where there is adequate time to do so, a disappointed party must challenge a solicitation containing a patent error or ambiguity prior to the contract award.[38] As the Federal Circuit pointed out, Comint did not claim to be unaware of the defect in Amendment 5; rather, Comint signed the amendment, thus "signal[ing] its agreement with its terms."[39] Moreover, Comint had plenty of time to file its protest objecting to the amendment.[40] The court explained that Comint sought to "restart the bidding process" by objecting to Amendment 5, which is "precisely what *Blue & Gold* forbids.[41]

31. *Id.* (emphasis added).
32. *Id.* (quoting 48 C.F.R. § 33.102(a) (2012)).
33. *Id.* ("The statute gives [COFC] 'jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency,' and further provides that [COFC] has jurisdiction 'without regard to whether suit is instituted before or after the contract is awarded.'" (quoting 28 U.S.C. § 1491(b)(1) (2006))).
34. *Id.*
35. *Id.* (quoting Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1314 (Fed. Cir. 2007)).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 1383.
41. *Id.* (citing Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1314 (Fed. Cir. 2007)).

The Federal Circuit then addressed Comint's ineligibility determination, upholding the COFC's finding that, because Comint's marginal Quality/Capability rating prohibited it from receiving an award, Comint lacked standing.[42] To determine whether Comint had a "substantial chance of securing the award," the Federal Circuit looked at whether Comint would have received an award but for the alleged errors.[43] The court noted that all three awardees were assigned "outstanding" ratings where Comint received a "marginal" rating; thus, Comint did not show that its rating was legally erroneous, nor did it contend that it could have received an award with its rating.[44]

The decision of the Federal Circuit in *Comint* extended the waiver principle of *Blue & Gold.* Thus, in cases where a bidder had the opportunity to challenge a solicitation prior to a contract award, but failed to do so, the bidder will have waived its right to challenge the solicitation. Accordingly, the waiver principle of *Blue & Gold* applies to all situations where a party had an opportunity to challenge an agency's procurement decision, but failed to do so.[45]

B. Systems Application & Technologies, Inc. v. United States

In *Systems Application & Technologies, Inc. v. United States*[46] the Federal Circuit upheld the COFC decision to deny the U.S. Army's motion to dismiss the complaint of Systems Application and Technologies, Inc., ("SA-TECH").[47] SA-TECH protested the Army's decision to engage in corrective action of its solicitation by cancelling its award to SA-TECH for aerial target flight and maintenance services.[48] Given the complicated nature of this protest, a comprehensive review of the factual background is provided here.[49]

In April 2010, the Army solicited proposals for a one-year base contract with four option years for aerial target flight operations and maintenance services at its installations.[50] The solicitation listed the

42. *Id.*
43. *Id.* (quoting Myers Investigative & Sec. Servs., Inc. v. United States, 275 F.3d 1366, 1370 (Fed. Cir. 2002)).
44. *Id.* at 1383–84 (concluding that the Agency, here, made it clear that a marginal rating is appropriate if a proposal contains one or more weaknesses, not offset by strengths).
45. Id. at 1383.
46. 691 F.3d 1374 (Fed. Cir. 2012).
47. *Id.* at 1377.
48. *Id.* at 1382.
49. The Federal Circuit reviewed and discussed only those facts that touched on the Army's jurisdictional arguments. *Id.*
50. *Id.* at 1378. At the time of the solicitation, the services were being provided by Kratos Defense & Security Solutions. *Id.*

three evaluation factors as Technical/Management, Past Performance, and Price/Cost.[51] Both Technical/Management and Price/Cost were "similarly weighted," but individually were "significantly more important" than Past Performance.[52] However, Past Performance and Technical/Management together were more important than Price/Cost.[53] In addition, the Technical/Management factor contained three subfactors, one of which included Labor; under this subfactor, the solicitation also stated that the contract would be subject to the Service Contract Act of 1965.[54] However, the Army later amended the solicitation to include a new Wage Determination that contained the collective bargaining agreement between Kratos Defense & Security Solutions, Inc. ("Kratos") and the International Association of Machinists and Aerospace Local Lodge 2515.[55]

The Army received a total of three proposals, including proposals from Kratos and SA-TECH.[56] The Army informed both Kratos and SA-TECH that their proposals fell in the competitive range, and requested final proposal revisions from them.[57] Despite noting difficulties in the Labor sub-factor, the Army rated SA-TECH as outstanding for all factors.[58] While Kratos also received outstanding ratings, the Army awarded the contract to SA-TECH because its proposal had price/cost advantages.[59] The Army then notified the offerors of its decision, which included SA-TECH's final price and ratings.[60] In response, Kratos filed a protest with GAO.

In the GAO protest, Kratos argued that the Army improperly added the new Wage Determination requirement to the solicitation without considering Kratos' compliance with the agreement, and further challenged the Army's rating of SA-TECH's Technical/Management factor.[61] Months later, Kratos filed a

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51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* This meant that pursuant to the Federal Acquisition Regulations (FAR), "successor contractors performing on contracts in excess of $2,500 for substantially the same services performed in the same locality must pay wages and fringe benefits . . . at least equal to those contained in any bona fide collective bargaining agreement entered into under the predecessor contract." *Id.* (quoting 22 C.F.R. 22.1002-3(a) (2006)).
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 1379 (citing Sys. Application & Tech., Inc. v. United States, 100 Fed. Cl. 687, 698 (2011), *aff'd*, 691 F.3d 1374).
60. *Id.*
61. *Id.* SA-TECH thus intervened in the protest at GAO. *Id.*

supplemental protest, arguing that the Army "converted the best value procurement into a lower price, technically acceptable evaluation."[62] In response, the GAO attorney informed both SA-TECH and Kratos that Kratos had a "straight forward argument" on the Army's unreasonable evaluation of the proposals.[63] Hence, he asked the Army whether it would "defend the protest or take corrective action."[64] SA-TECH responded and requested that the supplemental protest be dismissed due to its untimeliness and speculative nature. SA-TECH also questioned Kratos' showing of prejudice as Kratos was not next in line for the award.[65] Yet, GAO noted that the Army's treatment of SA-TECH appeared improper, and that GAO likely would sustain the protest.[66] In light of this, the Army sent a letter to GAO, Kratos, and SA-TECH stating that the agency would take corrective action, amend the solicitation, and request that Kratos' protest be dismissed.[67] GAO thus dismissed the protest based on the Army reopening the solicitation.[68]

SA-TECH then filed a protest in the COFC challenging the Army's corrective action as "arbitrary, capricious, and unreasonable" and "based on an improper and unreasonable GAO statement."[69] The COFC found that SA-TECH showed proper standing and ripeness, and that the Army's decision in taking corrective action was in fact "arbitrary, capricious, and an abuse of discretion."[70] Accordingly, the COFC granted SA-TECH's request for injunctive relief to prohibit the Army's corrective action from moving forward.[71] The Army appealed.[72]

The Federal Circuit first addressed the Army's attempt to narrow the scope of the Tucker Act's jurisdiction in section 1491(b)(1).[73] The Federal Circuit noted that the COFC "correctly observed" that section 1491(b)(1) covers a broad range of disputes that might arise

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62. *Id.* (citing *Sys. Application & Tech.*, 100 Fed. Cl. at 700).
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* (citing *Sys. Application & Tech.*, 100 Fed. Cl. at 702).
68. *Id.* at 1380. Kratos intervened, and after SA-TECH filed a motion for judgment on the administrative record, Kratos and the Army moved to dismiss the complaint and cross-moved for judgment on the record. The COFC denied the motions and found jurisdiction under 28 U.S.C. § 1491(b)(1) (2006). *Sys. Application & Tech.*, 691 F.3d at 1380.
69. *Sys. Application & Tech.*, 691 F.3d at 1380.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 1381.

during a procurement process.[74] Relying on *Resource Conservation Group, LLC v. United States*,[75] the Federal Circuit held "that once a party objects to a procurement, section 1491(b)(1) provides a broad grant of jurisdiction[,] because '[p]rocurement includes *all stages of the process of acquiring property or services*.'"[76] Accordingly, SA-TECH's challenge to the Army's corrective action is an "unambiguous objection 'to a solicitation' covered by the Tucker Act."[77]

Here, the Federal Circuit relied on its decision from 2011 in *Turner III*.[78] In that case, the Federal Circuit "made clear" that bid protest jurisdiction exists when an agency decides to engage in corrective action—even if the action had not been implemented yet.[79] Thus, the Federal Circuit held in *Turner III* that there is no jurisdictional bar for a bid protest brought by a contract awardee after the Army decided to terminate the contract and to re-compete a contract in light of a GAO recommendation.[80] Presented with similar facts here,[81] the court concluded that SA-TECH merely "attempted to enjoin the Government from terminating its contract"; this did not transform the case from a protest into a Contract Disputes Act claim, contrary to the Government's argument.[82] Accordingly, the COFC properly exercised its Tucker Act jurisdiction in addressing SA-TECH's protest.[83]

The Federal Circuit next addressed SA-TECH's standing in the protest. To meet the bid protest standing requirement, SA-TECH

74. *Id.* at 1380.

75. 597 F.3d 1238 (Fed. Cir. 2010).

76. *Sys. Application & Tech.*, 691 F.3d at 1381 (quoting *Res. Conservation Grp.*, 597 F.3d at 1244); *see also* Distributed Solutions, Inc. v. United States, 539 F.3d 1340, 1345 (Fed. Cir. 2008) (utilizing the definition of procurement in 41 U.S.C. § 403(2) (2006) to determine the scope of § 1491(b)(1)). Furthermore, the Federal Circuit noted that the Army did not show that SA-TECH's protest lacks connection to the procurement. *Sys. Application & Tech.*, 691 F.3d at 1381.

77. *Sys. Application & Tech.*, 691 F.3d at 1381 ("[COFC's] decision on the merits underscores that SA-TECH's allegations of procurement violations were not frivolous." (citing Sys. Application & Tech., Inc. v. United States, 100 Fed. Cl. 687, 719 (2011), *aff'd*, 691 F.3d 1374)).

78. *Sys. Application & Tech.*, 691 F.3d at 1381; *see also* Turner Constr. Co. v. United States (*Turner III*), 645 F.3d 1377 (Fed. Cir. 2011).

79. *Sys. Application & Tech.*, 691 F.3d at 1381 (citing *Turner III*, 645 F.3d at 1388); *see, e.g.*, Centech Grp. Inc. v. United States, 554 F.3d 1029, 1040 (Fed. Cir. 2009); ManTech Telecomms. & Info. Sys. Corp. v. United States, 49 Fed Cl. 57, 80 (2001), *aff'd per curiam*, 30 F. App'x 995 (Fed. Cir. 2002).

80. *Turner III*, 645 F.3d at 1385.

81. The Federal Circuit noted that the Army merely decided it would engage in a corrective action and terminate the contract with the awardee, SA-TECH. *Sys. Application & Tech.*, 691 F.3d at 1381.

82. *Id.* at 1381–82. This issue arose in *Turner III* as well, and the Federal Circuit there held that an injunctive relief request concerns COFC's equitable powers and does not implicate the Tucker Act jurisdiction matter. *Turner III*, 645 F.3d at 1388.

83. *Sys. Application & Tech.*, 691 F.3d at 1382.

had to establish that it was "an actual or prospective bidder" and that it had "the requisite direct economic interest" in the outcome of the procurement.[84] Whether a bidder possesses the requisite direct economic interest is dependent on whether the protest is pre-award or post-award.[85] Because SA-TECH protested the Army's decision to re-solicit proposals, SA-TECH's protest was a pre-award protest.[86] Accordingly, SA-TECH's standing depended on whether the Army's action resulted in a "non-trivial competitive injury [to SA-TECH] which can be addressed by judicial relief."[87]

Here, the Federal Circuit held that SA-TECH's protest asserted the required injury for standing. The court determined that SA-TECH's allegation that the agency essentially was requiring SA-TECH, arbitrarily, to win the same award twice was sufficient for standing purposes.[88] While the Army capriciously decided to take this action without adequate justification, the Federal Circuit was more disturbed by the fact that SA-TECH would have to re-compete for a contract after its price was made publicly known.[89] Indeed, offerors must accept some risk when they participate in the procurement. Yet, as the Federal Circuit noted, "[t]he risk of re-competing for a contract after revelation of one's price calculations to competitors, however, does not extend to a contract fairly competed and won on the first solicitation."[90] Furthermore, because "price was a crucial factor in making the original contract award[,]" SA-TECH would "unduly bear the burden" of re-competing with its prices known and competing against itself.[91] Thus, the Federal Circuit upheld the COFC's determination that SA-TECH showed the necessary injury and standing as an interested party in the protest.[92]

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84. *Id.* (citing Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1359 (Fed. Cir. 2009)).
85. *Id.* (citing *Weeks Marine*, 575 F.3d at 1361–62).
86. *Id.*
87. *Id.* (quoting *Weeks Marine*, 575 F.3d at 1362); *see also Weeks Marine*, 575 F.3d at 1361–62 (rejecting the proposition that the "substantial chance" requirement of post-award protest applies in pre-award protests).
88. *Sys. Application & Tech.*, 691 F.3d at 1382 ("[A]rbitrarily being required to win the same award twice . . . is certainly the sort of non-trivial competitive injury sufficient to support [a protestor's] standing to object to the corrective action." (alteration in original) (omission in original) (quoting CBY Design Builders v. United States, 105 Fed. Cl. 303, 337 (2012))).
89. *Id.* at 1383.
90. *Id.*
91. *Id.*; *see also* Bayfirst Solutions LLC v. United States, 104 Fed Cl. 493, 501 (2012) (finding that a protestor shows sufficient competitive injury when it loses an advantage through the Government's decision to re-solicit proposals).
92. *Sys. Application & Tech.*, 691 F.3d at 1383.

Finally, the Federal Circuit considered whether SA-TECH presented a ripe claim for standing.[93] Because a claim is not ripe if it is dependent on future events, the Army argued that SA-TECH had not challenged a final agency action.[94] The Federal Circuit, however, disagreed, explaining that the Army "publicized its decision to take corrective action" in its letter to GAO, because it "ha[d] determined that it is in its best interest to take corrective action."[95] Furthermore, the court also noted that if SA-TECH claims were not ripe until after the award, SA-TECH could never protest the amendment of the solicitation terms in the corrective action.[96] Even so, the Army also asserted that SA-TECH did not suffer the necessary hardship under the ordinary ripeness test.[97] The Federal Circuit pointed out, however, that the standard for ripeness requires a lesser showing of hardship than what is required to show irreparable harm to obtain injunctive relief.[98] SA-TECH showed that it would have to re-compete with its prices known to others—a competitive hardship.[99] Because this was an immediate and substantial impact of the corrective action, SA-TECH demonstrated that its claim was sufficiently ripe.[100]

The Federal Circuit used the opportunity in *SA-TECH* to acknowledge and emphasize its decision in *Turner III*. In *Turner III*, the Federal Circuit made clear that bid protest jurisdiction exists when an agency decides to take corrective action—a plaintiff need not wait until corrective action is fully implemented. Significantly, the court recognized that timing is of the essence in such a case, as a bidder must be able to challenge an agency's corrective action decision prior to the implementation of the action.

