

THE FEDERAL CIRCUIT'S 2014 GOVERNMENT CONTRACT DECISIONS

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It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.¹

- Abraham Lincoln

INTRODUCTION

The U.S. Court of Appeals for the Federal Circuit’s 2014 government contract decisions provide yet another opportunity to evaluate how the federal government, and the Federal Circuit in particular, has fulfilled the duty expressed by President Lincoln above. The idea is “not that the government should lose every case appealed to the Federal Circuit, but that the government, when it waives its sovereign immunity, should be held to the same standards as its opponents.”²

In recent years, a number of commentators have questioned whether the Federal Circuit has lived up to President Lincoln’s ideal.³ Ralph Nash, Professor Emeritus of Law at the George Washington University Law School, argued that “[t]he Federal Circuit seems to have slowly drifted away from this view of its role.”⁴ As Professor Steven Schooner of the George Washington University Law School

1. CONG. GLOBE, 37TH CONG., 2D SESS. app. 2 (1861). President Lincoln made these remarks in the first year of the Civil War in asking Congress to grant to the Court of Claims the power to make the court’s judgments final.

2. Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1489 (2012).

3. In fairness to the current Federal Circuit, criticism of the court’s failure to operate a level playing field in government contracts is nothing new. See, e.g., David R. Hazelton, *The Federal Circuit’s Emerging Role in Bid Protest Cases*, 36 AM. U. L. REV. 919, 933 (1987) (discussing “[t]he Federal Circuit’s long-standing pro-agency bias”).

4. Ralph C. Nash, Jr., *The Government Contract Decisions of the Federal Circuit*, 78 GEO. WASH. L. REV. 586, 588 (2010). Professor Nash explicitly contrasts the Federal Circuit’s view with that of the Court of Claims, which he contends held the view that “[n]othing could be more important than ensuring that the citizens of this country believe that their federal government treats them fairly.” *Id.* at 587–88.

explained, “rather than elevating fairness to the citizen as its foremost priority, the court has adopted a strong deference toward the government, regardless of whether in the role of plaintiff or defendant.”⁵ Stanfield Johnson’s criticism of the Federal Circuit has been just as pointed:

[T]he Federal Circuit has made protection of the public fisc its priority. Plainly, the decisions show that it is no longer considered a priority or “special responsibility” of the court “to make government officials accountable to the citizens whose servants they are” or for the Government to “render prompt justice against itself.”⁶

All of these commentators based their opinions on Federal Circuit decisions that they believed failed to provide contractors with a level playing field.⁷ However, such a case-by-case review potentially overlooks the bigger picture as to how the government, as a litigant, is regularly treated by the Federal Circuit.

This Article examines whether there is in fact empirical support for these commentators’ position that the Federal Circuit’s approach to government contract cases favors the government. To conduct an examination that avoids the limitations of a case-by-case review, this Article performs a high-level review of all of the Federal Circuit’s government contracts cases decided in 2010 through 2014, paying particular attention to both the overall rate at which the government prevails and the rate at which the government prevails when it is the appellant. The findings demonstrate that the government prevails at the Federal Circuit in the majority of its cases. However, when those decisions are reviewed to consider the types of cases and whether the government or the contractor is appealing the underlying U.S. Court of Federal Claims (COFC) or Board of Contract Appeals (BCA)⁸

5. Steven L. Schooner & Pamela J. Kovacs, *Affirmatively Inefficient Jurisprudence?: Confusing Contractors’ Rights to Raise Affirmative Defenses with Sovereign Immunity*, 21 FED. CIR. B.J. 685, 700 (2012).

6. W. Stanfield Johnson, *The Federal Circuit’s Great Dissenter and Her “National Policy of Fairness to Contractors”*, 40 PUB. CONT. L.J. 275, 346 (2011) (footnote omitted).

7. See, e.g., *id.* (reviewing and praising Judge Newman’s dissents that advocate for a “frustrated national conscience” and her calls for “a national policy of fairness to contractors” (internal quotation marks omitted)); Schooner & Kovacs, *supra* note 5, at 701–02 (reviewing the U.S. Court of Appeals for the Third Circuit’s decision in *M. Maropakis Carpentry v. United States*, 609 F.3d 1323 (3d Cir. 1994), and arguing that it is a prime example of how the Federal Circuit’s strict constructionist analysis in government contract disputes can result in favorable treatment for the government).

8. This includes the Armed Services Board of Contract Appeals (ASBCA), the Civilian Board of Contract Appeals (CBCA), and, less commonly, the Postal Service

decision, the government and contractors appear to have very similar rates of success.⁹

Although a superficial review of the empirical evidence could lead one to argue that the government wins more than its share of cases, the Federal Circuit's 2014 decisions do not appear to favor the government. Indeed, the court's 2014 decisions resulted in wins for contractors in significant cases where a formal rule-based approach could have easily resulted in losses for the contractors.

I. BACKGROUND

A. *The Federal Circuit's Unique Role in Reviewing Government Contracts*

The Supreme Court has made clear that the government should be held to the same legal standards as private parties once it has decided to enter into a contract, having declared that “[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.”¹⁰ This has been the Supreme Court's position for almost 140 years.¹¹

The Federal Circuit has a unique responsibility to hold the government accountable for its conduct when it steps “down from its position of sovereignty, and enters the domain of commerce.”¹² As Judge Marion Bennett, a former judge on the Court of Claims and the Federal Circuit, explained, “[H]olding the Government and its officials to a strict code of conduct in their relations with citizens . . . is a special responsibility for a court created as the main forum for

Board of Contract Appeals. Historically, before 2007, this would also include various agency boards of contract appeals.

9. See *infra* notes 17–19 and accompanying text (observing that the government was the prevailing party in 60% of the Federal Circuit's government contract decisions from 2010 through 2014); see also *infra* notes 21–22 and accompanying text (finding that the government, when appealing a lower court decision, prevailed in 44.4% of cases between 2010 and 2014).

10. *Lynch v. United States*, 292 U.S. 571, 579 (1934); see also *Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002) (suggesting that the United States acts “much as a party never cloaked with immunity” when it contracts with private parties).

11. *Cooke v. United States*, 91 U.S. 389, 398 (1875) (“If [a government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.”).

12. *Id.*

claims against the sovereign.”¹³ Indeed, this principle of dealing fairly with commercial contractors is imbedded in the fabric of government contracting—the Federal Acquisition Regulations (FAR)—which requires the government to “[c]onduct business with integrity, fairness, and openness.”¹⁴

However, many commentators have pointed to a number of fundamental principles that they assert demonstrate that the Federal Circuit is not providing a level playing field for the government and its contractors. For instance, Professor Nash analyzed seven areas where the Federal Circuit has reached conclusions that he claimed lead to more favorable treatment for the government, including the process of contract interpretation, government employees’ contracting authority, bad faith, accounting disputes, unabsorbed overhead damages, interest on claims, and Tucker Act jurisdiction.¹⁵

B. Empirical Review of Federal Circuit Government Contract Cases

Focusing on particular decisions—and whether they tilt the playing field to the advantage of the government litigant—has been the methodology used by the critics referenced above.¹⁶ However, the critics’ case-by-case approach potentially misses the broader impact on contractors involved in litigation. Further, an anecdotal review fails to reveal whether the government is winning its expected share of cases before the Federal Circuit.

For the purpose of determining whether the government is, in fact, winning an expected share of cases, this Article reviews the Federal Circuit’s government contract decisions from 2010 through 2014.¹⁷ At the most superficial level of review—without attempting to parse or group the decisions—the government was the prevailing party¹⁸ in

13. WILSON COWEN ET AL., *THE UNITED STATES COURT OF CLAIMS: A HISTORY, PART II: ORIGIN-DEVELOPMENT-JURISDICTION 1855–1978* 170 (1978).

14. FAR 1.102(b)(3) (2014).

15. See generally Nash, *supra* note 4, at 588–612 (providing Professor Nash’s analysis respecting the seven areas).

16. See, e.g., *id.* at 588.

17. There are some instances where it is not entirely clear whether a case should be included as a government contract case. For our purposes, we have utilized the work of the authors of prior government contract annual reviews to identify the relevant government contract cases.

18. Not all cases have a clear and decisive winner. For purposes of this review, we determined the prevailing party by identifying which party either prevailed on a larger number of issues or the largest dollar value issue.

60% of those cases.¹⁹ While a 60% prevailing rate confirms that the government, which is always a participant in government contract cases, is winning most of its cases at the Federal Circuit, this fact alone does not mean that the Federal Circuit favors the government. Indeed, there are multiple reasons why the government could prevail in more than 50% of the cases without the Federal Circuit favoring the government.

One significant factor in examining the government's success rate is the ratio of the different types of appeals that reach the Federal Circuit. For a variety of reasons, the number of government contract cases heard by the Federal Circuit might include fewer government appeals than contractor appeals, and one would expect the government to prevail at a higher rate when it is defending the COFC's or a BCA's decision.²⁰ Indeed, one would expect appellees to naturally have a higher success rate than appellants in federal appellate litigation across all circuits, particularly since appellees have already won once at a lower court. To control for this potential variance, this analysis examines cases in which the government is the appellant.²¹ And in these cases, the rate of success drops below 50%—the government prevailed in only 44.4% of the cases.²²

These government rates of success on appeal are not significantly higher than the contractors' rates of success on appeal. Based on the same data, contractors prevailed in 37.79% of cases in which they were the appellants before the Federal Circuit. Thus, the difference in success rates on appeal between contractors and the government—

19. For the purposes of statistical analysis, there was a relatively small sample size, which can potentially explain any of these results. Specifically, the analysis includes ninety cases from 2010 through 2014. When excluding Spent Nuclear Fuel (SNF) cases and cases deriving from *United States v. Winstar Corp.*, 518 U.S. 839 (1996), from the analysis, the sample size is seventy-two cases.

20. One potential reason for greater government success is that the government may exercise more discretion in choosing which judgments to appeal by virtue of the fact that the government can appeal only with the approval of the Solicitor General—a feature that not only promotes uniformity in the government's litigating positions on appeal but also likely prevents appeals in cases the Solicitor General believes to be sure losers. Another possibility is that because the government has so much more experience in these cases (it participates as a party in every government contract case), it simply has developed more expertise and the most effective litigation strategies.

21. This analysis only includes instances where the government was the sole appellant. Cross-appeals are excluded.

22. In cases where the government is either appealing or cross-appealing—in other words, if cross-appeals are included—the government prevails in 55.6% of the cases.

without considering any other factors—appears to be only about 7% in this relatively small sample size of cases. This slight difference is not enough to suggest—at least empirically—that the Federal Circuit favors the government in cases involving government contracts.

Looking at the data in greater detail, there are significant differences in the types of government contract cases, which further undermine the notion of any perceived favoritism at the Federal Circuit. For instance, between 2010 and 2014, the government prevailed in 83.3% of bid protests brought before the Federal Circuit. However, that statistic is heavily skewed by the mix of cases. There were eighteen bid protest cases before the Federal Circuit from 2010 through 2014. Sixteen of those cases were appeals brought by the contractor protesting the award. Given the highly deferential standard the government receives when conducting a procurement²³ and the additional deference given to the decision of the COFC,²⁴ the government should be expected to prevail in the vast majority of bid protest appeals brought by contractors—which is precisely what the data shows. Contractors prevailed in two of sixteen protests appealed, or 12.5% of the time.²⁵

Indeed, the rate of success for contractors appealing bid protest decisions of the COFC appears to be consistent with what would be expected in federal appeals. The Administrative Office of the United States Courts (AOUSC) maintains statistics on reversal percentages.²⁶ According to the AOUSC statistics, across the federal

23. *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1371 (Fed. Cir. 2009) (“If the court finds a reasonable basis for the agency’s action, the court should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations.” (quoting *Honeywell, Inc. v. United States*, 870 F.2d 644, 648 (Fed. Cir. 1989))).

24. *Turner Constr. Co. v. United States*, 645 F.3d 1377, 1383 (Fed. Cir. 2011) (“We review ‘rulings on motions for judgment on the administrative record de novo . . . and factual findings based on the administrative record for clear error.’” (alteration in original) (quoting *PAI Corp. v. United States*, 614 F.3d 1347, 1351 (Fed. Cir. 2010))).

25. Of the two cases that the government appealed, the government prevailed in one of two—or 50%—of its appealed bid protests. Needless to say, the sample size of government appeals is too small to be much of an indicator.

26. See generally *Federal Judicial Caseload Statistics 2014*, U.S. CTS., <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2014.aspx> (last visited Feb. 19, 2015) (providing detailed statistical tables on a yearly basis for appeals filed in the U.S. courts of appeals, including those terminated on the merits).

appellate system, appellants typically prevail in very low percentages of their cases.²⁷ For the twelve-month period ending March 31, 2014, the U.S. Courts of Appeals—excluding the Federal Circuit—reversed or remanded to lower courts in only 8.7% of the cases decided on the merits.²⁸

Furthermore, the reversed or remanded percentages are not significantly higher when the AUOSC statistics are limited to civil cases in which the United States was a party. Limiting the analysis to cases that the AUOSC classifies as “Other U.S. Civil,” which are civil cases where the government is a party, and to “Administrative Agency Appeals,” the reversal or remand rate is still only 13%.²⁹ If anything, given the high standards of deference given to the agency in conducting the procurement and deference to the COFC in hearing the case, the contractors’ prevailing rate of 12.5% in bid protest cases appears to be higher than one might expect. Thus, the government’s overall prevailing rate in government contract cases appears to be skewed by the government’s very high success rate in bid protest cases, which in this sample are heavily weighted toward contractor appeals rather than government appeals.

In contrast to the bid protest cases, the government prevailed in only 56.6% of the claims cases from 2010 to 2014. Comparing the success rates of contractors and the government acting as appellants, both the government and contractors appear to fair equally well. The government prevailed in 44.4% of the claims cases in which it was the appellant.³⁰ Similarly, the contractors prevailed in 44.1% of

27. *U.S. Courts of Appeals—Appeals Filed, Terminated, and Pending (Details)*, U.S. CTS., <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2013/Table202.pdf> (last visited Feb. 19, 2015) (providing an overview of the increasing number of appeals filed and terminated on the merits in the U.S. Courts of Appeals, excluding the Federal Circuit, from 1990 through 2013).

28. The courts reversed 2505 cases and remanded 523 cases out of a total of 34,717 cases terminated on the merits. See *U.S. Courts of Appeals—Decisions in Cases Terminated on the Merits, by Circuit and Nature of Proceeding, During the 12-Month Period Ending March 31, 2014*, U.S. CTS., <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/B05Mar14.pdf> (last visited Feb. 19, 2015).

29. The courts reversed 183 cases and remanded thirty cases out of 1447 “Other U.S. Civil” cases. In addition, the courts reversed 261 cases and remanded 195 cases out of 3709 “Administrative Agency Appeals.” *Id.*

30. The government was the sole appellant in nine claims cases between 2010 and 2014 and prevailed in four of those cases.

the claims cases in which the contractor was the appellant.³¹ Thus, rather than demonstrating that the Federal Circuit favors one side over the other, the empirical data demonstrates that both parties have virtually identical results as the appellant.

To summarize the above, the biggest drivers in explaining why the government prevails in more government contract cases than the protestors appears to be based on two specific factors that are wholly unrelated to any formalism or pro-government tendencies. First, the government—because of the applicable legal standards—enjoys a substantial advantage in bid protest cases.³² Second, the cases that the Federal Circuit heard from 2010 to 2014 were primarily cases in which the contractor was the appellant. In other words, one would expect the government to be the prevailing party. Indeed, of the ninety cases reviewed for this Article, contractors were the appellants in fifty-three cases, the government was the appellant in nineteen cases, and the parties were cross-appellants in eighteen cases. In short, the government does not appear to prevail in cases before the Federal Circuit more often than one would expect.

Based purely on this empirical review, it does not appear that the Federal Circuit favors the government when resolving government contract disputes.

C. Reviewing the Federal Circuit Government Contract Cases for Government Favoritism

While the empirical evidence does not support the critics' concern with the Federal Circuit's approach to government contract cases, there remains the possibility that the court favors the government in ways that are not revealed through the data. For instance, if the court routinely favored the government, that could impact the decisions made by stakeholders, such as contractors and the government, as well as judges on the COFC and the BCAs. In that scenario, the court's positions could operate as a disincentive to contractors from appealing lower court decisions, even when they believe their case is meritorious. Conversely, a perceived favoritism for the government might act as an incentive for the government to appeal to the Federal

31. The contractor was the sole appellant in thirty-four claims cases between 2010 and 2014 and prevailed in fifteen of those cases. The government and the contractor cross-appealed ten cases between 2010 and 2014. The government was the prevailing party in seven of those ten cases.

32. See *supra* note 23 (providing the deferential standard the government receives in bid protest cases).

Circuit more frequently. And of course, it is possible that if the Federal Circuit favors the government, then judges on the COFC and the BCAs could also tilt the balance in favor of the government in an effort to lower the odds of reversal if a decision is challenged at the Federal Circuit.

Faced with the empirical evidence discussed above that the Federal Circuit does not rule in favor of the government a disproportionate amount of the time in government contract appeals but recognizing that any government favoritism might not be captured by the purely empirical review, there remains the important question as to how to review the Federal Circuit's decisions to investigate whether it does favor the government.

Professor Nash offers three possible overarching decisional approaches that the Federal Circuit may be following and which may lead it to what Professor Nash describes as its "controversial positions."³³ The first is "the court's attempt to impose strict rules on the law of government contracting. . . . The dogmatic application of a strict legal rule in these situations—without a close analysis of the factual nuances—can lead to unfair results."³⁴ Professor Nash's second possible explanation for the Federal Circuit's decision-making process is a "mistrust of trial judges" and the crafting of rules that take away discretion from the BCAs and the COFC to "assess the facts fully and seek a fair outcome."³⁵ Finally, his third possible explanation is a "desire to impose more rigorous standards on the people in the government and industry that draft and perform government contracts."³⁶

All of Professor Nash's possible explanations fit very well within the concept of imposing "doctrines that will lead to easier, quicker, and faster decisions" as the result of having a judiciary disinterested in the issues before it.³⁷ Moreover, all of his explanations fit within the broader criticisms of the Federal Circuit that it is too geared toward

33. Nash, *supra* note 4, at 612.

34. *Id.* at 612–13.

35. *Id.* at 613.

36. *See id.* at 614. This explanation could potentially result in decisions that favor either party, and, as Professor Nash notes, all parties could benefit from more rigorous standards. However, Professor Nash argues that government contracts are frequently entered by individuals without formal legal training and performed under stressful conditions. Therefore, Professor Nash contends that contractors frequently view the imposition of strict rules as punitive. *Id.*

37. Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787, 820 (2008).

formalism,³⁸ and that formalism does not lead to better decisions. As one commentator explained, “A formalistic doctrine is ‘inquiry truncating’: only certain factors are considered. Thus, formalistic doctrines make courts’ jobs easier.”³⁹ In short, critics contend that formalism reduces the factors that a court must consider, leading to easier reviews for courts but decisions that are less just.

This Article examines the Federal Circuit’s 2014 government contract cases with these criticisms in mind. It examines whether the court applies formalism in these decisions by looking for instances in which the court imposes bright-line rules, disregards or distrusts lower courts’ findings, and attempts to impose rigorous standards on participants in government contracts. As explained in the analysis below, the case-by-case review of *all* of the Court’s 2014’s decisions by and large does not show a consistent use of formalism by the court to find in favor of the government. Rather, several decisions suggest quite the opposite—that the Federal Circuit is successfully performing its role in ensuring fairness to the citizens.

