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**Government Contract Cases in the United States Court of Appeals for the Federal Circuit: 1995 in Review**

# GOVERNMENT CONTRACT CASES IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT: 1995 IN REVIEW

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## INTRODUCTION

The United States Court of Appeals for the Federal Circuit decided fifty-seven government contract cases in 1995. In comparison, that court handed down thirty government contract decisions in 1990,<sup>1</sup> twenty-six in 1991,<sup>2</sup> thirty-one in 1992,<sup>3</sup> forty in 1993,<sup>4</sup> and, twenty-two in 1994.<sup>5</sup> Forty-seven of the fifty-seven 1995 decisions were

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1. Giovanna M. Cinelli, *The United States Court of Appeals for the Federal Circuit: Government Contracts 1990 Summary*, 40 AM. U. L. REV. 1117, 1118 (1991).

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

3. Victor J. Zupa & Brian J. Siebel, *Government Contracts: 1992 Analysis and Summary*, 42 AM. U. L. REV. 1109, 1110 (1993).

4. Richard B. Clifford, Jr. et al., *Government Contract Cases Before the Court of Appeals for the Federal Circuit*, 43 AM. U. L. REV. 1417, 1418 (1994).

5. David R. Johnson et al., *A Survey of Government Contract Cases Decided by the United States Court of Appeals for the Federal Circuit in 1994*, 44 AM. U. L. REV. 2115, 2116 (1995).

appeals from the agency boards of contract appeals,<sup>6</sup> eight came from the Court of Federal Claims;<sup>7</sup> one came from the Office of Personnel Management;<sup>8</sup> and one, a case involving bankruptcy, came from the District Court for the Northern District of Alabama.<sup>9</sup> Well over half (thirty-two) of the decisions were unpublished.<sup>10</sup> By far, most (thirty-one) of the appeals from agency boards were from the Armed Services Board of Contract Appeals ("ASBCA"),<sup>11</sup> while four came

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6. See *infra* notes 11-17.

7. Thomas Creek Lumber & Log Co. v. United States, 73 F.3d 379 (unpublished table decision), No. 95-5080, 1995 WL 710862 (Fed. Cir. Dec. 4, 1995); Fairchild Indus., Inc. v. United States, 71 F.3d 868 (Fed. Cir. 1995); Central Ark. Maintenance, Inc. v. United States, 68 F.3d 1338 (Fed. Cir. 1995); Gould, Inc. v. United States, 67 F.3d 925 (Fed. Cir. 1995); Winstar Corp. v. United States, 64 F.3d 1531 (Fed. Cir. 1995), *aff'd*, 116 S.Ct. 2432 (1996); Hamlet v. United States, 63 F.3d 1097 (Fed. Cir. 1995); Minelli v. United States, 61 F.3d 920 (unpublished table decision), No. 95-5018, 1995 WL 424858 (Fed. Cir. July 18, 1995); Henke v. United States, 60 F.3d 795 (Fed. Cir. 1995).

8. See Chertkov v. Office of Personnel Management, 52 F.3d 961 (Fed. Cir. 1995).

9. Quality Tooling, Inc. v. United States, 47 F.3d 1569, 1571 (Fed. Cir. 1995) (finding that Court of Federal Claims had concurrent jurisdiction over government contractor's bankruptcy proceedings and contract dispute).

10. See *infra* part VI.

11. Jacksonville Shipyards, Inc. v. Dalton, 73 F.3d 380 (unpublished table decision), No. 95-1272, 1995 WL 730458 (Fed. Cir. Dec. 11, 1995); Sippial Elec. & Constr. Co. v. Widnall, 69 F.3d 555 (unpublished table decision), No. 93-1276, 1995 WL 646344 (Fed. Cir. Nov. 2, 1995); Metric Constructors v. Goldin, 69 F.3d 554 (unpublished table decision), No. 95-1078, 1995 WL 620154 (Fed. Cir. Oct. 20, 1995); Hollfelder Technische Dienste Ingenieurgesellschaft MBH v. West, 69 F.3d 534 (unpublished table decision), No. 94-1421, 1995 WL 616601 (Fed. Cir. Oct. 18, 1995), *aff'g per curiam* ASBCA No. 39888, 94-2 B.C.A. (CCH) ¶ 26,809 (1994); R.B. Enters., Inc. v. Widnall, 66 F.3d 347 (unpublished table decision), No. 95-1053, 1995 WL 550250 (Fed. Cir. Sept. 14, 1995), *aff'g per curiam* ASBCA No. 45514, 94-3 B.C.A. (CCH) ¶ 27,030 (1994); McDonald Welding & Mach. Co. v. Dalton, 66 F.3d 347 (unpublished table decision), No. 95-1147, 1995 WL 550251 (Fed. Cir. Sept. 14, 1995), *aff'g per curiam* ASBCA No. 36284, 94-2 B.C.A. (CCH) ¶ 27,181 (1994); Dalton v. Murdock Mach. Eng'g Co., 66 F.3d 344 (unpublished table decision), No. 95-1121, 1995 WL 515222 (Fed. Cir. Aug. 30, 1995); International Gunnery Range Servs. Inc. v. Widnall, 64 F.3d 678 (unpublished table decision), No. 94-1444, 1995 WL 502895 (Fed. Cir. Aug. 24, 1995); Program & Constr. Management Group, Inc. v. West, 64 F.3d 676 (unpublished table decision), No. 95-1084, 1995 WL 490260 (Fed. Cir. Aug. 11, 1995), *aff'g per curiam* ASBCA No. 47048, 95-1 B.C.A. (CCH) ¶ 27,413 (1995); Raven Indus., Inc. v. Kelso, 62 F.3d 1433 (unpublished table decision), No. 93-1374, 1995 WL 453069 (Fed. Cir. July 31, 1995); Aydin Corp. (West) v. Widnall, 61 F.3d 1571 (Fed. Cir. 1995); M. Bianchi v. Perry, 61 F.3d 920 (unpublished table decision), No. 94-1166, 1995 WL 432398 (Fed. Cir. July 21, 1995); GTE Gov't Sys. Corp. v. Perry, 61 F.3d 920 (unpublished table decision), No. 91-1424, 1995 WL 424835 (Fed. Cir. July 18, 1995); Interstate Constr. Inc. v. Widnall, 61 F.3d 920 (unpublished table decision), No. 94-1506, 1995 WL 424841 (Fed. Cir. July 18, 1995), *aff'g per curiam* ASBCA No. 45696, 94-2 B.C.A. (CCH) ¶ 26,930 (1994); Mech-Con Corp. v. West, 61 F.3d 883 (Fed. Cir. 1995); Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995); Peterson Constr. Co. v. Widnall, 57 F.3d 1085 (unpublished table decision), No. 94-1530, 1995 WL 358133 (Fed. Cir. June 12, 1995), *aff'g per curiam* ASBCA Nos. 41132, 41142, 41600, 94-3 B.C.A. (CCH) ¶ 26,991 (1994); Planning & Human Sys., Inc. v. Shalala, 56 F.3d 80 (unpublished table decision), No. 94-1448, 1995 WL 298956 (Fed. Cir. May 8, 1995), *aff'g per curiam* ASBCA No. 44013, 94-2 B.C.A. (CCH) ¶ 26,860 (1994); American Contract Servs., Inc. v. Widnall, 53 F.3d 348 (unpublished table decision), No. 94-1415, 1995 WL 239306 (Fed. Cir. Apr. 20, 1995), *aff'g per curiam* ASBCA No. 46788, 94-3 B.C.A. (CCH) ¶ 27,025 (1994); Santa Fe Eng'rs, Inc. v. Dalton, 53 F.3d 347 (unpublished table decision), No. 94-1449, 1995 WL 225545 (Fed. Cir. Apr. 14, 1995), *aff'g per curiam* ASBCA Nos. 24578, 25838, 28687, 94-2 B.C.A. (CCH) ¶ 26,687 (1994); Mallory Elec. Co. v. Dalton, 60 F.3d 839 (unpublished table decision), No. 94-1432, 1995 WL 375947 (Fed. Cir.

from the Corps of Engineers Board ("ENGBCA"),<sup>12</sup> six from the General Services Board of Contract Appeals ("GSBCA"),<sup>13</sup> two from the Department of Agriculture Board ("AGBCA"),<sup>14</sup> two from the Department of Housing and Urban Affairs Board ("HUDBCA"),<sup>15</sup> and one each from the Department of Veterans Affairs Board ("VACAB"),<sup>16</sup> and the Department of Energy Board ("DOEBCA").<sup>17</sup> The court reversed, in whole or in part, fifteen of the fifty-seven lower-court decisions.<sup>18</sup>

This Article presents an analysis of the significant 1995 cases decided by the Federal Circuit and a summary of unpublished and less precedentially significant published cases. Part I presents the

Apr. 5, 1995); CBI NA-CON, Inc. v. West, 52 F.3d 343 (unpublished table decision), No. 94-1393, 1995 WL 133347 (Fed. Cir. Mar. 28, 1995); Orlando Helicopter Airways, Inc. v. Widnall, 51 F.3d 258 (Fed. Cir. 1995); Dalton v. Sherwood Van Lines, Inc., 50 F.3d 1014 (Fed. Cir. 1995); Spectrum Emergency Care, Inc. v. Dalton, 50 F.3d 22 (unpublished table decision), No. 94-1408, 1995 WL 128422 (Fed. Cir. Mar. 23, 1995), *aff'g per curiam* ASBCA No. 43979, 94-2 B.C.A. (CCH) ¶ 26,806 (1994); H.L. Smith, Inc. v. Dalton, 49 F.3d 1563 (Fed. Cir. 1995); Bill Strong Enters., Inc. v. Shannon, 49 F.3d 1541 (Fed. Cir. 1995); Vinyl Tech., Inc. v. Perry, 48 F.3d 1238 (unpublished table decision), No. 94-1278, 1995 WL 74530 (Fed. Cir. Feb. 22, 1995), *aff'g per curiam* ASBCA Nos. 43464, 45880, 93-2 B.C.A. (CCH) ¶ 25,693 (1993); Perry v. Martin Marietta Corp., 47 F.3d 1134 (Fed. Cir. 1995); Grover Enters., Inc. v. Dalton, 47 F.3d 1180 (unpublished table decision), No. 94-1336, 1995 WL 5614 (Fed. Cir. Jan. 6, 1995), *aff'g per curiam* ASBCA No. 44331, 94-3 B.C.A. (CCH) ¶ 27,139 (1994); LaBarge Prods., Inc. v. West, 46 F.3d 1547 (Fed. Cir. 1995).

12. Jim Smith Contracting Co. v. West, 61 F.3d 918 (unpublished table decision), No. 94-1383, 1995 WL 331124 (Fed. Cir. June 2, 1995); Consultores Profesionales De Ingeniera, S.A. v. West, 52 F.3d 345 (unpublished table decision), No. 94-1443, 1995 WL 216881 (Fed. Cir. Apr. 12, 1995), *aff'g per curiam* ENGBCA No. PCC-78, 94-2 B.C.A. (CCH) ¶ 26,652 (1994); Gulf Coast Trailing Co. v. West, 48 F.3d 1236 (unpublished table decision), No. 94-1347, 1995 WL 51610 (Fed. Cir. Feb. 10, 1995), *aff'g per curiam* ENGBCA No. 5795, 94-2 B.C.A. (CCH) ¶ 26,921 (1994); Maitland Bros. v. West, 47 F.3d 1181 (unpublished table decision), No. 94-1244, 1995 WL 11193 (Fed. Cir. Jan. 11, 1995), *aff'g per curiam* ENGBCA No. 5782-R, 94-1 B.C.A. (CCH) ¶ 26,473 (1995).

13. TLC Eng'g & Constr. v. Johnson, 70 F.3d 1290 (unpublished table decision), No. 95-1190, 1995 WL 697310 (Fed. Cir. Nov. 22, 1995), *aff'g per curiam* GSBCA No. 11057, 95-1 B.C.A. (CCH) ¶ 27,456 (1995); Nortel Fed. Sys., Inc. v. United States Air Force, 77 F.3d 501 (unpublished table decision), No. 95-1213, 1995 WL 723796 (Fed. Cir. Nov. 13, 1995); PRC, Inc. v. Widnall, 64 F.3d 644 (Fed. Cir. 1995); Network Solutions, Inc. v. Widnall, 70 F.3d 1289 (unpublished table decision), No. 94-1480, 1995 WL 656809 (Fed. Cir. Aug. 23, 1995), *rev'g* GSBCA Nos. 11498-P, 11863-C, 94-3 B.C.A. (CCH) ¶ 27,160 (1994); OAO Corp. v. Johnson, 49 F.3d 721 (Fed. Cir. 1995); Dynacorp v. O'Leary, 47 F.3d 1180 (unpublished table decision), No. 94-1493, 1995 WL 13300 (Fed. Cir. Jan. 4, 1995).

14. White Buffalo Constr., Inc. v. Glickman, 70 F.3d 128 (unpublished table decision), No. 95-1122, 1995 WL 662404 (Fed. Cir. Nov. 3, 1995), *aff'g per curiam* AGBCA Nos. 92-199-1, 93-113-1, 94-3 B.C.A. (CCH) ¶ 27,176 (1994); Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578 (Fed. Cir. 1995).

15. Renic Gov't Sys. v. Cisneros, 77 F.3d 501 (unpublished table decision), No. 95-1238, 1995 WL 723797 (Fed. Cir. Nov. 15, 1995); Reece v. Cisneros, 60 F.3d 841 (unpublished table decision), No. 95-1140, 1995 WL 376184 (Fed. Cir. June 8, 1995).

16. Wilson v. Department of Veterans Affairs, 60 F.3d 839 (unpublished table decision), No. 95-3236, 1995 WL 258301 (Fed. Cir. Apr. 28, 1995).

17. Beacon Oil Co. v. O'Leary, 71 F.3d 391 (Fed. Cir. 1995).

18. See *infra* part VI.

cases in which jurisdiction was the principal issue, including cases interpreting portions of the Contract Disputes Act of 1978 ("CDA"),<sup>19</sup> the heart of the dispute-resolution process. Part II discusses three appeals arising from bid protests. Part III examines a termination case in which the Government's broad discretion to terminate a contract for convenience was attacked unsuccessfully. Part IV addresses cases involving cost issues. Part V analyzes an important sovereign acts case and Part VI summarizes the unpublished decisions and less significant published cases.

## I. JURISDICTION

### A. *When Is a Claim a Claim?*

Although there has never been serious dispute that the CDA requires a "claim" to be in existence before the CDA process may be invoked,<sup>20</sup> the definition of what constitutes a "claim" has, in recent years, been the subject of more wasteful and confusing government contract litigation than any other aspect of the CDA.<sup>21</sup> As is often the case when one attempts to describe complicated processes with a few words, the CDA language is not terribly helpful: "All claims by a contractor against the Government relating to a contract shall be in writing and shall be submitted to the Contracting Officer for a decision."<sup>22</sup> The Federal Acquisition Regulation ("FAR"), the pertinent regulatory implementation of the CDA, defines a "claim" as:

[(1) A] written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. . . . [(2)] A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. *The submission may be converted to a claim, by written notice to the contracting officer . . . if it is disputed either as to liability or amount or is not acted upon in a reasonable time.*<sup>23</sup>

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19. Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified at 41 U.S.C. §§ 601-613 (1994)).

20. *Sharman Co. v. United States*, 2 F.3d 1564, 1568-69 (Fed. Cir. 1993) (reviewing jurisdictional scheme of CDA).

21. Congress recently solved another vexing problem involving the certification requirement of the CDA after the Federal Circuit's decision in *United States v. Grumman Aerospace Corp.*, 927 F.2d 575 (Fed. Cir. 1990), cert. denied, 502 U.S. 919 (1991). See 41 U.S.C. §§ 605(c)(6)-(7).

22. 41 U.S.C. § 605(a).

23. 48 C.F.R. § 33.201 (1995) (emphasis added).

The recent protracted struggle in the boards of contract appeals and the courts has been to decide whether the last sentence of FAR 33.201 applies to all requests for payment or just to "vouchers, invoices, or other routine request[s]."<sup>24</sup> The argument has been shaped by two often competing interests: (1) the CDA's goal to simplify the disputes process (enabling the contractor to have his day in court quickly);<sup>25</sup> and (2) the desire to encourage negotiated settlements rather than forcing parties into litigation prematurely (giving the contracting officer enough information and time to achieve a settlement).<sup>26</sup> The disputes process also has been impacted by a natural tendency on the part of the Government, the defendant in the cases, to invoke procedural delays whenever possible,<sup>27</sup> and, in recent years, by a lack of funds to finance settlements.<sup>28</sup> The process also has been affected by the somewhat less than inspiring performances by the boards of contract appeals and the courts in dealing with the competing interests in the context of the statutory and regulatory language. The result has been torture of the CDA and the government contract disputes process that was envisioned by neither Congress, which enacted the CDA with the intent of simplifying the process of resolving government contract

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24. *Id.*

25. H.R. REP. NO. 1556, 95th Cong., 2d Sess. 5 (1978), reprinted in 1978 U.S.C.C.A.N. 5235, 5239.

26. In the cases in which the definition of "claim" became an issue, the Government argued that the requirement that there be a dispute as a prerequisite to "claim" status is a proper goal of the CDA because it provides the government contracting officer with the opportunity to request more information to use in evaluating a request for payment that has been submitted without creating a claim which necessitates a final decision. Under the CDA, once a submission is deemed a "claim" it triggers the contracting officer's duty to respond, within 60 days for claims under \$100,000, and within a reasonable amount of time for claims over that amount. 41 U.S.C. § 605(c). The requirement for a dispute would also serve to prevent the contractor from bypassing the negotiations by withholding information and moving straight into litigation. See *Reflectone Inc. v. Dalton*, 60 F.3d 1572, 1573 (Fed. Cir. 1995); *Bonnum, Inc. v. United States*, 33 Fed. Cl. 672, 675 (1995).

27. The debate over the classification of requests for payments as claims or invoices also would allow the Government to delay the payment of interest on a successful claim, because under the CDA, interest does not accrue until the date the contracting officer receives the claim. 41 U.S.C. § 611.

28. If a dispute is settled, the settlement funds usually come from the agency's operating appropriation. *Id.* § 612. On the other hand, if a CDA monetary case is resolved through a decision of an agency board of contract appeals or by a court, the judgment is paid from the permanent judgment appropriation established by 31 U.S.C. § 724a. Section 13(c) requires that the judgment appropriation be reimbursed "by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes." 41 U.S.C. § 612(c). Notwithstanding this reimbursement feature, the authors believe there is at least anecdotal evidence that some, if not many, settlements fail, and cases go to litigation either because of a lack of funds to pay the settlement or because the agency prefers to have the claim paid out of something other than its operating appropriation.



disputes, nor the members of the Commission on Government Procurement, which provided the framework for the CDA.<sup>29</sup>

The torture of the disputes process began in earnest with the Federal Circuit's decision in *Dawco Construction, Inc. v. United States*.<sup>30</sup> In a fact situation in which liability was admitted and only the contract amount was at issue, the court attempted to define what constitutes a CDA claim, holding that in order for the claim to be valid, the contractor and the agency must "already be *in dispute* over the amount requested."<sup>31</sup> The court in *Dawco* also stated that "[t]he [CDA] and its implementing regulation require that a 'claim' arise from a request for payment that is 'in dispute.'"<sup>32</sup>

The impact of *Dawco* was immediate, substantial, and detrimental. The procedural defense that the claim was not in dispute either as to liability or amount was introduced thereafter by the Government in hundreds of CDA cases.<sup>33</sup> The resulting waste of contractor, government, and judicial resources expended on sorting out the cases threatened to reverse any gains made by the CDA in achieving efficient resolution of disputes. An ASBCA judge noted that fully one-half of the cases before the ASBCA in which *Dawco's* dispute requirement was considered resulted in dismissal for lack of jurisdiction.<sup>34</sup> Fortunately, after a somewhat inelegant process, the Federal Circuit reversed *Dawco* in a generally acclaimed decision, *Reflectone, Inc. v. Dalton*.<sup>35</sup> The court thereby took a large step toward restoring the CDA requirements to those originally intended.<sup>36</sup>

The *Reflectone* case began its journey to the Federal Circuit in 1992 when the ASBCA dismissed Reflectone's appeal from a Navy contract-

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29. The Commission on Government Procurement, established by Pub. L. No. 91-127, submitted its report to Congress on December 31, 1972. This report, the result of two years of study of the procurement system, formed the basis for the CDA. See COMMISSION ON GOV'T PROCUREMENT, REPORT (1972).

30. 930 F.2d 872 (Fed. Cir. 1991).

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

32. *Id.*

33. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1580 (Fed. Cir. 1995) (citing Donald P. Arnavas, *To Claim or Not to Claim*, 8 NASH & CIBINIC REPORT ¶ 63 (1994)).

34. *Id.*

35. 60 F.3d at 1577 (finding that request for equitable adjustment was "claim" under CDA).

36. Four other Federal Circuit decisions were also overruled to the extent that they relied on *Dawco*: *Bill Strong Enters., Inc. v. Shannon*, 49 F.3d 1541, 1551 (Fed. Cir. 1995) (allowing contractor's claim for increased compensation due to government delay to constitute "claim" under CDA); *Sharman Co. v. United States*, 2 F.3d 1564, 1572 (Fed. Cir. 1993) (permitting consolidation of contractor's claim for default termination); *Santa Fe Eng'rs, Inc. v. Garrett*, 991 F.2d 1579, 1582 (Fed. Cir. 1993) (stating that cost letter sent by contractor did not establish valid jurisdiction under CDA); *Heyl & Patterson, Inc. v. O'Keefe*, 986 F.2d 480, 485 (Fed. Cir. 1993) (disallowing "claims" because negotiations were continuing between Government and contractor).

ing officer's final decision for lack of subject matter jurisdiction.<sup>37</sup> Reflectone had been awarded a \$4,573,559 fixed price contract by the Navy for updating helicopter weapon system trailers.<sup>38</sup> In 1988, before the trailers were to be delivered, Reflectone advised the contracting officer that late, unavailable, or defective Government-furnished property was delaying delivery of certain equipment.<sup>39</sup> The Navy denied responsibility for the delay and issued a cure notice threatening termination for default.<sup>40</sup> Between January 1989 and April 1990, the parties failed to reach agreement on responsibility for the delay, with the Navy extending the delivery date several times while reserving the right to make a claim against Reflectone.<sup>41</sup> Reflectone, in turn, continued to maintain that the Navy was responsible, stating that it would file a claim when the full impact of such claim was known.<sup>42</sup> On June 1, 1990, Reflectone submitted a request for equitable adjustment ("REA") to the Navy for \$266,840 in delay-related costs.<sup>43</sup> Reflectone's president certified the REA and requested a final decision from the contracting officer.<sup>44</sup> On January 15, 1991, the contracting officer denied sixteen of twenty-one items in Reflectone's claim and estimated the settlement value of remaining items at \$17,662. In addition, the contracting officer told the contractor that a counterclaim and set-off exceeding the amount requested by Reflectone was being prepared.<sup>45</sup> On March 19, 1991, the contracting officer notified Reflectone that the Navy position of no liability remained the same and advised Reflectone of its right to appeal.<sup>46</sup>

Unfortunately for Reflectone, by this time the ASBCA had the benefit of the Federal Circuit's decision in *Dawco*, and, after sixteen months, the Board ultimately held that it did not have jurisdiction over the appeal because Reflectone's REA was not a "claim" within the meaning of the CDA.<sup>47</sup> The Board found that "[a] contractor and the government contracting agency must already be in dispute over the amount requested," reiterating *Dawco's* interpretation that "[t]he [CDA] and its implementing regulation require that a 'claim' arise

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37. *Reflectone*, 60 F.3d at 1573-74.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 1574.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

from a request for payment that is 'in dispute.'<sup>48</sup> The ASBCA interpreted FAR 33.201 and *Dawco* as holding that no demand for payment could be a claim unless the *amount* of the payment had been in dispute.<sup>49</sup> The ASBCA reasoned that because Reflectone first requested a specific amount in the REA, no dispute over the amount existed prior to the REA, and therefore, under *Dawco*, the REA could not be a CDA claim.<sup>50</sup> The Board stated:

[W]e need not determine whether these issues [presented in the REA] had previously been submitted to the contracting officer and were in dispute. *Dawco* requires that the parties be in dispute over the amount requested. Clearly in the appeal before us, [Reflectone] had not quantified the impact of the delays on itself and communicated it to the government prior to the 1 June 1990 REA. The failure of [Reflectone] to request any amount (and therefore a dispute could not exist over it) prior to its REA, renders [Reflectone's] 1 June 1990 REA incapable of being considered a claim under the CDA in accordance with the holding of *Dawco*.<sup>51</sup>

Reflectone appealed to the Federal Circuit, and on September 1, 1994, a three-judge panel affirmed the ASBCA, accepting its interpretation of *Dawco*.<sup>52</sup> In a split decision, the panel held, as did the ASBCA, that while liability was clearly in dispute, the amount of the claim had not been in dispute prior to the June 1 REA.<sup>53</sup> Interestingly, the author of *Dawco*, Judge Michel, dissented, stating that "a pre-existing dispute as to liability, even without a pre-existing dispute as to amount, is sufficient to make the REA a claim under the CDA."<sup>54</sup> Reflectone filed a petition for rehearing in September 1994, with a suggestion for a rehearing in banc.<sup>55</sup> The Federal Circuit granted Reflectone's petition for rehearing on December 5, 1994, issuing its decision on July 26, 1995.<sup>56</sup>

The principal issue facing the Federal Circuit in the rehearing was whether *Dawco* properly concluded that a CDA claim, as defined in FAR 33.201, requires a pre-existing dispute between a contractor and the Government when the claim is in the form of a "written assertion

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48. *Id.* (quoting ASBCA decision (quoting *Dawco Constr., Inc. v. United States*, 930 F.2d 872, 878 (Fed. Cir. 1991))).

49. *Id.*; see 48 C.F.R. § 33.201 (1995).

50. *Reflectone*, 60 F.3d at 1574.

51. *Id.* (citing *Reflectone*, ASBCA No. 43081, 93-1 B.C.A. (CCH) ¶ 25,512, at 127,056 (1992)).

52. *Reflectone, Inc. v. Dalton*, 34 F.3d 1031 (Fed. Cir. 1994), *reh'g in banc granted, op. withdrawn*, 1994 U.S. App. LEXIS 34181 (Fed. Cir. Dec. 5, 1994).

53. *Id.* at 1035-36 (deciding "sum certain" had been reached).

54. *Id.* at 1039.

55. *Reflectone*, 60 F.3d at 1574.

56. *Id.*

. . . seeking, as a matter of right, the payment of money in a sum certain" or other contract relief pursuant to FAR 33.201.<sup>57</sup> In the alternative, the court considered whether the claim requirement applied only when the claim initially is in the form of a "routine" request for payment.<sup>58</sup> Distinguishing between "routine" and "non-routine" requests for payment, the Federal Circuit held:

We answer the first half of this question in the negative and the second half in the affirmative. We hold that [the first] sentence of FAR 33.201 sets forth the only three requirements of a non-routine "claim" for money: that it be (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain. . . . [N]othing in [FAR 33.201] suggests that *other* written demands seeking payment of a sum certain as a matter of right, i.e., those demands that are not "routine request[s] for payment," also must be already in dispute to constitute a "claim."<sup>59</sup>

The *Reflectone* holding is a triumph for common sense and judicial efficiency.<sup>60</sup> As the court itself points out, it is illogical to require a dispute before a demand for payment rightfully due can be a "claim," because to have a dispute, the contractor first must make a demand for payment as a matter of right, i.e., a claim that then is refused.<sup>61</sup> The court held that under the FAR language, the critical distinction in identifying a "claim" is not between disputed and undisputed submissions, but between *routine and non-routine* submissions.<sup>62</sup> The former must be converted to a CDA claim if disputed, while the latter constitutes a CDA claim when first submitted.<sup>63</sup>

What, then, is a "non-routine" submission? The answer will be crafted in the next round of judicial and board decisions. The Federal Circuit held in *Reflectone* that an REA clearly is an example of a non-routine submission because it is a remedy payable only when "unforeseen or unintended circumstances" cause an increase in contract performance costs.<sup>64</sup> "A demand for compensation for unforeseen or unintended circumstances cannot be characterized as

57. *Id.* at 1575; see 48 C.F.R. § 33.201 (1995).

58. *Reflectone*, 60 F.3d at 1575.

59. *Id.* at 1575-76 (emphasis added).

60. The Court, five days after issuing the decision in *Reflectone*, remanded another *Dawco*-type case back to the ASBCA for consideration on the merits in a unpublished decision. *Raven Indus., Inc. v. Kelso*, 62 F.3d 1433 (unpublished table decision), No. 93-1374, 1995 WL 453069 (Fed. Cir. July 31, 1995) (reversing ASBCA decision in accordance with *Reflectone*).

61. *Reflectone*, 60 F.3d at 1576; see 48 C.F.R. § 33.201.

62. *Reflectone*, 60 F.3d at 1577.

63. *Id.* at 1578.

64. *Id.* at 1577 (citing *Pacific Architects & Eng'rs, Inc. v. United States*, 491 F.2d 734, 739 (Ct. Cl. 1974)).

'routine.'"<sup>65</sup> The court used as examples Government modification of the contract, differing site conditions, defective or late-delivered government property, and issuance of a stop work order.<sup>66</sup> Another important example not mentioned by the court, but that presumably would be classified equally "unforeseen or unintended" as a stop work order claim, is a claim submitted under a contract Termination for Convenience clause.<sup>67</sup> A closer question would be a request for price adjustment under an Economic Adjustment clause where one might argue that increases in price indexes are quite foreseeable.<sup>68</sup>

Obviously, the consequences of a non-routine request that constitutes a CDA claim when first submitted goes beyond jurisdiction. Of particular importance to contractors is the fact that interest will begin to accrue upon the claim's submission to the contracting officer.<sup>69</sup> On the other hand, *Reflectone* may render previously recoverable costs unrecoverable. For example, would costs incurred in connection with the preparation of a settlement proposal still be recoverable if that settlement proposal is deemed, under the *Reflectone* ruling, to be a CDA claim? The court may have provided an answer to this question in another case decided in 1995, *Bill Strong Enterprises, Inc. v. Shannan*,<sup>70</sup> which is discussed below.<sup>71</sup> Clearly, however, issues raised by the *Reflectone* decision will continue to be litigated for years to come.

