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2018 Government Contract Law Decisions of the Federal Circuit

Collin Swan

World Bank Office of Suspension and Debarment

Victor Pham

George Washington University Law School

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2018 Government Contract Law Decisions of the Federal Circuit

2018 GOVERNMENT CONTRACT LAW DECISIONS OF THE FEDERAL CIRCUIT

COLLIN SWAN* AND VICTOR PHAM**

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* Mr. Swan is Counsel (Sanctions) in the World Bank Office of Suspension and Debarment and a former law clerk to the Honorable Jimmie V. Reyna, Circuit Judge, United States Court of Appeals for the Federal Circuit.

** Mr. Pham is a third-year law student at the George Washington University Law School.

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INTRODUCTION

In 2018, the U.S. Court of Appeals for the Federal Circuit issued thirteen precedential opinions in the area of government contracts law. Seven of these decisions consisted of bid protests appealed from the Court of Federal Claims, making 2018 the “year of the protest,” at least in terms of the Federal Circuit’s government contracts jurisprudence. Four decisions concerned contractual disputes arising under the Contract Disputes Act¹ (CDA) regime, and the remaining two decisions addressed the scope of the Court of Federal Claims’s jurisdiction to hear non-CDA contractual disputes pursuant to the Tucker Act.²

Before diving into the individual decisions, it is perhaps worth reiterating that government contracts cases have always been a small portion of the Federal Circuit’s overall docket. Indeed, in a court

1. Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 7101–09).

2. 28 U.S.C. § 1491(a)(1).

that was created primarily to “address the burgeoning federal litigation and inter-circuit splits in the area of patent law,” government contracts law issues rarely take center stage.³ The passage of the Leahy-Smith America Invents Act⁴ (AIA) and the resulting surge of appeals from the newly-formed Patent Trial and Appeal Board have further increased the percentage of the court’s docket that is taken up by patent issues.⁵ According to annual data published by the court, the number of appeals in the area of intellectual property has risen from forty-seven percent of the court’s docket in fiscal year 2012 to about sixty-five percent in fiscal year 2017.⁶ In contrast, only about four to five percent of the court’s appeals have related to contract law during this same period.⁷ This generally translates to between ten and twenty precedential opinions each year on government contracts issues.⁸

It is therefore difficult for the Federal Circuit judges to develop a significant body of expertise and jurisprudence on government contracts law issues. As noted by the Honorable Jimmie V. Reyna and Nathaniel E. Castellano in a 2016 article about successful government contracts advocacy before the Federal Circuit:

These statistics suggest that the Federal Circuit has relatively few opportunities to issue precedential opinions that can meaningfully contribute to and shape the contours of government contracts law. They also suggest that there are not enough government contracts cases appealed to the Federal Circuit for the judges, much less their clerks, to develop and maintain a high level of working knowledge in all aspects of the law of government contracting.⁹

3. Collin D. Swan, *Government Contracts and the Federal Circuit: A History of Judicial Remedies Against the Sovereign*, 8 J. FED. CIR. HIST. SOC’Y 105, 114 (2014).

4. Pub. L. No. 112–29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.) (AIA).

5. See, e.g., Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part I of II*, 21 FED. CIR. B.J. 435, 435–36 (2012) (describing the substantial impact of the AIA on patent litigation).

6. Compare UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, APPEALS FILED, BY CATEGORY: FY 2012, http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/Caseload_by_Category_Appeals_Filed_2012.pdf (last visited May 20, 2019), with UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, APPEALS FILED, BY CATEGORY: FY 2017, http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/FY_17_Filings_by_Category.pdf (last visited May 20, 2019).

7. *Id.*

8. Dennis J. Callahan et al., *2017 Government Contract Law Decisions of the Federal Circuit*, 67 AM. U. L. REV. 1273, 1274 (2018).

9. Jimmie V. Reyna & Nathaniel E. Castellano, *Successful Advocacy in Government Contracts Appeals Before the Federal Circuit: Context is Key*, 46 PUB. CONT. L.J. 209, 209–10 (2016).

Professor Steven L. Schooner noted such a trend in his 2010 review of the Federal Circuit's government contracts cases.¹⁰ He examined the judges' level of participation in government contracts cases during 2010 and concluded that "no judge participated in ten, and the vast majority of judges participated in fewer than half a dozen, government contracts related matters."¹¹ Eight years later, Professor Schooner's observations continue to be on point¹²:

10. Steven L. Schooner, *A Random Walk: The Federal Circuit's 2010 Government Contracts Decisions*, 60 AM. U. L. REV. 1067, 1069–72 (2011).

11. *Id.* at 1071.

12. Of course, as previously noted by Professor Schooner, case selection methodology is not always consistent. The above table includes only appeals that resulted in precedential published opinions. The Authors also decided not to include the Federal Circuit's decision in *Moda Health Plan, Inc. v. United States*, which addressed certain contractual claims but was largely related to the government's decision to stop making risk corridor payments to health insurance companies under the Patient Protection and Affordable Care Act. 892 F.3d 1311, 1314 (Fed. Cir. 2018). The Authors included two other decisions in the above table that are not discussed in the Article. The first, *FastShip, LLC v. United States*, involved a patent infringement suit against the United States in connection with the U.S. Navy's development and production of its *Freedom*-class Littoral Combat Ships. *See* 892 F.3d 1298, 1300 (Fed. Cir. 2018). The second, *Starry Associates, Inc. v. United States*, followed a successful post-award bid protest and addressed the scope of the "special factor" exception to the statutory cap to receive attorney fees under the Equal Access to Justice Act. *See* 892 F.3d 1372, 1373 (Fed. Cir. 2018).

JUDGE	PARTICIPATED IN DECISION	PARTICIPATED WITHOUT WRITING	DRAFTED DECISION	DISSENTING DECISION
Prost	6	<i>AgustaWestland Meridian PDS Consultants</i>	<i>CliniComp Agility Progressive</i>	
Newman	1	<i>Palantir</i>		
Lourie	1	<i>Agility</i>		
Dyk	1		<i>Securiforce</i>	
Moore	4	<i>FastShip Dell Federal Alpine PCS</i>	<i>Cleveland Assets</i>	
O'Malley	3	<i>Securiforce</i>	<i>Starry Associates PDS Consultants</i>	
Reyna	5	<i>Meridian Lee et al. Alpine PCS Progressive K-CON, Inc.</i>		
Wallach	6	<i>CliniComp Securiforce</i>	<i>FastShip Dell Federal Meridian</i>	<i>Cleveland Assets (denial of en banc rehearing)</i>
Taranto	2	<i>CliniComp</i>	<i>Alpine PCS</i>	
Chen	3	<i>FastShip AgustaWestland Agility</i>		
Hughes	3	<i>Cleveland Assets Starry Associates</i>	<i>AgustaWestland</i>	
Stoll	5	<i>Cleveland Assets Lee et al. PDS Consultants</i>	<i>Palantir K-CON, Inc.</i>	

SENIOR JUDGES	PARTICIPATED IN DECISION	PARTICIPATED WITHOUT WRITING	DRAFTED DECISION	DISSENTING DECISION
Mayer	2	<i>Palantir Progressive</i>		
Plager				
Clevenger				
Schall	1	<i>Dell Federal</i>		
Bryson	2	<i>K-CON, Inc.</i>	<i>Lee et al.</i>	
Linn	1	<i>Starry Associates</i>		

Each active judge sitting on the Federal Circuit participated in at least one government contracts case in 2018 that resulted in a published opinion. Chief Judge Prost and Judge Wallach were the most involved in this year's set of government contracts opinions, having each participated in six cases and each authoring three opinions (not including Judge Wallach's dissent of the court's denial of a petition for rehearing en banc in *Cleveland Assets LLC v. United States*¹³).

Hence, the dearth of government contracts cases before the Federal Circuit means that advocates often face a "dauntingly difficult task" of conveying their points on "complex issues to an audience that may have no direct experience grappling with the particular issues on appeal and may even lack a taste for procurement flavored fare."¹⁴

The Federal Circuit may issue a limited number of government contracts decisions each year, but as this year's decisions show, the court continues to serve as the de facto court of last resort on many issues facing the government contracts community.¹⁵ The court's

13. 897 F.3d 1332, 1333 (Fed. Cir. 2018) (Wallach, J., dissenting).

14. Reyna & Castellano, *supra* note 9, at 211. For a discussion of how the government contracts community could assist the court in developing its government contracts jurisprudence by increasing the use of amicus briefs, see Jayna Marie Rust, Note, *How to Win Friends and Influence Government Contracts Law: Improving the Use of Amicus Briefs at the Federal Circuit*, 42 PUB. CONT. L.J. 185, 187 (2012).

15. See, e.g., Ruth C. Burg, *The Role of the U.S. Court of Appeals for the Federal Circuit in Government Contract Disputes: A Historic View from the Bench*, 42 PUB. CONT. L.J. 173, 183 (2012) ("The Federal Circuit has exclusive jurisdiction to decide appeals relating to the contracts of the United States Government and, because Supreme Court review is rare, is effectively 'the court of last resort' for government agencies and their contractors."); Richard C. Johnson, *Beyond Judicial Activism: Federal Circuit Decisions Legislating New Contract Requirements*, 42 PUB. CONT. L.J. 69, 71 (2012) ("[B]ecause appeals on certiorari from the [Federal Circuit] to the Supreme Court

decisions are thus often significant and have wide-ranging implications that every government contracts practitioner should consider.

I. BID PROTEST CASES

A. Dell Federal Systems, L.P. v. United States

In *Dell Federal Systems, L.P. v. United States*,¹⁶ the Federal Circuit addressed the proper legal standard for reviewing the scope of an agency's decision to take corrective action when faced with a protest.¹⁷ In particular, the Federal Circuit reversed a line of cases at the Court of Federal Claims that had previously required agencies to "narrowly tailor" their corrective action to the identified procurement errors.¹⁸ The Federal Circuit instead applied the arbitrary and capricious standard of review under the Administrative Procedure Act (APA) and held that an agency's corrective action requires only a "rational basis" to be upheld.¹⁹ As discussed below, this decision may significantly impact bid protest litigation.

1. Background

In May 2016, the U.S. Army solicited proposals for indefinite delivery, indefinite quantity contracts to procure approximately \$5 billion worth of commercial off-the-shelf computers and other related equipment over a ten-year period.²⁰ The contracts were to be awarded to the lowest priced technically acceptable offerors.²¹ Fifty-eight contractors bid for the contract, but only nine were considered technically acceptable.²² All nine contractors were awarded contracts, causing a total of twenty-one disappointed bidders to file bid protests at the Government Accountability Office (GAO).²³

In response to the protests, the Army acknowledged the existence of procurement errors, including ambiguities in the solicitation and the Army's decision not to conduct discussions with offerors despite a

are as rare as hens' teeth, the [Federal Circuit] has in effect become the court of last appeal in government contract cases.").

16. 906 F.3d 982 (Fed. Cir. 2018).

17. *Id.* at 991–94.

18. *Id.* at 993.

19. *Id.* at 992, 994–96.

20. *Dell Fed. Sys., L.P. v. United States*, 133 Fed. Cl. 92, 97 (2017).

21. *Id.* at 98.

22. *Id.* at 96.

23. *Id.*

regulatory requirement to do so.²⁴ The corrective action involved: “(1) opening discussions with all of the remaining offerors, including those who filed protests, (2) requesting final revised proposals, and (3) issuing a new award decision.”²⁵ The Army also decided to release an anonymized list of all the proposed prices from the original procurement so that the original awardees would not be at a competitive disadvantage.²⁶

Dell Federal Systems and Blue Tech Inc., along with five other awardees, challenged the scope of the Army’s corrective action in the Court of Federal Claims.²⁷ Judge Wheeler found in favor of the awardees and imposed a permanent injunction against the Army.²⁸ Relying on its own precedent under *Amazon Web Services, Inc. v. United States*,²⁹ the court reasoned that the Army’s corrective action was not “narrowly tailored” to the defects in the Army’s procurement.³⁰ The court stated, “[e]ven where an agency has rationally identified defects in its procurement, its corrective action ‘must narrowly target the defects it is intended to remedy.’”³¹

2. *The Federal Circuit’s decision*

The Army, along with several protesters, appealed to the Federal Circuit, which reversed the Court of Federal Claims’s decision. In an opinion authored by Judge Wallach and joined by Judge Moore and Senior Judge Schall, the Federal Circuit rejected the lower court’s “narrowly tailored” analysis under *Amazon Web Services* as contrary to the court’s own precedent and inconsistent with the arbitrary and capricious standard under the APA.³²

The Federal Circuit criticized the lower court’s reliance on its own precedent, stating, “[T]he Court of Federal Claims must follow relevant decisions of the Supreme Court and the Federal Circuit, not the other way around.”³³ In asserting its disapproval of the lower

24. *Id.* at 99 (“For acquisitions with an estimated value of \$100 million or more, contracting officers should conduct discussions.” (quoting the Department of Defense Federal Acquisition Regulation Supplement § 215.306(c)(1))).

25. *Dell Fed. Sys., L.P. v. United States*, 906 F.3d 982, 988 (Fed. Cir. 2018).

26. *Id.* at 989.

27. *Dell Fed. Sys.*, 133 Fed. Cl. at 100.

28. *Id.* at 107.

29. 113 Fed. Cl. 102 (2013).

30. *Dell Fed. Sys.*, 133 Fed. Cl. at 104–06.

31. *Id.* at 104 (quoting *Amazon Web Servs.*, 113 Fed. Cl. at 115).

32. *Dell Fed. Sys., L.P. v. United States*, 906 F.3d 982, 986, 993–94 (Fed. Cir. 2018).

