

YEAR IN REVIEW: THE FEDERAL CIRCUIT’S 2020 GOVERNMENT CONTRACT LAW DECISIONS

THE HONORABLE JERI KAYLENE SOMERS, JEDIDIAH BLAKE II, MATTHEW
GURR, & W. BENJAMIN PHILLIPS III*

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* Judge Jeri K. Somers is the Chief Judge (Chair) of the U.S. Civilian Board of Contract Appeals (CBCA). In addition to managing the CBCA, Judge Somers carries a full docket and presides over trials involving multi-million-dollar contract disputes arising from all civilian federal agencies. Judge Somers also served in the U.S. Air Force as a Judge Advocate, retiring in the rank of Lieutenant Colonel in the U.S. Air Force Reserves. In her last assignment, she served as a Military Trial Judge, where she heard felony and misdemeanor cases involving military defendants. Judge Somers is currently a Professorial Lecturer in Law at the *George Washington University School of Law* and the *American University Washington College of Law*. Judge Somers earned her J.D. from the *American University Washington College of Law* and her B.A. in Biology from *George Mason University*. She holds bar memberships in Virginia and the District of Columbia. Jedidiah Blake II is a Class of 2020 graduate of the *George Washington University School of Law* and a Law Clerk at the CBCA. Matthew Gurr is a Class of 2020 graduate of the *University of South Carolina School of Law* and a Law Clerk at the CBCA. W. Benjamin Phillips III is a Class of 2020 graduate of the *George Washington University School of Law* and a Law Clerk at the CBCA. The authors would like to thank Judge Somers and Judge Lester for their assistance and guidance in preparing this Article. The views expressed in this Article are solely those of the authors and do not reflect the official policy or position of the CBCA or the U.S. government.

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INTRODUCTION

This Article discusses a number of important 2020 government contracts decisions from the U.S. Court of Appeals for the Federal Circuit. As in previous years, appeals involving government contracting issues comprised only a small portion of the Federal Circuit’s docket, the majority of which is consistently intellectual property disputes.¹ Although only comprising a small portion of the docket, the government contracts appeals that the Federal Circuit considered in 2020 covered a wide range of topics. This year-in-review first addresses Federal Circuit decisions across three major issues in government contracts appeals—cost and pricing, contract interpretation, and bid protests—before examining other significant decisions of which procurement practitioners should

1. APPEALS FILED, BY CATEGORY FY 2020, U.S. CT. OF APPEALS FOR THE FED. CIR., http://www.ca9.uscourts.gov/sites/default/files/the-court/statistics/04_-_Caseload_by_Category.pdf [<https://perma.cc/JN9X-6ENJ>].

be aware. The purpose of the Article is not only to keep procurement practitioners “informed of developments in the law but also to [help practitioners] understand how the Federal Circuit decides government contracts appeals and better anticipate where the law may turn next.”²

DISCUSSION: THE FEDERAL CIRCUIT’S 2020 GOVERNMENT CONTRACTS
DECISIONS

A. *Cost and Pricing*

The Federal Circuit issued three notable precedential decisions in 2020 addressing government contracts cost and pricing issues. In *Kellogg Brown & Root Services, Inc. v. Secretary of the Army*,³ the court set a standard for cost reasonableness. In *Parsons Evergreene, LLC v. Secretary of the Air Force*,⁴ the court considered issues regarding the burden of proof for cost reasonableness and damages. Finally, in *Oliva v. United States*,⁵ the court addressed expectancy damages.

1. *Kellogg Brown: Cost reasonableness standard*

a. *Procedural history and facts*

In 2001, the U.S. Army awarded a contract to Kellogg Brown and Root Services, Inc. (“KBR”) to “provide logistical support in the form of goods (such as trailers used for temporary housing).”⁶ The Army agreed to provide a level of force protection equal to that which it would provide to U.S. military civilians in areas in which military operations were taking place.⁷

In 2003, the Army issued a task order requiring KBR to support operations in Iraq by supplying temporary housing trailers for Army personnel located there.⁸ KBR awarded a subcontract to Kuwaiti Company of Kuwait (“Kuwaiti”) for the necessary trailers, the number of which slowly increased as the Army requested additional trailers through several task order modifications.⁹ Issues with the force protection

2. Nathaniel E. Castellano, *Year in Review: The Federal Circuit’s 2019 Government Contract Law Decisions*, 69 AM. U. L. REV. 1265, 1266–67 (2020).

3. 973 F.3d 1366 (Fed. Cir. 2020).

4. 968 F.3d 1359 (Fed. Cir. 2020).

5. 961 F.3d 1359 (Fed. Cir. 2020).

6. *Kellogg Brown*, 973 F.3d at 1368.

7. *Id.*

8. *Id.*

9. *Id.* at 1369.

resulted in a dispute between KBR and the Army¹⁰ and delivery delays between Kuwaiti and KBR, which forced Kuwaiti to hold trailers at the Kuwait-Iraq border.¹¹ Kuwaiti claimed costs that it incurred from the backup and delivery delays, and KBR granted equitable adjustments to Kuwaiti totaling over \$48 million.¹² In turn, KBR requested an equitable adjustment from the Army totaling over \$51 million, but the Army Contracting Officer (CO) issued a final decision allowing less than \$4 million and rejecting the remainder of the costs.¹³

KBR appealed to the Armed Services Board of Contract Appeals (ASBCA or “the Board”).¹⁴ The Board denied the claim; it found that while convoy limitations affected KBR’s delivery time, the delay could not be attributed to the government because the Army made its best efforts to provide timely force protection, and the contract never stated that force protection would be readily available without delay.¹⁵ The Board also found that the equitable adjustment that KBR paid out to Kuwaiti was unreasonable because KBR simply accepted Kuwaiti’s statement of its incurred costs without carefully reviewing Kuwaiti’s business documents to identify *actual* incurred costs.¹⁶ Further, the Board found that Kuwaiti’s request for equitable adjustment (REA) pricing model was unrealistic.¹⁷ Following the Board’s decision, KBR appealed to the Federal Circuit.¹⁸

b. The Federal Circuit’s decision

In a decision by Judge Timothy Dyk, which Judge Evan Wallach joined, the Federal Circuit affirmed the Board’s decision.¹⁹ Notably, the court did not address the force protection issue, instead focusing on cost reasonableness.²⁰ The court pointed to Federal Acquisition

10. *See generally* Sec’y of the Army v. Kellogg Brown & Root Servs., Inc., 779 F. App’x 716, 718 (Fed. Cir. 2019) (providing the procedural history of the legal dispute between KBR and the Army regarding force protection).

11. *Kellogg Brown*, 973 F.3d at 1369.

12. *Id.*

13. *Id.*

14. *Kellogg Brown & Root Servs., Inc.*, ASBCA No. 57530, 19-1 BCA ¶ 37,205, *aff’d*, 973 F.3d 1366 (Fed. Cir. 2020).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Kellogg Brown*, 973 F.3d at 1368, 1370.

19. *Id.* at 1368.

20. *Id.*

Regulation (FAR) 31.201-2(a), which states that costs are only allowable if they are reasonable.²¹ Additionally, contractors bear the burden of establishing that costs are reasonable.²² The court also clarified that there was no presumption of reasonableness or entitlement to reimbursement simply because costs were incurred.²³

The court examined KBR's justifications for its claimed costs beginning with the delays at the Kuwait-Iraq border.²⁴ First, KBR overestimated the actual costs in assuming that the required number of trucks were always ready to move out each day, when in reality, Kuwaiti's records showed that there were different numbers of trucks ready each day.²⁵ Second, KBR assumed that the Army could provide force protection each day, but there were factors outside of the Army's control that prevented daily convoys.²⁶ Third, KBR's estimates regarding how long trucks waited at the border were imprecise and lacked supporting evidence to establish reasonableness.²⁷ Fourth, KBR calculated a daily rate of \$300 for "each truck, trailer, and driver" held idle at the border but offered no data or evidence to support that specific amount.²⁸ Under the subcontract, Kuwaiti was required to keep precise records regarding daily costs, number of idle trucks, number of idle days, and so on.²⁹ KBR had access to the records, but instead of using the records to calculate incurred costs, KBR relied on estimates and presented insufficient evidence to support the estimates.³⁰ Additionally, there were inconsistencies between the proposed estimates and the actual record.³¹

21. *Id.* at 1371 (citing FAR 31.201-2(a) (2019)).

22. *Id.* (citing FAR 31.201-3(a) (2019)).

23. *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1363 (Fed. Cir. 2013) (per curiam), *opinion corrected on denial of reh'g*, 563 F. App'x 769 (Fed. Cir. 2014).

24. *Kellogg Brown*, 973 F.3d at 1371.

25. *Id.* at 1372.

26. *Id.* at 1373; *see Kellogg Brown & Root Servs., Inc.*, ASBCA No. 57530, 19-1 BCA ¶ 37,205 (finding that U.S. intelligence often concluded that the roads were "too dangerous for travel" due to activity by insurgents recurrently aimed at the convoys), *aff'd*, 973 F.3d 1366 (Fed. Cir. 2020).

27. *Kellogg Brown*, 973 F.3d at 1373.

28. *Id.*

29. *See id.* at 1372-73 (detailing the type and accuracy of the records that Kuwaiti kept regarding its contract with KBR).

30. *Id.*

31. *Id.* at 1374.

The court also examined KBR's justifications for claimed costs relating to double-handling.³² Once at the border, some of the trailers were kept in a storage facility, and KBR wanted reimbursement for those costs as well.³³ However, the court found that those estimates suffered from the same problems discussed above, namely that KBR did not supply any meaningful evidence to show that the costs were reasonable and, in some cases, did not even specify the purpose of the costs.³⁴

KBR argued that the Board failed to apply the "jury verdict" method.³⁵ But the court pointed out that the jury verdict method is not favored and should only be used when other "more exact[] methods cannot be applied."³⁶ KBR did not show that other methods were unavailable, and the court held that the Board was right to reject the jury verdict method.³⁷

c. The dissent

Judge Pauline Newman, dissenting, concluded that the court should have remanded the case to the Board for KBR to try to meet the court's reasonableness standard.³⁸ The dissent argued that the majority's reasonableness standard was "new and undefined" and that KBR had no opportunity to meet that standard.³⁹ While KBR submitted enough documentation under the jury verdict method that it should have recovered something, the majority instead looked at the assorted materials in the record and held that they were not detailed enough to meet the reasonableness standard.⁴⁰ But the dissent found that KBR's documentation was not prepared with the majority's standard in mind; in fact, the contract did not require that KBR submit actual costs, and KBR only spent two pages in its brief discussing reasonableness.⁴¹ To

32. *Id.*

33. *Id.*

34. *Id.* at 1374–75.

35. *Id.* at 1375. The jury verdict method is a technique that the Court of Federal Claims and Boards of Contract Appeals occasionally use, in which the court or board simply approximates the contractor's costs. Gary S. Ward, *Avoid the Uncertainty of a Jury Verdict: Prove Your Quantum Using Actual Costs*, WILEY (Winter 2014), <https://www.wiley.com/newsletter-4878> [<https://perma.cc/6RY8-GWWY>].

36. *Kellogg Brown*, 973 F.3d at 1375 (quoting *Dawco Constr., Inc. v. United States*, 930 F.2d 872, 880 (Fed. Cir. 1991)).

37. *Id.*

38. *Id.* at 1377 (Newman, J., dissenting).