II. THE FEDERAL CIRCUIT’S 2014 CASES

The empirical evidence suggests that—at least during the past several years—the Federal Circuit does not appear to be tilting the playing field in favor of the government. However, the case-by-case analysis undertaken by many other commentators purports to reach a different conclusion.⁴⁰ This Article reviews the Federal Circuit’s 2014 decisions with the concern of government favoritism in mind. In 2014, the government continued to prevail in more cases than

38. See Gugliuzza, *supra* note 2, at 1490 (stating that Professor Nash’s critique of the Federal Circuit “will again sound familiar to patent law scholars”). For a critic’s contention that the Federal Circuit’s formalism leads to results against contractors and in the government’s favor, consider Mr. Johnson’s discussion of the topic. See Johnson, *supra* note 6, at 345 (“It is also an indication of the court’s disinterest in the general law between private individuals that in [two cases], the Federal Circuit effectively concluded that the contractors had forfeited their claims.”).

39. Daniel Kazhdan, *Beyond Patents*, 94 J. PAT. & TRADEMARK OFF. SOC’Y 275, 295 (2012) (footnote omitted).

40. See, e.g., Gugliuzza, *supra* note 2, at 1443, 1487–89 (discussing commentators’ concerns about the approach of the Federal Circuit in government contracts cases); Johnson, *supra* note 6, at 346 (concluding that the Federal Circuit has moved away from its role as the “nation’s conscience” and instead favors the government unfairly in its contracts jurisprudence (internal quotation marks omitted)); Schooner & Kovacs, *supra* note 5, at 700–01 (examining the trend towards deference to the government in government contracts cases).

contractors. However, the Federal Circuit's decisions do not support a finding of government favoritism even on a case-by-case basis. Indeed, 2014 included significant cases where the Federal Circuit failed to follow bright-line formalistic rules and where the playing field between the government and contractors appeared level.

A. *Claims Cases*

1. *Bad faith*

The claims cases decided by the Federal Circuit in 2014 presented three potential opportunities for the court to address its case law regarding "bad faith." The court's "bad faith" jurisprudence is one of the areas where Professor Nash has specifically faulted the court's position and argued how it unfairly favors the government.⁴¹

In short, the government, in a variety of contexts, has argued—and some COFC judges have agreed⁴²—that the Federal Circuit's 2002 decision in *Am-Pro Protective Agency, Inc. v. United States*⁴³ indicates that "to prove breach of the implied duty of good faith and fair dealing, a contractor must prove that the government acted *in bad faith with the specific intent to harm the contractor*."⁴⁴ This standard has been criticized by many, including the Court of Federal Claims in *Tecom, Inc. v. United States*,⁴⁵ where the court declared that "it is clear, particularly when the specific aspects of the duties to cooperate and not to hinder are at issue, that proof of fraud, or quasi-criminal wrongdoing, or even bad intent are not required."⁴⁶ Professor Nash explained that the Federal Circuit needed to weigh in and correct this misinterpretation:

It would be very helpful if the court would clear the air in this area by . . . stating that cases involving the implied duties of good faith

41. Nash, *supra* note 4, at 603 (suggesting that the Federal Circuit could clarify its bad faith jurisprudence by articulating that there is no presumption that government employees' actions that injure contractors were reasonable).

42. See, e.g., *S. Comfort Builders, Inc. v. United States*, 67 Fed. Cl. 124, 153–55 (2005) (expounding on the high bar of proof for the bad faith standard and ultimately denying Southern Comfort's claims based on its inability to meet that high standard); *Sys. Fuels Inc. v. United States*, 66 Fed. Cl. 722, 735 (2005) (applying the presumption that the government has acted in good faith to deny the plaintiff's claim that the government breached the duty of good faith).

43. 281 F.3d 1234 (Fed. Cir. 2002).

44. Nash, *supra* note 4, at 600 (emphasis added).

45. 66 Fed. Cl. 736 (2005).

46. *Id.* at 770.

and fair dealing and of disclosing superior knowledge have nothing to do with the motive of the government employees in following the course of action that injured the contractor and that there is no presumption that the actions taken were reasonable.⁴⁷

The Federal Circuit did address the standard in 2010 when deciding *Precision Pine & Timber, Inc. v. United States*,⁴⁸ which again implied that for a contractor to prevail in a claimed breach of the duty of good faith and fair dealing, the contractor must prove bad faith on the part of the government. The Federal Circuit explained that “liability only attaches if the government action ‘specifically targeted’ a benefit of Precision Pine’s contract.”⁴⁹ Commentators claimed that the Federal Circuit’s position was “inconsistent with precedent” and “departs from well-established and widely cited common law principles [where] a party to a contract violates its duty of good faith and fair dealing (of which the duty to cooperate and not to hinder is a part) if that party unreasonably acts or fails to act”⁵⁰

This requirement to prove bad faith and specific intent to harm the contractor presents a nearly impossible burden for a contractor. According to the Federal Circuit, disputing the presumption of good faith in favor of the government requires “[a]lmost irrefragable proof,” which constitutes clear and convincing evidence.⁵¹ In other words, there must be a specific intent to harm the contractor.

The Federal Circuit reviewed three cases in 2014 where the duty of good faith and fair dealing—and potentially the bad faith requirement—was at issue. In two of the cases, *Bell/Heery v. United States*⁵² and *Lakeshore Engineering Services, Inc. v. United States*,⁵³ the court essentially determined that there was no breach of the implied duty of good faith because the contracts allocated the specific risks at issue to the contractors.⁵⁴ Therefore, *Bell/Heery* and *Lakeshore* did not address the issue regarding the necessity of proving bad faith. However, in *Metcalf Construction Co. v. United States*,⁵⁵ the Federal Circuit directly addressed the critics’ concerns

47. Nash, *supra* note 4, at 603.

48. 596 F.3d 817 (Fed. Cir. 2010).

49. *Id.* at 830.

50. Daniel P. Graham et al., *Feature Comment: Fed. Cir. Resets Standard for Breach of the Duty to Cooperate and Not to Hinder*, 52 GOV’T CONTRACTOR ¶ 97 (2010).

51. *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004).

52. 739 F.3d 1324 (Fed. Cir. 2014).

53. 748 F.3d 1341 (Fed. Cir. 2014).

54. *Id.* at 1349; *Bell/Heery*, 739 F.3d at 1335.

55. 742 F.3d 984 (Fed. Cir. 2014).

with its decisions in *Am-Pro* and *Precision Pine* and made clear that “bad faith” is not necessary to prove a breach of an implied duty of good faith and fair dealing.⁵⁶

a. Metcalf Construction Co. v. United States

The Federal Circuit in *Metcalf* provided clarity about the implied covenant of good faith and fair dealing.⁵⁷ *Metcalf* squarely confronted the issue of proving bad faith and found that “bad faith” was not required for a contractor to prevail in a claimed breach of the implied duty of good faith and fair dealing.⁵⁸

i. Background

Metcalf Construction Company (“Metcalf”) entered into a contract with the U.S. Navy to design and build housing units at the Marine Corps Base in Hawaii.⁵⁹ The initial Request For Proposals (RFP) cited a government-commissioned report regarding the building site’s soil condition.⁶⁰ A later version of the RFP stated that the “soil reconnaissance report” was “for preliminary information only.”⁶¹ In addition, the resulting contract incorporated FAR 52.326-2 concerning site conditions that materially differed from the conditions disclosed in the contract and required that the contractor conduct its own soil investigation.⁶² The Navy also published a set of questions and answers clarifying that the contract would be amended if the contractor’s investigation revealed significantly different soil conditions.⁶³

After winning the contract, Metcalf investigated the soil and learned that the conditions differed from the Navy’s report.⁶⁴ Metcalf informed the Navy of the deviation and indicated that it wanted to follow its consultant’s recommendations for handling the soil, but the Navy insisted on following the contractual construction requirements.⁶⁵ Metcalf grew tired of waiting for the Navy’s approval

56. *Id.* at 993.

57. *Id.*

58. *Id.*

59. *Id.* at 987.

60. *Id.*

61. *Id.* at 988 (internal quotation marks omitted).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

after debating the issue for a year and began implementing its preferred methods to deal with the soil conditions at a higher cost.⁶⁶ The Navy ultimately concluded that its original soil assessment was correct and, therefore, that Metcalf was not entitled to additional compensation for its decision to implement its consultant's recommendations at the higher cost.⁶⁷

Metcalf filed an unsuccessful claim with the Navy's contracting officer for approximately \$26 million in damages for additional costs incurred due to the differing soil conditions and other issues on the grounds that the Navy materially breached the contract and the implied duty of good faith and fair dealing.⁶⁸ Metcalf then sued the Navy in the COFC, and the government counterclaimed, seeking damages for each day past the contractually agreed-upon completion date that Metcalf had failed to meet.⁶⁹ The trial court concluded that Metcalf failed to establish liability under all of its alleged claims other than two claims not at issue on appeal.⁷⁰ The COFC determined, based on its reading of case law and particularly *Precision Pine*, that Metcalf failed to establish a breach of an implied duty of good faith and fair dealing because Metcalf did not show that the Navy "specifically designed to reappropriate the benefits [that] the other party expected to obtain from the transaction, thereby abrogating the government's obligations under the contract."⁷¹

The COFC further nullified the pre-bid contractual representations because the final contract required Metcalf to investigate the soil conditions independently after it was awarded the contract.⁷² Specifically, the COFC held that a reasonable contractor would not have read the contract documents to mean that the government was making a representation about the site conditions since the contract required the contractor to make an independent soil analysis.⁷³ The contract therefore put the contractor on notice

66. *Id.*

67. *Id.* However, the Navy did compensate Metcalf for two contract modifications, which it approved—namely, further tests of the soil as well as the building of two housing unit prototypes. *Id.* Later, the Navy also amended the contract to approve the use of materials recommended by Metcalf's subcontractor. *Id.*

68. *Id.* at 989.

69. *Id.*

70. *Id.* at 989–90.

71. *Metcalf Constr. Co. v. United States*, 102 Fed. Cl. 334, 346 (2011) (alteration in original).

72. *Metcalf*, 742 F.3d at 995.

73. *Id.*

that it could not rely on the government's report and put the risks and costs of addressing new or different conditions on Metcalf.⁷⁴

ii. *The Federal Circuit decision*

The Federal Circuit found that the COFC misread and misrelied on *Precision Pine* and took an “unduly narrow view of the duty of good faith and fair dealing.”⁷⁵ The Federal Circuit explained that *Precision Pine* does not impose a “specific-targeting requirement” on all cases.⁷⁶ The court stated that its decision in *Precision Pine* provided “that the government ‘may be liable’—not that it was liable *only*—when a subsequent government action is ‘specifically designed to reappropriate the benefits the other party expected to obtain from the transaction.’”⁷⁷ Thus, “*Precision Pine* did not hold that the absence of specific targeting, by itself, would defeat a claim of breach of the implied duty”⁷⁸

Instead, the Federal Circuit found that a broader, reasonableness standard is the correct standard for determining if the implied duty has been breached.⁷⁹ In general, the scope of the duty depends on what is included in and expected from the underlying contract.⁸⁰ The court explained that

[t]he covenant of good faith and fair dealing . . . imposes obligations on both contracting parties that include the duty not to interfere with the other party's *performance* and not to act so as to destroy the *reasonable expectations* of the other party regarding the *fruits of the contract*.⁸¹

This duty includes both a duty not to hinder and a duty to cooperate.⁸² Further, “[w]hat is promised or disclaimed in a contract helps define what constitutes ‘lack of diligence and interference with or failure to cooperate in the other party's performance.’”⁸³

74. *Id.*

75. *Id.* at 992–93.

76. *Id.* at 993.

77. *Id.* (quoting *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 829 (Fed. Cir. 2010)).

78. *Id.*

79. *Id.* at 994.

80. *Id.* at 991.

81. *Id.* (alteration in original).

82. *Id.* (citing *Precision Pine & Timber, Inc.*, 596 F.3d at 820 n.1).

83. *Id.* (quoting *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988)).

The Federal Circuit then looked at the contractual provisions related to the breach of the implied duty claim.⁸⁴ The court found that nothing in the contract's requirements or in the "Differing Site Conditions" clause, FAR 52.236-2,⁸⁵ warned Metcalf that it could not rely on the Navy's representations about the soil's conditions or that Metcalf bore the risk of any cost associated with an error in the representations.⁸⁶ Rather, the Navy included the soil report in its RFP and pre-bid questions and answers to assist bidders in estimating costs and submitting bids.⁸⁷ The Federal Circuit concluded that including the report and an independent evaluation requirement necessarily dispelled any conclusion that the contractor would be financially responsible for any post-award cost discrepancy.⁸⁸ This interpretation was reinforced by the contract's incorporation of FAR 52.236-2, which "exists precisely in order to 'take at least some of the gamble on subsurface conditions out of bidding.'"⁸⁹ The court concluded that even though Metcalf was responsible for investigating site conditions once the work began, the contractual provisions protected Metcalf from the risk that the government's reports on soil conditions were inaccurate.⁹⁰

Given these conclusions about the implied covenant and the contract's provisions, the Federal Circuit vacated the trial court's judgment and remanded for further proceedings under the broader and correct standard for the implied duty⁹¹ articulated in *Centex Corp. v. United States*⁹² and *Malone v. United States*.⁹³

iii. Significance

After nearly a decade of decisions that critics claimed directly contradicted prior precedent and commercial practice, the Federal

84. *Id.* at 994–95.

85. *See* FAR 52.236-2 (2014) (providing for an equitable adjustment "[i]f the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions").

86. *Metcalf*, 742 F.3d at 995–96.

87. *Id.* at 996.

88. *Id.*

89. *Id.* (quoting *Foster Constr. C.A. & Williams Bros. Co. v. United States*, 435 F.2d 873, 887 (Ct. Cl. 1970) (per curiam)).

90. *Id.*

91. *Id.* at 997.

92. 395 F.3d 1283 (Fed. Cir. 2005).

93. 849 F.2d 1441 (Fed. Cir. 1988).

Circuit clarified its standards for proving a violation of the duty of good faith and fair dealing. In addition, *Metcalf* provides a useful interpretation of FAR 52.236-2, “Differing Site Conditions.”

Contractors should no longer have to worry that the COFC or BCA will require them to prove that the government acted in bad faith or violated an express term of the contract to prove a breach of the implied duty of good faith and fair dealing. *Metcalf* makes clear that courts must apply the less rigorous “reasonableness” test to assess allegations that the government violated the implied duty.⁹⁴ In short, *Metcalf* directly addressed one of the critics’ specific concerns with the Federal Circuit’s approach to government contract cases—“bad faith”—and ruled in favor of the contractor.

With regard to FAR 52.236-2, *Metcalf* disallows the use of broad disclaimer language for the government to argue that the contractor cannot rely on government-provided data and, thus, provides contractors a chance to obtain relief on a differing site condition claim.⁹⁵ The government can no longer argue that a design-builder assumes all risk and cannot rely upon initial information provided by the government if the design-builder is required to do further site investigation and final design after contract award.⁹⁶

b. Bell/Heery v. United States

i. Background

Joint venture contractor Bell/Heery (“BH”) entered into a contract with the Federal Bureau of Prisons (FBOP) for the construction of a federal correctional institution in New Hampshire.⁹⁷ The RFP specified that the operations needed to be performed in compliance with the rules and regulations of the New Hampshire Department of Environmental Sciences (NHDES), which required obtaining and complying with an NHDES permit.⁹⁸ The RFP further stated that the contractor would be responsible for preparing the paperwork

94. *Metcalf*, 742 F.3d at 994.

95. *Id.* at 996.

96. Some commentators believe this decision may have impacts beyond federal contract cases. *E.g.*, Zach Jones, *Differing Site Conditions: Court Affirms Contractor’s Reliance on Owner-Provided Geotech Information*, 58 DESIGN COST DATA 14, 14 (2014); Eric Frechtel, *United States: Federal Circuit’s Metcalf Decision a Big Win for Contractors*, MONDAQ BUS. BRIEFING, May 7, 2014.

97. Bell/Heery v. United States, 739 F.3d 1324, 1326 (Fed. Cir. 2014).

98. *Id.*

required for applying for the permits, the permit application, and its associated fees; for obtaining the permits; and for submitting applications to the FBOP.⁹⁹ The RFP also specified that the risks associated with obtaining the permits were the contractor's responsibility and that the government would not compensate the contractor for any unexpected costs.¹⁰⁰ In addition, the RFP included a "Consultation, Review, and Inspection" provision that required the contractor, in conjunction with the FBOP Project Management Team, to consult with appropriate state officials in preparing for the design of the project.¹⁰¹

After the government awarded the contract to BH, BH applied for the required NHDES permits, but the NHDES rejected its application.¹⁰² BH advised the FBOP that the NHDES intended to place various restrictions on BH's operations for the project, which would likely result in delay and additional costs.¹⁰³ BH further informed the FBOP that it was "reserving [its] rights for additional compensation resulting from the requirement of . . . the [permit] as well as future requirements of the permit."¹⁰⁴ However, BH did not refuse to proceed with construction under the NHDES's restrictions or ask the FBOP to intercede with the NHDES on BH's behalf.¹⁰⁵

BH commenced work, and the additional restrictions imposed by the NHDES caused the work to proceed slower and with greater costs.¹⁰⁶ BH repeatedly informed the FBOP of these issues and later asserted that two individuals associated with the FBOP advised BH "that it would be treated fairly with respect to the extra work caused by the NHDES's administration of the . . . permit."¹⁰⁷

BH submitted a Request for Equitable Adjustment ("REA") to the contracting officer for approximately \$7.7 million.¹⁰⁸ When the contracting officer rejected the REA, BH sued the FBOP in the COFC.¹⁰⁹ The COFC dismissed the case for failure to state a claim upon which relief could be granted because the contract allocated

99. *Id.* at 1327.

100. *Id.*

101. *Id.*

102. *Id.* at 1328.

103. *Id.*

104. *Id.* at 1328-29.

105. *Id.* at 1329.

106. *Id.*

107. *Id.* (internal quotation marks omitted).

108. *Id.*

109. *Id.*

the risk of increased costs for compliance to the contractor and because the FBOP did not control the NHDES's actions.¹¹⁰

ii. The Federal Circuit decision

(a) Breach of contract

BH argued on appeal that the contract's "Consultation, Review, and Inspection" and "Changes" clauses limited BH's obligations under the "Permits and Responsibility" clause.¹¹¹ Further, BH argued that pursuant to the RFP's requirement that the FBOP consult with the NHDES, the FBOP was obligated to work with BH involving the changes dictated by the NHDES.¹¹² BH argued that the FBOP failed to fulfill this duty and, thus, forced BH to concede to the NHDES's determinations and incur the extra costs.¹¹³

The Federal Circuit disagreed, finding that nothing in the "Consultation, Review, and Inspection" provision created an obligation for the FBOP concerning the increased costs or interactions with the NHDES at issue.¹¹⁴ Further, the court rejected BH's argument that the FBOP breached the "Changes" clause by not issuing an equitable adjustment to cover the additional costs necessitated by the NHDES's restrictions.¹¹⁵ The court observed that "there must have been a change in the form of a 'written or oral order . . . from the Contracting Officer that causes a change'" for the "Changes" clause to apply.¹¹⁶ The court explained that the FBOP's silence here did not establish a demonstrated acceptance of a contractual change by the agency's contracting officer.¹¹⁷ Because the contract allocated the costs for complying with the NHDES's permit to BH and because BH failed to identify any governmental duty that contracted or complicated the risk allocation, the Federal Circuit concluded that BH failed to demonstrate a cognizable claim for breach of contract.¹¹⁸

110. *Id.* at 1329–30.