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93. *Id.* at 1384–85.

94. *Id.* at 1384.

95. *Id.*

96. *Id.* at 1384–85. As the Federal Circuit cited, this would defy the principle of *Blue & Gold*, which held that a party waives its ability to raise the same objection to the terms of a solicitation in the COFC when it fails to object prior to the close of the bidding process. *Id.* (citing Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313 (Fed. Cir. 2007)); *see also* Comint Sys. Corp. v. United States, 700 F.3d 1377, 1382–83 (Fed. Cir. 2012) (holding that *Blue & Gold* applies to all situations—not just prior to the close of the bidding process—in which the protesting party had the opportunity to challenge a solicitation before the award).

97. *Sys. Application & Tech.*, 691 F.3d at 1385.

98. *Id.* ("Withholding court consideration of an action causes hardship to the plaintiff where the complained-of conduct has an 'immediate and substantial impact on the plaintiff.'" (internal quotation marks omitted)).

99. *Id.*

100. *Id.*

C. Digitalis Education Solutions, Inc. v. United States

In *Digitalis Education Solutions, Inc. v. United States,*[101] the Federal Circuit upheld the trial court's dismissal holding that the rule of *Rex Service Corp.* applies to determine whether a bidder is an interested party with standing in a sole-source protest.[102] In 2009, the U.S. Department of Defense (DoD) conducted an unadvertised sole-source procurement from Science First for STARLAB analog planetariums to be used in schools overseen by DoD.[103] In 2010, DoD wanted to procure additional, digital planetariums, rather than analog ones.[104] Because it made this decision near the end of the fiscal year, DoD attempted to expedite the procurement.[105] On September 17, 2010, DoD posted its notice of intent to award a sole-source contract to Science First on www.fedbizopps.gov.[106] This notice indicated that any party seeking to challenge the award to Science First must do so no later than September 22, 2010.[107] In response to the notice, Sky Shan submitted a statement of capability within the response period.[108] DoD then asked Science First to provide additional specifications to be added to the notice.[109] DoD updated the notice to include these specifications, and responded to Sky Shan's submission by referencing the updated notice.[110]

On September 25, 2010, DoD awarded the contract to Science First.[111] Soon after learning about the contract, Digitalis Education Solutions, Inc. ("Digitalis") contacted a congressman and objected to the way the contract was awarded.[112] The congressman forwarded the complaint to DoD. DoD responded that because Digitalis failed to protest the award, DoD would not consider the objections.[113] Several months after the award, Digitalis objected to DoD for the first time, and subsequently filed its case in the COFC.[114]

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101. 664 F.3d 1380, 1382 (Fed. Cir. 2012).
102. *Id.* at 1382.
103. *Id.* at 1382–83. DoD justified this procurement by noting that its curricula were geared toward STARLAB. *Id.*
104. *Id.* at 1383.
105. *Id.*
106. *Id.* Before posting a notice of its intention to sole-source the contract, DoD discussed possible terms with Science First. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* The Government filed a motion to dismiss for lack of standing and a motion for judgment on the administrative record, and Digitalis filed a cross motion for judgment on the record. *Id.* at 1383–84.

Digitalis could not demonstrate prejudice, which is necessary for standing, because Digitalis did not have a substantial chance of winning the contract.[115] Thus, the COFC dismissed the case.[116] Additionally, Digitalis failed to review fedbizopps, and also failed to respond as required in the notice.[117] The COFC noted that even if DoD provided a longer response time, this would not change Digitalis' case—it "did not check fedbizopps for weeks."[118] Digitalis appealed.

Because the COFC dismissed the case for lack of standing, the Federal Circuit only addressed that issue. Here, the Federal Circuit relied on *Rex Service* to determine what constitutes an "interested party."[119] In *Rex Service*, the Federal Circuit defined an interested party as "an actual or prospective bidder whose direct economic interest would be affected by the award of the contract[;]" this gives a party standing to challenge an award.[120] Accordingly, Digitalis needed to show that it was an actual or prospective bidder, and had a direct economic interest, by demonstrating that it had a "substantial chance" of winning the contract.[121] Digitalis thus argued that DoD should have conducted a full and open competition instead of awarding a sole-source contract, and that if DoD did had conducted a competitive procurement, Digitalis would have had a substantial chance of winning the contract.[122] In addition, Digitalis argued that its failure to submit a statement of capability is irrelevant, and even if it was relevant, the period for submitting statements was "unreasonably short."[123]

The Government argued that Digitalis lacked standing as an interested party pursuant to the Federal Circuit's decision in *Rex Service*.[124] The Federal Circuit agreed.[125] Applying *Rex Service*, the appellate court held that "if a party does not bid during the bid period, it does not have standing regardless of any illegalities by the

115. *Id.* at 1384.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. Rex Serv. Corp. v. United States, 448 F.3d 1305, 1307–08 (Fed. Cir. 2006); Am. Fed'n of Gov't Emps. v. United States, 258 F. 3d 1294, 1302 (Fed. Cir. 2001) (construing interested party as "limited to actual or prospective bidders or offerors whose direct economic interest would be affected by the award of the contract or by failure to award the contract").
121. *Digitalis*, 664 F.3d at 1384.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 1385.

Government in the bid process."[126] Like Rex Service, Digitalis did not satisfy the test for standing, because "'in order to be eligible to protest, one who has not actually submitted an offer must be *expecting* to submit an offer prior to the closing date of the solicitation'" and that the opportunity to become a "'prospective bidder ends when the proposal period ends.'"[127] Because Digitalis did not submit a bid, it had no substantial chance in being awarded the bid.[128]

Although *Rex Service* involved a competitive, not a sole-source, procurement, the Federal Circuit, in *Digitalis*, took the opportunity to extend *Rex Service* to sole-source procurements, holding there was "no reason" to limit the rule to competitive procurements only.[129] The Federal Circuit noted that the COFC has, in fact, applied the *Rex Service* rule to protests involving sole-source procurements.[130] Accordingly, the Federal Circuit held that "in order to be an actual or prospective bidder, a party must submit a statement of capability during the prescribed period."[131] This is because "[f]ailure to do so . . . means that a party does not have the requisite direct economic interest because it cannot have a 'substantial chance' of convincing the government to hold a formal competition and subsequently bid on the contract."[132]

The Federal Circuit clarified, however, that its holding should not be read "as foreclosing challenges to the reasonableness of the procurement time period."[133] Digitalis argued, on the one hand, that due to the unreasonable short response period, it should be able to challenge the procurement despite it failing to file a statement.[134] The Government responded that a party may not challenge the reasonableness of the time given for the response period, unless it is so short that it was impossible to bid.[135] The Federal Circuit did not

126. *Id.* (quoting *Rex Serv.*, 448 F.3d at 1307–08). In *Rex Service*, Rex Service filed an objection to the request for proposal one day before the end of the period to submit proposals, and argued that the Government's violations of certain legalities prevented Rex Service from submitting a proposal. *Rex Serv.*, 448 F.3d at 1307–08.

127. *Digitalis*, 664 F.3d at 1385 (citing *Rex Serv.*, 448 F.3d at 1308).

128. *Id.* at 1385 (quoting MCI Telecomms. Corp. v. United States, 878 F.2d 362 (Fed. Cir. 1989)).

129. *Id.* The Federal Circuit reasoned that the notice of intent in sole-source procurements is "analogous" to a request for a proposal in competitive procurements. *Id.* This is because interested parties are invited to submit statements of capability to the Government to convince the Government that it should engage in a full competition instead. *Id.*

130. *Id.* (citing Infrastructure Def. Techs. v. United States, 81 Fed. Cl. 375, 386 (2008)).

131. *Id.*

132. *Id.* (citing *Rex Service*, 448 F.3d at 1308).

133. *Id.*

134. *Id.*

135. *Id.*

agree with the Government on this point.[136] Rather, the Federal Circuit concluded that "a proper inquiry is not whether it is possible for a party to submit a statement of capability during the time period, but whether it is reasonable to expect contractors to see a notice and respond."[137] Here, Sky Shan saw the notice and filed a statement; this suggests that the time period was not unreasonably short.[138] Nevertheless, because Digitalis did not check fedbizopps or notice the sole-source award to Science First for a number of days, the Federal Circuit did not decide whether the posting time was unreasonable.[139] In fact, the appeals court noted the COFC's holding on this point and observed that while "a twenty-day period would have certainly been reasonable, Digitalis still would have failed to file a statement of capability."[140] Thus, Digitalis did not have standing to challenge the time period given, and, accordingly, the Federal Circuit did not reach the question of whether five days is a reasonable time period.[141]

In light of the Federal Circuit's decision in *Digitalis*, the interested party standard from *Rex Service* now applies to both competitive and sole-source protests.

II. CDA CASES

A. Arctic Slope Native Ass'n v. Sebelius

In *Arctic Slope Native Ass'n v. Sebelius*,[142] the Federal Circuit decided whether, given Arctic Slope Native Association's ("ASNA") unique case, the statute of limitations should be equitably tolled.[143] The Civilian Board of Contract Appeals (CBCA) found equitable tolling was unavailable for ASNA's breach-of-contract claim under the Contract Disputes Act (CDA).[144] ASNA appealed, and the Federal Circuit reversed, holding that equitable tolling did apply because of the unique facts and extraordinary circumstances of ASNA's case.[145]

This case arose out of a long and complicated procedural history. ASNA contracted with the Department of Health and Human

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136. *Id.* at 1386.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*; *see* Digitalis Educ. Solutions, Inc. v. United States, 97 Fed. Cl. 89, 95 (2011), *aff'd*, 664 F.3d 1380.
141. *Digitalis*, 664 F.3d at 1385.
142. 699 F.3d 1289 (Fed. Cir. 2012).
143. *Id.* at 1294.
144. *Id.* at 1293.
145. *Id.* at 1298.

Services, Indian Health Services (IHS) in fiscal years 1996–1998 to operate a hospital in Barrow, Alaska.[146] ASNA presented its CDA claims arising out of the Government's refusal to pay support cost under the Indian Self Determination and Education Assistance Act (ISDA) to the contracting officer on September 30, 2005.[147] Almost a year later, ASNA filed its complaint with CBCA.[148]

The CBCA dismissed the complaint as barred by the six-year statute of limitations contained in section 605(a) of the CDA.[149] ASNA appealed the CBCA decision to the Federal Circuit, which held that equitable tolling is available for claims brought under section 605(a) of the CDA and remanded the case back to the CBCA "for a determination as to whether equitable tolling applied to ASNA."[150]

On remand, the CBCA found equitable tolling did not apply to ASNA's claims.[151] The CBCA found that ASNA had erroneously relied on a changing legal landscape[152] and did not pursue its rights diligently.[153] The CBCA also did not accept ASNA's argument that the special relationship between the Government and Indian tribes

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146. *Id.* at 1290–91.
147. *Id.* at 1290.
148. *Id.* at 1291, 1293.
149. Arctic Slope Native Ass'n v. Dep't of Health & Human Servs., CBCA 190-ISDA, 08-2 BCA ¶ 33,923, *aff'd in part, rev'd in part,* 699 F.3d 1289.
150. *Arctic Slope Native Ass'n,* 699 F.3d at 1293.
151. *Arctic Slope Native Ass'n,* CBCA 190-ISDA, 08-2 BCA ¶ 33,923.
152. Part of the complicated procedural history mentioned above is the legal landscape ASNA was operating in. The first case was a class action, in which ASNA was a class member, filed in the District Court for the District of New Mexico by Indian tribes seeking to recover the underpayment of contract support costs. Ramah Navajo Chapter v. Babbitt, 50 F. Supp. 2d 1091, 1094 (D.N.M. 1999). The court certified the class, holding that "it [was] not necessary that each member of the proposed class exhaust its administrative remedies under the Contract Disputes Act." *Arctic Slope Native Ass'n,* 699 F.3d at 1291 (emphasis omitted). The next case that arose was *Cherokee Nation v. United States,* 199 F.R.D. 357 (E.D. Okla. 2001), in which the court denied class certification because the claims were not typical among members since the contracts differed by tribe. *Id.* at 362. ASNA would have been included in the class as described, even though it had not yet presented claims to the contracting officer. *Arctic Slope Native Ass'n,* 699 F.3d at 1292. The plaintiffs appealed to the U.S. Supreme Court on the merits rather than the class certification issue, and the Court ruled without discussing how some tribes had already exhausted their administrative remedies and others had not. *See generally* Cherokee Nation v. Leavitt, 543 U.S. 631 (2005) (addressing the legal issues presented without raising concern regarding the tribes' class qualifications). Finally, the plaintiff in *Pueblo of Zuni v. United States,* 467 F. Supp. 2d 1099 (D.N.M. 2006), sought to certify a class of all tribes contracted with IHS under the ISDA since fiscal year 1993. *Id.* at 1105. The district court stayed the proceedings while *Cherokee* moved through the appellate process, but subsequently denied class certification based on the finding that "exhaustion under the CDA is mandatory and jurisdictional," *Id.* at 442–43.
153. *See Arctic Slope Native Ass'n,* 699 F.3d at 1294 ("According to the Majority, ASNA had a responsibility to investigate the applicable legal landscape in pursuing its claims and to make an independent and reasoned decision, rather than relying upon Judge Hanson's court order.").

deserved equitable tolling.[154] As a result, ASNA appealed for a second time to the Federal Circuit on the narrower issue of "whether the six-year statute of limitations should have been equitably tolled as to ASNA given the unique circumstances of the case."[155]

The Federal Circuit reversed the CBCA's decision denying equitable tolling and remanded the case to the CBCA for proceedings consistent with their opinion.[156] The central issues concerned whether ASNA had pursued its rights diligently despite failing to present its claims within the six-year statute of limitations based on its reliance on the *Ramah*, *Cherokee*, and *Zuni* litigation, and whether this reliance amounted to an "extraordinary circumstance" sufficient to warrant equitable tolling.[157] Rather than "sleeping on [its] rights," the Federal Circuit determined that ASNA "took reasonable, diligent, and appropriate action" in its response to the shifting legal landscape.[158] In reaching this conclusion, the court acknowledged that ASNA promptly presented claims to the contracting officer once the stay was lifted in *Zuni* and the Government indicated that it would challenge the class certification.[159] Furthermore, the court noted that the same judge in *Ramah*, the 1993 case involving similar circumstances and legal issues, governed the *Zuni* proceedings and thus ruled in an identical manner.[160] As a result, the court concluded that ASNA pursued its rights in an appropriate, timely manner.[161]

The Federal Circuit also recognized the importance of the special relationship between the Government and Indian tribes, especially under the ISDA.[162] The Federal Circuit found the result fair to the Government because "filing of the *Zuni* complaint put IHS on notice of the exact nature and scope of ASNA's claims."[163] Judge Bryson filed an adamant dissent arguing that ASNA should have presented its claims to a contracting officer before the six-year limitations period expired to qualify as reasonably diligent.[164] According to

154. *Id.*
155. *Id.*
156. *Id.* at 1298.
157. *Id.* at 1296.
158. *Id.* at 1297.
159. *Id.*
160. *Id.* at 1296–97.
161. *Id.*
162. *Id.* at 1297–98.
163. *Id.* at 1297.
164. *Id.* at 1301 (Bryson, J., dissenting).