39. *Id.* at 1377–78.

40. *Id.* at 1378.

41. *Id.* at 1377–78.

allow proper application of this new cost reasonableness standard, the dissent wanted the case remanded so KBR could submit detailed evidence and expert testimony.⁴²

d. Takeaways

This case sets out how precise contractors must be when bringing cost overrun claims to the Federal Circuit or Boards of Contract Appeals (BCAs). The court requires *actual* cost information, and contractors must provide detailed and precise evidence to show that the incurred costs were reasonable. When actual cost data is available, contractors should not rely on the jury verdict method or loose estimates but should instead carefully review the actual costs and use precise calculations when submitting REAs.

2. Parsons Evergreene⁴³: *Cost reasonableness and damages*

a. Procedural history and facts

In 2003, the government awarded Parsons Evergreene (“Parsons”) an indefinite delivery, indefinite quantity (ID/IQ) contract for construction work.⁴⁴ In 2005, the government issued a \$34 million task order for the design and construction of two facilities at an Air Force base in New Jersey.⁴⁵ In 2008, Parsons completed the work and the Air Force accepted it.⁴⁶ Then, in 2012, Parsons submitted a claim for \$34 million in alleged incurred costs during contract performance.⁴⁷ The CO’s final decision practically denied the entire claim, and Parsons appealed to the ASBCA.⁴⁸

42. *Id.* at 1377.

43. The authors do not discuss the jurisdictional issues presented and discussed in this case because they are beyond the scope of this Article. For a detailed summary of the jurisdictional issues and the court’s ruling, see *Federal Circuit Rejects Air Force’s Claim that Contract for Welfare of Servicemembers Was Not a Procurement Under the CDA Because It Did Not Benefit the Agency*; Parsons Evergreene, LLC v. Secretary of the Air Force, *Fed. Cir.* 2019-1931, 2019-1975, PUB K GROUP (Aug. 14, 2020), <https://pubkgroup.com/law/federal-circuit-rejects-air-forces-claim-that-contract-for-morale-and-welfare-of-servicemembers-was-not-a-procurement-under-the-cda-parsons-evergreene-llc-v-secretary-of-the-air-force-fed> [<https://perma.cc/437M-ZRG9>].

44. Parsons Evergreene, LLC v. Sec’y of the Air Force, 968 F.3d 1359, 1362 (Fed. Cir. 2020).

45. *Id.*

46. *Id.*

47. *Id.* at 1362–63.

48. *Id.* at 1363.

In a lengthy opinion, the Board sustained the appeal in part, awarding the contractor over \$10.5 million.⁴⁹ The relevant issues involved cost impacts of brick design and paint brands, and cost reasonableness. Parsons's architects wanted to use a more efficient brick design than the design plans called for, specifically a structural brick design that would help prevent progressive collapse.⁵⁰ The government required Parsons to use the design that the plan specified but modify it to prevent progressive collapse.⁵¹ Parsons's REA reflected the additional money spent to use the modified version of the specified brick design.⁵² The Board only granted a portion of those incurred costs.⁵³

For the paint, there was confusion about whether Parsons needed to use Triarch or Sherwin Williams paint for the walls.⁵⁴ Parsons applied Sherwin Williams paint and incurred costs when the government told it to use Triarch paint instead.⁵⁵ The Board concluded that Parsons should have used Triarch paint but acknowledged that the Air Force was liable for the costs Parsons incurred in switching to and applying Triarch paint due to the Air Force's indecision about which paint to use.⁵⁶ However, the Board held that Parsons could not recover costs that it incurred in applying Sherwin Williams paint because it did not describe such costs in its claim.⁵⁷

Finally, regarding cost reasonableness, the Board concluded that Parsons's alleged incurred costs were reasonable because the Air Force audited the claim and never raised any objections concerning reasonableness to any specific costs.⁵⁸ In their concurrence, Board Judges Richard Shackelford and J. Reid Prouty discussed cost reasonableness.⁵⁹ The concurrence disagreed with the finding that the costs were

49. *Parsons Evergreene, LLC*, ASBCA No. 58634, 18-1 BCA ¶ 37,137, *aff'd in part and rev'd in part*, 968 F.3d 1359 (Fed. Cir. 2020).

50. *Id.* The structural brick design is a "single brick wall system" as opposed to the "two wall system" the design specifications called for. *Id.* Progressive collapse is "a phenomen[on] that occurs when certain members of a building are damaged and weight is transferred to other members that cannot handle the weight and the building starts to collapse." *Id.*

51. *Parsons Evergreene*, 968 F.3d at 1369.

52. *Id.*

53. *Id.*

54. *Parsons Evergreene, LLC*, ASBCA No. 58634, 18-1 BCA ¶ 37,137.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* (Shackelford, J., concurring).

reasonable due to the government not making specific objections and instead conducted its own review of the record to conclude that the costs were reasonable.⁶⁰

Parsons appealed to the Federal Circuit on several issues, including the brick design and paint issues.⁶¹ The government cross-appealed, raising several jurisdictional issues as well as an objection to the Board's finding of cost reasonableness.⁶²

b. The Federal Circuit's decision

In a unanimous decision by Judge Dyk, which Judge Raymond Clevenger and Judge Todd Hughes joined, the Federal Circuit affirmed in part, reversed in part, dismissed in part, and remanded.⁶³ As stated above, the bulk of the decision addressed the jurisdictional issues, but the court also reached the merits on the paint, brick design, and cost reasonableness issues.⁶⁴

On the paint issue, the court affirmed the Board's decision.⁶⁵ The court examined this claim under a damages standard in which the contractor must "provide a basis for making a reasonably correct approximation of the damages' for which the government is liable."⁶⁶ Parsons had the burden of proving incurred costs in applying Sherwin Williams paint.⁶⁷ Parsons argued that the record contained enough information for the Board to calculate the cost, but the court held that it is not for the Board to comb through thousands of pages in the record to make calculations that the contractor should have provided.⁶⁸ The court also rejected Parsons's assertion that the Board should have given it the opportunity to supply that calculation before deciding the case; instead, the court found that the Board was not required to "alert a [claimant] that it may find the asserted theory,' or any other theory that the claimant could have argued, 'lacking in

60. *Id.*

61. *Parsons Evergreene, LLC v. Sec'y of the Air Force*, 968 F.3d 1359, 1367, 1369 (Fed. Cir. 2020).

62. *Id.* at 1362.

63. *Id.*

64. *Id.* at 1367.

65. *Id.* at 1368.

66. *Id.* (quoting *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 969 (Ct. Cl. 1965)).

67. *Id.*

68. *Id.*

evidence before it actually does so in [an opinion].”⁶⁹ The court held that Parsons had not met its burden to prove damages and that the motion for reconsideration was untimely because the evidence already existed when Parsons filed the original claim.⁷⁰

Concerning the brick design issue, the court reversed the Board’s decision.⁷¹ Parsons argued that it spent more money to modify the specified brick design plan because it required two walls and Parsons had to address progressive collapse issues.⁷² The court held that the Board erred in not granting full recovery.⁷³ The award for an equitable adjustment is “the difference between the reasonable cost of performing without the change . . . and the reasonable cost of performing with the change.”⁷⁴ Performing without the change would have meant using the structural brick design, a cheaper and more efficient method, whereas Parsons’s actual construction costs represented the cost of performing with the change.⁷⁵ The court reversed and instructed the Board to award Parsons the difference between its actual costs using the government’s brick design and the costs that Parsons would have incurred if it had used the structural brick design.⁷⁶

Finally, on the issue of cost reasonableness, the court affirmed the Board’s conclusion that the costs were reasonable.⁷⁷ The government argued that the Board incorrectly shifted the burden of reasonableness onto the government when case law and the FAR put the burden on the contractor.⁷⁸ The court noted that the main Board decision erred in shifting the burden but pointed out that the concurring opinion with two judges was the majority on the cost reasonableness issue and that it used the correct standard.⁷⁹ The concurring opinion performed a brief but sufficient analysis of the justifications Parsons made to prove

69. *Id.* (alterations in original) (quoting *Fanduel, Inc. v. Interactive Games LLC*, 966 F.3d 1334, 1343 (Fed. Cir. 2020)).

70. *Id.* at 1368–69.

71. *Id.* at 1369.

72. *Id.*

73. *Id.*

74. *Id.* (alteration in original) (quoting *Morrison Knudsen Corp. v. Fireman’s Fund Ins.*, 175 F.3d 1221, 1244 (10th Cir. 1999)).

75. *Id.*

76. *Id.*

77. *Id.* at 1370.

78. *See id.* at 1369–70; *see also supra* Section I.A.1.b (discussing how FAR 31.201-2 states that only reasonable costs are allowable, and that contractors bear the burden of proving that a cost is reasonable).

79. *Parsons Evergreene*, 968 F.3d at 1370.

its claimed costs were reasonable.⁸⁰ Lastly, the government did not raise issues of prejudice over the Board's error in the main opinion, so the court concluded that it was harmless error.⁸¹

c. Takeaways

This case discusses both damages and cost reasonableness. On damages, the case imparts that contractors must provide a reasonable and correct approximation of damages for which they allege the government is liable. Contractors cannot rely on the court or the BCAs to do the calculations for them. Additionally, the case provides a formula for determining equitable adjustment awards. The court, or a BCA, awards the difference between the reasonable cost of performing without a change and the reasonable cost of performing with a change. Finally, the case reiterates that the burden is on the contractor to prove that its claimed costs are reasonable.

3. *Oliva: Expectancy damages*

a. Procedural history and facts

In January 2015, Steven Oliva, a U.S. Department of Veterans Affairs (VA) employee from 2000 to 2016, received a letter of reprimand from the VA for "accusing a supervisor of improperly pre-selecting an applicant for a position."⁸² After Oliva filed a formal grievance, a settlement agreement resolved the issue and stated that written and verbal references would be positive and not mention the letter.⁸³ The VA terminated Oliva in April 2016.⁸⁴

In 2018, Oliva filed a complaint with the Court of Federal Claims (COFC) alleging that the VA violated the settlement agreement on two occasions⁸⁵: first in 2015 by disclosing to a prospective employer that Oliva had a letter of reprimand on file, and second in February 2016 by providing a reference to a prospective employer that was not in compliance with the settlement agreement.⁸⁶ Oliva argued that, but for the alleged breaches, he would have secured employment in both

80. *Id.*

81. *Id.*

82. *Oliva v. United States*, 961 F.3d 1359, 1361 (Fed. Cir. 2020).

83. *Id.*

84. *Id.*

85. *Oliva v. United States*, No. 18-104C, 2018 WL 3455135, at *1 (Fed. Cl. July 18, 2018).

