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GOULD, INC. v. UNITED STATES: CONTRACTOR CLAIMS FOR RELIEF UNDER ILLEGAL CONTRACTS WITH THE GOVERNMENT

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INTRODUCTION

Parties generally are free to contract as they see fit. "[T]he right to make and enforce contracts is one of the most valuable and sacred rights of individuals and corporations."[1] Provided there is an offer and an acceptance, mutual consideration, and no fraud or duress, courts will recognize and enforce contracts.[2] The freedom to contract, however, may be restrained when the contract violates the law or offends public policy.[3] Courts generally will not enforce an illegal contract. The term "illegal contract" might refer to a contract that requires performance of an act which is against the law (e.g., a contract that involves payment to commit a crime), or it might refer to a contract, the performance of which is not illegal per se, but that the parties have entered into in violation of the law.[4] This latter type of illegal contract, although somewhat rare in a commercial setting, is more common in the area of government contracts.

Numerous laws and regulations qualify the government's ability to enter into a contract. The Federal Acquisition Regulation alone contains hundreds of regulations that cover solicitation, formation, performance, and termination of government contracts.[5] In addition, numerous other statutes prescribe procedures for and place restrictions on government contracting.[6] Given the myriad of requirements and prohibitions in this area, it is not surprising that the government occasionally enters into contracts in violation of a regulation or statute. Courts generally have held that these "illegal contracts" are void *ab initio* on the theory that the illegality prevented a contract from arising.[7] When an illegality is uncovered following full or partial performance by a government contractor, the inequity of leaving a contractor who has performed in good faith without compensation has forced courts to fashion remedies to make contractors whole.[8]

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1. 17 AM JUR. 2D *Contracts* § 238, at 241 (1991).
2. *Id.* § 16, at 42.
3. *Id.* § 238, at 241.
4. *Id.* § 239, at 243.
5. *See generally* Federal Acquisition Regulation ("FAR"), 48 C.F.R. § 48.000 (1995) (providing description of policies and procedures for obtaining and performing government contracts).
6. *See, e.g.*, 10 U.S.C. § 2306 (1994) (providing regulations for contract awards, including fees, bid procurement, and negotiations); 48 C.F.R. § 452 (detailing solicitation provisions and contract clauses for government contracts).
7. *See* Alabama Rural Fire Ins. Co. v. United States, 572 F.2d 727, 732 (Ct. Cl. 1978) (finding contract void because it was illegal for plaintiff to contract with government to provide insurance outside of Alabama).
8. *See* United States v. Amdahl Corp., 786 F.2d 387, 392-93 (Fed. Cir. 1986) (holding that contractors should be compensated for conferring benefit on government despite fact that

The government frequently argues that it is not liable to a contractor under a contract tainted with illegality.[9] One case in which the government has sought to preclude a contractor's recovery under an illegal contract is *Gould, Inc. v. United States*.[10] For nearly ten years, the parties in *Gould* have been litigating Gould's claims for additional compensation under a contract that the contractor alleges was entered in violation of a federal statute.[11] To date, the Federal Circuit has issued two opinions in the case responding to government motions to dismiss.[12] The history of the *Gould* case and the legal arguments advanced by the parties provide a good opportunity to examine Federal Circuit law applicable to relief under illegal government contracts.

Using the facts and procedural history of *Gould* as a backdrop, this Article examines established precedent recognizing contractor claims for relief despite contract illegalities. Three principle lines of cases are discussed: (1) cases allowing relief under the express contract when the illegality is not palpable; (2) cases allowing relief under an implied-in-fact contract when the government has received a benefit; and (3) cases permitting contract reformation to sever the illegal portion of the contract. The Article then addresses the Federal Circuit's most recent decision in *Gould* and its affirmation of cases allowing relief under illegal contracts.

Finally, the Article argues that important public policy goals are served by recognizing contractor claims under illegal contracts. First, such recognition preserves the integrity of the government procurement system by avoiding losses to innocent contractors while preventing the government from entering into illegal contracts with impunity. Second, the recognition of claims under illegal contracts maintains the distinction between the government as sovereign and the government as a contracting party. When the government is acting as a contracting party, it cannot be permitted to take advantage of other contracting parties by virtue of its sovereign position. The

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contract was illegal).

9. *See id.* at 392-93 (discussing government's claim of non-liability under illegal government contract).

10. 19 Cl. Ct. 257 (1990), *vacated and remanded*, 935 F.2d 1271 (Fed. Cir. 1991); 29 Fed. Cl. 758 (1993), *vacated*, 67 F.3d 925 (Fed. Cir. 1995).

11. Gould, Inc. v. United States, 935 F.2d 1271, 1272 (Fed. Cir. 1991) [hereinafter *Gould II*].

12. *See* Gould, Inc. v. United States, 29 Fed. Cl. 758 (1993) (granting government's motion to dismiss for lack of jurisdiction) [hereinafter *Gould III*], *vacated*, 67 F.3d 925 (Fed. Cir. 1995); Gould, Inc. v. United States, 19 Cl. Ct. 257 (1990) (granting government's motion to dismiss for failure to state a claim) [hereinafter *Gould I*], *vacated*, 935 F.2d 1271 (Fed. Cir. 1991).

government must share the burden of a failed contract declared unenforceable by virtue of an illegality.

I. THE PROCEDURAL HISTORY OF THE *GOULD* LITIGATION

The facts set forth below were alleged by Gould, Inc. ("Gould") in its complaint. The Federal Circuit and the Court of Federal Claims assumed these facts to be true for the purpose of ruling on the motions to dismiss filed by the government in this litigation.[13]

On April 9, 1983, the Navy issued a Request for Proposals ("RFP"), soliciting proposals for tactical radios.[14] The RFP contemplated the award of a multi-year contract pursuant to 10 U.S.C. § 2306(h).[15] The Army previously had procured a similar radio, the Bancroft, but the Navy's RFP called for radios that were to meet more exacting requirements.[16] The Navy's version of the Bancroft-type radio never had been procured or produced.[17]

Prior to contract award, the Navy conducted a question and answer session with potential bidders.[18] At that session, certain bidders requested information that the Navy had developed concerning its version of the radio, but the Navy refused to disclose any of this information.[19]

On October 3, 1983, the Navy awarded the contract to Gould on a fixed-price basis. After Gould began performing the contract, it found significant differences between the earlier Army design and the Navy's contract requirements.[20] Gould could not satisfy the Navy's specifications by upgrading the Army's design, and as a result, a complete redesign became necessary.[21] Accordingly, Gould undertook a major design and development effort, substantially in excess of what it had anticipated in its original proposal.[22]

During contract performance, the Navy released to Gould some of the information that bidders had requested, but that the Navy did not release, at the pre-award conference.[23] This information confirmed that the Army Bancroft radio design required significant design and

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13. Gould, Inc. v. United States, 67 F.3d 925, 927 (Fed. Cir. 1995) [hereinafter *Gould IV*].
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* According to Gould, it had requested information concerning specifications during the pre-award conference. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

development work in order to satisfy the Navy's requirements.[24] Gould never delivered conforming goods under the contract.[25]

On December 11, 1986, pursuant to the Contract Disputes Act,[26] Gould submitted a claim to the contracting officer seeking to recover its increased costs of performance. In its claim, Gould asserted that the increased development effort resulted in a substantial financial loss and a considerable delay in contract performance.[27] The claim requested that the Navy compensate Gould for the unanticipated design and development effort and for anticipated recurring production costs to complete the contract.[28]

In its claim, Gould asserted three grounds for the money damages requested.[29] First, Gould argued that the Navy violated the multi-year procurement statute,[30] which requires a "stable design" before a multi-year procurement may be conducted.[31] Gould alleged that no stable design for the Bancroft radio existed at the time of contract award and that the contract was therefore illegal.[32] Accordingly, Gould claimed entitlement to recover its increased costs of performance.[33]

Second, Gould asserted that the Navy withheld vital information from the bidders, which if released, would have indicated that a substantial design and development effort was required.[34] Third, Gould claimed that, if the Navy truly thought a "stable design" existed, and no substantial design and development effort was required, then the Navy and Gould were mutually mistaken as to a basic factual assumption of the contract.[35]

While the claim was pending, the Navy and Gould executed a termination settlement agreement on December 9, 1987.[36] This agreement expressly preserved Gould's right to pursue the claims set forth in its December 11, 1986 claim.[37]

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24. *Id.*
25. *Id.*
26. Pub. L. No. 97-164, 92 Stat. 2388 (1978) (codified as amended at 41 U.S.C. § 609 (1994)).
27. *Gould IV*, 67 F.3d at 927.
28. *Gould II*, 935 F.2d 1271, 1272 (Fed. Cir. 1991).
29. *Id.*
30. 10 U.S.C. § 2306(h)(1) (1994).
31. *Gould IV*, 67 F.3d at 927.
32. *Id.*
33. *Gould II*, 935 F.2d at 1272.
34. *Id.*
35. *See id.* (explaining that mutual mistake was alleged because both parties believed "tha only minimal design and development effort would be required").
36. *Id.* at 1272-73.
37. *Id.* at 1273.