Judge Bryson, there were no "extraordinary circumstances [that] stood in ASNA's way and prevented timely filing."[165]

Arctic Slope Native Ass'n is the first case in the Federal Circuit holding that the CDA's statute of limitations may be tolled. Contractors will likely try to argue for the tolling of the statute in the future; indeed, the COFC already has cited *Arctic Slope Native Ass'n* in a case under the Vaccine Act.[166] Part of the debate in *Arctic Slope Native Ass'n*, however, dealt with the special relationship between the Government and Indian tribes and tipped the balance in the tribes' favor. Without that relationship, a government contractor may have difficulty showing that equitable tolling is proper.

B. Tip Top Construction, Inc. v. Donahoe

In *Tip Top Construction, Inc. v. Donahoe*,[167] the Federal Circuit revisited its decision in *Bill Strong Enterprises, Inc. v. Shannon*,[168] to decide whether "costs arising from negotiations relating to the price of the changed work are recoverable in this case because they constituted part of the increased costs arising from the change directed by the Postal Service."[169] The Postal Service Board of Contract Appeals (PSBCA) awarded some of Tip Top Construction, Inc.'s ("Tip Top") requested contract administration costs, but denied others because the costs did not relate to "genuine contract administration" and instead focused on negotiations and getting Tip Top the best price.[170] Tip Top appealed the PSBCA decision based on two arguments.[171] First, Tip Top argued that the legal fees were recoverable as part of contract negotiations with the Postal Service. Second, according to Tip Top, "the Board's finding of insufficient evidence supporting certain consultant costs was not supported by substantial evidence."[172]

The Government, in contrast, defended the PSBCA's decision, arguing that the costs denied were claim preparation costs and therefore not recoverable, and the other costs were not supported by sufficient detail.[173] The Federal Circuit agreed with both of Tip Top's

165. *Id.* at 1301 (citations omitted) (quoting Holland v. Florida, 130 S. Ct. 2549, 2562 (2010)).
166. *E.g.*, Wax v. Sec'y of Health & Human Servs., 108 Fed. Cl. 538, 541 (2012).
167. 695 F.3d 1276 (Fed. Cir. 2012).
168. 49 F.3d 1541 (Fed. Cir. 1995).
169. *Tip Top*, 695 F.3d at 1282.
170. *Id.* at 1280 (citation omitted).
171. *Id.* at 1281.
172. *Id.*
173. *Id.* at 1281–82.

arguments, reversed the Board's ruling, and remanded the case to the PSBCA with the instruction to grant Tip Top's remaining costs.[174]

The original dispute arose out of an indefinite quantity job order contract awarded to Tip Top by the Postal Service on July 26, 2007.[175] The Postal Service issued a work order to replace the air conditioning system at the Main Post Office in the U.S. Virgin Islands in 2009,[176] and changed the refrigerant type to be used in the system.[177] Tip Top incurred $12,400 in preparation costs, extended overhead, and legal fees for negotiating and preparing the estimate for the refrigerant change that was submitted and approved by the Postal Service contracting officer.[178] After negotiations between Tip Top and the Postal Service for reimbursement failed, Tip Top filed a claim with the contracting officer, which was also denied.[179]

Tip Top appealed the denial to the PSBCA and sought to recover the preparation costs and legal fees.[180] However, the PSBCA granted Tip Top $2565 for its consultant fees up to the date the contracting officer approved the change proposal.[181] The Board rejected the rest of the costs, including the remainder of the consultant's cost and legal fees.[182] The PSBCA found that the negotiations after the contracting officer approved the change proposal, thus resulting in the consultant costs and legal fees, "had nothing to do with performance of the changed work or genuine contract administration and were solely directed at trying to convince the contracting officer to accept [Tip Top's] figure for the change and maximizing [Tip Top's] monetary recovery."[183] The PSBCA also noted that it was Tip Top's responsibility to account for the consultant's time, and because Tip Top did not indicate post-approval consultant costs, the PSBCA concluded that the consultant was most likely working on other projects.[184]

On appeal, the Federal Circuit reversed the PSBCA's ruling.[185] The Federal Circuit began by noting that the changes clause of the contract entitled Tip Top to an "equitable adjustment" for cost

174. *Id.* at 1285.
175. *Id.* at 1277.
176. *Id.* at 1278.
177. *Id.*
178. *Id.* at 1279.
179. *Id.* at 1279–80.
180. *Id.* at 1280.
181. *Tip Top Constr., Inc.*, PSBCA No. 6351, 11-1 BCA ¶ 34,726, *rev'd*, 695 F.3d 1276.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Tip Top*, 695 F.3d at 1277.

increases stemming from the Postal Service's requested change in refrigerant.[186] In addition, the Government conceded at oral argument that as long as the requisite showing is made to PSBCA, costs associated with price negotiation are recoverable.[187] The Federal Circuit agreed, finding that the dispute really came down to "whether the costs are classified as general contract administration costs or claim preparation costs."[188] The Federal Circuit then turned to its previous discussion in *Bill Strong* for guidance on the issue of how to classify costs.[189]

In *Bill Strong*, the Federal Circuit distinguished between costs connected with contract administration and costs regarding CDA claims.[190] The distinction rested on "the objective reason why the contractor incurred the cost."[191] If a contractor sustained the cost in the process of "materially furthering the negotiation process," the cost is valid even if the negotiations eventually collapse.[192] However, the cost is unallowable if it is incurred "to promote the prosecution of a CDA claim."[193]

With this framework in mind, the Federal Circuit turned to the facts of the case, and concluded that both the consultant's cost after the proposal met the test for allowable costs under *Bill Strong*.[194] The Federal Circuit reasoned that the issue of price was left open by the contracting officer in an initial letter, and Tip Top and the contracting officer were negotiating the price in order to avoid litigation.[195] Thus, because "[c]onsideration of price is a legitimate part of the change order process," the Federal Circuit reversed the PSBCA's decision to deny Tip Top's claims for these costs.[196]

The Federal Circuit next turned to the PSBCA's finding that Tip Top did not adequately specify its costs for the time period in question.[197] The Federal Circuit found the PSBCA's finding lacked

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186. *Id.* at 1282.
187. *Id.*
188. *Id.* at 1282–83.
189. *Id.* at 1283. It should be noted that in *Bill Strong*, the Federal Circuit was asked to determine what costs were recoverable under the FAR. Bill Strong Enters., Inc. v. Shannon, 49 F.3d 1541, 1550 (Fed. Cir. 1995). The FAR, however, did not apply in *Tip Top* because "Postal Service contracts are not governed by the FAR." *Tip Top*, 695 F.3d at 1281 n.1.
190. *Tip Top*, 695 F.3d at 1283 (citing *Bill Strong*, 49 F.3d at 1549).
191. *Bill Strong*, 49 F.3d at 1550.
192. *Id.*
193. *Id.*
194. *Tip Top*, 695 F.3d at 1284.
195. *Id.*
196. *Id.*
197. *Id.*

substantial evidence because Tip Top provided timesheets, billing records, and affidavits that were undisputed.[198]

Tip Top provides guidance for contractors trying to recover costs from the Government when the Government requests a change order. The Federal Circuit extended its holding in *Bill Strong* to contracts not covered by the Federal Acquisition Regulations (FAR), and bolstered the *Bill Strong* framework as the proper mode of analysis when determining what costs are recoverable by a contractor when the Government issues a change order.[199] *Tip Top* did not, however, provide additional clarity for distinguishing when consulting and legal costs constitute contract administration costs rather than costs promoting CDA claim prosecution. The test will continue to be a very fact intensive inquiry.[200]

Another clear implication of *Tip Top* is that contractors can recover costs associated with negotiations when price is the only thing being negotiated. From the Government's perspective, this appears to be a counterproductive rule: if the Government is ultimately going to be responsible for the contractor's cost of negotiating price, the Government will end up saving money by accepting a contractor's higher price quickly rather than making sure the Government gets the best price.

C. Bowers Investment Co. v. United States

In *Bowers Investment Co. v. United States*,[201] the Federal Circuit upheld the COFC's application of res judicata, affirming the trial court's dismissal of Bowers Investment Company, LLC's ("Bowers") claims against the Federal Aviation Administration (FAA) for nonpayment and underpayment of rent.[202]

The case arose out of a lease agreement between Bowers and the FAA for office and warehouse space.[203] After the contract was terminated, Bowers filed a claim with the contracting officer, claiming that the contract provided for "in arrears" payments and thus the FAA still owed the last month's rent.[204] The Government, however, argued that it had been making payments in advance rather

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198. *Id.* at 1284–85.

199. *See id.* at 1283–84 (finding that *Bill Strong* "provides guidance" on classifying costs under the present circumstances regarding change orders).

200. *See generally Unallowable Claims Costs vs. Allowable Contract Administration Costs: The Bill Strong Legacy*, 12 NASH & CIBINIC REP. ¶ 35 (June 1998) (discussing *Bill Strong* and its progeny).

201. 695 F.3d 1380 (Fed. Cir. 2012).

202. *Id.* at 1381.

203. *Id.* at 1382.

204. *Id.*

than "in arrears," and the contracting officer agreed.[205] Bowers appealed to the CBCA, and, during these proceedings, the FAA provided its rental payment records.[206] After this production showed a lack of rent payments for the first three months, Bowers attempted to amend its claims to obtain the first three months' rent.[207] After the CBCA denied Bowers' attempt to amend, Bowers signed and accepted the CBCA award as a "final satisfaction of its case."[208] Bowers then filed two more claims with the contracting officer for underpayment and unpaid rent under the lease.[209] The contracting officer denied the claims, and Bowers appealed to the COFC.[210]

The COFC found that it had jurisdiction, but dismissed Bowers' claims as precluded.[211] Bowers had argued that it did not bring all of its claims to the CBCA for two reasons. First, Bowers contended that it was not aware of the nonpayment and underpayment until the record production in the CBCA hearing. Second, Bowers maintained that it had received a large sum from the FAA around that time.[212] Although the COFC refused to grant the government's motion to dismiss for lack of jurisdiction based upon the Election Doctrine,[213] the COFC was "skeptical" of Bowers' assertions that it was unaware of the miscalculations, reasoning that a "commercial entity" should have recorded rental payments.[214] The COFC thus held that "the CBCA's final decision precluded litigation of these claims in the Court of Federal Claims."[215] Not happy with this result, Bowers appealed to the Federal Circuit.[216]

The Federal Circuit began its discussion with a review of the Election Doctrine under the CDA.[217] Bowers asserted that the claims before the COFC were "separate and distinct" from the claims decided by the CBCA, and thus the Election Doctrine did not

205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. Bowers Inv. Co. v. United States, 104 Fed. Cl. 246, 249 (2011), *aff'd*, 695 F.3d 1380.
212. *Id.* at 259–60.
213. *Bowers*, 695 F.3d at 1383 (discussing the trial court's reasoning that "that the claim for the final rental payment of September 2006 was the only rental claim that had been presented to the contracting officer in 2008, while the 2009 claim was for other underpayments or nonpayments of rent").
214. *Id.*
215. *Id.*
216. *Id.*
217. *See id.* ("[T]he contracting officer's decision may be appealed to either the appropriate board of contract appeals or the Court of Federal Claims, at the contractor's election." (citing 41 U.S.C. § 7104(a)–(b)(1) (2006))).

apply.[218] The COFC found this reasoning persuasive and held that it had jurisdiction to hear the claims; the Federal Circuit subsequently agreed.[219] The Federal Circuit, however, rejected Bowers' argument on appeal that the CBCA "chose to not address" the first three months' rent issue.[220] The Federal Circuit instead found the CBCA considered the argument about the first three months' rent, but did not grant the requested payment, expressing the same doubts as the COFC regarding Bowers' failure to raise the question of the unpaid rent to the CO.[221]

The Federal Circuit next turned to the issue of claim preclusion. Because Bowers' claims stemmed from the same contract and "raise[d] the same issue of payment of the rent provided in the Lease," the Federal Circuit agreed with the COFC that the claims at issue "arose from the same transactional facts" and should therefore be precluded.[222]

The Federal Circuit's holding demonstrates that claims can be distinct enough to avoid the application of the Election Doctrine, but not sufficiently distinct to avoid claim preclusion. The distinction is that while "the Election Doctrine focuses on the claim presented by the plaintiff to the contracting officer," claim preclusion extends not only to that claim but also those claims that *could have been* and *should have been raised* in the previous case.[223]

D. Parsons Global Services, Inc. ex rel. Odell Intern., Inc. v. McHugh

Illustrating the "jurisdictional pitfalls" of the CDA's claim process, *Parsons Global Services, Inc. ex rel. Odell Intern., Inc. v. McHugh*[224] elaborated upon the distinction between "routine" and "non-routine" requests for payments.[225] In *Parsons*, the prime contract underlying

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218. *Id.*
219. *Id.* at 1383–84.
220. *Id.* at 1384.
221. *Id.*
222. *Bowers*, 695 F.3d at 1384; *see* Philips/May Corp. v. United States, 524 F.3d 1264, 1272 (Fed. Cir. 2008) ("The presumption that claims arising out of the same contract constitute the same claim for res judicata purposes may be overcome by showing that the claims are unrelated."); Ammex, Inc. v. United States, 334 F.3d 1052, 1055 (Fed. Cir. 2003) (acknowledging that "the party asserting the bar must prove that: (1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first").
223. Bowers Inv. Co. v. United States, 104 Fed. Cl. 246, 249 (2011) (emphasis added), *aff'd*, 695 F.3d 1380.
224. 677 F.3d 1166 (Fed. Cir. 2012).
225. *See, e.g.*, Christopher E. Hale, *Avoiding "Embarrassment" in Contract Disputes Act Litigation: Routine vs. Non-Routine Requests for Payment*, GOV'T CONT.,

the dispute was an indefinite-delivery, indefinite-quantity contract between the Army and Parsons Global Services, Inc. ("Parsons").[226] Parsons then subcontracted with Odell Intern., Inc. ("Odell") and entered into a basic ordering agreement (the "subcontract"), which, after a later amendment, specified that Odell was entitled to compensation of 1.75% for overhead and general and administrative costs.[227] Even after the amendments, however, Odell continued, due to a billing error, to use a 75% mark-up in billing Parsons.[228]

Shortly after the Army terminated for convenience the Task Orders that Odell was assigned, Odell submitted to Parsons a memorandum with an attached invoice for the difference between the markup Odell had billed Parsons and the markup that it should have received according to the Defense Contract Audit Agency (DCAA).[229] Parsons disputed the amount.[230] At the same time, Parsons entered a termination settlement with the Army.[231] Once the amount owed Odell was settled, Parsons filed a claim for the amount from the Army.[232]

On appeal to the Armed Services Board of Contract Appeals (ASBCA), the Board found that Parsons had failed to submit a valid sponsored claim because the request for Odell's costs incurred under the subcontract were "routine" and, thus, could not constitute a claim under the CDA.[233] Accordingly, the Board granted the Government's motion to dismiss for lack of jurisdiction.[234]

Because the CDA does not define "claim," the Federal Circuit "evaluate[s] whether a particular request for payment amounts to a claim based on the FAR implementing the CDA, the language of the contract in dispute, and the facts of each case."[235] When evaluating whether requests constitute a claim, the Federal Circuit's analysis is divided, according to the FAR's definition of a claim,[236] into two

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INVESTIGATIONS & INT'L TRADE BLOG (May 14, 2012), http://www.governmentcontractslawblog.com/2012/05/articles/appeals/avoiding-embarrassment-in-contract-disputes-act-litigation-routine-vs-nonroutine-requests-for-payment.