111. *Id.* at 1331.

112. *Id.*

113. *Id.*

114. *Id.* at 1331–33.

115. *Id.* at 1333–34.

116. *Id.* at 1334 (quoting FAR 52.243-4(b) (2014)).

117. *Id.*

118. *Id.*

(b) *Breach of the implied covenant of good faith and fair dealing*

The Federal Circuit explained that while every contract implies “a duty of good faith and fair dealing that requires a party to refrain from interfering with another party’s performance or from acting to destroy another party’s reasonable expectations regarding the fruits of the contract,” an implied covenant “cannot ‘create duties inconsistent with the contract’s provisions.’”¹¹⁹ Here, BH alleged that the FBOP breached its obligation by advising BH that it would be treated fairly with respect to the NHDES’s requirements and then refusing to compensate BH for the additional costs and delays.¹²⁰

However, referencing *Precision Pine*, the court found that BH failed to present any allegations that the FBOP “engaged in conduct that reappropriated benefits promised to BH under the contract.”¹²¹ As a result, the implied duty of good faith and fair dealing could not “form the basis for wholly new contract terms, particularly terms which would be inconsistent with the express terms of the agreement.”¹²² Further, because BH’s complaint focused on the conduct of NHDES, an independent state agency, BH’s “allegations [did] not set forth a viable claim for breach of the implied covenant of good faith and fair dealing.”¹²³

(c) *Significance*

Bell/Heery appears to fit within the jurisprudence described by commentators like Professor Nash, Professor Schooner, and Mr. Johnson¹²⁴ in that it can be said to have followed formal rules and strict reviews to deny a contractor an equitable result. The court here read the provisions of the contract narrowly and with much scrutiny and held that BH’s arguments did not assert sufficient facts to create the possibility of liability for the government despite multiple warnings from the contractor about additional costs and delays if it continued performance under the contract. Further, the court narrowly interpreted the implied duty of good faith and fair dealing, focusing on the contract’s allocation of risk rather than subsequent

119. *Id.* at 1334–35 (quoting *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005)).

120. *Id.* at 1335.

121. *Id.*

122. *Id.* (internal quotation marks omitted).

123. *Id.*

124. *See supra* notes 4–6 and accompanying text (describing the trend in the Federal Circuit of affording the government more deference in these contract disputes).

communications between the parties. Accordingly, contractors must remember that the costs relating to certain risks—such as an outside state agency interfering and disrupting a project—are allocated based on the terms of the contract and are not necessarily based on what they may believe to be fair. Further, contractors should ask the government for direction as to how to proceed in writing when faced with additional work and costs. However, with the subsequent resolution of *Metcalfe*, there is some question as to whether *Bell/Heery* would arrive at the same result with regard to the implied duty of good faith if litigated again.

c. Lakeshore Engineering Services, Inc. v. United States

As in *Bell/Heery* and *Metcalfe*, the Federal Circuit in *Lakeshore Engineering Services, Inc., v. United States*¹²⁵ addressed the allocation of the risk of increased costs after contract formation. This case once again provided the Federal Circuit with an opportunity to address its case law on “bad faith” in the context of an allegation of a breach of the duty of good faith and fair dealing.

i. Background

Lakeshore Engineering Services, Inc. (“Lakeshore”) entered into an indefinite delivery/indefinite quantity (IDIQ) contract with the U.S. Army Contracting Agency for repair, maintenance, and construction services at Fort Rucker, Alabama.¹²⁶ The solicitation stated that the Army would place separate job orders with the awardee based on pricing that the parties would calculate by the identified costs for those jobs, multiplied by certain “coefficients” set in the contract.¹²⁷ The identified costs were based on unit prices found in the Universal Unit Price Book (UUPB).¹²⁸ The government advised offerors to set their coefficients to represent “costs (generally indirect costs) not considered to be included in the [UUPB] prices” and to “contain all costs other than the prepriced unit prices, as no allowance [would] be made after award.”¹²⁹ The solicitation further enumerated factors that offerors needed to include in their coefficients, including “[o]ther risks of doing business (i.e., risk of a

125. 748 F.3d 1341 (Fed. Cir. 2014).

126. *Id.* at 1343–44.

127. *Id.* at 1343 (internal quotation marks omitted).

128. *Id.*

129. *Id.* (second alteration in original) (internal quotation marks omitted).

lower than expected contract dollar value; risk of poor subcontractor performance and re-performance).”¹³⁰

After performing on the contract for two years, Lakeshore unsuccessfully requested an equitable adjustment of contract prices because its incurred costs exceeded its payments from the government.¹³¹ Lakeshore claimed that it was encountering “extraordinary inflationary circumstances” and complained of extremely high local prices as a result of Hurricane Katrina.¹³² Lakeshore then sought relief in the COFC, alleging, among other claims, breach of contract, breach of the covenant of good faith and fair dealing, and mistake.¹³³ The COFC granted the government’s motion for summary judgment, finding that Lakeshore had not identified enough evidence that, even if credited, would allow it to prevail at trial.¹³⁴

ii. The Federal Circuit decision

(a) Breach of contract

The Federal Circuit affirmed the COFC’s rejection of Lakeshore’s principal breach of contract claim, which was based on the argument that the unit prices that the government was paying Lakeshore were not accurate at the time the parties entered into the contract.¹³⁵ The court determined that “the only reasonable conclusion on the evidence here [was] that any risk that the prices in the UUPB were inaccurate at the time of contracting [were] borne by Lakeshore.”¹³⁶ Specifically, the Federal Circuit found that nothing in the contractual language guaranteed the accurateness of the prices in the UUPB or put the government at any risk if those prices were later determined to be inaccurate.¹³⁷ Moreover, the solicitation provided for task orders for a “Firm Fixed-Price” contract.¹³⁸ As the court explained,

130. *Id.* (alteration in original) (internal quotation marks omitted).

131. *Id.* at 1345.

132. *Lakeshore Eng’g Servs., Inc. v. United States*, 110 Fed. Cl. 230, 237–38 (2013), *aff’d*, 748 F.3d 1341 (Fed. Cir. 2014) (internal quotation marks omitted).

133. *Id.* at 237.

134. *Lakeshore Eng’g Servs.*, 748 F.3d at 1345.

135. *Id.*

136. *Id.* at 1347.

137. *Id.*

138. *Id.* (internal quotation marks omitted).

“[t]he essence of a firm fixed-price contract is that the contractor, not the government, assumes the risk of unexpected costs.”¹³⁹

In addition, the Federal Circuit found that Lakeshore’s actions showed that it understood that it was responsible for ensuring the accuracy of the UUPB unit prices and setting its coefficients. After all, Lakeshore had (1) reviewed the UUPB and compared major line items with its actual experience on past projects, (2) discussed pricing with the prior contractor, and (3) reflected that it was not relying on the accuracy of the UUPB pricing by adjusting its principal coefficients 6% above ordinary levels.¹⁴⁰

The court also determined that Lakeshore’s second argument—that the government’s “refusal to allow equitable adjustments for inflation of costs that occurred after the contract was made”—failed.¹⁴¹ The court explained that “[i]t is a necessary condition for an adjustment under the FAR provision that the increased contractor cost be the result of a change to the contract made by the government.”¹⁴² Here, Lakeshore’s claim was not based on any such government change to the contract.¹⁴³

(b) Covenant of good faith and fair dealing

The court also agreed with the COFC that Lakeshore could not establish that the government breached the covenant of good faith and fair dealing.¹⁴⁴ Lakeshore had entered into a fixed-price contract that established “that the contractor, not the government, would bear the risk of any inaccuracy in the pre-contract prices used for bidding . . . and of post-contract changes in market prices for the contractor’s inputs beyond those covered by the contract’s specific price-adjustment clauses.”¹⁴⁵ Thus, the Federal Circuit found that Lakeshore got what it bargained for: payment based on UUPB unit prices multiplied by the contractor’s bid coefficients and adjusted by limited post-contract changes.¹⁴⁶

139. *Id.* (citing *United States v. Spearin*, 248 U.S. 132, 136 (1918); 48 C.F.R. § 16.202-1 (2014)).

140. *Id.* at 1347–48.

141. *Id.* at 1348.

142. *Id.* (citing *Int’l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007)).

143. *Id.*

144. *Id.* at 1349.

145. *Id.*

146. *Id.*

(c) *Significance*

With regard to the Federal Circuit's significant clarification in *Metcalf, Lakeshore* addresses the covenant of good faith and fair dealing, but it does nothing to either support or contradict the ruling that "bad faith" is not required to prevail. Instead, the Federal Circuit in *Lakeshore* focused on the allocation of risk between the government and Lakeshore and found repeatedly that Lakeshore bore the risk. The court's language could be argued to be another example of the formalism commentators have criticized and seen in *Bell/Heery*.

However, in *Lakeshore*, this formalistic result may be less susceptible to a charge of unfairness. It appears that the increased local pricing of which Lakeshore complained was tied to Hurricane Katrina. However, Lakeshore submitted its proposal in March 2007¹⁴⁷—fifteen months after Hurricane Katrina impacted the Gulf Coast. Indeed, the Federal Circuit noted that "at the time of the government's solicitation and Lakeshore's review in preparing its bid, it was well known that construction costs in the region of Fort Rucker had increased in the aftermath of Hurricane Katrina."¹⁴⁸ In short, where the government and the contractor are both aware of increased costs and the risk created by them, the Federal Circuit's decision to hold the contractor to its obligation to bear the risk of cost increases would seem less vulnerable to allegations of inequity or unfairness.

2. *Contract formation and interpretation*

This subsection analyzes four cases that address issues of contract formation and interpretation that do not otherwise fit within one of the other categories (such as oil and gas cases). Moreover, each of these cases is primarily concerned with whether and to what extent the government is obligated to pay the contractor for its actions. In *Estes Express Lines v. United States*,¹⁴⁹ the Federal Circuit found the government obliged to pay a subcontractor even where the government had formally entered into a contract with another entity. In other words, the court specifically found the government liable by looking beyond a formal review of the contract at issue. The court reached the opposite conclusion—that the government had no

147. *Lakeshore Eng'g Servs., Inc. v. United States*, 110 Fed. Cl. 230, 236 (2013), *aff'd*, 748 F.3d 1341 (Fed. Cir. 2014).

148. *Lakeshore Eng'g Servs.*, 748 F.3d at 1344.

149. 739 F.3d 689 (Fed. Cir. 2014).

obligation to pay—in *Crewzers Fire Crew Transport, Inc. v. United States*,¹⁵⁰ where the court again affirmed the principal that a Blanket Purchase Agreement is not a contract.

In the remaining two cases, *In re Nwogu*¹⁵¹ and *Nichole Medical Equipment & Supply, Inc. v. United States*,¹⁵² the Federal Circuit addressed whether the government had an obligation to pay the contractor for the government's actions during performance of the contract. For *In re Nwogu*, the Federal Circuit concluded that the government was obligated to pay and that the COFC was wrong not to enforce that determination. In *Nichole Medical*, the court held that the government had not breached its agreement with the plaintiff and was not obligated to pay.

a. Estes Express Lines v. United States

Where the *Bell/Heery* case may be claimed as an example of the formalistic approach that has generated extensive criticism of the Federal Circuit, the court's decision in *Estes Express* is at the opposite end of the spectrum. In *Estes Express*, the Federal Circuit took a wider view of the facts and determined that it could still find privity of contract by looking beyond the four corners of a formal government contract.

i. Background

Estes Express involved an appeal from a motor carrier that sought to recover from the Marine Corps Community Services ("MCCS") freight charges incurred for shipments arranged on behalf of MCCS by a freight broker, Salem Logistics ("Salem").¹⁵³ Salem and MCCS had entered into a contract wherein "Salem agreed to provide MCCS with certain transportation and freight management services, including coordinating the pick-up, transport and delivery of vendor products to various MCCS or Marine Corps Exchange ('MCX') locations."¹⁵⁴ Under the contract, Salem would select a carrier—one of which was Estes Express Lines ("Estes")—to move merchandise from the vendor to the MCCS or MCX destination, pay the carrier directly, and invoice MCCS.¹⁵⁵ The contract specified that bills of

150. 741 F.3d 1380 (Fed. Cir. 2014).

151. 570 F. App'x 919 (Fed. Cir. 2014).

152. 558 F. App'x 1001 (Fed. Cir. 2014) (per curiam).

153. *Estes Express Lines*, 739 F.3d at 691.

154. *Id.*

155. *Id.*

lading indicate that “third party freight charges’ were to be billed to ‘Marine Corps Exchange C/O Salem Logistics,’” that delivery receipts must be signed by a representative of the MCCA or MCX delivery locations, and that MCX should be billed.¹⁵⁶ Pursuant to this arrangement, shipments “handled by Estes [were] identified by a bill of lading, a freight bill, and a delivery receipt,” and “Estes invoiced ‘MCX, care of Salem’ for freight charges.”¹⁵⁷

Although MCCA paid Salem for shipments, Salem apparently did not remit all required payments to Estes for the shipments Estes handled.¹⁵⁸ When MCCA became aware of this, it began paying carriers directly but only for subsequent shipments.¹⁵⁹ Estes sued Salem and the government in the U.S. District Court for the Middle District of North Carolina, seeking to recover earlier freight charges.¹⁶⁰ The case was transferred to the COFC, which dismissed Estes’s complaint for lack of subject matter jurisdiction after finding no direct privity of contract between Estes and the government and rejected Estes’s claim under 49 U.S.C. § 13706 regarding the liability of consignees for shipping.¹⁶¹

ii. *The Federal Circuit decision*

The Federal Circuit disagreed with the COFC, finding that the bills of lading were sufficient to establish privity and thus jurisdiction.¹⁶² Reviewing the question of jurisdiction de novo, the Federal Circuit examined the specific language of the bills of lading and found that “MCCA intended to be bound by bills of lading that would reflect . . . that it was . . . the party ultimately responsible for freight charges.”¹⁶³ Based on the facts at hand, as well as the rule that “a party to the shipment may assume liability where the terms of the bill of lading so provide and the party accepts the shipment subject to the terms of the bill of lading,” the court found the bills of lading satisfied Estes’s burden to show privity.¹⁶⁴ The court considered that MCCA had “expressly authorized, by contract, its designation as a

156. *Id.*

157. *Id.*

158. *Id.* at 691–92.

159. *Id.* at 692.

160. *Id.*

161. *Id.*

162. *Id.* at 693–94.

163. *Id.*

164. *Id.*

party to the bills of lading,” that “MCX accepted all shipments without exception, and that a MCX representative signed each delivery receipt listing MCX as the ‘bill to’ party.”¹⁶⁵ Accordingly, the court reversed and remanded.¹⁶⁶

iii. Significance

The Federal Circuit in *Estes Express* looked beyond the four corners of the contract at issue and found a solution that appeared to equitably resolve the dispute. As mentioned above, the history of the action gave the Federal Circuit an opportunity to deny the contractor’s claim—namely, that the court lacked jurisdiction because the plaintiff had not entered into a contract with the government.¹⁶⁷ However, the Federal Circuit ruled in a way that would be at odds with commentators’ assertions that the court is too formalistic.

More broadly, the court in *Estes Express* clarified the scope of federal jurisdiction over contract claims. Privity of contract need not be explicitly stated in the underlying contract with the federal government.¹⁶⁸ Such contracts must be read in context with other related ancillary documents, such as bills of lading.¹⁶⁹ Just because the plaintiff is not a party to the underlying contract does not foreclose the existence of a separate contractual relationship between that person or entity and the government based on bills of lading or other ancillary agreements.

b. Crewzers Fire Crew Transport, Inc. v. United States

The Federal Circuit’s decision in *Crewzers* is part of a consistent line of cases concluding that blanket purchase agreements (“BPAs”) and similar arrangements where neither party is obligated are not subject to the Tucker Act.¹⁷⁰

165. *Id.* at 693.

166. *Id.* at 694. The Federal Circuit declined to decide the question of “whether the Government may be liable for freight charges solely on the basis that it is the consignee and owner of the freight.” *Id.*

167. *See id.* at 693 (explaining that *Estes* was a subcontractor with Salem rather than a government contractor).

168. *See id.* (concluding that the government intended to be bound by bills of lading even though it had not contracted with *Estes*).

169. *See id.* at 693–94 (explaining that bills of lading can show privity with the government even though they are not part of a government contract itself).

170. *See, e.g., Ridge Runner Forestry v. Veneman*, 287 F.3d 1058, 1061 (Fed. Cir. 2002) (tender agreements); *Modern Sys. Tech. Corp. v. United States*, 979 F.2d 200, 206 (Fed. Cir. 1992) (BPAs).

i. Background

The U.S. Forest Service (Forest Service) awarded two BPAs to Crewzers Fire Crew Transport, Inc. (“Crewzers”)—one to provide crew carrier buses to the Forest Service to transport fire crews to wildfires and other disaster areas and a second to provide flame retardant tents to disaster areas as needed.¹⁷¹ The Forest Service awarded these BPAs to multiple contractors for each set of goods.¹⁷² The Forest Service ranked the contractors by cost in each of the six Forest Service geographic regions and then contacted the top-ranked contractor to contract for services for the emergency at hand.¹⁷³ If the top-ranked contractor chose to accept the offer, a contract was formed.¹⁷⁴ If that contractor declined the offer, if the Forest Service could not reach the contractor, or if the contractor could not provide the service in question, the Forest Service could move on to the next contractor on the list.¹⁷⁵ Finally, the Forest Service could deviate from the priority list as needed to respond effectively to actual fire conditions and without violating the BPA.¹⁷⁶ Crewzers’s BPA also specifically provided (1) that Crewzers only had to furnish resources to the extent that it was willing and able at the time of order and (2) that because incidents were sporadic and unforeseeable, there was no guarantee that the Fire Service would place any orders at all.¹⁷⁷

In August 2011, the Forest Service terminated Crewzers’s BPA for carrier buses after Crewzers accepted several orders despite having non-regulation vehicles and then attempted to bill the Forest Service for costs above the authorized rate.¹⁷⁸ In November 2011, the Forest Service terminated Crewzers’s BPA for flame retardant tents because Crewzers had provided the tents late and against specifications.¹⁷⁹

Crewzers sued the Forest Service in the COFC for breach of each contract.¹⁸⁰ The COFC granted the government’s motions to dismiss

171. *Crewzers Fire Crew Transp., Inc. v. United States*, 741 F.3d 1380, 1381 (Fed. Cir. 2014).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 1382.

179. *Id.*

180. *Id.*

for lack of jurisdiction under the Tucker Act¹⁸¹ because the BPAs lacked the mutuality of consideration required for a contract to be enforceable and, therefore, were not binding.¹⁸² Crewzers appealed.¹⁸³

ii. The Federal Circuit decision

The Federal Circuit found that Crewzers had not sufficiently pled that the BPAs at issue were binding contracts.¹⁸⁴ The court noted that for a contract to be enforceable, it must have both consideration and mutuality of obligation.¹⁸⁵ The court also explained that a promise is not valid consideration when its terms dictate that the “promisor reserves a choice of alternative performances”¹⁸⁶ Under the BPAs, the Forest Service was not required to place any orders with Crewzers.¹⁸⁷ In fact, the BPAs allowed the Forest Service to deviate from the priority list in order to adequately address needs in a disaster situation.¹⁸⁸ Similarly, the BPAs did not require any specific performance from Crewzers: upon offer from the Forest Service, Crewzers was not obligated to accept the contract, and if it did, the BPA permitted the company to fulfill the contract to the extent it was “willing and able.”¹⁸⁹ Accordingly, the BPAs reflected illusory promises that imposed no enforceable obligations on either party.¹⁹⁰ Finding such contracts to be non-enforceable, the Federal Circuit upheld the trial court’s dismissal.¹⁹¹

iii. Significance

The Federal Circuit’s decision in *Crewzers* is consistent with a line of cases that find that BPAs and similar arrangements where neither party is contractually obligated to perform are not binding contracts under the Tucker Act.¹⁹² Because such arrangements do not qualify

181. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (codified as amended at 28 U.S.C. § 1491(a) (2012)).