On January 6, 1988, the contracting officer issued his final decision denying Gould's claim.[38] Gould appealed the final decision to the United States Claims Court on February 12, 1988.[39]

On October 28, 1988, the United States moved to dismiss Gould's action for failure to state a claim. On January 16, 1990, the United States Claims Court, in *Gould I*, granted the United States' motion.[40] Assuming for purposes of the motion that Gould's allegations were true, the court determined that Gould would be entitled to money damages if it prevailed, and that the court, therefore, had jurisdiction to grant such relief.[41] In construing Gould's complaint, however, the trial court decided that Gould had not alleged sufficient facts to support a claim based on illegality, superior knowledge, or mutual mistake.[42]

In *Gould II*, decided on June 7, 1991, the Court of Appeals for the Federal Circuit reversed the Claims Court's order of dismissal.[43] The court agreed that the trial court has the power to grant relief to a contractor when the express contract is illegal,[44] but overturned the trial court's holding that Gould failed to allege facts necessary to support its claims for relief.[45] The court remanded the case, with instructions that the trial court determine whether the facts would merit recovery for Gould.[46]

After remand, the United States filed a motion to dismiss for lack of jurisdiction.[47] On October 29, 1993, in *Gould III*, the Court of Federal Claims granted the government's motion and dismissed the case.[48] The court held that, because Gould based its complaint solely on an allegedly illegal contract with the United States, the only possible basis for jurisdiction was a contract implied-in-law.[49] Because the Court of Federal Claims lacks jurisdiction over implied-in-law contracts,[50] the court found no basis

38. *Id.*
39. *Gould I*, 19 Cl. Ct. 257 (1990).
40. *Id.* at 259.
41. *Id.* at 263.
42. *Id.* at 265.
43. *Gould II*, 935 F.2d 1271, 1272 (Fed. Cir. 1991).
44. *Id.* at 1275.
45. *Id.* at 1275-76. The Federal Circuit also held that the settlement agreement between Gould and the Navy preserved Gould's right to pursue a cause of action for damages. *Id.* at 1276.
46. *Id.*
47. *Gould III*, 29 Fed. Cl. 758, 759 (1993), *vacated*, 67 F.3d 925 (Fed. Cir. 1995).
48. *Id.*
49. *Id.* at 761.
50. *See id.* (holding that Tucker Act does not give right of action against United States when recovery is sought for breach of implied-in-law contract (citing Merritt v. United States, 267 U.S. 338, 341 (1925))); City of El Centro v. United States, 922 F.2d 816, 823 (Fed. Cir. 1990)

for jurisdiction.[51] In addition, the court held that *Office of Personnel Management v. Richmond*[52] barred Gould's claim, and that the Federal Circuit's decision in *Gould II* was not binding because (1) *Richmond* conflicted with that decision; and (2) the issues before the court were not decided in *Gould II*.[53] Gould appealed to the Federal Circuit for the second time.[54]

On October 11, 1995, in *Gould IV*, the Federal Circuit vacated the decision of the Court of Federal Claims and remanded the case once again.[55] The court noted that the government's motion to dismiss for lack of jurisdiction was essentially a motion to dismiss for failure to state a claim.[56] A dismissal for lack of jurisdiction, the court explained, means that the court lacks the power to hear and decide the subject matter of the dispute.[57] When a party has asserted a cause of action, the court must assume jurisdiction, however, to determine whether the allegations in a complaint state a cause of action under which the court may grant relief.[58]

The court determined that Gould had stated a claim upon which relief could be granted, affirming the viability of the theories set forth in two lines of cases argued by Gould: (1) a contractor still may recover under an illegal contract if the illegality is not palpable; and (2) when the illegality is palpable, the contractor may recover under an implied-in-fact contract.[59] The court concluded that the allegations of the amended complaint, viewed in the light most favorable to Gould, were sufficient to support one or both of these theories of relief.[60]

The court also applied the law of the case doctrine,[61] and ruled that its earlier *Gould II* decision was controlling on the issues brought in this appeal.[62] The court cited two reasons for rejecting the

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(maintaining that plaintiff could not recover under contract because Congress had not relinquished government's sovereign immunity with respect to implied-in-law contracts).

51. *Gould III*, 29 Fed. Cl. at 761.

52. 496 U.S. 414 (1990). In *Richmond*, the Court ruled that claims to federal funds based upon a statutory right are limited to those authorized by the statute. *Id.* at 424.

53. *Gould III*, 29 Fed. Cl. at 761-62.

54. *Gould IV*, 67 F.3d 925, 928 (Fed. Cir. 1995).

55. *Id.* at 931.

56. *Id.* at 929.

57. *Id.*; *see* Do-Well Mach. Shop, Inc. v. United States, 870 F.2d 637, 639-40 (Fed. Cir. 1989) (explaining differences between dismissal for lack of jurisdiction and for failure to state claim).

58. *Gould IV*, 67 F.3d at 929.

59. *Id.* at 929-30.

60. *Id.* at 930. The court found that Gould's amended complaint alleged the existence of an implied-in-fact contract and, therefore, a separate basis of jurisdiction. *Id.*

61. *See id.* (explaining that law of case doctrine is judicially created doctrine designed to prevent relitigation of issues already decided by appellate court).

62. *Id.* at 931.

government's argument that the law of the case doctrine did not apply. First, the Federal Circuit held that its decision in *CACI, Inc. v. Stone*[63] did not implicitly overrule cases allowing recovery when an illegality was not palpable.[64] Second, the court found that *Richmond* did not constitute subsequent controlling authority in conflict with the *Gould II* decision because *Richmond* did not apply to contract claims, and, moreover, *Richmond* was not "subsequent" authority.[65] Therefore, the court remanded the case for trial on the merits.[66]

II. ESTABLISHED PRECEDENT RECOGNIZING CONTRACTOR CLAIMS DESPITE CONTRACT ILLEGALITY

The principle that a government contractor may obtain judicial relief when its express contract is illegal stems from century-old Supreme Court precedent.[67] Although contracts awarded in violation of applicable statutes and regulations generally are void *ab initio*, judicial relief still may be available.[68] The contracts are voidable, void, or subject to reformation. The contractor may recover: (1) under the express contract when the illegality is not plain; (2) under an implied-in-fact contract; or (3) under the terms of the express contract as reformed.[69]

A. *Relief Under the Express Contract When the Illegality Is Not Palpable*

Not all illegal contracts are treated as void. When the illegality is not plain to the contractor, courts have treated the contract as merely voidable and have recognized that the contractor may pursue a claim under the express contract.[70] In such instances, courts have recognized that the contractor can be entitled to relief under the contract's Termination for Convenience clause.[71]

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63. 990 F.2d 1233 (Fed. Cir. 1993).

64. *Gould IV*, 67 F.3d at 931.

65. *Id.*

66. *Id.*

67. *See* Clark v. United States, 95 U.S. 539, 544 (1877) (awarding damages to claimant for loss of equipment during performance of government contract despite finding that contract was illegal because it was not in writing).

68. *See* John Reiner & Co. v. United States, 325 F.2d 438, 445 (Ct. Cl. 1963) (granting plaintiff recovery after finding contract was not void *ab initio*), *cert. denied*, 377 U.S. 931 (1964); United States v. Amdahl Corp., 786 F.2d 387, 398 (Fed. Cir. 1986) (upholding plaintiff's damage award after determining that judicial relief was available because illegality of award was not plain).

69. *Amdahl*, 786 F.2d at 393-94.

70. *Id.*

71. *Id.* Government contracts must contain a clause allowing the government to terminate the contract without incurring liability for common-law breach of contract damages. *See* FAR, 48 C.F.R. § 48.000 (1995) (discussing standard Termination for Convenience clause for fixed-price contracts).

In *John Reiner & Co. v. United States*,[72] a dispute arose from a General Accounting Office ("GAO") determination that the government had awarded the contract at issue illegally.[73] The contractor neither caused the illegality, nor knew of the illegality prior to contract award.[74] The Comptroller General recommended cancellation of the contract, and the procuring agency did so. The contractor then sued the government for breach of contract.[75] The Court of Claims held that the contract's illegality did not automatically void the contract and preclude the contractor's recovery.[76] Rather, because the illegality was not "plain" to the contractor, the court concluded that the contract was "deemed lawful, not void," for purposes of granting the contractor a remedy.[77] The court noted:

> [When] a problem of the validity of the invitation or the responsiveness of the accepted bid arises after the award, the court should ordinarily impose the binding stamp of nullity only when the illegality is plain. If the contracting officer has viewed the award as lawful, and it is reasonable to take that position under the legislation and regulations, the court should normally follow suit.[78]

In reaching this result, the Court of Claims emphasized the inequity of punishing an innocent contractor when it did not cause the illegality and was not aware of it.[79] Thus, the court established that when a contract is awarded illegally, the contractor may state a cause of action *under the contract*, with the contractor's remedy measured by the contract's Termination for Convenience clause.[80] This rule entitled the contractor in *Reiner* to the costs incurred for the work performed prior to termination plus a reasonable profit.[81]

During the past thirty years, the Federal Circuit and the Court of Federal Claims, and their predecessors, consistently have followed *Reiner*.[82] These decisions establish that an illegal contract need not

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72. 325 F.2d 438 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964).
73. *John Reiner*, 325 F.2d at 439.
74. *Id.*
75. *Id.* at 440.
76. *Id.* at 444.
77. *Id.* at 442.
78. *Id.* at 440 (footnote omitted).
79. *Id.*
80. *Id.* at 444.
81. *Id.* at 445.
82. *See* Godley v. United States, 5 F.3d 1473, 1475 n.2 (Fed. Cir. 1993) (finding that contract may be voidable rather than void when subcontractor is found guilty of illegal conduct); CACI, Inc. v. Stone, 990 F.2d 1233, 1236 (Fed. Cir. 1993) (holding that contract was void because absence of delegation of procurement authority was plain illegality); United States v. Amdahl Corp., 786 F.2d 387, 393-94 (Fed. Cir. 1986) (applying *Reiner* to find no relief under contract when advance payment provision was plainly illegal); Mapco Alaska Petroleum v. United States, 27 Fed. Cl. 405, 408 (1992) (recognizing on motion for summary judgment that contracts should

be treated as void, thereby depriving the contractor of a right of action under the express contract.[83] Rather, the court will treat the contract as void only when it was "palpably illegal to the bidder's eyes."[84]

Reiner has been applied most frequently in the context of a contract award in violation of law.[85] The Comptroller General established the following guidance regarding when awards made in violation of law should be considered void:

> In determining when an award is plainly or palpably illegal, we believe that if the award was made contrary to statutory or regulatory requirements because of some action or statement by the contractor, or if the contractor was on direct notice that the procedures being followed were violative of such requirements, then the award may be canceled without liability to the Government except to the extent recovery may be had on the basis of *quantum meruit*. On the other hand, if the contractor did not contribute to the mistake resulting in the award and was not on direct notice before award that the procedures being followed were wrong, the award should not be considered plainly or palpably illegal, and the contract may only be terminated for the convenience of the Government.[86]

B. *Relief Under an Implied-in-Fact Contract*

From *Reiner* and its progeny, it is apparent that a court has jurisdiction over an express contract when the contract's illegality is not plain. A contractor who has performed under even a palpably illegal contract also may have a remedy when the contract is declared

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not be nullified for illegality unless illegality is plain); Johnson v. United States, 15 Cl. Ct. 169, 174 (1988) (finding contract void when bid was clearly nonresponsive); Trilon Educ. Corp. v. United States, 578 F.2d 1356, 1360 (Ct. Cl. 1978) (granting relief when contractor later was found not responsible due to criminal conviction of its parent company); Schoenbrod v. United States, 410 F.2d 400, 404 (Ct. Cl. 1969) (finding award and contract invalid when proper procedures were not followed in contract award and illegality was clear under *Reiner* standard); Warren Bros. Roads Co. v. United States, 355 F.2d 612, 615 (Ct. Cl. 1965) (upholding contract award in which lowest bidder was disqualified wrongly because award was not plainly illegal under *Reiner*); Brown & Son Elec. Co. v. United States, 325 F.2d 446, 448 (Ct. Cl. 1963) (ruling that contract was not void when award was founded solely on base bid and not on total bid because illegality was not plain).