33. *Id.* at 992 (quoting *Dellew Corp. v. United States*, 855 F.3d 1375, 1382 (Fed. Cir. 2017)).

court's analysis, the Federal Circuit cited precedent showing that it had "consistently reviewed agencies' corrective action under the APA's 'highly deferential' 'rational basis' standard."³⁴ The Federal Circuit explained that while the Court of Federal Claims attempted to frame its standard with rationality and reasonableness, it had actually applied a heightened, "narrowly targeted" standard.³⁵ This heightened standard was against the precedent of not only the Court of Federal Claims but also the Federal Circuit.³⁶ According to the Federal Circuit, by asking whether a remedy to an identified error in the bidding process was as narrowly tailored as possible, the Court of Federal Claims incorrectly applied an overly stringent test for corrective action.³⁷

The awardees argued that the "narrowly targeted" requirement applied by the Court of Federal Claims should not be viewed as a separate standard, but instead, should be viewed as an application of the "rational basis" standard.³⁸ The Federal Circuit rejected the argument, stating that a "narrowly targeted" standard was not found in either the statute or its own precedent.³⁹ The APA requires an agency to show that it "provided a coherent and reasonable explanation of its exercise of discretion."⁴⁰ According to the Federal Circuit, the "narrowly targeted" standard applied by the Court of Federal Claims in this case would undermine the deferential standard that an agency is entitled to under the APA.⁴¹

The Federal Circuit also rejected the awardees' argument that the Army's decision to release all offered prices from the original procurement put the awardees at a competitive disadvantage. First, the Federal Circuit found no binding authority that would prohibit the Army's disclosure of the pricing from all offerors.⁴² In addition, it found that the Army had a reasonable explanation for releasing the pricing information.⁴³ The Federal Circuit also accepted the government's conclusion that upon rebidding, the release of pricing

34. *Id.* (quoting *Croman Corp. v. United States*, 724 F.3d 1357, 1363 (Fed. Cir. 2013)).

35. *Id.* at 992.

36. *Id.*

37. *Id.* at 992–93.

38. *Id.* at 993.

39. *Id.* at 994.

40. *Id.* (quoting *Banknote Corp. of America, Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004)).

41. *Dell Fed. Sys.*, 906 F.3d at 994.

42. *Id.* at 997.

43. *Id.*

information would actually help those offerors who did not put forth the lowest price.⁴⁴ During the rebidding process, those offerors now had the chance to revise their proposals and fairly compete with other offerors.⁴⁵

The Federal Circuit's explicit rejection of the lower court's use of the "narrowly tailored" standard means that initial awardees and other potential contractors unhappy with an agency's decision to take corrective action will be unlikely to obtain relief unless they can demonstrate that the agency failed to act with a rational basis.

The practical impact of this decision on bid protest litigation may be quite significant for at least three reasons. First, the Court of Federal Claims's "narrowly tailored" standard deviated from the highly deferential standard used by GAO to review the reasonableness of agency corrective action plans.⁴⁶ Therefore, the Federal Circuit's decision in *Dell Federal* brings further harmony to the legal standards applied by GAO and the Court of Federal Claims. Second, the Court of Federal Claims's decisions reviewing challenges to agency corrective action plans were not uniform in their application of the "narrowly tailored" standard. Some cases seemed to strictly apply the "narrowly tailored" standard, limiting the permissible scope of agency corrective action, while other cases were more deferential. By rejecting the "narrowly tailored" line of cases and confirming that the highly deferential APA standard applies, the Federal Circuit's decision may reduce uncertainty in this area of procurement law in favor of uniformly deferential review. Third, and perhaps most significantly, agencies facing protests and weighing the potential costs and benefits of corrective action previously had to consider the risk that their corrective action would immediately trigger another round of protest litigation and additional procurement delays. The Federal Circuit's clear pronouncement that corrective action is subject to deferential APA review, and not any "narrowly tailored" standard, may provide agencies more certainty and maneuverability in their protest response and corrective action

44. *Id.*

45. *Id.*

46. *See, e.g.*, CSRA LLC, B-415171.3, at 4-5 (Comp. Gen. Aug. 27, 2018) (identifying the "broad discretion" agencies have to make corrective action decisions in terms of negotiated procurements); Computer Assocs. Int'l Inc., B-292077.2, at 5 (Comp. Gen. Sept. 4, 2003) (asserting that agencies have the discretion to decide the scope of proposed revisions); SMS Data Prods. Grp., Inc., B-280970.4, at 2 (Comp. Gen. Jan. 29, 1999) (adding that agency discretion has the purpose of ensuring fair and impartial competition).

strategies. This flexibility is particularly important in light of recent calls for protest reform. These calls emerge from perceived concerns that serial protests could threaten to paralyze the acquisition process.⁴⁷

B. Palantir USG, Inc. v. United States

The Federal Circuit's decision in *Palantir USG, Inc. v. United States*⁴⁸ encourages the government and commercial vendors to collaborate and hold each other accountable when conducting business. The decision emphasized the Federal Acquisition Streamlining Act's (FASA) mandate that agencies prioritize commercial solutions over developmental efforts.⁴⁹ The Federal Circuit's decision will impose an obligation on agencies to carefully conduct market research and document the reasons or explanations for selecting an acquisition strategy. It may also provide commercial companies an incentive to carefully review and provide suggestions to the specifications of a solicitation.⁵⁰

1. Background

The Army solicited bids for an upgraded Distributed Common Ground System (DCGS-A), an intelligence software that allows the Army and other military branches to easily share and access essential intelligence information.⁵¹ The Army sought potential bidders to produce a revamped system, DCGS-A2, to replace the outdated data

47. See, e.g., Richard B. Oliver & Kevin Massoudi, *Congress Commissions Study of Bid Protests Filed at Both the GAO and COFC*, PILLSBURY (Aug. 8, 2018), <https://www.pillsburylaw.com/en/news-and-insights/bid-protests-gao-cofc.html> (describing a 2017 congressionally mandated study of certain bid protests in order to “advance the efficiency of the acquisition system”); Bruce Tsai, *Targeting Frivolous Bid Protests by Revisiting the Competition in Contracting Act's Automatic Stay Provision*, 13 J. OF CONT. MGMT. 215, 215 (2015) (“[F]rivolous protests are a problem . . . [P]rotests disrupt the Government-contractor relationship.”).

48. 904 F.3d 980 (Fed. Cir. 2018).

49. *Id.* at 983–84.

50. For additional analysis, see Steven L. Schooner, *Commercial Products and Services: Raising the Market Research Bar or Much Ado About Nothing?*, 32 NASH & CIBINIC REP. ¶ 52 (2018) (stating that “[c]ontractors that believe they can provide a commercial product that meets the Government's needs should explicitly inform the Government of their capabilities, early in the process, and frequently remind the Government what they bring to the table”); Nathaniel Castellano et al., *Palantir: Federal Circuit Confirms Agencies' Obligations to Prioritize Commercial Solutions*, ARNOLD & PORTER (Sept. 17, 2018), <https://www.arnoldporter.com/en/perspectives/publications/2018/09/palantir-federal-circuit-confirms-agencies> (identifying the increased opportunity for, and importance of, company objections to procurements).

51. *Palantir USG, Inc. v. United States*, 129 Fed. Cl. 218, 222–23 (2016).

architecture of the current system.⁵² More specifically, the government wanted the system to “introduce a new and modernized data management architecture using a modular system approach to perform Army intelligence analysis capabilities.”⁵³

Palantir USG Inc. (“Palantir”), a contractor that already operated a commercial data management system called “Gotham” for the Department of Defense, encouraged the Army to use its commercial platform, or a modified version, for DCGS-A2.⁵⁴ The Gotham contract was on a firm-fixed price, commercial-item basis.⁵⁵ However, the Army ignored Palantir’s proposals and continued its solicitation for DCGS-A2 on a cost-plus basis.⁵⁶

Palantir challenged the solicitation at GAO, arguing that the government’s developmental approach violated § 2377 of FASA.⁵⁷ Section 2377 requires federal agencies to procure commercially available technology to the “maximum extent practicable” and to conduct market research for existing commercial items or commercial items that could be reasonably modified before soliciting proposals.⁵⁸ GAO denied Palantir’s protest, favoring the Army’s developmental approach.⁵⁹ GAO reasoned that no existing commercial contract met the DCGS-A2 specifications, and that the Army’s non-commercial developmental approach was reasonably related to its needs for the DCGS-A2 system.⁶⁰

Undeterred, Palantir filed a bid protest with the Court of Federal Claims.⁶¹ Judge Marian Blank Horn found that the Army did not meet its obligations under § 2377 and permanently enjoined the Army from issuing an award for the solicitation.⁶² The court found that the Army’s market research was insufficient. First, the Army did not explain or indicate which commercial items were considered or potentially available.⁶³ In addition, the Market Research Report failed to acknowledge any commercial items that could have been

52. *Id.* at 222.

53. *Id.* at 223.

54. *Id.* at 223–24.

55. *Id.*

56. *See id.* at 226–32 (outlining Palantir’s multiple responses to the Army’s Requests for Information).

57. *Id.* at 234.

58. 10 U.S.C. § 2377(b), (c) (2012).

59. Palantir USG, Inc., B-412746, 2016 WL 3035029, at *4–5 (Comp. Gen. May 18, 2016).

60. *Id.*

61. *Palantir*, 129 Fed. Cl. at 221–22.

62. *Id.* at 282, 295.

63. *Id.* at 276.

modified to potentially meet the Army's needs.⁶⁴ Even after market research was completed, the Army did not consider whether Palantir's data management platform met their requirements.⁶⁵ Based on the Army's lack of discussion regarding commercial items, the court found that the Army's focus on a developmental approach early in the process led to the complete exclusion of possible commercially available alternatives.⁶⁶ Judge Horn also emphasized that the Army continued with their developmental approach despite Palantir's efforts to inform them that its Gotham platform could be modified to satisfy their needs.⁶⁷

2. *The Federal Circuit's decision*

The government appealed to the Federal Circuit, raising two issues:

- (1) [W]hether the trial court went beyond the statutory and regulatory language of FASA and its implementing regulations and imposed heightened obligations; and
- (2) whether the trial court wrongly discarded the presumption of regularity and substituted its judgment in determining that the Army acted arbitrarily and capriciously and in violation of § 2377.⁶⁸

The Federal Circuit, in a decision authored by Judge Stoll and joined by Judge Newman and Senior Judge Mayer, unanimously upheld the lower court's decision, finding that the Court of Federal Claims remained within the scope of the statutory language in § 2377 and that the presumption of regularity was appropriately discarded.⁶⁹

With respect to the first issue, the government argued that the Court of Federal Claims improperly heightened the Army's responsibilities for its solicitation under § 2377 because it required the Army to "fully investigate" whether any commercial items could adequately satisfy the government's request.⁷⁰ The Federal Circuit rejected this argument. It found that the Court of Federal Claims required the government only to "determine" whether there were commercial items that met the Army's requirements or could be modified to meet the Army's requirements.⁷¹ Therefore, the lower

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 276–81.

68. *Palantir USG, Inc., v. United States*, 904 F.3d 980, 990 (Fed. Cir. 2018).

69. *Id.* at 990, 995.

70. *Id.* at 990.

71. *Id.*

court correctly applied the standard set forth under § 2377(c)(2).⁷² The Federal Circuit noted that while the Court of Federal Claims may have used language other than “determine” throughout its opinion, read in context, it still had the same meaning as the word “determine” under FASA.⁷³ In addition, the Federal Circuit’s *de novo* review of the record led it to the same conclusion: the Army failed to “determine” under § 2377(c)(2) whether there were commercial products available during the solicitation process that could “meet the agency’s requirements; could be modified to meet the agency’s requirements; or could meet the agency’s requirements if those requirements were modified to a reasonable extent.”⁷⁴

The Federal Circuit further noted that the Army was put on notice about readily available commercial alternatives when Palantir reached out to them.⁷⁵ Despite that notice, the Army was adamant in taking a developmental approach for its solicitation, seeking a bidder that would build DCGS-A2 from the ground up.⁷⁶ Palantir argued that this was a complete disregard for § 2377’s requirement to procure commercial items to the “maximum extent practicable.”⁷⁷ The Federal Circuit agreed, finding that the Army’s method was arbitrary and capricious.⁷⁸

As for the second issue, the government argued that the Army was entitled to a presumption of regularity that had not been rebutted because it had conducted sufficient market research.⁷⁹ A presumption of regularity does not require an agency to provide a reason or explanation for its determination.⁸⁰ However, under the APA, even if an explanation is not required, a reviewing court has the power to require one if the presumption is “rebutted by record evidence suggesting that the agency decision is arbitrary and capricious.”⁸¹

After thoroughly reviewing the record evidence, the Federal Circuit rejected the Army’s argument and found that the Army’s solicitation was arbitrary and capricious.⁸² It found that the Army’s market research

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *See id.* at 994.

77. *Id.* at 983.

78. *Id.* at 990.

79. *Id.* at 995.

80. *Id.*

81. *Id.* (quoting *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1338 (Fed. Cir. 2001)).

82. *Id.*

failed to consider any commercially available alternatives that “(A) meet the agency’s requirements; (B) could be modified to meet the agency’s requirements; or (C) could meet the agency’s requirements if those requirements were modified to a reasonable extent.”⁸³

The *Palantir* decision is the first time that the Court of Federal Claims and the Federal Circuit provided an in-depth analysis of a federal agency’s obligations under FASA to consider commercial solutions and opportunities. Following the Federal Circuit’s affirmation, agencies will likely become more accommodating to contractors that provide commercial goods and services. When it comes to technology and innovation, the government has lagged behind the private sector and commercial markets. By imposing responsibilities upon federal agencies under FASA’s mandate, this decision will likely increase the adoption of commercial practices in the public sector and close the gap.

Palantir is also likely to require federal agencies to take more caution in documenting their market research and their reasons for their solicitation strategy, especially if they choose to use a developmental approach. The decision opens a door for commercial companies to more frequently challenge an agency’s decision to solicit goods or services on a non-commercial basis, especially if those companies are able to present evidence showing that the agency had notice of alternative commercial solutions but chose to act otherwise. If an agency receives such notice, it should be careful to research and document the reasons why it chose to use a non-commercial approach.