226. *Parsons*, 677 F.3d at 1168.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 1169.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 1170.

235. *Id.* (citing James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1542 (Fed. Cir. 1996); Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc)).

236. Pursuant to FAR 2.101, "claim" is defined as follows:

> 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,

categories, depending upon whether the demand for payment is "routine" or "non-routine":

> As [the Federal Circuit], sitting en banc, explained in *Reflectone, Inc. v. Dalton,* if the request is "non-routine," all that is required is that "it be (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain"; the request does not need to be in dispute. If the request for payment is "routine," a pre-existing dispute is necessary for it to constitute a claim under the CDA.[237]

On appeal to the Federal Circuit, the parties agreed that jurisdiction over Parsons' claim turned on how the request was classified.[238] Parsons argued that the request was "non-routine" because the amount was not determined until two years after the prime contract was terminated.[239] In response, the Government argued that the request was "routine" before the contract was terminated and that the termination did not change its classification.[240]

The Federal Circuit sided with the Government and held that the payment request, even though it occurred after the prime contract was terminated, was "routine."[241] In reaching this conclusion, the court primarily relied upon the fact that the payment sought was "not a result of intervening unforeseen circumstances or Government action."[242] The Federal Circuit highlighted that the payment Parsons sought would have been appropriately accounted for in the invoices submitted during the contract's duration, if not for Odell's billing error, and both Odell and Parsons' failure to enforce the terms of their contract.[243] The court ultimately determined that Parsons' request was routine because it should have been submitted under the prime contract according to the expected progression of contract performance.[244]

> the adjustment or interpretation of contract terms, or other relief arising under or related to the contract.... *A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim.* The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

Parsons, 677 F.3d at 1170 (quoting FAR 2.101) (emphasis added in *Parsons*).

237. *Id.* (citations omitted).
238. *Id.* at 1171.
239. *Id.*
240. *Id.*
241. *Id.* at 1172.
242. *Id.* at 1171.
243. *Id.*
244. *Id.*

The Federal Circuit also rejected Parsons' argument that the request became non-routine when the task orders terminated because it had no other method to obtain payment[245] In conclusion, the Federal Circuit affirmed the Board's dismissal because the Board did not have jurisdiction over the routine payment request and there was no pre-existing dispute.[246]

In her dissent, Judge Newman explained that the majority erred in focusing the analysis of the term "routine" on the "mark-up obligation" that gave rise to the payment request, instead of recognizing that "[m]ajor billing errors are neither foreseen nor intended."[247] Judge Newman reasoned that the "CDA provides the Board with 'jurisdiction to decide any appeal from a contracting officer's decision.'"[248] Specifically, as the court in *Reflectone* held, "[a] demand for compensation for unforeseen or unintended circumstances cannot be characterized as 'routine.'"[249] Because "major billing errors are neither foreseen nor intended," the payment request was non-routine, according to the dissent.[250]

Moreover, Judge Newman lamented the "embarrassment" of lengthy litigation surrounding a conceded Government obligation[251] wherein "a simple correction to a billing error evolved into nearly four-years of litigation."[252] Judge Newman was highly critical of the Government counsel for presenting "creative arguments" based "on points that were not raised by contracting officers," that were "readily resolved or irrelevant,"[253] and that were representative of an accumulation "of creative excuses, that were neither raised by the contracting officers nor affected the Government's conceded obligation."[254] Judge Newman emphasized that the majority's opinion was contrary to the guiding principle of the DCAA, as well as to the "strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases."[255]

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245. *Id.* at 1172.
246. *Id.* at 1173.
247. *Id.* at 1174 (Newman, J., dissenting).
248. *Id.* at 1173.
249. *Id.* at 1174 (quoting Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1577 (Fed. Cir. 1995) (en banc)).
250. *Id.*
251. *Id.*
252. *Id.* at 1173.
253. *Id.* at 1174.
254. *Id.* at 1173.
255. *Id.* (quoting Immigration & Naturalization Serv. v. Abudu, 485 U.S. 94, 107 (1988)).

E. Minesen Co. v. McHugh

Minesen Co. v. McHugh[256] is a case with "far-reaching implications" for government contractors.[257] In *Minesen*, the Federal Circuit held that a government contractor may waive the statutory right under the CDA to appeal decisions of agency boards to the Federal Circuit.[258]

The Minesen Company ("Minesen") entered into a contract with the United States Army's Morale, Welfare, and Recreation Fund ("Fund")[259] to construct a lodging facility ("Inn") for travelling military personnel.[260] Of particular importance to the court's decision, the contract explicitly provided that, in the event of a dispute, the ASBCA's decision was final.[261] Ultimately, Minesen brought a certified claim against the Fund.[262] The contracting officer denied the claim and Minesen appealed to the ASBCA.[263] The ASCBA denied Minesen's summary judgment motion and granted the Fund's motion to dismiss on substantive grounds.[264] Minesen then appealed to the Federal Circuit.[265]

On appeal to the Federal Circuit, Minesen argued that the ASBCA's dismissal of the claim was improper based on the merits of

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256. 671 F.3d 1332 (Fed. Cir. 2012).

257. *See generally* Brian J. Whittaker, *Government Contractors Can Contractually Waive Right To Appeal Decisions of Agency Boards of Contract Appeals to the Federal Circuit Court of Appeals*, GOV'T CONTS. ALERT (April 27, 2012), http://www.nixonpeabody.com/files/146187_Government_Contracts_Alert_04_27_2012.pdf.

258. *Minesen*, 671 F.3d at 1338.

259. *Id.* at 1333. The Fund was defined in the contract as "a nonappropriated fund instrumentality (NAFI) of the United States." *Id.* at 1334. The contract further provided, "[t]he Government is not a party to this contract, and no funds appropriated by Congress are in any way obligated or can be obligated by virtue of any provision of this contract." *Id.* (internal quotation marks omitted).

260. *Id.* at 1333.

261. *Id.* at 1340.

262. *Id.* at 1334. As part of Minesen's consideration for the bargain, the Inn was designated as "government quarters" under the Joint Federal Travel Regulation (JFTR), which gave it special privileges. *Id.* After the JFTR was amended in 1997 and 1998, such that the benefit of these privileges was significantly altered, Minesen filed a certified claim with the contracting officer alleging that the Fund's acceptance of the JFTR amendments breached the contract. *Id.* at 1333–34. The contracting officer denied the claim, and Minesen then appealed the claims to the ASBCA. *Id.* at 1334. The ASBCA found that, although there was "no outright repudiation of the contract," the Fund breached the contract when it failed to fashion a remedy to the JFTR amendments. *Id.* The ASBCA remanded the case to the contracting officer to determine damages. After a delay, Minesen appealed and argued that the delay was a breach; the contract officer's denial of the claim was the basis for this appeal. *Id.* at 1335.

263. *Id.*

264. *Id.* at 1336.

265. *Id.* at 1335.

the case.[266] In response, the Fund argued that the court should not reach the merits for two reasons: (1) the Federal Circuit lacked jurisdiction because the CDA did not govern disputes regarding the Contract with the Fund, a nonappropriated fund instrumentality ("NAFI"); and (2) "Minesen waived any right to appeal to the Federal Circuit pursuant to the disputes clause of the Contract, which states that ASBCA decisions are final."[267]

The Federal Circuit in *Minesen* first refused to address whether the CDA governed contracts with NAFIs, explaining as follows: "Because the question of whether claims against NAFIs can be made pursuant to the CDA is complex post-*Slattery*, and because the question has a statutory provenance, we will assume jurisdiction for present purposes and proceed directly to the substance of the appellate waiver argument."[268] While courts are generally required to address jurisdictional issues first, that principle is limited to Article III jurisdiction, not statutory jurisdiction questions as was the case here.[269] Thus, whether the court's recent holding in *Slattery v. United States*[270] "eliminat[ed] the NAFI doctrine's applicability to the CDA also," remains to be seen.[271]

Next, the court analyzed the waiver issue. Minesen conceded that the terms of the contract purported to waive the right to appeal to the Federal Circuit, but argued that such a waiver provision was contrary to the CDA and its public policy and was therefore unenforceable.[272] The court, however, found that Minesen did not meet its burden of demonstrating that Congress intended to preclude such waivers in the CDA for two reasons.[273] First, the plain words of the CDA did not proscribe a contractual waiver of appeal rights. Second, the legislative history of the CDA actually indicated

266. *Id.* Specifically, Minesen argued that the contract officer's denial of the claim was erroneous because "it constitutes a new and distinct claim over that decided in the 2006 Decision." *Id.*

267. *Id.*

268. *Id.* at 1337.

269. *Id.* (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 95–97 (1998); Restoration Pres. Masonry, Inc. v. Grove Eur. Ltd., 325 F.3d 54, 59 (1st Cir. 2003)).

270. 635 F.3d 1298, 1301 (Fed. Cir. 2011) (en banc) (concluding that "Tucker Act jurisdiction does not depend on and is not limited by whether the government entity receives or draws upon appropriated funds").

271. *Minesen*, 671 F.3d at 1337.

272. *Id.*

273. *Id.* at 1338. The court noted that "[i]n order to conclude that Congress intended for the CDA to include protection against waiving appeals from the ASBCA to th[e Federal Circuit], that intention must be discernable from the text or the legislative history." *Id.* at 1337–38 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 705 (1945); McCall v. U.S. Postal Serv., 839 F.2d 664, 667 (Fed. Cir. 1988)).

that, contrary to Minesen's argument, the CDA was meant to encourage swift resolutions of contract disputes without litigation.[274] In sum, the court concluded that, "[h]aving agreed to simplify disputes by pursuing resolution under the terms of the Contract, Minesen should be held to its bargain as it does not conflict with—indeed it advances—statutory purposes."[275]

The court went further in its analysis and also rejected Minesen's argument that allowing such waivers "favor the government during contract negotiations."[276] The court first noted that extensive precedent has established that "if not otherwise prohibited by statute, [the Government] can enforce a voluntary contractual waiver with the same force as a private party, notwithstanding superior bargaining power."[277] Moreover, the court emphasized, "public policy is not *per se* offended when a sophisticated contractor knowingly and voluntarily agrees to an appellate waiver provision denying Federal Circuit review."[278]

The court declined to expand *Burnside-Ott Aviation Training Center v. Dalton*,[279] which held that parties could not contractually waive the right to appeal contracting officer decisions to the ASBCA, beyond those specific, narrow facts.[280] The court clarified that the CDA requires "at least one impartial review of [contracting officer] decisions," but does not require anything further.[281] The court explained: "Whereas the ASBCA is a neutral tribunal and not a representative of the agency, the [contracting officer] is unquestionably biased, permitting the government to 'commandeer the final decision on all disputes of fact arising under the contract' if its decisions remain unreviewable."[282] "An unwaivable right to ASBCA review" must now be distinguished from "optional review before the Federal Circuit."[283]

In dissent, Judge Bryson opined that the disputes resolution provision in the contract was unenforceable and authorized Minesen

274. *Id.* at 1338 (citing S. REP. NO. 95-1118 (1978); 124 CONG. REC. 31,645 (1978)).
275. *Id.* (citing *Mitsubishi Motors*, 473 U.S. at 628).
276. *Id.* at 1339.
277. *Id.* (citing Town of Newton v. Rumery, 480 U.S. 386, 392–94 (1987); Lynch v. United States, 292 U.S. 571, 579 (1934); Do-Well Mach. Shop, Inc. v. United States, 870 F.2d 637, 641 (Fed. Cir. 1989)).
278. *Id.* at 1340 (citing *Rumery*, 480 U.S. at 392–94).
279. 107 F.3d 854 (Fed. Cir. 1997).
280. *Minesen*, 671 F.3d at 1340 (citing *Burnside-Ott*, 107 F.3d 854).
281. *Id.*
282. *Id.*
283. *Id.* at 1340–41 (noting also that the CDA's legislative history supports this interpretation).

to appeal under the CDA on several grounds.[284] First, Judge Bryson stated that "Minesen [could] proceed under the CDA even if the Fund is considered a NAFI" because "[a]lthough *Slattery* did not address the NAFI doctrine in the context of the CDA, its holding applies equally to claims brought under that Act, because the reach of the CDA is tied to the waiver of sovereign immunity in the Tucker Act."[285]

Judge Bryson's strongest disagreement with the majority, however, was in regard to whether the waiver of Minesen's right to appeal was enforceable. In what the majority characterized as a "novel theory" that "was never briefed by Minesen,"[286] Judge Bryson opined that 41 U.S.C. § 7107(b), the standard of review provision of the CDA, "reveals the intent of Congress to permit review by this court of all government contract disputes brought under the CDA."[287]

> The CDA provides the exclusive remedy for all contract disputes that fall within its scope. It provides a right to judicial review of Board decisions and it prescribes particular standards of review that this court must adhere to "[n]otwithstanding any contract provision . . . to the contrary."[288]

Because the disputes clause in the contract precludes such review, Judge Bryson concluded that the provision conflicted with the CDA and, thus, was unenforceable.[289]

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284. *Id.* at 1343 (Bryson, J., dissenting). Because Judge Bryson opined that the court had jurisdiction, he also reached a discussion of the case's merits. *Id.* at 1349–50. He would have affirmed the ASBCA's decision because he found "[t]he Board did not abuse its discretion in determining that delay alone is insufficient to justify the initiation of a separate proceeding on a theory of total contract breach." *Id.* at 1350.