83. *Trilon*, 578 F.2d at 1360.

84. *Id.*

85. *See, e.g., Amdahl*, 786 F.2d at 395 (applying *Reiner* to hold that contractor may recover when illegality of contract award is not plain); *Trilon*, 578 F.2d at 1360 (relying on *Reiner* for proposition that courts may allow contractor to recover on ground that contract was not palpably illegal to bidder); *Schoenbrod*, 410 F.2d at 404 (holding that not following Department of Interior's regulations did not constitute breach because contract was illegal under authority of *Reiner*).

86. 52 Comp. Gen. 214, 218 (1972) (citations omitted).

void. A court may have jurisdiction over an implied-in-fact contract when the illegality of the express contract is plain.[87]

An implied-in-fact contract requires all of the elements of an express contract: (1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer; and (4) an unconditional acceptance.[88] An implied-in-fact contract differs from an express contract in that the existence of the implied-in-fact contract must be inferred from the conduct of the parties.[89]

The Federal Circuit has allowed recovery under an implied-in-fact contract when a contract is deemed void due to illegality.[90] *United States v. Amdahl*[91] concerned a contract for the sale and delivery of a computer.[92] The contract terms provided for an initial payment upon signing, with the contractor retaining title to the equipment until payment of the remainder of the purchase price.[93] A disappointed bidder protested the award, and the General Services Board of Contract Appeals held that the initial payment provision rendered the contract illegal.[94] Because the board further concluded that the illegality was "plain and palpable," it ruled that the contractor was not entitled to relief under the contract.[95] The board, therefore, ordered the contractor to return the initial payment to the government and directed the government to return the computer to the contractor.[96]

On appeal, the Federal Circuit affirmed the long-standing principle that a contractor can be entitled to relief under an implied-in-fact contract when the express contract fails because of an illegality.[97] After confirming that a contractor could pursue a contract claim under *Reiner* when a contract was not "plainly" illegal, the court held that a contractor could have an alternative contractual basis for

87. *See Amdahl*, 786 F.2d at 392-93 (allowing contractor to recover under implied-in-fact contract theory, because to do otherwise would violate court's "good conscience" and impose on contractor all economic loss from an illegal contract); Chavez v. United States, 18 Cl. Ct. 540, 545 (1989) (maintaining that under Tucker Act, courts have jurisdiction over implied-in-fact contracts).

88. City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991).

89. Lewis v. United States, 70 F.3d 597, 600 (Fed. Cir. 1995) (citing Baltimore & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923)).

90. *Amdahl*, 786 F.2d at 398.

91. 786 F.2d 387 (Fed. Cir. 1986).

92. *Id.* at 390.

93. *Id.*

94. *Id.*

95. *Id.* at 391.

96. *Id.* at 392.

97. *Id.* at 392-93.

recovery: "The contractor is not compensated *under* the contract, but rather under an implied-in-fact contract."[98]

As the Court of Claims did in *Reiner*, the Federal Circuit in *Amdahl* decided it is inequitable to punish a contractor because of an illegality in the contract.[99] Accordingly, the court concluded that the lower court should not have penalized the contractor by ordering the return of already delivered and accepted items:

> [When] conforming goods or services have been delivered by a contractor and accepted by the government, the contractor has been held entitled to payment, either on a *quantum valebant* or *quantum meruit* basis if the contract is void *ab initio* or to a possibly larger amount if the contract is voidable, that is, deemed valid and terminated for convenience in accordance with the contract. None of the above precedent supports an *order* to return conforming goods as a remedy even where a contract is held to be void *ab initio*.[100]

Amdahl is consistent with Supreme Court precedent from 1877.[101] In *Clark v. United States*,[102] the government entered into an oral contract for the use of a ship.[103] Under the contract, the government was to determine whether the ship met its needs, to pay a daily rate for using the ship, and to assume responsibility for the ship while it was in the government's possession.[104] During the time the ship was in the government's possession, it was destroyed.[105] The owner brought suit in the Court of Claims, but was denied recovery on the ground that a statutory requirement called for all contracts with the government to be in writing.[106]

The Supreme Court agreed with the Court of Claims that the oral contract violated the statutory requirement that all contracts be in writing.[107] Nonetheless, the Court ruled that the contractor was entitled to contractual relief:

98. *Id.* at 393; *see also* Prestex, Inc. v. United States, 320 F.2d 367, 373 (Ct. Cl. 1963) (articulating that even though contract may be unenforceable against government, equity dictates that government pay for goods or services rendered under contract).

99. *Amdahl*, 786 F.2d at 395.

100. *Id.*

101. *Compare* Clark v. United States, 95 U.S. 539, 544 (1877) (holding that claimant should be compensated for providing United States Government with ship) *with Amdahl*, 786 F.2d at 394 (citing *Clark* for proposition that government should compensate claimant for providing computer equipment and services under illegal contract).

102. 95 U.S. 539 (1877).

103. *Id.*

104. *Id.* at 540.

105. *Id.*

106. *Id.* at 541.

107. *Id.*

> We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit.* In the present case, the implied contract is such as arises upon a simple bailment for hire; and the obligations of the parties are those which are incidental to such a bailment. The special contract being void, the claimant is thrown back upon the rights which result from the implied contract.[108]

During the more than 100 years since the Supreme Court's decision in *Clark*, the courts consistently have applied the principle that a contractor is entitled to recover under an implied-in-fact contract when the express contract fails.[109] The Federal Circuit, the Court of Federal Claims, and their predecessors have applied this principle.[110] Courts have not always articulated that the relief they are granting is based on an implied-in-fact contract. For example, in *New York Mail & Newspaper Transportation Co. v. United States*,[111] the government rescinded a contract and the contractor responded by suing for breach of contract.[112] The government argued that the contract was void because it had been awarded in violation of applicable statutes.[113] The court agreed that the contract was

108. *Id.* at 542.

109. United States v. Amdahl, 786 F.2d 387, 393 (Fed. Cir. 1986).

110. *See, e.g.*, Godley v. United States, 5 F.3d 1473, 1475 n.2 (Fed. Cir. 1993) (allowing recovery on contract with United States Postal Service for lease agreement on basis that contract was not "palpably illegal"); Urban Data Sys., Inc. v. United States, 699 F.2d 1147, 1154 n.8 (Fed. Cir. 1983) (discussing *quantum meruit* recovery for implied-in-fact contract for services rendered to government); Farmers Grain Co. v. United States, 29 Fed. Cl. 684, 687 (1993) (determining that plaintiff can recover on implied-in-fact contract with government for providing grain warehouse facilities for storage); United Int'l Investigative Servs. v. United States, 26 Cl. Ct. 892, 899 (1992) (holding that plaintiff could recover on implied-in-fact bases for providing security services to government); Janowsky v. United States, 23 Cl. Ct. 706, 716 (1991) (concluding that business owner could recover for breach of implied-in-fact contract when owner allowed FBI to use its business as front for undercover investigation), *rev'd in part and vacated on other grounds*, 989 F.2d 1203 (Fed. Cir. 1993); Yosemite Park & Curry Co. v. United States, 582 F.2d 552, 560 (Ct. Cl. 1978) (entitling concessioner plaintiff to recovery for value of services received by national park); Cities Serv. Gas Co. v. United States, 500 F.2d 448, 451 (Ct. Cl. 1974) (articulating that court had jurisdiction over implied-in-fact contract by natural gas supplier who supplied gas to Army); Prestex, Inc. v. United States, 320 F.2d 367, 373 (Ct. Cl. 1963) (granting government contractor relief for providing United States Military Academy with cloth for uniforms despite illegal contract); Tidewater Coal Exch., Inc. v. United States, 67 Ct. Cl. 590, 600 (1929) (imposing liability on government for implied contract when government used facilities of Tidewater Coal Exchange).

111. 154 F. Supp. 271 (Ct. Cl.), *cert. denied*, 355 U.S. 904 (1957).

112. New York Mail & Newspaper Transp. Co. v. United States, 154 F. Supp. 271, 272 (Ct. Cl.), *cert. denied*, 355 U.S. 904 (1957).

113. *Id.* at 273.

void;[114] however, it awarded relief under the theory of *quantum meruit*.[115] Although the court did not state explicitly that it was awarding relief under an implied-in-fact contract, it cited *Clark* for the proposition that when one party has performed in whole or in part, the performing party should be reimbursed for the fair value of his property or services.[116]

In *Yosemite Park & Curry Co. v. United States*,[117] the Court of Claims ruled an invalid contract could not bind the government, but also ruled it was clear that "the Government bargained for, agreed to pay for, and received the benefit of YPC's services."[118] Therefore, the contractor was entitled to recover on a *quantum meruit* basis.[119] Although the court did not state that recovery was under an implied-in-fact contract, the reasoning it offered for granting relief focused on the government's agreement to pay and its receipt of benefits.[120]

The Federal Circuit recognizes that the relief granted in these cases is under an implied-in-fact contract and is not merely an equitable remedy designed to cure an injustice.[121] In *Urban Data Systems, Inc. v. United States*,[122] the court determined that the Price Adjustment clauses in two contracts were essentially cost plus a percentage of cost provisions.[123] These provisions are prohibited in government contracts.[124] The court declared the contracts void, stating that the United States is not estopped from denying the acts of its agents who have exceeded their authority.[125] The contractor, however, recovered on a *quantum valebant* basis under an implied-in-fact contract.[126] The court stated, "It is clear, however, that the Government bargained for, agreed to pay for, and accepted the supplies delivered by Urban. It is also plain that only the price terms of the two subcontracts were invalid—not any other part of those agreements."[127]

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114. *Id.* at 276.
115. *Id.*
116. *Id.*
117. 582 F.2d 552 (Ct. Cl. 1978).
118. Yosemite Park & Curry Co. v. United States, 582 F.2d 552, 560 (Ct. Cl. 1978).
119. *Id.*
120. *Id.*
121. *See* Urban Data Sys., Inc. v. United States, 699 F.2d 1147, 1154 (Fed. Cir. 1983) (finding appropriate relief "for the reasonable value in the marketplace of the supplies and concomitant services . . . [because] only the price terms of the two subcontracts were invalid—not any other part of those agreements").
122. 699 F.2d 1147 (Fed. Cir. 1983).
123. *Id.* at 1153.
124. *Id.*
125. *Id.*
126. *Id.* at 1154. The court noted that the use of the *quantum valebant* theory as opposed to the *quantum meruit* theory was of no significance. *Id.* at 1155 n.8.
127. *Id.* at 1154.