182. *Crewzers*, 741 F.3d at 1382.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* (quoting Restatement (Second) of Contracts § 77 (1981)).

187. *Id.* at 1384.

188. *Id.*

189. *Id.* (internal quotations marks omitted).

190. *Id.* at 1382–83.

191. *Id.* at 1384–85.

192. *See, e.g., Ridge Runner Forestry v. Veneman*, 287 F.3d 1058, 1061 (Fed. Cir. 2002) (concluding that the tenders agreement at issue were unenforceable because

as binding contracts, the COFC lacks jurisdiction to address claims of breaches thereof.¹⁹³

c. In re Nwogu

i. Background

This dispute arose out of two contracts awarded to the petitioner, Peter C. Nwogu, doing business as Environmental Safety Consultants, Inc. (“ESCI”).¹⁹⁴ ESCI asked the COFC to enforce the Armed Services Board of Contract Appeals (ASBCA) judgment against the government for \$93,989 plus interest related to a contract to remove, transport, and dispose of industrial waste sludge from the Naval Centers in Warminster, Pennsylvania (“Contract I”).¹⁹⁵ The government moved to dismiss, arguing that the COFC lacked jurisdiction over ESCI’s various claims regarding Contract I and that the government had a right of setoff based on damages owed to it under a separate contract to remove storage tanks in Yorktown, Virginia (“Contract II”).¹⁹⁶ The COFC granted the government’s motion based on the right of setoff.¹⁹⁷

ESCI appealed to the Federal Circuit.¹⁹⁸ The Federal Circuit vacated the dismissal because the ASBCA had already reviewed the termination of Contract II and decided to convert the termination from a default termination to one of convenience.¹⁹⁹ Additionally, the Federal Circuit reversed the COFC’s decision that it did not have jurisdiction to order payment of the ASBCA judgment.²⁰⁰ The Federal Circuit remanded for enforcement of the \$93,989 award plus interest.²⁰¹

On remand, the government asserted that four ASBCA proceedings were pending that could impact ESCI’s recovery under Contract II, which, in turn, could affect a setoff against the award for

they did not limit the promisor’s future behavior); *Modern Sys. Tech. Corp. v. United States*, 979 F.2d 200, 206 (Fed. Cir. 1992) (holding that a BPA was not binding because it did not contain a minimum quantity provision).

193. *Crewzers*, 741 F.3d at 1384–85.

194. *In re Nwogu*, 570 F. App’x 919, 919–20 (Fed. Cir. 2014).

195. *Id.* at 920.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

Contract I.²⁰² The COFC stayed the remand proceedings pending resolution of those ASBCA matters.²⁰³ “ESCI moved for reconsideration, asserting that the [Federal Circuit’s] mandate required the [COFC] to enter the judgment in its favor.”²⁰⁴ After the COFC failed to act on its motion for four months, ESCI filed a petition in the Federal Circuit for a writ of mandamus.²⁰⁵

ii. The Federal Circuit decision

In a 2–1 decision, the Federal Circuit explained that, in its earlier remand decision, the court had held that Contract II was not in default, ordered payment of the judgment on Contract I, and “did not invite further delay, or new issues, or additional reasons not to pay the judgment awarded in 2005” on Contract I.²⁰⁶ Further, “[b]y vacating the decision that the Government could properly withhold payment, [the Federal Circuit’s] mandate precluded the [COFC] from staying payment.”²⁰⁷

The government argued “that a stay of all proceedings [was] appropriate pending disposition of the four ASBCA actions.”²⁰⁸ However, the government later conceded that it considered only one of those actions to be pending.²⁰⁹ Additionally, the government did not “show[] that it [was] in a position to collect any monetary damages from ESCI in the ASBCA appeals.”²¹⁰ The court noted that none of the ASBCA matters appeared to involve any claim for setoff by the government.²¹¹ In fact, the only claims pending before the ASBCA were claims *by* ESCI, not *against* ESCI.²¹² Judge Wallach dissented, arguing that because the Federal Circuit did not finally resolve the enforcement claim, the mandate rule did not entitle the petitioner to a final judgment.²¹³

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 921.

207. *Id.*

208. *Id.*

209. *Id.* at 922.

210. *Id.* at 921.

211. *Id.* at 922.

212. *Id.* at 920–21.

213. *Id.* at 922 (Wallach, J., dissenting).

iii. Significance

This case articulates some limits concerning when the COFC can delay taking the steps required in a remand decision. Because this scenario does not frequently arise, it is not clear how instructive this decision can be. In fact, considering that this case involved a lower court—the COFC—that essentially refused to take the action directed by the Federal Circuit, it can be interpreted as resolving a dispute between courts as much as resolving a dispute between litigants.

d. Nichole Medical Equipment & Supply, Inc. v. United States

Nichole Medical is a non-precedential decision in a case brought by a pro se plaintiff-appellant.

i. Background

In 2004, as a result of a search of the Medicare records of Nichole Medical Equipment & Supply, Inc. (“Nichole”), a program safeguard contractor for the Centers for Medicaid & Medicare Services (CMS) directed a payment intermediary to withhold approximately \$101,000 due to Nichole because CMS suspected Nichole had committed fraud in the supply of wheelchairs and hospital beds (“wheelchair/bed issue”).²¹⁴ The payment intermediary imposed the offset but immediately stayed it.²¹⁵

In January 2006, the government and Nichole entered into a settlement agreement (“Settlement Agreement”) on a matter unrelated to the wheelchair/bed issue.²¹⁶ The government alleged that Nichole had knowingly submitted false and fraudulent payment requests to Medicare and Medicaid for incontinence supplies.²¹⁷ Under the Settlement Agreement, Nichole agreed to pay the government \$750,000 in installments and also agreed that, upon default without cure, the government could offset any remaining balance from any amounts the government owed Nichole.²¹⁸ Nichole soon defaulted on its obligations under the Settlement Agreement.²¹⁹ It made an initial payment and the first two monthly payments before

214. *Nichole Med. Equip. & Supply, Inc. v. United States*, 109 Fed. Cl. 328, 330 (2013), *aff’d*, 558 F. App’x 1001 (Fed. Cir. 2014) (per curiam).

215. *Id.*

216. *Id.*

217. *Nichole Med. Equip. & Supply, Inc. v. United States*, 558 F. App’x 1001, 1002 (Fed. Cir. 2014) (per curiam).

218. *Id.*

219. *Id.*

stopping payments in the spring of 2006, leaving a balance of more than \$577,350.²²⁰

In July 2006, a new payment intermediary reinstated the offset on the wheelchair/bed issue.²²¹ Nichole “allege[d] that reimposition of the wheelchair/bed offset caused plaintiffs to be unable to pay the [Settlement Agreement] balance, leading to its cessation of operations in January 2007.”²²² In 2008, a Medicare administrative law judge found for Nichole that the wheelchair/bed offset was improper because the government had failed to comply with Medicare regulations regarding notice requirements and timing limitations for reopening claims.²²³ However, since Nichole was still in default of the Settlement Agreement, the government instructed the intermediary not to reimburse Nichole the approximately \$101,000 from the earlier wheelchair/bed issue.²²⁴

Nichole and its owner, Dominic Rotella, alleged that the government breached the Settlement Agreement.²²⁵ The plaintiffs alleged that the government’s failure to comply with the then-current Medicare regulations regarding notice requirements and timing limitations for reopening claims violated the Settlement Agreement because the agreement stated that it would be “governed by the laws of the United States.”²²⁶

The COFC disagreed with the plaintiffs and found that the language at issue—that the Settlement Agreement would be “governed by the laws of the United States”—was a common choice of law provision that said nothing about how the government would conduct future dealings with Nichole.²²⁷ Further, even if this language did require the government and its intermediaries to follow

220. *Nichole Med. Equip. & Supply, Inc.*, 109 Fed. Cl. at 332.

221. *Id.*

222. *Id.*

223. *Id.* at 332–33. The Administrative Law Judge based his decision on two Medicare regulations. The first, 42 C.F.R. § 405.841(a)–(c), provided that an initial payment decision could be reopened either (1) within a year of official notice or (2) if good cause is shown why the claim should be reopened after a year but within four years as well as that a contractor could reopen a claim for review at any time when evidence of fraud existed. *Id.* at 332 n.6 (citation omitted). The second, 42 C.F.R. § 405.842(a), required that Nichole receive written notice if its past claims for reimbursement were to be reopened. *Id.* at 332.

224. *Nichole Med. Equip. & Supply, Inc.*, 558 F. App’x at 1002.

225. *Nichole Med. Equip. & Supply, Inc.*, 109 Fed. Cl. at 333.

226. *Id.* (internal quotation marks omitted).

227. *Id.* at 334 (internal quotation marks omitted).

applicable Medicare laws and regulations, Nichole was not entitled to forgo its legal obligations under the Settlement Agreement, as Nichole claimed.²²⁸ The COFC also explained that the “warranty as envisioned by plaintiffs would be inconsistent with other provisions of the [Settlement Agreement, which] specifically reserved claims of the United States that were based on conduct other than” that relating to the incontinence supplies.²²⁹ The trial court subsequently dismissed the complaint with prejudice for failure to state a claim upon which relief could be granted.²³⁰

ii. The Federal Circuit decision

Rotella, who appealed the case on his own,²³¹ argued on appeal that the Settlement Agreement obligated the government to comply with Medicare law and that Nichole could have plausibly understood the Settlement Agreement and incorporated documents to have resolved all prior payment actions, including the wheelchair/bed issue.²³²

The Federal Circuit rejected these arguments, finding that the Settlement Agreement and incorporated documents required only Nichole, not the government, to comply with Medicare law.²³³ Rotella’s argument that this interpretation was unfair failed because the issue was “whether [Rotella] plausibly alleged that there [was] a contractual obligation for the Government’s future activities to comply with Medicare law, not whether it was fair for there to be no such obligation.”²³⁴

The court also found that Rotella did not plausibly allege that the Settlement Agreement resolved all past disputes.²³⁵ Like the COFC, the Federal Circuit found that the express terms of the Settlement Agreement showed that it resolved only those allegations related to the incontinence supplies action and not to the wheelchair/bed

228. *Id.*

229. *Id.* at 335.

230. *Id.*

231. *Nichole Med. Equip. & Supply, Inc. v. United States*, 558 F. App’x 1001, 1003 (Fed. Cir. 2014) (per curiam) (“Since the filing of this appeal, Counsel for Appellants has withdrawn and Nichole Medical Equipment & Supply, Inc., as an unrepresented corporation, has been removed from this appeal. Rotella is proceeding pro se.”).

232. *Id.*

233. *Id.*

234. *Id.* (first alteration in original) (internal quotation marks omitted).

235. *Id.*

action.²³⁶ In addition, even if Nichole believed that the Settlement Agreement resolved all of its past problems, such a unilateral understanding was insufficient to support this claim because the subjective unexpressed intent of one party to a contract is irrelevant.²³⁷ Accordingly, the court affirmed the decision of the COFC.²³⁸

iii. Significance

The Federal Circuit's decision that Nichole had defaulted on its obligations under the Settlement Agreement in the spring of 2006 before the government reimposed the offset of the wheelchair/bed issue in July 2006 means that the government's subsequent conduct—even if in violation of the Medicare laws—does not appear relevant.

Nichole Medical also contains dicta that could be read to imply that the government does not have an obligation to comply with Medicare laws. Specifically, the court stated that “the Integrity Agreement only impose[d] an obligation on Nichole—and not the Government—to comply with Medicare law.”²³⁹ It would be interesting to see how different facts—for instance had Nichole defaulted only on its payments under the Settlement Agreement after the government violated the Medicare regulations and deprived Nichole of revenue that it was due—would have impacted the Federal Circuit's decision.

3. Cost reimbursement

The Federal Circuit decided three cost-reimbursement contracting cases in 2014, and each provided some welcome guidance. Perhaps the most significant of the group was the court's decision in *Sikorsky Aircraft Corp. v. United States*,²⁴⁰ which clarified that the statute of limitations under the Contract Disputes Act is not jurisdictional. The other two decisions, *Kellogg Brown & Root Services, Inc. v. United States*²⁴¹ and *Raytheon Co. v. United States*,²⁴² are both instances where the court deferred to the determinations of the COFC on complicated cost accounting issues. In particular, in *Raytheon*, the

236. *Id.*

237. *Id.* at 1003–04.

238. *Id.* at 1004.

239. *Id.* at 1003 (explaining that it is “irrelevant” whether it is “unfair” to consider the agreement as not requiring the government to comply with Medicare law).

240. 773 F.3d 1315 (Fed. Cir. 2014).

241. 742 F.3d 967 (Fed. Cir. 2014).

242. 747 F.3d 1341 (Fed. Cir. 2014).

court confirmed that the government bears the burden of proof in showing that a contractor's accounting practices are improper.

a. Kellogg Brown & Root Services, Inc. v. United States

The Federal Circuit's decision in *Kellogg Brown & Root* addressed cost-reimbursement contracting in the midst of a war zone.²⁴³ The court's decision left Kellogg Brown & Root Services, Inc. ("KBR") with substantial losses.²⁴⁴ However, in arriving at that result, the court avoided the formalism that critics have questioned and, instead, took into account the particularities of the circumstances in the case.

i. Background

KBR contracted with the U.S. Army to provide logistical support services during Operation Iraqi Freedom.²⁴⁵ Under the contract, KBR would provide services through individual task orders (TO).²⁴⁶ KBR sued the United States, seeking to recover \$12,529,504 in costs incurred under two TOs that "required KBR to provide, install, operate, and maintain dining facility services near Mosul, Iraq."²⁴⁷

The relevant TOs provided that the Army would compensate KBR on a cost-plus-award-fee basis.²⁴⁸ KBR subcontracted with ABC International Group ("ABC") to build a "Kirby-style" dining facility and to provide dining services for 2573 individuals.²⁴⁹ ABC originally quoted a total monthly cost of \$869,735 for 2501 to 3500 individuals.²⁵⁰

In June 2004, the Army told KBR to stop constructing the Kirby-style facility and asked KBR to instead begin constructing a concrete-reinforced facility for upwards of 6200 troops.²⁵¹ ABC then submitted a new proposal for constructing such a facility to KBR; ABC proposed

243. *Kellogg Brown & Root Servs., Inc.*, 742 F.3d at 968.

244. KBR originally sued in the Court of Federal Claims to recover about \$12.5 million in costs incurred in meeting the government's requirements but was only allowed to recover \$6.8 million. *Id.* at 970.

245. *Id.* at 968.

246. *Id.*

247. *Id.*

248. *Id.* In a cost-plus-fee award contract, the contractor is paid for "all allowable costs incurred" while performing the contract "plus an additional fee based upon the contractor's performance." *Id.* at 968 n.1.

249. *Id.* at 968-69. "Kirby-style" refers to the use of prefabricated metal structures. *Id.* at 968.

250. *Id.* at 969.

251. *Id.*

a monthly cost of \$2,706,600 for 5501 to 6500 individuals²⁵²—about three times the cost originally quoted for the Kirby-style facility.

KBR's Subcontract Administrator Team Leader reviewed the proposal and created a price negotiation memorandum to assess the reasonableness of ABC's quote.²⁵³ The memorandum included a benchmark against which to assess the new proposal for reasonableness, but KBR made an error that set the benchmark four times higher than it should have been.²⁵⁴ KBR management reviewed the proposal with this flawed memorandum and approved ABC's cost increase as reasonable.²⁵⁵

In 2007, the Defense Contract Auditing Agency (DCAA) suspended the government's reimbursement of KBR for costs paid to ABC pursuant to the second proposal.²⁵⁶ In the end, DCAA refused to reimburse KBR for the \$12,529,504 that KBR had paid ABC.²⁵⁷

KBR sued the government in the COFC to recover the \$12,529,504.²⁵⁸ The COFC found for the government, holding that KBR did not sufficiently show that the incurred costs were reasonable.²⁵⁹ The trial court found that KBR failed to employ sound business practices and did not act prudently in accepting ABC's proposed costs.²⁶⁰

ii. The Federal Circuit decision

On appeal, KBR argued that the FAR's reasonableness standard²⁶¹ encompasses a "broad range of reasonableness" and that "all costs

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 970.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. Pursuant to the FAR, a cost is reasonable when "in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business." FAR 31.201-3(a) (2014). Reasonableness is assessed using the following four fact specific factors:

- (1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;
- (2) Generally accepted sound business practices, arm's length bargaining, and Federal and State laws and regulations;
- (3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and

associated with a cost-reimbursement contract are reasonable unless they arise out of willful misconduct, gross negligence, or gross disregard of contractual obligations.”²⁶² The Federal Circuit reasoned that it did not need to decide how broad the reasonableness standard is in relation to negligent conduct in the performance of cost-reimbursement contracts because the COFC had already determined that KBR’s conduct was, in fact, grossly negligent.²⁶³ While the Federal Circuit did not explicitly articulate that cost is always unreasonable where the cost-incurring conduct is grossly negligent, it did affirm that KBR’s price negotiation memorandum was “seriously flawed, [and that] KBR’s management was aware of the inadequacies of the Memorandum and still approved the Change Order 1 without questioning the higher costs.”²⁶⁴ The Federal Circuit found that there was no clear error in the COFC’s determination that KBR failed to show “that it employed sound business practices and acted as a reasonably prudent business person.”²⁶⁵

KBR further argued that decisions made in a war zone during a time of conflict cannot be examined in the same light as ones made in less volatile circumstances.²⁶⁶ The court agreed but noted that “reasonableness” inherently accounts for unusual situations because the behavior must be examined under the specific circumstances that existed at the time at issue.²⁶⁷ The court then concluded that a reasonably prudent businessperson would still not have behaved as KBR did in this situation.²⁶⁸

iii. Significance

While not the result that the contractor wanted, the court’s decision does not display the hallmarks of formalism with which Professor Nash was concerned. The court did not resolve the case

(4) Any significant deviations from the contractor’s established practices.
Id. at 31.201-3(b).

262. *Kellogg Brown*, 742 F.3d at 971 (internal quotation marks omitted).

263. *Id.*

264. *Id.*

265. *Id.* at 972 (internal quotation marks omitted).

266. *Id.* (arguing that the urgency of the government’s request, combined with the dangerousness of the situation in Iraq, “bear[ed] on the reasonableness” of the contract terms (internal quotation marks omitted)).

267. *Id.* (explaining that the situation in Iraq was “certainly relevant” but not sufficient for determining that KBR acted as a reasonably prudent businessperson).