285. *Id.* at 1343–44 (citing Slattery v. United States, 635 F.3d 1298 (Fed. Cir. 2011)). Judge Bryson also relied on the language in the CDA as support: "The CDA is applicable to 'any express or implied contract (including those of the nonappropriated fund activities described in [the Tucker Act]) made by an executive agency. . . .'" *Id.* (citing 41 U.S.C. § 7102(a) (2006)). Moreover, Judge Bryson found that the Fund and other NAFIs "must be considered . . . 'executive agenc[ies]' for purposes of the CDA" and that "the term 'procurement' [in the CDA] does not bar a government contractor from proceeding under the CDA simply because the contracting agency does not use appropriated funds for the contract." *Id.* at 1344–45.

286. *Id.* at 1342 (majority opinion) (citing Singleton v. Wulff, 428 U.S. 106, 120 (1976)) (opining that the dissent's "novel theory" was not properly before the court because of the "well-established [rule] that federal appellate courts do not consider arguments not timely raised by the parties").

287. *Id.* at 1346 (Bryson, J., dissenting).

288. *Id.* (citations omitted). In support of his assertion that the language precluded waivers, Judge Bryson compared the language of the CDA and that of the Wunderlich Act, which precluded government contractors from waiving the right to appeal. *Id.* at 1346–48 (citing Pub.L. No. 83-356, 68 Stat. 81 (1954)). The CDA was intended to extend the options for a government contractor to appeal their claims, not "to diminish the statutory right government contractors previously held under the Wunderlich Act to obtain judicial review of agency boards." *Id.* at 1347.

289. *Id.* at 1346.

Furthermore, Judge Bryson disagreed with the majority's narrow interpretation of *Burnside-Ott*.[290] Judge Bryson agreed with Minesen that *Burnside-Ott* supported the argument that the parties cannot waive jurisdiction to hear appeals.[291] Most significantly, though, Judge Bryson emphasized that 41 U.S.C. § 7104(b)(1) provides that an appeal to the Federal Circuit "can be brought 'notwithstanding any contract provision . . . to the contrary.'"[292] He asserted that the majority's "decision in this case therefore create[d] an anomaly" because Minesen could have reached the Federal Circuit if it had pursued its claim directly in the COFC, rather than before the CBCA.[293]

> While the CDA provided for a "flexible system" that allows a claimant "to choose a forum according to . . . the degree of due process desired . . . balanced by the time and expense considered appropriate for the case," it was important to the statutory system that judicial review was available through either route.[294]

F. DIRECTV Group, Inc. v. United States

In *DIRECTV Group, Inc. v. United States*,[295] the Federal Circuit determined that a segment closing adjustment made after the sale of a business unit, as required by the original Cost Accounting Standards (CAS), should be based on the assets and liabilities associated with the entire segment.[296] Furthermore, the court held that the contractor could make any necessary payment via cost reductions realized by the Government after a transfer of surplus assets to the successor contractor.[297] Judge Gajarsa concurred in part and dissented in part.[298]

In this case, the Federal Circuit again addressed issues relating to the interpretation and application of CAS regulations regarding pension costs attributable to the Government from defined-benefit contribution plans.[299] Here, DIRECTV Group, Inc. ("DIRECTV")

290. *Id.* at 1348–49 (citing Burnside-Ott Aviation Training Ctr. v. Dalton, 107 F.3d 854, 858–59 (Fed. Cir. 1997)).
291. *Id.* at 1349.
292. *Id.*
293. *Id.*
294. *Id.*
295. 670 F.3d 1370 (Fed. Cir. 2012) (per curiam).
296. *Id.* at 1379.
297. *Id.* at 1375–77.
298. *Id.* at 1379.
299. *Id.* at 1372; *see, e.g.*, Gates v. Raytheon Co., 584 F.3d 1062, 1069–70 (Fed. Cir. 2009) (finding that a contractor is required to pay compound interest on monies owed due to a violation of the CAS); Eastman Kodak Co. v. United States, 317 F.3d 1377, 1383 (Fed. Cir. 2003) (affirming the ASBCA's decision that costs relating to

sold its two remaining defense business units to Raytheon Company ("Raytheon") and The Boeing Company ("Boeing"), respectively.[300] DIRECTV transferred more pension assets than liabilities to Raytheon, which resulted in a transfer of $2,464,626,589 surplus pension assets.[301] Similarly, DIRECTV's sale to Boeing resulted in a transfer of $806,586,825 in surplus pension assets.[302] The Government objected to these transactions, and, after DIRECTV provided a segment closing calculation for each of the sales, the Government issued two separate final decisions demanding payment for DIRECTV's noncompliance with CAS 413.50(c).[303] DIRECTV appealed the final decisions to the Court of Federal Claims, arguing that it did not owe the Government a segment closing adjustment for either sale.[304] The Government counterclaimed, seeking payment for the segment closing adjustments.[305]

The trial court granted DIRECTV's motion for summary judgment, finding that original CAS 413 requires that a segment closing adjustment be made on the assets and liabilities associated with the entire segment, including the assets and liabilities transferred to the buyer.[306] The trial court also rejected the Government's argument that, absent agreement, DIRECTV could not satisfy its CAS 413 obligations through a transfer of excess pension assets to the successor contractor that would result in cost reductions for the Government.[307] Specifically, the trial court found that the Allowable Cost and Payment clause[308] and the Credits provision[309] did not bar

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overfunded pension plans are not allocable to the Government); Allegheny Teledyne Inc. v. United States, 316 F.3d 1366, 1374–75, 1381, 1383–84 (Fed. Cir. 2003) (determining that a sale of a division constituted a segment closing despite continued operations, that a contractor is not entitled to an equitable adjustment for purposes of complying with the segment closing provisions, and that the Government can only recover pension costs it actually reimbursed); Teledyne Cont'l Motors v. United States, 906 F.2d 1579, 1580, 1582 (Fed. Cir. 1990) (dismissing the appeal for lack of jurisdiction because the contracting officer did not issue a final decision regarding the contractor's liability); United States v. Boeing Co., 802 F.2d 1390, 1395–96 (Fed. Cir. 1986) (finding that the CAS regulations governing the determination and measurement of pension costs controlled over regulations issued by the Department of Defense).

300. *DIRECTV Grp.*, 670 F.3d at 1373.
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.* at 1374.
306. *Id.*
307. *Id.*
308. 48 C.F.R. § 52.216-7(h)(2) (2012).
309. *Id.* § 31.201-5.

DIRECTV from receiving credit for cost reductions realized through Raytheon or Boeing.[310]

On appeal, the Government argued that the trial court erred by including the assets and liabilities transferred to the buyers in the segment closing adjustment calculation, and that the FAR required DIRECTV to make a payment to the Government, rather than provide for cost reductions at the hands of successor contractors.[311] In a per curiam decision, the Federal Circuit affirmed the trial court's decision.[312]

The Federal Circuit reviewed the language of the CAS provision at issue, original CAS 413.50(c)(12), and determined that the provision used the word "segment" nine times, noting that on eight of those nine occasions, the "word 'segment' is preceded by the definite article 'the,' and none is modified by language suggesting less than a full segment."[313] Furthermore, the court recognized that a later revision of CAS 413 specifically mandated that a segment closing adjustment must be calculated based upon the assets and liabilities "remaining with the contractor."[314] The court "presume[d] that when the [Cost Accounting and Standards Board] acted to make this change, it meant for the amendment to have real and substantial effect."[315] Therefore, the court affirmed the trial court's determination that an original CAS 413.50(c)(12) segment closing adjustment must be based on the assets and liabilities of the segment, not just those assets and liabilities that remained with the seller.[316]

The Federal Circuit then addressed the Government's argument that provisions in the FAR, specifically the Allowable Cost and Payment clause and the Credits provision, require DIRECTV to pay any segment closing adjustment by a "'cost reduction or by cash refund' that originates with DIRECTV, not a successor contractor."[317] Like the trial court, the Federal Circuit rejected this argument, finding that "the Credits Clause allows for payment by way of cost reductions that occur due to the transfer of pension assets to a successor contractor."[318] The court affirmed, concluding that the

310. *DIRECTV Grp.*, 670 F.3d at 1374.
311. *Id.* at 1375–76.
312. *Id.* at 1372.
313. *Id.* at 1375.
314. *Id.* at 1376.
315. *Id.* (citing Stone v. INS, 514 U.S. 386, 397 (1995)); *see Stone*, 514 U.S. at 397 ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").
316. *DIRECTV Grp.*, 670 F.3d at 1376.
317. *Id.* at 1377.
318. *Id.* at 1377–78.

"Court of Federal Claims correctly determined that DIRECTV's segment closing obligations could be satisfied by the cost savings realized by the Government in the successor contracts."[319]

Judge Gajarsa concurred-in-part and dissented-in-part. Specifically, he disagreed with the majority's conclusion regarding the method by which a contractor can satisfy its segment closing obligations.[320] He initially determined that summary judgment was not appropriate due to the lack of any evidence that "the Government agreed to the cost reductions instead of a refund."[321] Next, he concluded that the majority improperly read the Credits provision to allow for payment via a cost reduction by a successor contractor and ignored the plain language of 48 C.F.R. § 3.205-6(j)(4), which states that when "[pension] assets are constructively received by it for any reason, *the contractor* shall make a refund or give a credit to the Government for its equitable share."[322] Finally, he argued that DIRECTV should be held to its contracts, wherein the "Government contracted for specific goods and services from a specific party, in exchange for payment of costs according to a specified formula."[323]

Because this case deals with the Original CAS 413, which was updated in 1995, it is likely that this is the last time the Federal Circuit will face the issues raised here.

III. IMPLIED CONTRACTS AND TAKINGS CASES

A. Scott Timber Co. v. United States

In *Scott Timber Co. v. United States*,[324] the Federal Circuit addressed allegations that the Government, acting through the United States Forest Service ("Forest Service"), breached three timber sale contracts located on the Umpqua National Forest in the Pacific Northwest.[325] The trial court found that the Forest Service breached the implied duty of good faith and fair dealing, and awarded damages to both Scott Timber Co. ("Scott Timber") and its sister corporation, Roseburg Forest Products ("Roseburg").[326] The Government appealed, and the Federal Circuit reversed, with Judge

319. *Id.* at 1379.
320. *Id.* (Gajarsa, J., concurring-in-part and dissenting-in-part).
321. *Id.* at 1384.
322. *Id.* at 1385 (quoting 48 C.F.R. § 31.205-6(j)(4) (1990)).
323. *Id.* at 1386.
324. 692 F.3d 1365 (Fed. Cir. 2012).
325. *Id.* at 1368.
326. *Id.* at 1370–71.

Wallach dissenting.[327] This case is noteworthy largely because of the ongoing debate regarding the appropriate standard for determining a breach of the implied duty of good faith and fair dealing.

Ahead of the October 1998 auction for the three timber sale areas, the Forest Service informed "prospective bidders that then-current environmental litigation might cause the upcoming sale to be delayed."[328] The Forest Service awarded the three timber sale contracts at issue on July 8, 1999.[329] Each of the three timber sale contracts included provision CT6.01, which provided for suspension of the contracts to, among other things, "prevent serious environmental degradation or resource damage," or "comply with a court order, issued by a court of competent jurisdiction."[330] Provision CT6.01 provided for the recovery of out-of-pocket expenses incurred as a result of any interruption or delay,[331] but specifically prohibited recovery of "lost profits, attorney's fees, replacement cost of timber, or any other anticipatory losses."[332]

At the time of contract award, environmental groups had sued the Forest Service, alleging that its interpretation of the 1994 Northwest Forest Plan violated both the Plan and various environmental statutes by failing to conduct wildlife surveys prior to awarding certain timber sales, including the sales at issue.[333] The district court that heard the environmental case rejected the Forest Service's interpretation of the Plan and eventually expanded a preliminary injunction to prohibit operations pertaining to the timber sales at issue.[334] The Forest Service suspended operations on Scott Timber's three sales on August 31, 1999.[335] The district court dismissed the case in December of 1999 because the parties agreed that the Forest Service would continue the suspensions until the wildlife surveys were completed.[336] The district court ordered the voluntary dismissal of the claims "'subject only to reinstatement for enforcement against material breach' of the settlement agreement."[337] The Forest Service began the wildlife surveys in September 1999, and completed the surveys for

327. *Id.* at 1371, 1373, 1379.
328. *Id.* at 1368.
329. *Id.*
330. *Id.*
331. *Id.* at 1369.
332. *Id.*
333. *Id.*
334. *Id.* at 1369–70.
335. *Id.* at 1370.
336. *Id.*
337. *Id.*

two of the three timber sale areas in the fall of 2000.[338] Another lawsuit, however, challenged the environmental assessment that supported timber harvesting on these two sale areas and the Forest Service continued the suspensions of those sales through June 9, 2003.[339] The Forest Service completed surveys on the third sale area and lifted that suspension on June 11, 2002.[340] Scott Timber ultimately harvested all of the timber contemplated by the three timber sale contracts.[341]

The trial court found that the Forest Service breached the implied duty of good faith and fair dealing by awarding three timber sale contracts to Scott Timber without putting the company on notice that ongoing environmental litigation presented risks to the contract, and by unreasonably delaying the completion of wildlife surveys on the three timber sale areas.[342] The trial court awarded damages to Scott Timber for lost profits and increased costs, and also awarded nearly $7 million in damages to Scott Timber's sister corporation, Roseburg, pursuant to a pass-through claim.[343]