### B. Requirement for Claim Documentation

In a decision illustrating the two competing interests in the *Dawco* and *Reflectone* cases, the Federal Circuit ruled that detailed financial documentation for a CDA claim is not a jurisdictional prerequisite.<sup>72</sup> *H.L. Smith, Inc. v. Dalton*<sup>73</sup> involved a contractor who submitted a certified claim on behalf of a subcontractor that contained a recital of circumstances that would warrant alleged increased performance

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65. *Id.*

66. *Id.*

67. 48 C.F.R. § 52.249 (1995); *cf.* *Mayfair Constr. Co. v. United States*, 841 F.2d 1576, 1577 (Fed. Cir.) (holding it "beyond cavil" that no claim exists under termination for convenience clause unless dispute exists), *cert. denied*, 488 U.S. 980 (1988).

68. 48 C.F.R. § 52.216.

69. The CDA provides that "[i]nterest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim . . . until payment thereof." 41 U.S.C. § 611 (1994).

70. 49 F.3d 1541, 1555 (Fed. Cir. 1995) (holding that CDA claim on merits did not arise prior to claimed costs).

71. *See infra* notes 496-523 and accompanying text.

72. *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1566 (Fed. Cir. 1995).

73. 49 F.3d 1563 (Fed. Cir. 1995).

cost and time.<sup>74</sup> Smith, however, ignored repeated requests by the contracting officer for detailed cost breakdowns and additional financial information.<sup>75</sup> The contracting officer refused to issue a final decision because he did not consider the claim to be a valid CDA claim. Smith appealed to the ASBCA under the "deemed denied" provision of the CDA.<sup>76</sup> The ASBCA agreed with the contracting officer and dismissed the appeal for lack of jurisdiction, reasoning that without information on how Smith had arrived at the amount requested, there was no CDA claim.<sup>77</sup>

In reversing, the Federal Circuit noted, however, that neither the CDA nor its implementing regulations require the submission of a detailed cost breakdown or other cost-related documentation with the claim.<sup>78</sup> The court pointed out that there are only three requirements in FAR 33.201 for a CDA claim: (1) a demand in writing to the contracting officer; (2) as a matter of right; and (3) for a sum certain.<sup>79</sup> Smith had met these requirements, making the claims valid for CDA jurisdictional purposes.<sup>80</sup>

The competing interests illustrated by *H.L. Smith*, namely the contracting officer's interest in getting enough information to arrive at a correct decision and the contractor's interest in not having claims unreasonably tied up by contracting officer's endless requests for data, were also, as previously discussed, concerns in both *Dawco* and *Reflectone*.<sup>81</sup> Although *H.L. Smith* makes clear that a contractor may get to the board or a court with a bare minimum of information by meeting the three CDA requirements, that is not usually the advisable course.<sup>82</sup> The Federal Circuit pointed out that on remand the ASBCA could either direct the contracting officer to obtain additional information and stay Smith's claims pending a decision by the contracting officer, or decide the claims on the existing record.<sup>83</sup>

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74. *Id.*

75. *Id.* at 1564.

76. *Id.* Under the CDA, "[a]ny failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim." 41 U.S.C. § 605(c)(5) (1994).

77. *H.L. Smith, Inc.*, 94-2 B.C.A. (CCH) ¶ 26,723, 1994 WL 55629 (1994).

78. *H.L. Smith*, 49 F.3d at 1564-65.

79. *Id.* at 1565 (citing *Essex Electro Eng'rs, Inc. v. United States*, 960 F.2d 1576, 1580 (Fed. Cir.), *cert. denied*, 506 U.S. 953 (1992)).

80. *Id.* at 1565-66.

81. *Dawco Constr., Inc. v. United States*, 930 F.2d 872, 878 (Fed. Cir. 1991); *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1580 (Fed. Cir. 1995).

82. *H.L. Smith*, 49 F.3d at 1565.

83. *Id.* at 1566.

Neither course was likely the procedure Smith wanted. However, as the court observed:

The CDA envisions cooperation between the contracting officer and the contractor. It intends to facilitate resolution of contract disputes by negotiation rather than litigation. Contracting officers rightly expect cooperation. When Smith failed to respond to the contracting officer's requests for information and appealed directly to the Board, Smith simply delayed action on its claims.<sup>84</sup>

*C. When is a Claim Related to a CDA Contract?*

The CDA provides that in order for a board of contract appeals to have jurisdiction, the contractor's appeal must be from a contracting officer's decision on a claim "relating" to a CDA contract.<sup>85</sup> The Federal Circuit discussed the meaning of this CDA provision in an unusual 1995 case called *LaBarge Products, Inc. v. West*.<sup>86</sup>

LaBarge submitted the low bid of \$38.50 for the base year and \$40.80 for a second option year on an Army procurement for pipe couplings.<sup>87</sup> A second company, Victaulic, submitted the next lowest bid.<sup>88</sup> Out of concern that the couplings would not be compatible with pipes being procured separately,<sup>89</sup> the contracting officer decided to issue an amendment to the solicitation to give the Government the option of requiring the submission of production tooling and level-three drawings.<sup>90</sup> The amendment required another round of bids.<sup>91</sup> Before submission of the next round of bids, another government official impermissibly communicated to Victaulic that LaBarge had submitted the lowest bid in the initial round.<sup>92</sup> Although LaBarge did not know about the communication at the time, the company believed that the Government favored Victaulic and saw the amendment as a device to avoid awarding the contract to LaBarge.<sup>93</sup> LaBarge's fears of a government bias toward Victaulic apparently were justified, because the day after the request

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84. *Id.* (citations omitted).

85. 41 U.S.C. § 605(a) (1994) (providing that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision").

86. 46 F.3d 1547 (Fed. Cir. 1995).

87. *LaBarge Prods., Inc. v. West*, 46 F.3d 1547, 1549 (Fed. Cir. 1995).

88. *Id.*

89. To ensure that the pipes and couplings would be compatible, the Army originally intended to award one contract for both. In response to a bidder's complaint, however, the RFP was amended to allow bidders the option to bid on either the pipe or the couplings alone. *Id.*

90. *Id.*

91. *Id.* (requiring "best and final offers").

92. *Id.*

93. *Id.*

for best and final offers was issued, the Victaulic contract administrator received a telephone call from an unknown person who stated, "[Y]our competition on the coupling bid . . . [is] going to bid in the low 30's this time."<sup>94</sup> Notwithstanding this information leak, LaBarge was again the low bidder with a bid of \$32.90 per coupling for the base and option years; Victaulic bid \$32.50, but bid a higher price for the option years.<sup>95</sup> Victaulic then filed a bid protest with the General Accounting Office ("GAO"), revealing during the course of that protest the communication from the government official and the anonymous telephone call regarding the LaBarge bid.<sup>96</sup> The bid protest was denied, and the contract was awarded to LaBarge at its best and final price.<sup>97</sup>

Following successful contract performance, LaBarge submitted a claim to the contracting officer in which it sought to have the contract reformed to incorporate the earlier, higher best and final price—a total increase of approximately \$800,000.<sup>98</sup> LaBarge argued that it was entitled to reformation of the contract to the higher price to compensate it for the improper actions of Army personnel.<sup>99</sup> LaBarge claimed that but for the improper contract, it would have been awarded the contract at the original price.<sup>100</sup>

The contracting officer denied the claim, and LaBarge appealed to the ASBCA under the CDA.<sup>101</sup> The Government moved for dismissal on the grounds that the claim was a bid protest rather than a claim under the CDA and the ASBCA therefore lacked jurisdiction.<sup>102</sup> Once a party submits a bid in response to a request for proposals, an implied-in-fact contract exists between the Government and that party, under which the Government is obligated to treat that party's bid honestly and fairly.<sup>103</sup> Citing *Coastal Corp. v. United States*,<sup>104</sup> the Army argued that LaBarge's claim related to the implied-in-fact contract, not the coupling contract.<sup>105</sup> The ASBCA ruled against the Government on the motion but denied LaBarge's appeal on the

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94. *Id.*

95. *Id.*

96. *Id.* at 1549-50.

97. *Id.* at 1550.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1551 (citing *Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983) (holding that implied-in-fact contract to treat bids honestly and fairly is not contract covered by CDA)).

104. 713 F.2d 728, 730 (Fed. Cir. 1983).

105. *LaBarge*, 46 F.3d at 1551.



merits.<sup>106</sup> LaBarge appealed to the Federal Circuit, and the Government again challenged the ASBCA's jurisdiction.<sup>107</sup>

Was LaBarge's claim a claim relating to a CDA contract?<sup>108</sup> The Government argued that the claim could not relate to the coupling contract because at the time of the Government's wrongdoing, which was the basis for LaBarge's claim, the coupling contract had not come into existence.<sup>109</sup> The Federal Circuit disagreed and distinguished *Coastal Corp.* by noting that it involved only the implied-in-fact contract, whereas LaBarge was an actual holder of a procurement contract.<sup>110</sup> Moreover, the court found that in addition to the implied-in-fact contract, LaBarge's claim involved violations during the bidding process of the FAR provisions prohibiting auction techniques.<sup>111</sup> The court noted that the prohibition of auction techniques was a provision in place for the benefit of contractors and cited cases that had applied the principle of contract reformation when a contract had been written in violation of a law or regulation enacted for the benefit of contractors.<sup>112</sup> The court also held that in cases where a breach of the law is inherent in the writing of the contract, reformation is available despite the contractor's initial adherence to the contract provision later shown to be illegal.<sup>113</sup> Finally, the court noted that the claim related to the coupling contract both as to operative facts and requested relief, in that the leaking of LaBarge's bid and the allegedly illegal request for best and final offers could have affected the price of the coupling contract.<sup>114</sup> There could be no doubt, reasoned the court, that a claim based upon those actions "relates to the coupling contract even though it also asserts a breach of the implied-in-fact contract to treat bids fairly

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106. *Id.* at 1550.

107. *Id.*

108. The CDA applies to contracts for the procurement of property. 41 U.S.C. § 602(a) (1994). That the coupling contract was a contract for the procurement of property was undisputed. *LaBarge*, 46 F.3d at 1551 n.1.

109. *LaBarge*, 46 F.3d at 1551.

110. *Id.* at 1552 (finding equitable principle of reformation applicable because actual contract exists).

111. *Id.* The provision in effect at the time was 48 C.F.R. § 15.610(d) (1984). The FAR states that "[t]he contracting officer and other Government personnel . . . shall not engage in . . . (3) Auction techniques, such as—(i) Indicating to an offerer a cost or price that it must meet to obtain further consideration; (ii) Advising an offerer of its price standing relative to another offerer . . . (iii) Otherwise furnishing information about other offerors' prices." *LaBarge*, 46 F.3d at 1552 n.3 (quoting 48 C.F.R. § 15.610(d) (1984)).

112. *LaBarge*, 46 F.3d at 1552 (citing *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (in banc); *Beta Sys., Inc. v. United States*, 838 F.2d 1179, 1185 (Fed. Cir. 1988); *CRF-A Joint Venture, Etc. v. United States*, 624 F.2d 1054, 1061-62 (Ct. Cl. 1980); *Applied Devices Corp. v. United States*, 591 F.2d 635, 640-41 (Ct. Cl. 1979)).

113. *Id.* at 1552 (citing *Chris Berg, Inc. v. United States*, 426 F.2d 314 (Ct. Cl. 1970)).

114. *Id.* at 1553.

and honestly."<sup>115</sup> The court also cited the legislative history of the CDA in support of its holding.<sup>116</sup>

On the merits, however, the court ruled against LaBarge, finding that even though the disclosure to Victaulic clearly violated the FAR, the Government had a legitimate reason for asking for a best and final offer (concern about compatibility of the couplings and the pipes); and as LaBarge did not know at the time of the best and final offer that its price had been disclosed to Victaulic, its final price was not influenced by the wrongdoing.<sup>117</sup> Under the circumstances, LaBarge was not entitled to relief.

*D. When is a Board Appeal Ready for Appellate Review?*

The Federal Circuit addressed the doctrine of finality as it relates to board decisions in its affirmation of *Orlando Helicopter Airways, Inc. v. Widnall*.<sup>118</sup> Orlando Helicopter Airways, Inc. ("OHA"), sought to recover from the Government: (1) costs and expenses incurred in responding to a government investigation of safety violations and fraud, and (2) costs incurred as a result of the contracting officer's stop work order and his request for a technical review of a whistleblower's accusations.<sup>119</sup> OHA initially submitted a claim to the contracting officer only for the costs incurred as a result of the stop work order and for performing the technical review.<sup>120</sup> This claim for \$10,722 was denied and was not pursued further by OHA.<sup>121</sup> Instead, OHA submitted a new claim to the contracting officer for \$945,310, which included the full amount of the costs associated with the Government's investigation of the whistleblower's allegations.<sup>122</sup> OHA claimed entitlement to recovery of these costs under the Changes clause of the firm fixed price contract.<sup>123</sup> The contracting officer denied OHA's claim in its entirety, and OHA timely appealed to the ASBCA.<sup>124</sup>

Upon the Government's motion for summary judgment, the ASBCA found that the criminal investigation was undertaken as part of the

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115. *Id.*

116. *Id.* at 1553-54 (noting that intent behind "all disputes" clause was to resolve any and all disputes that arose in connection with government contracts).

117. *Id.* at 1556. The Army official making the decision to issue the request for best and final offers was not involved in the leaks of Labarge's prices. *Id.*

118. 51 F.3d 258, 260-61 (Fed. Cir. 1995).

119. *Orlando Helicopter Airways, Inc. v. Widnall*, 51 F.3d 258, 259 (Fed. Cir. 1995).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 259-60.

124. *Id.* at 260.

Government's sovereign law enforcement capacity.<sup>125</sup> The ASBCA also found that OHA's claim did not support recovery of these costs under the Changes clause of the contract because it was unclear that the investigation was instigated by the contracting officer.<sup>126</sup> For these reasons, the ASBCA granted the Government's motion with respect to those costs incurred by OHA in responding to the criminal investigation.<sup>127</sup> The Board did not grant the Government's summary judgment motion with regard to costs incurred in responding to the contracting officer's stop work order and the required technical review, both of which might be recoverable under the Changes clause of the contract.<sup>128</sup>

OHA appealed the Board's decision to the Federal Circuit,<sup>129</sup> which addressed two issues. The first issue, raised *sua sponte*, was the court's jurisdiction over OHA's appeal.<sup>130</sup> The second issue was whether the ASBCA was correct in its decision that the criminal investigation was a sovereign act for which OHA was not entitled to recover costs.<sup>131</sup>

The jurisdictional issue raised in *Orlando Helicopter* was based on whether the ASBCA's decision was "final" for purposes of permitting the Federal Circuit to review that decision.<sup>132</sup> The court commented on its high regard for the finality doctrine, emphasizing its reluctance to interfere with the function of administrative law judges ("ALJ") and its concern for avoiding wasteful and time-consuming appeals.<sup>133</sup>

The court distinguished the facts in *Orlando Helicopter* from an earlier case, *Dewey Electronics Corp. v. United States*,<sup>134</sup> on which the Government now relied for its argument that the court did not have jurisdiction. The Federal Circuit reasoned that *Dewey* involved nine separate claims, all of which had been considered by the Board,<sup>135</sup> whereas *Orlando Helicopter* involved only a single claim that had been

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125. *Orlando Helicopter Airways, Inc.*, ASBCA No. 45778, 94-2 B.C.A. (CCH) ¶ 26,751, at 133,080 (1994).

126. *Id.* at 133,080.

127. *Id.*

128. *Id.*

129. *Orlando Helicopter Airways, Inc. v. Widnall*, 51 F.3d 258, 260 (Fed. Cir. 1995).

130. *Id.*

131. *Id.* at 262.

132. *Id.* at 260. The jurisdictional issue falls under 28 U.S.C. § 1295(a)(10) (1994), which grants jurisdiction of appeals under section 8(g)(1) of the CDA to the Court of Appeals for the Federal Circuit.

133. *Orlando*, 51 F.3d at 260.

134. 803 F.2d 650, 653-54 (Fed. Cir. 1986).

135. *Dewey Elecs. Corp. v. United States*, 803 F.2d 650, 652 (Fed. Cir. 1986).

decided through partial summary judgment.<sup>136</sup> Unlike in *Dewey*, the Board in *Orlando Helicopter* retained jurisdiction over a part of the claim at the time of the appeal to the Federal Circuit.<sup>137</sup>

After rejecting *Dewey* as dispositive of the issue, the court reverted to general principles of finality to resolve the issue of whether the Board's decision was sufficiently final as to that part of the claim being appealed for the court to have jurisdiction.<sup>138</sup> In conducting its analysis, the court compared the effect of reviewing the appeal before the court at that time to the likely result of waiting until the remainder of the original appeal before the Board was adjudicated.<sup>139</sup> In conducting this comparison, the court considered what impact a decision to review the appeal before it at that time would have on the remainder of the appeal before the Board, as well as the inconvenience and cost associated with piecemeal review.<sup>140</sup>

In its analysis, the court determined that addressing the Government's sovereign acts defense at that time would not delay or otherwise affect the Board's adjudication of the remaining portion of OHA's claim still before the Board (that portion related to the stop work order and the requested technical review).<sup>141</sup> In the court's assessment, it would be less costly and more efficient for the court to address the appeal than to remand the issue to the Board until the entire claim was resolved.<sup>142</sup> The court also considered that OHA's costs of responding to the criminal investigation comprised the bulk of its claim compared to the costs not yet addressed by the Board.<sup>143</sup> Given that the Board clearly had decided OHA's rights with respect to the costs incurred in responding to the criminal investigation, the court determined that "judicial review will not disrupt the orderly process of adjudication."<sup>144</sup> On this finding, the court decided that

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136. *Orlando*, 51 F.3d at 260. Although the Board may have given the impression that two separate claims were involved in *Orlando*, in fact only a single claim was involved and the Board's decision was a partial summary judgment as to certain of the costs included in that one claim. *Id.* The Board's partial summary judgment did not apply to that portion of the claim for costs associated with the stop work order, the request for responses issued with that order, the technical review, or the documentation/part-removal requirements. *Id.*

137. *Id.* at 261.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

the Board's decision was final under 28 U.S.C. § 1295(a)(10)<sup>145</sup> and that the court had jurisdiction over the appeal before it.<sup>146</sup>

After assuming jurisdiction over OHA's appeal, the court addressed the issue of whether the Board was correct in holding that the criminal investigation was a sovereign act for which OHA was not entitled to recover its costs.<sup>147</sup> The court explained that "[a] sovereign act is public and general in nature, not private and contractual."<sup>148</sup> The determination of whether an act is sovereign depends on the nature of the conduct, not on who initiated the act.<sup>149</sup>

The conduct at issue in *Orlando Helicopter* is one of the oldest examples of sovereignty—exercise of the Government's law enforcement powers.<sup>150</sup> Neither the fact that the contracting officer had a role in the conduct at issue, nor the fact that the conduct affected a government contract, caused the conduct to become a contractual matter.<sup>151</sup> In *Orlando Helicopter*, moreover, there was no dispute that the contracting officer did not initiate or control the investigation, making it clear that the investigation was not a contractual matter.<sup>152</sup> As a result, OHA was not entitled to recover costs incurred in response to the Government's investigation under the Changes clause in the government contract.<sup>153</sup> OHA's allegation that the investigation was overzealous does not alter this result.<sup>154</sup> Accordingly, on the basis of the Government's sovereign acts defense, the court affirmed the ASBCA's decision that the Government was entitled to summary judgment as a matter of law as to the expenses caused by the criminal investigation.<sup>155</sup>

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145. *Id.*

146. *Id.*

147. *Id.* at 262.

148. *Id.* (citing *Horowitz v. United States*, 267 U.S. 458, 461 (1925); *Sun Oil Co. v. United States*, 572 F.2d 786, 817 (1978)).

149. *Id.*

150. *Id.* (citing *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (explaining that it has long been understood that exercise of police power is indicia of sovereignty); *Crow Tribe of Indians v. United States*, 284 F.2d 361, 364 (Ct. Cl. 1960), *cert. denied*, 366 U.S. 924 (1961)).

151. *See id.* (stating that whether contracting officer is involved in action or action occurs during government contract is not dispositive in determining whether sovereign act is contractual).

152. *Id.*

153. *See id.* (explaining that contract contained no express or implied provisions requiring agreement to pay for criminal investigations).

154. *See id.* at 262-63 (dismissing contractor's argument that it should recover, in contract, for alleged overzealous, unprofessional investigation).

155. *See id.* ("We simply hold that the Board did not err in exercising jurisdiction over the contract claim here presented, and correctly concluded that the government is entitled to summary judgment as to expenses caused by the criminal investigation.").

E. *Concurrent Jurisdiction over CDA Claims in Bankruptcy*

In *Quality Tooling, Inc. v. United States*,<sup>156</sup> the Federal Circuit held that the U.S. district court in which a government contractor's Chapter 11 estate is pending has concurrent jurisdiction with the Court of Federal Claims over a government contract claim included in the bankrupt's estate.<sup>157</sup> This decision was made against the backdrop of similar litigation in *Gary Aircraft Corp. v. United States*,<sup>158</sup> decided by the Fifth Circuit in 1983, and *United States v. Bagley*,<sup>159</sup> decided by the Tenth Circuit in 1993. In both *Gary Aircraft* and *Bagley*, the courts considered whether a district court sitting in bankruptcy had authority to decide a government contract claim of a bankrupt government contractor or whether the court was required to transfer or defer the claim to the ASBCA for decision.<sup>160</sup>

The Fifth Circuit considered five factors and essentially concluded that it was *always* appropriate for the district court to defer such a government contract claim to the appropriate board of contract appeals for decision—that is, the district court had virtually no discretion to defer the claim.<sup>161</sup> The factors considered by the court in *Gary Aircraft* included: (1) whether resolution of the claims by a specialized tribunal would impair the requirement that satisfaction of all claims against the bankrupt estate should proceed in a central forum; (2) whether technical and esoteric issues relating to government contract law are present; (3) whether the tribunals specifically designated to resolve government contract disputes may fulfill the needs for expertise, speed, and uniformity in resolving government contract disputes; (4) whether a contract dispute involving claims against the Government that falls under the Court of Federal Claims' exclusive jurisdiction would result in the same contract dispute being tried twice; and (5) whether Congress has endorsed the transfer of particular disputes to specialized tribunals.<sup>162</sup> The Fifth Circuit determined that each of these five factors would be present in every

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156. 47 F.3d 1569 (Fed. Cir. 1995), *reh'g in banc denied*, 1995 U.S. App. LEXIS 16623 (Fed. Cir. June 16, 1995).

157. *Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1573 (Fed. Cir. 1995).

158. 698 F.2d 775 (5th Cir.), *cert. denied*, 464 U.S. 820 (1983).

159. 990 F.2d 567 (10th Cir. 1993).

160. *United States v. Bagley*, 990 F.2d 567, 568 (10th Cir. 1993); *Gary Aircraft Corp. v. United States*, 698 F.2d 775, 778 (5th Cir.), *cert. denied*, 464 U.S. 820 (1983).

161. *Gary Aircraft*, 698 F.2d at 784 (concluding rule rather than discretion by choice is appropriate). *Gary Aircraft* involved a pre-CDA contract, and accordingly there was no question of statutory requirement to defer the claim to a specialized, government contract forum for decision. *Id.* at 778 (noting that CDA was not yet in effect).

162. *Id.* at 783-84.

government contract claim that might be involved in a bankruptcy situation.<sup>163</sup>

Ten years later, the Tenth Circuit addressed basically the same issue. In *Bagley*, the court considered identical factors and reached the opposite conclusion—that the bankruptcy court was *not* required to defer to the opinion of the ASBCA on a dispute between the Government and a bankrupt government contractor.<sup>164</sup> The Tenth Circuit decided that the five factors were not necessarily present in every case, and therefore the district court had discretion to decide when it was appropriate to defer to a specialized forum for decision.<sup>165</sup>

Against the backdrop of conflicting case law in its sister circuits,<sup>166</sup> the Federal Circuit was confronted with the jurisdictional dispute in *Quality Tooling*.<sup>167</sup> The case arose pursuant to an interlocutory appeal by the Government under 28 U.S.C. § 1292(d)(4).<sup>168</sup> Quality Tooling, Inc. (“Quality”), a bankrupt government contractor, brought a government contract claim in the Court of Federal Claims<sup>169</sup> pursuant to the Tucker Act<sup>170</sup> and the CDA.<sup>171</sup> While the claim was pending, Quality filed for Chapter 11 protection<sup>172</sup> under the Bankruptcy Act.<sup>173</sup> Quality subsequently sought to have its claim transferred from the Court of Federal Claims to the District Court for the Northern District of Alabama for consolidation with its bankrupt estate pending there.<sup>174</sup> After the claim was transferred to the district court, the Government moved to have it transferred back to the Court of Federal Claims pursuant to 28 U.S.C. § 1631.<sup>175</sup>

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163. *Id.* at 784.

164. *See Bagley*, 990 F.2d at 572 (“We believe the bankruptcy court correctly held that it had discretion to defer or to determine itself whether the government had a viable claim against the bankruptcy estate.”).

165. *Id.*

166. *Bagley*, 990 F.2d at 568; *Gary Aircraft*, 698 F.2d at 778.

167. *Quality Tooling, Inc., v. United States*, 47 F.3d 1569 (Fed. Cir. 1995).

168. *Id.* at 1573.

169. Quality’s claim arose after the United States Army terminated Quality’s parts supply contract for alleged default. *Id.* Quality contested the Army’s default termination arguing that the Army terminated the contract for the convenience of the Government rather than any default and that, accordingly, Quality was entitled to money damages. *Id.* at 1571.

170. 28 U.S.C. § 1491 (1994).

171. 41 U.S.C. § 609 (1994).

172. Quality initially filed for Chapter 11 protection in the District Court for the District of Columbia. *Quality Tooling*, 47 F.3d at 1571. Quality then obtained a transfer of its bankrupt estate to the District Court for the Northern District of Alabama where Quality is located. *Id.*

173. The Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C.).

174. Quality successfully sought this transfer pursuant to 28 U.S.C. § 1452. *Quality Tooling*, 47 F.3d at 1572.

175. *Quality Tooling*, 47 F.3d at 1571. Section 1631 provides for transfers to state courts when the federal court lacks jurisdiction to hear a case. 28 U.S.C. § 1631.

On motion to the district court, the Government argued that the court did not have jurisdiction to try the CDA claim and that the Court of Federal Claims was the proper forum for resolution of the claim.<sup>176</sup> When the Government's motion failed, it sought review of this decision by the Federal Circuit pursuant to 28 U.S.C. § 1292(d)(4).<sup>177</sup>

On appeal, the Government reiterated its argument that the district court was without jurisdiction to try Quality's claim and that the Court of Federal Claims was the proper forum for resolution of the dispute.<sup>178</sup> The Government based its position on language in the Tucker Act, specifically 28 U.S.C. §§ 1346(a)(2) and 1491(a)(2), which makes the Court of Federal Claims the *exclusive trial court* for hearing disputes that arise under the CDA.<sup>179</sup> The majority acknowledged that the Government was correct with regard to what the Tucker Act purports to do.<sup>180</sup> The majority pointed out, however, that the Bankruptcy Act gives district courts, sitting in bankruptcy, concurrent jurisdiction over every claim associated with a bankrupt's estate, including those claims that, by statute, are within another court's exclusive jurisdiction.<sup>181</sup> "*Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.*"<sup>182</sup> The majority in *Quality Tooling* noted that the meaning of the statute's express language is reinforced by legislative history that explains Congress' intent to consolidate a debtor's affairs before one court for the purpose of avoiding protracted litigation over jurisdiction issues that delay resolution of a debtor's estate.<sup>183</sup> Moreover, the majority noted that

176. *Quality Tooling*, 47 F.3d at 1571.

177. Section 1292(d)(4) establishes the court's exclusive jurisdiction over appeals of motions to transfer a case from a district court to the Court of Federal Claims. 28 U.S.C. § 1292(d)(4).

178. *Quality Tooling*, 47 F.3d at 1572. A separate, and also unsuccessful, argument made by the Government on appeal was that 28 U.S.C. § 1452 did not support the initial transfer of the claim from the Court of Federal Claims to the district court. *Quality Tooling*, 47 F.3d at 1572. The Government's position was that the section only permitted transfers from state courts to bankruptcy courts. *Id.* It did not authorize transfers from nationwide federal courts, such as the Tax Court and the Court of Federal Claims, to a bankruptcy court. *Id.* The court of appeals quickly dismissed this argument explaining that neither the language of § 1452 nor its legislative history indicated Congress' intent to limit the applicability of § 1452 to transfers of claims from state courts. *Id.*

179. *Id.* at 1572-73.

180. *Id.*

181. *Id.* at 1573.

182. *Id.* at 1573 (quoting 28 U.S.C. § 1334(b) (1994)) (emphasis added).

183. *Id.* (describing unfavorable results arising from division of jurisdiction in bankruptcy matters (citing H.R. REP. NO. 595, 95th Cong., 2d Sess. 44-46 (1978), *reprinted in* 1978



such an interpretation of a bankruptcy court's jurisdiction is consistent with the broad powers and authority granted to bankruptcy courts over debtor's estates.<sup>184</sup> For these reasons, the majority held that there is "little doubt" that the District Court for the Northern District of Alabama, sitting in bankruptcy, and the Court of Federal Claims have concurrent jurisdiction over the bankrupt's CDA claim.<sup>185</sup>

In reaching this conclusion, the majority was forced to consider the Government's argument that the only waiver of sovereign immunity for CDA claims is in the Tucker Act,<sup>186</sup> and furthermore, that the waiver is limited exclusively to the Court of Federal Claims.<sup>187</sup> Writing for the court, Judge Plager rebutted this claim,<sup>188</sup> determining that a waiver of sovereign immunity naturally precedes the grant of jurisdiction and, therefore, it would be redundant for the Tucker Act to state expressly that the United States consents to be sued in any forum with jurisdiction over a CDA claim.<sup>189</sup> According to the

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U.S.C.G.A.N. 5787, 6006-07)).

184. *Id.* at 1573. The court elaborated that a district court sitting in bankruptcy has the power for "the collection and distribution of the estates of bankrupts and the determination of controversies thereto . . . . In such respects, the jurisdiction of the bankruptcy courts is exclusive of any other courts." *Id.* (quoting *Pepper v. Litton*, 308 U.S. 295, 304 (1939)).

185. *Id.*

186. *Id.* at 1574. This waiver is express in the Tucker Act. See 28 U.S.C. § 1491(a)(1) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States . . .").