268. *Id.*

using an arbitrary rule that ignored factual nuances.²⁶⁹ In fact, the Federal Circuit made its determination based on the specific factual nuances presented by the war zone.²⁷⁰

Moreover, rather than ignore the findings of the trial court,²⁷¹ the Federal Circuit's decision expressly relied upon the COFC's finding that "KBR was grossly negligent."²⁷² Finally, this decision does not appear to reveal a "desire to impose more rigorous standards" on the government contract community.²⁷³ Rather, the court essentially directed the contracting community to determine reasonableness by evaluating individual circumstances by emphasizing that "the reasonableness standard *is flexible* . . . [and] must be examined under the circumstances that existed at the time the cost was incurred, but such business judgment must still be exercised in a rational manner, even in wartime."²⁷⁴

b. Raytheon Co. v. United States

In *Raytheon Co.*, the Federal Circuit affirmed a decision from the COFC requiring the government to pay Raytheon Co. ("Raytheon") approximately \$59.2 million for pension fund adjustments made pursuant to Cost Accounting Standard (CAS) 413.²⁷⁵ The dispute on appeal centered on the government's obligation to pay Raytheon segment closing adjustments for pension deficits concerning several businesses Raytheon sold during a corporate restructuring.²⁷⁶

269. Professor Nash has argued that the "dogmatic application of a strict legal rule" in government contract cases "can lead to unfair results." Nash, *supra* note 4, at 612–13.

270. See *Kellogg Brown*, 742 F.3d at 972 ("While the circumstances surrounding negotiations are certainly relevant, KBR still had the burden to show that a prudent businessperson would have accepted ABC's prices *under those circumstances*." (emphasis added)).

271. See Nash, *supra* note 4, at 613 (offering the Federal Circuit's possible "mistrust of trial judges" as a reason for its line of cases using plain language contract interpretation).

272. *Kellogg Brown*, 742 F.3d at 971.

273. Nash, *supra* note 4, at 614.

274. *Kellogg Brown*, 742 F.3d at 972 (emphasis added).

275. *Raytheon Co. v. United States*, 747 F.3d 1341, 1344 (Fed. Cir. 2014); see 48 C.F.R. § 9904.413-40 (2014) ("Contractors shall allocate pension cost to each segment having participants in a pension plan.").

276. *Raytheon Co.*, 747 F.3d at 1344–45.

i. Background

In the early 2000s, Raytheon sold eight business segments that performed government contracts as part of a major corporate reorganization.²⁷⁷ As part of this process, Raytheon calculated segment closing adjustments pursuant to CAS, including adjustments related to the defined benefit pension plans associated with the segments Raytheon sold.²⁷⁸ For some of those segments, Raytheon calculated a pension surplus and paid the government its share of those surpluses.²⁷⁹ However, for four segments, Raytheon calculated pension deficits and submitted certified claims to recover the government's share of the deficits.²⁸⁰ The contracting officer rejected the claim under the theory that Raytheon had not complied with CAS 413.²⁸¹

Raytheon sued the government under the Contract Disputes Act (CDA) and sought to reverse the contracting officer's decision.²⁸² The COFC ruled that Raytheon could recover about \$59.2 million for the claims related to two of the four Raytheon segments.²⁸³

ii. The Federal Circuit decision

The Federal Circuit affirmed all aspects of the COFC's decision, specifically rejecting the government's three arguments on appeal.²⁸⁴

(a) Segment closing adjustments are not "pension costs"

Directly on the substance of the CAS rules on pension costs, the court rejected the government's primary argument that "segment closing adjustments" constituted "pension costs" and thus were subject to the timely funding requirement of FAR 31.205-6(j).²⁸⁵ The court asserted three reasons for taking this position. First, the court noted that CAS 412²⁸⁶ and 413 do not treat segment closing

277. *Id.* at 1344.

278. *Id.*

279. *Id.* at 1344–45.

280. *Id.*

281. *Id.* at 1345.

282. *Id.* at 1347.

283. *Id.*

284. *Id.* at 1357. Raytheon also cross-appealed the trial court's decision denying recovery for one of the business segments. *Id.* at 1355. The Federal Circuit affirmed this decision as well, thus determining that Raytheon was not entitled to pension closing adjustments for that business segment. *Id.*

285. *Id.* at 1349 (internal quotation marks omitted).

286. *See* 48 C.F.R. § 9904.412 (2014).

adjustments as pension costs; indeed, such adjustments are not listed as a component of “pension costs,” which CAS 412 describes in detail.²⁸⁷ The preamble to CAS 413 also treats segment closing adjustments differently and provides that such costs are “not an actuarial gain or loss as defined in the Standard.”²⁸⁸

Second, the court rejected the government’s claim that the FAR’s cost principles trumped the CAS provisions on this point.²⁸⁹ Instead, the court explained that while the FAR governs allowability, the CAS has authority over “measurement of cost,” which includes the ability to define “the components of a pension cost.”²⁹⁰ The court also reiterated its prior holding that “if there is any conflict between the CAS and the FAR as to an issue of allocability, the CAS governs.”²⁹¹

Third, the court held that the text of FAR 31.205-6(j) itself recognizes the distinction between pension costs and segment closing adjustments.²⁹² According to the court, the provision does not suggest that segment closing adjustments are subject to the timely funding requirement, and the provision also references CAS 412 and 413 in order to determine how the costs for defined-benefit pension plans must be “measured, allocated, and accounted for.”²⁹³

(b) The government bears the burden of proving noncompliance with CAS

The Federal Circuit also rejected the government’s argument that Raytheon should have had the burden of proving that it complied with the CAS because it was affirmatively seeking compensation from the government.²⁹⁴ The Federal Circuit had not previously addressed this issue, but it noted that the ASBCA and the COFC have, for years, “determined that the Government bears the burden of proving that a contractor’s accounting practices do not comply with the CAS.”²⁹⁵ The court called the government’s argument that Raytheon was affirmatively alleging CAS noncompliance by the government

287. *Raytheon Co.*, 747 F.3d at 1349.

288. *Id.* (internal quotation marks omitted).

289. *Id.* at 1350.

290. *Id.* (quoting 48 C.F.R. § 9903.302-1(a)).

291. *Id.* (quoting *Boeing N. Am., Inc. v. Roche*, 298 F.3d 1274, 1283 (Fed. Cir. 2002)).

292. *Id.* at 1351.

293. *Id.* (internal quotation marks omitted).

294. *Id.*

295. *Id.* at 1352 (citing *Sikorsky Aircraft Corp. v. United States*, 110 Fed. Cl. 210, 219 (2013); *Gen. Dynamics Corp.*, ASBCA No. 56744, 11-2 BCA ¶ 34,787; *Unisys Corp.*, ASBCA No. 41135, 94-2 BCA ¶ 26,894)).

“dubious.”²⁹⁶ Rather, Raytheon was challenging the contracting officer’s decision, which alleged that Raytheon had not complied with CAS.²⁹⁷ Therefore, the court held that the “Government bears the burden to prove that a contractor’s segment closing adjustment does not comply with the CAS, even if the adjustment is asserted in a claim brought by the contractor.”²⁹⁸

(c) *The government cannot request an equitable adjustment without submitting a claim*

Finally, the court rejected the government’s request for an equitable adjustment, which the government claimed at trial was required to account for pension contributions made in 1995 and prior to revisions to CAS 413.²⁹⁹ Just as the trial court had held, the court explained that the “equitable adjustment” the government sought was “separate and distinct from the calculation of a segment closing adjustment required by CAS 413.”³⁰⁰ Because it was not part of this calculation, the adjustment the government sought constituted a “separate claim under the Contract Disputes Act subject to a written decision by the contracting officer.”³⁰¹ The contracting officer did not make a decision on this adjustment, so the court upheld the trial court’s determination that it lacked jurisdiction to decide the issue.³⁰²

iii. *Significance*

Raytheon does not fit into the category of cases that Professor Nash described as demonstrating the Federal Circuit’s “mistrust of trial judges.”³⁰³ Rather, in a case that was very much about the minutia of the CAS and FAR pension cost rules, the Federal Circuit effectively deferred to the COFC’s decision on those technical accounting issues.

Raytheon also provides guidance outside of the issue of pension costs, including (1) clarifying that the government has the burden of proof to show that the contractor’s accounting practices do not comply with the FAR, (2) indicating that the CAS trumps the FAR with regard to allocability, and (3) determining that the government

296. *Id.*

297. *Id.*

298. *Id.* at 1353.

299. *Id.*

300. *Id.*

301. *Id.* at 1354.

302. *Id.* at 1354–55.

303. Nash, *supra* note 4, at 613.

cannot seek an “equitable adjustment” on a separate distinct calculation for which it has not filed its own claim.³⁰⁴

c. *Sikorsky Aircraft Corp. v. United States*

The court in *Sikorsky* addressed Cost Accounting Standards and the statute of limitations for contract disputes.

i. *Background*

Prior to 1999, Sikorsky Aircraft Corporation (“Sikorsky”) allocated its materiel overhead costs, which included the indirect costs of purchasing and handling materiel that Sikorsky used to manufacture and assemble aircraft and parts, by using an allocation base of direct materiel costs less certain costs incurred for commercial contracts.³⁰⁵ Sikorsky subtracted these commercial costs in order to compensate for the exclusion of government furnished material (“GFM”) from the direct materiel cost base.³⁰⁶ However, Sikorsky later determined that this base did not adequately compensate for the distortions in the government’s favor caused by excluding GFM from direct materiel costs.³⁰⁷ As a result, effective January 1, 1999 through 2005, Sikorsky used a new method that allocated its materiel overhead costs to government cost objectives using a direct labor base.³⁰⁸ Under this method, Sikorsky allocated its materiel overhead costs in proportion to the direct labor costs consumed by each cost objective on each contract.³⁰⁹

The contracting officer determined that Sikorsky was liable for approximately \$65 million in principal and \$15 million in interest for noncompliance with CAS 418 between 1999 and 2005.³¹⁰ Sikorsky filed two suits in the COFC challenging the government’s claim, which were later consolidated.³¹¹ The COFC ultimately granted judgment in favor of Sikorsky, although it rejected Sikorsky’s statute

304. *Raytheon Co.*, 747 F.3d at 1350–51, 1354–55.

305. *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1319 (Fed. Cir. 2014).

306. *Id.*

307. *Id.*

308. *Id.* Although Sikorsky maintained that the old method complied with CAS, it changed its method effective January 1, 2006 to allocate purchasing costs according to a base of direct materiel costs minus the costs of commercial aircraft engines and continued to allocate materiel-handling costs according to a direct labor base. *Id.*

309. *Id.*

310. *Id.*

311. *Sikorsky Aircraft Corp. v. United States*, 110 Fed. Cl. 210, 213 n.5 (2013), *aff’d in part, dismissed in part*, 773 F.3d 1315 (Fed. Cir. 2014).

of limitations defense.³¹² The COFC determined that the statute of limitations under the CDA³¹³ was an affirmative defense, and, therefore, that Sikorsky had the burden of proof to show that the government had actual or constructive knowledge of a potential claim more than six years before the government submitted its claim to Sikorsky.³¹⁴ The COFC determined that Sikorsky did not satisfy its burden on that issue.³¹⁵ However, the COFC did find that, under CAS 418-50(e), the government failed to establish by a preponderance of the evidence that Sikorsky's direct labor base was not an appropriate allocation method.³¹⁶

ii. Federal Circuit decision

The Federal Circuit discussed whether the six-year statute of limitations was jurisdictional but did not perform a full analysis on this issue because it affirmed the COFC's holding on the merits in favor of Sikorsky.

(a) Statute of limitations

Sikorsky argued on appeal that the government's claim was time barred by the six-year statute of limitations under 41 U.S.C. § 7103(a)(4)(A).³¹⁷ The Federal Circuit disagreed with Sikorsky that the limitations period in the CDA is jurisdictional and that the court must decide the statute of limitations issue before addressing the merits.³¹⁸ The Federal Circuit explained that, because § 7103 lacked any special characteristic that would warrant making an exception to

312. *Id.* at 223, 230.

313. 41 U.S.C. § 7103(a)(4)(A) (2012).

314. *Sikorsky Aircraft Corp.*, 110 Fed. Cl. at 220.

315. *Id.* at 223.

316. *Id.* at 230.

317. *See Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1320 (Fed. Cir. 2014) (explaining that under this statute of limitations, "[a] claim accrues as of 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" and that a party was injured (internal quotation marks omitted)). The statute of limitations would therefore be satisfied if the claim accrued within the six years before December 11, 2008, the date on which the contracting officer submitted his final decision to Sikorsky. *Id.*

318. *Id.* Although the Federal Circuit had previously characterized the six-year statute of limitations as jurisdictional, *see Sys. Dev. Corp. v. McHugh*, 658 F.3d 1341, 1345 (Fed. Cir. 2011), that decision had been effectively overruled by the Supreme Court's decision in *Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817 (2013).

the general rule that filing deadlines are not jurisdictional,³¹⁹ the provision was not jurisdictional and did not need to be addressed before deciding the merits.³²⁰

(b) *CAS 418*

Much of the Federal Circuit's analysis addressed which subsections of CAS 418 governed the allocation of Sikorsky's materiel overhead pool. The government argued for an interpretation of CAS 418 based on internal government documents concerning the history of the CAS provisions and other materials, which were not published.³²¹ The court rejected the government's argument that the CAS should be interpreted using non-published internal documents and the preamble to the relevant regulations.³²²

Instead, the court looked solely to the regulations themselves and, where necessary, the history of the regulations as published in the Federal Register and stated that "[t]he CAS standards, like any other regulation, must be interpreted based on public authorities. . . . [W]e decline to rely on ambiguous language from the 'preamble' to contradict the plain language of the rule itself."³²³ The court then looked to the plain language of the CAS to determine whether subsection (d) or subsection (e) applied to the allocation of Sikorsky's materiel overhead pool.³²⁴ The court ultimately agreed with the COFC and Sikorsky that CAS 418-50(e) applied.³²⁵

iii. *Significance*

Sikorsky acknowledges that *Systems Development Corp. v. McHugh*³²⁶ was effectively overruled by the Supreme Court's more recent

319. *Sikorsky Aircraft Corp.*, 773 F.3d at 1321 (noting that the statute does not use jurisdictional terms, refer to the COFC's jurisdiction, or suggest that the provision was "meant to carry jurisdictional consequences" and that the context of the statute suggests it is not jurisdictional). Furthermore, no established Supreme Court precedent interprets § 7103 as jurisdictional. *See id.* at 1321–22; *cf.* *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (holding that 28 U.S.C. § 2501 was jurisdictional under the principles of stare decisis and the long list of Supreme Court decisions regarding that provision as jurisdictional).

320. *Sikorsky Aircraft Corp.*, 773 F.3d at 1322.

321. *Id.* at 1323.

322. *Id.* at 1323–24.

323. *Id.*

324. *Id.*

325. *Id.* at 1326.

326. 658 F.3d 1341 (Fed. Cir. 2011).

decision in *Sebelius v. Auburn Regional Medical Center*.³²⁷ The court is no longer required to decide a statute of limitations issue before addressing the merits because the six-year limitations period in the CDA is not jurisdictional.³²⁸ This decision can be read to open the door for the government and contractors to enter into tolling agreements that might give the parties more time to resolve, mediate, or negotiate disputes and still have the possibility of pursuing the case at a BCA or the COFC if the case cannot be resolved by mutual agreement.

Sikorsky also demonstrates that the express language in the regulations and the regulations' history will outweigh creative methods of interpreting the CAS, such as utilizing citations to unpublished materials, preambles, and self-proclaimed CAS experts like former Cost Accounting Standards Board employees.

4. *Oil and gas cases*

As an exploration of the theme of formalism in Federal Circuit decisions, the oil and gas cases offer interesting examples. In *Shell Oil Co. v. United States*,³²⁹ the court appears to have fashioned its decision based on the expectations of the parties after considering all the circumstances. In other words, the decision is premised on reasonableness and equity as opposed to formalism. In *Nycal Offshore Development Corp. v. United States*,³³⁰ however, the court placed the burden on the contractor to disprove any intervening causation theory the government proposed in a lost profits case. Similarly, in *Century Exploration New Orleans, LLC v. United States*,³³¹ the Federal Circuit essentially allowed the government to rewrite the terms of a government contract through incorporated regulatory provisions.

a. *Shell Oil Co. v. United States*

The Federal Circuit in *Shell Oil Co.*, in interpreting contracts from the 1940s, avoided a formalistic approach to consider the broader circumstances surrounding the formation of these contracts. The result was a Federal Circuit decision that protected contractors from

327. 133 S. Ct. 817 (2013).

328. *Sikorsky Aircraft Corp.*, 733 F.3d at 1320–21; see *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 826 (finding that the statutory time limitation in question is a “nonjurisdictional prescription”).

329. 751 F.3d 1282 (Fed. Cir. 2014).

330. 743 F.3d 837 (Fed. Cir. 2014).

331. 745 F.3d 1168 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1175 (2015).

liability for unanticipated costs that, at the time of contracting, the parties expected the government to assume.

i. Background

Several oil companies, including Shell Oil Co., Atlantic Richfield Co., Texaco, Inc., and Union Oil Co. of California (collectively, "Oil Companies"), contracted with the Defense Supplies Corporation ("DSC") to produce high-octane aviation gas ("avgas") for the U.S. military during World War II.³³² However, the government did not create sufficient waste processing facilities to handle the toxic byproducts from the avgas production.³³³ Because the Oil Companies did not have access to processing facilities, the firms disposed of the toxic byproducts by contracting to dump them at a site in Fullerton, California ("McCull site").³³⁴ Relevant to this case, a provision of the contracts between the Oil Companies and the government

required DSC to reimburse the Oil Companies for "any *new or additional* taxes, fees, or *charges*, . . . which [the Oil Companies] may be required by any municipal, state, or federal law in the United States or any foreign country to collect or pay by reason of the production, manufacture, sale or delivery of the [avgas]."³³⁵

In 1991, the government and the State of California sued the Oil Companies in federal district court to recover costs for cleaning up the McCull site under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which allows parties responsible for the cleanup cost of environmental contamination to seek contribution from other responsible parties.³³⁶ The Oil Companies argued that, under the avgas contracts, the government indemnified the Oil Companies from certain costs, including CERCLA costs.³³⁷ After a long procedural history including multiple lower court and appellate court decisions and a transfer of the case from the U.S. District Court for the Central District of California and the U.S. Court of Appeals for the Ninth Circuit, the COFC granted

332. *Shell Oil Co.*, 751 F.3d at 1284.

333. *Id.* at 1288.

334. *Id.* at 1284–85, 1288.

335. *Id.* at 1287 (alterations in original).

336. *Id.* at 1289–90.

337. *Id.* at 1290.

summary judgment for the government and denied the Oil Companies' motion for summary judgment.³³⁸

The COFC held that the Oil Companies were not entitled to reimbursement under the avgas contracts for three reasons. First, the trial court found that the meaning of "charges" in the "new or additional charges" provision, or the "Taxes" clause, did not encompass CERCLA cleanup costs.³³⁹ Second, the trial court found that even if the contracts did require the government to cover the costs of the McColl cleanup, the Oil Companies released any claim when the contracts terminated and "*all other issues*" were settled in the late 1940s.³⁴⁰ Third, the trial court held that the Anti-Deficiency Act barred U.S. government indemnification of the Oil Companies based on the avgas contracts.³⁴¹ The Federal Circuit disagreed with all three holdings.

ii. Federal Circuit decision

(a) Meaning of "charges"

The COFC found that "charges" as used in the "new or additional charges" provision was intended to implicate unforeseen *taxes* resulting from the avgas production.³⁴² On appeal, the Oil Companies argued in part that "charges" included "costs" generally and, thereby, CERCLA costs specifically.³⁴³ The government contended that "charges" could not mean "costs" because "costs" was used differently and specifically in other parts of the contract.³⁴⁴ The Federal Circuit sided with the Oil Companies, finding that because CERCLA is a federal law that requires responsible parties to pay the costs of removal or remedial action, CERCLA costs are a charge (i.e., cost) imposed by a federal law.³⁴⁵ Therefore, the court held, "the plain language of the new or additional charges provision . . . requires the Government to indemnify the Oil Companies for CERCLA costs incurred 'by reason of' of the avgas contracts."³⁴⁶

338. *Shell Oil Co. v. United States*, 108 Fed. Cl. 422, 448 (Fed. Cir. 2013), *rev'd*, 751 F.3d 1282 (Fed. Cir. 2014).