86. *Id.* at *2.

instances and received relocation incentives from the VA.⁸⁷ Oliva sought to recover payment for the relocation incentives and the VA moved to dismiss the case for failure to state a claim.⁸⁸ The COFC found that Oliva plausibly alleged that the VA breached the settlement agreement but failed to state a claim to justify recovery of the relocation incentive payments.⁸⁹

Later, in 2018, Oliva filed an amended complaint again asking for recovery of the relocation incentive payments and also lost salary for the period after his termination in 2016.⁹⁰ The VA filed a motion to dismiss both claims.⁹¹ For the relocation incentive payment claim, the COFC granted the motion to dismiss, finding that Oliva had not alleged sufficient facts to show that he was eligible to receive the payments.⁹² The COFC also dismissed the lost salary claim.⁹³ The court held that despite Oliva's allegations that the VA's breach was the but-for cause of his lost salary, he provided no facts to support his assertions and was in fact terminated for performance reasons unrelated to the settlement agreement.⁹⁴ Oliva appealed to the Federal Circuit.⁹⁵

b. The Federal Circuit's decision

In a unanimous decision by Judge Dyk, which Judge Newman and Judge Wallach joined, the Federal Circuit reversed and remanded the COFC's decision.⁹⁶ The court used the "expectancy damages" standard to examine the merits of the complaint.⁹⁷ Expectancy damages are the "benefits the nonbreaching party expected to receive in the absence of a breach."⁹⁸ To recover expectancy damages, the plaintiff must "show that the claimed damages . . . would not have occurred but for the breach."⁹⁹

87. *Id.* at *1.

88. *Id.* at *3, 5.

89. *Id.* at *5.

90. *Oliva v. United States*, No. 18-104C, 2019 WL 1953131, at *1, *3 (Fed. Cl. May 1, 2019), *rev'd*, 961 F.3d 1359 (Fed. Cir. 2020).

91. *Id.* at *3.

92. *Id.* at *5–6.

93. *Id.* at *7.

94. *Id.*; *Oliva*, 961 F.3d at 1362.

95. *Oliva*, 961 F.3d at 1362.

96. *Id.* at 1361.

97. *Id.* at 1362.

98. *Id.* (quoting *Cal. Fed. Bank v. United States*, 395 F.3d 1263, 1267 (Fed. Cir. 2005)).

99. *Id.* (alteration in original) (quoting *Fifth Third Bank v. United States*, 518 F.3d 1368, 1374 (Fed. Cir. 2008)).

Proving but-for causation requires that the plaintiff definitively establish a causal connection between the breach and the loss.¹⁰⁰

For the lost salary count, the court held that the COFC erred in finding that Oliva had not pled sufficient facts to state a claim.¹⁰¹ Oliva argued that due to the disclosure of the letter of reprimand to one potential employer in 2015 and the non-conforming reference supplied to another potential employer in 2016, he lost out on two potential jobs.¹⁰² The VA argued that because Oliva dated his lost salary claim from the date of his termination, he was arguing that he should recover because of the termination.¹⁰³ However, the court found that Oliva sufficiently pled that he would never have been terminated and lost salary but for the VA's breaches that cost him two employment positions.¹⁰⁴ Additionally, the court pointed out that on a motion to dismiss, it is "obligated to draw all reasonable inferences in favor of Mr. Oliva and accept as true his plausible factual allegation that he would have received an offer of employment at either [employer] . . . but for the alleged breaches."¹⁰⁵

The court held that the COFC erred as well on the relocation incentive pay count.¹⁰⁶ Oliva argued that he would have received the relocation pay because he should have been moving to a new position in 2015 or 2016 but for the VA breaches of the settlement agreement.¹⁰⁷ The VA argued that Oliva did not allege sufficient facts to show that he was eligible for the payments.¹⁰⁸ The VA pointed out that Office of Personnel Management regulations require a specific employee status for relocation incentives to be paid out, and Oliva did not allege facts to meet the criteria.¹⁰⁹ The COFC also found fault with the fact that Oliva did not explain how he arrived at the specific figure he was seeking for the relocation pay.¹¹⁰ However, the Federal Circuit held that detailed allegations regarding specific calculations were not

100. *Id.* at 1362–63 (citing *Cal. Fed. Bank*, 395 F.3d at 1267–68).

101. *Id.* at 1363.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1363–64.

106. *Id.* at 1364.

107. *Id.* at 1365.

108. *Id.* at 1364.

109. *Id.*

110. *Oliva v. United States*, No. 18-104C, 2019 WL 1953131, at *6 (Fed. Cl. May 1, 2019), *rev'd*, 961 F.3d 1359 (Fed. Cir. 2020).

required at the pleading stage and that the factual allegations Oliva did plead were sufficient to plausibly show that he was entitled to relocation incentive pay.¹¹¹

c. Takeaways

This decision sets out how the Federal Circuit evaluates expectancy damages claims. The plaintiff is given significant leeway to prove but-for causation, and the court does not require particularly detailed allegations at the pleading stage. Rather, the court looks to how plausible recovery is under the factual allegations. If the allegations are at least plausible, motions to dismiss will fail and the case can move forward.

B. Contract Interpretation

This Section discusses one precedential and one nonprecedential Federal Circuit decision from 2020 addressing government contract interpretation issues. *Kiewit Infrastructure West Co. v. United States*¹¹² accentuates the importance of contract language. *U.S. Army Corps of Engineers v. John C. Grimberg Co.*¹¹³ addresses the differing site condition (DSC) standard in the context of contract interpretation.¹¹⁴

111. *Oliva*, 961 F.3d at 1364–65.

112. 972 F.3d 1322 (Fed. Cir. 2020).

113. 817 F. App'x 960 (Fed. Cir. 2020).

114. A third Federal Circuit case from 2020 addressing contract interpretation, though not particularly surprising or novel, is worth mentioning briefly because it reminds practitioners of a basic tenet of contract interpretation: courts will always look to the plain language of contracts and will end inquiries there if the language is unambiguous. *See generally* *Team Hall Venture, LLC v. Army & Air Force Exch. Serv.*, 797 F. App'x 539 (Fed. Cir. 2020) (per curiam). In 2014, the Army and Air Force Exchange Service awarded a contract to Team Hall Venture (“Team Hall”) to operate a frozen yogurt shop in a food court on a military base. Team Hall Venture, LLC, ASBCA No. 60823, 18-1 BCA ¶ 37,095, *aff'd*, 797 F. App'x 539 (Fed. Cir. 2020). The contract was for up to ten years, but the government terminated it two years later. *Id.* Upon termination, the parties signed a termination agreement with the following release language:

The contractor hereby releases the Army and Air Force Exchange Service (the Exchange) from any and all obligations related to this contract, and waives any claim against the Exchange for monetary or other relief to this contract, including any that may arise in the future, to include the time period of 1–17 July 2016.

Team Hall Venture, 797 F. App'x at 539–40.

After termination, Team Hall filed a certified claim with the CO for over \$600,000 for alleged losses for the eight-year period following contract termination. Team Hall

1. Kiewit: *The importance of contract language*

a. *Procedural history and facts*

On August 2, 2012, Kiewit Infrastructure West Company (“Kiewit”) and the Western Federal Lands Highway Division of the Federal Highway Administration (FHA) entered into a contract for road design and reconstruction in Alaska.¹¹⁵ The contract contained Revised Standard Specification (RSS) 105.06, which stated that “[n]o further analysis of the environmental impacts of using [government-designated waste] sites [would be] needed unless an expansion of a site [were] proposed.”¹¹⁶ On March 7, 2013, Kiewit requested an equitable adjustment for the cost of purchasing mitigation credits¹¹⁷—a method to compensate for the ecological losses associated with creating government-designated waste sites in previously unencountered wetland areas.¹¹⁸ The FHA project manager denied the claim.¹¹⁹

On June 3, 2014, Kiewit sent the project manager a letter asserting that “the requirement that it perform wetland delineation at the waste disposal areas” was a constructive change to the original contract and therefore “compensable under the contract changes clause.”¹²⁰ The

Venture, LLC, ASBCA No. 60823, 18-1 BCA ¶ 37,095. The CO allowed about \$30,000 but rejected the rest of the claim. *Id.* Team Hall appealed to the ASBCA, which held that Team Hall could not claim any money because it had waived the right to do so when signing the release language. *Id.*

In a unanimous, per curiam decision, the Federal Circuit affirmed the Board’s decision. *Team Hall Venture*, 797 F. App’x at 540. The court examined the release language for ambiguity and concluded that there was none. *Id.* Team Hall argued that the release language was ambiguous as to whether all claims were barred or just claims arising between July 1–17, 2016, and that the ambiguity should be resolved against the government as the drafter. *Id.* But the court found that the plain language “released the Exchange from ‘any and all obligations’ under the contract; and by signing the Contract Amendment, Team Hall ‘waive[d] any claim against the Exchange for monetary or other relief to this contract.’” *Id.* (alteration in original) (quoting Support Appendix at 38, *Team Hall Venture*, 797 F. App’x 539 (No. 2018-2283)). The specification regarding the future period of July 1–17, 2016 did not create ambiguity since claims were *also* waived for that period. *Id.* Because there was no ambiguity, there was nothing to construe against the drafter, and the court ended the inquiry. *Id.*

115. *Kiewit*, 972 F.3d at 1325.

116. *Id.* at 1326 (alterations in original).

117. *Id.*

118. See Lisa M. Schenck, *Wetlands Protection: Regulators Need to Give Credit to Mitigation Banking*, 9 DICK. J. ENV’T L. & POL’Y 103, 104 (2000).

119. *Kiewit*, 972 F.3d at 1327.

120. *Id.*

project manager again denied Kiewit's claim, stating that the presence of wetlands at the government-designated waste areas was neither a change nor a DSC.¹²¹ Kiewit subsequently filed a certified claim requesting additional compensation.¹²² On January 15, 2015, the CO issued a final decision denying Kiewit's claim, stating that the contract made no representations that the wetlands process, including mitigation, was complete for government-designated waste sites.¹²³

Kiewit appealed to the COFC seeking an equitable adjustment and a determination that the presence of wetlands at the government-designated waste sites constituted both a constructive change and a DSC.¹²⁴ The COFC ruled in favor of the government, finding that the contract stated that no further analysis of the environmental impacts of using government-designated waste sites was required, given that "environmental impacts" referred only to the National Environmental Policy Act of 1969¹²⁵ (NEPA), not to the Clean Water Act.¹²⁶

b. The Federal Circuit's decision

In a unanimous decision by Judge Haldene Mayer, which Chief Sharon Prost and Judge Alan Lourie joined, the Federal Circuit reversed the COFC decision and remanded for further proceedings.¹²⁷ The court held that "[r]esolution of the dispute between Kiewit and the FHA hinges on the proper interpretation of the term 'environmental impacts' in RSS 105.06."¹²⁸ According to the Federal Circuit, "[b]y its plain terms, RSS 105.06 dictates that, unless a contractor decided to expand the government-designated waste sites, '[n]o further analysis of the environmental impacts of using' such sites would be necessary."¹²⁹ Despite this, the FHA argued that wetland delineation and payment of mitigation credits were excluded from the "environmental

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Pub. L. No. 91-190, 83 Stat. 852.

126. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816; *Kiewit Infrastructure West, Co. v. United States*, No. 16-45C, 2019 WL 2156459, at *10–11 (Fed. Cl. May 15, 2019), *rev'd*, 972 F.3d 1322 (Fed. Cir. 2020).

127. *Kiewit*, 972 F.3d at 1325.

128. *Id.* at 1329.