C. Cleveland Assets, LLC v. United States

*Cleveland Assets, LLC v. United States*⁸⁴ is a pre-award bid protest decision that initially promised to resolve a divide among Court of Federal Claims judges as to whether “prudential standing” requirements apply to bid protests. Instead of reaching the issue of prudential standing, the Federal Circuit made a relatively surprising decision that the Court of Federal Claims lacked subject matter jurisdiction on the basis that Cleveland Assets was challenging the solicitation’s compliance with an “appropriation statute” instead of a “procurement statute.”⁸⁵ While Cleveland Assets will not impact most

83. *Id.* at 994.

84. 883 F.3d 1378 (Fed. Cir. 2018).

85. *See id.* at 1381 (affirming the dismissal of Count II, but for lack of jurisdiction rather than lack of standing).

bid protests, it may serve as a previously unforeseen limit to the Court of Federal Claims's bid protest jurisdiction under 28 U.S.C. § 1491(b).⁸⁶

1. *Background*

Cleveland Assets arose from a Government Services Administration (GSA) Request for Lease Proposals (RLP) seeking a secure space for the Federal Bureau of Investigation's (FBI) Cleveland Field Office. The FBI Cleveland Field Office was housed in a building leased from Cleveland Assets since February 2002. The lease was initially set to expire in January 2012 but was extended multiple times.⁸⁷

Under 40 U.S.C. § 3307, GSA must seek approval of two congressional committees before obligating funds on a lease where the annual rent will exceed \$2.85 million.⁸⁸ This statute requires GSA to submit a prospectus describing, among other things, the property it intends to lease and an estimate of the price it will ultimately pay.⁸⁹

In 2009, GSA began preparing for a new lease for the FBI Cleveland Field Office.⁹⁰ It provided the congressional committees with a final prospectus in December 2010 that set forth an estimated rental rate of \$26.00 per square foot.⁹¹ By September 2011, the relevant committees adopted resolutions approving the prospectus at that rate.⁹² Over five years later, GSA issued an RLP that, pursuant to § 3307, stated GSA would award a lease only if the offered rental rate did not exceed the "[c]ongressionally-imposed rent limitation" of \$26.00 per square foot.⁹³ The Federal Circuit's decision explained that pursuant to the lease extensions, "GSA has paid, and continues to pay, Cleveland Assets a penalty rate of \$44.72 per rentable square foot ("PSF") since the expiration of the original 10-year period."⁹⁴

86. See generally Stuart W. Turner & Nathaniel E. Castellano, *Federal Circuit Implies Narrowing of Claims Court Jurisdiction*, ARNOLD & PORTER (Mar. 12, 2018), <https://www.arnoldporter.com/en/perspectives/publications/2018/03/fed-circ-implies-narrowing-of-claims-court> (describing the implications of the *Cleveland Assets* decision on Court of Federal Claims jurisdiction).

87. *Cleveland Assets, LLC v. United States*, 132 Fed. Cl. 264, 267–68 (2017).

88. *Id.* at 268 (citing 40 U.S.C. § 3307(a)(2) (2012)).

89. *Id.* (citing § 3307(b)).

90. *Id.*

91. *Id.* at 270.

92. *Id.*

93. *Id.* at 271.

94. *Cleveland Assets, LLC v. United States*, 883 F.3d 1378, 1379 (Fed. Cir. 2018).

Cleveland Assets filed a pre-award bid protest challenging the RLP under three relevant allegations.⁹⁵ Count II asserted that GSA exceeded its authority to solicit offers under § 3307, and Counts III and IV alleged that the \$26.00 PSF limitation was unreasonably low, imposed an undue restriction on competition and shifted all risk to the contractor.⁹⁶

Judge Kaplan of the Court of Federal Claims granted judgment on the administrative record in favor of the government on Counts III and IV because it found that GSA did not abuse its discretion when it selected the \$26.00 PSF rental cap.⁹⁷ The court dismissed Count II because, although it considered that Cleveland Assets may have had standing as an “interested party” under the Tucker Act, it found that Cleveland Assets lacked the “prudential standing” necessary to bring a claim.⁹⁸ Prudential standing is a doctrine that originated in the administrative law context. Even if a plaintiff challenging the government’s violation of a statute has some interest in the government’s action, to have “prudential” standing, those interests must be within the “zone of interests protected or regulated by the statutory provision” at issue—i.e. the statute must have, in some sense, been enacted to protect or control entities in the plaintiff’s position.⁹⁹ However, the judges of the Court of Federal Claims are divided on whether the requirements of prudential standing apply in protest cases brought under the Tucker Act.¹⁰⁰

Judge Kaplan found that Congress did not exempt the Tucker Act from the prudential standing requirement.¹⁰¹ Judge Kaplan further ruled that Cleveland Assets’ interest in keeping the current FBI lease (or winning a new one) is not within the “zone of interests” protected by the appropriations rules set out in § 3307.¹⁰² Judge Kaplan explained that while § 3307(a) requires an agency to secure approval from two

95. *Cleveland Assets*, 132 Fed. Cl. at 267.

96. *Id.* at 267, 274.

97. *See id.* at 279–82 (finding that GSA reasonably determined the rental rate for the RLP).

98. *Id.* at 275–77.

99. *Id.* at 275 (quoting *Bennett v. Spear*, 520 U.S. 154, 162 (1997)).

100. *Compare* *MORI Assocs., Inc. v. United States*, 102 Fed. Cl. 503, 542 (2011) (stating that the zone of interests standard does “not apply to bid protests brought as a breach of the duty to fairly and honestly consider bids”), *and* *Santa Barbara Applied Research, Inc. v. United States*, 98 Fed. Cl. 536, 544 (2011) (determining prudential standing does not apply under § 1491(b)), *with* *Hallmark-Phoenix 3, LLC v. United States*, 99 Fed. Cl. 65, 70 (2011) (holding prudential standing does apply to cases brought under 1491(b)).

101. *Cleveland Assets*, 132 Fed. Cl. at 277.

102. *Id.* at 275.

congressional committees in order to enter into a lease over a specified dollar amount, the purpose of the statute was not to protect a private contractor such as Cleveland Assets.¹⁰³ The goal of § 3307(a) was to provide congressional oversight over certain agency actions, and certainly not to provide private parties or contractors an avenue for judicial review.¹⁰⁴

2. *The Federal Circuit's decision*

Cleveland Assets appealed the Court of Federal Claims's decision.¹⁰⁵ With respect to Cleveland Assets' claim that the RLP violated § 3307, the parties' briefing focused entirely on whether the Court of Federal Claims correctly applied the "prudential standing" requirement. Cleveland Assets argued that the standing requirement for bid protests is only that the protester be an "interested party" and does not include any "zone of interest" requirement.¹⁰⁶ The government, in turn, argued that the Court of Federal Claims properly imposed a zone of interest test.¹⁰⁷

While the oral argument, held before Judges Moore, Hughes, and Stoll, initially focused on the issue of prudential standing, the panel indicated during the government's response an interest in whether § 3307 is a "procurement statute" that could be enforced in the bid protest process at all.¹⁰⁸

This line of reasoning carried through to the unanimous opinion, authored by Judge Moore, which declined to reach the prudential standing issue at all and instead held that § 1491(b) confers jurisdiction only over challenges in connection with a procurement.¹⁰⁹ It does not cover allegations of a violation of § 3307

103. *Id.* at 277.

104. *Id.*

105. *Cleveland Assets, LLC v. United States*, 883 F.3d 1378, 1379 (Fed. Cir. 2018).

106. *See* Reply Brief of Appellant at 3–4, *Cleveland Assets, LLC v. United States*, 883 F.3d 1378 (Fed. Cir. 2018) (No. 17-2113) (contending that a party has standing in a bid protest if it is an actual or prospective bidder and has a direct economic interest in the bid).

107. *See* Brief of Defendant-Appellee at 15, *Cleveland Assets, LLC v. United States*, 883 F.3d 1378 (Fed. Cir. 2018) (No. 17-2113) (agreeing with the trial court that Cleveland Assets challenges lacked standing to challenge because it was in the "zone of interests" authorizing the appropriations for leases under § 3307).

108. *See* Oral Argument at 32:00, *Cleveland Assets, LLC v. United States*, 883 F.3d 1378 (No. 17-2113), http://www.cafc.uscourts.gov/oral-argument-recordings?title=cleveland+assets&field_case_number_value=&field_date_value=2%5Bvalue%5D%5Bdat%5D= (questioning whether an appropriation statute has any connection to procurements).

109. *See Cleveland Assets*, 883 F.3d at 1381.

because it is “an appropriation, not a procurement, statute.”¹¹⁰ The Federal Circuit was concerned about unnecessarily expanding the scope of bid protest jurisdiction.¹¹¹ The decision also proves the court’s strong preference for plain language interpretation, noting that “the word ‘procurement’ is nowhere to be found in § 3307”¹¹²:

While the Claims Court dismissed Count II on prudential standing grounds, we need not reach that issue because the plain language of 28 U.S.C. § 1491(b)(1) expressly precludes Claims Court jurisdiction over Count II of the complaint. Section 1491(b)(1) only confers jurisdiction over challenges to statutes or regulations “in connection with a procurement or proposed procurement.” 28 U.S.C. § 1491(b)(1) We have previously interpreted § 1491(b) to extend only to actions in which “the government at least initiated a procurement, or initiated ‘the process for determining a need’ for acquisition.” The phrase “procurement” therefore limits the types of government action that the Claims Court has jurisdiction to review under § 1491(b). If plaintiffs could allege any statutory or regulatory violation tangentially related to a government procurement, § 1491(b)(1) jurisdiction risks expanding far beyond the procurement context.

The only statute alleged to be violated by Cleveland Assets in Count II is 40 U.S.C. § 3307, an appropriation, not a procurement, statute. The plain text of § 3307 demonstrates that the statute is directed to “appropriations [being] made only” pursuant to approval by the specified congressional committees. While the word “procurement” is nowhere to be found in the statute, “appropriation” is used eight times.

The statutory structure confirms our plain language reading of the statute. The structure of 40 U.S.C. § 3307 directs GSA how to apply for an appropriation, but it says nothing of how GSA must run its procurement once the appropriation is made If we were to read § 3307 as a procurement statute, every appropriations bill and rider would become a potential source of challenge for any interested party under 28 U.S.C. § 1491(b)(1).¹¹³

The Federal Circuit also affirmed the Court of Federal Claims holding that Cleveland Assets had not shown GSA’s decision to

110. *Id.*

111. *See id.*

112. *Id.*

113. *Id.* at 1381–82.

impose a \$26.00 PSF rent cap to be arbitrary, capricious, or otherwise not in accordance with law.¹¹⁴

3. *On petition for panel rehearing and rehearing en banc*

Cleveland Assets filed a petition for panel rehearing and rehearing en banc—both petitions were denied.¹¹⁵ The petitions argued that the panel erred in finding that Cleveland Assets' claim fell beyond the Court of Federal Claims's jurisdiction and that prudential standing does not apply to bid protests under § 1491(b).¹¹⁶ Judge Wallach, joined by Judge Newman, dissented from the denial of en banc rehearing.¹¹⁷ Judge Wallach voiced several concerns with the panel's conclusion that Cleveland Assets' claim fell beyond the scope of § 1491(b) jurisdiction, emphasizing prior Federal Circuit precedent describing the broad scope of § 1491(b).¹¹⁸

On balance, *Cleveland Assets* is unlikely to impact most bid protests brought under § 1491(b), which often allege violations of the Competition in Contracting Act¹¹⁹ and the Federal Acquisition Regulation (FAR).¹²⁰ However, in more unique protests that test jurisdictional limits, such as those challenging the award of an Other Transaction Agreement,¹²¹ the holding of *Cleveland Assets* that § 1491(b) extends only to alleged violations of "procurement" statutes may prove to be an important limitation on the Court of Federal Claims's bid protest jurisdiction. Moreover, it appears that the Court of Federal Claims remains divided as to whether prudential standing applies as an additional limit to bid protest standing.

114. *See id.* at 1382 (noting that the standard of review is highly deferential to the agency and Cleveland Assets did not meet its burden of proof).

115. *Cleveland Assets, LLC v. United States*, 897 F.3d 1332 (Fed. Cir. 2018) (per curiam).

116. Plaintiff-Appellant's Combined Petition for Rehearing at 6, *Cleveland Assets, LLC v. United States*, 883 F.3d 1378 (Fed. Cir. 2018) (No. 17-2113).

117. *Cleveland Assets*, 897 F.3d at 1333 (Wallach, J., dissenting).

118. *See id.* (arguing that the majority opinion narrows the court's jurisdiction too much and could set a negative precedent for future cases).

119. Pub. L. No. 98-396, §§ 2701–2753, 98 Stat. 494, 1175 (1984) (codified as amended at 41 U.S.C. §§ 3301–3312 (2012)).

120. *See FAR ch. 1* (2018). The FAR provides the principal set of rules for government procurement by federal executive agencies in the United States.

121. *See generally* Stuart W. Turner & Nathaniel Castellano, *Other Transactions Authority (OTA): Protests and Disputes*, ARNOLD & PORTER (June 28, 2018), <https://www.arnoldporter.com/en/perspectives/publications/2018/06/other-transactions-authority-ota-protests> (explaining that Other Transaction Authority "is a rubric describing a set of statutes that explicitly grant certain agencies the authority to enter into agreements other than procurement contracts, grants, and cooperative agreements").