339. *Id.* at 424–25, 430, 434 (internal quotation marks omitted).

340. *Id.* at 434–35.

341. *Id.* at 436.

342. *Id.* at 432.

343. *Shell Oil Co.*, 751 F.3d at 1291 (internal quotation marks omitted).

344. *Id.* at 1292 (internal quotation marks omitted).

345. *Id.* at 1292–93.

346. *Id.* at 1293.

Judge Reyna dissented from the majority on this issue because he did not interpret the “new or additional charges” provision as a general indemnification clause that captured production-related costs.³⁴⁷ Judge Reyna challenged the majority’s interpretation of “charges” to include “costs.”³⁴⁸ Mainly, Judge Reyna argued that “charges” in the “new or additional charges” provision relates to taxes exclusive of CERCLA costs because: (1) “the clause is titled ‘Taxes’”; (2) throughout the clause, the phrase “such taxes” appears several times and refers back to “taxes, fees, or charges” as a whole; and (3) the “exclusions from ‘taxes, fees, or charges’ are all income and related taxes.”³⁴⁹

(b) *Termination and release*

The Federal Circuit also found that the COFC erred in holding that the Oil Companies’ contractual claims were released when the contracts terminated in the late 1940s because the COFC had incorrectly allocated the burden of proof.³⁵⁰ The court held that where a breach is found, the defendant carries the burden of proof to show excuse for breach—in this case, release.³⁵¹ Because neither party could locate the termination agreements, the government could not sufficiently demonstrate that it had been released from claims in the late 1940s.³⁵²

(c) *Application of the Anti-Deficiency Act*

The Federal Circuit also reversed the COFC’s holding that any indemnification promise broad enough to encompass future CERCLA liability violated the Anti-Deficiency Act.³⁵³ While both parties agreed that the War Powers Act authorized the government to

347. *Id.* at 1303 (Reyna, J., dissenting).

348. *Id.* at 1304 (internal quotation marks omitted).

349. *Id.* at 1304–05.

350. *Id.* at 1297 (majority opinion).

351. *Id.*

352. *Id.* at 1299.

353. *Id.* at 1299, 1302. The Anti-Deficiency Act provides, in relevant part:

No executive department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law.

31 U.S.C. § 665 (1940) (current version at 31 U.S.C. § 1341 (2012)).

enter into contracts that would otherwise violate the ADA, they disagreed whether that power was properly delegated and extended to the DSC in this case.³⁵⁴ The Federal Circuit found that the delegations of power were proper and that the agreements could bypass the ADA.³⁵⁵

(d) *Factual questions of attribution*

Finally, the court found that the trial court correctly held that there were unresolved factual questions as to what portion of the waste was created as a result of the avgas contracts.³⁵⁶ Accordingly, the Federal Circuit found that the COFC correctly held that the matter of attribution remained unresolved and thereby denied the Oil Companies' motion for summary judgment.³⁵⁷

iii. *Significance*

The COFC and the dissent in *Shell Oil* both would have held the Oil Companies responsible for the CERCLA cleanup costs. Judge Reyna in his dissent argued that the majority decision did not reflect how the parties allocated the risk: "That the contracts are silent on who bears the cost related to the production and disposal of avgas-related byproducts indicates that the parties intended the cost to be borne by the Oil Companies."³⁵⁸

However, the majority took a step that is inconsistent with critics' allegations that the Federal Circuit relies on formalism in government contract cases and considered the context of the contracts:

World War II and the stark necessity of increased avgas production are the circumstances surrounding the formation of the avgas contracts. . . . The Oil Companies agreed to the avgas contracts' low profits in return for the Government's assumption of certain risks outside of the Oil Companies' control. The CERCLA charges in this case are one such risk. The Oil Companies could not have contemplated such CERCLA charges at the time they entered into the contracts; indeed, dumping the acid waste at the McColl site was expressly permitted. These circumstances confirm that the new or additional charges provision must be interpreted to require

354. *Shell Oil Co.*, 751 F.3d at 1300.

355. *Id.* at 1301–02.

356. *Id.* at 1302–03.

357. *Id.* at 1302.

358. *Id.* at 1307 (Reyna, J., dissenting).

reimbursement for the Oil Companies' CERCLA costs arising from avgas production.³⁵⁹

The *Shell Oil* decision appears consistent with Professor Nash's preferred approach of contract interpretation that "[a] judge should not arrive at his or her interpretation of the contract language without scrutinizing all of the actions and communications of the contracting parties before and after the contract's formation."³⁶⁰

b. Nycal Offshore Development Corp. v. United States

In *Nycal*, the Federal Circuit provided what will likely be the final word in a long-running dispute over leases for submerged oil fields off the Southern California coast.

i. Background

In 1982, the government issued leases for two oil fields off the coast of Southern California.³⁶¹ Nycal Offshore Development Corporation ("Nycal") eventually came to own a 4.25% interest in the leases.³⁶² In 2002, the Ninth Circuit ruled that the leases were unlawful, and the court's decision effectively ended the owners' rights to drill for oil.³⁶³ The legal battle then shifted to the COFC and the Federal Circuit. In a 2005 ruling, the COFC held that amendments to the Coastal Zone Management Act in 1990 constituted a breach of the lease agreements between the government and the several owners of the two leases.³⁶⁴ All of the plaintiffs other than Nycal agreed to accept restitution from the government as a remedy.³⁶⁵

Nycal determined to pursue lost profits at the COFC instead of restitution in the hopes of gaining a larger recovery.³⁶⁶ However, Nycal lost on this claim.³⁶⁷ The COFC ruled that Nycal had failed to prove that the government's actions were "the reason the owners

359. *Id.* at 1296 (majority opinion) (citations omitted).

360. Nash, *supra* note 4, at 593.

361. *Nycal Offshore Dev. Corp. v. United States*, 743 F.3d 837, 840 (Fed. Cir. 2014).

362. *Id.*

363. *Id.*

364. *Amber Res. Co. v. United States*, 68 Fed. Cl. 535, 538 (2005), *aff'd*, 538 F.3d 1358 (Fed. Cir. 2008).

365. *Nycal*, 743 F.3d at 839–40.

366. *Id.* at 840.

367. *See Nycal Offshore Dev. Corp. v. United States*, 106 Fed. Cl. 222, 224 (2012) (reasoning that Nycal had not proven its entitlement to expectancy damages), *aff'd*, 743 F.3d 837 (Fed. Cir. 2014).

ultimately would have been unable to proceed.”³⁶⁸ Going one step further, the COFC also determined that the government proved that Nycal’s inability to obtain environmental permits for drilling, extracting, and processing the oil was “an intervening cause” that would have precluded development.³⁶⁹ In other words, Nycal did not prove the government’s breach proximately caused any loss.³⁷⁰

ii. *The Federal Circuit decision*

On appeal, Nycal argued that the COFC improperly required it to prove that the lease owners would have been able to overcome the “intervening cause” the government raised in its defense—namely, the inability to obtain the necessary permits and processing facilities to go forward with lease exploration and development.³⁷¹ According to Nycal, the “intervening cause” operated as a defense to liability for the government and, therefore, that the government should have had the burden to prove the impact of the intervening causes on the leaseholders’ profits.³⁷²

The court rejected Nycal’s framing of the case and instead set forth the following rule regarding proof of damages in lost profits cases: “The burden of proof on the issue of causation in a lost-profits case rests on the plaintiff without regard to the nature of the impediment that the plaintiff would have had to overcome in the nonbreach world to make a profit.”³⁷³ The court took issue with Nycal distinguishing between “proof of causation in general” and “intervening causes,” stating that, in lost profit cases, there is “no ready way to distinguish” between these concepts.³⁷⁴ In the court’s view, all facts—whether “intervening” or not—“may bear, to a greater or lesser extent, on the ultimate issue of causation.”³⁷⁵ Once these facts are “identified as significant factors in the analysis, there is no reason that the plaintiff should bear the burden of proof as to some of them but not as to others.”³⁷⁶

368. *Id.* at 247.

369. *Id.* at 246.

370. *Nycal*, 743 F.3d at 843.

371. *Id.*

372. *Id.* at 843–44.

373. *Id.* at 844; *see* *SUFI Network Servs., Inc. v. United States*, 755 F.3d 1305, 1313 (Fed. Cir. 2014) (citing *Nycal* and reaffirming the rule that it is the plaintiff’s responsibility to prove causation in lost profits cases).

374. *Nycal*, 743 F.3d at 844 (internal quotation marks omitted).

375. *Id.*

376. *Id.*

iii. Significance

In light of this decision, contractors, faced with the already-difficult task of proving lost profits, must essentially disprove whatever theories of causation (or lack of causation) the government raises during litigation. Potential litigants in lost-profits cases should take note of this decision before deciding to proceed—particularly if, as in *Nycal*, proceeding means forgoing restitution.

c. Century Exploration New Orleans, LLC v. United States

i. Background

In *Century Exploration New Orleans, LLC v. United States*, Century Exploration New Orleans, LLC (“Century”) claimed that regulations issued by the Department of the Interior following the 2010 Deepwater Horizon oil spill breached its oil and gas lease with the government.³⁷⁷ According to Century, these regulatory changes violated the terms of its oil and gas lease, which it acquired in 2008, prior to the Deepwater Horizon spill.³⁷⁸ In particular, Century argued that changes to regulations regarding the “worst case discharge calculation” increased the bond requirement under its oil and gas lease.³⁷⁹ The COFC ruled against Century’s claim, and Century appealed.³⁸⁰

ii. The Federal Circuit decision

The government did not dispute the central fact that, in the aftermath of Deepwater Horizon, Century was required to acquire a much higher bond of \$150 million for “worst case discharge volume,” whereas prior to Deepwater Horizon, the requirement would have been \$35 million.³⁸¹ Instead, the dispute on appeal concerned how the requirements were promulgated. Century’s lease was expressly subject to regulations issued *in the future*, which provide for the “prevention of waste and conservation of the natural resources of the

377. *Century Exploration New Orleans, LLC v. United States*, 745 F.3d 1168 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1175, 1169–70 (2015).

378. *Id.* at 1170.

379. *Id.* at 1175.

380. *Id.* at 1171.

381. *Id.* at 1176.

Outer Continental Shelf” pursuant to the Outer Continental Shelf Lands Act of 1953 (OSCLA).³⁸²

According to the government, the changes after Deepwater Horizon regarding the “worst case discharge calculation” were made pursuant to the OSCLA and, therefore, the lease had not been violated.³⁸³ According to Century, however, the government’s changes were effectively to the Oil Pollution Act of 1990 (OPA)³⁸⁴ because the calculation of worst-case discharge volume was governed by the OPA rather than OSCLA. However, the court agreed with the government in both respects and affirmed the COFC’s ruling.

According to the court, even though the OCSLA regulation directed lessees to make worst-case discharge volume calculations according to the OPA, the government’s changes were to the OCLSA because the notice issued by the government “only referenced and discussed OCSLA regulations and requirements” and “never mentioned the OPA regulations.”³⁸⁵ The court also noted that there had been no showing that the government’s changes applied outside of the OCSLA context.³⁸⁶

iii. Significance

The Federal Circuit’s decision in *Century* should serve as a warning to all contractors who have a contract that is subject to incorporated regulations. Here, the particular terms of the lease were subject to one set of regulations—those implementing OCLSA. However, the court allowed the government to change the terms of these leases because the government referenced OCSLA in the promulgation of changes to regulations implementing *an entirely different statute*—the OPA.

382. *Century Exploration New Orleans, LLC v. United States*, 110 Fed. Cl. 148, 164 (2013) (quoting the terms of the contract), *aff’d*, 745 F.3d 1168 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1175 (2015).

383. *Century Exploration*, 745 F.3d at 1176. The COFC also determined that there had been no change to the Outer Continental Shelf Lands Act of 1953 (OSCLA) regulations themselves and, thus, no violation of the lease. *Id.* Nevertheless, the Federal Circuit analyzed the government’s actions as changes to the OCLSA regulations. *Id.*

384. Pub. L. No. 101-380, 104 Stat. 484 (codified as amended in scattered sections of 14, 26, 33 U.S.C. (2012)).

385. *Century Exploration*, 745 F.3d at 1178.

386. *Id.*

The decision also affirms the court's analysis of the good faith and fair dealing standard in *Metcalf*.³⁸⁷ Similar to its holding in *Metcalf*, the court found that the "implied duty of good faith and fair dealing [could not] expand a party's contractual duties beyond those in the express contract"³⁸⁸ Because the court found that the lease expressly authorized the government action of changing OSCLA regulatory requirements, the court determined that the government had not violated the implied duty of good faith and fair dealing.

5. *Damages cases*

All of the cases in this final category of claims cases addressed either the calculation of damages or whether a plaintiff was entitled to damages. In three of the four cases, the Federal Circuit struck down the COFC's decision, and the one case where it did not overturn the COFC, *Higgins v. United States*,³⁸⁹ was an unpublished decision addressing a failed attempt to avoid the impact of the statute of limitations.

In the other three cases, however, the Federal Circuit appeared to provide very little deference to the COFC. In *SUFI Network Services, Inc. v. United States*,³⁹⁰ the Federal Circuit found that in the unusual circumstance where the COFC is reviewing a decision from a BCA, that the COFC could not substitute its judgment as to the amount of damages. Similarly, the court explained in *Stockton East Water District v. United States*³⁹¹ that the COFC failed to use the proper standard for calculating expectancy damages. Finally, in *Veridyne Corp. v. United States*,³⁹² the Federal Circuit overturned the COFC's determination to award the plaintiff quantum meruit damages where the plaintiff had been involved in a fraud against the government. While the concept behind the *Veridyne* decision makes sense—that a contractor engaged in fraud should not receive a benefit from that fraud—the decision failed to consider that a government agency was a part of the fraud and was still allowed to obtain a benefit through the performance of the contract.

387. *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014) (holding that an act will not violate the contractually implied duty of good faith if such a finding conflicts with the terms of the contract).

388. *Century Exploration*, 745 F.3d at 1179 (quoting *Metcalf*, 742 F.3d at 991).

389. 589 F. App'x 977 (Fed. Cir. 2014) (per curiam).

390. 755 F.3d 1305 (Fed. Cir. 2014).

391. 761 F.3d 1344 (Fed. Cir. 2014).

392. 758 F.3d 1371 (Fed. Cir. 2014).

a. SUFI Network Services, Inc. v. United States

The Federal Circuit in *SUFI Network* addressed the standard of review in the rare circumstance when the COFC is acting as the first-level of appellate review of a BCA decision under the Wunderlich Act, which was repealed on January 4, 2011.³⁹³ The Wunderlich Act governed judicial review of administrative decisions in government contract cases that were “within the Tucker Act and outside the Contracts Disputes Act” and used the COFC for first-level appellate reviews of BCA determinations.³⁹⁴ In *SUFI Network*, the Federal Circuit refused to permit the COFC to substitute its own methodology for calculating damages after the ASBCA had already espoused a different methodology, finding that calculation of damages was a factual matter.

i. Background

This appeal involved damages from a breached contract for SUFI Network Services, Inc. (“SUFI”) to “install and operate telephone systems in guest lodgings on certain Air Force bases in Europe.”³⁹⁵ The parties entered into a contract in 1996, whereby SUFI agreed to furnish and install equipment and operate the system free-of-charge in exchange for the Air Force’s agreement that SUFI’s system would be the exclusive means for guests to place telephone calls at their lodgings.³⁹⁶ However, a dispute arose regarding the Air Force’s role in adhering to the exclusivity guarantee.³⁹⁷ For example, SUFI complained that other telephone systems remained in place at the lodging facilities after the Air Force awarded it the contract and that the Air Force assisted guests in placing calls on non-SUFI systems.³⁹⁸

After the contracting officer denied nearly all of SUFI’s claims for approximately \$130 million in damages, SUFI appealed to the Armed Services Board of Contract Appeals pursuant to the contract’s

393. Pub. L. No. 111-350, § 7, 124 Stat. 3855, 3859 (2011); see *SUFI Network Servs., Inc.*, 755 F.3d at 1311 (stating that the procedure was applicable because *SUFI Network* was filed in the ASBCA prior to the repeal of the Wunderlich Act).

394. *SUFI Network Servs., Inc.*, 755 F.3d at 1311–12. For a description of the history of Wunderlich Act jurisdiction, see *Vista Scientific Corp. v. United States*, 808 F.2d 50, 51 (Fed. Cir. 1986).

395. *SUFI Network Servs., Inc.*, 755 F.3d at 1309.

396. *Id.*

397. *Id.*

398. See *id.* at 1309–10 (noting that the Air Force would patch guests through to another telephone carrier and, thus, bypass SUFI’s charges).

disputes clause.³⁹⁹ The ASBCA granted only partial relief in a series of decisions between 2006 and 2010, for a total award of only approximately \$7.4 million in damages plus interest.⁴⁰⁰ SUFI challenged the ASBCA's decisions on numerous grounds in the COFC.⁴⁰¹ The COFC ultimately granted SUFI's motion for judgment on the administrative record in November 2012 and awarded SUFI damages of approximately \$118.8 million plus interest.⁴⁰² The government subsequently appealed the vastly increased amount of the award, and SUFI cross-appealed, seeking additional damages.⁴⁰³

ii. The Federal Circuit decision

The Federal Circuit explained that under the Wunderlich Act, a BCA's decision would stand unless it was "fra[ud]ulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or [was] not supported by substantial evidence."⁴⁰⁴ Here, the case was a judicial review of agency action and, thus, under *de novo* review, the COFC and the Federal Circuit should have reviewed the ASBCA's factual findings to ensure there was substantial evidence to support its findings and to confirm that the ASBCA's reasoning was not capricious or arbitrary.⁴⁰⁵ Review would be limited to the administrative record and would not involve taking new evidence.⁴⁰⁶ Guidance from prior case law directed the court to order a remand to the ASBCA on issues the ASBCA failed to reach and decide which ones needed to be addressed.⁴⁰⁷

The Federal Circuit agreed with the COFC that for one count, the ASBCA incorrectly rejected SUFI's proposed damage calculations in favor of calculations that were not supported by substantial evidence.⁴⁰⁸ Accordingly, the Federal Circuit remanded this count to

399. *Id.* at 1311.

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.* at 1311–12 (first alteration in original) (quoting 41 U.S.C. § 321 (2006)) (internal quotation marks omitted).

405. *Id.* at 1312.

406. *Id.*

407. *Id.* (citing *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 428–30 (1966)).