129. *Id.* at 1329–30 (second alteration in original).

impacts” covered by RSS 105.06 because the provision did not refer to the Clean Water Act.¹³⁰

The Federal Circuit rejected the FHA’s argument for two reasons. First, “contract language matters,” and RSS 105.06 “broadly provides” that no further analysis of the environmental impacts of using such sites would be required.¹³¹ “If the government intended to exclude wetland impacts from the ‘environmental impacts’ covered by RSS 105.06, it should have included contract language to that effect.”¹³² Second, there was no reason that Kiewit should have understood “environmental impacts” to exclude wetland impacts simply because the government-designated waste sites received NEPA clearance.¹³³ According to the court, “the fact that the FHA, as a part of the NEPA process, had already undertaken an evaluation of ‘the effects of [the] project activities on wetlands’ bolstered . . . rather than undercut[] Kiewit’s reasonable conclusion that it would not need to conduct any further wetlands analysis [at the disposal sites].”¹³⁴

c. Takeaways

This decision showcases the Federal Circuit’s commitment to interpreting a contract based on the plain language, as well as its resolve in declining to “rewrite the contract . . . and insert words the parties never agreed to.”¹³⁵ Additionally, this decision highlights the importance of specificity in contract drafting, in that a contract should be drafted to say exactly what the drafter wants it to say, hopefully leaving nothing to be inferred in the contract language.

2. Grimberg: *Differing site condition standard*

a. Procedural history and facts

In 2009, the U.S. Army Corps of Engineers (USACE) issued a request for proposals (RFP) for the design and construction of a biological

130. *Id.* at 1330.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 1331 (citation omitted) (quoting Joint Appendix at 350, *Kiewit*, 972 F.3d 1322 (No. 1:16-cv-00045-EJD)).

135. *Id.* at 1330 (alteration in original) (quoting *George Hyman Constr. Co. v. United States*, 832 F.2d 574, 581 (Fed. Cir. 1987)).

research lab.¹³⁶ The RFP incorporated the standard FAR DSC clause.¹³⁷ The RFP also included a detailed geotechnical report that provided some information about the subsurface conditions of the worksite, including the type of rock and rock formations under the soil.¹³⁸ The report also specified the type of support the lab would need and indicated that bidders should not assume anything based on the soil borings.¹³⁹ John C. Grimberg Co. (“Grimberg”) submitted a proposal and based the subsurface work it would have to do on the geotechnical report.¹⁴⁰ Grimberg was awarded the contract but ran into issues soon after commencing work.¹⁴¹ Namely, Grimberg argued that it was facing a DSC because it had to drill through substantially more rock than it anticipated.¹⁴² In 2012, after Grimberg completed the work, it filed an REA alleging a Type 1 DSC.¹⁴³ The claim was denied, and Grimberg appealed to the ASBCA.¹⁴⁴

The Board examined the RFP documents carefully, and in a lengthy opinion, it found that Grimberg had encountered a Type 1 DSC.¹⁴⁵ According to the Board’s decision, the burden is on the contractor to show by a preponderance of the evidence that (1) conditions in the contract differed materially from conditions encountered during performance; (2) the encountered conditions were reasonably unforeseeable; (3) the contractor reasonably relied on the contract documents; and (4) the contractor was damaged by the changed conditions.¹⁴⁶ Grimberg based its bid on the two soil borings taken within the project site and argued that it encountered more rock than the borings indicated and was forced to spend more money and time to drill.¹⁴⁷ USACE argued that it was unreasonable for Grimberg to rely

136. U.S. Army Corps of Eng’rs v. John C. Grimberg Co., 817 F. App’x 960, 960 (Fed. Cir. 2020).

137. *Id.* at 960–61.

138. *Id.* at 961.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* A Type 1 DSC occurs when “subsurface or latent physical conditions at the site . . . differ materially from those indicated in th[e] contract.” FAR 52.236-2 (2019).

144. *Grimberg*, 817 F. App’x at 962.

145. John C. Grimberg Co., ASBCA No. 58791, 18-1 BCA ¶ 37,191, *rev’d*, 817 F. App’x 960 (Fed. Cir. 2020).

146. *Id.* (citing *Comtrol, Inc. v. United States*, 294 F.3d 1357, 1362 (Fed. Cir. 2002)).

147. *Id.*

on two soil borings when more borings were available.¹⁴⁸ The Board found that it was unreasonable for Grimberg to rely on two soil borings but asserted that the government's argument was even more unreasonable because the other soil borings were taken hundreds of feet from the actual building site.¹⁴⁹ The Board concluded that Grimberg's reliance on two soil borings was more reasonable and that a Type 1 DSC existed because of the "gross disparity between the quantities of incompetent rock actually encountered and the quantity that . . . was reasonably indicated in the contract's Geotechnical Report."¹⁵⁰ Additionally "the disparity was material and not reasonably foreseeable."¹⁵¹ Thus, the Board found in favor of Grimberg.¹⁵²

b. The Federal Circuit's decision

The government appealed, and in a unanimous decision by Judge Kathleen O'Malley, which Judge Wallach and Judge Richard Taranto joined, the Federal Circuit reversed the Board's decision.¹⁵³ The court examined the claim under the same DSC standard that the Board used, and USACE argued that the Board was wrong to award recovery to Grimberg when it found that Grimberg's reliance on two soil borings was unreasonable.¹⁵⁴ The court agreed, finding that it did not matter if the Board thought that the government's interpretation was less reasonable.¹⁵⁵ The focus of the inquiry is on the contractor, and the burden never shifts to the government.¹⁵⁶ With that understanding, the court agreed that it was unreasonable for Grimberg to base its bid on two soil borings and reversed, finding in favor of USACE.¹⁵⁷

c. Takeaways

This case clarifies the standard for proving a Type 1 DSC claim. The burden is on the contractor, and it never shifts to the government. Courts should not attempt to balance the contractor's interpretation of the

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. U.S. Army Corps of Eng'rs v. John C. Grimberg Co., 817 F. App'x 960, 964 (Fed. Cir. 2020).

154. *Id.* at 962–63.

155. *Id.* at 963.

156. *Id.*

157. *Id.* at 963–64.

specifications and the government's. If a contractor's interpretation is unreasonable, then the contractor cannot recover under a Type I DSC claim.

C. Bid Protests

This Section summarizes four 2020 Federal Circuit decisions regarding bid protests, three precedential and one non-precedential. *Acetris Health, LLC v. United States*¹⁵⁸ addresses the Federal Circuit's interpretation of the Trade Agreements Act¹⁵⁹ (TAA), as well as standing. *LAX Electronics, Inc. v. United States*¹⁶⁰ is a non-precedential decision in which the Federal Circuit applied standing laws as developed in *Acetris Health*, and reinforced the importance of a disqualified bidder's future procurement opportunities to the court's determination as to whether the plaintiff has standing. Next, *Eskridge & Associates v. United States*¹⁶¹ discusses what it means to be an interested party in a bid protest, including what a bid protestor must show when alleging error in the procurement process. Lastly, *Insero Corp. v. United States*¹⁶² covers the waiver rule from *Blue & Gold Fleet, L.P. v. United States*.¹⁶³

1. Acetris Health: *The Trade Agreements Act and standing*

a. Procedural history and facts

Acetris Health, LLC ("Acetris") is a generic pharmaceutical distributor that provides pharmaceuticals to the federal government.¹⁶⁴ Acetris obtains many of its pharmaceuticals from Aurolife Pharma LLC ("Aurolife"), which manufactures the pills in Dayton, New Jersey.¹⁶⁵ In manufacturing the pills, Aurolife uses an active pharmaceutical ingredient (API) obtained from India.¹⁶⁶ Acetris holds contracts to provide more than thirteen types of pharmaceuticals to the VA.¹⁶⁷ This includes a contract to supply Entecavir tablets.¹⁶⁸

158. 949 F.3d 719 (Fed. Cir. 2020).

159. 19 U.S.C. §§ 2501–2581.

160. 835 F. App'x 553 (Fed. Cir. 2020).

161. 955 F.3d 1339 (Fed. Cir. 2020).

162. 961 F.3d 1343 (Fed. Cir. 2020).

163. 492 F.3d 1308 (Fed. Cir. 2007).

164. *Acetris Health*, 949 F.3d at 724.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

In March 2017, the VA demanded that Acetris provide a letter stating that the products provided to the VA were in compliance with the TAA.¹⁶⁹ Further, the VA required that the letter “follow the definition of substantial transformation under the TAA, as set forth in FAR 52.225-5,” which requires the VA to purchase “U.S.-made end products.”¹⁷⁰ Acetris responded by stating that its products fit the definition of U.S.-made end products because the ingredients used in its pharmaceuticals were “mined, produced, or manufactured” or “substantially transformed in the United States.”¹⁷¹ The VA ultimately required Acetris to obtain a country-of-origin certificate from U.S. Customs and Border Patrol, noting that several of Acetris’s products used ingredients obtained from India, a non-TAA member nation. As such, the pharmaceuticals were not TAA-compliant.¹⁷²

On January 30, 2018, U.S. Customs and Border Patrol issued a country-of-origin certificate stating that Acetris products used APIs made in India and that no “substantial transformation” occurred within the United States.¹⁷³ This led to Acetris and the VA agreeing to a no-cost cancellation of the Entecavir contract.¹⁷⁴ The VA subsequently issued a solicitation for a new supplier of Entecavir tablets.¹⁷⁵

Acetris filed suit with the COFC, arguing that its pharmaceuticals were made in the United States.¹⁷⁶ In challenging the VA’s interpretation of the TAA and FAR provisions, Acetris claimed that although its products used APIs from India, they were manufactured in the United States.¹⁷⁷ As a result, they were U.S.-made end products.¹⁷⁸ Shortly after filing its suit in the COFC, Acetris bid on the VA solicitation seeking a supplier of Entecavir tablets.¹⁷⁹ However, Acetris ranked as the third-highest bidder, and the VA awarded the contract to another supplier.¹⁸⁰

169. *Id.*

170. *Id.* (quoting Joint Appendix at 558, *Acetris Health*, 949 F.3d 719 (2018-2399)).

171. *Id.*

172. *Id.* at 724–25.

173. *Id.* at 725.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Acetris Health, LLC v. United States*, 138 Fed. Cl. 579, 584–86 (2018), *aff’d in part and rev’d in part*, 949 F.3d 719 (Fed. Cir. 2020).

178. *Id.* at 592, 599.

179. *Id.* at 590.

180. *Id.* at 591–92.

In response to the suit, the VA argued for dismissal.¹⁸¹ Of particular importance to this Article, the VA claimed that Acetris would not have been awarded the contract, regardless of whether the government's interpretation of the TAA and FAR were erroneous.¹⁸² As such, Acetris did not have an injury necessary to establish standing, rendering the case moot.¹⁸³ The COFC held that the VA interpretation was erroneous.¹⁸⁴ The COFC also found that Acetris products were manufactured in a facility within the United States.¹⁸⁵ As such, the VA had improperly excluded Acetris products from the VA's viable options when seeking suppliers.¹⁸⁶ The VA appealed the decision.¹⁸⁷

b. Federal Circuit decision

In a decision by Judge Dyk, the Federal Circuit affirmed the COFC decision in part and vacated in part. First, the court took up the issue of standing, which the government argued that Acetris lacked.¹⁸⁸ While the court agreed with the COFC's overall conclusion in dismissing the case, the Federal Circuit believed that the COFC should have done so for different reasons.¹⁸⁹ First, the Federal Circuit disagreed with the lower court's determination that standing could only be determined based on the allegations as they are filed in the complaint.¹⁹⁰ In citing U.S. Supreme Court precedent, the Federal Circuit stated that the high Court has "repeatedly held that an 'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation."¹⁹¹

i. Article III standing

The court determined that insofar as the Entecavir solicitation was concerned, Acetris did not have standing because it could not establish an injury resulting from the VA's failure to award Acetris the contract.¹⁹²

181. *Id.* at 593.

182. *Id.* at 594.