The Federal Circuit reversed the trial court's decision. The court held that the Forest Service "could not have breached the implied duty of good faith and fair dealing by its pre-award conduct because the covenant did not exist until the contract was signed."[344] The court rejected Scott Timber's attempt to sustain the trial court's decision on the basis of the superior knowledge doctrine, finding that "the [G]overnment satisfied any duty it had to disclose the pending litigation to Scott."[345] The court also rejected Scott Timber's claim that the suspensions were unauthorized after the district court's dismissal of the case in December of 1999, finding that, although the district court dismissed the case, it maintained jurisdiction for enforcement purposes and that the agreement as such "was the equivalent of a 'court order' within the suspension clause of the contracts."[346]

In a move that sparked some controversy, the Federal Circuit next examined whether the Forest Service unreasonably delayed the

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338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.* at 1370–71.
343. *Id.* at 1371.
344. *Id.* at 1372 ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and in its enforcement." (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981))).
345. *Id.* at 1373.
346. *Id.* at 1374.

completion of the required wildlife surveys, and found that it had not.[347] The court analyzed the Forest Service's actions pursuant to the standard announced in *Precision Pine & Timber, Inc. v. United States*[348]—namely, whether the Forest Service's actions were specifically targeted to re-appropriate a benefit guaranteed by the contracts.[349] The court found that the Forest Service did not specifically target Scott Timber because "there [was] no evidence that any delays in completing the surveys were incurred 'for the purpose of delaying or hampering [Scott's] contracts.'"[350] Furthermore, the "suspension clauses expressly qualified Scott's bargained-for harvesting rights, and uninterrupted performance cannot be considered a 'benefit guaranteed by the contracts.'"[351] The Federal Circuit distinguished its prior decision in *Scott Timber Co. v. United States*[352] (*Scott I*), finding that the two cases are "easily reconcilable"[353] because the suspension in *Scott I* invoked the "serious environmental degradation" provision of CT6.01, not the "court order" provision.[354] The court determined that the "court order" provision does not limit the court order to a reasonable period of time.[355] The court found it significant that "the obligation to comply with the injunction is not owed to the timber company but to the court that issued the injunction and the party that sought the injunction."[356] Because the Forest Service did not specifically target Scott Timber to re-appropriate a benefit guaranteed by the contracts, the Federal Circuit reversed the trial court's finding that the Forest Service breached the implied duty of good faith and fair dealing by delaying the completion of the wildlife surveys.[357]

Turning to the question of damages, the Federal Circuit determined that Scott Timber could not recover the lost profits of its sister corporation, Roseburg, pursuant to a pass-through claim because the timber sale contracts do not require the purchaser to process the timber domestically.[358] The court determined that the "Use of Timber" provision, which the trial court relied upon, "merely

347. *Id.* at 1374–76.
348. 596 F.3d 817 (Fed. Cir. 2010).
349. *Scott Timber*, 692 F.3d at 1374.
350. *Id.* at 1374–75 (quoting *Precision Pine & Timber*, 596 F.3d at 830).
351. *Id.* at 1375 (quoting *Precision Pine & Timber*, 596 F.3d at 830).
352. 333 F.3d 1358 (Fed. Cir. 2003).
353. *Scott Timber*, 692 F.3d at 1375.
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.* at 1375–76.
358. *Id.* at 1376–77.

ensured compliance with export laws that require processing to be done domestically."[359] In the absence of a domestic processing requirement, the court found that "Roseburg cannot be considered a subcontractor for the purposes of th[e] contracts."[360] However, the court reasoned that even if Roseburg were a subcontractor, Scott Timber's pass-through claim would fail because Scott Timber's agreement with Roseburg was a "best efforts" contract, which Scott Timber did not breach by ceasing operations during the suspensions.[361] The Federal Circuit reversed the trial court's award of $6,771,397 to Scott Timber for the alleged losses incurred by Roseburg.[362]

The court also reversed the $95,703 damage award to Scott Timber for lost profits and replacement timber.[363] The court held that Scott Timber failed to establish lost profits and could not recover the cost of replacement timber because it elected to treat the suspensions as partial, rather than total, breaches.[364]

In a dissenting opinion, Judge Wallach argued that the court's decisions in *Scott I* and *Precision Pine & Timber* are irreconcilable and recommended that the court hear the case en banc to resolve the conflict, or to apply the reasoning from *Scott I*.[365] He noted that *Scott I*, "*albeit sub silentio,* fully addressed the duty of good faith and fair dealing."[366] Although Scott Timber sought both a panel rehearing and rehearing en banc, the court denied its requests on February 22, 2013.[367]

B. Kam-Almaz v. United States

In *Kam-Almaz v. United States,*[368] the Federal Circuit was faced with deciding whether a United States citizen whose computer equipment was seized at the border and then damaged during the detention had stated an implied-in-fact contract claim and a Fifth Amendment takings claim.[369] The Federal Circuit held that claims had not been stated as a matter of law, with Judge Newman dissenting.[370]

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359. *Id.* at 1377.
360. *Id.*
361. *Id.*
362. *Id.* at 1378.
363. *Id.*
364. *Id.*
365. *Id.* at 1379 (Wallach, J. dissenting).
366. *Id.*
367. Scott Timber Co. v. United States, 499 F. App'x 973 (Fed. Cir. 2013) (en banc) (per curiam).
368. 682 F.3d 1364 (Fed. Cir. 2012).
369. *Id.* at 1367.
370. *Id.* at 1372.

The facts of *Kam-Almaz* are straightforward. Mr. Kam-Almaz was a citizen returning home from overseas travel at the time of the incident.[371] Upon arriving in the United States, an agent with Immigration and Customs Enforcement (ICE) detained Mr. Kam-Almaz, seizing his laptop and two flash drives.[372] During detention, the laptop's hard drive failed, destroying much of Mr. Kam-Almaz's business software.[373] Some ten weeks after its seizure, the laptop was returned to Mr. Kam-Almaz.[374]

Mr. Kam-Almaz sued in the COFC alleging breach of an implied-in-fact contract.[375] He later amended his complaint to assert a takings claim.[376] The Government moved to dismiss Mr. Kam-Almaz's claims.[377] The trial court granted the Government's motion, holding that the implied-in-fact contract claim failed to state a claim upon which relief could be granted.[378] Specifically, the trial court concluded that the complaint failed to allege facts sufficient to support a claim.[379] The trial court also held that the takings claim failed to state claim because property taken pursuant to the Government's police power is not taken for public use within the Fifth Amendment's takings clause.[380]

The Federal Circuit affirmed the trial court's decision.[381] With respect to the implied-in-fact contract claim, the court agreed with the Government that Mr. Kam-Almaz failed to allege sufficient facts to plausibly suggest a breach of an implied-in-fact bailment contract.[382] Specifically, the Federal Circuit concluded that Mr. Kam-Almaz failed to allege the requirements of a bailment, including that the computer equipment was voluntarily delivered to ICE.[383] Instead, Mr. Kam-Almaz repeatedly alleged that the equipment was "involuntarily 'seized.'"[384]

The Federal Circuit recognized an additional deficiency in the complaint, namely that "[t]he complaint further fails to allege facts indicating the mutual intent required for an implied-in-fact bailment

371. *Id.* at 1366.
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.* at 1367.
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.* at 1372.
382. *Id.* at 1369.
383. *Id.*
384. *Id.*

contract."[385] The court agreed with the trial court's finding that the "purely unilateral act of seizing a person's personal property does not evidence intent to enter into a bailment contract."[386] The Federal Circuit rejected Mr. Kam-Almaz's arguments that the Government's various statements supported his allegations regarding the existence of an implied-in-fact contract, holding that these "d[id] not evidence the government's intent to enter into an enforceable implied-in-fact contract."[387]

Finally, the Federal Circuit rejected the argument that the trial court disregarded Supreme Court and circuit precedent that allows for the possibility of alleging an implied-in-fact contract.[388] The Federal Circuit explained that this precedent simply stands for the proposition that a party may conceivably allege the existence of such a contract when property is detained by customs officials.[389] But in this case, the court explained, Mr. Kam-Almaz's complaint simply failed to allege sufficient facts to state a claim.[390]

Turning to the takings claim, the Federal Circuit agreed that the trial court possessed jurisdiction over this claim.[391] While Mr. Kam-Almaz alleged in his complaint that he suffered "an unjust and unlawful taking of his property," (and to bring a takings claim, the seizure must be lawful), the court interpreted this to mean that the Government's seizure, although authorized, was compensable.[392] The court, however, concluded that Mr. Kam-Almaz failed to state a takings claim.[393] The court explained that its precedent makes clear that "[p]roperty seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause."[394] In so holding, the court reiterated that "[c]ustoms officers unquestionably have the authority to search and seize property at our nation's borders."[395]

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385. *Id.* (citing Alde, S.A. v. United States, 28 Fed. Cl. 26, 30 (1993); Llamera v. United States, 15 Cl. Ct. 593, 597 (1988)).
386. *Id.* (quoting Kam-Almaz v. United States, 96 Fed. Cl. 84, 86 (2011)).
387. *Id.* at 1369.
388. *Id.* at 1370 (citing Kosak v. United States, 465 U.S. 848 (1984); Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980) (per curiam); Acadia Tech., Inc. v. United States, 458 F.3d 1327 (Fed. Cir. 2006)).
389. *Id.*
390. *Id.*
391. *Id.* at 1371.
392. *Id.*
393. *Id.*
394. *Id.* (quoting AmeriSource Corp. v. United States, 525 F.3d 1149, 1153 (Fed. Cir. 2008)).
395. *Id.* at 1372 (citing 19 C.F.R. §§ 162.6, 162.21 (2012)).

Judge Newman authored a dissenting opinion, concluding that the majority's decision conflicts with the Supreme Court's decisions in *Kosak* and *Hatzlachh*, which held that the United States may be liable for breach of an implied-in-fact contract when it loses goods being held following their seizure.[396] She further argued that Mr. Kam-Almaz had stated a takings claim because, when the Government in the performance of its police powers injures an innocent person, that injury should be "borne by the public as a whole."[397] Finally, Judge Newman appeared swayed by the argument that Mr. Kam-Almaz would have no available forum to address his claims and that the majority decision effectively precluded him from accessing the courts.[398]

While the case is straightforward, its implications are significant. A holding against the Government could have opened the courtroom doors to numerous implied-in-fact or takings claims based on ICE (or other government agency) seizures.

IV. OTHER TUCKER ACT CASES

A. FloorPro, Inc. v. United States

FloorPro, Inc. v. United States[399] is a case that involved terrible facts for the Government, although the law was squarely on the Government's side.[400] Indeed, this case illustrates the not-uncommon problem of a trial court (or, in this case, multiple tribunals) all but inducing a claimant to continue litigating, only to have the proverbial rug finally pulled out from that party at the end of the day.[401]

FloorPro's litigation saga began in 2003 before the ASBCA.[402] FloorPro was a subcontractor to a construction company, which in turn had a prime contract with the Navy for the installation of floor

396. *Id.* at 1374 (Newman, J., dissenting) (citing Kosak v. United States, 465 U.S. 848 (1984); Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980) (per curiam)).
397. *Id.* at 1375–76.
398. *Id.* at 1376–77 (quoting Armstrong v. United States, 364, U.S. 46–49, 80 (1960)).
399. 680 F.3d 1377 (Fed. Cir. 2012).
400. *Id.* at 1379–81.
401. *See, e.g.*, Lublin Corp. v. United States, 84 Fed. Cl. 678 (2008) (denying the Government's motion to dismiss or, in the alternative, for summary judgment); Lublin Corp. v. United States, 98 Fed. Cl. 53 (2011) (denying the Government's motion for summary judgment, and concluding that "in the court's view, the circumstantial evidence here—particularly when viewed, as it must be, in the light most favorable to plaintiff—is adequate to create genuine questions of material fact suitable only for resolution at trial"); Lublin Corp v. United States, 106 Fed. Cl. 669 (2012) ("The court finds that plaintiff has not proven that any contract it supposedly had with HUD was breached.").
402. *FloorPro*, 680 F.3d at 1379–80 (discussing FloorPro, Inc., ASBCA No. 54143, 07-2 BCA ¶ 33,615).

coating in several warehouse bays at a military base.[403] In April 2002, FloorPro contacted the Navy's contracting officer to complain that the prime contractor had not paid FloorPro.[404] The Navy and the prime contractor thereafter executed a contract modification providing that the Defense Finance and Accounting Service (DFAS) would issue a hard-copy check payable to both the prime contractor and FloorPro.[405] The modification also provided that the Navy would send the check directly to FloorPro.[406]

Despite the modification, DFAS mistakenly paid the prime contractor directly via an electronic fund transfer.[407] Although FloorPro wrote to the contracting officer raising concerns about the whereabouts of the payment, the Navy responded that the Government was not in privity of contract with FloorPro (or any other subcontractor) and that, by paying the prime contractor, the Government was without further obligation.[408] FloorPro filed a claim with the Navy's contracting officer, who declined to issue a final decision because FloorPro did not have a contract with the Government.[409]

FloorPro thereafter sought relief from the ASBCA, which denied the Government's motion to dismiss, granted summary judgment in favor of FloorPro, and affirmed that decision on reconsideration.[410] Relying upon the Federal Circuit's decision in *D & H Distributing Co. v. United States*,[411] the ASBCA determined that it had jurisdiction over FloorPro's claim because FloorPro was a third-party beneficiary of the contract between the Navy and GM & W.[412] The ASBCA thus concluded that FloorPro was entitled to damages of $37,500, plus interest, for the Government's breach of the contract modification.[413]

On appeal from the ASBCA, the Federal Circuit reversed.[414] The court held that, "under the Contract Disputes Act of 1978 ('CDA') the ASBCA has no jurisdiction over a claim brought by a

403. *Id.* at 1379.
404. *Id.*
405. *Id.*
406. *Id.*
407. *Id.*
408. *Id.*
409. *Id.*
410. Winter v. FloorPro, Inc., 570 F.3d 1367, 1369 (Fed. Cir. 2009) (discussing this case's prior procedural history as well as ABSCA's prior determinations as to the case's contested issues").
411. 102 F.3d 542 (Fed. Cir. 1996).
412. *FloorPro*, 680 F.3d at 1379–80 (citing *D & H Distribs.*, 102 F.3d at 546–48).
413. *Id.* at 1380.
414. David P. Graham et. al., *2009 Government Contract Law Decisions of the Federal Circuit*, 59 AM. U. L. REV. 991, 1030–32 (2010) (discussing *Winter v. FloorPro, Inc.*).

subcontractor who is a third-party beneficiary of a contract between the government and the prime contractor."[415] The court clarified that the CDA only applies to contractors in direct privity with the Government, and thus third party beneficiaries cannot use the CDA to bring a claim in the ASBCA.[416] Instead of ending its decision there, however, the Federal Circuit "observed . . . that the grant of jurisdiction to the Court of Federal Claims under the Tucker Act 'is broader' than the jurisdiction of the ASBCA under the CDA, and can potentially extend to an intended third-party beneficiary of a government contract."[417]

The Federal Circuit held out a very narrow sliver of hope and FloorPro took the bait, filing a new complaint at the COFC pursuant to the Tucker Act. The Government moved to dismiss, arguing that FloorPro's claim was time-barred because it was filed more than six years after it first accrued.[418] FloorPro, in response, contended that its claim did not arise until the Navy filed its brief with the ASBCA asserting that the modification at issue did not provide FloorPro with any enforceable rights.[419]

The COFC denied the Government's motion, holding not only that FloorPro correctly calculated its claim accrual date, but also that FloorPro "had diligently pursued its claim by filing suit at the ASBCA," and that, as result, dismissing FloorPro's claim as untimely would "lead to an unjust result."[420] The COFC also concluded that FloorPro was an intended third-party beneficiary of the contract modification and that FloorPro, therefore, was entitled to recover damages.[421] The Government appealed.