187. The Government maintained that "it [was] not enough" for a district court to have an express statutory grant of jurisdiction; the court also must have an express waiver of the Government's sovereign immunity. *Quality Tooling*, 47 F.3d at 1573-74. The Government derived its argument from the Supreme Court's opinion in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). *Quality Tooling*, 47 F.3d at 1574. In that decision, the Court held that 28 U.S.C. § 1362, which gives district courts authority to hear claims brought by Indian tribes, did not abrogate Alaska's Eleventh Amendment immunity from suit. *Id.* On the relationship between grants of jurisdiction and waiver of sovereign immunity, the Court in *Blatchford* stated that "[t]he fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim. The issues are wholly distinct." *Id.* (quoting *Blatchford*, 501 U.S. at 786 n.4). Furthermore, any waiver of sovereign immunity, such as that in the Tucker Act for CDA claims, must be "strictly construed." *Id.* (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 94 (1990); *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986)).

188. See *Quality Tooling*, 47 F.3d at 1573-78.

189. *Id.* at 1575 ("It is axiomatic that the United States not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983))). The majority in *Quality Tooling* stated that "a court need not find a separate waiver of sovereign immunity in the substantive provision [of law granting a right to monetary relief], just as a court need not find consent to suit in 'any express or implied contract with the United States.' . . . The Tucker Act itself provides the necessary consent." *Id.* (quoting *Mitchell*, 463 U.S. at 218 (quoting 28 U.S.C. § 1491(a)(1))).

majority, no "ritualistic formula" is necessary to establish waiver,<sup>190</sup> "rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy."<sup>191</sup> Relying on language in *United States v. Mitchell*,<sup>192</sup> *Keifer & Keifer v. Reconstruction Finance Corp.*<sup>193</sup> and the general practice of Congress to waive sovereign immunity simultaneously with the granting of jurisdiction to a forum over claims for monetary relief,<sup>194</sup> the majority concluded that the Tucker Act provides the necessary consent to be sued on CDA claims to any court with jurisdiction to hear the claim.

The majority wrote, "The issue here is not whether the Government has waived its sovereign immunity, but whether that waiver extends to federal trial fora other than the Court of Federal Claims."<sup>195</sup> While the majority expressed that decisions of the Supreme Court on this issue must be "honor[ed]," it concluded that it was more important to follow "Congressional intent and purpose" on this issue.<sup>196</sup> According to this rationale, the majority rejected arguments by the Government and by the dissent that relied on *United States v. Nordic Village*,<sup>197</sup> *Minnesota v. United*

190. *Id.* at 1575 (quoting *Keifer & Keifer v. Reconstr. Fin. Corp.*, 306 U.S. 381, 389 (1939)). *Keifer* did not contemplate the Government's waiver of sovereign immunity for particular claims in a context where exclusive jurisdiction was established by statute for those claims. *Keifer*, 306 U.S. at 387-89 (explaining that Congress did not even mention governmental immunity in legislation in question).

191. *Quality Tooling*, 47 F.3d at 1575 (quoting *Franchise Tax Bd. of Cal. v. United States Postal Serv.*, 467 U.S. 512, 521 (1984)).

192. 463 U.S. 206 (1983).

193. 306 U.S. 381 (1939).

194. The majority relies heavily on a general pattern of congressional action waiving sovereign immunity when it grants the right to sue the Government for monetary relief. *See Quality Tooling*, 47 F.3d at 1577-78 (citing to Federal Tort Claims Act, 28 U.S.C. § 2674 (1994) (waiving, through general legislation, governmental immunity for torts committed by its agents); Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1994) (eliminating governmental immunity from money claims resulting from government contracts); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9606(b)(2)(B) (1994) (allowing suits against Government for certain environmental compliance costs)).

195. *Quality Tooling*, 47 F.3d at 1576.

196. *See id.* at 1577 (favoring congressional intent over contrary Supreme Court decisions).

197. *Id.* at 1576, 1581-85. The Government relied on *United States v. Nordic Village*, 503 U.S. 30, 34-36 (1992), to argue that, for purposes of determining congressional intent regarding consent to suit, the specific waivers of sovereign immunity included in the Bankruptcy Act were relevant, not the broad waivers in the Tucker Act. *Quality Tooling*, 47 F.3d at 1575-76. Because none of the three Bankruptcy Act waivers was applicable to *Quality's* CDA claim, the Government concluded that there was no consent by the Government to be sued on the claim. *Id.* at 1576. *Nordic Village* involved the issue of whether a bankruptcy trustee had a substantive right to payment in the first instance based on possible waiver of sovereign immunity under § 106(c) of the Bankruptcy Code. *Nordic Village*, 503 U.S. at 31. It did not address the issue of whether the waiver extended beyond the COFC to federal trial courts. *Quality Tooling*, 47 F.3d at 1576. On the basis of this distinction, the majority concluded that the Government's reliance on *Nordic Village* was misplaced. *Id.*

*States*,<sup>198</sup> and *United States v. Shaw*.<sup>199</sup> The majority's articulation that Supreme Court case law was less significant than expressions of congressional intent on this issue<sup>200</sup> is difficult to reconcile with the majority's tremendous reliance on *Mitchell* and *Keifer* to support its opinion.<sup>201</sup> Even more perplexing is the majority's primary reliance on Congress' general pattern of concurrently waiving sovereign immunity and granting jurisdiction to a court to recover monetary relief from the Government.<sup>202</sup>

The majority pointed only to one concrete indication of congressional intent on this issue to support its opinion that Congress had not indicated a preference for one forum over the other.<sup>203</sup> Language in the Federal Acquisition Streamlining Act of 1994 ("FASA")<sup>204</sup> amended the CDA to include a provision permitting a district court to request opinions from a board of contract appeals on matters of contract interpretation relevant to CDA claims pending before that court.<sup>205</sup> According to the majority in *Quality Tooling*, this provision clearly contemplates that in some instances, district courts sitting in bankruptcy, such as the District Court for the Northern District of Alabama, properly would have CDA claims before them for resolution on the merits.<sup>206</sup> Therefore, according to the majority view, Congress believed it already had waived sovereign immunity to permit such claims to be heard by those courts.<sup>207</sup>

Notably, in its analysis, the majority did not consider the limiting language of 28 U.S.C. § 1346(a)(2) that provides, "[T]he district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States . . . which [is] subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978."<sup>208</sup>

Presumably in response to anticipated criticism of its decision, the majority expressly limited its holding to the specific facts involved in

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198. *Quality Tooling*, 47 F.3d at 1576-77, 1581-85 (citing *Minnesota v. United States*, 305 U.S. 382, 388-90 (1939)).

199. *Id.* (citing *United States v. Shaw*, 309 U.S. 495 (1940)).

200. *See id.* at 1576-77 (distinguishing Supreme Court case law).

201. *See supra* notes 189-91 and accompanying text (analyzing majority opinion).

202. *See supra* notes 181-82 and accompanying text (discussing Bankruptcy Act's concurrent jurisdiction provision).

203. *Quality Tooling*, 47 F.3d at 1576.

204. Pub. L. No. 103-355, § 2354, 108 Stat. 3243, 3323 (codified at 41 U.S.C. § 609(f)).

205. Federal Acquisition Streamlining Act of 1994 ("FASA"), Pub. L. No. 103-355, § 2354, 108 Stat. 3243, 3323 (codified as amended at 41 U.S.C. § 609(f)).

206. *Quality Tooling*, 47 F.3d at 1578.

207. *Id.*

208. 28 U.S.C. § 1346(a)(2) (1994).

*Quality Tooling*.<sup>209</sup> That is, its holding extends only to "civil proceedings arising under title 11, or arising in or related to cases under title 11."<sup>210</sup> It does not apply to takings cases, military pay claims, or other types of entitlement claims that parties may seek to have transferred from the Court of Federal Claims to a district court. It applies only to CDA claims that are before a district court sitting in bankruptcy.<sup>211</sup>

Judge Plager added one further qualification to the majority's holding: before the district court may adjudicate a CDA claim, it must consider whether, as a matter of judicial economy and prudence, the cause should be heard by it or the Court of Federal Claims.<sup>212</sup> In addressing this practical concern, the majority again considered the conflicting opinions of the Fifth Circuit in *Gary Aircraft*<sup>213</sup> and the Tenth Circuit in *Bagley*.<sup>214</sup> The majority chose to follow the rule enunciated by the Tenth Circuit, that the bankruptcy court has discretion to defer a claim to a specialized government contract forum or to adjudicate the claim itself.<sup>215</sup> The outcome is reviewable for abuse of the court's discretion.<sup>216</sup> The majority made this decision for the purpose of maintaining some flexibility on the issue, yet makes very clear that in many instances the prudential decision of the district court sitting in bankruptcy will be to "defer a complicated, technical dispute to a specialized forum," as in *Gary Aircraft*.<sup>217</sup> When a government contract claim is relatively straightforward, then, in the interest of judicial economy, it may be appropriate for the bankruptcy court to adjudicate the claim itself or to seek

209. See *Quality Tooling*, 47 F.3d at 1578 (responding to dissent's arguments by stating that opinion is limited to specific jurisdiction question raised by Quality).

210. *Id.* (quoting 28 U.S.C. § 1334(b)).

211. See *supra* notes 209-10 and accompanying text (discussing applicability of holding in *Quality Tooling*).

212. *Quality Tooling*, 47 F.3d at 1578.

213. 698 F.2d 775 (5th Cir.), *cert. denied*, 464 U.S. 820 (1983).

214. *United States v. Bagley (In re Murdock Mach. & Eng'g Co.)*, 990 F.2d 567 (10th Cir. 1993). For a discussion of these two cases, see *supra* notes 158-65 and accompanying text.

215. *Bagley*, 990 F.2d 567, 572 (10th Cir. 1993). The decisions in *Gary Aircraft* and *Bagley* are not as different as they may appear superficially. They both consider the factors itemized in the text accompanying *supra* note 165. In *Gary Aircraft*, the Fifth Circuit simply took a more conservative view and believed that as a general rule, the bankruptcy court was required to transfer a "complicated, technical dispute to a specialized forum." *Quality Tooling*, 47 F.3d at 1579 (quoting *Gary Aircraft Corp. v. United States*, 698 F.2d 775, 783 (5th Cir. 1983)). In *Bagley*, the Tenth Circuit took a more flexible approach, however, and decided that the court was to look at the facts in each case against the enunciated factors before determining whether the transfer to a specialized forum was appropriate. *Bagley*, 990 F.2d at 572.

216. See *Quality Tooling*, 47 F.3d at 1580 (holding that district court's discretion in deciding whether deferral is appropriate is reviewable for abuse).

217. *Id.* (quoting *Gary Aircraft*, 698 F.2d at 783).

an advisory opinion from a board of contract appeals, in lieu of a transfer of the claim to the Court of Federal Claims.<sup>218</sup>

The *Quality Tooling* decision was not free from controversy, least of all from the court's own members. Judge Schall vehemently dissented from the majority's decision in a well-reasoned opinion.<sup>219</sup> His dissent relied on the principles set forth in *Nordic Village*<sup>220</sup> and elsewhere<sup>221</sup> that "the Government's consent to be sued must be construed strictly in favor of the sovereign . . . and not enlarge[d] . . . beyond what the language [of the statute] requires."<sup>222</sup> On this basis, Judge Schall asserted that the waiver of sovereign immunity in the Tucker Act is forum specific.<sup>223</sup> Judge Schall bolstered his strict construction argument with reference to the Supreme Court decisions in *Minnesota*<sup>224</sup> and *Shaw*<sup>225</sup> that addressed the Government's consent to be sued.<sup>226</sup> In *Minnesota*, the Supreme Court stated, "It rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought."<sup>227</sup>

Applying the law enunciated by the Supreme Court, which requires a congressional expression of waiver of sovereign immunity for each specific forum,<sup>228</sup> the dissent opined that the district court, sitting in bankruptcy, did not have jurisdiction to hear *Quality's* claim.<sup>229</sup> The reasoning for the dissent's opinion is that section 106 of the Bankruptcy Act<sup>230</sup> as amended most recently in 1994,<sup>231</sup> provides for only three specific waivers of sovereign immunity for district courts sitting in bankruptcy and none of those are applicable to a "contractor's CDA claim when the government has not asserted a

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218. *Id.*; see *supra* notes 204-07 and accompanying text (discussing FASA and encouraging district courts' use of advisory opinions).

219. *Quality Tooling*, 47 F.3d at 1581 (Schall, J., dissenting).

220. 503 U.S. 30, 32-36 (1992).

221. See *Ardestani v. INS*, 502 U.S. 129, 137 (1991) (understanding waivers of sovereign immunity must be narrowly construed in favor of the United States).

222. *Quality Tooling*, 47 F.3d at 1581 (Schall, J., dissenting) (quoting *Nordic Village*, 503 U.S. at 32-36) (citations omitted).

223. See *id.* (Schall, J., dissenting) (concluding that Tucker Act's waiver was not sufficient to give district court jurisdiction over *Quality's* claim).

224. 305 U.S. 382 (1939) (determining that Congress alone confers jurisdiction).

225. 309 U.S. 495 (1940) (explaining that court does not have authority to extend waiver of immunity beyond Congress' intent).

226. *Quality Tooling*, 47 F.3d at 1581-82 (Schall, J., dissenting).

227. *Minnesota v. United States*, 305 U.S. 382, 388 (1939).

228. *Quality Tooling*, 47 F.3d at 1583 (Schall, J., dissenting).

229. See *id.* at 1581-83 (Schall, J., dissenting) (concluding that Government's consent to be sued through legislation must be strictly construed).

230. 11 U.S.C. § 106 (1994).

231. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified at 11 U.S.C. § 106).

claim in the bankruptcy proceeding."<sup>232</sup> Judge Schall placed great emphasis on the fact that § 106 was revised as recently as 1994, and that if Congress thought that the Government's waiver of sovereign immunity should extend to CDA claims before the bankruptcy court, then Congress would have so stated in § 106.<sup>233</sup>

It is unlikely that the Federal Circuit's decision in *Quality Tooling* will be the last word on this issue. At a minimum, expect to see some further action in proposed procurement reform legislation.

#### F. Contract Implied-in-Fact or Law

In *Gould, Inc. v. United States*,<sup>234</sup> the Federal Circuit once again addressed the distinction between dismissal for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.<sup>235</sup> The court previously addressed this issue in *Do-Well Machine Shop Inc. v. United States*,<sup>236</sup> in which it stated:

The distinction between lack of jurisdiction and failure to state a claim upon which relief can be granted, is an important one: "[T]he court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.

Jurisdiction, therefore, is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover."<sup>237</sup>

The Federal Circuit clearly was exasperated in its most recent decision in the decade-long *Gould* case.<sup>238</sup> *Gould* involved a 1983 Navy solicitation of bids for the construction of a radio in accordance with Navy-provided performance specifications.<sup>239</sup> In its initial bid price, Gould assumed that it could build the Navy radio by modifying a similar Army radio design that had been provided "for informational purposes only" with the Navy request for proposal.<sup>240</sup>

232. *Quality Tooling*, 47 F.3d at 1583 (Schall, J., dissenting).

233. See *id.* at 1583-84 (Schall, J., dissenting) (stating that when Congress enacts new legislation, it presumably knows current, pertinent law).

234. 67 F.3d 925 (Fed. Cir. 1995).

235. *Gould, Inc. v. United States*, 67 F.3d 925, 929 (Fed. Cir. 1995) [hereinafter *Gould IV*].

236. 870 F.2d 637 (Fed. Cir. 1989).

237. *Do-Well Mach. Shop Inc. v. United States*, 870 F.2d 637, 639-40 (Fed. Cir. 1989) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

238. See *Gould IV*, 67 F.3d at 931 ("[T]his matter is approaching its tenth anniversary and *Gould* has yet to get its first hearing on the merits. Justice delayed is indeed justice denied.").

239. *Id.* at 927. The Naval Electronics System Command solicited bids for a fixed-price, five-year contract to produce "Bancroft"-type radios, a VHF-FM radio built to military specifications.

*Id.*

240. *Id.*

After being awarded the contract, Gould claimed to have expended \$57 million in unanticipated design costs because it had to redesign completely the Army radio to meet the Navy's allegedly enhanced performance specifications.<sup>241</sup> The Navy allegedly withheld requested information from Gould during the procurement process that would have indicated that upgrading the Army radio design would not be sufficient to meet the Navy's performance specifications.<sup>242</sup> On December 11, 1986, Gould submitted a claim to the Navy for "equitable reformation" of the contract to recover its increased design costs.<sup>243</sup> The Navy contracting officer denied the claim and Gould appealed the decision to the Claims Court pursuant to 41 U.S.C. § 609(a)(1).<sup>244</sup>

The Government moved to dismiss Gould's appeal for failure to state a claim upon which relief can be granted.<sup>245</sup> The Claims Court granted the Government's motion on January 16, 1990, under Rule 12(b)(4) of the Rules of the United States Claims Court.<sup>246</sup> In this decision (*Gould I*), the Claims Court considered Gould's claim to be one for contract reformation.<sup>247</sup> The court did not believe that Gould had stated a basis upon which relief could be granted in any of the three counts it alleged in its complaint.<sup>248</sup> Gould had alleged that (1) the Navy violated 10 U.S.C. § 2306(h)(1)(D) by failing to supply a "stable design" for the contract, thereby making the contract illegal;<sup>249</sup> (2) the Navy "improperly withheld" information from bidders that would have informed them of the extent of the design effort and risk associated with performance;<sup>250</sup> and (3) there was mutual mistake relating to the amount of design work required by the contract.<sup>251</sup>

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241. *See id.* (noting that Gould contended that he believed that only modifications to existing Army radio were necessary to satisfy Navy enhanced performance requirement).

242. *Id.*

243. *See id.* (noting that Gould submitted claim for "equitable reformation and upward adjustment in the price of the contract," which included more than \$57 million in added costs).

244. *Id.*

245. *Id.*

246. *Id.* (citing *Gould, Inc. v. United States*, 19 Cl. Ct. 257 (1990)).

247. *Id.* at 927-28 (noting that Claims Court concluded that it had jurisdiction because contract reformation is equitable remedy for which money judgment may be granted).

248. *Id.* at 928.

249. *Id.* at 927 n.2 (noting 10 U.S.C. § 2306(h)(1)(D) (1994) requires that, for items and services associated with weapons systems and their logistical support, "there be a stable design for the property to be acquired and that the technical risks associated with such property are not excessive").

250. *Id.* at 927.

251. *Id.*

In *Gould II*, the Federal Circuit vacated the Claims Court's decision in *Gould I* and remanded the case for trial.<sup>252</sup> In that decision, the Federal Circuit held that Gould had not limited its claim to one for contract reformation and that Gould's complaint included sufficient facts upon which relief could be granted.<sup>253</sup>

On remand, the Government filed a motion to dismiss Gould's complaint for lack of jurisdiction.<sup>254</sup> In *Gould III*, the renamed Court of Federal Claims<sup>255</sup> granted the Government's motion.<sup>256</sup> The court reasoned that because Gould's complaint was based solely on a contract with the United States that Gould asserted was illegal (because the contracting officer was without authority to enter into a contract for a design that was not stable), the only possible basis for jurisdiction was a contract implied-in-law.<sup>257</sup> Implied-in-law contracts are not within the Court of Federal Claims' jurisdiction.<sup>258</sup>

*Gould III* further held that Gould's claim was barred by a subsequent Supreme Court decision,<sup>259</sup> *Office of Personnel Management v. Richmond*,<sup>260</sup> which was controlling authority conflicting with the law of the case in *Gould II*.<sup>261</sup> As *Gould II* did not address the issues before the trial court on remand, its holding was not binding.<sup>262</sup>

Gould appealed the court's dismissal in *Gould III* to the Federal Circuit, arguing that the court had jurisdiction over its claim pursuant to the Tucker Act.<sup>263</sup> Gould relied exclusively on its contract with the Government as the basis for jurisdiction in the Court of Federal Claims.<sup>264</sup> The Government argued that because the contracting

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252. *Gould, Inc. v. United States*, 935 F.2d 1271, 1276 (Fed. Cir. 1991) [hereinafter *Gould III*].

253. *Gould IV*, 67 F.3d at 928.

254. *Id.* at 929.

255. The Claims Court was renamed the Court of Federal Claims pursuant to the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516 (effective Oct. 29, 1992).

256. *Gould, Inc. v. United States*, 29 Fed. Cl. 758, 764 (1993) [hereinafter *Gould III*].

257. *Gould IV*, 67 F.3d at 928.

258. *Id.* (quoting *Gould III*, 29 Fed. Cl. at 758, 761) (footnotes omitted).

259. *Gould III*, 29 Fed. Cl. at 763.

260. 495 U.S. 414 (1990).

261. *Gould III*, 29 Fed. Cl. at 763 (citing *Office of Personnel Management v. Richmond*, 495 U.S. 414, 434 (1990), for proposition that money payments from Federal Treasury are limited to those authorized by statute, and that benefits claimant may not estop Government due to misinformation of government employee).

262. *Gould IV*, 67 F.3d at 928.

263. *Id.* The Tucker Act establishes jurisdiction only for actions "'founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.'" *Id.* (quoting 28 U.S.C. § 1491(a)(1) (1994)).

264. *Id.* at 928-29.



officer entered into the contract without appropriate authority, the contract was illegal.<sup>265</sup>

The threshold issue in the court's decision on appeal was whether Gould stated a claim upon which relief could be granted, not whether the Court of Federal Claims had jurisdiction.<sup>266</sup> The court explained the fallacy in the Government's argument that the Court of Federal Claims lacked jurisdiction over Gould's claim.<sup>267</sup> First, the court held that the Government ignored precedent, stating that only if a contract is plainly illegal does jurisdiction not exist.<sup>268</sup> To be plainly illegal, such that jurisdiction does not exist, the illegality in the award must be "plain on the face of the statute and the regulations."<sup>269</sup> Because the Navy's contract with Gould was not plainly illegal, the Court of Federal Claims was required to take jurisdiction over the contract claim in the first instance and to resolve the factual issue of the contract's legality.<sup>270</sup>

The court next considered that Gould also could have alleged that an implied-in-fact contract existed with the Government under which the company would be entitled to recover compensation for the work performed.<sup>271</sup> If the contractor confers a benefit on the Government in the course of performing a contract that subsequently is declared invalid, an implied-in-fact contract may be deemed to exist.<sup>272</sup> To determine if facts exist to show an implied-in-fact contract upon which recovery could be based, the Court of Federal Claims would have to assume jurisdiction.<sup>273</sup>

The court further stated that the Supreme Court decision in *Richmond* relied upon by the Government was irrelevant to Gould.<sup>274</sup> The decision in *Richmond* was premised on a statutory entitlement to certain disability benefits.<sup>275</sup> In contrast to *Richmond*, Gould's claim

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265. *Id.*

266. *Id.* at 929.

267. *Id.* (differentiating jurisdictional argument that court lacks power to hear subject matter of dispute from failure to state claim argument that Gould's allegations are insufficient to entitle Gould to rectify).

268. *Id.* (citing *John Reiner & Co. v. United States*, 325 F.2d 438, 440 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964)).

269. *Id.* (citing *CACI, Inc. v. Stone*, 990 F.2d 1233, 1235 (Fed. Cir. 1993)).

270. *Id.* at 930 (holding that illegality in case "turns on questions of fact and the terms of the contract in dispute and, therefore, there is no plain illegality").

271. *Id.* (holding that even if court found that no express contract existed, Gould's complaint, interpreted in manner most favorable to Gould, alleges implied-in-fact contract).

272. *Id.* (citing *United States v. Amdahl Corp.*, 786 F.2d 387, 392-93 (Fed. Cir. 1986)).

273. *Id.*

274. *Id.*

275. *Id.*; see *Office of Personnel Management v. Richmond*, 495 U.S. 414, 434 (1990) (observing statutory origin of claim).

was based on a *contractual* entitlement.<sup>276</sup> The Government's argument "stretch[ed] *Richmond* totally out of context" and the court paid little attention to it.<sup>277</sup> After making clear that the issue in this appeal was not jurisdiction, but whether Gould stated a claim upon which relief could be granted,<sup>278</sup> the Court asked what circumstances existed to permit the Court of Federal Claims to avoid following the "law of the case" that the Federal Circuit articulated in *Gould II*.<sup>279</sup> In *Gould II* the Federal Circuit concluded that Gould had stated a claim upon which relief could be granted.<sup>280</sup> "The law of the case is a judicially created doctrine, the purposes of which are to prevent the relitigation of issues that have been decided and to ensure that trial courts follow the decision of appellate courts."<sup>281</sup> Under the "law of the case" doctrine, a court must adhere to a decision in a prior appeal in the same case unless one or more of the following exceptional circumstances exist:

- (1) the evidence in a subsequent trial is substantially different;
- (2) controlling authority has since made a contrary decision of the law applicable to the issues; or
- (3) the earlier ruling was clearly erroneous and would work a manifest injustice.<sup>282</sup>

In the court's opinion, the Government did not establish the existence of any of these three exceptional circumstances.<sup>283</sup> The Court of Federal Claims was bound, therefore, to follow the law of the case on the issue of whether Gould had stated a claim upon which relief could be granted,<sup>284</sup> the answer to which was established in *Gould II*.<sup>285</sup> In a clearly exasperated tone, the court vacated the decision of the Court of Federal Claims and remanded the case for a speedy trial.<sup>286</sup>

276. *Gould IV*, 67 F.3d at 930.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Gould II*, 935 F.2d 1271, 1275-76 (Fed. Cir. 1991).

281. *Gould IV*, 67 F.3d at 930 (citing *Jamesbury Corp. v. Litton Indus. Prods.*, 839 F.2d 1544, 1550 (Fed. Cir.), *cert. denied*, 488 U.S. 823 (1988), *overruled on other grounds* by *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020 (Fed. Cir. 1992)).

282. *Id.* (citing *Gindes v. United States*, 740 F.2d 947, 950 (Fed. Cir.), *cert. denied*, 469 U.S. 1074 (1984)).

283. *Id.* at 931.

284. *Id.*

285. *Gould II*, 935 F.2d 1271, 1275-76 (Fed. Cir. 1991) (holding that Gould's complaint was sufficient to support claims of superior knowledge, mutual mistake and Navy's failure to supply a stable design).

286. *Gould IV*, 67 F.3d at 931 (finding that legal proceedings were now in tenth year and because no hearing on merits had yet occurred, Gould was being denied justice).

G. *Non-CDA Transportation Services Contract*

The CDA applies to contracts entered into by an executive agency for “(1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or (4) the disposal of personal property.”<sup>287</sup>

Presumably, “procurement of services” would include transportation services, but as the Federal Circuit decided in 1995, the provision does not encompass *all* transportation services.<sup>288</sup> In *Dalton v. Sherwood Van Lines, Inc.*,<sup>289</sup> the court overruled the ASBCA, holding that a contract for the provision of transportation services to the Government by a common carrier pursuant to a government bill of lading (“GBL”)<sup>290</sup> was not subject to the CDA and the ASBCA, therefore, had no jurisdiction over the claim.<sup>291</sup>

Sherwood Van Lines (“Sherwood”) provided transportation of household goods for uniformed members of the Navy<sup>292</sup> pursuant to a GBL.<sup>293</sup> A GBL serves as the contract between the Government and a common carrier for acquiring freight transportation services and establishes the parties’ respective rights with regard to the services procured and provided.<sup>294</sup>

Following moving services that Sherwood provided and for which it received payment, service members filed claims against the Navy alleging damage to their property during transport.<sup>295</sup> The Navy paid the claims and sought reimbursement from Sherwood.<sup>296</sup> Sherwood refused to pay and the Navy set off the damage amounts against other money due Sherwood.<sup>297</sup> Sherwood then filed an appeal on each of the claims with the ASBCA.<sup>298</sup>

The Government moved to dismiss the appeals on the grounds that the CDA did not apply to disputes arising from the provision of transportation services pursuant to GBLs and consequently, ASBCA

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287. 41 U.S.C. § 602(a) (1994).

288. *Dalton v. Sherwood Van Lines, Inc.*, 50 F.3d 1014, 1017 (Fed. Cir. 1995).

289. 50 F.3d 1014 (Fed. Cir. 1995).

290. A GBL is a document the Government uses to acquire freight transportation services from common carriers.

291. *Dalton*, 50 F.3d at 1017.

292. *Id.* at 1016.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

lacked jurisdiction to hear these disputes.<sup>299</sup> The Board ruled against the Government and in favor of Sherwood on the merits, holding that a "GBL contains all the terms necessary to be a [CDA] contract."<sup>300</sup>

The court overruled the ASBCA, finding that the Transportation Act of 1940<sup>301</sup> authorizes common carriers regulated by the Interstate Commerce Commission to provide transportation services to agencies of the federal government at or below their published tariff rates.<sup>302</sup> In passing the Transportation Act, Congress set up a system to pay carriers for providing those services and a mechanism to resolve disputes arising out of those transactions.<sup>303</sup> Although recognizing that the GBLs provided for the *procurement of services*, the court held that because the review procedures under the Transportation Act were different in several respects from the CDA procedures, the two could not be regarded as complementary.<sup>304</sup> Providing a detailed analysis of the differences between the CDA and the Transportation Act procedures, the court held:

When the [CDA] applies, it provides the exclusive mechanism for disputes resolution; the [CDA] was not designed to serve as an alternative administrative remedy . . . .

. . . .

. . . [I]f the [CDA] applies to GBL-based transportation services, the procedures established by [the Transportation Act and implementing regulations] do not.

We are not persuaded that Congress intended the [CDA] to have that effect.<sup>305</sup>

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299. *Id.*

300. *Id.*

301. 49 U.S.C. § 10721 (1994).

302. *Dalton*, 50 F.3d at 1016 (citing 49 U.S.C. § 10721).

303. *Id.* (citing 31 U.S.C. § 3726(a), (b), (g)(1) (1994)).

304. *Id.* at 1017. The CDA requires initial action on a claim by an agency contracting officer. 41 U.S.C. § 605(a) (1994). The Transportation Act, however, requires that a claim be submitted either to the GSA or to the agency from whose actions the claim arose. 31 U.S.C. § 3726(a).

305. *Dalton*, 50 F.3d at 1017-18. The court was careful to limit its decision to GBL-based transactions. It did not address procurement of transportation services obtained through other means. *See id.* at 1020 (differentiating non-GBL procurement on basis that in such instances GBL does not constitute contract itself, but merely constitutes means by which agency procures services under separate long term contract).