The government in *Gould IV* cited cases alleging that the relief granted in illegal contract cases is actually relief under an implied-in-law contract.[128] Whereas an implied-in-fact contract is actually a contract, a contract implied in law is an obligation the law imposes to avoid unjust enrichment of one party at the expense of the other.[129] In response to this argument, the Court of Federal Claims recently recognized in *AT&T v. United States*[130] that "[t]he question was squarely answered against [the government] in [*Amdahl*]."[131]

Despite the acknowledgment by the courts in *AT&T*[132] and *Gould IV*[133] that *Amdahl* clearly states that relief is being granted under an implied-in-fact contract, courts sometimes describe the nature of the relief in terms applicable to equitable relief.[134] For example, in *AT&T*, despite the court's recognition that the law is settled and relief is granted under an implied-in-fact contract, the court went on to characterize the relief available as restitution to restore the parties to the positions they would have occupied but for the failed contract.[135] Restitution, however, typically is available to meet implied-in-law obligations, and is measured by the value of any benefit conferred upon the defendant.[136] *Quantum meruit* damages, as applied to implied-in-fact contracts, are measured by the value of the work performed.[137]

The court's recognition in *Urban Data* and *Yosemite* that the government had agreed to perform under the contract is essential to understanding why the nature of the recovery in these cases accurately is described as relief under an implied-in-fact contract. These cases involve situations in which the government actually agreed to perform under a contract. In hindsight, a court may determine that the government should not have agreed to the contract as written. Nonetheless, the court still may recognize that the government did exchange promises with the contractor. This agreement is the basis for an implied-in-fact contract. By this exchange of promises, the

128. Government's Brief at 17-20, *Gould IV*, 67 F.3d 925 (Fed. Cir. 1995).
129. 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:6, at 25 (4th ed. 1990 & Supp. 1995).
130. 32 Fed. Cl. 672 (1995).
131. AT&T v. United States, 32 Fed. Cl. 672, 682 (1995).
132. *Id.* (discussing line of cases granting relief under implied-in-fact contracts).
133. *Gould IV*, 67 F.3d 925, 930 (Fed. Cir. 1995).
134. *See AT&T*, 32 Fed. Cl. at 683-84 (remanding case to determine if equitable relief was appropriate).
135. *Id.*
136. WILLISTON & LORD, *supra* note 129, § 1:6, at 26-27.
137. 12 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1480, at 280-82 (3d ed. 1970 & Supp. 1995).

government has assumed an obligation to pay the contractor for its performance despite the fact that the express written agreement is deemed void for illegality. The relief due to the contractor, therefore, is contractual, not restitutionary.

The confusion over the nature of the relief arises in part because the contract often ends prematurely after recognition that it is invalid. If a contract has been performed fully and a price promised, then the consideration agreed upon is the measure of recovery. When full performance has not been rendered, however, courts must adopt a means of determining damages. In such circumstances, the contractor may recover in *quantum meruit.* This duty to reimburse the contractor arises under a contract, not from an obligation imposed by law to avoid unjust enrichment. Therefore, the relief afforded contractors under the *Amdahl* line of cases is contractual; the obligation to pay these amounts arises from the agreement of the parties that is implied from their conduct rather than expressly in the contract.

C. *Equitable Relief Through Contract Reformation*

A court may use its inherent equitable powers to fashion a monetary remedy.[138] Contract reformation is among the equitable powers a court may use.[139] Reformation frequently is employed when the parties have made a mistake of fact.[140] The Federal Circuit and the Court of Claims have recognized the jurisdiction of the Court of Federal Claims to reform contracts that violate either statutory or regulatory requirements.[141]

In *Applied Devices Corp. v. United States,*[142] the Navy had awarded a multi-year contract that included a cancellation ceiling, and the applicable regulation required the ceiling to be based on a realistic

138. Pauley Petroleum, Inc. v. United States, 591 F.2d 1308, 1315 (Ct. Cl.), *cert. denied,* 444 U.S. 898 (1979).

139. *See* Quinault Allottee Ass'n v. United States, 453 F.2d 1272, 1274 n.1 (Ct. Cl. 1972) ("Where the relief is monetary, we can call upon such equitable concepts as rescission and reformation to help us reach the right result.").

140. *See, e.g.,* Atlas Corp. v. United States, 895 F.2d 745, 750 (Fed. Cir.) (holding that successful claimant seeking reformation must show that contract contained mistake of fact, that mistake concerned basic assumption about contract, that there was material effect, and that risk of mistake was not on party seeking reformation), *cert. denied,* 498 U.S. 811 (1990).

141. *See id.* (arguing that in reforming contract that violates either statutory or regulatory requirements, there must be clear demonstration of mutual assent); Chris Berg, Inc. v. United States, 426 F.2d 314, 318 (Ct. Cl. 1970) (finding that reformation was appropriate when there is "knowledge of [the] mistake [and] . . . a clear-cut violation of law" related to bidding for contract).

142. 591 F.2d 635 (Ct. Cl. 1979).

estimate of certain costs.[143] The court determined that the ceiling was unrealistic and therefore invalid.[144] The contractor sought to have the contract reformed so as to eliminate the illegal provision, but the government argued that the contractor had waived any right to protest the provision by not protesting the adequacy of the clause during the bidding process.[145] The court concluded that it had jurisdiction to reform the contract.[146] The court explained:

> As held in *Berg*, the contract was made in violation of law when made in disregard of such a provision. This court in *Rough Diamond Co. v. United States* carefully analyzed the differences in treatment between a contract written in violation of a provision of law enacted for the contractor's protection, and violation of a provision of law as to which it can only be said that the contractor derives an incidental benefit from the provision if it is observed. The contractor in the former case can obtain reformation and is not bound by his estoppel, acquiescence, and even failure to protest.[147]

The court concluded that the cancellation ceiling should be reformed and the proper cancellation charge should be calculated using the reformed ceiling.[148]

Similarly, in *Beta Systems, Inc. v. United States*,[149] the court reformed a contract to delete a price index that violated the procurement regulations, finding that the inclusion of the inappropriate price index in the contract's Escalation clause was a mutual mistake of fact.[150] The court rejected the notion that the contractor had assumed the risk that the price index was invalid, stating, "The risk of unintentional failure of a contract term to comply with a legal requirement does not fall solely on the contractor."[151] Faced with an illegality resulting from mutual mistake, the court found reformation was appropriate: "If the contract is in violation of the DAR [Defense Acquisition Regulations], and does not meet the requirement that an index be selected that approximately tracks the economic changes affecting this contract, then reformation is

143. Applied Devices Corp. v. United States, 591 F.2d 635, 636-37 (Ct. Cl. 1979).
144. *Id.* at 640.
145. *Id.* at 637-38.
146. *Id.* at 640.
147. *Id.* (citations omitted).
148. *Id.* at 641.
149. 838 F.2d 1179 (Fed. Cir. 1988).
150. Beta Systems, Inc. v. United States, 838 F.2d 1179, 1185 (Fed. Cir. 1988).
151. *Id.* at 1185-86.

appropriate."[152] Again, the court recognized that promises were exchanged.[153] To the extent the illegal portion of the contract can be severed from the rest of the agreement, the court will enforce the remaining contractual obligations.[154]

In *AT&T*, the Court of Federal Claims held that when a fixed-price research and development contract was invalid for failure to comply with a statute requiring a written finding of risk reduction prior to awarding the contract, the court did not have the power to reform the contract.[155] The court distinguished *Beta Systems* and *Chris Berg*[156] on the ground that, in those cases and others like them, the courts merely were replacing a prohibited term or clause in otherwise valid contracts.[157] The court stated that when a contract is void from its inception, there is nothing to reform.[158]

This argument is premised on the belief that some illegalities are "not significant enough to undermine the foundations of the contract."[159] In such circumstances, reformation is available. The court did not discuss, however, what kind of violation would be considered significant enough to void the contract. This reasoning appears inconsistent with the law on illegal contracts. Even in the *Reiner* line of cases, in which the contract is treated as valid until the illegality is discovered, the courts still make clear that an invalid contract cannot go forward.[160] Therefore, when faced with a request for reformation following the discovery of an illegality, the appropriate question should be: Can this contract be reformed to remove the illegality and still retain the constructive intention of the parties? If the answer is yes, then this remedy should be available following the discovery of an illegality.

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152. *Id.* at 1186; *see also* Craft Machine Works, Inc., ASBCA No. 35167, 90-3 B.C.A. (CCH) ¶ 23,095, at 115,962, 115,969 (1990) (reforming contract, in Board decision, by deleting illegal EPA clause after finding that there were promises exchanged and rest of contract could be severed to save agreement resulting from mutual mistake).

153. *Beta Systems*, 838 F.2d at 1185.

154. *Id.* at 1185-86.

155. AT&T v. United States, 32 Fed. Cl. 672, 682 (1995).

156. Chris Berg, Inc. v. United States, 426 F.2d 314 (Ct. Cl. 1970).

157. *See AT&T*, 32 Fed. Cl. at 682 (finding that, unlike contracts in *Beta Systems* and *Chris Berg*, contract was "void from its inception" and could not be reformed).

158. *Id.*

159. *Id.*

160. *See* John Reiner & Co. v. United States, 325 F.2d 438, 440 (Ct. Cl. 1963) (holding that "there is no place to remake that which was never established in the first instance"), *cert. denied*, 377 U.S. 931 (1964).

III. THE FEDERAL CIRCUIT'S DECISION IN *GOULD IV*

In *Gould IV*,[161] Gould cited the three lines of cases discussed above[162] as establishing the jurisdiction of the Court of Federal Claims over its claims.[163] The Federal Circuit agreed with Gould regarding the *Reiner* and *Amdahl* line of cases, confirming that these cases remain good law.[164] In addition, the court distinguished claims brought under contracts with the government from those based solely on a statutory entitlement.[165] The *Gould IV* decision reinforces the notion that when the government enters a contract, it may not use its position as sovereign to shield itself from liability.