This time, the Federal Circuit did not leave open any doors, concluding that FloorPro's suit was barred by the six-year limitations period, which "is jurisdictional and may not be waived or tolled."[422] In that regard, the court explained that "[i]n general, a cause of action against the government accrues 'when all the events have occurred which fix the liability of the Government and entitle the

415. *FloorPro*, 680 F.3d at 1380 (citations omitted) (citing *Winter v. FloorPro, Inc.*, 570 F.3d at 1371–73).
416. *Id.* (quoting Winter v. FloorPro, Inc., 570 F.3d at 1370–71).
417. *Id.* (citations omitted) (quoting *Winter v. FloorPro, Inc.*, 570 F.3d at 1372) (citing *D & H Distribs.* 102 F.3d at 546–48, for the proposition that "a third-party beneficiary of a government contract had the right to enforce a contract provision in the Court of Federal Claims").
418. *Id.*
419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.* at 1380–81.

claimant to institute an action.'"[423] In this case, the Federal Circuit held that "FloorPro's cause of action accrued when the government breached [the modification] by making payment directly to [the prime contractor], rather than sending a two-party check to FloorPro as the modification required."[424] The court thus rejected FloorPro's argument that the claim did not accrue until the Government's filing of its ASBCA brief, concluding that Government had repudiated the modification at issue in refusing to pay FloorPro.[425]

Finally, the Federal Circuit "reject[ed] FloorPro's contention that equitable tolling can be applied to defer the running of the limitations period."[426] Although "FloorPro argue[d] that its claim should be deemed timely because it diligently pursued its claim and acted reasonably in initially filing suit at the ASBCA, rather than in the Court of Federal Claims," the appellate court held that prior case law "makes clear that section 2501 sets forth an 'absolute' time limit for filing suit in the Court of Federal Claims."[427] In sum, "[b]ecause section 2501's time limit is jurisdictional, the six-year limitations period cannot be extended even in cases where such an extension might be justified on equitable grounds."[428]

B. VanDesande v. United States

In *VanDesande v. United States*,[429] a "matter of first impression,"[430] the Federal Circuit addressed whether a stipulation agreement adopted by a district court (as part of a settlement of a pregnancy discrimination claim[431]) constituted "a contract, a consent decree, or perhaps both," explaining that "[t]he label we put on it dictates the court that will have jurisdiction to hear the case on its merits."[432] In particular, the Federal Circuit framed the question before it as follows:

423. *Id.* at 1381 (quoting Goodrich v. United States, 434 F.3d 1329, 1333 (Fed. Cir. 2006)).
424. *Id.*
425. *Id.* at 1381–82 (noting that the Navy's August 2002 letter constituted an unequivocal refusal to pay FloorPro).
426. *Id.* at 1382.
427. *Id.* (quoting John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 135 (2008)).
428. *Id.*
429. 673 F.3d 1342 (Fed. Cir. 2012).
430. *Id.* at 1346.
431. *Id.* at 1344.
432. *Id.* at 1343. Although the Federal Circuit previously held that Tucker Act jurisdiction covers the alleged breach of a Title VII settlement agreement, the court had not addressed "whether the Court of Federal Claims also has jurisdiction over Title VII consent decrees." *Id.* at 1347 (citing Holmes v. United States, 657 F.3d 1303, 1316–17 (Fed. Cir. 2011)).

> [W]hat if the claim against the Government is based not on a settlement agreement per se, but on a settlement agreement that has been incorporated into a judicial or administrative order, in the form, for example, of a consent decree? Does the non-breaching party have the option to pursue a remedy in the Court of Federal Claims under the Tucker Act, or does jurisdiction for enforcing such an agreement rest solely in the hands of the tribunal that issued the order?[433]

The plaintiff, Ms. Gladys VanDesande, entered into a "'Stipulation Agreement Regarding Damages,' resulting from a settlement of an earlier personnel case" filed against her employer, the United States Postal Service (USPS).[434] The Equal Employment Opportunity Commission (EEOC) issued a final order, which incorporated the Stipulation Agreement by reference.[435]

Ms. VanDesande later believed that the USPS breached the agreement and sought recourse at the EEOC, which denied her request "and informed Ms. VanDesande of her right to file a civil action in an appropriate United States District Court."[436] Although she took the EEOC's counsel and filed an action for breach of the Stipulation Agreement in the U.S. District Court for the Southern District of Florida, the Government argued that the court lacked subject matter jurisdiction because her claim was "a contract claim within the meaning of the Tucker Act."[437] The parties stipulated to a voluntary dismissal following an unsuccessful attempt at mediation. Ultimately, after yet another EEOC decision and district court case, Ms. VanDesande "adopt[ed] the Government's position in her first District Court suit that the agreement is a contract and can be enforced only in the Court of Federal Claims."[438]

Before that court, however, the Government switched gears and argued that the "Stipulation Agreement is *not* a contract but a consent decree, enforcement of which is not within the jurisdiction of the Court of Federal Claims under the Tucker Act."[439] The COFC agreed with the Government, but the Federal Circuit reversed.[440]

The Federal Circuit acknowledged that, "[t]ypically, the court that issues a consent decree will retain jurisdiction to enforce it, and often the settlement agreement that led to the decree will so

433. *Id.* at 1346.
434. *Id.* at 1343.
435. *Id.* at 1344.
436. *Id.*
437. *Id.*
438. *Id.* at 1345.
439. *Id.* (citing VanDesande v. United States, 94 Fed. Cl. 624, 629 (2010)).
440. *Id.* at 1344.

specify."[441] But, the key premise undergirding the holding of the COFC—rejected by the Federal Circuit—was that "consent decrees and settlement agreements are mutually exclusive."[442] In that regard, "[t]he trial court's conclusion that they are mutually exclusive was based in large part on an opinion from [the Federal Circuit] . . . [cited] for the premise that 'a decree entered upon consent is a judicial act and is not a contract.'"[443] The problem is, "[a]s the trial court correctly observed," that case "was a nonprecedential opinion of this court, and therefore is not binding on subsequent decisions."[444]

The Federal Circuit's underlying logic for rejecting the trial court's approach in this matter is difficult to refute:

> If . . . a settlement agreement was no longer enforceable as a contract once incorporated into a consent decree, the effect would be to divest the Court of Federal Claims of its Tucker Act jurisdiction by the simple act of a court or agency adopting the agreement. We are unaware of any act of Congress that would allow for such an outcome.[445]

Having concluded "that consent decrees and settlement agreements are not necessarily mutually exclusive," the Federal Circuit had "no difficulty in concluding that the Stipulation Agreement in this case [was] a contract for enforcement purposes."[446]

This case is also notable for the extensive criticism leveled at the Department of Justice (DOJ). Notwithstanding that the Federal Circuit admittedly had never addressed directly the issue presented by this case, the court was disturbed by "this dispute [a]s yet another example of the wastefulness of litigation over where to litigate."[447] The court specifically described "the Government's conduct in this case [as] unacceptable," declaring that this "should not be how our

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441. *Id.* at 1345–46 (citation omitted) (citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379 (1994)) (noting that determining where to bring an action for enforcement of a settlement agreement, which had previously been incorporated into a court decree, can become a point of dispute between parties because it is unclear if the agreement must be enforced by the court that issued the decree or may be brought in any suitable court as a separate breach of contract action).

442. *Id.* at 1347.

443. *Id.* at 1348 (quoting Blodgett v. United States, No. 96-5067, 1996 WL 640238, at *1 (Fed. Cir. Oct. 22, 1996)).

444. *Id.*

445. *Id.* at 1350 (advancing "the well-established rule that neither courts nor parties possess the power to alter a federal court's statutory grant of subject matter jurisdiction").

446. *Id.* at 1350–51 (explaining that "a settlement agreement, even if it is embodied in a court decree," is a contract for the purposes of the Tucker Act (citing Angle v. United States, 709 F.2d 570, 573 (9th Cir. 1983)).

447. *Id.* at 1343.

Government handles itself."[448] The court thus urged the Government "to avoid taking positions in future litigations that open it up to the criticism that it has used its overwhelming resources to whipsaw a citizen into submission."[449] The Government, however, was not sanctioned.

V. EAJA

A. DGR Associates, Inc. v. United States

DGR Associates, Inc. v. United States[450] involved the Government's appeal of a COFC decision awarding attorney's fees and costs under the Equal Access to Justice Act[451] (EAJA), in a bid protest.[452] The Federal Circuit reversed the trial court's decision, holding that the Government's position in the underlying litigation was substantially justified.[453]

The case concerned an Air Force solicitation for a service contract at Eielson Air Force Base in Alaska.[454] The plaintiff requested that the contract be set aside for qualified small business concerns under the HUBZone Program, which assists small businesses that are located in historically underutilized business zones.[455] The Air Force decided to award the contract as a Section 8(a) contract, which is designed to assist small businesses owned and controlled by socially and economically disadvantaged individuals.[456]

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448. *Id.* at 1351.

449. *Id.* Although the Federal Circuit directed its withering criticism towards the "civil division . . . [as the] office that did the flip-flop" and engaged in "jurisdictional ping-pong," *id.*, both that court and the COFC repeatedly have noted that courts generally have an obligation to determine independently their own jurisdiction—even where the Government withdraws its motion to dismiss or where a case is transferred from a district court. *See, e.g.*, Township of Saddle Brook v. United States, 104 Fed. Cl. 101, 108 (2012) ("In this matter the jurisdictional premise underlying the district court's decision—that plaintiff pleaded contract claims—does not foreclose the Court of Federal Claims from determining its jurisdiction, despite having received the matter by transfer from a federal district court."); Zoubi v. United States, 25 Cl. Ct. 581, 585 n.4 (1992) (citing Hambsch v. United States, 857 F.2d 763, 764–65 (Fed. Cir. 1988)) ("Although defendant withdrew its motion to dismiss for lack of jurisdiction, this court is obligated to determine its own jurisdiction."). *But see VanDesande*, 673 F.3d at 1351–52 (citing Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 819 (1988)) (stating that appellate courts attempt to avoid wasteful jurisdictional litigation by accepting the reasonable jurisdictional determination of whichever circuit court first decides the issue).

450. 690 F.3d 1335 (Fed. Cir. 2012).

451. 28 U.S.C. § 2412 (2006).

452. *DGR Assocs.*, 690 F.3d at 1337.

453. *Id.*

454. *Id.* at 1338.

455. *Id.* at 1337–38.

456. *Id.* at 1338.

DGR Associates, Inc. ("DGR") filed a formal agency-level protest and, when that was denied, filed a protest with GAO.[457] GAO granted the protest, explaining that it had already addressed the issue in a prior decision, *Mission Critical Solutions*,[458] which found "that the Small Business Act gave priority to the HUBZone program over the 8(a) program."[459] GAO also noted that the COFC's decision in *Mission Critical* affirmed GAO's view.[460]

The Air Force declined to comply with the GAO decision, explaining that the Office of Management and Budget and the Department of Justice had both issued memoranda in response to the *Mission Critical* decision concluding that the Small Business Act does not compel prioritization of the HUBZone Program over the 8(a) Program.[461]

DGR filed a bid protest in the COFC.[462] The Government argued that the court lacked jurisdiction over the case because DGR waived its right to bring suit by not filing its case prior to the closing date for receipt of proposals.[463] The Government also argued that the Small Business Act did not require the Air Force to prioritize the HUBZone Program over the 8(a) Program.[464]

The trial court upheld the protest, finding that it possessed jurisdiction over the case and that GAO's *Mission Critical* decision correctly concluded that the Act gave priority to the HUBZone Program over the 8(a) program.[465] The trial court then awarded costs and fees pursuant to EAJA.[466]

The Government appealed the EAJA portion of the decision.[467] The Federal Circuit reversed, holding that the Government's position was substantially justified at both the agency level and during the litigation.[468]

First, the court held that the Air Force was bound by the various Executive Branch memoranda instructing "agencies to . . . comply with the [Small Business Administration's] parity regulations notwithstanding GAO and Court of Federal Claims' contrary

457. *Id.*
458. B-401057, 2009 CPD ¶ 93 (Comp. Gen. May 4, 2009).
459. *DGR Assocs.*, 690 F.3d at 1338–39.
460. *Id.* (citing Mission Critical Solutions v. United States, 91 Fed. Cl. 386 (2010)).
461. *Id.* at 1339.
462. *Id.*
463. *Id.*
464. *Id.*
465. *Id.*
466. *Id.*
467. *Id.* at 1340.
468. *Id.* at 1341.

positions."[469] Accordingly, the Government's position at the agency level was substantially justified.[470]

Next, the Federal Circuit concluded that the Government's position during the litigation was substantially justified.[471] The court considered two arguments raised by the Government—a merits-based argument and a jurisdictional argument. On the merits, the Government argued that "the Small Business Act and the SBA's implementing regulations did not require the Air Force to give priority to HUBZone small business concerns."[472] The Federal Circuit reversed the trial court's decision that this argument was not substantially justified, holding that "[a]t the time DGR initiated the underlying bid protest, presumptively reasonable people in all three branches of the Government had reached differing conclusions as to whether the Small Business Act permitted participating agencies to place the HUBZone and 8(a) programs on an equal footing."[473] Citing a district court decision that found that the relevant regulations promote the objective of parity between the HUBZone and 8(a) programs, the Federal Circuit also explained that "[e]ven the Federal courts were split on the matter."[474]

Noting the "relatively low threshold standard" that DOJ had to overcome, the Federal Circuit found that the foregoing was sufficient to conclude that DOJ was, in fact, substantially justified.[475] In addition, the court explained that there was also a "clear statement from Congress affirming the SBA regulations at issue."[476]