183. *Id.*

184. *Id.*

185. *See id.* at 603.

186. *Id.* at 603, 606.

187. *Acetris Health, LLC v. United States*, 949 F.3d 719 (Fed. Cir. 2020).

188. *Id.* at 726.

189. *Id.*

190. *Id.*

191. *Id.* (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013)).

192. *Id.* at 727.

However, the court ruled that this did not render the case moot because Acetris's standing should not be limited to the Entecavir contract alone.¹⁹³

In further reliance on the Supreme Court, the Federal Circuit determined that the requisite injury-in-fact needed to establish standing is not limited to the loss of a single contract.¹⁹⁴ Rather, it could also be the result of an "inability to compete on an equal footing in the bidding process" as a whole.¹⁹⁵ This becomes particularly true when a future bid by the disqualified contractor is "very likely" to occur.¹⁹⁶ As is the case with Acetris, it is very likely that it would bid on future contracts with the VA but for the VA's erroneous interpretation of the TAA and FAR provisions. Thus, Acetris had a sufficient injury-in-fact to establish Article III standing.¹⁹⁷

ii. Statutory standing

The Federal Circuit determined that Acetris had statutory standing as well. The court looked to the statute conferring jurisdiction over bid protests to the COFC. In relevant part, the statute states:

[T]he Unite[d] States Court of Federal Claims . . . shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement
[T]he United States Court of Federal Claims . . . shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.¹⁹⁸

As the Federal Circuit noted in its decision, the statute requires: "(1) that the challenge be 'in connection with a procurement or a proposed procurement' and (2) that the challenger be an 'interested party.'"¹⁹⁹

193. *Id.*

194. *Id.*

195. *Id.* (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993)).

196. *Id.*; *see Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211–12 (1995) (finding that contractors must show a high probability of bidding on future proposals in order to establish an injury-in-fact).

197. *Acetris Health*, 949 F.3d at 728.

198. 28 U.S.C. § 1491(b)(1).

199. *Acetris Health*, 949 F.3d at 727 (quoting § 1491(b)(1)).

The court ruled that Acetris had standing under this definition.²⁰⁰ As previously noted, it is highly likely that Acetris will bid on contracts with the VA in the near future.²⁰¹ Not only has the VA taken a definitive position regarding its interpretation of the TAA and FAR provisions, but it is also very likely that it will utilize its interpretation to exclude Acetris from those contract awards.²⁰² The court found this to be accurate, especially when the VA's interpretation had support from the ruling put forth by U.S. Customs and Border Patrol in determining a pharmaceutical product's country of origin.²⁰³

The court also stated that the Acetris claim fit within the "procurement" language as set forth in the statute. The court viewed the language in the statute to be broadly sweeping. Particularly, the court viewed the statutory term "proposed procurements" as encompassing all future potential procurement by the government.²⁰⁴ The court also retained this view for the language "in connection with," having previously held that an alleged violation of a statute that has a general connection with a proposed procurement is sufficient to establish standing under 28 U.S.C. § 1491(b)(1).²⁰⁵ Here, the court determined that the TAA and FAR have an obvious connection with the current as well as proposed procurements that Acetris will likely bid on with the VA.²⁰⁶ Thus, Acetris succeeded in establishing constitutional and statutory standing.²⁰⁷

iii. The merits of the claim

The Federal Circuit ultimately affirmed the COFC's holding that the VA's interpretation of the TAA and FAR was erroneous.²⁰⁸ In relevant part, the TAA's "country-of-origin" test²⁰⁹ stated:

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in

200. *Id.*

201. *Id.*

202. *Id.* at 728.

203. *Id.*

204. *Id.*

205. *Id.* (quoting *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999)).

206. *Id.*

207. *Id.*

208. *Id.* at 722.

209. *Id.* at 731.

whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.²¹⁰

Under the provisions of the statute, the court determined that it was clear that the TAA did not support the government's interpretation.²¹¹ The court distinguished between the final product to be purchased by the government and the individual ingredients used to create the final product.²¹² In applying the statutory language to Acetris's products, the court determined that the pharmaceuticals did not meet either prong necessary to establish India as being the final product's country of origin.²¹³

Additionally, the court determined that Acetris's products met the standard for a "U.S.-made end product" under the FAR 52.225-5 "Trade Agreements" Clause.²¹⁴ The court relied heavily on the history of the term "manufactured" as used in the FAR to determine that the products were manufactured in Dayton, New Jersey, regardless of where individual components of the pharmaceuticals originated.²¹⁵ Thus, the court was unpersuaded by the VA's arguments that FAR provisions barred it from purchasing Acetris pharmaceuticals.²¹⁶

Finally, the court did not buy into the VA's argument that a "substantial transformation" within the United States is required for a product to be considered a "U.S.-made end product."²¹⁷ The court recognized that under the terms of the FAR 25.003, a product may be a "U.S.-made end product" if it is: (1) "manufactured in the United States" or (2) "substantially transformed in the United States."²¹⁸ The court

210. 19 U.S.C. § 2518(4)(B).

211. *Acetris Health*, 949 F.3d at 731–33.

212. *Id.* at 731.

213. *Id.*

To the contrary, it is clear from the TAA that the "product" is the final product that is procured—here, the pill itself—rather than the ingredients of the pill. Acetris'[s] tablets do not meet prong (i) of the TAA's country-of-origin test for India because the tablets are not "wholly the . . . manufacture" of India. Acetris'[s] tablets similarly do not meet prong (ii) because the tablets' components are not "substantially transformed" into tablets in India.

Id.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* (quoting FAR 25.003 (2019)).

viewed this language as an indication that “substantial transformation” is an option to meet the standard of “U.S.-made end product,” not a requirement.²¹⁹ As a result, the term “manufacture” as used in FAR 25.003 does not require a “substantial transformation.”²²⁰ The court ultimately determined that Acetris won on the merits, and remanded the case to the COFC to enter a declaration in accordance with the Federal Circuit opinion.²²¹

c. Takeaways

In this case, the Federal Circuit moved away from the “substantial transformation” standard as the required means to determine whether a product should be designated as a “U.S.-made end product.” The court also established an alternative “manufacturing” standard to determine a product’s country of origin. In doing so, the Federal Circuit appeared to point to what it considers to be determinative factors in deciding whether a product is “manufactured” or “substantially transformed” within a particular country, for purposes of TAA compliance. At the very least, the court pointed to what factors to look at in determining that an end product is not “substantially transformed” in a foreign country. Moving forward, it seems as if the door could open for many pharmaceutical distributors to begin bidding for contracts with the federal government. Under this decision, it is likely that previously non-compliant products will now be eligible for purchase by federal agencies.

2. LAX Electronics: *Exploring standing under Acetris Health*

a. Procedural history and facts

LAX Electronics, Inc. (“LAX”) supplies the federal government, as well as private contractors, with electronic connectors.²²² Connectors sold by LAX were also listed on the Qualified Parts List (QPL) that the Defense Logistics Agency (DLA) maintains, which designates “government-approved sources of supply.”²²³ In June 2019, DLA audited a LAX facility.²²⁴ The audit revealed several violations of DLA standards related

219. *Id.*; see FAR 25.003 (2019) (defining “U.S.-made end product”).

220. *Acetris Health*, 949 F.3d at 732–33.

221. *Id.* at 733.

222. *LAX Elecs., Inc. v. United States*, 835 F. App’x 553, 554 (Fed. Cir. 2020).

223. *Id.*

224. *Id.*

to electronic parts.²²⁵ The violations required LAX to stop the production of connectors listed in the audit report, as well as provide DLA with a corrective action report within thirty days of the alleged violation.²²⁶ LAX timely submitted a corrective action report with DLA.²²⁷ Rather than respond, DLA demanded that LAX issue a notice regarding the audit to the Government Industry Data Exchange Program (GIDEP).²²⁸ When LAX refused to issue the notice as unnecessary, DLA removed two LAX connectors from the QPL, citing repeated violations and the failure to provide notice to GIDEP.²²⁹ As LAX alleged, DLA continually issued solicitations for the model connectors that LAX was disqualified from providing.²³⁰ Further, DLA continued to prevent LAX from submitting bids for the contracts in any capacity or re-qualifying for the QPL.²³¹ As a result, LAX sued DLA in the COFC, invoking the court's bid protest jurisdiction.²³²

LAX asserted two claims, one seeking injunctive relief, alleging that DLA failed to follow Department of Defense procedures when removing its connectors from the QPL, particularly by not allowing LAX to return to the QPL once LAX corrected its violations.²³³ Next, LAX claimed that DLA violated FAR 9.205(a) by not allowing LAX to qualify for the QLP prior to awarding contracts to other bidders.²³⁴ DLA responded by filing a motion to dismiss for lack of subject matter jurisdiction.²³⁵ The government argued that LAX was not an "interested party" for the purposes of the COFC's bid protest jurisdiction.²³⁶

The COFC agreed with DLA, stating that LAX's situation was in line with the decision rendered by the Federal Circuit in *Geiler/Schrudde & Zimmerman v. United States*.²³⁷ As such, LAX failed to meet the "in connection with" requirement necessary for the COFC's bid protest

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 555.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* (citing 28 U.S.C. § 1491(b)(1)).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 555–56.

237. 743 F. App'x 974 (Fed. Cir. 2018) (per curiam); *LAX Elecs., Inc. v. United States*, No. 19-1668C, 2019 WL 6880939, at *2–3 (Fed. Cl. Dec. 17, 2019) (citing *Geiler/Schrudde*, 743 F. App'x at 977), *rev'd*, 835 F. App'x 553 (Fed. Cir. 2020).

jurisdiction mainly because “the possibility that an agency action would affect future procurements did not ‘establish that the violation “clearly affected” a contract’s award or performance.’”²³⁸ The COFC determined that it did have bid protest jurisdiction over LAX’s second claim.²³⁹ However, the COFC also dismissed the claim asserted by LAX for failure to state a claim.²⁴⁰ The COFC entered judgment, and LAX timely appealed to the Federal Circuit.²⁴¹

b. Federal Circuit decision

The Federal Circuit unanimously ruled to overturn the COFC’s decision that it lacked subject matter jurisdiction over LAX’s first claim because it was not “in connection with” a procurement or proposed procurement as per 28 U.S.C. § 1491(b)(1).²⁴² Again, the Federal Circuit expressed its view that the terms “in connection with” and “procurement” are applied very broadly when establishing jurisdiction for bid protests.²⁴³ Further, the court noted that after the COFC issued its decision in *LAX Electronics*, the Federal Circuit ruled in *Acetris Health*.²⁴⁴ In doing so, the court narrowed the applicability of *Geiler*, allowing the claims court to hear bid protests “in connection with” future procurements.²⁴⁵

The court also explained that the distinguishing feature between *Acetris Health* and *Geiler* is the ability of the aggrieved protestor to identify specific future procurements on which it will be ineligible to bid.²⁴⁶ Unlike the plaintiff in *Acetris Health*, *Geiler* could not identify any future procurement on which it planned to submit proposals.²⁴⁷ On the other hand, *Acetris* could show that it wished to continue bidding on contracts and supplying goods to the federal government.²⁴⁸ While *Acetris* did not point to any specific future procurement, the interpretation of statutes regulating ingredients in *Acetris*’s products,

238. *LAX Elecs.*, 2019 WL 6880939, at *3 (quoting *Geiler/Schrudde*, 743 F. App’x at 977).

239. *Id.* at *3–4.