A. *Reaffirmation of* Reiner *and* Amdahl

The Federal Circuit decision in *Gould IV* reaffirms much of the analysis set forth above. The court began by distinguishing between a dismissal for lack of jurisdiction and a dismissal for failure to state a claim upon which relief can be granted.[166] A dismissal for lack of jurisdiction means that the court does not have power to hear and decide the case due to the subject matter of the dispute.[167] On the other hand, a dismissal for failure to state a claim means that the complaint alleges facts which, if proven, are insufficient to entitle a party to relief.[168]

Although the Federal Circuit did not specify in *Gould IV* what the plaintiff must allege to establish the jurisdiction of the court, it appears that the court is saying that once a party puts forward a theory of relief falling within the general subject matter jurisdiction of the court, the court then must take jurisdiction of the case to determine whether the party has alleged facts sufficient to state a cause of action under that theory. Premature arguments that the plaintiff cannot establish the facts necessary to support its legal theory do not defeat jurisdiction. This would be confusing the merits of a case with preliminary issues such as jurisdiction.

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161. 67 F.3d 925 (Fed. Cir. 1995).
162. *See supra* part II (detailing line of cases discussing how contractors may recover under implied-in-law or implied-in-fact contract when original contract is illegal, provided illegality is not palpable).
163. *Gould IV*, 67 F.3d 925, 929-30 (Fed. Cir. 1995).
164. *Id.*
165. *See id.* at 929.
166. *Id.*
167. *Id.*
168. *Id.*

In *Gould IV*, the government argued that, if the contract were illegal, the contracting officer lacked authority to enter either an express or an implied contract.[169] The government asserted, therefore, that Gould could recover only under a contract implied in law, which is outside the jurisdiction of the Court of Federal Claims.[170] According to the Federal Circuit's logic, however, even if the government was correct that authority to contract is an element of establishing entitlement to relief under the theories advanced by Gould, the court still would have to take jurisdiction to determine if Gould had properly alleged authority, and if so, whether the allegation was true.[171]

The court stated that Gould's allegation that an express contract existed, albeit an allegedly illegal one, was sufficient to confer jurisdiction on the court.[172] By arguing that the allegation of illegality divested the court of jurisdiction, the court stated that the government had ignored clear precedent establishing that "'the binding stamp of nullity'" should be imposed only when the illegality is plain, thus reaffirming the *Reiner* line of cases.[173] The court explained that it first must take jurisdiction over the case before deciding the merits issue of whether illegality is plain.[174]

In addition, the court noted that even if Gould's allegations of an express contract were insufficient, Gould alleged the existence of an implied-in-fact contract.[175] The court rejected the argument that the Supreme Court's decision in *Office of Personnel Management v. Richmond*[176] barred recovery under *Amdahl*.[177] Although the Court in *Richmond* held that the government could deny benefits not permitted by law,[178] the Federal Circuit stated that this rule applied only to statutory entitlement cases and not to claims based on

169. *Id.*
170. *Id.*
171. *See id.* ("The Court of Federal Claims must first take jurisdiction over the case before it decides on this record whether an illegality is plain . . . . ").
172. *Id.*
173. *Id.* (quoting John Reiner & Co. v. United States, 325 F.2d 438, 440 (Ct. Cl. 1963), *cert. denied*, 371 U.S. 931 (1964)).
174. *Id.* at 930.
175. *Id.*
176. 496 U.S. 414 (1990).
177. *See Gould IV*, 67 F.3d at 930-31 (noting that in *Richmond*, erroneous advice given by government employee did not confer obligation on government to pay disability funds, whereas under *Amdahl*, implied-in-fact contract did confer obligation to disburse funds).
178. Office of Personnel Management v. Richmond, 496 U.S. 414, 424 (1990).

contracts.[179] Thus, the court also reaffirmed this second basis for jurisdiction set forth in the *Amdahl* line of cases.[180]

In Part I of its opinion in *Gould IV*, the Federal Circuit held that Gould's allegations of entitlement to relief under the express contract, or in the alternative, under an implied-in-fact contract, were sufficient to allow the court to take jurisdiction of the case.[181] In addition, the factual allegations were sufficient to state a cause of action under the theories of *Reiner* and *Amdahl*.[182]

B. *The Law of the Case*

The Federal Circuit also concluded that the law of the case doctrine prevented the government from relitigating the issue unless one of three exceptions applied.[183] The court based this conclusion on its determination in Part I of its opinion that the government's motion was essentially a motion to dismiss for failure to state a claim and on the fact that the court already had decided this issue in *Gould II*.[184] The government argued that the law of the case doctrine was inapplicable because subsequent controlling authority conflicted with the court's earlier determination.[185] The court disagreed.[186]

Courts created the law of the case doctrine to help ensure finality in court decisions.[187] As the Federal Circuit stated in *Gould IV*, "'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 decisions of the appellate

179. *Gould IV*, 67 F.3d at 930 ("Gould's rights are not premised on a statutory entitlement but on a contract claim. It could be stretching *Richmond* totally out of context to apply it here.").

180. *See id.* (finding that court may have jurisdiction when it is found that "contractor can be compensated under implied-in-fact contract when the contractor confers benefit to government in the course of performing a government contract that is subsequently declared illegal" (citing *Amdahl*, 786 F.2d at 392-93)).

181. *Id.* at 928-29.

182. *Id.* at 929-30.

183. *Id.* at 930. The court held that only in three exceptional circumstances will it abandon a previous appellate decision: "(1) the evidence in the 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." *Id.* (citing Gindes v. United States, 740 F.2d 947, 950 (Fed. Cir.), *cert. denied*, 469 U.S. 1074 (1984)).

184. *Id.*

185. *Id.*

186. *Id.* at 931.

187. *See* Messenger v. Anderson, 225 U.S. 436, 444 (1912) (finding that state law construction of will should have been followed when state court initially adjudicated claims, instead of trying case repeatedly in federal court); Jamesbury Corp. v. Litton Indus. Prods., Inc., 839 F.2d 1544, 1550 (Fed. Cir.) (holding that although law of case doctrine should be followed in general, it was inappropriate here where issue of laches was not previously established), *cert. denied*, 488 U.S. 828 (1988), *overruled on other grounds*, A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1039-46 (Fed. Cir. 1992).

courts.'"[188] The more narrowly focused "Mandate Rule" is applied to effectuate the second purpose of the doctrine.[189] The Mandate Rule requires a lower court to implement and abide by a reviewing court's decisions without deviation with regard to issues considered and decided on appeal.[190] The rule precludes the exercise of discretion.[191] As the Supreme Court once stated, a trial court "has no power or authority to deviate from the mandate issued by an appellate court."[192] Likewise, the Federal Circuit recognizes the compulsory nature of the Mandate Rule: "Unlike the authority to reconsider its *own* rulings, a district court is without choice in obeying the mandate of the appellate court."[193]

Because the Mandate Rule establishes the jurisdiction of the lower court on remand, the lower court is not entitled to step beyond the bounds of the appellate court's decision.[194] Accordingly, the trial court's actions on remand must be consistent with both the express terms and the spirit of the mandate.[195] The Mandate Rule further requires that the decision of the appellate court is the controlling law unless and until modified by the appellate court.[196] Even if the correctness of the law of the case is called into question, arguments for departure from the established mandate must be addressed to the appellate court.[197]

The court in *Gould IV* first found that the government was attempting to relitigate the decision in *Gould II*.[198] In *Gould II*, the Federal Circuit held that in its settlement agreement with the Navy, Gould had reserved the right to pursue a cause of action for damages on three grounds without restricting itself to the remedy of reformation.[199] Therefore, the lower court's dismissal on the basis that Gould had not alleged adequate grounds for reformation was not proper.[200] Next, in *Gould II*, the Federal Circuit determined that

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188. *Gould IV*, 67 F.3d at 930 (quoting *Jamesbury*, 839 F.2d at 1550).

189. *See* Briggs v. Pennsylvania R.R., 334 U.S. 304, 306 (1948) (describing "Mandate Rule" as prohibiting inferior courts from deviating from mandates issued by appellate courts).

190. *Id.*

191. *Id.*

192. *Id.*

193. *In re* Roberts, 846 F.2d 1360, 1363 (Fed. Cir. 1988) (in banc).

194. *See generally* 1B JAMES WM. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.404[10], at II-58 (2d ed. 1995 & Supp. 1995-96) ("[T]he district court owes obedience to the mandate of the Supreme Court or the court of appeals and must carry into effect according to its terms.").

195. Quern v. Jordan, 440 U.S. 332, 347 n.18 (1979).

196. 1B MOORE & LUCAS, *supra* note 194, ¶ 0.404[10], at 60-61.

197. 1B MOORE & LUCAS, *supra* note 194, ¶ 0.404[10], at 60-61.

198. *Gould IV*, 67 F.3d 925, 930 (Fed. Cir. 1995).

199. *Gould II*, 935 F.2d 1271, 1273-76 (Fed. Cir. 1991).

200. *Id.* at 1274-75.

Gould had alleged sufficient facts to support a claim for equitable relief under an illegal contract in accordance with *Amdahl*.[201] In addition, the Federal Circuit noted that the government's allegation that a stable design existed (and thus, no illegality) belied the Claims Court's finding that Gould knew or should have known that the design was not stable.[202] Therefore, the Claims Court in *Gould III* wrongly construed the facts indicating awareness of the extent of design work necessary against Gould.[203] Although the Federal Circuit in *Gould II* did not say so explicitly, the lack of awareness would support relief under *Reiner*.[204]

When faced again in *Gould IV* with the contention that Gould could not establish entitlement to relief under either an express or an implied contract, the court held that the Mandate Rule required the lower court to follow its decision in *Gould II*, unless one of three exceptional circumstances existed.[205]

The government in *Gould IV* argued that one of the exceptions—subsequent controlling authority conflicting with the law of the case—applied in this instance.[206] In particular, the government maintained that the Federal Circuit decision in *CACI, Inc. v. Stone*[207] barred relief under *Reiner*.[208]

In *CACI*, the Army entered into a contract for automatic data processing services without obtaining a delegation of procurement authority from the General Services Administration as required by regulation.[209] The court ultimately held that the absence of actual contracting authority voided the contract.[210] The court, however, considered whether relief might be available under *Reiner*.[211] Because the illegality was plain, the court denied relief.[212] The court also determined that a board of contract appeals could not ratify the contract when the agency lacked authority to contract.[213]

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201. *Id.* at 1275.
202. *Id.*
203. *Id.*
204. *See supra* part II.A (discussing *Reiner* rule whereby relief may be granted under illegal express contract, provided illegality is not "palpable" to contractor).
205. *Gould IV*, 67 F.3d 925, 930 (Fed. Cir. 1995); *see also supra* note 183 and accompanying text (describing three exceptional circumstances whereby lower court does not have to follow appellate mandate).
206. *Gould IV*, 67 F.3d at 929.
207. 990 F.2d 1233 (Fed. Cir. 1993).
208. *Gould IV*, 67 F.3d at 929-31.
209. CACI, Inc. v. Stone, 990 F.2d 1233, 1235 (Fed. Cir. 1993).
210. *Id.* at 1236.
211. *Id.*
212. *Id.* at 1235.
213. *Id.* at 1236.