### H. Debarment

The Federal Circuit considered its first debarment case under the Federal Employees Health Benefits Program ("FEHBP")<sup>306</sup> in *Chertkov v. Office of Personnel Management*.<sup>307</sup>

The appellant, Lynn S. Chertkov, was a clinical social worker.<sup>308</sup> Through a private practice, she provided social services to federal employees and their dependents who were beneficiaries under the FEHBP.<sup>309</sup> She also provided those services to Medicaid beneficiaries.<sup>310</sup> In 1991, Chertkov was prosecuted by the State of Maryland for misdemeanor Medicaid fraud.<sup>311</sup> She subsequently pled guilty.<sup>312</sup>

As a result of her guilty plea, the Department of Health and Human Services ("HHS") notified Chertkov on August 14, 1992, that she was debarred or excluded from participating in any program under the Social Security Act,<sup>313</sup> including Medicaid, for a period of ten years and advised her of her rights to the review of the decision by an ALJ.<sup>314</sup> Chertkov sought a hearing before an ALJ but did not seek a review of the HHS decision in federal court.<sup>315</sup> The right to review of an HHS debarment or exclusion decision in federal court is provided by statute.<sup>316</sup>

Out of respect for HHS's debarment decision, on May 18, 1993, the Office of Personnel Management ("OPM"), which manages the FEHBP, extended Chertkov's exclusion from government contracting to the FEHBP.<sup>317</sup> OPM based its debarment of Chertkov on its regulation at 5 C.F.R. § 970.100(a), which provides that "[d]ebarment

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306. Congress enacted the FEHBP to provide medical benefits, insurance, or both for various classes of federal employees. See 5 U.S.C. §§ 8903-8904 (1994).

307. 52 F.3d 961 (Fed. Cir. 1995).

308. See *Chertkov v. Office of Personnel Management*, 52 F.3d 961, 964 (Fed. Cir. 1995) (noting that Chertkov practiced for 19 years rendering services to abused and neglected children and dysfunctional families).

309. *Id.*

310. *Id.* at 965.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* (citing 42 U.S.C. §§ 1320a-7(f), 7a(c)(2) (1994), which requires notice and hearing for party excluded by HHS from participating in programs under Social Security Act).

315. *Id.* at 966.

316. If the exclusion is pursuant to 42 U.S.C. § 1320a-7, the individual is entitled to review in the appropriate United States district court pursuant to 42 U.S.C. § 1320a-7(f)(1). If the exclusion is based on 42 U.S.C. § 1320a-7a, subsection (e) provides for review of HHS's decision in the United States Court of Appeals for the circuit in which the individual resides or in which the provider's conduct occurred.

317. *Chertkov*, 52 F.3d at 965-66. This exclusion was done through a notice of proposed debarment. *Id.* at 966.

or suspension of a participant in a program by one agency shall have government wide effect."<sup>318</sup> This regulation, implemented pursuant to Executive Order 12,549,<sup>319</sup> went into effect only the day before OPM sent the notice to Chertkov.<sup>320</sup>

OPM finalized its debarment decision on June 30, 1993.<sup>321</sup> Chertkov appealed OPM's debarment decision to the Federal Circuit pursuant to the right of appeal provided in 5 U.S.C. § 8902a(g)(2).<sup>322</sup> OPM argued that the Federal Circuit did not have jurisdiction pursuant to this section to hear Chertkov's appeal.<sup>323</sup>

Section 8902a(g)(2) was enacted on November 14, 1988, as part of the Federal Employees Health Benefits Amendments Act of 1988 ("FEHBA") for the purpose of protecting FEHBP beneficiaries from medical providers deemed unfit or found to have committed fraud or financial misconduct.<sup>324</sup> The FEHBA provides for debarment of such providers and includes certain procedural protections for providers against inappropriate or improper debarment actions, specifically, judicial review in the Federal Circuit of final debarment decisions.<sup>325</sup> FEHBA *does not* include collateral debarment<sup>326</sup> as one of the grounds for debarment for which it provides a right of judicial review.

Section 8902a(g)(2) provides: "[A]ny person adversely affected by a *final decision under [5 U.S.C. § 8902a(g)(1)]* may obtain review of such

318. 5 C.F.R. § 970.100(a) (1995). The history behind OPM's implementation of this regulation is significant. Executive Order 12,549, issued on February 18, 1986, by President Reagan, ordered that "[d]ebarment or suspension of a participant in a program by one agency shall have government-wide effect." *Id.* This Order was part of a broader initiative by President Reagan to curb fraud, waste, and abuse in federal programs. The purpose of this specific provision was to avoid the need for duplicative debarment proceedings by the various federal agencies on the same set of facts. *Id.*

Pursuant to the Executive Order, the Office of Management and Budget ("OMB") issued a "common rule" on debarments, which was basically a generic debarment rule that the various executive departments and agencies could tailor or incorporate as is into their own regulations. 52 Fed. Reg. 20,360 (1987). This common rule included provisions relating to original debarment decisions and collateral debarments. Twenty-eight agencies, including HHS, adopted the common rule, in some form, on May 26, 1988. 53 Fed. Reg. 19,160 (1988).

OPM eventually adopted the common debarment rule as required by the Executive Order in 1993. 58 Fed. Reg. 28,759 (1993) (codified at 5 C.F.R. § 970 (1996)).

319. 58 Fed. Reg. 28,759 (codified at 5 C.F.R. § 970).

320. *Id.*

321. *Chertkov*, 52 F.3d at 966.

322. *Id.*

323. *See id.* (agreeing with Government's lack of jurisdiction argument and holding that Congress had not conferred jurisdiction to hear case).

324. Federal Employee Health Benefits Amendments Act of 1988, 5 U.S.C. §§ 8902a, 8905a, 8906a (1994).

325. *Id.* § 8902a(g)(2).

326. A collateral debarment is when an agency extends another agency's debarment determination to its own agency without making its own initial findings to support the debarment. *Chertkov*, 52 F.3d at 966.

decision in the United States Court of Appeals for the Federal Circuit.<sup>327</sup> A “final decision” is a “determination under [5 U.S.C. § 8902(b) or (c)] adverse to a provider of health care services or supplies.”<sup>328</sup> Sections 8902(b) and (c) do not include collateral debarment actions; they include only debarment actions originated by OPM.

Once again, as in *Dalton v. Sherwood Van Lines, Inc.*,<sup>329</sup> the Federal Circuit refused to expand the scope of its jurisdiction beyond that expressly provided for by statute.<sup>330</sup> Because OPM’s debarment of Chertkov was based on authority other than FEHBA and was not expressly within the scope of debarments covered by § 8902a(g)(2), the Federal Circuit refused to take jurisdiction over Chertkov’s appeal.<sup>331</sup> The court interpreted this to be Congress’ intent from the language of the statute and subsequent Appropriations Acts.<sup>332</sup> It was clear to the court that the grant of jurisdiction under § 8902a(g)(2) is reserved for debarment decisions that an agency originates, despite the harshness this interpretation might have on individual providers such as Chertkov.<sup>333</sup>

## II. BID PROTEST DECISIONS

The number of precedential bid protest cases decided by the Federal Circuit in 1995 numbered only three,<sup>334</sup> compared to five in 1994.<sup>335</sup> Only one case, *OAO Corp. v. Johnson*,<sup>336</sup> involved a jurisdictional issue.<sup>337</sup> In *OAO* the court further restricted the

327. 5 U.S.C. § 8902a(g)(2) (requiring individual to be adversely affected by final decision) (emphasis added).

328. *Id.* § 8902a(g)(1).

329. 50 F.3d 1014 (Fed. Cir. 1995).

330. *Chertkov*, 52 F.3d at 966.

331. *Id.* at 967.

332. *Id.* In determining Congress’ intent on this issue, the court considered language in the 1993 Appropriations Act that forbids any payment from the Employees Health Benefit Fund (the fund holding contributions from employees and the Government for payment for health services under the FEHBP) to a health care provider excluded from participation under the Social Security Act. *Id.*; see also Pub. L. No. 102-393, 106 Stat. 1729, 1755 (1992). This language basically mandated that OPM give collateral effect to HHS debarments. The court further relied on language in the 1994 and 1995 Appropriations Acts. *Chertkov*, 52 F.3d at 967 & n.12.

333. *Chertkov*, 52 F.3d at 966-67.

334. See *OAO Corp. v. Johnson*, 49 F.3d 721, 726 (Fed. Cir. 1995); *PRC, Inc. v. Widnall*, 64 F.3d 644, 647 (Fed. Cir. 1995); *Central Ark. Maintenance, Inc. v. United States*, 68 F.3d 1338, 1343 (Fed. Cir. 1995).

335. *Cleveland Telecommunications Corp. v. Goldin*, 43 F.3d 655, 658 (Fed. Cir. 1994); *Kanemoto v. Reno*, 41 F.3d 641, 646 (Fed. Cir. 1994); *Parcel 49C Ltd. Partnership v. United States*, 31 F.3d 1147, 1154 (Fed. Cir. 1994); *Sterling Fed. Sys., Inc. v. Goldin*, 16 F.3d 1177, 1188 (Fed. Cir. 1994); *Grumman Data Sys. Corp. v. Widnall*, 15 F.3d 1044, 1046 (Fed. Cir. 1994).

336. 49 F.3d 721 (Fed. Cir. 1995).

337. *OAO Corp.*, 49 F.3d at 723 (discussing whether Brooks Act authorizes reverse protests under jurisdiction of GSBGA).

jurisdiction of the GSBCA by holding that the Brooks Act<sup>338</sup> does not authorize reverse protests.<sup>339</sup> In *PRC, Inc. v. Widnall*,<sup>340</sup> the court continued its trend of expanding the costs that a successful protestor can recover.<sup>341</sup> The third bid protest decision, *Central Arkansas Maintenance, Inc. v. United States*,<sup>342</sup> considered the scope of the Court of Federal Claims' power to grant injunctive relief to disappointed bidders.<sup>343</sup>

#### A. Reverse Protests Not Authorized by Brooks Act

In *OAO Corp. v. Johnson*, the Federal Circuit once again reversed the GSBCA on the issue of its jurisdiction over bid protest cases.<sup>344</sup> GSA awarded a contract for computer services to OAO on June 1, 1993.<sup>345</sup> Disappointed bidders protested the award decision, arguing that GSA had violated the Competition in Contracting Act of 1984<sup>346</sup> by mishandling pricing negotiations and that OAO was ineligible for the award because it had violated the "key personnel" requirement of the solicitation by not having senior personnel available for assignment on the award date.<sup>347</sup>

On June 25, 1993, GSA terminated the contract with OAO for convenience as part of a settlement with the protesters.<sup>348</sup> GSA and the protesters then filed a Joint Stipulation of Dismissal with the GSBCA in which GSA agreed that it had mishandled the price negotiations.<sup>349</sup> OAO objected to the Stipulation and filed a "reverse protest"<sup>350</sup> with the Board under the Brooks

338. 40 U.S.C. § 759 (1994).

339. *Id.* (holding that, absent explicit statutory language to effect that Brooks Act should be applied retroactively to reverse protests, retroactivity does not apply and GSBCA therefore does not have jurisdiction to decide such cases).

340. 64 F.3d 644, 645-46 (Fed. Cir. 1995) (deciding whether vacatur for mootness of Board decision sustaining bid protest could be interpreted to deny successful protestor right to recover protest and proposal costs).

341. *PRC, Inc. v. Widnall*, 64 F.3d 644, 647 (Fed. Cir. 1995).

342. 68 F.3d 1338 (Fed. Cir. 1995).

343. *Central Ark. Maintenance, Inc. v. United States*, 68 F.3d 1338, 1343 (Fed. Cir. 1995) (holding that Court of Federal Claims had no power to enjoin United States Army Corps from awarding contract to another bidder, after it determined that no breach of contract had occurred).

344. *OAO Corp. v. Johnson*, 49 F.3d 721, 726 (Fed. Cir. 1995) (holding that GSBCA has no jurisdiction under Brooks Act over reverse protest cases).

345. *Id.* at 723.

346. Pub. L. No. 98-369, tit. VII, §§ 2701-2907, 98 Stat. 1175, 1175-1210 (1984) (codified as amended in various sections of 10, 31, 40, and 41 U.S.C.).

347. *OAO Corp.*, 49 F.3d at 723.

348. *Id.*

349. *Id.*

350. "A 'reverse protest' is a challenge by the contract awardee to an agency's termination of the contract for improprieties in the award process." *Id.* at 724; see *OAO Corp. v. GSA*, GSBCA No. 12484-P, 94-1 B.C.A. (CCH) ¶ 26,392, at 131,295 (1993) [hereinafter *OAO I*]



Act.<sup>351</sup> OAO challenged GSA's revocation of the contract.<sup>352</sup> GSA moved to dismiss under the Brooks Act for lack of subject matter jurisdiction.<sup>353</sup> On September 3, 1993, the GSBCA ruled that it had jurisdiction and affirmed GSA's termination of the contract.<sup>354</sup> The Board concluded that OAO misled GSA regarding the availability of key personnel and that OAO did not comply with the solicitation provisions of the contract.<sup>355</sup>

On October 14, 1993, the contracting officer informed OAO that, due to its lack of integrity and ethics, OAO had been non-responsible and, therefore, barred OAO from further competition for the contract.<sup>356</sup> The contracting officer subsequently denied OAO's reconsideration request.<sup>357</sup> OAO did not protest the initial "non-responsibility" decision or the reconsideration decision.<sup>358</sup>

Subsequently, the GSA published Amendment 8 to the solicitation.<sup>359</sup> This addition changed some pricing and personnel requirements.<sup>360</sup> OAO then requested that the contracting officer allow it to re-enter the competition on the basis that the amendment "substantially changed" key requirements of the solicitation including the criteria upon which the GSBCA had deemed OAO non-responsible.<sup>361</sup> The contracting officer denied the request, and OAO filed a second protest that the GSBCA dismissed as untimely.<sup>362</sup> In its dismissal, the GSBCA noted that OAO had been excluded from the competition on the basis of the earlier finding of non-responsibility.<sup>363</sup> The GSBCA indicated that pursuant to its rules, OAO should have protested within ten days of the initial non-responsibility decision or at the latest, within ten days of the contracting officer's denial of its reconsideration.<sup>364</sup>

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(defining reverse protest as "involv[ing] a challenge by the contract awardee to an agency's decision to terminate a contract based upon improprieties in the award process").

351. *OAO I*, 94-1 B.C.A. (CCH), at 131,291.

352. *Id.*

353. *Id.* (citing Brooks Automatic Data Processing Act, 40 U.S.C. § 759 (1994), amended by Pub. L. No. 103-355, §§ 1431-1439, 108 Stat. 3234, 3292-94 (1994) (to be codified as amended at 40 U.S.C. § 759(f))).

354. *OAO Corp.*, 49 F.3d at 723 (citing *OAO I*, 94-1 B.C.A. (CCH) at 131,295-96).

355. *Id.* (citing *OAO I*, 94-1 B.C.A. (CCH) at 131,295-98).

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.* at 723-24.

362. *Id.* (citing *OAO Corp. v. GSA*, GSBCA No. 12718-P, 94-2 B.C.A. (CCH) ¶ 26,662, at 132,647 (1994)) [hereinafter *OAO II*].

363. *Id.* (citing *OAO II*, 94-2 B.C.A. (CCH) at 132,648-49).

364. *Id.* (citing *OAO II*, 94-2 B.C.A. (CCH) at 132,648 n.2).

OAO appealed the dismissal to the Federal Circuit under the Brooks Act,<sup>365</sup> challenging the Board's jurisdiction over reverse protests.<sup>366</sup> The court commented that the Brooks Act grants "an interested party" the right to file a "protest" as that term is defined by statute.<sup>367</sup> Under the Act, a "protest" is limited to written objections based on improprieties by the agency in the bid solicitation or objections to the proposed or actual award of a contract.<sup>368</sup> The Board's jurisdiction over protests thus is limited to "objections to the procurement process or the contract award itself."<sup>369</sup>

The court concluded that because OAO had objected neither to the propriety of GSA's procurement process, nor to GSA's award of the contract, it had not filed a "protest" under the Brooks Act.<sup>370</sup> Rather, OAO had filed an action seeking to affirm GSA's procurement process and its own contract award.<sup>371</sup> OAO's only objection was to the *termination* of its contract award.<sup>372</sup> The court stated that objection to a contract termination is within the jurisdictional scope of the CDA, not the Brooks Act.<sup>373</sup>

Interestingly, after this appeal was filed, Congress amended the Brooks Act as part of FASA.<sup>374</sup> This amendment expanded the Brooks Act's definition of "protest" in 40 U.S.C. § 759(f) to *include* objections to the cancellation of contract awards.<sup>375</sup> Although this amendment was enacted prior to the court's decision, the court refused to apply the revised definition retroactively to expand the Board's Brooks Act jurisdiction to OAO's appeal, stating that "[t]he plain language of the FASA dictates that the amended definition of 'protest' has only prospective effect."<sup>376</sup>

Despite the holding of the court in *OAO*, the GSBCA did acquire jurisdiction over reverse protests.<sup>377</sup> The Board's revised rules,

365. *Id.*; see 40 U.S.C. § 759(f)(6) (1994) (setting forth procedures for appeals).

366. *OAO Corp.*, 49 F.3d at 724.

367. *Id.*; see 40 U.S.C. § 759(f)(1).

368. See 40 U.S.C. § 759(f)(9)(A).

369. *OAO Corp.*, 49 F.3d at 725.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, §§ 1431-1439, 108 Stat. 3243, 3291-95 (codified at 40 U.S.C. § 759); *OAO Corp.*, 49 F.3d at 725.

375. 40 U.S.C. § 759(f)(9)(A) (1994); *OAO Corp.*, 49 F.3d at 725.

376. *OAO Corp.*, 49 F.3d at 725. FASA clarified that the revised definition applied prospectively only. Specifically, FASA provided that its amendments would take effect on the date provided in final implementing regulations or on October 1, 1995, whichever came first. FASA, 41 U.S.C. § 251(b)(3) (1994).

377. See 40 U.S.C. § 759(f)(9)(A)(iv) (including termination or cancellation of contract owner in definition of protest).

implemented pursuant to the FASA, became effective September 16, 1995.<sup>378</sup> Under the amendment to the Brooks Act, the Board acquired jurisdiction over protests of solicitations, cancellations of solicitations, awards or proposed awards of contracts, and the termination or cancellation of such a contract award.<sup>379</sup> This grant of jurisdiction was short-lived, however. The National Defense Authorization Act of 1996 removed the bid protest jurisdiction of the GSBCA.<sup>380</sup>

OAO's appeal to the Federal Circuit also challenged the Board's dismissal of its second protest relating to the contracting officer's non-responsibility determination as untimely.<sup>381</sup> In considering this issue, the court noted that a "protest based on anything other than improprieties in a solicitation shall be filed no later than ten days after the basis of the protest is known or should have been known, whichever is earlier."<sup>382</sup> The court also stated that "[a] party may obtain reexamination of its responsibility status when ample time exists and a material change occurs in a principal factor on which the responsibility determination rests."<sup>383</sup> Given the facts here, the contracting officer's non-responsibility determination was based on OAO's lack of integrity and ethics.<sup>384</sup> Because Amendment 8 did not materially change the standards for ethics or integrity applicable to potential awardees, it did not require the contracting officer to reassess OAO's responsibility.<sup>385</sup> The contracting officer's second refusal to reconsider her earlier responsibility determination, therefore, did not trigger a new protest period.<sup>386</sup> To obtain a hearing before the Board, OAO should have protested after the initial non-responsibility determination but no later than ten days after the contracting officer's first refusal to reconsider her responsibility determination.<sup>387</sup> In sum, the court affirmed the GSBCA's decision as to OAO's second untimely protest because OAO failed to submit a timely protest on the non-responsibility determination.<sup>388</sup>

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378. *Id.*

379. *See id.*

380. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (amending 41 U.S.C. § 251).

381. *OAO Corp.*, 49 F.3d at 726.

382. *Id.*

383. *Id.* (citations omitted).

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

*B. Motion for Costs Survives Procurement Cancellation*

In *PRC, Inc. v. Widnall*,<sup>389</sup> the Federal Circuit considered the effect of a vacated bid protest decision on a related motion for bid protest and proposal costs.<sup>390</sup>

In 1991, PRC protested the award by the Air Force of a contract for local area network system integration and installation to Electronic Data Systems Corporation ("EDS").<sup>391</sup> PRC's protest was sustained by the GSBICA on the basis that the Air Force had engaged in practices that were both prohibited and prejudicial to PRC.<sup>392</sup> PRC timely filed its Motion for Costs with the GSBICA seeking reimbursement for the costs of prosecuting its protest and its bid preparation.<sup>393</sup> EDS appealed the Board's underlying protest decision to the Federal Circuit.<sup>394</sup> Before a decision was issued on the EDS appeal, the Air Force canceled the procurement with the intent of incorporating it into a future acquisition.<sup>395</sup> PRC then moved to dismiss EDS's appeal as moot, arguing that because it had a motion for costs pending before the GSBICA, the court should not vacate the underlying protest decision.<sup>396</sup> The court denied PRC's motion to dismiss and instead vacated as moot the Board's decision sustaining PRC's protest, remanding the case to the GSBICA to dismiss PRC's protest complaint.<sup>397</sup>

On remand, the GSBICA dismissed PRC's protest complaint<sup>398</sup> and then dismissed PRC's motion for costs for lack of jurisdiction.<sup>399</sup> The Board based its decision on the ill-founded belief that the court's unqualified vacatur order nullified the underlying protest decision and that such nullification eliminated PRC's right to recover bid protest and preparation costs under 40 U.S.C. § 759(f)(5)(B) and

389. 64 F.3d 644 (Fed. Cir. 1995).

390. *PRC, Inc. v. Widnall*, 64 F.3d 644, 645 (Fed. Cir. 1995).

391. *Id.*

392. *Id.*; *Network Solutions, Inc. v. Department of Air Force*, GSBICA Nos. 11498-P, 11532-P, 92-3 B.C.A. (CCH) ¶ 25,083 at 125,049, *vacated as moot sub nom.* *Electronic Data Sys. Corp. v. Rice*, 988 F.2d 128 (unpublished table decision), No. 92-1511, 1992 WL 436547 (Fed. Cir. Dec. 2, 1992).

393. *PRC, Inc.*, 64 F.3d at 645; *see* 40 U.S.C. § 759(f)(5)(C) (1994).

394. *PRC, Inc.*, 64 F.3d at 645.

395. *Id.*

396. *Id.*

397. *Electronic Data Sys. Corp. v. Rice*, 988 F.2d 128 (unpublished table decision), No. 92-1511, 1992 WL 436547 (Fed. Cir. Dec. 2, 1992); *PRC, Inc.*, 64 F.3d at 645 (citing *United States v. Munsingwear*, 340 U.S. 36, 39 (1950)).

398. *Network Solutions, Inc. v. Department of the Air Force*, GSBICA Nos. 11498-P-REM, 11532-P-REM, 1993 WL 33071 (Feb. 10, 1993); *PRC, Inc.*, 64 F.3d at 645.

399. *PRC, Inc. v. Department of Air Force*, GSBICA Nos. 11864-C, 11532-P, 94-3 B.C.A. (CCH) ¶ 27,159, at 135,341 (1994); *PRC, Inc.*, 64 F.3d at 646.

(C).<sup>400</sup> The Board based its decision on the fact that the Federal Circuit handed down an unqualified vacatur order despite the fact that the court could have qualified its order so as to permit expressly the recovery of such costs.<sup>401</sup>

PRC appealed the Board's dismissal of its motion for costs,<sup>402</sup> arguing that Supreme Court precedent in *Crowell v. Mader*<sup>403</sup> required the Board to interpret the vacatur order so as not to prejudice PRC's right to recover protest and proposal costs.<sup>404</sup> The Air Force argued that the court's vacatur order nullified the GSBICA's finding of an Air Force violation in the procurement process and because such a determination was a necessary prerequisite to PRC's claim, PRC should not be allowed to recover its costs.<sup>405</sup>

On appeal, the court sided with PRC, holding that its earlier vacatur order should be interpreted so as not to conflict with precedent established in *Crowell*.<sup>406</sup> *Crowell* established that in cases in which the issues raised on appeal have become moot but the whole case has not become moot (that is, some portion of the case remains to be decided by the lower court), "it is 'inappropriate' to vacate the decision below with instructions to dismiss 'the entire action.'"<sup>407</sup> The court found that PRC's motion for costs was not at issue in EDS's appeal to the Federal Circuit or in PRC's motion to dismiss the appeal, and was not specifically addressed in the court's vacatur order.<sup>408</sup> Consequently, the court held that its vacatur order did not deprive the Board of jurisdiction to decide PRC's motion for costs.<sup>409</sup> The court further held that its vacatur order did not affect the existence of the Board's underlying protest decision for purposes of considering PRC's motion for costs.<sup>410</sup> The court, therefore, reversed the Board's decision and remanded the case to the Board for decision on PRC's motion for costs.<sup>411</sup>

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400. *PRC, Inc.*, 64 F.3d at 646 (quoting *PRC, Inc.*, 94-3 B.C.A. (CCH) at 135,339).

401. *Id.*

402. *Id.* at 645.

403. 444 U.S. 505, 506 (1980).

404. *PRC, Inc.*, 64 F.3d at 646.

405. *Id.*

406. *Id.* at 647.

407. *Id.* at 646 (quoting *Crowell v. Mader*, 444 U.S. 505, 506 (1980)).

408. *Id.* at 647.

409. *Id.*

410. *Id.*

411. *Id.*

### C. Authority to Grant Equitable Relief

Congress has granted the Court of Federal Claims the power to award equitable relief in connection with its bid protest jurisdiction.<sup>412</sup> In 1995, the Federal Circuit, in *Central Arkansas Maintenance, Inc. v. United States*,<sup>413</sup> squarely addressed the scope of the Court of Federal Claims' power to enjoin a contract award pursuant to an action by a disappointed bidder.<sup>414</sup> An Army Corps of Engineers contract for lake maintenance services in central Arkansas was at stake.<sup>415</sup> Central Arkansas Maintenance, Inc. ("CAM"), and Ferguson-Williams were two of eleven bidders for the Arkansas Lakes contract.<sup>416</sup>

In its initial bid, Ferguson-Williams included the resume of one Charles Hargett.<sup>417</sup> At the time, Hargett was a government employee responsible for managing some of the resources included in the contract, but he was planning to retire from his government position.<sup>418</sup> Hargett had some involvement on the government side in preparation of the Arkansas Lakes solicitation.<sup>419</sup> Despite Hargett's position and responsibilities related to the Arkansas Lakes work, agency counsel for the Corps initially determined that Hargett did not have any post-employment restrictions that would affect his potential employment with Ferguson-Williams.<sup>420</sup> Agency counsel specifically addressed this issue as it related to the Procurement Integrity Act post-employment restrictions.<sup>421</sup>

After agency counsel responded to the concerns of Corps evaluators about Hargett's inclusion in Ferguson-Williams' bid, the contracting officer established the competitive range.<sup>422</sup> Three firms, including

412. 28 U.S.C. § 1491(a)(3) (1994). The Federal Courts Improvement Act of 1982 provides in pertinent part: "To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to, injunctive relief." *Id.*

413. 68 F.3d 1338 (Fed. Cir. 1995).

414. *Central Ark. Maintenance, Inc. v. United States*, 68 F.3d 1338, 1339 (Fed. Cir. 1995).

415. *Id.*

416. *Id.* at 1340.

417. *Id.*

418. *Id.* at 1339-40.

419. *Id.*

420. *Id.* at 1340.

421. *Id.* Agency counsel determined that Mr. Hargett had not "participated substantially" in the development of the solicitation and therefore was not a "procurement official" under the Procurement Integrity Act, 41 U.S.C. § 423 (1994). *Central Ark.*, 68 F.3d at 1340. As a result, agency counsel believed that the post-employment restrictions under the Act did not apply to Mr. Hargett. *Id.*

422. *Id.*

Ferguson-Williams, remained in the competitive range after the initial evaluation of bids. CAM dropped out.<sup>423</sup> The Corps then requested that those firms in the competitive range submit best and final offers.<sup>424</sup>

During evaluation of the best and final offers, the issue of Hargett's participation on the Ferguson-Williams team resurfaced.<sup>425</sup> This time, however, agency counsel determined that there *was* a conflict of interest problem and recommended that Hargett be removed from the Ferguson-Williams team.<sup>426</sup> Hargett removed himself from the team, and the contracting officer requested a second round of best and final offers for the purpose of curing any possible taint to the procurement process that may have resulted from Hargett's relationship with Ferguson-Williams.<sup>427</sup> After evaluation of the second round offers, the contracting officer awarded the Arkansas Lakes contract to Ferguson-Williams.<sup>428</sup>

CAM subsequently filed a complaint alleging improper and illegal activity by the Corps and seeking injunctive relief.<sup>429</sup> The protest was filed in the United States District Court for the Eastern District of Arkansas, but that court transferred the case to the Court of Federal Claims.<sup>430</sup>

CAM advanced three arguments in its bid protest: (1) the Corps had improperly excluded CAM's proposal from the competitive range; (2) the solicitation was unduly vague; and (3) Ferguson-Williams' actions were in violation of the procurement integrity laws and the conflict of interest statutes and regulations.<sup>431</sup> As an alternative argument, CAM called for the cancellation and resolicitation of the Request for Proposals.<sup>432</sup>

The Court of Federal Claims found that the contracting officer did not exclude CAM arbitrarily from the competitive range.<sup>433</sup> Further, the court found CAM's vagueness challenge untimely, as it should

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423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.* CAM's proposal was not within the competitive range. *Id.*

have been made before CAM submitted its proposal.<sup>434</sup> CAM did not appeal either of these determinations.<sup>435</sup>

CAM's third challenge to the procurement process presented the most interesting issue in this case. The Court of Federal Claims found that the Corps' "contracting officer, Hargett, and Ferguson-Williams either violated, or were about to violate, provisions of the Procurement Integrity Act."<sup>436</sup> The court further ruled that these "violations, or imminent violations, did not taint the entire procurement and did not *deprive CAM of its right to have its offer considered fairly and honestly.*"<sup>437</sup> On the basis of these findings, the court declined either to order the Corps to put CAM in the competitive range or to restart the procurement process.<sup>438</sup> Despite its findings, however, the Court of Federal Claims permanently enjoined the Corps from awarding the contract to Ferguson-Williams, in reliance on *United States v. Mississippi Valley Generating Co.*<sup>439</sup>

The sole issue before the Federal Circuit in *Central Arkansas Maintenance* was whether the Court of Federal Claims "exceeded its statutory authority to grant equitable relief by enjoining the award of the Arkansas Lakes contract to Ferguson-Williams, *after finding that CAM's offer had been considered fairly and honestly and that any procurement integrity violations had not tainted the entire procurement.*"<sup>440</sup>

As a preliminary matter, the Federal Circuit addressed the Court of Federal Claims' basis for jurisdiction over the protest by CAM, because the Court of Federal Claims' powers to grant relief are tied specifically to the various areas of its jurisdiction.<sup>441</sup> The Court of Federal Claims had exercised jurisdiction over CAM's protest pursuant to language in the Tucker Act<sup>442</sup> providing the court with jurisdiction over breach of an "implied contract."<sup>443</sup> Specifically, the court exercised jurisdiction over the Government's "implied contract to have the involved bids fairly and honestly considered."<sup>444</sup> The court explained that one means of establishing a breach of this

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434. *Id.*

435. *Id.* at 1341.