240. *Id.* at *4.

241. *LAX Elecs.*, 835 F. App’x at 556.

242. *Id.* at 557.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 558.

247. *Geiler/Schrudde & Zimmerman v. United States*, 743 F. App’x 974, 977 (Fed. Cir. 2018) (per curiam).

248. *Acetris Health, LLC v. United States*, 949 F.3d 719, 727–28 (Fed. Cir. 2020).

as well as how the government applied those interpretations to Acetris, resulted in the contractor's ban from a "non-speculative stream of future government procurements."²⁴⁹

Here, the court viewed LAX's situation to be much more akin to that of Acetris than Geiler.²⁵⁰ As the court noted, LAX's complaint set forth several years of bidding on government proposals and supplying the government with the exact electrical components that the government banned it from providing.²⁵¹ As was the critical point in *Acetris Health*, the "in connection with" requirement was met because the government had taken a definitive position by disqualifying LAX from the QPL.²⁵² As a result, LAX was perpetually disqualified from future procurements on which it was highly likely to bid.²⁵³

The Federal Circuit concluded that LAX had satisfied the "in connection with" requirement necessary for statutory standing.²⁵⁴ However, because the COFC dismissed the claim for the perceived failure on the part of LAX to meet the "in connection with" requirement, the lower court did not address the "interested party" requirement, as required by 28 U.S.C. § 1491(b)(1).²⁵⁵ As such, the court remanded the case back to the claims court to make a determination on that issue.²⁵⁶

c. Takeaways

Although non-precedential, the decision in *LAX Electronics* provides a likely map that the Federal Circuit intends to follow in regard to standing. In narrowing *Geiler*, the court suggested that contractors will, at the very least, be able to meet minimal standing requirements when arguing that they have been prevented from bidding on unidentified future solicitations. Importantly, the court still renders a past award moot. Thus, much of the contractor's argument in addressing standing will likely need to involve establishing past performance in bidding on government solicitations, and a high likelihood that the action on the part of the government will prevent them from continuing to do so into the future.

249. *LAX Elecs.*, 835 F. App'x at 558.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 558–59.

254. *Id.* at 559.

255. *Id.*

256. *Id.*

3. Eskridge & Associates: *What makes an interested party?*

a. Procedural history and facts

In 2016, the Army solicited bids for Certified Registered Nurse Anesthetists (CRNAs) for the Womack Army Medical Center at Fort Bragg, North Carolina.²⁵⁷ Under the terms of the 2016 solicitation, the Army performed a price realism analysis on all submitted bids.²⁵⁸ Eskridge & Associates (“Eskridge”) submitted a bid proposal in response to the 2016 solicitation.²⁵⁹ However, the solicitation was cancelled the following year as the result of corrective action.²⁶⁰ Later that year, the Army released a solicitation preview indicating the terms to be included in the corrected solicitation.²⁶¹ This included the length of the base performance period, as well as an estimated cost of performance of over \$21 million. In 2018, the Army issued a second solicitation.²⁶² The terms of the solicitation included the “lowest price technically acceptable” evaluation method the Army would use to assess proposals.²⁶³ The solicitation stated that the Army would first rank the proposals from lowest price to highest.²⁶⁴ If the five proposals with the lowest price were also considered to be “technically acceptable,” the Army would not review any additional bids.²⁶⁵ Rather, it would award the contract to the technically acceptable bid with the lowest price.²⁶⁶ The Army would evaluate the bids for technical acceptability through the use of three categories: “(1) [g]eneral compliance with solicitation requirements; (2) technical merit, scored on six sub-factors; and (3) past performance.”²⁶⁷ Finally, and of particular importance to the matter at hand, the Army included a minimum compensation rate in the 2018 solicitation, rather than a

257. *Eskridge & Assocs. v. United States*, 955 F.3d 1339, 1340 (Fed. Cir. 2020).

258. *Id.* at 1341.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* (internal quotations omitted).

price realism analysis as was used in 2016.²⁶⁸ The Army set the minimum rate at about \$114 per hour.²⁶⁹

Prior to the Army evaluating bids on the 2018 solicitation, Eskridge filed a bid protest with the Government Accountability Office (GAO).²⁷⁰ Eskridge argued that the Army “acted in bad faith . . . by failing to include language” that the parties agreed upon following the cancellation of the 2016 solicitation.²⁷¹ Eskridge also claimed that the 2018 solicitation was generally ambiguous.²⁷² The Army responded to the complaint, and Eskridge withdrew the protest without further action.²⁷³

The Army subsequently resumed evaluating protests.²⁷⁴ The Army determined that three of the five lowest priced bids were also deemed to be technically acceptable.²⁷⁵ Ultimately, the Army awarded the contract to Ansible Government Solutions, LLC (“Ansible”).²⁷⁶ Eskridge responded by filing a post-award bid protest with GAO.²⁷⁷

During the second bid protest, Eskridge argued that the Army’s award to Ansible was “unreasonable, capricious, and contrary to law.”²⁷⁸ Eskridge also alleged that the evaluation methods that the Army used were ambiguous, as well as in conflict with the terms of the 2018 solicitation.²⁷⁹ During this time, the Army issued a stop-work order to Ansible.²⁸⁰ The Army also issued a corrective memorandum, in which it agreed to “better document the selection and award process.”²⁸¹ Further, the Army agreed to perform an additional review of Ansible’s proposal to ensure that it complied with all solicitation requirements.²⁸²

In accordance with the corrective memorandum, the Army reviewed the ten lowest-priced proposals for technical acceptability, narrowing the list down to a final five.²⁸³ Of the remaining five, the Eskridge

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 1341–42.

274. *Id.* at 1342.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

proposal listed the highest bid price.²⁸⁴ Thus, it was disqualified.²⁸⁵ The Army again awarded the contract to Ansible.²⁸⁶

Again, Eskridge filed a bid protest with GAO.²⁸⁷ Eskridge reiterated that the Army's determination process was ambiguous and that the Army failed to comply with the terms agreed upon following the cancellation of the 2016 solicitation.²⁸⁸ Additionally, Eskridge again claimed that the award to Ansible was "unreasonable, arbitrary, and contrary to law."²⁸⁹ GAO ruled that Eskridge was not an "interested party" for purposes of filing a protest.²⁹⁰ In doing so, GAO stated that bidders who submitted lower-priced proposals compared to Eskridge had a more direct economic interest in protesting the procurement.²⁹¹ Ultimately, GAO dismissed the claim.²⁹²

In December 2018, Eskridge filed suit in the COFC.²⁹³ Eskridge put forth many of the same arguments used in front of GAO.²⁹⁴ Eskridge also argued that the Army's award of the contract to Ansible was in violation of its own solicitation and procurement laws.²⁹⁵ The COFC dismissed the Eskridge complaint in its entirety.²⁹⁶ The COFC found that Eskridge, as the fifth-highest bidder, could not put forth a successful challenge because it did not possess a direct economic interest in the protest, and therefore lacked standing.²⁹⁷ Eskridge appealed to the Federal Circuit.²⁹⁸

b. Federal Circuit decision

The Federal Circuit affirmed the COFC decision.²⁹⁹ The court looked to its own precedent in defining the term "interested party" for

284. *Id.*

285. *See id.* at 1343.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Eskridge & Assocs. v. United States*, 142 Fed. Cl. 410 (2019), *aff'd*, 955 F.3d 1339 (Fed. Cir. 2020).

294. *Compare Eskridge*, 955 F.3d at 1343, *with Eskridge*, 142 Fed. Cl. at 412.

295. *Eskridge*, 142 Fed. Cl. at 412.

296. *Id.*

297. *Id.* at 425.

298. *Eskridge*, 955 F.3d at 1339.

299. *Id.* at 1340.

the purposes of a bid protest under 28 U.S.C. § 1491(b)(1).³⁰⁰ Despite the Federal Circuit's decisions in *Acetris Health* and *LAX Electronics*, the court has otherwise taken a limited view of standing for purposes of bid protests, previously holding that standing is "limited to actual or prospective bidders or offerors whose direct economic interest would be affected by the award . . . or by failure to award the contract."³⁰¹ In conformance with the Competition in Contracting Act,³⁰² the court has further held that in order for an aggrieved bidder to establish a "direct economic interest" in a post-award protest, it must have a "substantial chance" of winning the contract.³⁰³ Specifically, Eskridge must show that the Army committed an error in the procurement process.³⁰⁴ Eskridge must further show that "but for that error," it would have a substantial chance of winning the contract.³⁰⁵

In applying its precedent to the facts at hand, the Federal Circuit focused its analysis on the circumstances surrounding the 2018 solicitation.³⁰⁶ Ultimately, the court determined that Eskridge failed to establish that it had a "substantial chance" of being awarded the contract.³⁰⁷ As the court notes, Eskridge was fifth on the list of potential awardees.³⁰⁸ Even if Ansible were disqualified, three other bidders would be in line to win the contract prior to Eskridge.³⁰⁹ Thus, the court concluded, Eskridge failed to show a "direct economic interest" and ultimately lacked standing to protest the award.³¹⁰

c. Takeaways

Here, the Federal Circuit applied its own precedent to determine that Eskridge lacked standing to assert bid protest. As the court has continually stated, an error in the procurement process is not enough

300. *Id.* at 1345 (citing *Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1370 (Fed. Cir. 2002)).

301. *Myers Investigative & Sec. Servs.*, 275 F.3d at 1370.

302. Pub. L. 98-369, 98 Stat. 1175 (1984).

303. *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1308 (Fed. Cir. 2006); *see Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003) (describing the "substantial chance" requirement).

304. *Eskridge*, 955 F.3d at 1345.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

to establish standing. A bid protestor must also assert that the error resulted in prejudice in the award of the contract.

4. *Insero Corp.: Timeliness and conflict over the Blue & Gold waiver rule*

a. *Procedural history and facts*

On March 2, 2016, the Defense Information Systems Agency (DISA) solicited bids to enter into ID/IQ contracts to sell technology services to the federal government.³¹¹ The solicitation stated that the government would evaluate bids under three criteria: “(1) the bidder’s technical/management approach, (2) the bidder’s past performance, and (3) cost/price information.”³¹² The solicitation also stated that DISA would evaluate the bids’ total proposed price, as well as total evaluated price.³¹³ Of particular importance, DISA separated the competition into two classes of bidders to be awarded a “suite” of contracts within each class.³¹⁴ The classes were “full and open” competition and small businesses.³¹⁵ The solicitation further stated that a bidder could participate in both classes but could only receive one contract award.³¹⁶

Issues arose when DISA began notifying members of the full-and-open class as to whether they were selected for a contract award, while still reviewing revised proposals submitted by members of the small business class.³¹⁷ DISA provided full-and-open class members with debriefing information, which disclosed how DISA evaluated the cost of proposals.³¹⁸ Following the award of small business contracts, which Insero Corporation (“Insero”) did not receive, Insero informed DISA of the issue regarding the release of debriefing information to full-and-open class members while continuing to evaluate proposals for small business class members.³¹⁹ Insero ultimately filed a claim in the COFC.³²⁰

311. *Insero Corp. v. United States*, 961 F.3d 1343, 1346 (Fed. Cir. 2020).

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 1346–47.

319. *Id.* at 1347.

320. *Insero Corp. v. United States*, 142 Fed. Cl. 678 (2019), *vacated*, 961 F.3d 1343 (Fed. Cir. 2020).