D. PDS Consultants, Inc. v. United States

In *PDS Consultants, Inc. v. United States*,¹²² the Federal Circuit resolved an existing conflict between two statutory schemes designed to give contracting preferences to “two historically disadvantaged groups: veterans and disabled persons.”¹²³ This case required the Federal Circuit to once again address the scope of the Department of Veterans Affairs’ (VA) obligations to consider setting aside procurements for competition among veteran-owned small businesses through a process known as the “Rule of Two”¹²⁴ under the Veterans Benefits, Health Care, and Information Technology Act of 2006 (VBA).¹²⁵ Just two years ago, the U.S. Supreme Court considered this statute in *Kingdomware Technologies, Inc. v. United States*¹²⁶ and held that the VBA “unambiguously requires the [VA] to use the Rule of Two before contracting under the competitive procedures.”¹²⁷

At the same time, the Javits-Wagner O’Day Act¹²⁸ (JWOD) requires all federal government agencies to procure designated products and services from qualified nonprofit agencies operated by, and employing, blind or significantly disabled individuals.¹²⁹ The Federal Circuit addressed the conflict between the VBA (as interpreted by *Kingdomware*) and the JWOD and concluded that the VA must follow the VBA’s Rule of Two requirement in *every* procurement;¹³⁰ the VA cannot circumvent the VBA’s requirement by turning to JWOD-mandated sources.

1. Background

The JWOD’s mandatory sourcing requirements are fulfilled through a procurement list of eligible products and services (the “List”) that is maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled (the “AbilityOne

122. 907 F.3d 1345 (Fed. Cir. 2018).

123. *Id.* at 1348.

124. *See id.* at 1350 (explaining that the Rule of Two is a congressional “preference for awarding contracts restricted to veteran-owned small business[es]” (citing 38 U.S.C. § 8127(d))).

125. Pub. L. No. 109-461, 120 Stat. 3403 (2006) (codified as amended in scattered sections in 38 U.S.C.).

126. 136 S. Ct. 1969 (2016).

127. *Id.* at 1976.

128. Pub. L. No. 92-28, 85 Stat. 77 (1971) (codified as amended at 41 U.S.C. §§ 8501–06 (2012)).

129. *See* 41 U.S.C. § 8504 (codifying the requirement that all procurements under § 8503 come from a qualified nonprofit agency).

130. *PDS Consultants, Inc. v. United States*, 907 F.3d 1345, 1357–61 (Fed. Cir. 2018).

Commission”).¹³¹ In the early 2000s, before passage of the VBA, the AbilityOne Commission added to the List eyewear and eyewear prescription services provided by the VA through two Veterans Integrated Service Networks (VISNs), and the VA awarded contracts for these services to Winston-Salem Industries for the Blind (Industries for the Blind).¹³² Then in February 2016, after the VBA’s enactment but before the Supreme Court’s decision in *Kingdomware*, the AbilityOne Commission published a notice proposing to add to the List eyewear services under another one of the VA’s VISNs.¹³³ The *Kingdomware* decision was released shortly thereafter, which prompted PDS Consultants (PDS)—a service-disabled veteran-owned small business that provides eyewear services—to write to the AbilityOne Commission and assert that the Commission’s proposal to add additional VISNs to the List would violate the VA’s obligation under the VBA to consider setting aside all procurements to veteran-owned small businesses.¹³⁴ The AbilityOne Commission considered PDS’s comments but ultimately voted to add the additional VISN to the List.¹³⁵

PDS filed a bid protest in the Court of Federal Claims, seeking an injunction requiring the VA to perform the Rule of Two analysis mandated by the VBA when procuring eyewear services under any of the agency’s VISNs.¹³⁶ Under the VBA’s Rule of Two requirement, the VA must set aside a contract for competition among veteran-owned small businesses if the contracting officer reasonably expects that two or more veteran-owned small businesses will compete for the contract.¹³⁷ PDS pointed to the Supreme Court’s decision in *Kingdomware* to argue that the VBA’s Rule of Two requirement took priority over the JWOD.¹³⁸

The Court of Federal Claims ruled in favor of PDS and held that the VBA’s Rule of Two took priority over the JWOD for all VA procurements.¹³⁹ It explained that the decision in *Kingdomware* obligates the VA to use the Rule of Two, and that the VBA should take

131. *Id.* at 1348–49.

132. *Id.* at 1352–53.

133. *Id.* at 1353.

134. *Id.*

135. *Id.* at 1353–54.

136. *See generally* PDS Consultants, Inc. v. United States, 132 Fed. Cl. 117 (2017).

137. *Id.* at 119.

138. *Id.* at 120.

139. *Id.* at 128.

priority over the JWOD because it was “more specific.”¹⁴⁰ The court also noted that the VBA priority applies only to VA procurements, while the JWOD applies to all federal agency procurements.¹⁴¹

2. *The Federal Circuit’s decision*

The United States and Industries for the Blind appealed to the Federal Circuit.¹⁴² In an opinion authored by Judge O’Malley and joined by Chief Judge Prost and Judge Stoll, the Federal Circuit upheld the Court of Federal Claims’s decision and held that the VA must use the Rule of Two even when goods and services are on the List.¹⁴³

The Federal Circuit first considered various arguments by the Industries for the Blind that the Court of Federal Claims lacked subject matter jurisdiction to hear PDS’s claims. Industries for the Blind argued that: (1) PDS’s protest was nothing more than a challenge to the validity of the AbilityOne Program as a whole and VA regulations that could only be heard in district court under the APA; and (2) the “purchases from the List ‘are not ‘procurements’ for purposes of Tucker Act jurisdiction.”¹⁴⁴ The Federal Circuit rejected these arguments and held that PDS’s “claims fall squarely within Tucker Act jurisdiction.”¹⁴⁵ The court found that PDS alleged a statutory violation relating to the VA’s procurements—“namely, that the VA acted in violation of the VBA by awarding contracts without first conducting the Rule of Two analysis.”¹⁴⁶ In an effort to distinguish this case from its earlier decision in *Cleveland Assets*, the court noted that none of the parties disputed that “the VBA is a statute that relates to all VA procurements” and is thus “[f]ar from being ‘tangentially related to a government procurement.’”¹⁴⁷ Hence, the Federal Circuit held that the Court of Federal Claims properly found that it had jurisdiction over PDS’s claims.

The Federal Circuit then reviewed the plain language of both the VBA and the JWOD and explained that it needed to determine: (1)

140. *Id.* at 127–28.

141. *Id.* at 119–20.

142. *See generally* PDS Consultants, Inc. v. United States, 907 F.3d 1345 (Fed. Cir. 2018).

143. *Id.* at 1360.

144. *Id.* at 1355. The Federal Circuit explained in a footnote that the government was not appealing the Court of Claims’s exercise of subject-matter jurisdiction and had “taken the opposing view in related litigation, contending that such actions are essentially bid protests that fall under the [Court of Federal Claims’s] jurisdiction.” *Id.* at 1355 n.6.

145. *Id.* at 1356.

146. *Id.*

147. *Id.* (quoting *Cleveland Assets, LLC v. United States*, 883 F.3d 1378, 1381 (Fed. Cir. 2018)).

whether the statutes conflict with each other and, if so, to what extent; and (2) whether an alternative means for reconciling the provisions can be found in standard principles of statutory interpretation.¹⁴⁸

With respect to the first issue, the VA argued that the statutes do not conflict because the VBA applied only to “non-mandatory, competitive awards.”¹⁴⁹ The Federal Circuit rejected the argument and explained that:

[B]y its express language, the [VBA] applies to all contracts—not only *competitive* contracts. The statute requires that, when the Rule of Two is triggered—i.e., when “the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States”—the VA must apply competitive mechanisms to determine to whom the contract should be awarded.¹⁵⁰

As for the second issue, the court found that an alternative means could be found in standard principles of statutory interpretation because specific statutes take priority over general ones.¹⁵¹ The Federal Circuit pointed to Congress’s intent when it enacted the VBA to explain that the VBA was more specific than the JWOD:

While the JWOD applies to all agencies of the federal government, the VBA applies only to VA procurements and only when the Rule of Two is satisfied. The express, specific directives in § 8127(d), thus, override the more general contracting requirements of the JWOD The VBA, moreover, was expressly enacted to “increase contracting opportunities for small business concerns owned and controlled by veterans and . . . by veterans with service-connected disabilities.” Consistent with the VA’s duty to support and champion the veteran community, the VBA created the Veterans First Contracting Program (“Veterans First”), which requires the VA to give “contracting priority” to qualified service-disabled veteran-owned small businesses and veteran-owned small businesses. And it specifies that the Secretary, “[i]n procuring goods and services pursuant to a contracting preference under this title *or any other provision of law* . . . shall give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference.”¹⁵²

148. *Id.* at 1357, 1358.

149. *Id.* at 1358.

150. *Id.* (citation omitted).

151. *See id.* (explaining that under basic tenets of statutory construction, specific statutes take precedence over general ones).

152. *Id.* at 1358–59 (citations omitted).

The Federal Circuit also considered the fact that the VBA was enacted years after the JWOD. Since Congress enacted the VBA over thirty years after the JWOD, the Federal Circuit inferred that the VBA controls VA procurements while the JWOD dictates broader non-VA procurements.¹⁵³

Finally, the Federal Circuit noted that Congress had passed a similar statute in 2003—the Veteran Benefits Act—that gave the VA the discretion to consider setting aside procurements for service-disabled veteran-owned small businesses, but explicitly exempted the JWOD’s mandatory sourcing requirement.¹⁵⁴ The court thus “assume[d] that Congress was aware that it wrote an exception into the agency-wide Veterans Benefits Act in 2003 when it left that very same exception out of the VBA only three years later.”¹⁵⁵

The decision in *PDS Consultants, Inc.* once again provides a strict reading of the VBA’s provisions and reiterates that the VA is required to use the Rule of Two for all of its procurements. This decision is a logical extension of *Kingdomware* and the agency-specific requirements that the VBA imposes on the VA. Nevertheless, this decision will undeniably be seen as a blow to the AbilityOne program, as well as the many blind and disabled individuals who are dependent on the AbilityOne program to earn a living.

E. *AgustaWestland North America, Inc. v. United States*

*AgustaWestland North America, Inc. v. United States*¹⁵⁶ is another decision that provides further guidance on the scope of the court’s bid protest jurisdiction under 28 U.S.C. § 1491(b). *AgustaWestland* filed a pre-award protest challenging an Army sole source Justification & Approval (J&A).¹⁵⁷ After the Court of Federal Claims sustained the protest, the Federal Circuit reversed on three grounds in a decision that shows the Federal Circuit’s tendency to narrow the scope of § 1491(b) jurisdiction for unique claims.¹⁵⁸

1. *Background*

In 2006, following full and open competition in which *AgustaWestland* submitted an unsuccessful proposal, the Army awarded Airbus a contract to provide 322 Light Utility Helicopters over the course of ten years.¹⁵⁹

153. *Id.* at 1359 (citing *United States v. Estate of Romani*, 523 U.S. 517, 532 (1998)).

154. *Id.* at 1349–50.

155. *Id.* at 1359.

156. 880 F.3d 1326 (Fed. Cir. 2018).

157. *See id.* at 1329–30.

158. *See id.* at 1335.

159. *Id.* at 1328.

The contract required that Airbus provide eight UH-72A Lakota helicopters in the first year and provided the Army with the option to purchase up to 483 additional Lakotas.¹⁶⁰

In accordance with an initiative to reduce the defense budget, in 2013 the Army issued the Aviation Restructure Initiative “designed to deliver the best Army Aviation force possible within resource constraints.”¹⁶¹ This included “redistributing of assets” and “reducing aircraft types and standardizing Aviation brigade designs.”¹⁶²

The Army then issued a policy decision designating the Lakota as the “Institutional Training Helicopter” at Fort Rucker through an Army Execution Order on April 3, 2014.¹⁶³ The Army determined that it needed to increase the number of Lakotas from 317 to 427.¹⁶⁴ To obtain these additional aircraft, the Army exercised all remaining options under the Airbus contract but was sixteen Lakotas short of its objective.¹⁶⁵ Because Airbus had exclusive ownership over the data rights required to produce and maintain the Lakotas, the Army was faced with the prospect of either purchasing sixteen additional Lakotas on a sole source basis from Airbus or procuring sixteen alternate aircraft.¹⁶⁶ The Army chose to issue a sole source award to Airbus for the remaining sixteen Lakotas, supported by a J&A explaining the costs and delay associated with procuring and sustaining an alternate aircraft.¹⁶⁷

AgustaWestland filed suit in the Court of Federal Claims, arguing that the Execution Order designating the Lakota as the institutional training helicopter was an improper procurement decision.¹⁶⁸ AgustaWestland also challenged the Army’s sole source award for the sixteen remaining Lakotas.¹⁶⁹

Court of Federal Claims Judge Braden sustained AgustaWestland’s protest.¹⁷⁰ Judge Braden first held that the Army’s “Execution Order” was a “procurement” decision that contravened the Competition in Contracting

160. *Id.*

161. *Id.* at 1329.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *AgustaWestland N. Am., Inc. v. United States*, 127 Fed. Cl. 793, 801 (2016).

169. *Id.*

170. *Id.* at 798.

Act and the FAR.¹⁷¹ Judge Braden then granted AgustaWestland’s motion to supplement the administrative record with respect to the sole source award and held that the decision to purchase the additional sixteen aircraft was arbitrary and capricious.¹⁷² The Army appealed.

2. *The Federal Circuit’s decision*

In an unanimous decision authored by Judge Hughes and joined by Chief Judge Prost and Judge Chen, the Federal Circuit reversed all three of the Court of Federal Claims’s holdings.¹⁷³ First, the Federal Circuit held that the Execution Order was a policy decision, not a protestable decision made “in connection with a procurement” that fell within the court’s jurisdiction.¹⁷⁴ While many Federal Circuit decisions expound on the broad nature of the court’s protest jurisdiction under § 1491(b), the *AgustaWestland* opinion adds to the body of cases tending to narrow the scope of that jurisdiction for unique claims:

[In *Distributed Solutions* w]e clarified that to “establish jurisdiction pursuant to this definition, [a contractor] must demonstrate that the government at least initiated a procurement, or initiated ‘the process for determining a need’ for acquisition.”