In *Gould IV*, the government contended that *CACI* stands for the proposition that absence of authority is a palpable illegality, that the contracting officer was without authority to enter into a contract in violation of the multi-year procurement statute, and that therefore, relief under *Reiner* was unavailable to Gould.[214] The implication of the government's argument was that *CACI* overruled *Reiner*, however, because a contracting officer never would have authority to enter a contract that violates a statute; therefore, the illegality always would be palpable and the contract always would be void. The Federal Circuit explained in *Gould IV*, though, that rather than contradicting the holding in *Reiner*, the court in *CACI* had been applying *Reiner* to the facts of that case.[215] The court denied relief only after concluding that the illegality was plain.[216]

The court also found the government's argument that *Richmond* bars recovery under *Amdahl* erroneous because *Richmond* dealt with a statutory entitlement.[217] In *Richmond*, the Supreme Court held that mistaken advice given by a government employee to a disabled former government employee did not estop the government from denying benefits that were not authorized by law.[218] Congress had not provided for payment to this individual.[219] Therefore, payment would violate the Appropriations Clause of the Constitution.[220] In *Gould IV*, the government argued that *Richmond* prevented Gould from obtaining the relief it sought because Gould was attempting to secure relief under the multi-year procurement statute.[221] The Federal Circuit found that the case was not a statutory entitlement case;[222] rather, Gould was seeking relief under a contract with the government.[223] The court held that *Richmond* was inapplicable to contract claims against the government.[224] The court stated, "It would be stretching *Richmond* totally out of context to apply it here."[225]

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214. *See Gould IV*, 67 F.3d 925, 931 (Fed. Cir. 1995) (finding that "*CACI* did not overrule the holding of *Reiner*. . . but merely applied the law in *Reiner* to the particular facts in that case."). The court in *Gould IV*, however, maintained jurisdiction to determine whether, as in *CACI*, there was plain error. *Id.*

215. *Id.* at 931.

216. *Id.*

217. *Id.*

218. Office of Personnel Management v. Richmond, 496 U.S. 414, 432 (1990).

219. *Id.* The Court held that the relevant statute excluded the respondent's claim and that only Congress could provide a remedy. *Id.*

220. *Id.* at 434.

221. *Gould IV*, 67 F.3d at 927 (citing 10 U.S.C. § 2306(h)(1)(D) (1982)).

222. *Id.* at 929.

223. *Id.* at 930.

224. *Id.* at 931.

225. *Id.* at 930.

This decision is consistent with the Federal Circuit's holding in *Burnside-Ott Aviation Training Center, Inc. v. United States.*[226] In *Burnside-Ott*, decided after *Gould II* and *Richmond*, the court explicitly held that *Richmond* does not apply to contract claims.[227] The court distinguished a monetary claim based on "entitlement contrary to statutory eligibility criteria" from a claim based on a "contract with the Navy."[228] The Federal Circuit held that *Richmond* had no application in a contract setting:

> Burnside-Ott's assertion of a right to payment of money from the Public Treasury, however, is not based upon a statutory entitlement. Burnside-Ott's assertion is instead based upon its contract with the Navy. Nor does Burnside-Ott claim entitlement contrary to statutory eligibility criteria, as did Richmond. Thus, neither the holding nor analysis in *Richmond* is applicable in this case . . . . [229]

Subsequent decisions of the Court of Federal Claims and the boards of contract appeals consistently have recognized and applied this distinction, concluding that contract claims are not governed by *Richmond.*[230]

Because *Richmond* does not apply to contract claims, it is not conflicting authority applicable to the issues in *Gould*. Further, the court stated that it was aware of the decision in *Richmond* when it decided *Gould II*, and therefore, it was not *subsequent* authority.[231] Thus, because *Gould II* addressed and decided the same issues presented in *Gould IV*, and because no exceptions to the law of the case doctrine applied, the Mandate Rule prevented the Court of

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226. 985 F.2d 1574 (Fed. Cir. 1993).

227. Burnside-Ott Aviation Training Ctr. v. United States, 985 F.2d 1574, 1581 (Fed. Cir. 1993).

228. *Id.*

229. *Id.*

230. *See, e.g.*, Bunce v. United States, 28 Fed. Cl. 500, 506 (1993) (noting that in *Burnside-Ott*, Federal Circuit rejected broad reading of *Richmond* in favor of more narrow interpretation that would allow equitable estoppel claims against government); Peters v. United States, 28 Fed. Cl. 162, 168-69 (1993) (holding that *Richmond* does not apply when United States Air Force dismissed plaintiff for weight problems because of lack of affirmative misconduct by government); P.J. Dick, Inc., GSBCA No. 11772, 94-3 B.C.A. (CCH) ¶ 27,266, at 135,860 n.11 (1994) ("[I]n *Richmond*, the claimant was seeking to secure benefits pursuant to a Government employee's advice that was contrary to statute; here, . . . appellant is attempting only to secure the benefits of what it contends is its bargain; it is not trying to gain funds under conditions which Congress has precluded."); Bell-Boeing Joint Venture, ASBCA No. 39681, 94-1 B.C.A. (CCH) ¶ 26,383, at 131,247 (1993) (finding that contractor's claim against United States Navy was valid because claim was based in contract and not on statute); Kozak Micro Sys. Inc., GSBCA No. 10519, 91-1 B.C.A. (CCH) ¶ 23,342, at 117,061 (1990) (holding that *Richmond* is inapplicable in strictly contractual matter when government was not held responsible for selectively sending bills to auditor who understood contractual arrangement), *appeal dismissed mem.*, 949 F.2d 402 (Fed. Cir. 1991).

231. *Gould IV*, 67 F.3d 925, 931 (Fed. Cir. 1995).

Federal Claims from dismissing the case for failure to state a claim upon which relief can be granted.

IV. RECOGNITION OF CLAIMS UNDER GOVERNMENT CONTRACTS DESPITE AN ILLEGALITY SERVES IMPORTANT PUBLIC POLICY GOAL

A. *Equitable Considerations: Integrity of the Government Procurement System*

Reiner and *Amdahl* recognize the inequity of forcing the contractor to absorb the costs it expended believing a contract to be valid when in fact the contract was not.[232] In a highly regulated field such as government contracts, there is significant risk that a contract may deviate in some way from the applicable statutes and regulations. In such a situation, the court must answer the question: Who should bear the risk of contract illegality? The Federal Circuit has determined that the contractor should not bear all of this risk.[233] This determination is a just one.

1. *The risk of illegalities that are not palpable*

Where an illegality is not plain to a contractor, there are two possibilities regarding the government's knowledge: either the government is aware or should be aware of the illegality, or, like the contractor, the government is mistaken in believing the contract to be valid. In either case, the contractor should not bear all of the consequences of the illegality.

If the government is aware or should be aware of the illegality, an innocent contractor should not have to suffer the entire loss when the contract is declared void. In the worst case scenario, the government could enter illegal contracts with impunity, knowing that it will not be held accountable if the contract later is declared void. Failing to hold the government liable when a contract is deemed invalid more likely would remove the incentive for government officials to review their contracts carefully for compliance with all applicable laws and regulations. In addition, it would erode contractor confidence in the procurement system. The courts presume that government officials

232. *See* United States v. Amdahl Corp., 786 F.2d 387, 392-93 (Fed. Cir. 1993); John Reiner & Co. v. United States, 325 F.2d 438, 440 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964).

233. *See Amdahl*, 786 F.2d at 392-93 (finding that when one has conferred benefit to government, even though contract is deemed illegal, equity suggests that government should compensate individual for performance of contract).

act in good faith.[234] Contractors dealing with the government should be able to do the same.

In the second instance, when both the government and the contractor are mistaken about the legality of the contract, the contractor still should have an avenue for relief when the illegality is uncovered. The contractor should not bear the full burden of the mistake; rather, both parties should suffer the consequences of the mistake to the extent of their respective responsibility, if any, in causing or failing to detect the illegality. This rule will encourage more diligence on the part of both the government and its contractors in reviewing contracts for potential illegalities.

In addition, as the Court of Claims recognized, it is difficult enough for government contracting officers to keep up with all of the requirements of procurement law.[235] Requiring contractors to police government efforts to comply with applicable statutes and regulations would be unfair.

In *Trilon Educational Corp. v. United States*,[236] the government canceled a contract shortly after it had been awarded based on a determination that the contractor was not responsible due to a criminal conviction of the president of its parent company.[237] The contractor sued for breach of contract.[238] The government argued that the contract was void.[239] The court, however, perceived the inequity of denying relief to the contractor in that situation.[240]

Procurement officers must navigate a maze of statutes and regulations, about which bidders know little. It would be unfair for contractors to suffer for every deviation. Therefore, when the deviation is not egregious, the court prefers to allow the contractor to recover on the ground that the contracts were not palpably illegal to the bidder's eyes.[241]

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234. Caldwell & Santmeyer v. Glickman, 55 F.3d 1578, 1581 (Fed. Cir. 1995) ("We assume the government acts in good faith when contracting."); Torncello v. United States, 681 F.2d 756, 770 (Ct. Cl. 1982) ("[T]he government, unlike private parties, is assumed always to act in good faith, subject only to an extremely difficult showing by the plaintiff to the contrary.").