The Government also made a jurisdictional argument before the trial court. Specifically, the Government argued that the COFC lacked jurisdiction over the bid protest because DGR waited to file its claim until after the receipt proposals could be submitted.[477] The Government contended that this issue was jurisdictional because prior Federal Circuit precedent "tied the waiver rule to the Court of Federal Claims' statutory grant of jurisdiction, thereby implying that the rule was jurisdictionally preclusive."[478]

The trial court rejected the Government's argument. The Federal Circuit, while it found that the jurisdiction argument "present[ed] a

469. *Id.*
470. *Id.* at 1344.
471. *Id.*
472. *Id.* at 1341 (citing DGR Assocs., Inc. v. United States, 97 Fed. Cl. 214, 218 (2011)).
473. *Id.*
474. *Id.* at 1342.
475. *Id.*
476. *Id.*
477. *Id.* at 1343 (citing *DGR Assocs.*, 97 Fed. Cl. at 218).
478. *Id.* (citing Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308 (Fed. Cir. 2007)).

considerably closer call," nonetheless concluded that "[w]hen viewed in the overall context" the position "was 'justified to a degree that could satisfy a reasonable person,' which is all the Supreme Court and this court require."[479] The Federal Circuit explained that "the Government has in its favor at least one reasonable mind that had come to the same view as the Government regarding our statement in *Blue & Gold*.[480] The Federal Circuit concluded that even though the Government's jurisdictional argument "would have been better omitted," on the whole, the argument was substantially justified.[481]

VI. SPENT NUCLEAR FUEL

In 1983, Congress enacted the Nuclear Waste Policy Act of 1982[482] (NWPA or "the Act"), which authorized the Department of Energy (DOE) to enter into contracts for the collection and disposal of spent nuclear fuels ("SNF") and other high-level radioactive waste ("HLW").[483] The Act required the owners of SNF and HLW to pay certain fees into the Nuclear Waste Fund, and in exchange, the DOE would begin to dispose of the SNF and HLW "not later than January 31, 1998."[484]

Since then, owners of SNF and HLW who paid those fees have filed seventy-six lawsuits due to the DOE's failure to accept and dispose of radioactive waste from the nation's nuclear facilities.[485] According to GAO, these lawsuits have cost U.S. taxpayers approximately $1.6 billion.[486] In 2012, the Federal Circuit issued six SNF-related decisions, each of which focused primarily on the proper calculation of damages owed to utilities for the Government's breach of the Standard Contract.[487] In most cases, the Federal Circuit affirmed the

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479. *Id.* at 1343–44 (quoting Pierce v. Underwood, 487 U.S. 552, 565 (1988); White v. Nicholson, 412 F.3d 1314, 1315 (Fed. Cir. 2005)).

480. *Id.* at 1344 (citing Esterhill Boat Serv. Corp. v United States, 91 Fed. Cl. 483, 487 (2010)).

481. *Id.*

482. Pub. L. No. 97-425, 96 Stat. 2201 (codified as amended at 42 U.S.C. §§ 10101–10270 (2006)).

483. 42 U.S.C. § 10222(a)(1) (2006).

484. *Id.* § 10222(a)(5)(B).

485. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-797, SPENT NUCLEAR FUEL, ACCUMULATING QUANTITIES AT COMMERCIAL REACTORS PRESENT STORAGE AND OTHER CHALLENGES 2 (2012).

486. *Id.* DOE estimates that future liabilities will total about an additional $19.1 billion through 2020 and that they may cost about $500 million each year after that. *Id.*

487. Kan. Gas & Elec. Co. v. United States, 685 F.3d 1361, 1363–65 (Fed. Cir. 2012); Vt. Yankee Nuclear Power Corp. v. Entergy Nuclear Vt. Yankee, LLC, 683 F.3d 1330, 1335 (Fed. Cir. 2012); Yankee Atomic Elec. Co. v. United States, 679 F.3d 1354, 1358 (Fed. Cir. 2012); Consol. Edison Co. of N.Y., Inc. v. Entergy Nuclear Indian Point 2, LLC, 676 F.3d 1331, 1332 (Fed. Cir. 2012); Pac. Gas & Elec. Co. v. United

decision of the COFC. The Federal Circuit overturned decisions only when it found clear error in factual determinations.[488]

With regard to questions requiring factual determinations, the trial court generally possesses road discretion, "subject to certain controlling principles," in determining an appropriate quantum of damages.[489] Despite the broad deference given to trial courts in computing damages, the Federal Circuit, in its 2012 decisions, made multiple findings of clear error at the trial court level.[490] The Federal Circuit did not, however, break novel ground.

In several cases in 2012, the Federal Circuit found that the COFC erred when it denied overhead damages that the utility calculated by means of an internal accounting system that complied with Federal Energy Regulatory Commission (FERC) accounting regulations, and generally accepted accounting principles (GAAP).[491] The Federal Circuit found that, "where the utilities used accounting procedures as mandated by FERC and consistent with GAAP, the utilities' accounting records sufficiently demonstrated damages with reasonable particularity."[492]

The Federal Circuit also addressed the issue of whether, upon remand, the COFC may reconsider damages that were denied during the initial trial where the mandate changed the factual predicate for prior denial.[493] The Federal Circuit found that the trial court erred

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States, 668 F.3d 1346, 1349 (Fed. Cir. 2012); Sys. Fuels, Inc. v. United States, 666 F.3d 1306, 1309 (Fed. Cir. 2012).

488. *Yankee Atomic*, 679 F.3d at 1362–63.

489. Hi-Shear Tech. Corp. v. United States, 356 F.3d 1372, 1382 (Fed. Cir. 2004) (citing Ferguson Beauregard/Logic Controls v. Mega Sys., LLC, 350 F.3d 1327, 1345 (Fed. Cir. 2003)).

490. *Kan. Gas*, 685 F.3d at 1370; *Vt. Yankee*, 683 F.3d at 1344; *Yankee Atomic*, 679 F.3d at 1362–63; *Consol. Edison*, 676 F.3d at 1335–36; *Sys. Fuels*, 666 F.3d at 1312.

491. *Kan. Gas*, 685 F.3d at 1369–70 (internal accounting system coded costs to specific projects, and allocation rates were re-examined on a regular basis in order to reflect actual capital projects); *Vt. Yankee*, 683 F.3d at 1351 (internal accounting system followed Generally Accepted Accounting Principles and FERC guidelines); *Consol. Edison*, 676 F.3d at 1340 (internal accounting system captured costs associated with engineering supervision and the administration of capital projects, and allocated equitable portions of costs to mitigation activity); *Sys. Fuels*, 666 F.3d at 1311–12 (internal accounting system allocated overhead associated with the pool and charges accounts for the appropriate projects on a monthly basis). *But see Kan. Gas*, 685 F.3d at 1375 (Linn, J., dissenting in part) (disagreeing with the majority, and finding that "[e]vidence that generally accepted accounting practices were followed does not obviate examination of the underlying facts and should not nullify the trial court's role as the weigher of evidence, the finder of facts, and the crafter of reasonable damages awards").

492. *Kan. Gas*, 685 F.3d at 1370.

493. *Yankee Atomic*, 679 F.3d at 1362; *see also* Pac. Gas & Elec. Co. v. United States, 668 F.3d 1346, 1351 (Fed. Cir. 2012) (affirming the trial court's decision to revisit and reconsider an issue that was before the trial court during the original trial in view of the 1987 Annual Capacity Report (ACR) rate, rather than the 1991 ACR). The 1987 ACR

in its narrow interpretation of the remand because the "remand was not limited to a reexamination of costs previously awarded, and the trial court must consider both the letter and the spirit of [the Federal Circuit's] remand order."[494] The trial court should have revisited and reconsidered the damages that it denied during the initial trial because it had not assessed damages "according to the rate at which the Government was contractually obligated to accept the utilities' waste."[495]

On one occasion, the Federal Circuit found that the COFC erroneously permitted a hypothetical non-breach scenario, used to establish causation, to retroactively change the facts of the case to fit a plaintiff's damages theory.[496] The appellate court also held that, where a utility was unable to establish that overall generic-activity fees paid to the Nuclear Regulatory Commission (NRC) increased as a result of DOE's breach, the trial court erred in awarding damages for generic fees.[497]

The Federal Circuit also affirmed the COFC's application of established law to slightly new fact patterns. In the past year, the Federal Circuit twice-affirmed the application of *Dairyland Power Cooperative v. United States*,[498] in which the Federal Circuit used an "exchanges model" when calculating damages for the storage of SNF.[499] The Federal Circuit also affirmed a trial court's denial of the cost of financing in four different cases on the basis of the no-interest rule, which bars parties to the Standard Contract from recovering the financing costs of mitigation projects.[500]

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rate "provide[d] the best available pre-breach snapshot of both parties' intentions for an acceptance rate and contemplated full and timely performance" *Pac. Gas.*, 668 F.3d at 1351 (internal quotation marks omitted) (quoting Pac. Gas & Elec. Co. v. United States, 536 F.3d 1282, 1292 (Fed. Cir. 2008))).

494. *Yankee Atomic*, 679 F.3d at 1362.

495. *Id.* (quoting Yankee Atomic Elec. Co. v. United States, 536 F.3d 1268, 1271 (Fed. Cir. 2008)).

496. *Consol. Edison*, 676 F.3d at 1335–36 (holding that the utility's hypothetical model contemplated that if DOE had not breached the Standard Contract, the SNF stored in the Unit 1 spent fuel pool would have been removed in 1998; it did not reflect the fact that in the non-breach world, Unit 2 SNF, rather than Unit 1 SNF, would have been removed from Indian Point in 1998).

497. *Id.* at 1337–40 (quoting 10 C.F.R. § 171.15) (defining "generic fees" as "the costs of activities such as the development and provision of regulatory guidance, 'research,' and '[o]ther safety, environmental, and safeguards activities'").

498. 645 F.3d 1363 (Fed. Cir. 2011).

499. *Yankee Atomic Elec. Co.*, 679 F.3d at 1359–60 (finding that the trial court did not abuse its discretion in applying *Dairyland Power Coop.*, 645 F.3d at 1363); Pac. Gas & Elec. Co. v. United States, 668 F.3d 1346, 1354 (Fed. Cir. 2012) (same).

500. Kan. Gas & Elec. Co. v. United States, 685 F.3d 1361, 1371 (Fed. Cir. 2012); Vt. Yankee Nuclear Power Corp. v. Entergy Nuclear Vt. Yankee, LLC, 683 F.3d 1330, 1350–51 (Fed. Cir. 2012); *Consol. Edison*, 676 F.3d at 1340; Sys. Fuels Inc. v. United States, 666 F.3d 1306, 1310–11 (Fed. Cir. 2012); *see also* James Lockhart, Annotation,

Similarly, the Federal Circuit found that the trial court accurately addressed causation as set forth by *Yankee Atomic Electronic Co. v. United States*[501] and applied offsets as necessary, by comparing breach and non-breach worlds.[502] Part of this analysis, as affirmed by the Federal Circuit, is that if the SNF plaintiff would have been required to pursue a similar action and incur costs regardless of the breach, such efforts should not be included in the damages awarded.[503] Furthermore, the non-breaching party must mitigate the impending and foreseeable breach.[504] Where the mitigation activities, however, resulted in a benefit to the non-breaching party, the Federal Circuit affirmed the trial court's decision to reduce the damages by the value of the benefit.[505]

CONCLUSION

Last year's review of the Federal Circuit's government contracts decisions noted the sharp decline in *Winstar* cases.[506] Similarly, the usual, steady flow of SNF cases appears to be winding down, as well.

Validity, Construction, and Application of Nuclear Waste Policy Act of 1982, 41 A.L.R. FED. 2D 81 (2009) ("Cost of capital to fund mitigation activities of utility that operated nuclear facility could not be recovered from United States as mitigation cost that was directly traceable to breach of standard contract for disposal of spent nuclear fuel (SNF), pursuant to Nuclear Waste Policy Act, absent express waiver of immunity against recovery of interest."). Pre-judgment interest generally is not recoverable against the United States in cases before the COFC pursuant to the Tucker Act. Cal. Fed. Bank v. U.S. 395 F.3d 1263, 1273 (Fed. Cir. 2005) (discussing 28 U.S.C. § 2516(a), and holding that, "[i]n this contract case brought under the Tucker Act against the United States, there is no such constitutional compulsion for the payment of interest, and therefore the statutory 'no interest' rule applies.").

501. 679 F.3d 1354 (Fed. Cir. 2012).

502. *Id.* (citing *Yankee Atomic Elec. Co. v. United States*, 536 F.3d 1271, 1273 (Fed. Cir. 2008)); *Sys. Fuels*, 666 F.3d at 1312–13.

503. For an example in the past year, *Kansas Gas* found that the trial court correctly did not award damages for costs associated with researching alternative storage options for SNF and HLW because the record showed that the plaintiff would have been required to pursue a similar study regardless of the breach, and the plaintiff did not provide record evidence comparing the costs of the studies in the breach and non-breach worlds. *Kan. Gas*, 685 F.3d at 1371 (citing Energy Nw. v. United States, 641 F.3d 1300, 1309 (Fed. Cir. 2011)).

504. *Pac. Gas*, 668 F.3d at 1353 (affirming the trial court's finding that the utility undertook PFS off-site storage to mitigate the impending and foreseeable breach).

505. *Kan. Gas*, 685 F.3d at 1371; *see also* Lockhart, *supra* note 500 ("Trial court correctly reduced the damages due to operator of single-unit nuclear reactor for DOE's partial breach of standard contract for disposal of spent nuclear fuel (SNF) to account for efficiency benefits from operator's rerack project; operator acquired higher enrichment fuel as a direct consequence of the decision to rerack wet storage pool, decision to pursue higher enrichment fuel assemblies was part and parcel of operator's mitigation efforts, and higher enrichment fuel assemblies produced a real-world benefit.").

506. Singer et al., *2011 Government Contract Law Decisions of the Federal Circuit*, 61 AM. U. L. REV. 1013, 1079 & n.523 (2012).

Accordingly, we continue to expect that the Federal Circuit's most significant government contracts jurisprudence will center on Tucker Act jurisdiction and bid protest issues. Given the limited number of government contract cases that make their way to the Supreme Court—and the corresponding fact that the Federal Circuit "has in effect become the court of last appeal in government contract cases"[507]—contractors and their counsel who ignore the latest Federal Circuit decisions do so at their own peril.

507. Richard C. Johnson, *Beyond Judicial Activism: Federal Circuit Decisions Legislating New Contract Requirements*, 42 PUB. CONT. L.J. 69, 71 (2012).

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