One objective of the restructuring initiative, formalized in the Execution Order, was to “[r]eplace the aging Aviation institutional training fleet at Fort Rucker.” To accomplish this objective, the initiative instructed that “the Institutional Training Helicopter fleet is converted to UH-72s and the legacy TH-67 training helicopter is divested.” The initiative did not, however, direct or even discuss the procurement of UH-72A Lakota helicopters. In fact, the initiative only contemplated using existing Army assets.

The Execution Order, therefore, was not a procurement decision subject to Tucker Act jurisdiction because it did not begin “the process for determining a need for property or services.” The

171. *See id.* at 810–11 (noting that because the Army’s Execution Order determined a need for property, it was a “quintessential procurement decision” that failed to satisfy the requisite “justification review for other than a full and open competition”).

172. *See id.* at 817 (reasoning that “since the entire purpose of a J&A [justification and approval] is to explain and justify why competition is not required for a procurement, the Contracting Officer’s decision that ‘the justification [is] adequate to support other than full competition,’ prior to the review and approval of Legal Counsel and the SCA prima facie was arbitrary and capricious”).

173. *AgustaWestland N. Am., Inc. v. United States*, 880 F.3d 1326 (2018).

174. *Id.* at 1330–31.

Execution Order simply formalized the Army's decision designating the UH-72A Lakota as the Army's training helicopter.¹⁷⁵

Second, in a ruling reminiscent to its earlier decision in *Axiom Resource Management, Inc. v. United States*,¹⁷⁶ the Federal Circuit held that the lower court erred in allowing AgustaWestland to supplement the administrative record. The Federal Circuit explained that the Court of Federal Claims had an obligation to show why the omitted evidence from the record did not allow the court to conduct "effective judicial review" of the ultimate issue in the case.¹⁷⁷ Instead, the Court of Federal Claims merely provided conclusory statements "that it could not conduct effective judicial review without the supplemented material."¹⁷⁸ The Federal Circuit thus held that the administrative record was sufficient to review the Army's procurement award and concluded that "the trial court abused its discretion by supplementing the record[] and relying on the supplemental evidence to reach its decision."¹⁷⁹

According to the Federal Circuit, the Court of Federal Claims did not explain why the current record was insufficient before permitting supplementation of the record. Instead, the lower court merely concluded that it would not be able to conduct "effective judicial review" without providing any evidence to support that position.¹⁸⁰

Finally, the Federal Circuit reversed the lower court's determination that the J&A in support of the Army's sole source award was inadequate.¹⁸¹ Instead, the Federal Circuit found that the agency provided "a coherent and reasonable explanation of its exercise of discretion, and therefore the justifications for the sole-source award are not arbitrary and capricious."¹⁸² The J&A relied on two justifications: (1) significant duplicated costs in procuring and sustaining a different aircraft that would not be recovered through

175. *Id.* (citations omitted).

176. 564 F.3d 1374 (Fed. Cir. 2009). In *Axiom Resource Management*, the Federal Circuit concluded "that the trial court abused its discretion . . . by adding Axiom's documents to the record without evaluating whether the record before the agency was sufficient to permit meaningful judicial review." *Id.* at 1380.

177. *AgustaWestland*, 880 F.3d at 1331–32.

178. *Id.*

179. *Id.*

180. *Id.* at 1331.

181. *Id.* at 1333.

182. *Id.*

competition, and (2) unacceptable delays in the Army's missions, exposing the nation to security and safety risks.¹⁸³

The first justification was supported by an Independent Government Estimate of the cost of duplicating another competitive action.¹⁸⁴ Notably, the Court of Federal Claims criticized the Army for failing to consider the premium Airbus could charge for its intellectual property, or whether Airbus could extract a supra-competitive premium for the Lakotas.¹⁸⁵ The Federal Circuit found this concern to be irrelevant. The Federal Circuit noted that Airbus already refused a prior government request for an estimation of intellectual property costs and informed the government the data was not for sale. Since Airbus was unwilling to sell the data, the potential increased costs of intellectual property was irrelevant.¹⁸⁶

Overall, the Federal Circuit's decision in *AgustaWestland* demonstrates the discretion afforded to agencies in making certain requirements determinations, as well as the court's view of the limits of bid protest jurisdiction under § 1491 (b).

F. CliniComp International, Inc. v. United States

In *CliniComp International v. United States*,¹⁸⁷ an incumbent contractor—CliniComp—protested a sole-source award to a different contractor to provide an electronic health records (EHR) system to the VA.¹⁸⁸ The Court of Federal Claims dismissed the protest due to a lack of standing, and the Federal Circuit affirmed, finding that the lower court did not err in holding that CliniComp lacked the requisite experience to perform the large-scale sole-source contract.¹⁸⁹ The Federal Circuit's decision could be read to require pre-award protestors who challenge solicitation terms to prove standing by showing they would have qualified to compete for the contract.¹⁹⁰

183. *Id.*

184. *Id.*

185. *Id.* at 1333–34.

186. *Id.* (citations omitted).

187. 904 F.3d 1353 (Fed. Cir. 2018).

188. *Id.* at 1356–57.

189. *Id.* at 1357, 1359.

190. See generally Stuart W. Turner & Nathaniel E. Castellano, *Federal Circuit Ruling Highlights Bid Protester Standing Issues*, ARNOLD & PORTER (Sept. 25, 2018), <https://www.arnoldporter.com/en/perspectives/publications/2018/09/fed-circ-ruling-highlights-bid-protester> (providing background on the Federal Circuit's protester standing jurisprudence and explaining the potential impacts of the CliniComp decision).

1. *Background*

In 2011, the VA and the Department of Defense (DOD) determined that they would both upgrade their EHR systems. Their intention was to have one “common system” that supports interoperability between the agencies.¹⁹¹ The DOD upgraded its EHR system first.¹⁹² In 2015, it procured an EHR system that consisted primarily of commercial software developed by Cerner Corporation (Cerner).¹⁹³ Then, in 2017, the VA Secretary issued a Determination & Findings (D&F) to contract with Cerner on a sole-source award basis, relying on the public-interest exception under the Competition in Contracting Act to avoid full and open competition.¹⁹⁴

Subsequently, CliniComp protested the proposed Cerner contract, contending that it should have gone through a competitive process.¹⁹⁵ To support this contention, CliniComp argued that the VA “failed to engage in advance planning” and that “the Secretary’s award decision [was] a brand-name justification.”¹⁹⁶

Judge Griggsby of the Court of Federal Claims dismissed the protest, finding that CliniComp lacked standing because it failed to show that it had a “direct economic interest.”¹⁹⁷ To satisfy the “direct economic interest” requirement, CliniComp had to show that it had a “substantial chance of receiving the contract” if the VA used a competitive process.¹⁹⁸ Unfortunately for CliniComp, the Court of Federal Claims concluded that CliniComp did not have sufficient experience in EHR services to compete for the contract described in the VA Secretary’s D&F.¹⁹⁹ In evaluating CliniComp’s experience, the court compared the dollar value, scope, and nature of CliniComp’s prior work for the VA with the proposed Cerner contract.²⁰⁰

The Court of Federal Claims also rejected CliniComp’s argument that it could have provided an “alternative solution” to satisfy the VA’s needs, explaining: “[T]he question before the Court is not whether

191. *CliniComp Int’l*, 904 F.3d at 1356.

192. *Id.*

193. *See id.* (noting that the DOD awarded Cerner a \$4.3 billion contract for the EHR system).

194. *Id.*

195. *Id.* at 1357.

196. *CliniComp Int’l, Inc. v. United States*, 134 Fed. Cl. 736, 748 (2017).

197. *Id.* at 749.

198. *Id.*

199. *Id.* at 749–52.

200. *Id.* at 750–52.

CliniComp could offer the VA an alternative solution. But, rather, whether CliniComp could compete for the contract that the Secretary has decided to award to Cerner.”²⁰¹

2. *The Federal Circuit’s decision*

CliniComp appealed to the Federal Circuit, which affirmed the Court of Federal Claims and dismissed the protest for lack of standing.²⁰² In an opinion authored by Chief Judge Prost and joined by Judges Wallach and Toronto, the Federal Circuit found that there was no “clear error” when the Court of Federal Claims determined that CliniComp did not have the relevant experience to compete for the proposed Cerner contract.²⁰³

CliniComp raised a series of arguments. First, it contended that the Court of Federal Claims incorrectly applied the standard adopted in *Myers Investigative and Security Services, Inc. v. United States*,²⁰⁴ which requires the protestor to show that it “could compete for the contract if the bid process were made competitive.”²⁰⁵ CliniComp asserted that the court should have instead applied the standard from *Weeks Marine, Inc. v. United States*,²⁰⁶ which requires the protestor to show only a “non-trivial competitive injury which can be addressed by judicial relief.”²⁰⁷ The Federal Circuit ultimately concluded that the *Myers* standard was the proper standard.²⁰⁸ However, it explained that even if the *Weeks Marine* standard were applied, CliniComp would still lack standing:

CliniComp failed to show that it was a qualified bidder Absent such a showing, CliniComp could not satisfy the “non-trivial competitive injury” standard for prejudice set forth in *Weeks Marine* [A]lthough we apply the standard for prejudice as articulated in *Myers*, our conclusion would be the same applying the “non-trivial competitive injury” standard set forth in *Weeks Marine*.²⁰⁹

Second, the Federal Circuit rejected CliniComp’s argument that there was no way for the Court of Federal Claims to determine that it was “incapable of performing the contract” because the requirements

201. *Id.* at 751.

202. *CliniComp Int’l, Inc. v. United States*, 904 F.3d 1353, 1355–56 (Fed. Cir. 2018).

203. *Id.* at 1359.

204. 275 F.3d 1366 (Fed. Cir. 2002).

205. *Id.* at 1370 (internal quotation marks omitted).

206. 575 F.3d 1352 (Fed. Cir. 2009).

207. *CliniComp Int’l*, 904 F.3d at 1358–59 (quoting *Weeks Marine, Inc.*, 575 F.3d at 1361–62).

208. *See id.* at 1358, 1360.

209. *Id.* at 1359–60.

of the proposed Cerner contract were “not known.”²¹⁰ The Federal Circuit noted that this was “not a case where a plaintiff is unable to demonstrate its ability to compete due to a lack of information about what is required.”²¹¹ Instead, the Federal Circuit found that CliniComp lacked standing “because it failed to demonstrate an ability to perform specific requirements that are set forth in the administrative record.”²¹²

Finally, the Federal Circuit was unpersuaded by CliniComp’s contention that it could have hired subcontractors to assist it in completing the work. The Federal Circuit found that CliniComp’s “vague, cursory references to using subcontractors to perform the work it is unable to do are insufficient to cure CliniComp’s otherwise deficient showing that it is a qualified bidder.”²¹³

The Federal Circuit’s decision in *CliniComp* shows that contractors protesting sole source awards or the terms of a solicitation must provide sufficient evidence to show that they are qualified to compete.

G. Progressive Industries, Inc. v. United States

*Progressive Industries, Inc. v. United States*²¹⁴ involves a disappointed bidder’s noncompliance with procedural deadlines. The VA solicited proposals to procure medical gases for its medical facilities.²¹⁵ After being notified that it had not been awarded the contracts, Progressive filed a bid protest in the Court of Federal Claims arguing that it was treated unfairly when the VA established the competitive range.²¹⁶ The court sustained Progressive’s protest in part and enjoined the VA from awarding the contracts.²¹⁷

The day after judgment was entered, the VA filed a status report explaining that it planned to award emergency bridge contracts to the original awardees while it re-solicited the contracts.²¹⁸ Three weeks later, following some back-and-forth relating to Progressive’s ability to seek costs and attorney fees, the Court of Federal Claims entered an amended judgment that removed a sentence reading, “No

210. *Id.* at 1360.

211. *Id.*

212. *Id.*

213. *Id.* at 1360–61.

214. 888 F.3d 1248 (Fed. Cir. 2018).

215. *Id.* at 1249–50.

216. *Progressive Indus., Inc. v. United States*, 129 Fed. Cl. 457, 469–70 (2016).

217. *Id.* at 486; *Progressive Indus.*, 888 F.3d at 1250.

218. *Progressive Indus.*, 888 F.3d at 1250.

costs.”²¹⁹ A month later, Progressive filed a motion for reconsideration of amended judgment, requesting that the VA reevaluate the bid proposals in the competitive range instead of re-soliciting the contract.²²⁰ The Court of Federal Claims denied Progressive’s motion as untimely. According to Rule 59(e) of the Rules of the Court of Federal Claims, to be timely, Progressive had to submit a motion for reconsideration within twenty-eight days after entry of judgment.²²¹ The Court of Federal Claims held that the time for filing a motion for reconsideration began on the date of the court’s original judgment, not its amended judgment.²²²

Progressive appealed to the Federal Circuit.²²³ In a decision authored by Chief Judge Prost and joined by Judge Reyna and Senior Judge Mayer, the Federal Circuit affirmed the lower court’s decision and explained that the amended judgment merely changed the collateral issue of costs, and thus did not restart the time for filing: “[T]he original judgment in this case ended the litigation on the merits, and any ongoing disputes regarding costs or attorney fees were *merely collateral issues* Moreover, Progressive’s Rule 59(e) motion addressed matters that had not been modified by the amended judgment.”²²⁴

Progressive also tried to obtain relief under Rule 60(b)(6) of the Rules of the Court of Federal Claims, which “states that ‘the court may relieve a party or its legal representative from a final judgment, order, or proceeding’ for ‘any other reason that justifies relief.’”²²⁵ However, the court can grant this form of relief only under “extraordinary circumstances.”²²⁶ Progressive argued on appeal that “extraordinary circumstances” existed because it would be excluded from the re-solicited contract due to the VA’s intent to set aside the

219. *Id.* at 1251–52.