235. *See* Trilon Educ. Corp. v. United States, 578 F.2d 1356, 1357 (Ct. Cl. 1978) (finding that court will give great weight to good-faith effort in awarding otherwise erroneous contract because illegality is often "not so obvious").

236. 578 F.2d 1356 (Ct. Cl. 1978).

237. *Id.* at 1357.

238. *Id.* at 1358-59.

239. *Id.* at 1360.

240. *Id.* at 1361.

241. *See id.* (holding that procurement contract canceled due to error made in "good faith but erroneous responsibility judgments generally will not serve to invalidate a contract award").

In *Trilon*, the court noted that the bidder had no duty to provide the information regarding the conviction voluntarily.[242] Rather, the contracting officer was obligated to uncover facts bearing on the responsibility determination.[243] The court stated that the contractor was entitled to assume that the contracting officer would make an adequate investigation in compliance with the regulations.[244] Based on the perceived inequity of punishing the contractor for the government official's mistake, the court determined that *Reiner* controlled and treated the cancellation as a termination for convenience.[245]

In considering the allocation of the risk of contract illegality, the purpose of the law violated also is relevant. Many of the laws and regulations governing government contracts were enacted for the protection of the public welfare. There are very tight restrictions on the government's ability to spend public funds.[246] For example, the Anti-Deficiency Act[247] prohibits the government from entering into obligations in advance or in excess of appropriations and prohibits the acceptance of voluntary services.[248] Congress adopted the original version of the Act believing that it was morally and perhaps legally obligated to appropriate funds to cover deficiencies that resulted when the government obtained or accepted goods and services in advance or in excess of appropriations.[249] The Anti-Deficiency Act protects the process by which funds are appropriated and shields the Treasury from unauthorized debts incurred by government representatives.[250]

Likewise, the multi-year procurement statute[251] limits the government's ability to enter certain kinds of contracts because funds for the

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242. *Id.* at 1359.
243. *Id.*
244. *Id.*
245. *See id.* (finding "that when the question of legality is close, the contractor should be accorded the benefit of the doubt, in order to allow the reimbursement of good faith expenditures" (citing John Reiner & Co. v. United States, 325 F.2d 438, 440 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964))).
246. *See* Anti-Deficiency Act, 31 U.S.C. §§ 1341-1344 (1994) (making it illegal for any government official to spend more money than is available as part of agency appropriation).
247. *Id.*
248. *See id.* § 1341(a)(1)(B) (proscribing government involvement "in a contract or obligation or the payment of money before an appropriation is made unless authorized by law").
249. *See* 59 Comp. Gen. 369, 372 (1980).
250. *See* 31 U.S.C. § 1341(B) (providing that no government employee may "involve . . . [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law").
251. Pub. L. No. 97-295, 96 Stat. 1291 (codified at 10 U.S.C. §§ 2302, 2306b (1994)).

contract in future years may not be forthcoming.[252] The statute also serves the equally important goal of protecting contractors, however. Because of the risk that funds may not be appropriated for future years, the multi-year procurement statute permits such contracts only if a stable design exists, thereby reducing other risks such as the need for extensive design work on a product that is not fully developed.[253]

In contracting with the Navy, Gould assumed the risk that the contract might be terminated prior to completion.[254] This risk, however, did not include the risk that the Navy might utilize the wrong type of contract, thereby voiding the contract.[255] If, as Gould alleges, the use of a multi-year contract was not permissible for this procurement,[256] Gould should not incur the unanticipated costs resulting from that violation. Gould did not cause the violation and further alleges that the government possessed the knowledge that would have made the violation clear.[257] Relief must be available to protect the contractor from the unique vulnerabilities of contracting with a party that also enjoys the powers of the sovereign.

2. *The risk of plain illegalities*

The "innocent contractor" scenario discussed above makes a fairly sympathetic case for allowing relief to contractors. On the other hand, what should be done when the illegality is "palpabl[e] to the bidder's [eyes]"?[258] Why should a contractor be entitled to recover in such a situation? Does a government contractor assume the risk of such illegalities?

As the Federal Circuit recognized in *Amdahl*, it still is important to afford relief to a contractor despite the contract's plain illegality.[259] Often, illegalities in government contracts result from the government's failure to comply with certain regulations that are prerequisites to entering certain kinds of contracts. A contractor does

252. *See* 10 U.S.C. §§ 2302, 2306b(a) (stating that there must be sufficient funds forthcoming for the government to enter into contract because without congressional authorization, government is precluded from entering into obligation).

253. *Id.* § 2306b(a)(4) (noting that head of agency may enter into multi-year contract so long as "there is [a] stable design for the property to be acquired and . . . the technical risks associated with such property are not excessive").

254. *Gould IV*, 67 F.3d 925, 927 (Fed. Cir. 1995).

255. *See id.* (discussing Gould's argument that Navy had provided incorrect information making specific contractual agreement impossible to finish on time).

256. *Id.*

257. *Id.*

258. Trilon Educ. Corp. v. United States, 578 F.2d 1356, 1360 (Ct. Cl. 1978).

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

not possess the wherewithal to determine whether these requirements have been met, and possibly lacks the means to enforce them against the government. Holding a party liable for something over which it exercises no control would be inequitable. Stated another way, it would be inequitable to allow a party (in this case, the government) to escape a burden created by its own actions.

Government contractors stand in a unique position. Even if a contractor believes that a contract provision might be illegal, the contractor's bargaining power with the government is limited. In the *Gould* case, the government asserts that the contract was legal.[260] If the government believes the contract and the method of contracting are legal, the contractor has few options. It can lodge a protest (thereby incurring additional costs), it can walk away, or it can bid on the contract. Obviously, a prudent contractor often cannot afford to walk away from potential business. Because the government enjoys greater bargaining power than the contractor, it is equitable to impose on the government some, if not the majority, of the risk of palpable illegalities.

In sum, when a contractor incurs substantial costs as a result of an illegal contract—and particularly when, as Gould alleges, the illegality stems from the very fact that additional work will be required—it is incumbent upon the government to deal fairly with the contractor. As the Federal Circuit has observed:

> The need for mutual fair dealing is no less required in contracts to which the government is a party, than in any other commercial arrangement. "It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government."[261]

Thus, the Federal Circuit's reaffirmation of the availability of relief for contractors under the theories set forth in *Reiner* and *Amdahl* serves the equitable purpose of allocating to the government some of the risk that a contract may be deemed void for illegality.

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260. *Gould IV*, 67 F.3d at 929 (arguing that contract based on implied-in-law claim falls outside jurisdiction of Court of Federal Claims and should be dismissed).

261. Maxima Corp. v. United States, 847 F.2d 1549, 1556 (Fed. Cir. 1988) (quoting St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting)); *see also* Brandt v. Hickel, 427 F.2d 53, 57 (9th Cir. 1970) ("To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government.").

B. The Distinction Between the Government as Contractor and the Government as Sovereign

The government's position as sovereign also alters the balance of power in its contractual relationships. Absent statutes such as the Contract Disputes Act[262] and the Tucker Act,[263] the government would be immune from suit in relation to its contracts. Although sovereign immunity has been waived, such waiver is strictly construed.[264] In addition, statutes such as the Anti-Deficiency Act and the multi-year procurement statute place very specific restrictions on the government's ability to contract.[265] Numerous internal government regulations of which a contractor may have little or no notice also affect government contracting.[266] These laws and regulations are considered necessary to protect the sovereign. Therefore, violation of these statutes and regulations results in an illegal contract.[267] Such laws and regulations place additional burdens on a contractor contracting with the government that do not exist in a commercial setting. The Federal Circuit's determination that the government can be held liable under an illegal contract helps to maintain the separation between the government as sovereign and the government as contractor. This principle is in accord with other decisions in which courts have refused to permit the government to take advantage of its sovereign powers when contracting.

The government as contractor enjoys certain privileges that a private party does not. For example, government contractors assume the risk that the government representative with whom they are dealing does not possess actual authority to contract.[268] This risk is higher than the risk that a party to a private contract assumes because apparent authority, as well as actual authority, is sufficient to bind a

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262. 41 U.S.C. §§ 601, 609 (1994).

263. 28 U.S.C. § 1491 (1994).

264. *See, e.g.*, Lane v. Pena, 116 S. Ct. 2092, 2096 (1996); Ardestani v. Immigration & Naturalization Serv., 502 U.S. 129, 130 (1991); Library of Congress v. Shaw, 478 U.S. 310, 318 (1986).

265. *See* 31 U.S.C. §§ 1341, 1344 (1994) (allowing government to contract only when specifically authorized through law and when funds have been appropriated).

266. *See, e.g.*, 41 C.F.R. § 201-20.305.1(a)(1) (1995) (requiring Army to get approval when entering into any contract exceeding $2 million).

267. CACI, Inc. v. Stone, 990 F.2d 1233, 1235 (Fed. Cir. 1993) (quoting Schoenbrod v. United States, 410 F.2d 400, 404 (Ct. Cl. 1969)).

268. *See* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947) (finding, in context of insurance dispute regarding coverage of wheat protection under Federal Crop Insurance Act, that "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority").

party in a commercial setting. In *Gould IV*, the government attempted to expand this sovereign privilege.[269] The government argued that if Gould's allegations of illegality were true, then the contracting officer did not have actual authority to enter either an express or an implied contract.[270] Therefore, even if Gould's allegations were correct, Gould would have no right to recover.[271]

In effect, the government's argument in *Gould IV* would impose on the contractor an additional burden beyond the risk that the person with whom the contractor deals does not have actual authority to bind the government. By linking authority and illegality, *all* of the risk of illegality would fall on a contractor because an illegality automatically would strip the government representative of the authority to contract. Thus, the government sought to broaden a provision applicable only to the government as sovereign so as to allow the government as contractor to escape any risk that a contract will be deemed illegal.

The Federal Circuit did not address the authority issue in *Gould IV*.[272] The court did, however, distinguish the government as sovereign from the government as contractor in its discussion of *Richmond*.[273] The court held that *Richmond*, which dealt with a statutory entitlement, was inapplicable to contract claims.[274] This distinction is very important. The government as sovereign has the right and ability to pass laws defining eligibility criteria for benefits programs.[275] The possibility that an individual government employee might give incorrect advice regarding eligibility cannot alter the sovereign's determinations regarding entitlement to benefits.[276] Such a rule would deprive Congress of its constitutional power to

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269. *See Gould IV*, 67 F.3d 925, 928-29 (Fed. Cir. 1995) (arguing that despite existence of contractual agreement, no contract could have been formed because contracting officer lacked authority to enter into illegal contracts).