436. *Id.*

437. *Id.* (emphasis added).

438. *Id.*

439. *Id.* (citing *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961)).

440. *Id.* (emphasis added).

441. *Id.*

442. 28 U.S.C. § 1491 (1994).

443. 28 U.S.C. § 1491(a)(1). The Tucker Act grants the Court of Federal Claims jurisdiction "to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States." *Id.*

444. *Central Ark.*, 68 F.3d at 1341 (quoting *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1367 (Fed. Cir. 1983)).



implied contract is to show a violation of a procurement statute or regulation.<sup>445</sup> To obtain relief, however, the protester must establish that the violation is "clear and prejudicial."<sup>446</sup> A lesser violation, or one that does not affect the protester, will not entitle the protester to obtain relief.<sup>447</sup>

If breach of this implied contract occurs, the Court of Federal Claims has power to exercise its injunctive power to "afford complete relief" to the litigant in the pre-award bid protest.<sup>448</sup> This language expresses congressional intent that a court's injunctive power be used *only* to grant relief to the protester.<sup>449</sup> If the protester does not obtain relief from a court's exercise of this power, then the court has exceeded its authority.<sup>450</sup> Here, the Court of Federal Claims' action in enjoining Ferguson-Williams from receipt of the Arkansas Lakes contract did not provide any relief to CAM because CAM remained outside of the competitive range. Under these circumstances, in which CAM was not entitled to relief because CAM's implied contract was not breached, the court held that the Court of Federal Claims clearly exceeded its authority to exercise its injunctive powers.<sup>451</sup>

In reaching its decision, the court rejected the Government's argument that the Court of Federal Claims was entitled to exercise injunctive relief more broadly in order to protect the integrity of the procurement process in situations in which violations of conflict of

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445. *Id.* at 1342 (citing *Keco Indus., Inc. v. United States*, 492 F.2d 1200, 1204 (Ct. Cl. 1974)).

446. *Id.* (citing *CACI Field Servs., Inc. v. United States*, 854 F.2d 464, 466 (Fed. Cir. 1988)).

447. *Id.* The violation must be "arbitrary and capricious toward the bidder-claimant" to entitle the disappointed bidder to relief. *Id.* at 1341 (citing *Keco Indus.*, 492 F.2d at 1203); see *Prineville Sawmill Co. v. United States*, 859 F.2d 905, 909 (Fed. Cir. 1988); see also S. REP. NO. 275, 97th Cong., 2d Sess. 22, 23 (1982), reprinted in 1982 U.S.C.C.A.N. 11, 32 (stating that courts' injunctive powers should be exercised "only in circumstances where the contract, if awarded, would be the result of arbitrary or capricious action by the contracting officials, to deny qualified firms the opportunity to compete fairly for the procurement award").

448. *Central Ark.*, 68 F.3d at 1342 (quoting 28 U.S.C. § 1491(a)(3) (1994) (emphasis added)).

449. *Id.* The court relied on language in the Senate Report on the Federal Courts Improvement Act of 1982, which provides that § 133 gives the Court of Federal Claims "the ability to grant litigants complete relief." S. REP. NO., 275 *supra* note 447, at 22, reprinted in 1982 U.S.C.C.A.N. at 32.

The Senate Report states further that the court's injunctive power should be exercised "only in circumstances where the contract, if awarded, would be the result of arbitrary or capricious action by the contracting officials, to deny qualified firms the opportunity to compete fairly for the procurement award." Thus, Congress intended the court to use the equitable power of section 1491(a)(3) to grant qualified firms, which are parties determined to have been denied the opportunity to compete fairly for a government contract, injunctive relief.

*Central Ark.*, 68 F.3d at 1342-43 (internal citation omitted) (quoting S. REP. NO. 275, *supra* note 447, at 23, reprinted in 1982 U.S.C.C.A.N. at 33).

450. *Central Ark.*, 68 F.3d at 1343.

451. *Id.*

interest statutes are involved.<sup>452</sup> The Government derived its argument from *United States v. Mississippi Valley Generating Co.*,<sup>453</sup> which the court readily distinguished. That case concerned the avoidance of a contract affected by a conflict of interest, not the exercise of a court's statutory-based authority as *Central Arkansas Maintenance* did.<sup>454</sup> The court also made the point that if Congress was concerned that the court's powers were insufficient to address conflict of interest violations affecting the integrity of a procurement, then Congress, not the courts, must fix the problem.<sup>455</sup>

### III. TERMINATIONS: *TORNCELLO* NOT EXTENDED

The Government has long been considered to have very broad discretion in deciding when and under what circumstances to exercise its contractual right to terminate a contract under the Termination for Convenience clause. One seemingly important exception was carved out in 1982, when the United States Court of Claims decided *Torncello v. United States*.<sup>456</sup> The Navy awarded Torncello a requirements contract for pest control that obligated the Government to procure all the pest control services it required from Torncello.<sup>457</sup> The Navy awarded the contract despite its knowledge that a lower bid had been submitted.<sup>458</sup> Subsequently, Torncello did not receive any work under the contract because the Navy gave the work to the low bidder, the Navy Department of Public Works.<sup>459</sup> The court in *Torncello* held that the constructive termination of Torncello's contract was not available to excuse the Navy's breach in failing to provide the work to Torncello when it knew of the lower price prior to making the contract award.<sup>460</sup> Although the court's decision in *Torncello* established precedent for cases in which the Government was relatively certain in advance of making an award that it would not honor the contract, it did not speak to situations in which the Government has pre-award knowledge of facts that *might* make a termination desirable at some point after contract award.

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452. *Id.*

453. 364 U.S. 520 (1961).

454. *Central Ark.*, 68 F.3d at 1343.

455. *Id.* ("If these remedies are insufficient, the responsibility for stronger measures lies with Congress.")

456. 681 F.2d 756 (Cl. Ct. 1982).

457. *Torncello v. United States*, 681 F.2d 756, 758 (Cl. Ct. 1982).

458. *Id.*

459. *Id.*

460. *Id.* at 772.

The Federal Circuit addressed this situation in 1995 in the case of *Caldwell & Santmyer, Inc. v. Glickman*<sup>461</sup> and refused to expand *Torncello*.<sup>462</sup> In April 1992, the Department of Agriculture solicited bids for a plant laboratory in Beltsville, Maryland.<sup>463</sup> The specifications and equipment schedule in the contract listed two categories of equipment as “vendor furnished/vendor installed.”<sup>464</sup> Caldwell was a bidder, but R.J. Crowley submitted the lowest bid.<sup>465</sup> After the agency asked Crowley to submit the cost summary sheets it had used in preparing its bid, Crowley informed the agency that it had made two mathematical errors in its bid.<sup>466</sup> The agency also discovered that Crowley had omitted the “vendor installed/vendor furnished” equipment costs.<sup>467</sup> The agency permitted Crowley to withdraw its bid on August 8, 1992, making Caldwell the lowest remaining bidder.<sup>468</sup>

Because of the problems with the Crowley bid, the agency contact person, in the absence of the contracting officer, asked Caldwell for its cost sheets,<sup>469</sup> which showed that Caldwell also had not included any costs for the “vendor furnished/vendor installed” equipment.<sup>470</sup> When the contracting officer returned from vacation, he was angry that Caldwell had been asked for the cost sheets because, in his view, the agency had no reason to believe that Caldwell’s bid contained an error that would require verification.<sup>471</sup>

Caldwell was awarded the contract on September 7, 1992.<sup>472</sup> On October 5, 1992, after personally reviewing Caldwell’s bid for the first time, the contracting officer also concluded that Caldwell had not included any costs for the “vendor furnished/vendor installed” equipment.<sup>473</sup> The next day he wrote Caldwell a letter stating that it was responsible for supplying the equipment and asking for a corrected bid in accordance with “mistake after award” proce-

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461. 55 F.3d 1578 (Fed. Cir. 1995).

462. *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1582 (Fed. Cir. 1995).

463. *Id.* at 1579.

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.* This judgment was based on the analysis of the architectural/engineering firm that had prepared the specifications for the project and on the amounts of the next three lowest bids. *Id.*

472. *Id.*

473. *Id.* at 1580.

dures.<sup>474</sup> He also directed that no work proceed under the contract.<sup>475</sup> Caldwell replied that it had not made a mistake, as it interpreted the provision to require the agency to furnish the equipment involved.<sup>476</sup> After reviewing the specifications, the contracting officer concluded that the provision was not precisely defined, and therefore, Caldwell had *not* made a mistake in its bid.<sup>477</sup>

Thereafter, the agency estimated that the cost of supplying the equipment would be between \$200,000 and \$300,000 and "decided not to proceed under a contract that would require such a material alteration."<sup>478</sup> Consequently, on November 23, 1992, the agency terminated Caldwell's contract for convenience.<sup>479</sup>

On January 5, 1993, Caldwell submitted two settlement proposals to the contracting officer: (1) a termination for convenience proposal in the amount of \$24,669.13, and (2) a proposal for breach of contract in the amount of \$148,123.66.<sup>480</sup> The first proposal, which was accepted and paid by the agency, included overhead expenses, settlement expenses, and standard markups.<sup>481</sup> The second proposal sought to recover lost profits, overhead, and a bonding premium.<sup>482</sup> Citing *Torncello*, Caldwell asserted that the agency could not use the Termination for Convenience clause "to terminate a contract where the circumstances of the bargain or the expectations of the parties have not changed."<sup>483</sup> According to Caldwell, the agency interpreted *Torncello* to mean that it could not use the termination for convenience clause simply to avoid "a bad deal it was aware of, or should have been aware of, at the time of the contract award."<sup>484</sup>

474. *Id.*; see 48 C.F.R. § 14.407-4 (1995) (stating that contractor shall support claim of mistake by submitting written statement and relevant evidence such as data contractor used in preparing bid and bids of contractors and suppliers).

475. *Caldwell*, 55 F.3d at 1580.

476. *Id.*

477. *Id.*

478. *Id.*

479. *Id.* In a termination letter, the Contracting Officer notified Caldwell

that the contract had been erroneously awarded, that the solicitation contained defective specifications susceptible to more than one reasonable interpretation, that other bidders on the project also may have omitted the costs of 'vendor furnished/vendor installed' equipment, that the ambiguity of the specifications impeded full and open competition, and that corrective action would prejudice the other bidders.

*Id.*

480. *Id.*

481. *Id.*

482. *Id.*

483. *Id.* (citing *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982)).

484. *Id.*

The AGBCA granted summary judgment in favor of the agency, observing that the clause appeared to have been used “for its intended purpose of ending an improvident procurement.”<sup>485</sup> It found “no evidence [that] the Government intended before award to terminate the contract for any reason.”<sup>486</sup>

Citing *Torncello*, the Federal Circuit noted in affirming the Board’s decision:

We have stated that “[i]t is not the province of the courts to decide *de novo* whether termination was the best course.” In the absence of bad faith or clear abuse of discretion the contracting officer’s election to terminate is conclusive. We assume the government acts in good faith when contracting. A contractor can overcome this presumption only if it shows through “well-nigh irrefragable proof” that the government had a specific intent to injure it.<sup>487</sup>

The court held that the facts did not support Caldwell’s claims of either bad faith or abuse of discretion and that there was no impropriety in the Government’s exercise of its contractual right to terminate.<sup>488</sup> The court distinguished *Torncello* by reference to *Salsbury Industries v. United States*<sup>489</sup> in which the Federal Circuit held: “[*Torncello*] stands for the unremarkable proposition that when the Government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause.”<sup>490</sup> The court remarked that Caldwell was

asking us to extend *Torncello* to the situation in which the government contracts in good faith but, at the same time, has knowledge of facts supposedly putting it on notice that, at some future date, it may be appropriate to terminate the contract for convenience. We decline the invitation. We see no merit in putting such an additional limitation on the government’s use of the termination for convenience clause.<sup>491</sup>

By emphasizing that bad faith was a prerequisite to a successful *Torncello* claim, the Federal Circuit left intact the broad discretion government contracting officers have with respect to exercising their right to terminate a contract for the convenience of the Government.

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485. *Id.* (quoting *Caldwell & Santmyer, Inc.*, AGBCA No. 93-191-1, 94-2 B.C.A. (CCH) ¶ 26,854, at 133,625 (1993)).

486. *Id.* (citing *Caldwell & Santmyer, Inc.*, 94-2 B.C.A. (CCH), at 133,625).

487. *Id.* at 1581 (quoting *Torncello*, 681 F.2d at 770) (citations omitted).

488. *Id.*

489. 905 F.2d 1518 (Fed. Cir. 1990).

490. *Caldwell*, 55 F.3d at 1582 (quoting *Salsbury Indus. v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990)).

491. *Id.*

## IV. COSTS

A. *Performance Versus Litigation Costs Examined*

If a "non-routine" request for payment is by definition a CDA claim, as in the court's decision in *Reflectone, Inc. v. Dalton*,<sup>492</sup> what effect does that have on the allowability of costs contained in the claim? For example, legal, accounting, and consulting fees commonly are incurred in the preparation of a termination for convenience settlement proposal, and generally have been allowable.<sup>493</sup> If that same proposal will be deemed a CDA claim under the *Reflectone* ruling, are those costs still allowable, or are they barred as unallowable costs of prosecuting a claim against the Government?<sup>494</sup> *Bill Strong Enterprises, Inc. v. Shannon*,<sup>495</sup> a case decided three months before the *Reflectone* rehearing decision, is an interesting companion to *Reflectone*.

In 1987, the Army awarded Bill Strong Enterprises ("BSE") a fixed-price contract for the renovation of family housing units.<sup>496</sup> Approximately one year after the contract award, BSE notified the Army that houses were being released out of sequence, resulting in increased costs, estimated at \$1.5 million.<sup>497</sup> The contracting officer requested an itemization of BSE's costs and told BSE that an audit would be necessary.<sup>498</sup> BSE submitted a claim for \$520,001 in May 1989 and certified cost and pricing data in June.<sup>499</sup> The housing renovation was completed and accepted by the Government in July 1989.<sup>500</sup> In September 1989, BSE hired Excell, a consulting firm, to revise its data for resubmission to the contracting officer.<sup>501</sup> BSE then submitted a revised certified claim for \$995,568 in November

492. 60 F.3d 1572 (Fed. Cir. 1995).

493. See 48 C.F.R. § 31.205-42(g)(i) (1995) (including reasonable "accounting, legal, clerical, and similar costs" in list of allowable settlement expenses).

494. See *id.* § 31.205-47 (defining costs of prosecuting claim as including legal, accounting, and consulting costs). Whether a termination for convenience claim is a CDA claim under the ruling of *Reflectone* has yet to be decided. See *supra* notes 62-67 and accompanying text (discussing key distinction in *Reflectone* between routine and non-routine submissions for payment).

495. 49 F.3d 1541 (Fed. Cir. 1995), *overruled by* *Reflectone v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995).

496. *Bill Strong Enters., Inc. v. Shannon*, 49 F.3d 1541, 1542 (Fed. Cir. 1995), *overruled by* *Reflectone v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995).

497. *Id.*

498. *Id.* at 1543.

499. *Id.*

500. *Id.*

501. *Id.*

including \$122,336 for Excell's work in preparing the submission.<sup>502</sup> The Government noted that the Changes clause of the contract governed BSE's REA and that the Government was assuming that BSE was not requesting a final decision at that time.<sup>503</sup> A subsequent audit by the Defense Contract Audit Agency ("DCAA") questioned \$529,572 of BSE's claimed cost increase, but did not question the amount claimed for Excell's costs.<sup>504</sup> The parties settled the delay costs for \$290,000, but the contracting officer denied the recovery of Excell's costs on the grounds that the Excell work was performed after completion of the contract work and therefore was "not incurred in connection with the actual performance of the work."<sup>505</sup> BSE appealed to the ASBCA.<sup>506</sup>

BSE argued to the ASBCA that consultant costs can be recovered if they pertain to the presentation of costs stemming "from a performance-related claim *that the Government did not dispute*."<sup>507</sup> BSE also argued that the Excell costs were related to its administration of and performance under the contract, and did not arise from the pursuit of a claim against the Government.<sup>508</sup> Finally, BSE argued that the claim never became so "disputatious" as to reach the level of a claim against the Government.<sup>509</sup> The Government took the position that a claim against it existed at the time Excell was hired, and that, therefore, the consultant fees *were* incurred in the prosecution of that claim.<sup>510</sup> The Government contended that the costs were incurred after completion of the contract and thus could not be performance related.<sup>511</sup>

In a 3-2 decision, the ASBCA denied BSE's appeal, finding that the Government disputed the amount of the claim at the time of the November submission, and that the submission was a valid claim under *Dawco Construction, Inc. v. United States*<sup>512</sup> and FAR 33.201.<sup>513</sup> The Board also noted that BSE incurred Excell's costs after comple-

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502. *Id.*

503. *Id.*

504. *Id.*

505. *Id.* at 1543-44.

506. *Id.* at 1544.

507. *Id.* (emphasis added).

508. *Id.*

509. *Id.*

510. *Id.*

511. *Id.*

512. 930 F.2d 872 (Fed. Cir. 1991).

513. *Bill Strong*, 49 F.3d at 1544.

tion of contract performance.<sup>514</sup> BSE appealed the ASBCA decision.<sup>515</sup>

The Federal Circuit began its analysis by holding that the FAR provided a "specific, clear, bright-line test for unallowability: a legal, accounting, or consulting cost incurred in connection with the prosecution of a CDA claim or an appeal against the Government is *per se* unallowable."<sup>516</sup> The court then turned to the question of what is meant by the phrase "incurred in connection with the prosecution of a [CDA] claim against the government."<sup>517</sup> The court wrote that there are at least three distinct categories of legal, accounting, and consulting costs in the FAR cost principles: costs incurred in contract performance, in contract administration, and in prosecuting a CDA claim.<sup>518</sup> To assess the allowability of a cost, it must be classified into a category:

In classifying a particular cost . . . courts should examine the objective reason why the contractor incurred the cost. If a contractor incurred the cost for the genuine purpose of materially furthering the negotiation process, such cost should normally be a contract administration cost allowable under FAR 31.205-33, even if the negotiation eventually fails and a CDA claim is later submitted. On the other hand, if a contractor's underlying purpose for incurring a cost is to promote the prosecution of a CDA claim against the Government, then such cost is unallowable under FAR 31.205-33.<sup>519</sup>

Applying the test to the *Bill Strong* facts, the Federal Circuit reversed the Board majority, finding that prior to the November submission, the parties were in a negotiation posture. The Government never disputed BSE's right to increased compensation; it claimed to be conducting an audit and was requesting more information merely to help it analyze BSE's request.<sup>520</sup> "This exchange of information is exactly what is encompassed in the concept of contract administration."<sup>521</sup>

The court next held that BSE's November submission was not a formal CDA claim because: (1) BSE did not request a final decision; (2) the parties had not reached a dispute stage; and (3) the parties

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514. *Id.*

515. *Id.*

516. *Id.* at 1549.

517. *Id.*

518. *Id.*

519. *Id.* at 1550 (citations omitted).

520. *Id.*

521. *Id.*



remained in a state of negotiation and exchange of information following the submission.<sup>522</sup> This conclusion was overruled, however, by the same court's decision in *Reflectone* four months later.<sup>523</sup> Under the *Reflectone* analysis, BSE's November submission would have been considered certified and clearly "non-routine."<sup>524</sup> Furthermore, applying the court's logic in *Bill Strong*, a holding that the November submission *was* a CDA claim would not have affected the allowability of the Excell costs, because the court clearly found that they were incurred as contract administration costs in support of the negotiations.<sup>525</sup> The fact that the costs were included as part of a CDA claim does not make them per se unallowable, so long as they were incurred as part of contract performance or administration.<sup>526</sup>

The lesson of *Bill Strong* is that even though a submission may be "non-routine," costs included in the submission that would be disallowed if incurred in prosecution of a claim against the Government *may be allowed even if they are part of a CDA claim.*<sup>527</sup> The same logic would extend to such costs if they were part of a "routine" submission that is in dispute. Thus, the focus of the analysis hereafter must shift from the nature of the submission to the circumstances under which the costs were incurred.

### *B. Corporate Reorganization Not a Change in Accounting Practice*

When the Cost Accounting Standards ("CAS") apply to a cost contract under the FAR, the contractor must "disclose to the government [its] cost accounting practices, notify the government when it changes its disclosed practices, and submit cost impact proposals which allow adjustments in the contract price if the changes result in increased costs to the government."<sup>528</sup>

In *Perry v. Martin Marietta Corp.*,<sup>529</sup> the Federal Circuit faced, in the context of a major corporate reorganization, the question of what comprises a change in cost accounting practices.<sup>530</sup> Affirming the ASBCA's determination that a corporate reorganization resulting in expanded cost pools is *not* a change in cost accounting practices

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522. *Id.*

523. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 n.10 (Fed. Cir. 1995).

524. *Id.* at 1575-76.

525. *Bill Strong*, 49 F.3d at 1546-50.

526. *See id.* at 1550 (noting that courts should look at objective reason why contractor incurred costs rather than at existence or non-existence of claim).

527. *Id.*

528. 63 Fed. Cont. Rep. 551 (1995); *see* 48 C.F.R. § 30.201-4 (1995) (setting forth the disclosure requirements).

529. 47 F.3d 1134 (Fed. Cir. 1995).

530. *Perry v. Martin Marietta Corp.*, 47 F.3d 1134, 1135-36 (Fed. Cir. 1995).

within the meaning FAR 52.230-3 and 52.230-4,<sup>531</sup> the Federal Circuit held that the only changes triggering additional disclosure requirements are changes to the “proportional measurement, assignment or allocation of costs.”<sup>532</sup>

In *Perry*, Martin Marietta Corporation (“MMC”) underwent internal corporate reorganizations that resulted in the dissolution of one of its three intermediate home offices.<sup>533</sup> Before it was dissolved, the home office had been responsible for collecting the indirect expenses incurred by its five business segments and for grouping them into three pools.<sup>534</sup> These expenses were proportionately allocated back to each segment and applied against the government contracts that the segments were performing.<sup>535</sup>

The corporate reorganization also resulted in the realignment of three business segments that previously had reported to the dissolved intermediate home office.<sup>536</sup> These three business segments were realigned to report directly to corporate headquarters.<sup>537</sup> The indirect expenses incurred by these three segments were collected and grouped into cost pools maintained by headquarters.<sup>538</sup> The remaining two segments reported to a new intermediate home office.<sup>539</sup> As at headquarters, indirect costs incurred by these two segments were collected by the new home office and grouped into cost pools.<sup>540</sup>

Because the formula employed for allocating the costs back to the segments and their respective contracts varied slightly after reorganization,<sup>541</sup> MMC filed a cost impact statement as required by FAR 52.230.<sup>542</sup> MMC did not include in its cost impact proposal any

531. *Martin Marietta Corp.*, ASBCA Nos. 38920, 41565, 92-3 B.C.A. (CCH) ¶ 25,175, at 125,458; see 48 C.F.R. §§ 52.230-3, 52.230-4.

532. *Perry*, 47 F.3d at 1139.

533. *Id.* at 1135.

534. *Id.* The three cost pools were marketing, foreign marketing, and residual. *Id.*

535. *Id.* The intermediate home office allocated on the basis of sales, foreign sales, and total cost input. *Id.*

536. *Id.* at 1136.

537. *Id.*

538. *Id.* Headquarters maintained the same cost pools that the former intermediate office had maintained: marketing, foreign marketing, and residual. *Id.*

539. *Id.*

540. *Id.* The intermediate home office collected costs in only two pools: marketing and residual. *Id.*

541. *Id.* Costs that previously had been allocated from the pools on the basis of a single factor (that is, sales or total cost input) would now be allocated according to a three-factor formula. *Id.*

542. FAR Clause 52.230-2(a)(2) provides, “If any change in cost accounting practice is made for the purposes of any contract or subcontract subject to CAS requirements, the change must be applied prospectively to this contract . . . .” 48 C.F.R. § 52.230-2(a)(2) (1995). FAR Clause 52.230-6(b) includes a requirement that the contractor “submit a cost impact proposal in the

changes in the grouping of indirect costs or business segments resulting from the reorganization.<sup>543</sup> The Government audited the proposal and determined that no contract modification was required.<sup>544</sup> However, because additional allocations were applied against his contract, a Federal Aviation Administration (“FAA”) contracting officer decided that the expansion of the cost pools at headquarters and the new intermediate office constituted a change in cost accounting practices for which no cost impact statement had been filed.<sup>545</sup> Accordingly, the FAA contracting officer denied reimbursement of the new costs allocated to the contract.<sup>546</sup> MMC filed suit in the United States Claims Court contesting this decision.<sup>547</sup>

Because MMC believed that the FAA contracting officer was not the “cognizant” contracting officer to render this decision, MMC additionally requested a decision from a Department of Defense (“DOD”) contracting officer.<sup>548</sup> Sixty days later, MMC appealed a “deemed denial” from the DOD contracting officer to the ASBCA.<sup>549</sup> The ASBCA ruled in favor of MMC, holding that organizational changes, such as those incurred as a result of MMC’s corporate reorganization, did not constitute changes to an accounting practice.<sup>550</sup> The Government appealed the Board’s decision to the Federal Circuit.<sup>551</sup>

Because FAR 52.230-3 and 52.230-4 implement the CAS but do not expressly define a change in accounting practice, the Federal Circuit turned to various regulations implemented by the CAS Board to interpret the meaning of “cost accounting practice” as used in FAR 52.230-3 and 52.230-4.<sup>552</sup> Interestingly, the court undertook its review *de novo* and refused to accord any deference to agency interpretations of the FAR provisions on the grounds that the FAR

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form and manner specified by the Contracting Officer” when a change in accounting practice is made. 48 C.F.R. § 52.230-6(b) (1996).

543. *Perry*, 47 F.3d at 1136.

544. *Id.*

545. *Id.*

546. *Id.*

547. *Id.* at 1136 n.4.

548. *Id.* at 1135.

549. *Id.* After the appeal was filed, the contracting officer determined that the corporate reorganization did constitute a change in accounting practice and that a new cost impact proposal was required to be submitted. *Id.* MMC also appealed this decision to the Board, which consolidated this appeal with the appeal already pending. *Id.*

550. *Id.* at 1135-36.

551. *Id.*

552. *Id.* at 1137-39; *see* 48 C.F.R. §§ 52.230-3, 52.230-4 (1995).

and the CAS are not regulations of the Department of Defense.<sup>553</sup> Relying on definitions, illustrations, and a preamble contained in the CAS regulations, the court determined that the CAS Board intended to limit "cost accounting practice" to accounting "methods or techniques."<sup>554</sup> Furthermore, the court reasoned that a change in size or composition of cost pools is not a change in the "method or technique" triggering 52.230-3 or 52.230-4.<sup>555</sup> The Court stated:

[T]he phrase "change to a cost accounting practice," as used in the FAR and MMC's CAS-covered contracts, refers to changes in the proportional measurement, assignment or allocation of costs. The Secretary's contention that merely changing the size of cost pools or the groupings of segments as a result of a reorganization causes a cost accounting practice change must be rejected. Organizational changes alone do not create a change in a cost accounting practice.<sup>556</sup>

In sum, the court found there was no other change to a cost accounting practice that occurred as a result of reorganization that was not already disclosed by MMC in its proposal.<sup>557</sup>

The *Perry* case has sparked considerable reaction. Following the Federal Circuit affirmance, a CAS Board advance notice of proposed rulemaking ("ANPRM") was issued seeking to expand the current definition of "cost accounting practice" from "methods or techniques" to include, "'policies' and 'procedures' used to 'accumulate' as well as to allocate, assign or measure costs."<sup>558</sup> Furthermore, the Board

553. *Perry*, 47 F.3d at 1135 (citing *Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1551 (Fed. Cir. 1993)). Perhaps the court's refusal to defer to agency interpretations of the CAS and the FAR is inappropriate. Tribunals routinely defer to agency regulations on the theory that agencies have greater expertise in that area. The CAS Board and the two FAR councils, while not independent agencies, are comprised of agency representatives. A representative from the Department of Defense and a representative from the General Services Administration comprise two of five members on the CAS Board. Members of both FAR councils (the DAR and CAA Councils) serve as representatives to their respective agencies. 48 C.F.R. § 1.201-1. Thus, it is at least arguable that the CAS Board and the FAR Councils are extensions of administrative agencies and that agency interpretations of the CAS and the FAR should be given deference.

554. *Perry*, 47 F.3d at 1137. These CAS regulations are presently codified at 48 C.F.R. pt. 9903. The regulations define "cost accounting practice" as "any . . . method or technique which is used for allocation of cost to cost objectives, assignment of cost to cost accounting periods, or measurement of cost," and illustrate changes that meet the definition of "change in cost accounting practice." *Id.* § 9903.302-1. The particular illustration relied on by the Board and the Federal Circuit is set forth at 48 C.F.R. § 9903.302-3(c).

555. *Perry*, 47 F.3d at 1139-40; see 48 C.F.R. §§ 52.230-3, 52.230-4.

556. *Perry*, 47 F.3d at 1139-40.

557. *Id.*

558. Letter from John B. Miller, Chair, American Bar Association Section of Public Contract Law, to Rudolph J. Schuhbauer, Project Director, Cost Accounting Standards Board, Office of Federal Procurement Policy 2 (July 10, 1995) (on file with *The American University Law Review*) [hereinafter Miller Letter] (citing ANPRM at 32, 34). The goal of the ANPRM was summarized as:

proposed that the language "change to a cost accounting practice" should be amended to include language stating that "[a] change in cost accounting practice would . . . occur after an organizational change if an ongoing function is transferred to a new or different indirect cost pool or allocation base or if indirect cost pools or allocation bases are combined or otherwise fragmented."<sup>559</sup>

This flurry of activity derived from the Government's concern that the current interpretation of the CAS and its illustrations place the risk of increased costs resulting from unilateral voluntary action—corporate reorganization—squarely on the Government.<sup>560</sup> Of particular concern was the use of otherwise unnecessary corporate reorganization to recoup additional costs from the Government.<sup>561</sup> Not surprisingly, and especially in a competitive era marked by industry-wide downsizing, contractors strongly support the current interpretation of the CAS.<sup>562</sup>

Thus, *Perry* sits at the center of a heated controversy that will remain unresolved until the promulgation of a final CAS Board rule regarding cost accounting practices.<sup>563</sup> Whatever the outcome, the case's significance may not be limited to its interpretation of "cost accounting practices" as set forth by the current CAS and the

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Revising the definitions and illustrations governing cost accounting practice changes, for purposes of making it explicit that a change in the manner in which costs are grouped and accumulated constitutes a change in cost accounting practice and that organizational changes must be evaluated on a case-by-case basis in order to determine if a change in cost accounting practice has occurred.