220. *Id.* at 1252.

221. *See id.* at 1252–53 & n.4 (noting that Rule 59(e) of the Rules of the Court of Federal Claims is the same as Rule 59(e) of the Federal Rules of Civil Procedure).

222. *See id.* at 1253 (explaining that the original judgment was entered on November 2, 2016, but Progressive’s motion for reconsideration was not filed until December 20, 2016).

223. *Id.* at 1252.

224. *Id.* at 1254 (emphasis added) (citations omitted).

225. *Id.* at 1255 & n.11 (quoting Rule 60(b)(6) of the Rules of the Court of Federal Claims) (commenting that language of Rule 60(b)(6) is the same as Rule 60(b)(6) of the Federal Rules of Civil Procedure).

226. *Id.* at 1255 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988)).

contract for Service-Disabled Veteran Owned Small Businesses.²²⁷ The Federal Circuit found that the Court of Federal Claims did not abuse its discretion in denying Progressive's motion:

In denying Progressive's Rule 60(b)(6) motion, the [Court of Federal Claims] noted that Progressive could have raised its concerns regarding the potential impact of *Kingdomware* before the original judgment was entered. Although Progressive attempts to explain its rationale for not doing so, there is no indication that Progressive was somehow prevented from raising this issue earlier. And, regardless, it is unclear whether Progressive would have been able to avoid the application of *Kingdomware* even if Progressive had raised the issue prior to judgment.²²⁸

The decision in *Progressive Industries* shows that protesters need to be diligent about adhering to procedural deadlines, even after obtaining a favorable judgment.

II. CONTRACT DISPUTES

A. Securiforce International America, LLC v. United States

In 1978, Congress passed the Contracts Disputes Act (CDA) with the stated purpose of providing "a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving government contract claims."²²⁹ The CDA also "removed the contract disputes process from the discretionary realm of agency-imposed contract clauses and established a fixed statutory framework that continues to this day."²³⁰ But after the CDA's passage, a range of judicial decisions and interpretative issues arose that "began to obstruct the inexpensive and expeditious resolution of disputes called for by [the CDA]."²³¹ In a recent example of these interpretative issues, *Securiforce International America, LLC v. United States*²³² adds further complexity to the role that the Court of Federal

227. *Id.* at 1255–56. The VA intended to set aside the contract following the Supreme Court's decision in *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016). Progressive argued that it would be excluded because the two original awardees were veteran-owned small businesses, whereas Progressive was not. *Progressive Indus.*, 888 F.3d at 1255–56.

228. *Progressive Indus.*, 888 F.3d at 1256.

229. S. Rep. No. 95-1118, at 1 (1978), as reprinted in 1978 U.S.C.C.A.N. 5235, 5235.

230. Swan, *supra* note 3, at 112.

231. Burg, *supra* note 15, at 174.

232. 879 F.3d 1354 (Fed. Cir. 2018).

Claims and Board of Contract Appeals play in deciding arguments raised during the litigation of CDA claims.

1. *Background*

In early September 2011, the Defense Logistics Agency (DLA) awarded a requirements contract to Securiforce International America, LLC (Securiforce) for the delivery of fuel to eight sites in Iraq.²³³ Shortly thereafter, on September 26, 2011, DLA partially terminated the contract for convenience, descopeing two sites from the contract.²³⁴ DLA then placed small orders for two of the remaining sites with delivery deadlines of October 24, 2011.²³⁵ In response, Securiforce repeatedly revised its projected delivery date into late November, well past the deadline.²³⁶ Consequently, DLA issued Securiforce a show cause notice seeking explanation for the delays or risk a default termination.²³⁷ Securiforce offered various purported government breaches as causes for the delays, including the allegedly improper termination for convenience, but gave no firm delivery date for the two orders.²³⁸ Without assurances that Securiforce would perform, DLA terminated the contract for default on November 15, 2011.²³⁹

Nearly one year later, on November 6, 2012, Securiforce filed a complaint with the Court of Federal Claims. Securiforce requested declaratory relief that the termination for default was invalid and that, due to its prior material breaches, the government could not avail itself of the alternative remedy of termination for convenience.²⁴⁰ Alternatively, Securiforce sought a declaration that the default be converted to termination for convenience.²⁴¹

On November 16, 2012, ten days after filing its complaint, Securiforce sent a letter to the contracting officer requesting a final decision that the termination for convenience was a material breach of contract entitling Securiforce to damages.²⁴² On January 16, 2013, the contracting officer responded that Securiforce did not present a

233. Securiforce Int'l Am., LLC v. United States, 125 Fed. Cl. 749, 754 (2016).

234. *Id.* at 756–57.

235. *Id.* at 760–61.

236. *Id.* at 761.

237. *Id.* at 778.

238. *Id.* at 762.

239. *Id.*

240. Securiforce Int'l Am., LLC v. United States, 879 F.3d 1354, 1358–59 (Fed. Cir. 2018).

241. *See id.* at 1359 (discussing Securiforce's first amended complaint).

242. *Securiforce Int'l Am.*, 125 Fed. Cl. at 768.

cognizable claim because the letter “failed to state a sum certain and it did not ‘make any reference to seeking an adjustment or interpretation of the contract terms.’”²⁴³ The contracting officer also indicated that Securiforce’s allegation of an improper termination for convenience was “likely without merit.”²⁴⁴

Upon receipt of the contracting officer’s letter, Securiforce amended its complaint to challenge the “deemed denial” of its November 16, 2012 request for final decision.²⁴⁵ Among other things, Securiforce requested that the court “enter a declaratory judgment that the terminations were invalid; that, due to its prior material breaches, and other breaches, the government may not avail itself of its termination for convenience remedy, either directly or as an alternative to its improper default; and that Securiforce is entitled to breach damages.”²⁴⁶

Judge Horn held that the Court of Federal Claims had jurisdiction over both termination challenges under the CDA. She found that the termination for convenience was improper, but that the termination for default was proper.²⁴⁷ Securiforce appealed Judge Horn’s decision on the default termination. The government cross-appealed, contending that the Court of Federal Claims lacked jurisdiction over Securiforce’s claim of entitlement to breach damages.²⁴⁸

2. *The Federal Circuit’s decision*

In a unanimous opinion authored by Judge Dyk and joined by Judges O’Malley and Wallach, the Federal Circuit affirmed the Court of Federal Claims’s ruling that the termination for default was proper. But the Federal Circuit also held that the Court of Federal Claims lacked jurisdiction over Securiforce’s challenge to the prior termination for convenience because Securiforce failed to state a sum certain in its November 2012 letter to the contracting officer.²⁴⁹ Consequently, the Federal Circuit vacated the Court of Federal Claims’s entry of judgement with respect to the termination for convenience and remanded with instructions to dismiss that claim.²⁵⁰

243. *Id.* at 762.

244. *Id.* at 762.

245. First Amended Complaint for Declaratory Relief at 2, *Securiforce Int’l Am., LLC v. United States*, 125 Fed. Cl. 749, 2013 WL 358916 (2013) (No. 12-759C).

246. *Id.* at 14.

247. *Securiforce Int’l Am.*, 125 Fed. Cl. at 754, 780–81, 799.

248. *Securiforce Int’l Am., LLC v. United States*, 879 F.3d 1354, 1359 (Fed. Cir. 2018).

249. *Id.* at 1361, 1368.

250. *Id.* at 1368.

The Federal Circuit held that the contractor's termination for convenience challenge was a monetary claim, regardless of how it was styled. The Federal Circuit also found that the contractor's failure to present or certify a "sum certain" to the contracting officer in its letter seeking a final decision rendered the claim "insufficient" and precluded jurisdiction because the Court of Federal Claims has jurisdiction only over a contracting officer's final decision on a valid CDA claim.²⁵¹ To determine whether the relief sought is monetary or non-monetary, the Federal Circuit noted that it looks to the substance of the pleadings, not the form. It explained that "[i]f 'the only significant consequence' of the declaratory relief sought 'would be that [the plaintiff] would obtain monetary damages from the federal government,' the claim is in essence a monetary one."²⁵²

The Federal Circuit concluded that Securiforce's termination for convenience challenge was a monetary claim. It observed that Securiforce's own November 2012 letter to the contracting officer "asked the [contracting officer] to decide whether 'Securiforce is entitled to breach damages,' without specifying an amount,"²⁵³ and that, after the Court of Federal Claims ruled in Securiforce's favor, the contractor "sent an additional letter to the [contracting officer], for the first time quantifying its damages as \$47 million."²⁵⁴ Consequently, "Securiforce's failure to present this sum certain to the [contracting officer] in its November 2012 letter rendered its claim insufficient," and left the Court of Federal Claims without jurisdiction

251. *Id.* at 1360. There is no "sum-certain" requirement in the CDA itself; that requirement comes from the definition of claim in the FAR. *See* FAR 2.101 (defining "claim" as a "written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain"). The Federal Circuit has long treated the FAR's definition of a claim as controlling for determining when CDA jurisdiction exists. *See* *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc). Treating the sum-certain and similar requirements as jurisdictional prerequisites to CDA litigation is at least questionable in light of recent Supreme Court precedent. *See* Nathaniel E. Castellano, *After Arbaugh: Neither Claim Submission, Certification, nor Timely Appeal are Jurisdictional Prerequisites to Contract Disputes Act Litigation*, 47 PUB. CONT. L.J. 35, 68 (2017) ("Because claim submission is not jurisdictional, it follows that neither are any of the judicially and administratively conjured elements of claim submission—e.g., the need to demand a 'sum-certain' . . .").

252. *Securiforce Int'l Am.*, 879 F.3d at 1360 (quoting *Brazos Elec. Power Coop., Inc. v. United States*, 144 F.3d 784, 787 (Fed. Cir. 1998)).

253. *Id.* at 1360–61.

254. *Id.* at 1361.

to “entertain Securiforce’s declaratory judgment claim with respect to the termination for convenience.”²⁵⁵

The Federal Circuit acknowledged that the Tucker Act provides the Court of Federal Claims jurisdiction over “some non-monetary disputes,” but found that this statutory language “did not relieve parties’ obligations to comply with the separate requirements of the CDA, including the statement of a sum certain where, as here, the party is in essence seeking monetary relief.”²⁵⁶ In addition, the court observed that, even if Securiforce’s affirmative challenge to the termination for convenience was “properly characterized as nonmonetary,” the Court of Federal Claims lacked jurisdiction to entertain the claim because it has discretion to grant declaratory relief only in “narrow circumstances,” such as “during contract performance.” This includes when there is “a fundamental question of contract interpretation or a special need for early resolution of a legal issue,” but only if the legal remedies available to the parties are not adequate.²⁵⁷

Based on the record, the Federal Circuit characterized Securiforce’s termination for convenience challenge as epitomizing “a circumstance where ‘the legal remedies . . . would be adequate to protect [Securiforce’s] interests.’”²⁵⁸ The Federal Circuit reasoned that “damages are always the default remedy for breach of contract,”²⁵⁹ and thus, “[a] contractor’s request for declaratory judgment that the government materially breached a contract by terminating for convenience . . . would violate ‘the traditional rule that courts will not grant equitable relief when money damages are adequate.’”²⁶⁰

The Federal Circuit’s opinion then addressed the Court of Federal Claims’s jurisdiction to entertain the contractor’s affirmative defense of prior material breach, including the improper termination for convenience defense, to the default termination. The Federal Circuit reasoned that the default termination was a government claim and that the common law material breach defense did not require the payment of money or an adjustment or interpretation of the contract terms.²⁶¹ The Federal Circuit’s holding in *Securiforce* thus distinguishes between

255. *Id.*

256. *Id.*

257. *Id.* (quoting *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271 (Fed. Cir. 1999)).

258. *Id.* (quoting *Alliant*, 178 F.3d at 1271).

259. *Id.* at 1361–62.

260. *Id.* at 1362.

261. *Id.* at 1362–63.

jurisdiction over claims used as “swords” to seek affirmative relief and claims used as “shields” to defend against or negate a government claim.

The Federal Circuit explained that the rule articulated in *M. Maropakis Carpentry Co. v. United States*²⁶² applies only to those defenses that “seek the payment of money or the adjustment or interpretation of the contract terms.”²⁶³ In *Maropakis*, the Federal Circuit held that contractors must comply with the CDA’s jurisdictional and procedural prerequisites to assert an affirmative defense against a government claim. The Federal Circuit thus clarified in *Securiforce* that a contractor need not meet the CDA’s jurisdictional prerequisites to assert an affirmative defense to the contract as written, including the defense of prior material breach.²⁶⁴

Finding that the Court of Federal Claims had jurisdiction to entertain that defense, the Federal Circuit then turned to the merits and determined that the government did not breach the contract by partially terminating it for convenience, nor did the termination for convenience amount to an abuse of discretion.²⁶⁵

B. Meridian Engineering Co. v. United States

1. Background

*Meridian Engineering Co. v. United States*²⁶⁶ involved a classic construction contract dispute. In 2007, the U.S. Army Corps of Engineers contracted with Meridian Engineering Company to perform flood control work in relation to the Chula Vista Project.²⁶⁷ The project required Meridian to demolish and reconstruct a highway bridge in Arizona by adding concrete flood channels and relocating a sewer line.²⁶⁸

After contract formation and once performance was underway, Meridian encountered “subsurface organic/unsuitable material” at the job site, “specifically, ‘a layer of dripping saturated dark clay

262. 609 F.3d 1323, 1326–32 (Fed. Cir. 2010).

263. *Securiforce Int’l Am.*, 879 F.3d at 1362 (citation omitted). For further discussion of the Federal Circuit’s decision in *Maropakis*, see Schooner, *supra* note 10, at 1095–99; Steven L. Schooner & Pamela J. Kovacs, *Affirmatively Inefficient Jurisprudence?: Confusing Contractors’ Rights to Raise Affirmative Defense with Sovereign Immunity*, 21 FED. CIR. B.J. 685, 702 (2012).