In the COFC, Inerso asserted that the debriefing information provided to the full-and-open class members gave certain competitors who were also competing in the small business class an unfair advantage.³²¹ As such, this created an organizational conflict of interest, violating FAR 9.504 and 9.505.³²² The COFC found that it was possible that the unbalanced release of information could have created an organizational conflict.³²³ However, the COFC dismissed the claim because Inerso could not demonstrate any prejudice suffered as a result of the agency action.³²⁴ Inerso appealed to the Federal Circuit.³²⁵

b. Federal Circuit decision

In a split decision by Judge Taranto, the Federal Circuit dismissed the case using the reasoning set forth in *Blue & Gold Fleet, L.P. v. United States*.³²⁶ As the court noted, the COFC has applied the waiver rule to cases involving an alleged organizational conflict.³²⁷ Additionally, the court found that Inerso was charged with the knowledge that the “express terms of the solicitation contemplated [the] overlap of [the] bidders” in the solicitation.³²⁸ Although there was not an express solicitation term that put Inerso on notice as to the unequal disclosure of debriefing information, Inerso was aware that bidders could compete in both classes.³²⁹ Further, the terms of the solicitation should have made Inerso aware that the full-and-open competition closed prior to the small business competition and that the DISA would likely release debriefing information shortly after awarding the “suite” of contracts.³³⁰ As such, Inerso should have known that the overlap in competitors would result in some small business class participants receiving debriefing information regarding their bid in the full-and-

321. *Id.* at 681–82.

322. *Id.* at 683.

323. *Id.* at 684.

324. *Id.* at 684–85.

325. *Inerso Corp.*, 961 F.3d at 1343.

326. *Id.* at 1349 (“[A] party who has [an] opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.” (quoting *Blue & Gold Fleet*, 492 F.3d at 1313)).

327. *Inerso Corp.*, 961 F.3d at 1349 (citing *Ceres Env’t Servs., Inc. v. United States*, 97 Fed. Cl. 277, 310 (2011)).

328. *Id.* at 1350.

329. *Id.*

330. *Id.*

open competition.³³¹ The court ultimately found that the facts and circumstances surrounding the solicitation process made the unequal disclosure of information a patent defect that Inerso should have challenged prior to the contract award.³³²

c. Dissent

Judge Jimmie Reyna dissented from the majority ruling.³³³ Judge Reyna argued that the Federal Circuit's *Blue & Gold* waiver rule "rests on shaky[] legal ground."³³⁴ The dissent asserted that the rule did not apply here because Inerso challenged a latent defect in the solicitation.³³⁵ Judge Reyna noted that the unequal disclosure of information only took place as the result of the divergence of the timing in the competition among the two separate classes.³³⁶ Thus, an obvious, or patent, defect did not exist on the face of the solicitation.³³⁷ Further, the dissent argued that the majority decision placed an undue burden on the contractor to anticipate any potential challenges that may arise from the terms of the solicitation, rather than just disputing those that are patently obvious.³³⁸

More broadly, the dissent argued that this case ran afoul of a U.S. Supreme Court decision, *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*.³³⁹ Specifically, the dissent saw the waiver rule as a "judicially-created time bar" established by the Federal Circuit.³⁴⁰ The dissent argued that the Supreme Court addressed this issue in *SCA Hygiene*, when it held that "a court cannot rely on the doctrine of laches, an equitable doctrine primarily focused on the timelines[s] of a claim, to preclude a claim for damages incurred within the Patent Act's statute of limitations."³⁴¹ The Supreme Court reasoned that Congress established the appropriate time to bring a claim under the

331. *Id.*

332. *Id.*

333. *Id.* at 1352 (Reyna, J., dissenting).

334. *Id.*

335. *Id.* at 1353.

336. *Id.* at 1356–57.

337. *Id.* at 1357.

338. *Id.*

339. 137 S. Ct. 954 (2017); *Inerso Corp.*, 961 F.3d at 1358 (Reyna, J., dissenting).

340. *Inerso Corp.*, 961 F.3d at 1353 (Reyna, J., dissenting).

341. *Id.* at 1354 (citing *SCA Hygiene Prods.*, 137 S. Ct. at 967).

Patent Act³⁴² by creating a statute of limitations.³⁴³ Thus, it was not up to the court to make such a determination, as it would “jettison Congress’[s] judgment on the *timeliness of suit*.”³⁴⁴

The dissent held the waiver rule in a similar regard. Judge Reyna noted that Congress has already spoken to the timeliness of bringing a bid protest to the COFC.³⁴⁵ As such, the Federal Circuit’s bar of post-award protests against patent errors in the solicitation was essentially replacing congressional intent with that of the judiciary.³⁴⁶

d. Takeaways

Judge Reyna’s dissent points to potential implications moving forward. Although the waiver rule is still in place in the Federal Circuit, there appears to be at least some disagreement among the judges as to the appropriateness of the court’s continued reliance on the rule. Further, it seems as if the majority ruling places a substantial burden on the contractor to predict the need to file a pre-award bid protest, regardless of whether the protested error is readily apparent from the terms of the solicitation. Rather, it appears that an aggrieved bidder may be charged with the knowledge of hypothetical situations that may result from the terms of the solicitation, as opposed to limiting its pre-award protest to those terms that are expressly stated. This appears to be particularly true when the designation of the defect is up for debate amongst the judges on a particular panel.

D. Other Significant Decisions

In addition to the topics above, less prevalent but equally important issues encountered in government contracting appeared in Federal Circuit decisions from 2020. *Electric Boat Corp. v. Secretary of the Navy*³⁴⁷ discusses when a contractor’s claim accrues and the statute of

342. An Act to Revise and Codify the Laws Relating to Patents and the Patent Office, and to Enact into Law Title 35 of the United States Code Entitled “Patents,” Pub. L. No. 82-593, 66 Stat. 792 (1952).

343. *SCA Hygiene Prods.*, 137 S. Ct. at 960.

344. *Insero Corp.*, 961 F.3d at 1354 (Reyna, J., dissenting) (quoting *SCA Hygiene Prods.*, 137 S. Ct. at 960).

345. *Id.* (“[E]very claim of which the United States Court of Federal Claims has jurisdiction . . . shall be barred unless the petition thereon is filed within six years after such claim first accrues.” (quoting 28 U.S.C. § 2501)).

346. *Id.*

347. 958 F.3d 1372 (Fed. Cir. 2020).

limitations under the Contract Dispute Act³⁴⁸ (CDA) begins to run. In *Guarantee Co. of North America, USA v. Ikhana, LLC*,³⁴⁹ the dissent calls into question whether *Admiralty Construction, Inc. v. Dalton*³⁵⁰ and *Fireman's Fund Insurance v. England*³⁵¹ are used to erroneously conclude that a surety does not become a “contractor” for the government upon the original contractor’s default. *Agility Public Warehousing Co. K.S.C.P. v. United States*³⁵² examines when the government may properly offset a contractor’s pre-existing debt under the Debt Collection Act of 1982³⁵³ (DCA).

1. *Electric Boat: An application of the CDA’s statute of limitations*

a. *Procedural history and facts*

The CDA provides that a claim “shall be submitted within 6 years after the accrual of the claim.”³⁵⁴ The moment at which a claim has accrued is determined by three factors: (1) the FAR; (2) the language of the contract; and (3) the facts of the case.³⁵⁵

FAR 33.201 defines accrual of a claim as “the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known.”³⁵⁶ While “monetary damages” are not required, “[f]or liability to be fixed, some injury must have occurred.”³⁵⁷

The relevant contract language in *Electric Boat* was found in a change-of-law clause that allowed for price adjustment if the cost of performance was in any way affected by a new or changed federal law. Section (b) of the clause provided that:

If, at any time after the effective date of this contract, a New Federal Law is enacted or a change is made to a Currently Applicable Federal Law or a New Federal Law or regulations thereunder promulgated by Federal authorities, and compliance with such new law or change directly results in an increase or decrease in the Contractor’s cost of performance of this contract, the contract price(s) shall be

348. Pub. L. No. 95-563, 92 Stat. 2383 (1978).

349. 959 F.3d 1354 (Fed. Cir. 2020) (per curiam).

350. 156 F.3d 1217 (Fed. Cir. 1998).

351. 313 F.3d 1344 (Fed. Cir. 2002).

352. 969 F.3d 1355 (Fed. Cir. 2020).

353. Pub. L. No. 97-365, 96 Stat. 1749 (1982).

354. 41 U.S.C. § 7103(a)(4)(A).

355. *Kellogg Brown & Root Servs. Inc. v. Murphy*, 823 F.3d 622, 626 (Fed. Cir. 2016).

356. FAR 33.201 (2019).

357. *Id.*

adjusted No such adjustment shall be made for contract costs incurred during the two (2) year period after the effective date of this contract.³⁵⁸

Section (d) of the change-of-law clause required Electric Boat to promptly notify the Navy's contracting officer of any qualifying enactment or change in federal law.³⁵⁹ Section (e) of the change-of-law clause required requests for price adjustments to be made in accordance with uniform procedures set for requesting equitable adjustments under the contract.³⁶⁰

On September 15, 2004, the Occupational Safety and Health Administration (OSHA) issued a new federal regulation that would impact Electric Boat's cost of performance.³⁶¹ The regulation became effective on December 14, 2004, and Electric Boat notified the Navy on February 24, 2005 that the OSHA regulation would result in an increase in the cost of performance.³⁶² Between June 2007 and May 2011, Electric Boat submitted two cost proposals seeking price adjustments, both of which the Navy denied.³⁶³ On December 19, 2012, Electric Boat filed a certified claim seeking price adjustment for its increased costs, and on February 27, 2013, the Navy issued a CO's final decision denying Electric Boat's claim.³⁶⁴

Electric Boat appealed to the ASBCA.³⁶⁵ After finding Electric Boat's claim barred by the CDA's statute of limitations, the ASBCA granted in part the Navy's motion for summary judgment and dismissed Electric Boat's complaint.³⁶⁶ Electric Boat appealed.³⁶⁷ The narrow question presented to the Federal Circuit was whether Electric Boat's claim was barred by the CDA's statute of limitations.³⁶⁸

358. *Elec. Boat Corp. v. Sec'y of the Navy*, 958 F.3d 1372, 1376 (Fed. Cir. 2020) (alteration in original) (quoting Joint Appendix at 280, *Elec. Boat Corp.*, 958 F.3d 1372 (No. 2019-1621)).

359. *Id.* at 1374.

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.* at 1374–75.

364. *Id.* at 1375.

365. *Elec. Boat Corp.*, ASBCA No. 58672, 19-1 BCA ¶ 37,233, *aff'd*, 958 F.3d 1372 (Fed. Cir. 2020).

366. *Id.*

367. *Elec. Boat Corp.*, 958 F.3d at 1372.