60 Fed. Reg. 20,252, 20,253 (1995). For an outline of the staff discussion paper issued by the CAS Board following the ASBCA decision, see 59 Fed. Cont. Rep. (BNA) 495, 498-99 (1993) (summarizing staff discussion paper issued by CAS Board which solicits comments on nine proposed changes to cost accounting practices); 59 Fed. Cont. Rep. (BNA) 811, 821 (1993) (declaring that organization changes do not by themselves constitute changes in cost accounting practices).

559. 63 Fed. Cont. Rep. (BNA) 543, 552 (1995). Additionally, an existing illustration would be replaced with two new illustrations depicting changes in cost accounting practices consistent with the revised definitions. *Id.*

560. 59 Fed. Cont. Rep. (BNA) 811, 822 (1993).

561. *Id.*

562. *Id.* Contractors address government concerns by pointing out that organizational changes usually are undertaken for legitimate business reasons. *Id.* This position is buttressed by the fact that the Government may take action against contractors who undergo organizational changes without legitimate purposes. *Id.*; see *Perry v. Martin Marietta Corp.*, 47 F.3d 1134, 1140 n.9 (Fed. Cir. 1995) (citing Truth in Negotiations Act, Pub. L. No. 87-653, § 1(e), 76 Stat. 528, 528-29 (1962) (codified as amended at 10 U.S.C. §§ 2306(f), 2306a (1994))).

Industry also takes the position that an expanded view of the CAS definitions ultimately injures all the participants in the procurement process, arguing that "[c]ompanies will be reluctant to make changes when administrative and pricing impacts are considered, even where such changes will have long-term benefit for the Government, the contractor, and the economy." 59 Fed. Cont. Rep. (BNA) 811, 823 (1993); see Miller Letter, *supra* note 558 (providing comprehensive discussion of industry's myriad problems with the ANPRM).

563. On September 19, 1996, the CAS Board announced a notice of proposed rulemaking on cost accounting practices. See 61 Fed. Reg. 49,196 (1996).

implementing FAR provisions.<sup>564</sup> In refusing to afford any deference to agency interpretations of the FAR and the CAS, the Federal Circuit may have established a principle with lasting implications as great as those generated by the substantive decision on what constitutes a change in a cost accounting practice.<sup>565</sup>

*C. Directed Change in Accounting System Constitutes  
Constructive Change*

In 1995, the Federal Circuit also faced the issue of whether a Government-ordered change in the contractor's accounting methods constituted a constructive change entitling the contractor to an equitable adjustment. In *Aydin Corp. (West) v. Widnall*,<sup>566</sup> the court employed traditional constructive change analysis—interpretation of the contract language—to conclude that an ordered change to the contractor's allocation and billing method entitled the contractor to relief.<sup>567</sup>

*Aydin* held a multi-year, firm-fixed-price requirements contract to produce ground-based radar simulators called Multiple Threat Emitter Systems ("MUTES").<sup>568</sup> A "progress payments" clause in the contract provided that the contractor receive payments based on a percentage of its "cumulative total costs under [the] contract."<sup>569</sup> Accordingly, the contractor accumulated all of the costs it incurred in individual delivery orders as costs of a single contract, later allocating the total cost equally among the total delivery orders, and requested progress payments as a percentage of its cumulative total costs on the MUTES contract.<sup>570</sup>

The contracting officer, however, interpreted the Progress Payment provision as requiring *Aydin* to segregate its cost and to submit

564. 48 C.F.R. § 52.230-3 (1995).

565. See 37 THE GOVERNMENT CONTRACTOR ¶ 95, at 6 (Feb. 22, 1995). But see *Aydin Corp. (West) v. Widnall*, 61 F.3d 1571, 1577 (Fed. Cir. 1995) (post-dating *Perry* and stating that "[t]his court . . . reviews the Board's interpretation of the FAR provisions incorporated into [the contract] *de novo*, with some deference afforded the Board's expertise in interpreting contract regulations" (citing *SMS Data Prods. Group, Inc. v. United States*, 900 F.2d 1553, 1555 (Fed. Cir. 1990))).

566. 61 F.3d 1571 (Fed. Cir. 1995).

567. *Aydin*, 61 F.3d at 1577 ("To identify a constructive change, this court consults the contract language.").

568. *Id.* at 1574. As described by the court, MUTES are "ground-based radar simulators which evaluate airborne radar systems, test electronic warfare countermeasures systems, and train pilots." *Id.*

569. *Id.* at 1577. The Progress Payments clause provided that "each progress payment shall be computed as . . . eighty percent (80%) of the contractor's cumulative total costs under this contract." *Id.*

570. *Id.* at 1574-75.

separate progress payment requests by delivery order.<sup>571</sup> When the contractor refused to alter its allocation and billing practice, the contracting officer withheld progress payments and refused to resume them until the directed change was made.<sup>572</sup> Aydin eventually made the directed change, incurring significant administrative costs.<sup>573</sup> Consequently, Aydin submitted a request for an equitable adjustment, but the request was denied by both the contracting officer and the ASBCA.<sup>574</sup> On appeal to the Federal Circuit, however, the court concluded that the contracting officer constructively changed the contract, entitling the contractor to an equitable adjustment.<sup>575</sup>

The Federal Circuit opined that the clear language in the “progress payments” clause, “cumulative total costs under [the] contract,” mandated the conclusion that the contractor was entitled to accumulate all delivery order costs and allocate them to the larger contract.<sup>576</sup> In reaching this conclusion, the court relied on the fact that nothing in the Progress Payments clause directed Aydin to segregate costs by delivery order, and that the Ordering clause of the contract clearly distinguished between delivery orders and the overall contract.<sup>577</sup> Consequently, it was clear to the court that the language of the Progress Payments clause referred to the MUTES contract as a whole, and not to individual delivery orders.<sup>578</sup> Notably, the fact that the contractor treated the delivery orders as separate contracts for performance purposes was irrelevant to the court.<sup>579</sup> Furthermore, the court chastised the ASBCA for basing its decision denying the equitable adjustment on a clause not expressly nor impliedly contained in the Aydin contract.<sup>580</sup>

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571. *Id.* at 1575.

572. *Id.*

573. *Id.*

574. *Id.*

575. *Id.* at 1578 (citing *J.B. Williams Co. v. United States*, 450 F.2d 1379, 1394 (Ct. Cl. 1971), for proposition that Government has obligation to compensate contractor that is required to proceed beyond its contractual obligation).

576. *Id.* at 1577.

577. *Id.*

578. *Id.*

579. *Id.* at 1578.

580. *Id.* at 1577. The ASBCA had relied on FAR 32.503-5 (“Administration of Progress Payments”) to support its finding that each delivery order should be treated as a separate contract. That regulation provides that “[g]enerally, the progress payments made under multiple-order contracts should be administered under each individual order as if the order constituted a separate contract.” 48 C.F.R. § 32.503-5(c)(1) (1995). The Federal Circuit found no evidence that 32.503-5 was contained in the instant contract and suggested that even if the contract had relied on that provision, its inclusion would not have been outcome determinative as the Board had suggested. *Aydin*, 61 F.3d at 1577 n.1.

*Aydin* makes it clear that the contractor is entitled to an equitable adjustment if the contracting officer requires the contractor to implement an allocation or billing method change not otherwise required by the terms of the contract. Furthermore, *Aydin* suggests that the Federal Circuit prefers to confine its analysis to the express terms of the contract and will not seriously entertain Government arguments regarding implied terms or course of performance when the contract requirements are clear on the face of the contract.

*D. CAS Coverage and Foreign Sales Commissions in  
CAS-covered Contracts*

*Aydin*<sup>581</sup> also presented the Federal Circuit with issues regarding when a contract is covered by the CAS and how foreign sales commissions are treated when the contract is CAS-covered. These issues arose in the following context: *Aydin* sold an electronic system called "SOLAR II" to the Argentine government in 1988, included the resulting \$3.7 million sales commission in its general and administrative ("G&A") expense pool, and later allocated a portion of those costs to the above-described MUTES contract.<sup>582</sup> The Defense Contract Audit Agency ("DCAA"), operating under the assumption that the contract was governed by the CAS, excluded the sales commission from *Aydin*'s G&A on the grounds that its inclusion violated CAS 410 and 418.<sup>583</sup> *Aydin* then sought to recover the amount it would have received in progress payments from the Government if the DCAA had not excluded the SOLAR II commission from *Aydin*'s G&A expense pool. However, the contractor's claim was denied by both the contracting officer and the ASBCA.<sup>584</sup>

Again operating under the assumption that the CAS applied to the MUTES contract, the ASBCA excluded the SOLAR II foreign sales commission from *Aydin*'s G&A because: (1) the sales commissions were not proper G&A expenses as defined in CAS 410;<sup>585</sup> (2) the sales commissions were significant in size and thus could not otherwise qualify as proper G&A expenses under the exception set forth at CAS 510.50(C);<sup>586</sup> and (3) if included in G&A, the SOLAR II sales commissions "would result in inequitable distribution of those

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581. 61 F.3d 1571 (Fed. Cir. 1995).

582. *Id.* at 1575.

583. *Id.*

584. *Id.*

585. *Id.*

586. *Id.*



commissions to Government contracts.”<sup>587</sup> Instead, the Board concluded that the SOLAR II sales commission must be removed from G&A and should be handled by “special allocation” as provided in CAS 410.50(j).<sup>588</sup> Significantly, none of the other sales commissions that had been included in G&A were of comparable size and none were required to be removed from G&A.<sup>589</sup> The Board finally instructed Aydin to assign the sales commission directly to the SOLAR II contract.<sup>590</sup>

Before assessing the validity of the Board’s decision with regard to proper treatment of the SOLAR II sales commission under the CAS, the Federal Circuit inquired whether the MUTES contract was, in fact, covered by the CAS. The MUTES contract, described in the preceding section, contained FAR 52.230-2, entitled “Cost Accounting Standards.”<sup>591</sup> Pursuant to that clause, Aydin was required to comply with all CAS in effect on the date of award unless it qualified for one of several regulatory exceptions.<sup>592</sup> Specifically, the Federal Circuit was faced with the question of whether the MUTES contract was exempted from CAS coverage under CAS 331.30(b)(9) because it was a firm fixed price contract awarded without the submission of *any* cost data.<sup>593</sup>

CAS 331.30(b)(9) exempts from CAS coverage “any firm fixed price contract or subcontract awarded without submission of any cost data: Provided, that the failure to submit such data is not attributable to a waiver of the requirement for certified cost or pricing data.”<sup>594</sup>

Ultimately, the Federal Circuit concluded that the MUTES contract was not exempt from the CAS under 331.30(b)(9) because Aydin had submitted informal cost information at the request of the contracting officer prior to the contract award.<sup>595</sup> This remained so despite the fact that the contracting officer “sought this information to check for mistakes or major omissions in offers, not to negotiate price.”<sup>596</sup> To support its expansive definition of “any cost data,” the court stated:

The language of the regulation encompasses broadly “any cost data.” The modifier “any” sweeps all types of cost data within the coverage of the regulation, including informal cost data. Moreover,

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587. *Id.*

588. *Id.* at 1576.

589. *Id.* at 1575-76.

590. *Id.* at 1576.

591. *Id.* at 1578.

592. *Id.*

593. *Id.*

594. *Id.* at 1578-79.

595. *Id.* at 1579.

596. *Id.*

the appearance of the narrower phrase "cost and pricing data" later in the regulation indicates that "cost data" covers more than the "cost and pricing data" in negotiations.<sup>597</sup>

The court also relied on the history of the promulgation of CAS 331.30(b)(9) to support its broad interpretation.<sup>598</sup>

Having determined that the MUTES contract was a CAS-covered contract, the Federal Circuit addressed the validity of the Board's decision to exclude the \$3.7 million SOLAR II foreign sales commission from G&A. Of central concern to the court was whether the Board, in ordering a change in Aydin's cost accounting principles, had violated CAS 402.<sup>599</sup>

Contractors operating under a CAS-covered contract are required, by CAS 402, to employ consistent accounting practices when classifying similar costs as direct or indirect.<sup>600</sup> Finding first that there was "no distinction between the SOLAR II sales commission costs and Aydin's sales commission costs other than dollar amount,"<sup>601</sup> the court concluded that the Government violated CAS 402 when it determined that Aydin could retain all sales commissions other than the SOLAR II commission in its G&A pool.<sup>602</sup>

Specifically, the court stated that "the Government may not define 'costs' so narrowly [when construing the CAS] as to capture only one isolated cost item, even where that cost item is disproportionately large."<sup>603</sup> Significantly, this statement was not without limit. The court noted that a foreign sales commission incurred under "different circumstances" or for purposes other than foreign sales commissions may not have violated CAS 402.<sup>604</sup> Accordingly, the court remanded the case to the ASBCA for a determination of whether any of those circumstances were present in the instant case.<sup>605</sup>

*Aydin* appears to take as much as it gives. On the one hand, the Federal Circuit appears to side with the contractor in this case by requiring the Government to play by its own rules and treat costs consistently, as envisioned by the CAS. Even that premise, however, is somewhat tempered by the court's observation that in certain circumstances, some similar costs may be treated differently. More

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597. *Id.*

598. *Id.*

599. *Id.*

600. *Id.*

601. *Id.* at 1580.

602. *Id.*

603. *Id.*

604. *Id.*

605. *Id.* For the subsequent history of this case, see *Aydin Corp (West)*, ASBCA No. 42760, 96-1 B.C.A. (CCH) ¶ 28,134 (1996).

significantly, this decision provides contractors with a bevy of new situations that may cause the CAS to become applicable to their fixed-price contracts.

*E. Independent Research and Development Costs Not Depreciable Under GAAP*

Independent research and development (“IR&D”) costs are defined by the FAR as costs associated with projects involving basic research, applied research, development, or systems and other concept-formulation studies.<sup>606</sup> IR&D does not include the costs of efforts sponsored by a grant, costs required in the performance of a contract, or costs expended in preparing data specifically to support submitting a bid or proposal.<sup>607</sup>

When a government contract contains FAR 31.205-18(d),<sup>608</sup> IR&D costs generally are not depreciable and must be expensed in the year that they are incurred.<sup>609</sup> When the contract does not contain FAR 31.205-18(d) and the contract is governed by generally accepted accounting principles (“GAAP”), IR&D costs remain non-depreciable and also must be expensed in the year that they are incurred.<sup>610</sup>

This latter rule was applied by the Federal Circuit in 1995 in *Aydin*.<sup>611</sup> In that case, Aydin entered into a Research and Development Partnership with a private party to develop a three-dimensional radar system.<sup>612</sup> When the funding for research and development ran out, Aydin built the system with its own funds during 1986 and 1987.<sup>613</sup> Aydin then treated the system as a capital asset and depre-

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606. 48 C.F.R. § 31.205-18(a) (1995).

607. *Id.*

608. FAR § 31.205-18(d) provides in pertinent part:

(1) IR&D costs that were incurred in previous accounting periods are unallowable, except when a contractor has developed a specific product at its own risk in anticipation of recovering the development costs in the sale price of the product provided that—

(i) The total amount of IR&D costs applicable to the product can be identified;

(ii) The proration of such costs to sales of the product is reasonable;

(iii) The contractor had no Government business during the time that the costs were incurred or did not allocate IR&D costs to Government contracts except to prorate the cost of developing a specific product to the sales of that product; and

(iv) No costs of current IR&D programs are allocated to Government work except to prorate the costs of developing a specific product to the sales of that product.

48 C.F.R. § 31.205-18(d).

609. *Id.*

610. *Aydin Corp. (West) v. Widnall*, 61 F.3d 1571, 1580 (Fed. Cir. 1995) (citing *Denro, Inc. v. United States*, 19 Cl. Ct. 270, 278 n.14 (1990)).

611. 61 F.3d 1571 (Fed. Cir. 1995).

612. *Id.* at 1576.

613. *Id.*

ciated its costs over a five year period.<sup>614</sup> The depreciated costs were included in Aydin's 1988 G&A expense pool, and a portion of those costs were allocated to the aforementioned MUTES contract.<sup>615</sup> The DCCA challenged Aydin's treatment of the radar system costs, maintaining that the costs were IR&D costs, which, under FAR 31.205-18(d)(1), must be expensed in the years that they were incurred.<sup>616</sup> Accordingly, DCAA disallowed the radar system costs and excluded them from Aydin's 1988 G&A expense pool.<sup>617</sup> Both the contracting officer and the ASBCA denied Aydin's request for full reimbursement.<sup>618</sup>

Without significant discussion, the Federal Circuit affirmed that the costs were IR&D costs.<sup>619</sup> Although it ultimately determined that the IR&D costs were not depreciable, the court did not rest this determination on FAR 31.205-18(d)(1).<sup>620</sup> Because the contract between Aydin and the Government did not expressly incorporate FAR 31.205-18(d)(1), the court held that the ASBCA erred when it relied on that provision to exclude IR&D from the 1988 G&A pool.<sup>621</sup> However, because the contract expressly incorporated GAAP,<sup>622</sup> and GAAP precludes depreciation of IR&D costs,<sup>623</sup> the costs remained non-depreciable.<sup>624</sup>

Although *Aydin* does very little to clarify what constitutes IR&D costs, the case is significant for at least two reasons. First, *Aydin* sets forth the GAAP rule regarding depreciation of IR&D costs, that is, IR&D costs are not depreciable and must be expensed in the year that they are incurred.<sup>625</sup> Second, *Aydin* is significant because it reiterates the extremely important principle that the Government and the boards of contract appeals are not free to read into contracts

614. *Id.*

615. *Id.*

616. *Id.*; see 48 C.F.R. § 31.205-18(d)(1) (1995).

617. *Aydin*, 61 F.3d at 1576.

618. *Id.*

619. *Id.* at 1580.

620. *Id.* at 1580 n.2.

621. *Id.*

622. The contract between Aydin and the Government contained FAR 52.232-16, which provides that "[t]he Contractor shall not include the following in total costs for progress payment purposes . . .

(i) Costs that are not reasonable, allocable to this contract, and consistent with sound and generally accepted accounting principles and practices." *Id.* at 1580 (quoting 48 C.F.R. § 52.232-16 (1995)).

623. *Id.* (citing *Denro, Inc. v. United States*, 19 Cl. Ct. 270, 278 n.14 (1990)).

624. *Id.* at 1580-81.

625. *Id.*

nonmandatory FAR clauses that the Government has omitted by mistake.<sup>626</sup>

#### F. A Final Note on Aydin

The *Aydin* appeal to the Federal Circuit involved one final claim. In 1988 and 1989, Aydin settled two claims it had with the Government and received more than \$4.7 million for unabsorbed overhead costs.<sup>627</sup> Following payment, the contracting officer deducted \$1.6 million and \$2.8 million from Aydin's indirect cost pools to offset the unabsorbed overhead already recovered.<sup>628</sup> Aydin challenged the corresponding reductions in its progress payments,<sup>629</sup> but both the contracting officer and the ASBCA denied its claim for reimbursement.<sup>630</sup> The Federal Circuit summarily affirmed the Board's decision stating simply that "Aydin cannot recoup indirectly what the Government has already paid it directly."<sup>631</sup>

#### G. Entitlement to Eichleay Formula Damages Clarified

The *Eichleay* formula is a method<sup>632</sup> of calculating a contractor's damages for unabsorbed overhead when the Government delays contract performance, the contractor is required to "stand by" ready to perform, and the contractor is unable to take on any additional work during the period of delay.<sup>633</sup> The Federal Circuit adopted the *Eichleay* formula as the exclusive means for calculating unabsorbed home office overhead in a 1994 case, *Wickham Contracting Co. v. Fischer*,<sup>634</sup> after a lengthy battle over the proper method of calculat-

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626. Cf. *G.L. Christian & Assocs. v. United States*, 312 F.2d 418, *reh'g denied*, 320 F.2d 345 (Ct. Cl.), *cert denied*, 375 U.S. 954 (1963) (holding that government contract regulations created under statutory authority will have force and effect of law, even though not included in terms of particular contract).

627. *Aydin*, 61 F.3d at 1576-77.

628. *Id.* at 1577.

629. *Id.*

630. *Id.*

631. *Id.* at 1581.

632. The formula "estimates unabsorbed overhead by determining a daily overhead dollar amount for a particular contract and multiplying that amount by the number of days of delay." *Mech-Con Corp. v. West*, 61 F.3d 883, 886 (citing *Eichleay Corp.*, ASBCA No. 5183, 60-2 B.C.A. (CCH) ¶ 2688, *aff'd on reconsideration*, 61-1 B.C.A. (CCH) ¶ 2894).

633. See *Eichleay Corp.*, ASBCA No. 5183, 60-2 B.C.A. (CCH) ¶ 2688 (1960) (deriving method for allocation of continuing expenses between company overhead and government contract cost), *aff'd on reconsideration*, 61-1 B.C.A. (CCH) ¶ 2894 (1961).

634. 12 F.3d 1574 (Fed. Cir. 1994). The court in *Wickham* stated:

[B]ecause it is impossible to determine the amount of unabsorbed overhead caused by the delay of any particular contract, and because the *Eichleay* formula provides an equitable method of compensating a contractor for unabsorbed overhead without costing taxpayers more than they should pay, we hold that the *Eichleay* formula is the exclusive means for compensating a contractor for unabsorbed overhead when it

ing such damages. In 1995, the Federal Circuit in *Mech-Con Corp. v. West*<sup>635</sup> clarified the circumstances under which the *Eichleay* formula may be applied properly by establishing that when the length of the Government-imposed delay is uncertain, the contractor need prove only the first two predicate facts to entitlement—Government-imposed delay and “standby”—to shift the burden to the Government to show that the contractor could have accepted additional work to absorb the overhead costs.<sup>636</sup>

Mech-Con had contracted to upgrade the fire alarm system at Fort Belvoir, Virginia.<sup>637</sup> The contract provided that the Government would install the transmission lines for the upgraded system.<sup>638</sup> Mech-Con completed all the work that could be done without the updated transmission lines.<sup>639</sup> After being informed by the Government that the transmission lines would not be forthcoming soon, the contractor left the job site.<sup>640</sup> Two hundred-eighty-nine days later, the Government instructed Mech-Con to complete the contract without the specified transmission lines.<sup>641</sup>

Following contract completion, Mech-Con filed a properly certified claim for an equitable adjustment for unabsorbed home office overhead costs during the delay period.<sup>642</sup> When the contracting officer and the ASBCA denied its claim, Mech-Con appealed to the Federal Circuit.<sup>643</sup> The contractor’s argument for entitlement rested solely on the following joint stipulation entered into by the parties: “The suspension of work from July 9, 1985, through April 23, 1986,

otherwise meets the *Eichleay* prerequisites.

*Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1580-81 (Fed. Cir. 1994). *But see* Charles E. Raley, *The Eichleay Bandwagon: Should We Pause Before Jumping Aboard?* 31-2 THE PROCUREMENT LAWYER 3 (1996) (challenging exclusive use of *Eichleay* formula damages).

For a discussion of the history leading to *Wickham*, see *Interstate Gen. Gov’t Contractors, Inc. v. West*, 12 F.3d 1053, 1059 (Fed. Cir. 1993) (establishing three-prong test for determining whether unabsorbed overhead costs are recoverable using *Eichleay* formula); *Daly Constr., Inc. v. Garrett*, 5 F.3d 520, 552 (Fed. Cir. 1993) (rejecting application of *Eichleay* formula when contractor did not show that it could not take on additional work); *Community Heating & Plumbing Co., Inc. v. Kelso*, 987 F.2d 1575, 1582 (Fed. Cir. 1993) (rejecting application of *Eichleay* formula when no suspension of performance occurred); *C.B.C. Enters., Inc. v. United States*, 978 F.2d 669, 674 (Fed. Cir. 1992) (acknowledging that for *Eichleay* formula to be used, contractor must be on stand-by *and* be unable to take other work).

635. 61 F.3d 883 (Fed. Cir. 1995).

636. *Mech-Con Corp. v. West*, 61 F.3d 883, 886 (Fed. Cir. 1995).

637. *Id.* at 884.

638. *Id.*

639. *Id.*

640. *Id.*

641. *Id.*

642. *Id.* Mech-Con calculated its total unabsorbed overhead to be \$60,847.50 under the *Eichleay* formula. *Id.*

643. *Id.* at 884-85. The Board’s decision is at *Mech-Con Corp.*, ASBCA No. 45105, 94-3 B.C.A. (CCH) ¶ 27,252.

[289 days] was unexpected, and Mech-Con did not know how long it would last. Mech-Con had to stand ready to return, install equipment, make final connections, and maintain a presence for the testing by [its subcontractor].<sup>644</sup>

In the litigation before the Board, the Government prevailed because Mech-Con failed to prove that the Government's delay precluded Mech-Con from taking on other work during the delay period.<sup>645</sup> On appeal, the Government reiterated its contention that Mech-Con had the burden of proof with regard to this element of entitlement.<sup>646</sup> Additionally, the Government pointed to the relatively small amount of work remaining as evidence that Mech-Con was not precluded from finding additional work.<sup>647</sup>

The Federal Circuit rejected the Government's argument. Recognizing the "impracticality of a contractor obtaining replacement work or reducing home office overhead when it must 'standby' during an 'uncertain' period of government imposed delay,"<sup>648</sup> the court concluded that the joint stipulation averred a prima facie case for application of the *Eichleay* formula.<sup>649</sup> Furthermore, because the Government did little more than point to the amount of work remaining, the court held that the Government did not meet its burden to show that Mech-Con was able to take on more work:

Eichleay formula damages are awarded because a government-imposed delay prevents the contractor from allocating its resources to a new project. The amount of work remaining on a suspended contract is essentially irrelevant if a contractor must leave its resources idle in order to complete that work on short notice. In view of stipulations . . . establishing (i) that Mech-Con was on standby, (ii) that it was a small company whose "home office staff could not be affectively [sic] reduced during the indefinite suspension period," and (iii) that it had limited bonding capacity, we are not prepared to say that the government rebutted Mech-Con's prima facie case of entitlement to Eichleay formula damages simply by pointing to the fact that little work remained to be done.<sup>650</sup>

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644. *Mech-Con*, 61 F.3d at 884-85 (quoting Joint Stipulation of Facts, at 20).

645. *Id.* at 885. The Board also discounted the Joint Stipulation and concluded that Mech-Con failed to establish that it had stood ready to return on short notice. *Id.*

646. *Id.* at 887.

647. *Id.*

648. *Id.* (citations omitted).

649. *Id.* at 886. The Federal Circuit, unlike the ASBCA, gave full weight to the Joint Stipulation when the Government did not contest the accuracy of the Joint Stipulation, nor was the Stipulation contrary to the record. *Id.* at 887.

650. *Id.*

Significantly, the court observed that the amount remaining could be relevant in a case in which the contractor did not have to leave its resources idle.<sup>651</sup>

Notably, the court in *Mech-Con* refused to grant *Eichleay* formula damages to the contractor for the period of time between the Government's order to resume work and the contractor's remobilization,<sup>652</sup> because the contractor took more than three months to return to the site, thereby undercutting the "standby" element of entitlement.<sup>653</sup>

The most significant aspect of the *Mech-Con* decision is its holding that when the Government places a contractor on standby for an uncertain duration, the Government will be required to show lack of harm to the contractor or pay *Eichleay* formula damages.<sup>654</sup> Consequently, it is probable that future litigation will center around the level of proof required for the Government to rebut successfully a prima facie showing of *Eichleay's* application.

#### H. Research Tax Credit Applicable to Fixed Price Contract

The Economic Recovery Tax Act of 1981<sup>655</sup> established a research tax credit to provide an incentive to American industry to invest in research.<sup>656</sup> In 1995, the Federal Circuit addressed the issue of whether the tax credit would be applicable to research performed under a government procurement contract in *Fairchild Industries v. United States*.<sup>657</sup>

The provision at issue "provides a tax credit of increased research expenditures compared with a baseline measured by the previous three years' research expenditures."<sup>658</sup> The tax credit, however, is not applicable to research costs "to the extent funded by any grant, contract, or otherwise by another person (or any governmental entity)."<sup>659</sup> At first glance this would seem to exclude research

651. *Id.* at 887 n.4.

652. *Id.* at 887.

653. *Id.*

654. The following cases recently have applied the *Mech-Con* interpretation of *Eichleay*: *Sippial Elec. & Constr. Co. v. Widnall*, 69 F.3d 555 (unpublished table decision), No. 93-1276, 1995 WL 646344 (Fed. Cir. Nov. 2, 1995); *Satellite Elec. Co.*, ASBCA No. 46935, 95-2 B.C.A. (CCH) ¶ 27,883 (1995); *C.E.R., Inc.*, ASBCA No. 41767, 96-1 B.C.A. (CCH) ¶ 28,029 (1995).

655. Pub. L. No. 97-34, 95 Stat. 172 (codified in scattered sections of 26 U.S.C. (1994)) (amending Internal Revenue Code of 1954 to encourage economic growth through variety of taxation measures).

656. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 221(a), 95 Stat. 172, 241 (codified at 26 U.S.C. § 30).

657. 71 F.3d 868 (Fed. Cir. 1995).

658. *Fairchild Indus. v. United States*, 71 F.3d 868, 869 (Fed. Cir. 1995).

659. *Id.*



conducted pursuant to the terms of a government procurement contract. Applicable Treasury Regulations, however, set forth the criterion for “funded” as whether payment for the research is “contingent on [its] success.”<sup>660</sup> It was on this language that *Fairchild Industries* turned.