264. *Securiforce Int’l Am.*, 879 F.3d at 1362–63.

265. *Id.* at 1364, 1367.

266. 885 F.3d 1351 (Fed. Cir. 2018).

267. *Id.* at 1354.

268. *Id.*

material under which a clean layer of sand is producing water' that had 'the potential for serious structural damage.'"²⁶⁹ In response, the Army modified the contract to provide increased funding, yet subsequent structural failures eventually resulted in the government suspending work and ultimately terminating the contract.²⁷⁰

Following failed negotiations as to termination costs, Meridian filed a twelve-count complaint at the Court of Federal Claims.²⁷¹ The Court of Federal Claims denied the vast majority of Meridian's claims.²⁷² On the question of whether Meridian was entitled to be paid for certain work it completed, the court ordered Meridian to provide the government with all relevant invoices and directed the parties to attempt to negotiate a settlement.²⁷³

2. *The Federal Circuit's decision*

Meridian appealed, challenging the Court of Federal Claims's decision on several grounds.²⁷⁴ In an opinion authored by Judge Wallach, joined by Judge Reyna and Chief Judge Prost, the Federal Circuit affirmed in part, vacated in part, and reversed in part the Court of Federal Claims's decision.²⁷⁵

This long and complex decision affirms most of the Court of Federal Claims's conclusions and summarily denies many of Meridian's arguments presented on appeal. First, Meridian argued that the Court of Federal Claims erred in analyzing Meridian's claims as "breach" claims instead of analyzing them "under the framework contemplated by the CDA."²⁷⁶ The Federal Circuit quickly dismissed this argument, noting that "Meridian does not explain the alternate CDA framework to which it refers, nor does it state how analysis under a different hypothetical framework would result in a finding in its favor."²⁷⁷ The decision explains that "the CDA itself does not provide a cause of action to which money damages may accrue; it is the

269. *Id.* (citations omitted).

270. *Id.*

271. *See Meridian Eng'g Co. v. United States*, 122 Fed. Cl. 381, 396–97 (2015) (listing Meridian's claims, including health hazards, flood events, unpaid contract quantities, suspension of work, and channel fill).

272. *Id.* at 426.

273. *See id.* at 396–97, 414, 426 (describing the various work performed and the associated reports provided to the government).

274. *See generally Meridian*, 885 F.3d at 1353–54.

275. *Id.*

276. *Id.* at 1355.

277. *Id.*

claim asserted pursuant to the CDA that is the source of potential damages and review by the trier of fact.”²⁷⁸ Second, the Federal Circuit affirmed the Court of Federal Claims’s findings that Meridian failed to establish liability with respect to its differing site conditions claims. Essentially, the Federal Circuit agreed with the Court of Federal Claims’s findings that a reasonable contractor would have foreseen the site conditions Meridian encountered.²⁷⁹ Third, Meridian challenged the Court of Federal Claims’s decision to consolidate Meridian’s differing site conditions claim with its separate claim that the government provided defective specifications. The Federal Circuit agreed with the lower court that the arguments were so intertwined as to effectively constitute a single claim.²⁸⁰

Nevertheless, the Federal Circuit held in favor of Meridian with respect to three issues, resulting in remand for further proceedings. First, because Meridian and the government both agreed that the Court of Federal Claims erred in determining when interest would begin to accrue, the Federal Circuit remanded with instructions to recalculate interest.²⁸¹ Second, the Federal Circuit held that the Court of Federal Claims provided insufficient analysis to support its conclusion that the doctrine of accord and satisfaction precluded Meridian’s claim seeking damages for government-caused delays that forced Meridian to work in inclement weather.²⁸² Specifically, the Court of Federal Claims found accord and satisfaction without adequately considering evidence presented by Meridian suggesting that there was no “meeting of the minds” between the parties.²⁸³ Finally, the Federal Circuit held that the Court of Federal Claims erred in its conclusion that the government had already paid Meridian sufficiently to cover Meridian’s entitlement for certain “unpaid contract quantities” based on the government’s right under FAR 52.232-5 to withhold a percentage of progress payments if there is a lack of “satisfactory progress.”²⁸⁴ Because there was no allegation of unsatisfactory performance, the Federal Circuit held that the government’s right to withhold under FAR 52.232-5 was

278. *Id.*

279. *See id.* at 1355–60.

280. *Id.* at 1360–61.

281. *Id.* at 1354 n.2.

282. *See id.* at 1362–65.

283. *Id.* at 1364 n.12.

284. *See id.* at 1365–67 (quoting FAR 52.232-5 (2018)).

inapplicable.²⁸⁵ The Federal Circuit thus remanded for further proceedings on the amount Meridian is entitled to recover for the “unpaid contract quantities.”²⁸⁶

C. K-CON, Inc. v. Secretary of the Army

In *K-Con, Inc. v. Secretary of the Army*,²⁸⁷ the Federal Circuit held that the mandatory bonding requirements at FAR 52.228-15 are subject to the doctrine set forth in *G.L. Christian and Associates v. United States*²⁸⁸ and were thus automatically incorporated by operation of law into two contracts for the construction of pre-engineered metal buildings.²⁸⁹ The decision also highlighted the need for contractors to seek clarification when faced with a potentially patent ambiguity as to the type of acquisition being sought by the government.

1. Background

In September 2013, the Army awarded K-Con, Inc. two contracts for pre-engineered metal buildings at Camp Edwards, Massachusetts.²⁹⁰ One contract was to design and construct a laundry facility, and the other was to construct a communications equipment shelter.²⁹¹ The government issued both solicitations using Standard Form 1449, Solicitation/Contract/Order for Commercial Items, and neither solicitation mentioned performance and payment bond requirements.²⁹² A month after the contract award, the Army requested that K-Con provide performance and payment bonds pursuant to FAR 28.102-1, which “requires performance and payment bonds for any construction contract exceeding \$150,000.”²⁹³ K-Con provided the required performance bonds and, in January 2016, sent the Army a certified claim in the amount of \$116,336.56 for the increases in cost and labor.²⁹⁴

285. *Id.* at 1366.

286. *Id.* at 1366–67.

287. 908 F.3d 719 (Fed. Cir. 2018).

288. *See* *G.L. Christian & Assoc. v. United States*, 312 F.2d 418, 427 (Ct. Cl. 1963) (holding that “it is both fitting and legally sound to read the termination article required by the Procurement Regulations as necessarily applicable to the present contract and therefore as incorporated into it by operation of law”).

289. *K-Con, Inc.*, 908 F.3d at 727–28.

290. *Id.* at 721.

291. *Id.*

292. *Id.* at 721–22.

293. *Id.* at 722, 725 (quoting FAR 28.102-1(a) (2017)).

294. *Id.* at 722.

The Contracting Officer for the Army rejected the requests on two grounds. First, the Contracting Officer stated that the bonds were mandatory because the contracts were for construction. Second, the Contracting Officer asserted that the bond requirements were assumed to be in the contract pursuant to the *Christian* doctrine.²⁹⁵ K-Con appealed the Army's decision to the Armed Services Board of Contract Appeals, and the Board affirmed the Army's denial of K-Con's claim.²⁹⁶

2. *The Federal Circuit's decision*

K-Con appealed to the Federal Circuit and raised two arguments: (1) the contracts were for commercial items instead of construction and were thus not required to have the bond requirements; and (2) even if the contracts were for construction, the Board erred in holding that the bond requirements could be incorporated into the contracts by operation of law pursuant to the *Christian* doctrine.²⁹⁷

The Federal Circuit affirmed the Board's decision on both grounds.²⁹⁸ In an opinion authored by Judge Stoll and joined by Judge Reyna and Senior Judge Bryson, the Federal Circuit held that the contracts were patently ambiguous as to whether they were for construction or commercial items, meaning that "the contract[s] contain[ed] facially inconsistent provisions that would place a reasonable contractor on notice and prompt the contractor to rectify the inconsistency by inquiring of the appropriate parties."²⁹⁹ K-Con thus had a duty, at the outset, to inquire as to whether the contracts were for construction or commercial items. K-Con's failure to do so precluded it from arguing that the contracts were for commercial items.³⁰⁰ The court reasoned that the ambiguity in the contracts was obvious because they were issued using the standard commercial items contract form, while the details in the contracts clearly referred to construction activities.³⁰¹

295. *Id.*

296. *Id.* at 721, 722.

297. *Id.* at 722.

298. *Id.* at 727–28.

299. *Id.* at 722 (quoting *Stratos Mobile Networks USA, LLC v. United States*, 213 F.3d 1375, 1381 (Fed. Cir. 2000)).

300. *See id.* at 723 ("Because the solicitations contained contract language that was patently ambiguous, K-Con cannot argue that its interpretation was proper unless K-Con contemporaneously sought clarification of the language from the Army. K-Con did not seek such clarification and therefore cannot now argue that the contracts should be for commercial items." (citation omitted)).

301. *Id.*

The Federal Circuit also found that the Board did not err when it applied the *Christian* doctrine to the performance and payment bond requirements at FAR part 28.³⁰² Under the *Christian* doctrine, a contract clause will be incorporated by operation of law into a government contract if: (1) the clause is mandatory under the FAR, and (2) the clause “expresses a significant or deeply ingrained strand of public procurement policy.”³⁰³ The Federal Circuit found that the performance bond clauses were mandatory because they were required by statute, namely, 40 U.S.C. §§ 3131–34, formerly known as the Miller Act.³⁰⁴ The statute states that performance and payment bonds “must” be furnished in construction contracts worth more than \$100,000.³⁰⁵ It was later implemented into the FAR and required that the bond clauses be inserted into construction contracts and solicitations.³⁰⁶

K-Con contended that the clauses were not mandatory because the Contracting Officer had the discretion to waive the bond requirement.³⁰⁷ However, the Federal Circuit rejected this argument:

That the contracting officer could revise the bond requirements does not change the fact that the bonding requirements are mandatory for construction contracts over \$150,000, like the contracts here. Instead, the words “must” and “shall” in the statutory and regulatory language establish that the requirement to furnish performance and payment bonds is mandatory.³⁰⁸

With respect to the second prong of the *Christian* doctrine analysis, the Federal Circuit discussed the legislative history of the Miller Act and concluded that the bond requirements were “deeply ingrained” in procurement policy.³⁰⁹ To start, it explained that since government property cannot be subjected to subcontractors’ and suppliers’ liens, payment bonds were created in government contracts to provide an alternative remedy for those who supply labor or materials to a contractor on a federal project.³¹⁰ It also explained that

302. *Id.* at 725, 727.

303. *Id.* at 724 (citing *Gen. Eng’g & Mach. Works v. O’Keefe*, 991 F.2d 775, 779 (Fed. Cir. 1993)).

304. *See id.* at 724–25.

305. *Id.* (citing 40 U.S.C. § 3131(b) (2012)). The threshold has since been raised to \$150,000. FAR 28.102-1(a) (2017); *see also K-Con, Inc.*, 908 F.3d at 724 n.4 (noting that the regulation contains a higher threshold than the statute).

306. *K-Con, Inc.*, 908 F.3d at 724–25.

307. *Id.* at 725.

308. *Id.* (citing *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016)).

309. *Id.*

310. *Id.*

performance bonds were made to ensure that federal contracts get completed without additional costs in the event of a default.³¹¹ The Miller Act expressly required these bonds to protect both of these interests. Thus, the Federal Circuit found that the statute was “deeply ingrained” in public policy.³¹²

D. Agility Logistics Services Co. KSC v. Mattis

The Federal Circuit’s decision in *Agility Logistics Services Co. KSC v. Mattis*³¹³ holds that CDA jurisdiction does not extend to claims arising under contracts formed with the Iraqi Coalition Provisional Authority (CPA).³¹⁴ This holding turns on the finding that the U.S. government is not actually a contracting party to CPA contracts, even where task orders under a CPA contract were issued and administered by a U.S. agency and obligated U.S. funds.³¹⁵

1. Background

The United States and its coalition partners created the CPA in 2003 to govern Iraq while awaiting the constitution of a new Iraqi government.³¹⁶ Shortly thereafter, the CPA formed an umbrella contract with Agility to establish and operate distribution center warehouses and staging areas as part of a supply chain management system.³¹⁷

Agility’s umbrella contract with the CPA stated that obligations under the contract would be made with Iraqi funds, not the funds of any coalition member country.³¹⁸ The umbrella contract also anticipated a transfer of authority from the CPA to an Iraqi Interim Government, at which point the CPA would be dissolved.³¹⁹ In doing so, the umbrella contract disclaimed U.S. liability for performance after the transfer: “The CPA, U.S. Government or Coalition

311. *Id.* at 725–26.

312. *Id.* at 726.

313. 887 F.3d 1143 (Fed. Cir. 2018).

314. *Id.* at 1145–46.

315. See generally Ralph C. Nash, *Puzzling Decisions: Is Issuing Task Orders Contract Administration?*, 32 NASH & CIBINIC REP. ¶ 27 (June 2018) (noting that the Federal Circuit found that the contracts were only “issued by” a government agency, not “made by” the government).

316. *Agility*, 887 F.3d at 1146.