368. *Id.* at 1373.

b. The Federal Circuit's decision

The Federal Circuit unanimously affirmed the ASBCA decision.³⁶⁹ The Federal Circuit held that Electric Boat's "injury under the Contract was the enactment of the OSHA Regulation" that Electric Boat claimed would increase its costs of performance.³⁷⁰ Given that the OSHA regulation became effective before the two-year period identified in the change-of-law clause had expired, the Federal Circuit concluded that the "Navy's liability for a price adjustment became fixed under the Contract on August 15, 2005, when [the change-of-law clause] first provide[d] a right to a price adjustment."³⁷¹ From this, the Federal Circuit believed the ASBCA correctly determined that "Electric Boat's claim accrued, on August 15, 2005, more than six years before Electric Boat filed its claim," and thus was barred by the CDA's statute of limitations.³⁷²

Electric Boat argued that its claim did not accrue until May 2, 2011 when the Navy denied its request for price adjustment.³⁷³ Electric Boat asserted this was the actual date of claim accrual because it did not know it was injured until the Navy provided notice that it did not intend to adjust the price.³⁷⁴ The Federal Circuit rejected this argument, stating that "[a]lthough 'the limitations period does not begin to run if a claim cannot be filed because mandatory pre-claim procedures have not been completed,' the contract here did not require that Electric Boat undertake any such procedures."³⁷⁵ The Federal Circuit also rejected Electric Boat's remaining arguments for partial timeliness.

c. Takeaways

The Federal Circuit's decision seems to clarify that for the purposes of the CDA's statute of limitations, a claim accrues as soon as a party is injured under the contract and that such injury is not dependent on a contracting officer's final decision. Put another way, a contractor should

369. *Id.*

370. *Id.* at 1376.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.* (quoting *Kellogg Brown & Root Servs., Inc. v. Murphy*, 823 F.3d 622, 628 (Fed. Cir. 2016)).

act on a perceived injury as soon as possible under the contract because that is the point at which the statute of limitations begins to run.

2. *Agility: Offsets and the Debt Collection Act*

a. *Procedural history and facts*

Under the DCA, the U.S. government has the power to “withhold[] funds payable by the United States . . . to satisfy a claim.”³⁷⁶ The DCA defines a claim as “any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States.”³⁷⁷ The DCA further provides that a “claim includes, without limitation . . . over-payments.”³⁷⁸ Therefore, for a claim to be “recoverable” under the DCA, it must be first “owed to the United States.”³⁷⁹

The Federal Circuit has interpreted the DCA to be a “supplement” to the common law right of offset.³⁸⁰ The purpose of the DCA is to “increase the efficiency of government-wide efforts to collect *debts owed the United States* and to provide additional procedures for the collection of debts owed the United States.”³⁸¹ Thus, a pre-existing, valid debt is a prerequisite to the government’s use of the DCA’s offset provision.

Agility involves an offset by the Army of payments owed to Agility Public Warehousing Company K.S.C.P. (“Agility”) under a separate contract between the Army and Agility in order to recoup money allegedly overpaid on another contract.³⁸² Following a Defense Contract Audit Agency’s audit in September 2010, the Army sent Agility demand letters for overpayments made on twelve task orders.³⁸³ The overpayments stemmed from Agility being paid with U.S. funds instead of funds from the Development Fund for Iraq.³⁸⁴ Having not received any payment from Agility by September 2012, the Army withheld payments due to Agility under a separate contract to offset

376. 31 U.S.C. § 3701(a)(1).

377. *Id.* § 3701(b)(1).

378. *Id.*

379. *Agility Pub. Warehousing Co. K.S.C.P. v. United States*, 969 F.3d 1355, 1364 (Fed. Cir. 2020) (quoting § 3701(b)(1)).

380. *McCall Stock Farms, Inc. v. United States*, 14 F.3d 1562, 1566 (Fed. Cir. 1993).

381. *Agility Pub. Warehousing*, 969 F.3d at 1364 (quoting Pub. L. No. 97-365, 96 Stat. 1749, 1749 (1982)).

382. *Id.* at 1361.

383. *Id.*

384. *Id.* at 1359, 1361.

part of the debt owed for the overpayments.³⁸⁵ While Agility sought review of the Army's overpayment determination in multiple forums, Agility specifically argued at the COFC that "the Army's offset constituted a breach of . . . contract, a breach of the Army's duty of good faith and fair dealing under the [] contract, and an illegal exaction."³⁸⁶

b. The Federal Circuit's decision

Following an analysis of the DCA, the Federal Circuit addressed whether the offset was proper.³⁸⁷ The court found that, insofar as "the United States overpaid Agility with U.S. Funds, the United States is owed these funds . . . because the United States has an independent and inherent right to recover erroneously expended congressionally appropriated funds."³⁸⁸ Because there was no dispute as to whether the funds in question were congressionally appropriated, the Federal Circuit concluded that "under these circumstances, the United States has an independent and inherent right to recover any overpayment of U.S. Funds."³⁸⁹ From this conclusion, the Federal Circuit "determine[d] that the United States ha[d] a right to offset any overpayment of U.S. Funds" under the contract.³⁹⁰

Although the Federal Circuit determined that the government had the right to offset any overpayment, it did not say whether the offset was proper.³⁹¹ This is because the COFC did not make a determination as to whether the Army actually overpaid Agility.³⁹² Thus, on the issue of the validity of the offset, the Federal Circuit vacated the COFC decision in favor of the government and remanded for the COFC to "review in the first instance the merits of the United States' overpayment determination."³⁹³

As to whether the Army procedurally complied with the DCA, the Federal Circuit agreed with Agility that the Army did not follow the proper steps before taking an offset.³⁹⁴ The Federal Circuit noted that

385. *Id.* at 1361.

386. *Id.* at 1362.

387. *Id.* at 1363–64.

388. *Id.* at 1365.

389. *Id.* at 1366.

390. *Id.* at 1367.

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.* at 1369–70.

“Congress afforded debtors procedural protections under the DCA”³⁹⁵ and in light of these procedures concluded that the “letters and bills did not provide Agility with all of the required procedural safeguards due under the DCA.”³⁹⁶ Because it found that whether the Army complied with the DCA’s procedures is a “material factual dispute,” the Federal Circuit remanded for further proceedings.³⁹⁷

c. Takeaways

This decision is beneficial for both contractors and agencies because it identifies the required conditions for a valid offset, as well as highlighting the steps an agency must take when making an offset. For a contractor with multiple government contracts, this decision outlines its rights under the DCA prior to the government making an offset, the most important of which is the opportunity to negotiate repayment, potentially avoiding a complete offset.

3. Guarantee Co.: *The impact of Admiralty and Fireman’s Fund on suretyship*

a. Procedural history and facts

Guarantee Company of North America, USA (“GCNA”) filed a petition for a rehearing en banc.³⁹⁸ The petition followed a Federal Circuit ruling that held that as a surety, GCNA could not assert claims to the ASBCA that arose before it entered into a settlement agreement with USACE.³⁹⁹ The Surety & Fidelity Association of America was granted leave to file an amicus curiae brief, and the court further

395. *Id.* at 1369. Before taking an offset, the government is required to provide the debtor with:

(1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section; (2) an opportunity to inspect and copy the records of the agency related to the claim; (3) an opportunity for a review within the agency of the decision of the agency related to the claim; and (4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

31 U.S.C. § 3716(a)(1)–(4).

396. *Agility Pub. Warehousing*, 969 F.3d at 1370.

397. *Id.*

398. *Guarantee Co. of N. Am., USA v. Ikhana, LLC*, 959 F.3d 1354 (Fed. Cir. 2020) (per curiam).

399. *Guarantee Co. of N. Am., USA v. Ikhana, LLC*, 941 F.3d 1140, 1143–44 (Fed. Cir. 2019).

invited the United States to file an amicus curiae brief.⁴⁰⁰ The petition for rehearing, response, and amici curiae briefs were referred to the circuit judges who were in regular active service.⁴⁰¹

b. The Federal Circuit's decision

Following a failed polling of the judges, the Federal Circuit denied the petition for a rehearing and the petition for a rehearing en banc.⁴⁰² Judge Wallach, along with Judge Newman, Judge Dyk, and Judge Moore, authored a dissent about the court's decision declining to rehear the appeal en banc.⁴⁰³ The dissent proposed that because of the Federal Circuit's erroneous precedent established by *Admiralty* and *Fireman's Fund*, "a surety is hindered from playing its necessary role in government contracting . . . because it lacks the legal rights it needs to ensure speedy dispute resolution."⁴⁰⁴

In *Admiralty*, the Federal Circuit held that a surety is not a "contractor" within the meaning of the CDA and therefore lacks standing to bring appeal before the BCAs.⁴⁰⁵ When addressing whether a surety can represent the contractor in an appeal to a BCA, the Federal Circuit concluded that in limited circumstances where the surety takes over contract performance or finances the completion of the contract, the surety may be "entitl[ed] [] to succeed to the contractual rights of the contractor against the government."⁴⁰⁶ In *Fireman's Fund*, the Federal Circuit narrowed the types of claims a surety can bring to "claims against the government that arose from the work the surety itself did following the takeover of the contract and not any claims pertaining to the prior period."⁴⁰⁷

According to the dissent, these decisions gave "little consideration to the argument that, because the surety and the contractor had agreed that the contractor would cede all legal rights to the surety in the event of default, the surety should assume all of the contractor's legal rights," and instead focused too heavily on the policy rationales

400. *Guarantee Co.*, 959 F.3d at 1354.

401. *Id.* at 1354–55.

402. *Id.* at 1355.

403. *Id.* (Wallach, J., dissenting).

404. *Id.* (citing *Admiralty Constr., Inc. v. Dalton*, 156 F.3d 1217 (Fed. Cir. 1998); *Fireman's Fund Ins. v. England*, 313 F.3d 1344 (Fed. Cir. 2002)).

405. *Admiralty Constr.*, 156 F.3d at 1220–21.

406. *Id.* at 1222 (quoting *Ransom v. United States*, 900 F.2d 242, 245 (Fed. Cir. 1990)).

407. *Guarantee Co.*, 959 F.3d at 1357 (citing *Fireman's Fund Ins.*, 313 F.3d at 1351).

behind the CDA.⁴⁰⁸ These specific policy rationales highlighted by the dissent ensure that only a single contractor is eligible to pursue a claim against the government before the boards and that all other claims would be litigated elsewhere.⁴⁰⁹ However, the dissenting judge believed this analysis was incorrect in that the portion of the relevant Senate Report relied on by decisions like *Admiralty* and *Fireman's Fund* actually relates to subcontractors and has nothing to do with sureties.⁴¹⁰ In short, *Admiralty* and *Fireman's Fund* “equated a surety to a subcontractor with *no* supporting analysis,” when in fact a “surety is different from a subcontractor in fundamental respects.”⁴¹¹

c. Takeaways

According to Judge Wallach, by declining the opportunity to rehear the appeal en banc, the Federal Circuit missed an opportunity to review its precedent and correct a potential inefficiency it had created. By failing to take this opportunity, the Federal Circuit has kept in place a precedent that compels sureties for government contracts to “recognize the lurking ensnarement, and either cancel the service or actuarially charge a higher rate for their services.”⁴¹² Therefore, the implication of this missed opportunity is a higher overall cost of doing business for government contractors.⁴¹³

CONCLUSION

Although the number of government contracts appeals the Federal Circuit hears remains small, the role the decisions play in shaping procurement law will always be significant. Whether providing new legal standards—as *Kellogg Brown* did for cost reasonableness in government contracting and as *Acetris Health* did regarding standing in bid protest cases—or clarifying existing ones—as in *Grimberg*, in which the court discussed the DSC standard—the Federal Circuit shapes this legal framework in which government contracting issues live. For this reason, it is important that procurement practitioners read the Federal Circuit’s decisions as they come out in order to remain current on the evolving procurement law landscape.

408. *Id.* at 1357–58.

409. *Id.* at 1358.

410. *Id.*

411. *Id.*

412. *Id.* at 1360.

413. *Id.*