408. *Id.* at 1313–16 (agreeing that the ASBCA erred in calculating damages resulting from the Air Force's failure to remove non-SUFI phones from the hallways and lobbies).

the ASBCA for reconsideration, including review of the legal and evidentiary basis for the premises for its calculations.⁴⁰⁹ Conversely, the Federal Circuit found that for other counts, the ASBCA's methodology was supported by substantial evidence and in accordance with law.⁴¹⁰ Therefore, for those counts, the court held that the ASBCA's damages calculations should stand over any conflicting decisions or recalculations from the COFC.⁴¹¹ Because SUFI did not meet its burden to show that there was no reason why the ASBCA's methodology was impermissible, the Federal Circuit found that it could not agree with SUFI's argument that the ASBCA's methodology was unsupported by substantial evidence.⁴¹² It therefore reversed the COFC's decision on this count and allowed the ASBCA's decision to stand.⁴¹³

The Federal Circuit also reviewed de novo the parties' arguments regarding contract provisions relevant to calculating SUFI's post-termination lost profits.⁴¹⁴ For example, the ASBCA interpreted three sections of the contract to provide for an across-the-board fifteen-year term from the date the contract was awarded, not separate fifteen-year terms for each location at issue.⁴¹⁵ The COFC had rejected this interpretation because it would render two of the three sections "superfluous."⁴¹⁶ Although the Federal Circuit disagreed with the COFC's assertion that the ASBCA's reading rendered the two sections of the contract superfluous, the court found the COFC's interpretation to be the more reasonable reading of the relevant contract provisions.⁴¹⁷ Accordingly, it affirmed the COFC's conclusion that SUFI's post-termination lost profits should be calculated as separate fifteen-year terms for each site, from the date of completion and acceptance of each respective system, and directed the ASBCA to recalculate damages on that basis.⁴¹⁸

409. *Id.* at 1316.

410. *See id.* at 1313–14, 1320–21 (upholding the damages calculation for lost profits associated with the allowance of calling cards and the court's conclusions concerning a twenty-month delay in removing non-SUFI phones from a facility).

411. *Id.*

412. *Id.* at 1314, 1320.

413. *Id.* at 1314, 1321.

414. *Id.* at 1321 (citing *Mass. Bay Transp. Auth. v. United States*, 254 F.3d 1367, 1372 (Fed. Cir. 2001)).

415. *Id.* at 1321–22.

416. *Id.* at 1322 (internal quotation marks omitted).

417. *Id.*

418. *Id.*

iii. Significance

SUFI Network Services is primarily focused on the proper standards of review when the COFC performs an appellate review of a BCA case. With the repeal of the Wunderlich Act, such scenarios will be exceedingly rare. The case does potentially provide some insights into the levels of support required to justify a claim of damages, but the procedural posture appears to make this case of limited usefulness to general government contracting practitioners.

*b. Stockton East Water District v. United States**i. Background*

In 1983, Central San Joaquin Water Conservation District (“Central”) and Stockton East Water District (“Stockton”) (collectively “the Districts”) entered into contracts with the U.S. Bureau of Reclamation (“Reclamation”) for the appropriation of reclaimed water from a reservoir in the San Joaquin Valley.⁴¹⁹ The contracts specified that Reclamation would allocate between 56,000 and 80,000 acre-feet of water from the Central Valley Project reservoir for processing each year.⁴²⁰ In turn, Central would submit a schedule to Reclamation requesting certain amounts of water for monthly delivery during the year.⁴²¹ Under the agreements, the water would be used to support agricultural needs in the San Joaquin Valley.⁴²²

To perform the contracts, Central began to build distribution facilities.⁴²³ Because Central needed time to build these facilities, Reclamation did not deliver any reclaimed water between 1988 and 1992.⁴²⁴ In 1992, Congress enacted the Central Valley Project Improvement Act (CVPIA), which required Reclamation to dedicate 800,000 acre-feet each year to certain non-agricultural purposes.⁴²⁵

Each year from 1993 until 1998, Reclamation announced that it would be unable to provide the minimum volume of water specified

419. *Stockton E. Water Dist. v. United States*, 761 F.3d 1344, 1346 & n.1 (Fed. Cir. 2014).

420. *Id.* at 1346.

421. *Id.*

422. *Id.*

423. *Id.* at 1346–47.

424. *Id.* at 1347.

425. *Id.* (explaining that the CVPIA sought to protect fish, wildlife, and threatened habitats).

by the contracts.⁴²⁶ In 1997, the U.S. Fish and Wildlife Service, along with the Districts, Reclamation, and other interested parties, negotiated an Interim Plan of Operations (“IPO”), a short-term modification to the original contracts.⁴²⁷ The modification applied to Reclamation’s delivery for 1997 and 1998.⁴²⁸ However, from 1999 to 2004, Reclamation continued to use the IPO formulas to allocate delivery.⁴²⁹

In 1993, the Districts brought suit in federal district court against the government for breach of contract and takings.⁴³⁰ The case was eventually transferred to the COFC.⁴³¹ The COFC first found in favor of the government on each breach of contract claim from 1993 through 2004 and dismissed a related takings claim.⁴³² The Districts appealed the trial court’s non-liability finding for 1994, 1995, and 1999–2004.⁴³³ On the first appeal, the Federal Circuit affirmed the trial court’s finding of non-liability for 1994 and 1995 and reversed the finding of non-liability for 1999–2004.⁴³⁴ On remand, the COFC found for Central and awarded \$149,950 in damages but denied all expectancy damages.⁴³⁵ Central appealed the denial of expectancy damages.⁴³⁶

ii. *The Federal Circuit decision*

As a preliminary matter, the parties disagreed over how to interpret a contract provision that outlined the maximum and minimum volumes of water Reclamation would provide Central.⁴³⁷ The Federal Circuit found that the contract required Reclamation to “*make available*” between 56,000 and 80,000 acre-feet of water but that it was not obligated to *deliver* the water unless the water was specifically requested by Central.⁴³⁸ The court further noted that it had previously established that “the Districts and the Reclamation [had]

426. *Id.* at 1347–48 (delivering between zero and 25,000 acre-feet of water per year to each district).

427. *Id.* at 1348.

428. *Id.*

429. *Id.*

430. *Stockton E. Water Dist. v. United States*, 101 Fed. Cl. 352, 354 (2011).

431. *See Stockton E. Water Dist.*, 761 F.3d at 1346.

432. *Id.* at 1349.

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.* at 1346.

437. *Id.* at 1350.

438. *Id.* at 1351.

binding contracts for specified quantities of water which Reclamation [was] obligated to provide, and that Reclamation failed to provide those specified quantities in the years at issue.”⁴³⁹ The court found that the trial court did not err in the interpretation of the provision but, rather, in the methodology it used to determine expectancy damages.⁴⁴⁰

The court held that the COFC should have used the non-breach world to calculate expectancy damages where the 1993 announcement had not occurred because that announcement was the underlying reason for Reclamation not making the minimum water quantities available.⁴⁴¹ The COFC had determined that because Central had stopped requesting the contractual minimum, the Districts’ economic damages were only the difference between the amount Central actually requested and the amount Reclamation made available.⁴⁴² The Federal Circuit disagreed and reasoned that, were it not for Reclamation’s pre-1999 announcements that it was not going to meet its contractual obligations, Central might have requested higher volumes of reclaimed water.⁴⁴³ Therefore, the non-breach world against which the trial court compared the current status of Central should have taken into account the impact of the announcements on Central’s requests from 1990–2004.⁴⁴⁴ Accordingly, the Federal Circuit vacated the judgment denying expectancy damages to Central and remanded the matter for a damages determination consistent with its opinion.⁴⁴⁵

iii. Significance

The case helps to define how to calculate expectancy damages. In particular, the Federal Circuit reiterated that the trier of fact must consider what would have happened if there had been no breach.⁴⁴⁶ Overall the decision appears at odds with formalism. The Federal Circuit did not allow the COFC to use a bright-line basis for expectancy damages—in this case, the fact that “Central took less water than it demanded or that Reclamation allocated to it in

439. *Id.* (internal quotation marks omitted).

440. *Id.*

441. *Id.* at 1351–52.

442. *Id.*

443. *Id.* at 1352–53.

444. *Id.* at 1353.

445. *Id.*

446. *Id.* at 1352.

1996”⁴⁴⁷ Rather than such a bright line, the Federal Circuit’s decision requiring the COFC to consider what would have happened had the announcement never been made—and the potential requirement that the COFC reopen the record to receive additional evidence—is inconsistent with formalism.

c. Higgins v. United States

In an unpublished decision, *Higgins*, the Federal Circuit rejected a grantee’s attempts to recover on a claim that was filed more than a decade after the termination of the grant.

i. Background

In 1999, the Department of Labor (DOL) awarded a grant to Devereaux Corporation (“Devereaux”) to be paid over the course of three years.⁴⁴⁸ However, when Devereaux allegedly defaulted a few months later, DOL began proceedings to terminate the grant for default under 29 C.F.R. § 95.61(a)(1).⁴⁴⁹ The parties signed a Modification on October 24, 2001 whereby DOL paid the remainder of a negotiated amount to Devereaux and advanced the expiration date for the grant.⁴⁵⁰ DOL attempted to send closeout documents to Devereaux; however, the agency learned that the corporation was defunct and subsequently executed a unilateral closeout on May 12, 2004.⁴⁵¹ DOL sent a preliminary settlement notice to Devereaux’s executive director, Cheryl Higgins, on May 26, 2004 (“Settlement Notice”), which listed the possibility of additional payment adjustments for an amended settlement, including “[u]nresolved disputes or claims identified on the Grantee’s Release.”⁴⁵²

In November 2005, Higgins sent a letter requesting approximately \$1.5 million for reimbursement of various outstanding claims.⁴⁵³ DOL responded in February 2006, stating it did not owe anything further to Devereaux and that the grant had been closed out.⁴⁵⁴ Through additional correspondence, DOL reiterated that the grant

447. *Id.*

448. *Higgins v. United States*, 589 F. App’x 977, 978 (Fed. Cir. 2014) (per curiam).

449. *Id.*

450. *Id.* at 979.

451. *Id.*

452. *Id.* (alteration in original) (internal quotation marks omitted).

453. *Id.*

454. *Id.*

had been terminated.⁴⁵⁵ DOL sent another letter in October 2008 in response to another inquiry from Higgins and stated that the grant was terminated in accordance with 29 C.F.R. § 95.61(a)(2), termination based on mutual agreement.⁴⁵⁶

Higgins filed suit in the COFC on December 28, 2012, alleging a breach of contract or, alternatively, entitlement to an amended settlement according to the Settlement Notice or a final settlement under 29 C.F.R. § 95.61(a)(2) for mutual agreement.⁴⁵⁷ The COFC found that the breach claim occurred when DOL unilaterally closed out the grant on May 12, 2004.⁴⁵⁸ Further, it found that the amended-settlement claim accrued when DOL sent the Settlement Notice on May 26, 2004.⁴⁵⁹ It also determined that the termination occurred under § 95.61(a)(1) based on breach instead of § 95.61(a)(2) based on mutual agreement.⁴⁶⁰ The COFC therefore dismissed the breach of contract claim and the amended-settlement claim for passing the six-year statute of limitations and granted the government's motion for summary judgment regarding the final-settlement claims arising under an inapplicable statutory provision.⁴⁶¹

ii. The Federal Circuit decision

The Federal Circuit agreed with the COFC that the breach claim first accrued more than six years before Higgins filed her complaint.⁴⁶² The court found that May 12, 2004, the date when DOL unilaterally executed the closeout, was the "latest date upon which a contractual claim could conceivably be seen to arise."⁴⁶³ Furthermore, Higgins did not offer any later date that would acceptably give rise to a breach of contract claim, particularly

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.* at 979–80.

462. *Id.* at 980 ("A claim against the government must be filed within six years after the claim first accrues."). Further, "[a] claim accrues for purpose of the statute of limitations 'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" *Id.* (quoting *FloorPro, Inc. v. United States*, 680 F.3d 1377, 1381 (Fed. Cir. 2012)).

463. *Id.* (internal quotation marks omitted).

considering the contract in question had been terminated, amended to expire, officially closed, and then processed for closeout.⁴⁶⁴

Higgins also asserted that she was entitled to an amended settlement because the grantee's release was never executed.⁴⁶⁵ The Federal Circuit disagreed. The amended-settlement claim related to the Settlement Notice, which was dated May 26, 2004.⁴⁶⁶ Higgins failed to provide any legal basis for her argument that every grantee is entitled to a release.⁴⁶⁷ Moreover, the court determined that receipt of the Settlement Notice put Higgins on notice about that contingency and that she was aware that she did not have a grantee's release.⁴⁶⁸

Higgins also argued that the October 2008 letter evinced that the DOL converted the unilateral termination to a mutual termination, which, consequently, entitled her to a final settlement.⁴⁶⁹ However, the Federal Circuit agreed with the government that the October 2008 letter did not alter the original basis for terminating the grant.⁴⁷⁰ The record showed that contemporaneous documents specifically referred to 29 C.F.R. § 95.61(a)(1) as the source of the termination for breach.⁴⁷¹ Moreover, the October 2008 letter was sent over seven years after DOL terminated the grant and it did not state that it converted the termination nor imply that it would follow up with a final settlement.⁴⁷² Accordingly, the court affirmed the COFC's grant of summary judgment on the final-settlement claim in favor of the government.⁴⁷³

iii. Significance

Higgins resulted in the unsurprising conclusion that the Federal Circuit will not entertain claims asserted outside of the statute of limitations. Moreover, the court was not receptive to either of Higgins's arguments regarding why the suit was timely. First, it rejected Higgins's argument that relied on a typo in a government letter and then rejected her assertions that the government failed to

464. *Id.*

465. *Id.* at 981.

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.* at 981–82.

472. *Id.* at 982.

473. *Id.*

take formal steps because all the parties were on notice of exactly what was going on. The Federal Circuit will apply an objective standard to determine the date on which a claim accrued.⁴⁷⁴

d. Veridyne Corp. v. United States

i. Background

In March 1998, Veridyne Corporation (“Veridyne”), a qualifying company under the Small Business Administration’s (SBA) 8(a) program, submitted a proposal to the Maritime Administration (MARAD) for an IDIQ cost-plus-award-fee contract under the 8(a) program.⁴⁷⁵ The “proposed” cost specified in the proposal was \$2,999,949.00.⁴⁷⁶ At the time, however, Veridyne knew that the services to be provided under the extension would cost far in excess of \$3 million and in fact would cost more than \$30 million.⁴⁷⁷ MARAD personnel also knew, according to the COFC, that the \$3 million amount was merely a pretext to enable the agency to award the contract without competition under the SBA’s 8(a) rules.⁴⁷⁸

In December 2004, MARAD issued a stop order suspending contract performance and informed Veridyne of its view that the contract was void *ab initio* because it was obtained by fraud.⁴⁷⁹ MARAD did not pay Veridyne for its final eight invoices under the contract, including invoices for work performed after the stop work order was issued.⁴⁸⁰

On February 28, 2006, Veridyne filed a complaint in the COFC to recover \$2,267,163.96.⁴⁸¹ The government maintained that Veridyne forfeited its contract claim under 28 U.S.C. § 2514, the Special Plea in Fraud statute.⁴⁸² The government also filed a counterclaim under the False Claims Act (FCA) for each fraudulent claim presented and

474. *Id.* at 980.

475. *Veridyne Corp. v. United States*, 758 F.3d 1371, 1374 (Fed. Cir. 2014).

476. *Id.*

477. *Id.* at 1374–75.

478. *Id.* at 1375. The SBA 8(a) program states that when a bid exceeds \$3 million, it is subject to open competition from other SBA-qualified businesses. *Id.* at 1374. Competition would have delayed the bid process until after Veridyne was no longer an SBA-qualified business. *Id.*

479. *Id.* at 1375.

480. *Id.*

481. *Id.* at 1376.

482. *Id.*

under the antifraud provision of the CDA for the unsupported portion of Veridyne's CDA claims.⁴⁸³

The COFC held that because Veridyne's invoices contained false information, its direct contract claims were forfeited under the Special Plea in Fraud statute.⁴⁸⁴ However, it also concluded that Veridyne was due \$1,068,636.33 in quantum meruit because Veridyne had conferred a benefit on the government under the contract.⁴⁸⁵ With respect to the government's FCA counterclaim, the COFC held that Veridyne's proposal was a false claim.⁴⁸⁶ The COFC awarded the government \$1,397,000 in FCA penalties.⁴⁸⁷ Additionally, the COFC held that Veridyne's CDA claims were unsupported and concluded that the government was entitled to \$568,802.09 in CDA damages.⁴⁸⁸ Both parties appealed portions of the COFC's decision.⁴⁸⁹

ii. The Federal Circuit decision

The Federal Circuit held that it was improper for the COFC to allow Veridyne to recover in quantum meruit when its claims were forfeited under the Special Plea in Fraud statute.⁴⁹⁰ The court also found that Veridyne's proposal to MARAD was a false claim because it misrepresented the cost of the services that Veridyne agreed to provide in the proposal.⁴⁹¹

Veridyne argued that it did not have the requisite intent to defraud MARAD because MARAD knew that these statements were false.⁴⁹² The Federal Circuit noted that although MARAD had knowledge that the proposal contained false statements, the FCA inquiry did not end with MARAD's knowledge because Veridyne's contract was ultimately with the SBA and not MARAD.⁴⁹³ The SBA did not have knowledge that Veridyne's statements were fraudulent.⁴⁹⁴ Even if Veridyne believed that MARAD officials were not misled by its

483. *Id.*

484. *Id.*

485. *Id.*

486. *Id.*

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.* at 1377–78 (citing *Little v. United States*, 152 F. Supp. 84, 87–88 (Ct. Cl. 1957); *Mervin Contracting Corp. v. United States*, 94 Ct. Cl. 81, 86–87 (1941)).

491. *Id.* at 1378–79.

492. *Id.* at 1379.

493. *Id.*

494. *Id.*

proposal, these false statements misled the SBA to enter the contract with Veridyne and Veridyne intended that the SBA do so in reliance on the false statements.⁴⁹⁵

The Federal Circuit further rejected Veridyne's argument that even if the contract was procured by fraud, the invoices submitted pursuant to the contract did not contain any false statements and therefore could not support FCA penalties.⁴⁹⁶ Claims submitted pursuant to a fraudulently obtained contract are FCA violations even if the claims themselves do not contain false statements.⁴⁹⁷ The Federal Circuit thus affirmed the COFC's award of \$1,397,000 in FCA penalties.⁴⁹⁸

The antifraud provision of the CDA provides that

[i]f a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim.⁴⁹⁹

Veridyne's CEO certified with respect to each claim that the claims were "made in good faith, that the supporting data [were] accurate and complete . . . , [and] that the amount requested accurately reflect[ed] the contract adjustment for which the contractor believe[d] the government was liable."⁵⁰⁰ The COFC found that some invoices, where Veridyne billed for the work completed after MARAD's stop order, were unsupported and violated the CDA antifraud provision.⁵⁰¹ Therefore, the Federal Circuit affirmed the COFC's award of \$568,802.09 to the government as a CDA penalty.⁵⁰²

iii. Significance

Veridyne underscores the risks to contractors from making false submissions to the government. The court denied the contractor any quantum meruit recovery and required Veridyne to pay penalties

495. *Id.*

496. *Id.*

497. *Id.* (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543–44 (1943), *superseded by statute on other grounds*, 31 U.S.C. § 233(c) (current version at 31 U.S.C. § 3730(c) (2012)), *as recognized in Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885 (2011)).

498. *Id.* at 1380.

499. *Id.* at 1380–81 (alteration in original) (internal quotation marks omitted).

500. *Id.* at 1381 (alterations in original) (internal quotation marks omitted).

501. *Id.*

502. *Id.* at 1382.

under the FCA and under the CDA even though the government apparently still received the benefit of the contract and none of the individual invoices were false. The case is also interesting because it relies on a particular distinction between the knowledge of MARAD and SBA to establish fraud. MARAD knew of the fraud and was the agency that was actually paying for the work, but MARAD was essentially absolved from its conduct because the SBA—an agency with no monetary interest in the contract—was misled by Veridyne in the awarding of the contract.