Fairchild entered into a fixed-price incentive contract with the Air Force in 1982, in which Fairchild was to design and produce T-46A training aircraft.<sup>661</sup> The contract required a full-scale development (“FSD”) phase and a production phase.<sup>662</sup> The contract ultimately was terminated for government convenience after the program was cancelled by Congress in late 1986.<sup>663</sup> By that time, Fairchild already had spent \$216,056,000 during its FSD phase.<sup>664</sup> The tax credit related solely to the FSD phase, and on its 1982-85 tax returns, Fairchild reported a total of \$109.4 million of research expenses related to that phase of the contract.<sup>665</sup> The Internal Revenue Service (“IRS”) disallowed approximately \$19.6 million for reasons unrelated to the appeal before the court<sup>666</sup> and disallowed 55.8%, or \$50.3 million, as having been “funded” within the meaning of § 44F(d)(3).<sup>667</sup> The 55.8% figure represented the ratio of the FSD costs the Air Force ultimately paid (\$120.6 million) to Fairchild’s total FSD costs (\$216.1 million).<sup>668</sup> As a consequence, the IRS disallowed \$5.8 million in research tax credits claimed by Fairchild for the 1983 and 1984 tax years.<sup>669</sup> The Court of Federal Claims held that because Fairchild “did not itself incur” the research expenses, as the expenses were “funded” by the Government, it was not entitled to the tax credit.<sup>670</sup> Whether this was the correct result was the issue before the Federal Circuit.<sup>671</sup>

Fairchild argued “that the Air Force ‘funded’ no part of the research because Fairchild’s right to payment was ‘contingent on the success of the research’ within the text and intent of the statute and Treasury Regulation § 1.41-5(d)(1).”<sup>672</sup> It is a characteristic of most

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660. *Id.* (citing Treas. Reg. § 1.41-5(d)(1) (1995)).

661. *Id.* at 870.

662. *Id.* at 870-71.

663. *Id.* at 871.

664. *Id.*

665. *Id.*

666. *Id.*

667. *Id.*

668. *Id.*

669. *Id.* at 871-72.

670. *Fairchild Indus. v. United States*, 30 Fed. Cl. 839, 850-51 (1994).

671. *Fairchild Indus.*, 71 F.3d at 869.

672. *Id.* at 872.

government contracts that successful performance is a prerequisite to payment.<sup>673</sup> This applies even to contracts such as Fairchild's, in which performance has been funded partially by progress payments, because the contractor is obliged to repay the progress payments if it fails to perform.<sup>674</sup> In its decision, the Federal Circuit examined the provisions of Fairchild's contract with the Air Force in order to show that the Air Force was obligated to pay for the research only if Fairchild produced results that met the contract specifications.<sup>675</sup> Reversing the Court of Federal Claims, the Federal Circuit held:

Treasury regulation § 1.41-5(d)(1) provides that for the researcher to claim the credit, the amounts payable under the agreement must be contingent on success. The inquiry turned on who bears the research costs upon failure, not on whether the researcher is likely to succeed in performing the project. When payment is contingent on performance, such as the successful research and development of a new product or process, the researcher bears the risk of failure. Whatever risk Fairchild was bearing, the Air Force bore none of it, for the Air Force was liable for payment only when the work, line item by item, succeeded and was accepted.<sup>676</sup>

## V. THE SOVEREIGN ACTS DOCTRINE

The sovereign acts doctrine shields the Government as a contracting party from liability for breach of its contractual obligations when its actions as sovereign interfere with or abrogate the terms of a government contract.<sup>677</sup> Thus, when legislation or executive action interferes with an existing government contract, the Government will be liable for breach unless the legislative or executive act is a "sovereign" act.<sup>678</sup>

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673. See 48 C.F.R. § 252.217-7007(e) (1995) ("Upon completion of the work under a job order and final inspection and acceptance, and upon submission of invoices in such form and with such copies as the Contracting Officer may prescribe, the Contractor shall be paid for the price of the job order . . .").

674. See 48 C.F.R. § 52.232-16(b) (1995) ("The Contractor shall repay to the Government any amounts required by a retroactive price reduction, after computing liquidations and payments on past invoices at the reduced prices and adjusting the unliquidated progress payments accordingly.").

675. *Fairchild Indus.*, 71 F.3d. at 870-71.

676. *Id.* at 872.

677. *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed. Cir. 1993). For an excellent discussion of the sovereign acts doctrine, see *Horowitz v. United States*, 267 U.S. 458, 461 (1925), and *Atlas Corp. v. United States*, 895 F.2d 745, 754 (Fed. Cir. 1990).

678. *Thermalon Indus., Ltd. v. United States*, No. 94-1078C, 1995 WL 650677, at \*8 (Fed. Cl. Nov. 6, 1995).

To qualify as "sovereign," the governmental act must be both "public and general."<sup>679</sup> When these criteria are satisfied, government liability will not arise.<sup>680</sup> The Government, however, will remain liable under the contract despite the sovereign nature of its actions when the contract expressly shifts the risk of such action to the Government.<sup>681</sup>

In 1995, the Federal Circuit was faced with a sovereign acts defense of monumental proportion in *Winstar Corp. v. United States*.<sup>682</sup> The *Winstar* decision cannot be analyzed properly without a brief recitation of both the history of the federal savings and loan industry and the procedural history of the case.

Following the Great Depression of the 1930s, Congress implemented several programs designed to revive failing thrift institutions and to restore public confidence in federal savings and loan associations.<sup>683</sup> For example, Congress created and authorized the Federal Home Loan Bank Board ("Bank Board") to charter and regulate federal savings and loan associations.<sup>684</sup> Federal deposit insurance also was established, and the Federal Savings and Loan Insurance Corporation ("FSLIC") was created to regulate all federally insured thrifts.<sup>685</sup> Integral to the new regulatory scheme was the requirement that thrifts maintain minimal reserves of capital.<sup>686</sup> Failure to meet capital adequacy requirements has serious repercussions:

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679. *Orlando Helicopter Airways, Inc. v. Widnall*, 51 F.3d 258, 262 (Fed. Cir. 1995) ("The United States when sued as contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as sovereign.") (citing *Horowitz*, 267 U.S. at 461). *Orlando Helicopter* provides an example of an executive sovereign act. In that case, a contractor was barred from recovering costs incurred in connection with a criminal investigation not initiated by the contracting officer because "the government's . . . police powers . . . are an ancient and fundamental indicia of sovereignty." *Id.* at 262; see *Walter Dawgie Ski Corp. v. United States*, 30 Fed. Cl. 115, 134 (1995) (holding that construction of federal highway on federal land was sovereign act).

680. For a recent case finding that a government act was not sufficiently "public or general" and holding the Government liable for breach of contract, see *Cienega Gardens v. United States*, 33 Fed. Cl. 196, 210 (1995); see also *Sun Oil Co. v. United States*, 572 F.2d 786, 817 (Ct. Cl. 1978) (holding Government liable for breach when its actions were "directed principally and primarily at plaintiffs' contractual right"); *Everett Plywood Corp. v. United States*, 651 F.2d 723, 731 (1981) (holding Government liable for breach when it unilaterally "terminated one contract after deciding continued performance would have been unwise").

681. *Hughes Communications Galaxy*, 998 F.2d at 958. The court in *Hughes* stated: "Because we conclude that the contract shifts responsibility to the government for changes in policy which conflict with the provisions of Article IV [of the contract], we offer no opinion about the presidential actions as they might pertain to the sovereign act doctrine." *Id.* at 958 n.8.

682. 64 F.3d 1531 (Fed. Cir. 1995).

683. *Winstar Corp. v. United States*, 64 F.3d 1531, 1534-35 (Fed. Cir. 1995) (in banc).

684. *Id.* at 1535; see Federal Home Loan Bank Act, Pub. L. No. 72-304, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1449 (1994)).

685. *Winstar*, 64 F.3d at 1535 (discussing National Housing Act of 1934, Pub. L. No. 73-479, 48 Stat. 1246 (codified as amended at 12 U.S.C. §§ 1701-1750g (1994))).

686. *Id.*

noncomplying thrifts can be seized, placed into receivership, and later sold or liquidated.<sup>687</sup>

When the prime interest rate rose in the late 1970s and early 1980s, the federal savings and loan industry faced a new crisis.<sup>688</sup> The thrifts' main assets were long-term, fixed-rate mortgages acquired during an era of low interest rates.<sup>689</sup> The revenues produced by these mortgages were slight in comparison to the rising costs of attracting short-term deposits, making it difficult for thrifts to meet their deposit obligations.<sup>690</sup> Rather than seizing and liquidating all of the failing thrifts—actions that would exhaust the federal deposit insurance fund established under the 1930s legislation—the Government implemented policy changes encouraging healthy thrifts to acquire failing ones.<sup>691</sup> Encouragement took the form of two incentives: “supervisory goodwill” and “capital credits.”<sup>692</sup>

The supervisory goodwill incentive operated as follows: following a merger between the healthy and failing thrift, the healthy thrift could count toward its minimum capital requirement the difference between the fair market value of the failing thrift's liabilities and the fair market value of the failing thrift's assets.<sup>693</sup> In addition, supervisory goodwill could be amortized over periods of up to forty years.<sup>694</sup> The second incentive, capital credits, provided for a federal cash contribution to the merged thrift that could also be counted toward the minimum capital requirement.<sup>695</sup>

At least three healthy thrifts (including Winstar, Statesman, and Glendale) took advantage of this special accounting treatment and, after substantial negotiation with the Bank Board and FSLIC, agreed to acquire failing thrifts with government approval.<sup>696</sup> Despite the fact that mergers such as these probably saved the Government millions of dollars,<sup>697</sup> the federal savings and loan industry continued to falter.<sup>698</sup>

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687. *Id.* This remedy was almost never utilized. *Id.*

688. *Id.*

689. *Id.*

690. *Id.*

691. *Id.*

692. *Id.*

693. *Id.* at 1536.

694. *Id.*

695. *Id.*

696. *See id.* at 1536-38.

697. *Id.* at 1536. If the failing thrifts had been liquidated rather than acquired, the Government would have been forced to pay the insured depositors. *Id.*

698. *Id.* at 1538.

Attempting again to restore the industry, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").<sup>699</sup> While FIRREA made substantial changes to the overall regulatory scheme,<sup>700</sup> it specifically restricted the use of supervisory goodwill as a means of meeting new capital requirements.<sup>701</sup> In addition, the newly created Office of Thrift Supervision issued regulations under FIRREA that imposed the same limitation on the use of capital credits.<sup>702</sup> Without the continued availability of this special accounting treatment, the merged thrifts quickly fell into noncompliance with Government-mandated capital adequacy requirements.<sup>703</sup>

In three suits before the Court of Federal Claims<sup>704</sup> between 1990 and 1992, *Winstar*, *Statesman*, and *Glendale* successfully argued that the United States had a contractual obligation to recognize supervisory goodwill and capital credits, and that FIRREA and its implementing regulations breached this obligation.<sup>705</sup>

After reviewing documentation generated by the respective merger transactions, the Court of Federal Claims concluded that supervisory goodwill and capital credits were explicit terms in enforceable contracts.<sup>706</sup> The fact that FIRREA and its implementing regulations

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699. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified as amended in scattered sections of 12 U.S.C.).

700. *Winstar*, 64 F.3d at 1538 (outlining FIRREA-imposed organizational changes).

701. 12 U.S.C. § 1464(t) (1994). Sections 1464(t)(3)(A) and 1464(t)(9)(B) limit the amount of amortized goodwill and the length of time for amortizing supervisory goodwill. *Id.*

702. See 12 C.F.R. § 567.1(w) (1995).

703. See *Winstar*, 64 F.3d at 538-39 (discussing failure and seizure of thrifts that did not satisfy new capital standards).

704. The parties filed suit in the Claims Court. In 1992, this court was renamed the United States Court of Federal Claims. Pub. L. No. 102-572, tit. IX, §§ 902(a), 903(b), 102 Stat. 4516, 4517 (1992) (codified as amended at 28 U.S.C. § 171(c) (1994)).

705. See *Statesman Sav. Holding Corp. v. United States*, 26 Cl. Ct. 904, 915 (1992) (holding that Government was contractually obligated to permit financial institutions to use purchase method and that Government breached its contract by prohibiting such use); *Winstar Corp. v. United States*, 25 Cl. Ct. 541, 549 (1992) (finding that binding contract existed between Government and plaintiffs and that Government breached contract when Congress enacted FIRREA); *Winstar Corp. v. United States*, 21 Cl. Ct. 112, 117 (1990) (holding that implied-in-fact contract was created by Government's promise that corporations could treat "supervisory goodwill" as capital asset and amortize it over 35 years). The *Glendale* case was consolidated and decided with *Statesman*. The Court of Federal Claims did not reach the thrifts' alternative argument that the Government violated the Fifth Amendment's Takings Clause in any of these cases. *Winstar*, 64 F.3d at 1539.

706. *Winstar*, 64 F.3d at 1539. Based on its review of *Statesman's* Assistance Agreement and various other documents, the court concluded that *Statesman* had an express contract with the Government. *Statesman Sav. Holding Corp.*, 26 Cl. Ct. at 912. Similarly, the court found that the Supervisory Action Agreement and various other documents constituted an express contract between *Glendale* and the Government. *Id.* at 912. By contrast, the documentation available in *Winstar* led the court to conclude that an implied-in-fact contract arose. *Winstar*, 21 Cl. Ct. at 114-15. The court rejected the Government's assertion that the documents were merely statements of then-existing regulatory policy and bound the Government to the representations

mandated abrogation of supervisory goodwill and capital credits caused the Government to breach the terms of the merger agreements.<sup>707</sup> The court found that FIRREA's end result was to "tak[e] away plaintiffs' right"<sup>708</sup> to use supervisory goodwill, and that the legislation, therefore, could not be considered "public and general." Thus, the sovereign acts doctrine could not shield the Government from breach.<sup>709</sup>

The Government countered with an unmistakability argument. Relying on *Bowen v. Public Agencies Opposed to Social Security Entrapment*,<sup>710</sup> the Government argued that the instant contracts restricted congressional legislative authority, and that such a restriction was impermissible absent an unmistakable government waiver of that right.<sup>711</sup> The consequence, according to the Government, was that "no contract rights existed between the parties."<sup>712</sup>

The court flatly rejected the Government's argument that the power of Congress to legislate was at issue when the contractors sought only monetary damages for breach of contract.<sup>713</sup> Distinguishing breach of contract cases from cases in which the plaintiffs seek injunctive relief, the Court reasoned that the unmistakability doctrine was inapposite, stating:

It is critical to this case . . . that plaintiffs are not claiming that the government contractually bound Congress not to change its regulations. Rather, plaintiffs claim that in their particular transaction with the government, it was agreed that they would be permitted to treat supervisory goodwill in a particular way for a fixed number of years. Thus, while Congress' power to regulate is not impaired, the government may be compelled to pay for the results of its actions, especially when in so doing the government actually is paying because it received a benefit.<sup>714</sup>

The three Court of Federal Claims decisions were consolidated for interlocutory appeal to the Federal Circuit.<sup>715</sup> Conceding that it had afforded the thrifts special accounting treatment in the past, the Government contested the lower court's finding that enforceable

made therein. *Id.* at 115.

707. *Winstar*, 25 Cl. Ct. at 549.

708. *Id.* at 552.

709. *Id.* at 553.

710. 477 U.S. 41 (1986).

711. *Winstar*, 25 Cl. Ct. at 543-44; see *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 51-55 (1986).

712. *Winstar*, 25 Cl. Ct. at 543.

713. *Id.* at 545 n.7 (holding that Government can be liable for monetary damages).

714. *Winstar Corp. v. United States*, 21 Cl. Ct. 112, 116 (1990).

715. *Winstar Corp. v. United States*, 994 F.2d 797 (1993), *vacated and withdrawn and reh'g in banc granted*, 64 F.3d 1531 (1995).

contracts bound the Government to continue to afford such special accounting treatment in the future.<sup>716</sup>

Reversing the Court of Federal Claims in a panel decision, the Federal Circuit held that the Government *was* shielded from contractual liability under the sovereign acts doctrine.<sup>717</sup> Stating that FIRREA was a “generally applicabl[e]” statute enacted for the “public good,”<sup>718</sup> the court rejected the lower court’s finding that the statute “singled out [the plaintiffs] as targets.”<sup>719</sup> Instead, the court found that FIRREA was squarely within the bounds of a sovereign act. After citing to numerous congressional reports suggesting that the thrift crisis was caused by the “utilization of capital gimmicks,”<sup>720</sup> the court stated that “[t]he accounting methods which had been approved were disapproved for all of the industry because of the perceived harm to the public.”<sup>721</sup> The fact that many merged thrifts survived the changes imposed by FIRREA also influenced the court’s conclusion.<sup>722</sup> In addition, the majority panel endorsed the Government’s unmistakability argument.<sup>723</sup> By order of August 18, 1993, however, the panel decision was vacated and withdrawn, and rehearing in banc was granted.<sup>724</sup>

In a 9-2 vote, the Federal Circuit affirmed the decision of the Court of Federal Claims.<sup>725</sup> The court concluded that each thrift had an express contractual right to special accounting treatment and that those contractual rights were abrogated by FIRREA and its implementing regulations.<sup>726</sup>

The Government’s sovereign act defense was rejected on the ground that FIRREA was not a “general or public” act. Because the court determined that the statute “plainly singles out supervisory goodwill for special treatment,” it followed that the thrifts that

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716. *Id.* at 807. The Government also reiterated its alternative argument that the unmistakability doctrine barred government liability for the subsequent change in terms. *Id.* at 809.

717. *See id.* at 807-08 (concluding that FIRREA legislation falls within ambit of sovereign acts doctrine).

718. *Id.* at 808.

719. *Id.* at 809 (finding that accounting methods were disapproved for entire industry).

720. *Id.* at 808-09 (quoting H.R. REP. NO. 54, 101st Cong., 1st Sess., pt. 1, 310 (1989), reprinted in 1989 U.S.C.C.A.N. 86, 106).

721. *Id.* at 809.

722. *Id.*

723. *Id.* at 809-10.

724. *Id.* at 819.

725. *Winstar Corp. v. United States*, 64 F.3d 1531, 1551 (Fed. Cir. 1995) (in banc).

726. *Id.* at 1540-45. The Federal Circuit did not reach the issue of whether Winstar had an implied-in-fact contract because it found that an express contract arose. *Id.* at 1543.

underwent supervisory mergers were targeted by the statute.<sup>727</sup> The court stated:

We accept, as did the Court of Federal Claims, that FIRREA was enacted for the public welfare—presumably all legislation is. We are convinced, however, that the FIRREA provisions at issue here targeted thrifts that had undergone supervisory mergers, financed in part with supervisory goodwill, with the approval and assistance of the federal government. . . . The government has plainly sought to render its own performance impossible. This is not a public and general act. The sovereign acts doctrine does not apply.<sup>728</sup>

This determination was supported by examination of FIRREA's legislative history<sup>729</sup> and was not undermined by the fact that the particular provisions abrogating the special accounting treatment were part of comprehensive legislation.<sup>730</sup> Finally, the court, sitting in banc, adopted the Court of Federal Claims' reasoning to reject application of the unmistakability doctrine in breach of contract cases.<sup>731</sup>

The Department of Justice sought a writ of certiorari that was granted in January 1996.<sup>732</sup> On July 1, 1996, the Supreme Court affirmed the judgment of the Federal Circuit in a 7-2 decision and remanded the case to the Court of Federal Claims for determination

727. *Id.* at 1549.

728. *Id.* at 1550-51.

729. *Id.* at 1550. The court reproduced the following statements made by members of the House Committee on Banking, Finance and Foreign Affairs in response to the House version of FIRREA:

"Unfortunately, [FIRREA] was amended by the Full Committee to phase out the treatment of goodwill for capital purposes over a five year period. Simply put, the Committee has reneged on the agreements that the government entered into concerning supervisory goodwill.

. . . Clearly, the agreements concerning the treatment of goodwill were part of what the institutions had bargained for. Just as clearly, the committee is abrogating those agreements."

*Id.* (quoting H.R. REP. NO. 54, *supra* note 720, at 498, reprinted in 1989 U.S.C.C.A.N. at 293-94).

730. In dissent, Circuit Judge Lourie argued that the majority's focus on the supervisory goodwill provisions "mischaracterize[d] the true nature of the governmental action." *Id.* at 1552 (Lourie, J., dissenting).

731. The decision made it clear that the unmistakability doctrine is applicable only "when a party asserts that the Government has waived its right to exercise a sovereign power and seeks to enforce that right through an injunction or a declaration that a statute is unconstitutional." Clarence T. Kipps, Jr. & Kevin C. Dwyer, *Winstar Confirms the Limits on the Government's Ability to Avoid Liability When It Reneges on Its Contracts*, 64 FED. CONT. REP. (Special Supp.) 3, 14 (1995). According to the *Winstar* majority: "Congress was always free to deem supervisory goodwill a bad idea and legislate it out of existence. Where that legislation breached the Government's prior contractual obligations regarding the treatment of supervisory goodwill, however, the Government remains liable in money damages for breach." *Winstar*, 64 F.3d at 1548.

732. 116 S. Ct. 806 (1996).



of the appropriate measure and amount of damages.<sup>733</sup> Like the lower courts before it, the Supreme Court initiated its analysis by reviewing “the relevant documents and circumstances . . . [and] applying ordinary principles of contract construction and breach that would be applicable to any contract action between private parties.”<sup>734</sup> The Court accepted the Federal Circuit’s conclusion that “the government breached these contracts when, pursuant to the new regulatory capital requirements imposed by FIRREA . . . the federal regulatory agencies limited the use of supervisory goodwill and capital credits in calculating [the thrifts’] net worth.”<sup>735</sup>

The Court then evaluated the Government’s unmistakability and sovereign act defenses to breach. With regard to the former, the Court stated:

[The Government’s] argument mistakes the scope of the unmistakability doctrine. The thrifts do not claim that the Bank Board and FSLIC purported to bind Congress to ossify the law in conformity to the contracts; they seek no injunction against application of FIRREA’s new capital requirements to them and no exemption from FIRREA’s terms. They simply claim that the Government assumed the risk that subsequent changes in the law might prevent it from performing, and agreed to pay damages in the event that such failure to perform caused financial injury. The question, then, is not whether Congress could be constrained but whether the doctrine of unmistakability is applicable to any contract claim against the Government for breach occasioned by a subsequent act of Congress. The answer to this question is no.<sup>736</sup>

After a lengthy discussion of applicable precedent,<sup>737</sup> the Court found that application of the unmistakability doctrine turns not on the particular remedy sought,<sup>738</sup> but rather “on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government.”<sup>739</sup>

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733. 116 S. Ct. 2432 (1996). Justice Souter penned the majority decision, joined by Justices Stevens, Breyer, and O’Connor (in part). Justice Breyer and Justice Scalia (joined by Justices Kennedy and Thomas) filed separate concurring opinions. Chief Justice Rehnquist and Justice Ginsberg dissented.

734. *Id.* at 2453.

735. *Id.* at 2452-53.

736. *Id.* at 2453.

737. Among other cases, the Court discussed *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987); *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986); and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). See *Winstar*, 116 S. Ct. at 2455-57.

738. *Id.* at 2457.

739. *Id.* at 2456.

[A]pplication of the doctrine will . . . differ according to the different kinds of obligations the Government may assume and the consequences of enforcing them. At one end of the wide spectrum are claims for enforcement of contractual obligations that could not be recognized without effectively limiting sovereign authority, such as a claim for rebate under an agreement for a tax exemption. Granting a rebate, like enjoining enforcement, would simply block the exercise of taxing power . . . and the unmistakability doctrine would have to be satisfied. At the other end are contracts, say, to buy food for the army; no sovereign power is limited by the Government's promise to purchase and a claim for damages implies no such limitation. That is why no one would seriously contend that enforcement of humdrum supply contracts might be subject to the unmistakability doctrine. Between these extremes lies an enormous variety of contracts including those under which performance will require exercise (or not) of a power peculiar to the Government. *So long as such a contract is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of that power, the enforcement of the risk allocation raises nothing for the unmistakability doctrine to guard against, and there is no reason to apply it.*<sup>740</sup>

Ultimately, because the thrifts' contracts did not prevent Congress from enacting regulatory measures, did not seek an injunction against the application of the law to them, *and included a risk-shifting component (insuring the thrifts against any losses arising from future regulatory change) that could be enforced without an effective bar of governmental power*, the unmistakability doctrine did not apply.<sup>741</sup> Anticipating the Government's argument that the cost of a subsequent regulatory change could be construed as an indirect impediment to the exercise of sovereign power, the Court stated:

[A]ll regulations have their costs, and Congress itself expressed a willingness to bear the costs at issue when it first authorized FSLIC to 'guarantee [acquiring thrifts] against loss' that might occur as a result of a supervisory merger. . . . [W]e must reject the suggestion that the Government may simply shift costs of legislation onto its contractual partners who are adversely affected by the change in

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740. *Id.* at 2457-58 (emphasis added).

741. *Id.* at 2458. The Court found:

The Bank Board resolutions, Forbearance Letters, and other documents setting forth the accounting treatment to be accorded supervisory goodwill generated by the transactions were not mere statements of then-current regulatory policy, but in each instance were terms in an allocation of risk of regulatory change that was essential to the contract between the parties.

*Id.* at 2471-72.

the law, when the Government has assumed the risk of such change.<sup>742</sup>

The Court also viewed its refusal to accept the Government's unmistakability defense as consistent with the Government's own long-run interest, because "[i]njecting the opportunity for unmistakability litigation into every common contract action would . . . produce the untoward result of compromising the Government's practical capacity to make contracts, which we have held to be 'of the essence of sovereignty' itself."<sup>743</sup>

The Court also rejected the Government's sovereign acts defense. With regard to the "public and general" nature of FIRREA, the Court disputed the Government's contention that FIRREA was enacted solely in the Government's regulatory capacity.<sup>744</sup> Noting that it is difficult to draw "a workable line . . . between the Government's 'regulatory' and 'nonregulatory' capacities,"<sup>745</sup> the Court suggested that FIRREA was enacted, at least in part, to protect the Government as private insurer.<sup>746</sup> Moreover, because the Court was concerned with the Government's ability to label its acts as "regulatory" to avoid its contractual liabilities,<sup>747</sup> the Court established that "a governmental act will not be public and general if it has the substantial effect of releasing the Government from its contractual obligations."<sup>748</sup> The Court then concluded that the enactment of FIRREA was not a public or general act because it had a "substantial effect" on government contracts and it specifically eliminated the very accounting gimmicks that the acquiring thrifts had been promised.<sup>749</sup>

The Court continued by observing that even if FIRREA could qualify as a "public and general" act, it did not follow automatically that the Government would be relieved from liability. The Court stated:

[Because] the object of the sovereign acts defense is to place the Government as contractor on par with a private contractor in the same circumstances, . . . the Government, like any other defending party in a contract action, must show that the passage of the statute rendering its performance impossible was an event contrary to the basic assumptions on which the parties agreed, and must ultimately

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742. *Id.* at 2459 (quoting 12 U.S.C. § 1729(f)(2) (1988) (repealed 1989)).

743. *Id.* (quoting *United States v. Bekins*, 304 U.S. 27, 51-52 (1938)).

744. *Id.* at 2464.

745. *Id.*

746. *Id.*

747. *Id.* at 2464-65.

748. *Id.* at 2467.

749. *Id.* at 2467-68.

show that the language or circumstances do not indicate that the Government should be liable in any case.<sup>750</sup>

Because "it would be absurd to say that the nonoccurrence of a change in the regulatory capital rules was a basic assumption upon which these contracts were made,"<sup>751</sup> the Court found that impossibility could not be established. Additionally, the fact that the contracts specifically allocated the risk of regulatory change to the Government necessarily defeated an impossibility defense.<sup>752</sup>

Although the majority opinion has been summarized here only briefly, there is no doubt that the *Winstar* decision has far-reaching implications for government contractors and taxpayers alike. The Supreme Court properly upheld the long-standing principle that the Government, as contractor, should be liable for breach of its contracts when it specifically abrogates the terms of those contracts acting in its capacity as sovereign. The financial impact of this particular holding is staggering: *Winstar*, *Statesman*, and *Glendale* have sought more than \$1.5 billion in damages, and eighty-eight additional cases are pending.<sup>753</sup> It has been projected that the Government now faces liability somewhere in the range of \$10-20 billion dollars.<sup>754</sup>

## VI. OTHER DECISIONS

In 1995, the Federal Circuit issued thirty-nine other government contract decisions. Eighteen of these decisions were unpublished summary affirmances of the decision below.<sup>755</sup> Three unpublished

750. *Id.* at 2469 (citation omitted).

751. *Id.* at 2471 (referring to *Moncrief v. Williston Basin Interstate Pipeline Co.*, 880 F. Supp. 1495, 1508 (D. Wyo. 1995); *Wollmar v. CSX Transp. Inc.*, 705 F. Supp. 1154, 1176 (E.D. Va. 1989), *aff'd*, 898 F.2d 413 (4th Cir. 1990)).

752. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981)).

753. See Jerry Knigh & Joan Biskupic, *High Court Ruling May Add Billions to S&L Cleanup Cost*, WASH. POST, July 2, 1996, at A1.

754. See *id.*

755. See *Jacksonville Shipyards, Inc. v. Dalton*, 73 F.3d 380 (unpublished table decision), No. 95-1272, 1995 WL 730458 (Fed. Cir. Dec. 11, 1995); *TLC Eng'g & Constr. v. Johnson*, 70 F.3d 1290 (unpublished table decision), No. 95-1190, 1995 WL 697310 (Fed. Cir. Nov. 22, 1995), *aff'g per curiam* ASBCA No. 11057, 95-1 B.C.A. (CCH) ¶ 27,456; *White Buffalo Constr., Inc. v. Glickman*, 70 F.3d 128 (unpublished table decision), No. 95-1122, 1995 WL 662404 (Fed. Cir. Nov. 3, 1995), *aff'g per curiam* AGBCA Nos. 92-199-1, 93-113-1, 94-3 B.C.A. (CCH) ¶ 27,176 (1994); *Hollfelder Technische Dienste Ingenieurgesellschaft MBH v. West*, 69 F.3d 554 (unpublished table decision), No. 94-1421, 1995 WL 616601 (Fed. Cir. Oct. 18, 1995), *aff'g per curiam* ASBCA No. 39888, 94-2 B.C.A. ¶ 26,809 (1994); *R.B. Enters., Inc. v. Widnall*, 66 F.3d 347 (unpublished table decision), No. 95-1053, 1995 WL 550250 (Fed. Cir. Sept. 14, 1995), *aff'g per curiam* ASBCA No. 45514, 94-3 B.C.A. (CCH) ¶ 27,030 (1994); *McDonald Welding & Mach. Co. v. Dalton*, 66 F.3d 347 (unpublished table decision), No. 95-1147, 1995 WL 550251 (Fed. Cir. Sept. 14, 1995), *aff'g per curiam* ASBCA No. 36284, 94-2 B.C.A. (CCH) ¶ 27,181 (1994); *Program & Constr. Management Group, Inc. v. West*, 64 F.3d 676 (unpublished table decision), No. 95-1084, 1995 WL 490260 (Fed. Cir. Aug. 11, 1995), *aff'g per curiam* ASBCA No. 47048, 95-1 B.C.A. (CCH) ¶ 27,413 (1995); *Interstate Constr. Inc. v. Widnall*, 61 F.3d 920 (unpublished table

decisions summarily dismissed the appeal, one on settlement of the parties,<sup>756</sup> one on mootness grounds,<sup>757</sup> and one on finality grounds.<sup>758</sup> The remaining fifteen decisions substantively analyzed the respective lower court decisions. Although most of these decisions were unpublished, and although Federal Circuit Local Rules prohibit citation to unpublished decisions as precedent,<sup>759</sup> these decisions are instructive for practitioners and academics alike and are categorized and synopsised in this section.