317. *Id.*

318. *Id.*

319. *Id.*

Government will not be liable to the contractor for any performance undertaken after the [transfer of authority].”³²⁰

Once governing authority was transferred from the CPA to the interim government, responsibility for administering CPA contracts fell to the Project and Contracting Office, a temporary department created within the U.S. Army that subsequently issued a series of task orders to Agility under the CPA umbrella contract.³²¹ Despite language in the umbrella contract that all obligations under it would be made with Iraqi funds, several of the task orders issued by the Army in fact obligated U.S. funds.³²²

In 2010, a U.S. contracting officer issued final decisions claiming over \$81 million for alleged overpayments made to Agility during performance of task orders under the CPA contract.³²³ Each contracting officer decision contained standard CDA language pertaining to a contractor’s right to appeal, and Agility appealed all but one of the contracting officer’s decisions to the Armed Services Board of Contract Appeals.³²⁴ Agility also submitted to the contracting officer a claim of its own for \$47 million in unpaid invoices submitted under the CPA contract.³²⁵ The Contracting Officer denied Agility’s claim, and Agility also appealed that denial to the Board.³²⁶

The government moved to dismiss Agility’s appeals for lack of jurisdiction, and the Board granted the government’s motion.³²⁷ The Board reasoned that its jurisdiction under the CDA extends only to contracts made by executive agencies, and that “the CPA, created by a coalition of nation states, is not a federal executive agency for purposes of CDA jurisdiction.”³²⁸ Thus, absent evidence that the CPA contract was novated or assigned to a U.S. executive agency, the United States acted as a contract administrator, not a contracting party, and the Board lacked jurisdiction.³²⁹

320. *Id.*

321. *Id.* at 1147.

322. *See id.* at 1146–47 (noting that the twelve task orders at issue in the case obligated U.S. funds).

323. *Id.* at 1147–48.

324. *Id.* at 1148; Appeals of Agility Logistics Servs. Co. KSC, ASBCA No. 57415, 15-1 B.C.A. (CCH) ¶ 35840, 2014 WL 7260693 (Dec. 9, 2014).

325. *Agility*, 887 F.3d at 1148.

326. *Id.*

327. *Id.*

328. *Appeals of Agility*, ASBCA No. 57415, 15-1 B.C.A. (CCH) ¶ 35840.

329. *Id.*

2. *The Federal Circuit's decision*

Agility appealed to the Federal Circuit. The Federal Circuit affirmed the Board decision in an opinion authored by Chief Judge Prost and joined by Judges Lourie and Chen.³³⁰ As with the Board's decision, the Federal Circuit's decision turned on the assertion that CDA jurisdiction applies only to contracts made by an executive agency.³³¹

In essence, the Federal Circuit declined to accept any argument that the U.S. government's actions administering the CPA contract, however involved, could transform the U.S. government from a contract administrator, or an agent of the CPA or its successors, into a contracting party.³³² According to the Federal Circuit, it was irrelevant that the U.S. government issued and administered the task orders and obligated U.S. funds. The Federal Circuit found "that even if an executive agency issued the Task Orders, it did so as a contract administrator and not as a contracting party." The Federal Circuit thus concluded that "the Task Orders were not 'made by' an executive agency."³³³

Ultimately, the Federal Circuit's decision was driven by language in the umbrella CPA contract expressly stating that the "U.S. Government . . . will not be liable . . . for any performance undertaken after the" transfer of authority from the CPA to the interim government.³³⁴

While unlikely to impact the vast majority of traditional CDA claims, the *Agility* decision is critically important for any contractor that entered into a contract with the CPA. Absent distinct contractual provisions that may implicate U.S. government liability, or subsequent novation to a U.S. executive agency, appeals brought under the CDA from contracting officer decisions relating to CPA contracts are likely to face motions to dismiss by the government.

III. OTHER TUCKER ACT JURISDICTION CASES

The Tucker Act of 1887 was passed by Congress to cement the jurisdiction of the U.S. Court of Claims—today, the Court of Federal Claims—to adjudicate monetary claims against the U.S. government based on the Constitution, statute or regulation, or "upon any

330. *Agility*, 887 F.3d at 1145.

331. *Id.* at 1148–49.

332. *See id.* at 1149–51.

333. *Id.* at 1151.

334. *Id.*

express or implied contract with the United States.”³³⁵ While most of the contractual disputes heard by the Court of Federal Claims today arise under the CDA,³³⁶ the court will sometimes be called upon to resolve other claims against the government that fall outside the scope of the CDA but are still based upon a “contract with the United States.”

A. *Alpine PCS, Inc. v. United States*

*Alpine PCS, Inc. v. United States*³³⁷ involves the scope of Tucker Act jurisdiction, particularly 28 U.S.C. § 1491(a)(1), and the circumstances under which that jurisdiction can be displaced by a separate, comprehensive regulatory scheme.

In 1996, Alpine PCS, Inc. (Alpine), a small wireless telecommunications company, contracted with the Federal Communications Commission (FCC) to obtain two ten-year “personal communication services” licenses in California.³³⁸ Alpine was to pay for the licenses in installments during the ten-year period.³³⁹ In January 2002, Alpine failed to make payment, triggering a regulation that provided Alpine three months to pay the amount in full plus late fees.³⁴⁰ If the payment was not made, the license was to “automatically cancel.”³⁴¹ One week before the deadline, Alpine asked the FCC if it could restructure the payment plan and waive the automatic cancellation provision.³⁴² Due to a change in the FCC’s database, the licenses reverted back to the FCC.³⁴³ Alpine alleged that the FCC assured them that the reversion was a clerical error.³⁴⁴

In January 2007, the FCC denied both of Alpine’s requests to restructure, causing Alpine to default.³⁴⁵ Alpine filed a petition for reconsideration with the FCC.³⁴⁶ While the petition was pending, the

335. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (codified at 28 U.S.C. § 1491 (2012)); *see also* Swan, *supra* note 3, at 108 (noting that the Tucker Act constitutes “the bedrock waiver of sovereign immunity for claims founded upon contracts with the United States”).

336. The Court of Federal Claims has jurisdiction to hear CDA claims pursuant to 28 U.S.C. § 1491(a)(2).

337. 878 F.3d 1086 (Fed. Cir. 2018).

338. *Id.* at 1088–89.

339. *Id.* at 1089.

340. *Id.* at 1090 (citing 47 C.F.R. § 1.2110(g)(4)(i)–(ii) (2000)).

341. *Id.* (quoting § 1.2110(g)(iii)–(iv)).

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

FCC announced a new auction offering the cancelled licenses.³⁴⁷ Alpine asked the FCC to stay the auction until a decision was made on the petition, but the FCC refused.³⁴⁸ In 2008, Alpine filed for bankruptcy.³⁴⁹ In 2010, Alpine appealed to the U.S. Court of Appeals for the District of Columbia, which ultimately affirmed the FCC's decision.³⁵⁰

In 2013, Alpine brought another suit in the U.S. District Court for the District of Columbia alleging various theories of breach of contract.³⁵¹ The District Court dismissed Alpine's claim for lack of jurisdiction on the basis that, pursuant to the regulatory regime created by the Federal Communications Act,³⁵² only the D.C. Circuit could hear Alpine's claim against the FCC. The D.C. Circuit affirmed this jurisdictional ruling.³⁵³

On January 4, 2016, Alpine brought another suit against the FCC—this time in the Court of Federal Claims—alleging that the FCC breached the contracts by unilaterally placing Alpine in default on the licenses, and the FCC's cancellation of the licenses constituted a taking under the Fifth Amendment.³⁵⁴ Court of Federal Claims Judge Lettow dismissed the case for lack of jurisdiction.³⁵⁵ He explained that the “specific and comprehensive” statutory scheme within the Federal Communications Act preempted the Court of Federal Claims's jurisdiction under the Tucker Act.³⁵⁶ As for the takings claim, he found that the claim accrued when the licenses were re-auctioned, and thus were barred by the Tucker Act's six-year jurisdictional statute of limitations.³⁵⁷

Alpine appealed to the Federal Circuit.³⁵⁸ In an unanimous decision authored by Judge Taranto and joined by Judges Moore and Reyna, the Federal Circuit affirmed the dismissal of Alpine's case for lack of jurisdiction.³⁵⁹ The Federal Circuit framed the issue as whether

347. *Id.* at 1090–91.

348. *Id.* at 1091.

349. *Id.*

350. *Id.*

351. *See id.* (listing Alpine's claims against the FCC for “breach of contract, unjust enrichment, fraud in the inducement, and breach of fiduciary duty”).

352. Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151–624 (2012)).

353. *Id.*

354. *Id.*

355. *Alpine PCS, Inc. v. United States*, 128 Fed. Cl. 303, 307–09 (2016).

356. *Id.* at 307.

357. *Id.* at 309.

358. *See generally* *Alpine PCS, Inc. v. United States*, 878 F.3d 1086 (Fed. Cir. 2018).

359. *Id.* at 1088.

Tucker Act jurisdiction was displaced by the Federal Communication Act's specific and comprehensive regulatory scheme.³⁶⁰ Alpine argued that it was challenging the "breach of a contract that resulted in forfeiture of [the] licenses" and not the revocation of its licenses, but the Federal Circuit found, "[t]hat distinction is an empty one."³⁶¹ The Federal Circuit held that the Federal Communications Act displaces the Tucker Act by providing Alpine a comprehensive vehicle to obtain an administrative and judicial remedy for its breach of contract claims, noting that Alpine had already taken advantage of that remedial scheme in 2002 and 2010.³⁶²

B. *Lee v. United States*

*Lee v. United States*³⁶³ involved a class action claim against the government alleging breach of a non-procurement contract.³⁶⁴ The decision demonstrated the difficulties of recovering under breach of implied contract theories where an express contract already exists.

The plaintiffs in the class action lawsuit were hired by the government through individual purchase order vendor (POV) contracts to provide services to Voice of America, a government-funded broadcast service.³⁶⁵ The plaintiffs filed suit in the Court of Federal Claims, alleging that the government breached their POV contracts by failing to provide them with the salary and benefits appropriate for federal employees or personal service contractors.³⁶⁶ The plaintiffs sought damages under three theories: (1) breach of express contract, (2) breach of implied-in-fact contract, and (3) quantum meruit.³⁶⁷

360. *Id.* at 1093 ("In *Folden*, we examined in detail the [Federal] Communication Act's 'comprehensive statutory and regulatory regime governing orders of the [FCC],' including the remedial scheme of administrative review under 47 U.S.C. § 155 and judicial enforcement and review under §§ 401–02. We held that the comprehensive scheme displaces Tucker Act jurisdiction for, *inter alia*, FCC decisions and orders falling within 47 U.S.C. § 402(b). Here, the key question is whether Alpine's contract claims fall within § 402(b). That subsection provides for appeals to the D.C. Circuit of FCC 'decisions and orders' '[b]y the holder of any . . . station license which has been . . . revoked by the [FCC].' Alpine's contract claims, which challenge the validity of the FCC's cancellation and revocation of its station licenses, fall squarely within that provision.").

361. *Id.* at 1094.

362. *Id.* at 1094, 1097–98.

363. 895 F.3d 1363 (Fed. Cir. 2018).

364. *Id.* at 1365.

365. *Id.*

366. *Id.*

367. *Id.* at 1365–66.

Judge Lettow of the Court of Federal Claims dismissed the case and declined to allow the plaintiffs to file a second amended complaint on the basis that doing so would be futile.³⁶⁸ The Federal Circuit affirmed in a unanimous decision authored by Senior Judge Bryson and joined by Judges Reyna and Stoll.³⁶⁹

With respect to the breach of express contract theory, the plaintiffs argued that, although the government treated the plaintiffs as employees or personal service contractors during performance of the contracts, the government failed to provide the salary and benefits to which federal employees and personal service contractors are entitled. The Federal Circuit rejected this theory, noting that the plaintiffs' contracts stated that the plaintiffs were independent contractors and did not suggest that the government was obligated to provide the wages or benefits owed to federal employees or personal service contractors. The Federal Circuit noted that "the plaintiffs fail[ed] to identify any specific provision of the representative contracts that was breached; instead, they relied on general allegations regarding the rights normally enjoyed by independent contractors."³⁷⁰ The Federal Circuit thus concluded that the plaintiffs "failed to state a claim for breach of express contract" because their allegations were "not tied to the rights and obligations of the parties defined by the contracts."³⁷¹

The Federal Circuit also rejected the plaintiffs' claims that the government breached an implied-in-fact contract to compensate them as federal employees or personal service contractors. It held that an implied-in-fact contract could not exist because the plaintiffs already had an express contract that covered the same subject matter.³⁷²

The plaintiffs attempted to save their implied contract claim by arguing that the express contracts were void because they violated FAR 37.104,³⁷³ which only allows the government to award personal service contracts if they are specifically permitted under law.³⁷⁴ The Federal Circuit rejected this argument as well. It concluded that the contracts did not violate FAR 37.104, and explained that, even if the contracts

368. *Lee v. United States*, 127 Fed. Cl. 734, 736–37 (2016).

369. *Lee*, 895 F.3d at 1365.

370. *Id.* at 1369.

371. *Id.* at 1368, 1369.

372. *Id.* at 1370–73.

373. FAR 37.104(a) (2017).

374. *Lee*, 895 F.3d at 1370–71 (citing FAR 37.104).

did violate the FAR, such a violation itself is not sufficient to justify the extraordinary act of retroactively voiding a government contract.³⁷⁵

Finally, the Federal Circuit rejected the plaintiffs' claim for recovery under a theory of quantum meruit. The Federal Circuit explained that the Tucker Act generally does not provide jurisdiction over claims of quantum meruit, and the court held that a quantum meruit exception was insufficient to overcome the presumption against jurisdiction when the underlying implied-in-fact contract claim could not survive a motion to dismiss.³⁷⁶

CONCLUSION

The Federal Circuit's government contracts decisions in 2018 were few but potent. The court broke new ground by examining, for the first time, the government's obligation under FASA to consider commercial sources; considered a follow-on issue related to the Supreme Court's *Kingdomware* decision; and continued to struggle with the consequences of its 2010 decision in *Maropakis*. Many—although certainly not all—of the court's decisions this year were consistent with the Federal Circuit's strict constructionist approach to statutory and contractual interpretation. This year's decisions continue to demonstrate the court's lack of specialized expertise in the area of government contracts and the importance of having advocates provide sufficient context surrounding the issues on appeal to enable the court to come to a fully informed decision.

375. *Id.* at 1372.

376. *Id.* at 1373–74.