270. *Id.* at 929.

271. *Id.*

272. *See id.* at 930 n.5 (finding that court had decided issue of whether Gould had stated claim upon which relief could be granted in *Gould II* and declining to consider new argument in support of same ground for relief).

273. *See id.* at 930 (arguing that unlike *Richmond* in which there was contractual claim, it would be unfair for government to hide behind veil of sovereign in this case).

274. *Id.*

275. *See* Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 51 (1986) (arguing that Congress can establish eligibility criteria related to benefits conferred as part of government program).

276. *See* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85 (1947) (finding that reliance on erroneous advice of government official does not entitle relier to what was promised mistakenly because "[j]ust as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents") (citations omitted).

appropriate funds.[277] Moreover, the recipient of the erroneous advice has not given any consideration for the benefits, and may receive benefits only to the extent that the law permits. Thus, whereas in the private sector an individual may be liable by operation of promissory estoppel under the facts of *Richmond*, the government is not so bound.[278]

When the government signs a contract, however, it is not acting as the sovereign.[279] It is interacting with a specific party with whom it exchanges specific promises.[280] The government cannot be permitted to hold itself out as a contractor or hold out a contracting officer as a person with authority to contract, and then later escape liability on the ground that the authority of the designated government contracting agent automatically is stripped by virtue of an illegality.[281] If a contracting officer has authority to bind the government, that authority cannot be rescinded due to an error in the manner in which the officer exercises his authority.[282]

In addition, in *Gould IV*, the government attempted to use its position as sovereign to excuse itself from any liability by arguing that Congress enacted the multi-year procurement statute for the benefit of the government and that the statute provides no remedy to the contractor when the statute is violated.[283] The government further asserted that sovereign immunity is not waived for government violations of the statute.[284]

A number of government contract cases predicate standing to litigate on whether the plaintiff is an intended beneficiary of the statute at issue.[285] Although those cases are not discussed here, this argument is important to note because it constitutes another attempt by the government to avoid liability for contractual damages by claiming the powers of the sovereign. When the government signed the multi-year contract with Gould, it impliedly promised that a stable design existed. If the government ignores that promise and any costs

277. *Id.* at 385.

278. In discussing *Richmond*, the court in *Gould IV* stated that "erroneous advice given by a government employee to a person seeking . . . benefits could not estop the government from denying benefits that were not otherwise permitted by law." *Gould IV*, 67 F.3d at 930.

279. *See* Torncello v. United States, 681 F.2d 756, 762 (Ct. Cl. 1982) (finding that government's power is limited when contracting).

280. *Id.*

281. *Id.*

282. *Id.*

283. *Gould IV*, 67 F.3d 925, 931 (Fed. Cir. 1995).

284. *Id.*

285. *See, e.g.*, Rough Diamond Co. v. United States, 351 F.2d 636 (Ct. Cl. 1965), *cert. denied*, 383 U.S. 957 (1966).

incurred by the contractor as a result of the promise by invoking the shield of sovereign immunity, it essentially withdraws one of the promises given as consideration under the contract. The government cannot be permitted to do so without compensating the contractor for the consequences of the failed promise.

Other decisions have recognized the importance of distinguishing between the government as sovereign and the government as contractor in other contexts in which, by virtue of special requirements and clauses applicable to the government as sovereign, the government seeks to escape liability under a contract.[286] Although courts have not always articulated the importance of mutuality of obligation, they have alluded to it in declining to let the government use its position as sovereign to avoid contractual duties.[287]

For example, in *Torncello v. United States*,[288] the contractor entered into a requirements contract with the government, but the government never provided work with regard to one of the activities covered by the contract.[289] Instead, the government gave the work to another contractor who performed at a lower cost.[290] The first contractor sued for breach of contract seeking lost profits.[291] The government argued that recovery was limited by the Termination for Convenience clause, which allowed the government to terminate the contract at any time.[292] The concept of "termination for convenience" is unique to government contracting.[293] This clause is considered necessary because, at times, the public good requires the termination of a contract. Although a contractor is reimbursed for its costs, including costs of the termination and profit on work already completed, it is not entitled to breach of contract damages, that is, lost profits.[294]

The court in *Torncello*, however, held that the government could not use the Termination for Convenience clause to exculpate itself entirely from its contractual promises.[295] The court stated, "We

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286. *See, e.g.*, *Torncello*, 681 F.2d at 762 (finding that government cannot abuse its power when contracting with private entity and must perform its contractual obligations).

287. *See id.* at 760, 762 (finding that, despite apparent authority to break any contract, government had to live up to bargain it entered into or else all government contractual promises would seem illusory).

288. 681 F.2d 756 (Ct. Cl. 1982).

289. *Id.* at 758.

290. *Id.*

291. *Id.*

292. *Id.* at 759.

293. *Id.* at 760.

294. *Id.* at 772.

295. *Id.*

note as one of the most elementary propositions of contract law that a party may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void, and we question if the Government's termination for convenience clause should be construed that broadly."[296] In essence, the government in *Torncello* was withdrawing its consideration—the promise to purchase its requirements from a particular contractor.[297] The court held the government liable for breach of contract.[298] Although the Termination for Convenience clause allows the government additional freedom to end contracts, it does not permit the government to shirk all of its contractual obligations.[299]

A more recent Supreme Court decision addressed the government's liability as a contractor when legislation enacted subsequent to contracting rendered certain terms of the contract illegal. In *Winstar Corp. v. United States*,[300] several healthy savings institutions had entered into contracts with the government to take over failing thrifts following the crisis in the savings and loan industry in the 1980s.[301] To induce these healthy thrifts to acquire failing institutions, the government agreed to let the acquiring thrifts use certain favorable accounting treatments.[302] Congress later resolved to disallow these accounting treatments and enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"),[303] which explicitly prohibited use of the types of accounting treatments that the healthy institutions had bargained for in their agreements to acquire failing thrifts.[304] The contractors sought to recover for breach of contract.[305] The government claimed it could not be held liable under the contracts because its performance was prevented by a sovereign act—the enactment of FIRREA—and the right to exercise sovereign power may not be limited unless the government does so

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296. *Id.*

297. *See id.* at 758-60 (finding that, despite promises to one contractor, government entered deal with another contractor when it found new contract price favorable).

298. *Id.* at 772. The Court of Federal Claims recently has decided that *Torncello* prohibits invocation of the Termination for Convenience clause only when the government has *actual* knowledge that it will not perform the contract prior to contracting. Advanced Materials v. United States, 34 Fed. Cl. 480, 483 (1995).

299. *Torncello*, 681 F.2d at 766.

300. 116 S. Ct. 2432 (1996).

301. United States v. Winstar Corp., 116 S. Ct. 2432, 2442 (1996).

302. *Id.*

303. Pub. L. No. 101-73, 103 Stat. 183, 282-313 (1989) (codified in relevant part at 12 U.S.C. § 1464 (1994)).

304. 12 U.S.C. § 1464.

305. *Winstar*, 116 S. Ct. at 2447.

in unmistakable terms.[306] The government sought to broaden this doctrine so that it would be excused from nonperformance caused by any statutory change unless the contract unmistakeably reflected an intent for the government to remain bound.

In *Winstar*, the government's principal argument relied upon the so-called unmistakability doctrine.[307] After reviewing the case law, the Court explained that "application of the doctrine thus turns on whether enforcement of the contractual obligation would block the exercise of a sovereign power of the Government."[308] If it would, then the sovereign act excuses the government's own performance of a contract, unless the government in unmistakeable terms promised to remain bound. On this basis, the Court ruled that the unmistakability doctrine was no defense:

> The Government's position is mistaken, however, for the complementary reasons that the contracts have not been construed as binding the Government's exercise of authority to modify banking regulation or of any other sovereign power, and there has been no demonstration that awarding damages for breach would be tantamount to any such limitation.[309]

In rejecting what it characertized as "a conceptual expression" of the doctrine, the Court explained that "it would make an inroad on [the Government's] power to contract, by expanding the Government's opportunities for contractual abrogation, with the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements."[310]

The government also argued its breach was excused by the sovereign acts doctrine. This doctrine excuses the government whenever a sovereign act is a "public and general" act.[311] The Court again rejected the government's position, describing the doctrine's application as follows:

> The sovereign act doctrine thus balances the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor. If the answer is no, the Government's defense to liability depends on the answer to the further question,

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306. *Id.* at 2453.
307. *Id.*
308. *Id.* at 2456.
309. *Id.* at 2458.
310. *Id.* at 2459.
311. *Id.* at 2463.

whether that act would otherwise release the Government from liability under ordinary principles of contract law.[312]

Because the Court found the government failed on both tests, it ruled the sovereign act doctrine not to be a defense.

The Federal Circuit's decision in *Gould IV* comports with these decisions differentiating the role of the government as sovereign from its role as contractor. In the context of contracts deemed void for illegality, the government cannot be permitted to walk away without compensating a contractor for any resulting loss. *Torncello*, *Winstar*, and *Gould* all involve attempts by the government to gain special treatment when it acts as a contractor. The Federal Circuit and its predecessor, the Court of Claims, have refused to allow the government as contractor to gain an unfair advantage. The Supreme Court now has sanctioned that these decisions rightly maintain the integrity of the procurement system and prevent contractors from bearing additional risks when contracting with the government.

CONCLUSION

Courts have long provided for relief for contractors when their contracts with the government are deemed illegal.[313] The Federal Circuit in *Gould IV* expressly reaffirmed two of these avenues for relief: recovery under the express contract when the illegality is not palpable and recovery under an implied-in-fact contract when the government has received a benefit. These theories of relief prevent losses to innocent contractors and force the government to bear some of the risk that a contract may be determined to violate a statute or regulation. In addition, allowing relief for contractors under either an express or an implied contract theory forces the government to act as any other contractor, thereby leveling the playing field for government contractors.

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312. *Id.* at 2465.

313. *See* United States v. Amdahl Corp., 786 F.2d 387, 393 (Fed. Cir. 1986) ("'Even though a contract be unenforceable against the Government, because not properly advertized, not authorized, or for some other reason, it is only fair and just that the Government pay for goods delivered or services rendered and accepted under it.'" (quoting Prestex, Inc. v. United States, 320 F.2d 367, 373 (Ct. Cl. 1963))).