### A. *Jurisdictional Issues*

In *Hardwick Bros. Co. v. United States*,<sup>760</sup> the Federal Circuit reversed the Court of Federal Claims and held that 28 U.S.C. § 1500<sup>761</sup> does *not* require the Court of Federal Claims to dismiss a properly-filed claim for lack of jurisdiction when the claimant later files an action involving the same claim in District Court.<sup>762</sup>

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decision), No. 94-1506, 1995 WL 424841 (Fed. Cir. July 18, 1995), *aff'g per curiam* ASBCA No. 45696, 94-2 B.C.A. (CCH) ¶ 26,930 (1994); Peterson Constr. Co. v. Widnall, 57 F.3d 1085 (unpublished table decision), No. 94-1530, 1995 WL 358133 (Fed. Cir. June 12, 1995), *aff'g per curiam* ASBCA Nos. 41132, 41142, 41600, 94-3 B.C.A. (CCH) ¶ 26,991 (1994); Planning & Human Sys., Inc. v. Shalala, 56 F.3d 80 (unpublished table decision), No. 94-1448, 1995 WL 298956 (Fed. Cir. May 8, 1995), *aff'g per curiam* ASBCA No. 44013, 94-2 B.C.A. (CCH) ¶ 26,860 (1994); American Contract Servs., Inc. v. Widnall, 53 F.3d 348 (unpublished table decision), No. 94-1415, 1995 WL 239306 (Fed. Cir. Apr. 20, 1995), *aff'g per curiam* ASBCA No. 46788, 94-3 B.C.A. (CCH) ¶ 27,025 (1994); Santa Fe Eng'rs, Inc. v. Dalton, 53 F.3d 347 (unpublished table decision), No. 94-1449, 1995 WL 225545 (Fed. Cir. Apr. 14, 1995), *aff'g per curiam* ASBCA Nos. 24578, 25838, 28687, 94-2 B.C.A. (CCH) ¶ 26,687 (1994); Consultores Profesionales De Ingeniera, S.A. v. West, 52 F.3d 345 (unpublished table decision), No. 94-1443, 1995 WL 216881 (Fed. Cir. Apr. 12, 1995), *aff'g per curiam* ENGBCA No. PCC-78, 94-2 B.C.A. (CCH) ¶ 26,652 (1994); Spectrum Emergency Care, Inc. v. Dalton, 50 F.3d 22 (unpublished table decision), No. 94-1408, 1995 WL 128422 (Fed. Cir. Mar. 23, 1995), *aff'g per curiam* ASBCA No. 43979, 94-2 B.C.A. (CCH) ¶ 26,806 (1994); Vinyl Technology, Inc. v. Perry, 48 F.3d 1238 (unpublished table decision), No. 94-1278, 1995 WL 74530 (Fed. Cir. Feb. 22, 1995), *aff'g per curiam* ASBCA Nos. 43464, 45880, 93-2 B.C.A. (CCH) ¶ 25,693 (1993); Gulf Coast Trailing Co. v. West, 48 F.3d 1236 (unpublished table decision), No. 94-1347, 1995 WL 51610 (Fed. Cir. Feb. 10, 1995), *aff'g per curiam* ENGBCA No. 5795, 94-2 B.C.A. (CCH) ¶ 26,921 (1994); Maitland Bros. Co. v. West, 47 F.3d 1181 (unpublished table decision), No. 94-1244, 1995 WL 11193 (Fed. Cir. Jan. 11, 1995), *aff'g per curiam* ENGBCA No. 5782-R, 94-1 B.C.A. (CCH) ¶ 26,473 (1995); Grover Enters., Inc. v. Dalton, 47 F.3d 1180 (unpublished table decision), No. 94-1336, 1995 WL 5614 (Fed. Cir. Jan. 6, 1995), *aff'g per curiam* ASBCA No. 44331, 94-03 B.C.A. (CCH) ¶ 27,139 (1994).

756. *Dyncorp v. O'Leary*, 47 F.3d 1180 (unpublished table decision), No. 94-1493, 1995 WL 13300 (Fed. Cir. Jan. 4, 1995).

757. *Nortel Fed. Sys., Inc. v. United States Air Force*, 77 F.3d 501 (unpublished table decision), No. 95-1213, 1995 WL 723796 (Fed. Cir. Nov. 13, 1995).

758. *Renic Gov't Sys., Inc. v. Cisneros*, 77 F.3d 501 (unpublished table decision), No. 95-1238, 1995 WL 723797 (Fed. Cir. Nov. 15, 1995).

759. FED. CIR. R. 47.6(b).

760. 72 F.3d 883 (Fed. Cir. 1995).

761. Section 1500 provides in relevant part: "The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States . . ." 28 U.S.C. § 1500 (1994).

762. *Hardwick Bros. v. United States*, 72 F.3d 883, 886 (Fed. Cir. 1995).

The Federal Circuit affirmed the Court of Claims ruling that no implied-in-fact contract arose between appellant and the United States Customs Service in *Lewis v. United States*.<sup>763</sup> In so affirming, the Federal Circuit observed that the lower court's dismissal should have been predicated on the merits rather than on jurisdictional grounds.<sup>764</sup>

*B. Contract Interpretation, Contractor Claims, and Related Issues*

Reversing the ASBCA in *Metric Constructors, Inc. v. Goldin*,<sup>765</sup> the Federal Circuit held that when the number of trap primers required by the contract was latently ambiguous<sup>766</sup> and the contractor's interpretation of the contract requirements was "within the zone of reasonableness,"<sup>767</sup> the Government could not require additional trap primers without incurring liability for constructive change.<sup>768</sup>

In *CBI NA-CON, Inc. v. West*,<sup>769</sup> the Federal Circuit relied on a "common sense interpretation of the contract terms . . . supported by the structure of the contract"<sup>770</sup> and the parties' contemporaneous conduct<sup>771</sup> to decipher contract requirements regarding pipe installation. Reversing the ASBCA, the court found that the contractor had complied fully with the installation specifications.<sup>772</sup>

In *Jim Smith Contracting Co. v. West*,<sup>773</sup> the court construed the Order of Work clause as having two independent prerequisite conditions that required satisfaction before the contractor could

763. 70 F.3d 597 (Fed. Cir. 1995). Appellant's primary argument was that the customs service "informer award" statute, 19 U.S.C. § 1619 (1994), constituted an offer by the Government to pay individuals who provide original information regarding violations of customs laws. *Lewis v. United States*, 70 F.3d 597, 600 (Fed. Cir. 1995). This argument was reflected as "contrary to well-settled properties of contract law and to the statutes governing customs service investigations." *Id.*

764. *Id.* at 604. The lower court had dismissed for lack of jurisdiction because it deemed the claim to be "wholly insubstantial and frivolous." *Id.* at 602. The Federal Circuit did not argue with this characterization of the claim. *Id.* at 604.

765. 69 F.3d 554 (unpublished table decision), No. 95-1078, 1995 WL 620154, at \*4 (Fed. Cir. Oct. 20, 1995).

766. *Metric Constructors, Inc. v. Goldin*, 69 F.3d 554 (unpublished table decision), No. 95-1078, 1995 WL 620154, at \*1-3 (Fed. Cir. Oct. 20, 1995).

767. *Id.*, 1995 WL 620154, at \*3.

768. *Id.*, 1995 WL 620154.

769. 52 F.3d 343 (unpublished table decision), No. 94-1393, 1995 WL 133347 (Fed. Cir. Mar. 28, 1995).

770. *CBI NA-CON, Inc. v. West*, 52 F.3d 343 (unpublished table decision), No. 94-1393, 1995 WL 133347, at \*1 (Fed. Cir. Mar. 28, 1995).

771. *Id.*, 1995 WL 133347, at \*3.

772. *Id.*, 1995 WL 133347, at \*3. The case was remanded to the Board for determination of the contractor's entitlement to an equitable adjustment. *Id.*

773. 61 F.3d 918 (unpublished table decision), No. 94-1383, 1995 WL 331124 (Fed. Cir. June 2, 1995).

proceed to the following work item.<sup>774</sup> Because one of the conditions contained in this clause was not satisfied, the court found the contracting officer was justified in refusing to allow the contractor to proceed and affirmed the ENGBCA's determination that the contractor was not entitled to any compensation pursuant to the Suspension of Work clause.<sup>775</sup>

Affirming the ASBCA in *M. Bianchi v. Perry*,<sup>776</sup> the court held that a contractor was not entitled to royalties under a Value Engineering Incentive clause because three of the contractor's Value Engineering Change Proposals ("VECPs") were rejected by the agency in good faith before termination of the contracts.<sup>777</sup> Additionally, because the contractor's accepted VECP was not implemented on future contracts involving "essentially the same items," the court affirmed the ASBCA's determination that the contractor was not entitled to future royalties.<sup>778</sup>

In *Penn Environmental Controls, Inc. v. Brown*,<sup>779</sup> the Federal Circuit vacated and remanded a VABCA decision on the narrow issue of whether the Board correctly interpreted the meaning of "extra labor hours" contained in the contractor's labor estimates submitted in support of a claim for an equitable adjustment.<sup>780</sup>

### C. Costs

In *Sippial Electric & Construction Co. v. Widnall*,<sup>781</sup> the court applied its recently clarified test for *Eichleay* damages,<sup>782</sup> holding that the contractor established a prima facie case for entitlement when the Government conceded that the contractor remained on standby

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774. *Jim Smith Contracting Co. v. West*, 61 F.3d 918 (unpublished table decision), No. 94-1383, 1995 WL 331124, at \*2 (Fed. Cir. June 2, 1995).

775. *Id.*, 1995 WL 331124, at \*3.

776. 61 F.3d 920 (unpublished table decision), No. 94-1166, 1995 WL 432398 (Fed. Cir. July 21, 1995), *cert. denied*, 116 S. Ct. 817 (1996).

777. *M. Bianchi v. Perry*, 61 F.3d 920 (unpublished table decision), No. 94-1166, 1995 WL 432398, at \*3 (Fed. Cir. July 21, 1995), *cert. denied*, 116 S. Ct. 817 (1996). Such a finding precluded application of the doctrine of constructive acceptance. *Id.*, 1995 WL 432398, at \*2.

778. *Id.*, 1995 WL 432398, at \*2. The court interpreted the phrase "essentially the same items" as referring to items purchased under the contract and not component parts of those items. *Id.* (citing *M. Bianchi v. Perry*, 31 F.3d 1163, 1168 (Fed. Cir. 1994)). The court also determined that a final VECP never was implemented. *Id.*, 1995 WL 432398, at \*2.

779. 66 F.3d 345 (unpublished table decision), No. 94-1518, 1995 WL 521172 (Fed. Cir. Sept. 5, 1995).

780. *Pennsylvania Envtl. Controls, Inc. v. Brown*, 66 F.3d 345 (unpublished table decision), No. 94-1518, 1995 WL 521172 (Fed. Cir. Sept. 5, 1995). The Board's decision on remand is located at VABCA No. 3726R, 96-1 B.C.A. (CCH) ¶ 28,213 (1996).

781. 69 F.3d 555 (unpublished table decision), No. 93-1276, 1995 WL 646344 (Fed. Cir. Nov. 2, 1995).

782. *See Mech-Con Corp. v. West*, 61 F.3d 883 (Fed. Cir. 1995) (discussing proper application of *Eichleay* formula). For a discussion of *Mech-Con*, see *supra* notes 637-56.

during a Government-imposed delay of uncertain duration.<sup>783</sup> The court found that the ASBCA incorrectly placed the burden of proof on the contractor to establish actual loss.<sup>784</sup> The contractor, therefore, prevailed absent any showing by the Government that the contractor did not suffer actual loss.<sup>785</sup>

In *GTE Government Systems Corp. v. Perry*,<sup>786</sup> the court reversed the ASBCA and determined that a stock purchase discount afforded to employees under a qualified company employee stock purchase plan constituted a reimbursable cost for personal services under DAR 15.205-6.<sup>787</sup> Central to this holding was the determination that the tax-deductibility of the cost, a criterion for allowability under DAR 15.205-6, was not dispositive and did not preclude recovery of the cost.<sup>788</sup>

#### D. *The CDA and Other Jurisdictional Issues*

In *Raven Industries, Inc. v. Kelso*,<sup>789</sup> the Federal Circuit reversed the ASBCA's determination that the Board lacked jurisdiction to hear a claim. The court found that the Board erroneously relied on *Dawco Construction v. United States*<sup>790</sup> and its requirement that a sum certain be stated at the time of submission to the contracting officer.<sup>791</sup> Because *Reflectone, Inc. v. United States*<sup>792</sup> overruled *Dawco* and provides that Board jurisdiction does not depend on whether a sum certain has been asserted to the contracting officer,<sup>793</sup> the court

783. *Sippial Elec. & Constr. v. Widnall*, 69 F.3d 555 (unpublished table decision), No. 93-1276, 1995 WL 646344, at \*2-3 (Fed. Cir. Nov. 2, 1995).

784. *Id.*, 1995 WL 646344, at \*3.

785. *Id.*, 1995 WL 646344, at \*4.

786. 61 F.3d 920 (unpublished table decision), No. 91-1424, 1995 WL 424835 (Fed. Cir. July 18, 1995).

787. *GTE Gov't Sys. Corp. v. Perry*, 61 F.3d 920 (unpublished table decision), No. 91-1424, 1995 WL 424835, at \*1 (Fed. Cir. July 18, 1995).

788. *See GTE*, 61 F.3d 920, 1995 WL 424835, at \*2 (holding that when employer elected to qualify stock plan and forgo tax deduction in effort to provide employees with favorable tax treatment, DAR 15.205-6 did not bar recoverability of discount).

789. 62 F.3d 1433 (unpublished table decision), No. 93-1374, 1995 WL 453069 (Fed. Cir. July 31, 1995).

790. 930 F.2d 872 (Fed. Cir. 1991), *overruled by* *Reflectone, Inc. v. United States*, 60 F.3d 1572 (Fed. Cir. 1995).

791. *Raven Indus., Inc. v. Kelso*, 62 F.3d 1433 (unpublished table decision), No. 93-1374, 1995 WL 453069, at \*1 (Fed. Cir. July 31, 1995).

792. 60 F.3d 1572 (Fed. Cir. 1995).

793. *Raven Indus.*, 62 F.3d 1433, 1995 WL 453069, at \*1. The Board has CDA jurisdiction so long as a sum certain is stated by the date of appeal. *Id.*, 1995 WL 453069, at \*1. For a discussion of *Reflectone* and what constitutes a claim under the CDA, see discussion *supra* notes 523-27.



remanded the case for reinstatement and consideration on the merits.<sup>794</sup>

An order by HUD regarding enforceability of a federally guaranteed home owners' loan could not be reviewed by the Federal Circuit in *Reece v. Cisneros*.<sup>795</sup> Because the loan involved was not a contract for the direct procurement of property or services by the United States,<sup>796</sup> the Board's order was not a final decision for the purposes of the CDA and the court was without jurisdiction to hear the appeal.<sup>797</sup>

In *International Gunnery Range Services, Inc. v. Widnall*,<sup>798</sup> the Federal Circuit vacated an ASBCA decision that rescinded a contract modification authorized by the Air Force Contract Adjustment Board ("AFCAB").<sup>799</sup> Because decisions of contract adjustment boards are final and not subject to review, the Federal Circuit found that the Board was without authority to rescind the AFCAB modification.<sup>800</sup>

In *Henke v. United States*,<sup>801</sup> the Federal Circuit concluded that the six-year statute of limitations for filing claims in the Court of Federal Claims<sup>802</sup> did not bar suit for payment by a pilot who allegedly flew marijuana from Colombia to Mexico pursuant to a covert contract with the Drug Enforcement Agency ("DEA").<sup>803</sup> The court noted that claim accrual typically occurs "when all events necessary to fix the Government's liability have occurred."<sup>804</sup> Reasoning that the purpose of the contract was not the mere transportation of drugs, but rather obtaining information about Colombian and Mexican

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794. *Id.*, 1995 WL 453069, at \*1.

795. 60 F.3d 841 (unpublished table decision), No. 95-1140, 1995 WL 376184 (Fed. Cir. June 8, 1995).

796. *Reece v. Cisneros*, 60 F.3d 841 (unpublished table decision), No. 95-1140, 1995 WL 376184, at \*1 (Fed. Cir. June 8, 1995) (citing *Institute Pasteur v. United States*, 814 F.2d 624, 627-28 (Fed. Cir. 1987)).

797. *Id.*, 1995 WL 376184, at \*1.

798. 64 F.3d 678 (unpublished table decision), No. 94-1444, 1995 WL 502895 (Fed. Cir. Aug. 24, 1995)).

799. *International Gunnery Range Servs., Inc. v. Widnall*, 64 F.3d 678 (unpublished table decision), No. 94-1444, 1995 WL 502895, at \*7 (Fed. Cir. Aug. 24, 1995). The case was remanded to the Board. *See* ASBCA No. 34152, 1996 WL 466645 (Aug. 12, 1996).

800. *Id.*, 1995 WL 502895, at \*5 (citing *Murdock Mach. & Eng'g Co. v. United States*, 873 F.2d 1410, 1413 n.1 (Fed. Cir. 1989); *Coastal Corp. v. United States*, 713 F.2d 728, 731 (Fed. Cir. 1983)); *see* Pub. L. No. 85-804, 72 Stat. 972 (codified as amended at 50 U.S.C. §§ 1431-1435 (1994)) (providing that agency may establish contract adjustment board whose decisions in approving, authorizing, and directing appropriate contract action are not subject to appeal); 48 C.F.R. § 50.201 (1995) (authorizing creation of contract adjustment boards).

801. 60 F.3d 795 (Fed. Cir. 1995).

802. 28 U.S.C. § 2501 (1994).

803. *Henke v. United States*, 60 F.3d 795, 797-98 (Fed. Cir. 1995). The court declined to entertain government arguments raising issues of sovereign immunity. *Id.* at 799.

804. *Id.* (quoting *L.S.S. Leasing Corp. v. United States*, 695 F.2d 1359, 1365 (Fed. Cir. 1982)).

involvement in drug trafficking into the United States, the court determined that the date for claim accrual was sometime following the actual transport.<sup>805</sup> Consequently, the fact that the pilot filed suit six years and one day from the date of transport did not make his claim for payment untimely.<sup>806</sup>

#### E. Bid Protests

In *Network Solutions, Inc. v. Widnall*,<sup>807</sup> the Federal Circuit applied the reasoning set forth in *PRC, Inc. v. Widnall*<sup>808</sup> to hold that the lower court's order vacating the GSBCA's decision sustaining a contractor's protest did not require the Board to dismiss the contractor's motion for costs.<sup>809</sup>

#### F. Contracting Officer's Abuse of Discretion?

Reversing the ASBCA in *Mallory Electric Co. v. Dalton*,<sup>810</sup> the court held that the contractor sufficiently established reliance on the agency's prior practice of paying progress payments due to the contractor in full when it bid on the contract.<sup>811</sup> Consequently, the contracting officer abused his discretion when he withheld a percentage of the progress payments due to the contractor under an informal agency rule.<sup>812</sup>

805. *Id.* at 799-800.

806. *Id.* at 800-01. The court found it unnecessary to address the argument raised by Henke that even if the claim accrued on the date of transport, the statute of limitations would not bar his claim. *Id.* at 799. It ruled that because Henke had filed suit erroneously for more than \$10,000 in district court, the District Court properly had dismissed his claim for lack of jurisdiction. *Id.* Henke argued that such filing equitably tolled the statute of limitations. *Id.*

807. 70 F.3d 1289 (unpublished table decision), No. 94-1480, 1995 WL 656809 (Fed. Cir. Aug. 23, 1995), *rev'g* GSBCA Nos. 11498-P, 11863-C, 94-3 B.C.A. (CCH) ¶ 27,160 (1994).

808. 64 F.3d 644 (Fed. Cir. 1995); *see supra* notes 389-411 and accompanying text for a detailed discussion of this case.

809. *Network Solutions, Inc. v. Widnall*, 70 F.3d 1289 (unpublished table decision), No. 94-1480, 1995 WL 656809, at \*1 (Fed. Cir. Aug. 23, 1995). The case was remanded to the Board and the Board's decision is at GSBCA No. 11863-C-REM, 96-1 B.C.A. (CCH) ¶ 23,148 (1996).

810. 60 F.3d 839 (unpublished table decision), No. 94-1432, 1995 WL 375947 (Fed. Cir. Apr. 5, 1995).

811. *Mallory Elec. Co. v. Dalton*, 60 F.3d 839 (unpublished table decision), No. 94-1432, 1995 WL 375947, at \*2 (Fed. Cir. Apr. 5, 1995).

812. *Id.*, 1995 WL 375947, at \*2 (citing *C. Lawrence Constr. Co.*, ASBCA No. 45270, 93-3 B.C.A. (CCH) ¶ 26,129 (1986)). The court in *Mallory* paraphrased the holding in *Lawrence*, stating:

[When] a bidding contractor assumes, based on its own past experience, that full progress payments will be made for materials stored at a construction site, it is an abuse of discretion for a contracting officer to withhold such payments on the ground that the contractor has not yet paid its supplier.

*Id.*, 1995 WL 375947, at \*2.

In *Minelli v. United States*<sup>813</sup> the court ruled that a contracting officer had no obligation to grant the contractor a waiver of the contract's painting surface temperature restriction and did not abuse his discretion in terminating the contract for default.<sup>814</sup> The court concluded that: (1) a termination for default is appropriate when it is clear that there is no reasonable likelihood that the contractor can complete performance in the time prescribed,<sup>815</sup> (2) when the contractor admitted that it could not perform in a timely manner absent a waiver, default termination was proper,<sup>816</sup> and (3) although the factors enumerated in FAR 49.402-3(f)<sup>817</sup> should inform a contracting officer's decision regarding default termination, failure to consider all factors does not necessarily indicate an abuse of discretion.<sup>818</sup>

#### G. Amount of Interest Due

In *Dalton v. Murdoch Machine & Engineering Co.*,<sup>819</sup> the court affirmed the ASBCA's determination that the Government was entitled to principal and interest on V-Loans held by the Navy<sup>820</sup> and could offset the amounts owed to it from the amounts owed to the contractor following termination for convenience.<sup>821</sup> Disagreeing with the formula adopted by the Board for the calculation of the

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813. 61 F.3d 920 (unpublished table decision), No. 95-5018, 1995 WL 424858 (Fed. Cir. July 18, 1995).

814. *Minelli v. United States*, 61 F.3d 920 (unpublished table decision), No. 95-5018, 1995 WL 424858, at \*1 (Fed. Cir. July 18, 1995).

815. *Id.*, 1995 WL 424858, at \*2.

816. *Id.*, 1995 WL 424858, at \*3.

817. 48 C.F.R. § 49.402-3(f) (1995).

818. *Minelli*, 61 F.3d 920, 1995 WL 424858, at \*4. The regulation sets forth the following factors that contracting officers should consider when determining whether to terminate a contract for default:

(1) The terms of the contract and applicable laws and regulations.

(2) The specific failure of the contractor and the excuses for the failure.

(3) The availability of the supplies or services from other sources.

(4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

(5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination default upon the contractor's capability as a supplier under other contracts.

(6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advanced payments.

(7) Any other pertinent facts and circumstances.

*Id.*, 1995 WL 424858, at \*4 (citing 48 C.F.R. § 49.402-3(f)).

819. 66 F.3d 344 (unpublished table decision), No. 95-1121, 1995 WL 515222 (Fed. Cir. Aug. 30, 1995).

820. *Dalton v. Murdoch Mach. & Eng'g Co.*, 66 F.3d 344 (unpublished table decision), No. 95-1121, 1995 WL 515222, at \*4 (Fed. Cir. Aug. 30, 1995).

821. *Id.*, 1995 WL 515222, at \*2.

amount of interest recoverable by the Navy, the Court set forth the proper formula to be applied by the Board on remand.<sup>822</sup>

#### H. Beacon Oil Co. v. O'Leary

Finally, in a case that the Federal Circuit charitably characterized as "dishearteningly protracted," *Beacon Oil Co. v. O'Leary*,<sup>823</sup> the court issued an opinion that is mind-numbing in its historical detail and dry legal complexity. The court reversed the latest DOEBCA ruling in a fifteen-year-old dispute about the price paid to the Government for a 1979 purchase of crude oil under the Naval Petroleum Reserves Production Act of 1976.<sup>824</sup> The court remanded the case to the DOE Board for trial on the issues of "purchaser" and "posted price."<sup>825</sup>

#### CONCLUSION

In 1995, the Federal Circuit issued a number of government contract decisions that were decidedly helpful in furthering the cause of procurement simplification, a cause also championed by Congress during the same year.<sup>826</sup> Most of the 1995 decisions seem logical and well-supported; nevertheless, one continues to be struck by the amount of time consumed by largely procedural disputes that do not seem to merit Federal Circuit review. Although it certainly is true that any court has its share of cases that reasonable people would agree take an inordinate amount of resources to resolve, the procurement system of the U.S. Government seems especially prone to litigation that could best be resolved in other ways, or that should not arise at all. Endless litigation on when a claim is a claim, involving the centerpiece of the eighteen-year-old CDA, should not have occurred.

Twenty-four years ago, the Commission on Government Procurement issued its Report,<sup>827</sup> the result of an exhaustive two year study of the procurement system, in which it concluded that the then existing government procurement dispute resolution system was inadequate, and that improvements in the system were necessary. The CDA incorporated several of the Commission's suggestions six years later. The CDA was designed specifically to "induce resolution

822. *Id.*, 1995 WL 515222, at \*1-2.

823. 71 F.3d 391 (Fed. Cir. 1995).

824. 10 U.S.C. §§ 7420-7438 (1994).

825. *Beacon Oil Co. v. O'Leary*, 71 F.3d 391, 395 (Fed. Cir. 1995).

826. *See* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified in relevant part in scattered sections of 41 U.S.C.) (simplifying federal procurement processes).

827. *See* COMMISSION ON GOV'T PROCUREMENT, *supra* note 29.

of more contract disputes by negotiation prior to litigation; equalize the bargaining power of the parties when a dispute exists; provide alternate forums suitable to handle the different types of disputes; and insure fair and equitable treatment to contractors and Government agencies.<sup>828</sup>

Unfortunately, as illustrated by the 1995 Federal Circuit cases, we have not yet achieved these goals. The procurement system, and the system for resolving disputes under it, is too cumbersome and expensive, and often is unfair.<sup>829</sup>

The cases before the Federal Circuit in 1995 illustrate that much remains to be done to reform the system and that reform must be undertaken by both the courts and Congress.

*Reflectone, Inc. v. Dalton*<sup>830</sup> was a welcome clarification of what constitutes a CDA claim, but the relief engendered by its appearance is tempered by the knowledge that the system that produced the murky language of FAR 33.201 and *Dawco Construction, Inc. v. United States*<sup>831</sup> is still alive and well. Further, it seems certain that, lacking congressional intervention through new legislation, we will see a series of new cases in the coming years that will argue the details of the *Reflectone* ruling, such as the definition of "routine" and "non-routine" submissions.<sup>832</sup> Termination for convenience claims will be among the first to be applied to *Reflectone*. *Bill Strong Enterprises, Inc. v. Shannon*<sup>833</sup> shows that the availability of costs under CDA claims also must be examined in light of *Reflectone*.<sup>834</sup>

Cases such as *Gould, Inc. v. United States*<sup>835</sup> and *Beacon Oil Company v. O'Leary*<sup>836</sup> seem doomed to sail interminably across the procurement seascape without a means of reasonably quick resolution. It also seems likely that the issues of jurisdiction raised in *Quality Tooling, Inc. v. United States*<sup>837</sup> will rise again, quite possibly in Congress or as a

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828. 41 U.S.C. § 601 (1994).

829. See Eldon H. Crowell & Charles Pou, Jr., *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques*, 49 MD. L. REV. 183, 183 (1990) (suggesting that current appeal system for government contract cases is expensive, complicated, time-consuming, and frustrating).

830. 60 F.3d 1572 (Fed. Cir. 1995).

831. 48 C.F.R. § 33.201 (1995); 930 F.2d 872 (Fed. Cir. 1991).

832. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (discussing "routine" and "non-routine" claims for payment).

833. 49 F.3d 1541 (Fed. Cir. 1995).

834. *Bill Strong Enters., Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995).

835. 67 F.3d 925 (Fed. Cir. 1995).

836. 71 F.3d 391 (Fed. Cir. 1995).

837. 47 F.3d 1569 (Fed. Cir. 1995), *reh'g in banc denied*, 1995 U.S. App. LEXIS 16623 (Fed. Cir. June 16, 1995).

result of a new series of conflicting CDA decisions from the district courts.

Congress and the Clinton administration are attempting to improve the system. In January 1996, Congress passed and the President signed the National Defense Authorization Act for Fiscal Year 1996,<sup>838</sup> the latest attempt at procurement reform. Among other things, the Act removes the bid protest jurisdiction of the GSBCA,<sup>839</sup> eliminating a rich source of appeals (and reversals) for the Federal Circuit. Despite such progress, the only meaningful way to improve the procurement dispute resolution system in a manner that meets the goals of the Commission on Government Procurement is to create an underlying procurement system that is much simpler than any thus far proposed. The ideal system would look more like the commercial system in that it would not hinder government and contractor procurement officials with the sort of convoluted regulations and procedures that have characterized the procurement system since at least World War II. Until such monumental change occurs, the Federal Circuit and other fora will continue to hear too many cases that often seem to have more to do with tossing wrenches into the overly complicated and delicate machinery of the procurement process than the resolution of substantive issues.

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838. Pub. L. No. 104-106, 110 Stat. 186 (1996) (codified in scattered sections of 10, 22, 38, 40, and 41 U.S.C.).

839. *See, e.g.*, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4203, 110 Stat. 186, 654-655 (codified at 41 U.S.C. § 431).