B. Bid Protest Cases

The Federal Circuit's bid protest cases addressed different challenges to and provided new guidance regarding the COFC's jurisdiction to hear protests. In one, *SRA International, Inc. v. United States*,⁵⁰³ the Federal Circuit found that the COFC did not have jurisdiction to hear a challenge to the General Services Administration's (GSA) actions related to the issuance of a task order.⁵⁰⁴ While the result in that case was a contractor losing its appeal and a limitation on future contractors' ability to pursue remedies at the COFC level, the decision appears well grounded in a very specific congressional determination to deny the COFC jurisdiction to hear such protests.

In the second bid protest jurisdictional determination, *CMS Contract Management Services v. Massachusetts Housing Finance Agency*,⁵⁰⁵ the Federal Circuit overturned a COFC determination that the assistance agreement at issue was not a procurement contract falling under the requirements of the Competition in Contracting Act (CICA).⁵⁰⁶ The court's decision in *CMS Contract Management Services* represents an unusual instance where the Federal Circuit established a bright-line rule that works to the benefit of contractors, and it also expanded the scope of issues that the COFC can consider.

1. *SRA International, Inc. v. United States*

One of the more significant Federal Circuit decisions of the year is undoubtedly *SRA International, Inc. v. United States*, in which the

503. 766 F.3d 1409 (Fed. Cir. 2014).

504. *Id.* at 1410.

505. 745 F.3d 1379 (Fed. Cir. 2014), *petition for cert. filed*, 2015 WL 77675 (U.S. Jan. 1, 2015) (No. 14-781).

506. *Id.* at 1381, 1386.

Federal Circuit provided its first interpretation of the statutory bar to jurisdiction over bid protests of task or delivery orders in the Federal Acquisition Streamlining Act of 1994 (FASA).⁵⁰⁷ The decision significantly clarified this aspect of FASA for the COFC, which has somewhat inconsistently interpreted this statute in recent years.⁵⁰⁸ For disappointed offerors, however, the decision represents a substantial limitation on the COFC's jurisdiction to ever hear bid protests that are in any way connected to a task or delivery order.

a. Background

The plaintiff, SRA International, Inc. ("SRA"), initially filed a bid protest at the Government Accountability Office (GAO) alleging that the GSA improperly awarded an August 14, 2013 task order because of the presence of two organizational conflicts of interest (OCI) arising from the involvement of a proposed subcontractor of the awardee.⁵⁰⁹ Though the GSA found the possibility of an OCI to be "exceedingly remote and unsubstantiated," it issued a "Determination and Findings for Waiver of Organizational Conflict of Interest Rules" ("Waiver") on November 25, 2013 in order to waive any OCI that might exist.⁵¹⁰ Because of the Waiver, the GAO dismissed the protest as "academic."⁵¹¹ The timing of the GSA's Waiver—three months after the issuance of the task order—was critical to the procedural posture of SRA before the COFC. When SRA filed a bid protest at the COFC, its allegations focused on the Waiver, through which SRA requested the COFC to overturn the award of the task order.⁵¹²

The COFC found that it had jurisdiction to hear the protest.⁵¹³ The court recognized that FASA barred it from adjudicating protests "'in connection with the issuance or proposed issuance of a task or delivery order,' unless the protest is 'on the ground that the order

507. 41 U.S.C. § 4106(f) (2012).

508. *Compare* Digital Techs., Inc. v. United States, 89 Fed. Cl. 711, 730 (2009) (concluding that FASA does not bar jurisdiction over a breach of contract claim related to task order procurement), *with* DataMill, Inc. v. United States, 91 Fed. Cl. 740, 762 (2010) (finding that FASA bars jurisdiction over an agency's determination regarding sole-source procurement that was made "in connection with" a proposed delivery order (internal quotation marks omitted)).

509. *SRA Int'l, Inc.*, 766 F.3d at 1410–11.

510. *Id.* at 1411 (internal quotation marks omitted).

511. *Id.* (internal quotation marks omitted).

512. *Id.*

513. *SRA Int'l, Inc. v. United States*, 114 Fed. Cl. 247, 256 (2014), *vacated*, 766 F.3d 1409 (Fed. Cir. 2014).

increases the scope, period, or maximum value of the contract under which the order is issued.”⁵¹⁴ However, the COFC drew the distinction that while the Waiver was undoubtedly *related* to the issuance of the task order, it was not issued “in connection with” the issuance of the task order, which is what FASA requires.⁵¹⁵ The COFC’s distinction between “related” and “in connection with” was based on its determination that the Waiver did not have a “direct, causal relationship” to the issuance of the task order because it was issued “well after the award” and that the Waiver was a discretionary action by the GSA that was not necessary for the issuance of the task order.⁵¹⁶

Despite finding in favor of SRA on jurisdiction, the COFC later dismissed SRA’s claims on the merits.⁵¹⁷ SRA appealed this dismissal.

b. The Federal Circuit decision

Rather than address the merits, the Federal Circuit vacated the COFC’s decision on jurisdictional grounds and instructed the COFC to dismiss the case based on the jurisdictional bar in FASA.⁵¹⁸ The Federal Circuit’s explanation was succinct: “The statutory language of FASA is clear and gives the court no room to exercise jurisdiction over claims made ‘in connection with the issuance or proposed issuance of a task or delivery order.’”⁵¹⁹

Most substantially for future protestors, the court expressly rejected SRA’s main statutory argument for a more limited reading of the FASA ban. SRA argued that the FASA ban only applied to one of the three separate prongs of jurisdiction that the Tucker Act confers on the COFC.⁵²⁰ According to SRA, at issue was the third prong of the Tucker Act, which provides the COFC with 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.⁵²¹

514. *Id.* at 251 (quoting 41 U.S.C. § 4106(f) (2012)).

515. *Id.* at 255 (internal quotation marks omitted).

516. *Id.* at 255–56 (internal quotation marks omitted).

517. *SRA Int’l Inc.*, 766 F.3d at 1412.

518. *Id.* at 1413–14.

519. *Id.* at 1413.

520. *Id.* at 1411.

521. 28 U.S.C. § 1491(b)(1) (2012).

SRA asserted that because SRA's protest of the Waiver was brought under the third prong, the COFC could hear SRA's protest of the Waiver.⁵²²

The Federal Circuit made it clear that it does not read FASA so narrowly. The court held that FASA "effectively eliminates all judicial review for protests made in connection with a procurement designated as a task order—*perhaps even in the event of an agency's egregious, or even criminal, conduct.*"⁵²³ Taking on SRA's statutory argument, the court stated that "[e]ven if the protestor points to an alleged violation of statute or regulation, . . . the court still has no jurisdiction to hear the case if the protest is in connection with the issuance of a task order."⁵²⁴

The court noted that the relief SRA sought—the rescission of the task order—demonstrated the connection between the Waiver and the issuance of the task order.⁵²⁵ The court also rejected the COFC's distinctions that the "temporal disconnect" and the "discretionary nature" of the Waiver severed the *connection* with the task order for FASA purposes.⁵²⁶ The court explained that FASA does not contain an exception for discretionary agency actions and that the GSA could have issued the Waiver at any time—including *before* the issuance of the task order.⁵²⁷ While the court left open the possibility that a "temporal disconnect" could "help to support the non-application of the FASA bar," the court did not elaborate on what this might look like.⁵²⁸

c. Significance

As a result of the Federal Circuit's ruling in *SRA*, there may be far fewer protests at the COFC of agency actions that *relate* to task or delivery orders. While the court's decision leaves open the possibility that under very different facts, there could be a bid protest *related* to the issuance of a task or delivery order that is not *in connection* with the issuance, the court's analysis may foreclose this outcome in practice because the court explicitly looked to the requested relief (rescission of the task order's issuance) to inform its decision. At

522. *SRA Int'l Inc.*, 766 F.3d at 1411.

523. *Id.* at 1413 (emphasis added).

524. *Id.*

525. *Id.* at 1414.

526. *Id.* at 1413.

527. *Id.*

528. *Id.*

least in post-award bid protests, it is difficult—if not impossible—to imagine a bid protest that does not request rescission of the award. By removing this avenue of relief, there may be little incentive to protest in the first place.

It is also anticipated that *SRA* will encourage agencies to issue more task and delivery orders that fall under \$10 million because these decisions cannot be reviewed by the GAO or the COFC.⁵²⁹ As a result, an agency may avoid review of its decision to override a CICA stay in these circumstances as long as the resultant bridge contract is a task or delivery order under \$10 million.⁵³⁰ Under these circumstances, the GAO may lack jurisdiction over the bridge contract, and the COFC may have no jurisdiction over the override decision itself because it would be issued “in connection with the issuance or proposed issuance of a task or delivery order.”⁵³¹

2. CMS Contract Management Services v. Massachusetts Housing Finance Agency

Contrasting the limitations on bid protest jurisdiction from *SRA*, the court’s decision in *CMS Contract Management Services* essentially expanded the COFC’s jurisdiction over certain federal assistance agreements that are—as the Federal Circuit has now made clear—properly classified as “procurement contracts.”⁵³² The dispute in *CMS* involved a split between the GAO and the COFC over whether a particular kind of assistance agreement used by the Department of Housing and Urban Development (HUD) to administer public housing benefits qualified as a “procurement contract.”⁵³³ If it did, HUD would be required to comply with the much more stringent

529. See 41 U.S.C. § 4106(f)(1) (2012) (listing the two exceptions for authorized protests). Of course, FASA does not restrict protests “on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued[,] or . . . a protest of an order valued in excess of \$10,000,000.” See *id.* (delineating eligibility requirement of protestors). In practice, however, these grounds can be used only under certain circumstances that simply do not apply to many would-be protestors.

530. See, e.g., *Serco Inc.*, B-410676.2, 2014 CPD ¶ 371 (Comp. Gen. Dec. 12, 2014) (dismissing a protest of a bridge task order under \$10 million even though the task order subject to the initial bid protest exceeded \$10 million).

531. 41 U.S.C. § 4106(f)(1).

532. *CMS Contract Mgmt. Servs. v. Mass. Hous. Fin. Agency.*, 745 F.3d 1379, 1381 (Fed. Cir. 2014), *petition for cert. filed*, 2015 WL 77675 (U.S. Jan. 1, 2015) (No. 14-781).

533. *Id.*

standards for competition in CICA⁵³⁴ rather than the more lenient standards available under the Federal Grant and Cooperative Agreements Act (FGCAA).⁵³⁵ Adopting the GAO's determination that the more stringent rules applied to the assistance agreement used by HUD, the Federal Circuit reversed the COFC and ruled that HUD should have complied with federal procurement laws and competition requirements in issuing and awarding these assistance agreements.⁵³⁶

a. Background

HUD is charged with providing rental assistance to low-income families and must accomplish this goal, in part, by paying owners of private residences to subsidize the cost of rent.⁵³⁷ In 2012, HUD issued a Notice of Funding Availability ("NOFA")—a term typically used to describe solicitations for cooperative agreements—for the administration and award of subsidized housing contracts.⁵³⁸ Believing that the NOFA's terms improperly excluded it from the competition, CMS, which had performed these types of contracts in prior years for HUD, filed a pre-award bid protest with the GAO alleging that the NOFA failed to meet the competitive requirements mandated by CICA.⁵³⁹ HUD responded that CICA was not applicable because the awards under the NOFA would be cooperative agreements subject to the FGCAA, a statute with far fewer requirements for competition and awards than the more stringent CICA.⁵⁴⁰ The GAO agreed with CMS and found that the agreements qualified as "procurement contracts" and, thus, were subject to the more stringent competition rules in CICA because the principle

534. See 41 U.S.C. § 3301 (outlining the CICA's requirements for full and open competition).

535. 31 U.S.C. §§ 6301, 6303–05 (expressing an overall purpose of maximizing competition in the creation of procurement contracts as well as encouraging competition in the creation of grants and cooperative agreements but providing no specific competition requirements).

536. *CMS Contract Mgmt. Servs.*, 745 F.3d at 1386.

537. See 42 U.S.C. § 1437(a) (declaring the federal government's policy of promoting decent and affordable housing for all citizens).

538. *CMS Contract Mgmt. Servs.*, 745 F.3d at 1383.

539. *Id.* at 1384.

540. See *id.* at 1383 (noting HUD characterized the awards as cooperative agreements, which meant they were outside of the scope of federal procurement law).

purpose of the NOFA was “to acquire goods or services for the direct benefit or use of the federal government.”⁵⁴¹

HUD decided to disregard the GAO’s recommendations and proceeded to award the assistance agreements based on the NOFA.⁵⁴² Soon after HUD’s announcement of its intentions, CMS filed a pre-award bid protest at the COFC.⁵⁴³ In a lengthy and complex opinion that the COFC noted dealt with “a morass of arcane housing assistance statutes and regulations,” the COFC found in favor of the government.⁵⁴⁴ According to the COFC, the principal purpose of the agreements that were to be established from the NOFA was to “‘transfer a thing of value’ to the recipient in order ‘to carry out a public purpose of support or stimulation authorized by a law of the United States.’”⁵⁴⁵ The COFC found it persuasive that the statutory and regulatory scheme applicable to the subsidized housing program provided HUD a mechanism through which to carry out its “statutorily authorized goal of supporting affordable housing for low-income individuals and families.”⁵⁴⁶ Because HUD essentially “engaged in a core statutory duty of providing funding assistance to state-sponsored” entities, the COFC found that the agreements in question qualified as cooperative agreements under the FGCAA and not procurement contracts under CICA.⁵⁴⁷

b. The Federal Circuit decision

In a much shorter opinion than the COFC’s extensive review of the “morass” of arcane housing regulations, the Federal Circuit sided with the GAO and reversed.⁵⁴⁸ According to the court, the principal purpose of the NOFA was to procure services “to support HUD’s staff and provide assistance to HUD with the oversight and monitoring of Section 8 housing assistance.”⁵⁴⁹ This was evidenced by (1) HUD’s acknowledgement of its intention to “procure” these

541. Assisted Hous. Servs. Corp., B-406738 *et al.*, 2012 CPD ¶ 236 (Comp. Gen. Aug. 15, 2012) (citing 31 U.S.C. § 6303).

542. *CMS Contract Mgmt. Servs.*, 745 F.3d at 1384.

543. *Id.* at 1385.

544. *CMS Contract Mgmt. Servs. v. United States*, 110 Fed. Cl. 537, 541 (2013), *rev’d*, 745 F.3d 1379 (Fed. Cir. 2014), *petition for cert. filed*, 2015 WL 77675 (U.S. Jan. 1, 2015) (No. 14-781).

545. *Id.* at 5 63 (quoting 31 U.S.C. § 6305).

546. *Id.* at 562.

547. *Id.* at 563.

548. *CMS Contract Mgmt. Servs.*, 745 F.3d at 1386.

549. *Id.* at 1385.

services in order to release agency officials to perform other work, (2) prior HUD procurements for the same services that utilized procurement contracts, and (3) HUD's statements that its use of contractors here helped HUD reduce costs and provided "support for HUD's Field Staff."⁵⁵⁰ Importantly, the court noted that it could not discern a "thing of value" that was transferred to the awardees, who acted merely as intermediaries between HUD and the entities eligible for assistance.⁵⁵¹ According to the court, in the case of such an "intermediary relationship, 'the proper instrument is a procurement contract.'"⁵⁵²

c. Significance

For government contractors that perform assistance agreements, *CMS* potentially represents a sea change in their ability to seek redress at the COFC. The impact of *CMS* is effectively an expansion of bid protest jurisdiction over assistance agreements that, under the Federal Circuit's interpretation of the FGCAA, are actually procurement contracts subject to CICA, the FAR, and all of the associated stringent rules regarding full and open competition.

Before *CMS*, a disappointed applicant for these types of assistance agreements would be limited to agency-specific regulations that may or may not offer some avenue for relief. Moreover, the FGCAA contains no requirements regarding competitions for grants and cooperative agreements. Thus, it stands to reason that agencies, in an effort to streamline their operations prior to *CMS*, might seek to classify opportunities as assistance agreements under the FGCAA rather than as procurement contracts subject to CICA and the FAR. The Federal Circuit succinctly summarized this issue in stating that when using cooperative agreements under the FGCAA, "agencies escape the requirements of federal procurement law."⁵⁵³

550. *Id.* at 1385–86 (internal quotation marks omitted).

551. *Id.* at 1386 (internal quotation marks omitted).

552. *Id.* (internal quotation marks omitted). Curiously, the court's sole citation for this point is a Senate Report from 1981 offering a committee's interpretation of the Federal Grant and Cooperative Agreements Act (FGCAA). *Id.* However, the persuasive value of this source is questionable because the FGCAA was already in effect at this time, and the specific amendment the committee addressed in this report had nothing to do with the classification of cooperative agreements and procurement contracts under the statute.

553. *Id.* at 1381.

Now, however, agencies no longer have the luxury of merely reclassifying procurements as cooperative agreements to escape the requirements of federal procurement law. Instead, regardless of how the agency classifies such an agreement, CICA and the FAR apply if the agreement actually constitutes a “procurement contract.”⁵⁵⁴ Thus, *CMS* will provide a much-needed check on agency overreach on the use of cooperative agreements to achieve procurement goals, particularly in situations involving intermediary contractors performing administrative functions for agencies that provide assistance programs. Indeed, the COFC has already applied the holding in *CMS* to enjoin the award of cooperative farming agreements by the Fish and Wildlife Service until it complies with the requirements of CICA.⁵⁵⁵ It is also potentially significant that the government has filed a petition for a writ of certiorari in this case, so the Federal Circuit’s decision may not be the final word.⁵⁵⁶

In any event, *CMS* should certainly not be read to suggest that *all* cooperative agreements and grants are now subject to CICA. Rather, the Federal Circuit’s decision does not address cooperative agreements and grants that are properly categorized as cooperative agreements or grants under the FGCAA definitions. As noted above, the FGCAA provides potential awardees with no remedy for errors an agency makes in awarding these kinds of agreements, and *CMS* does not change this fact. What *CMS* does, however, is help clarify the boundary—the “gray area”—between cooperative agreements and procurement contracts that, until now, has largely been left to agencies’ discretion.

3. Adams & Associates, Inc. v. United States

a. Background

*Adams & Associates, Inc. v. United States*⁵⁵⁷ involves the appeal of the incumbent contractor at two Job Corps centers.⁵⁵⁸ As a result of its

554. *Id.*

555. *Hymas v. United States*, 117 Fed. Cl. 466, 500–01, 508 (2014) (holding that the Fish and Wildlife Service is not exempt from the competitive requirements of CICA and that the agency violated the FGAA).

556. Petition for Writ of Certiorari, *CMS Contract Mgmt. Servs.*, 2015 WL 77675 (No. 14-781).

557. 741 F.3d 102 (Fed. Cir. 2014).

558. *Id.* at 104. The Job Corps program is a national residential training and employment program administered by the Department of Labor.

market research, the Department of Labor limited the right to compete for subsequent contracts to operate those two facilities to small businesses.⁵⁵⁹ The incumbent contractor, Adams & Associates, Inc. (“Adams”), did not qualify as a small business and was therefore precluded from competing.⁵⁶⁰

Adams filed two pre-award bid protests in the COFC.⁵⁶¹ In each case, the COFC denied Adams’s motion for judgment on the administrative record and granted the government’s cross-motion for judgment on the administrative record, finding that 29 U.S.C. § 2887(a)(2)(A) did not require that the procurement be open to full and open competition,⁵⁶² that the fair proportion analysis was conducted in compliance with 15 U.S.C. § 644,⁵⁶³ and that the DOL was not arbitrary and capricious in the way it conducted its Rule of Two⁵⁶⁴ analysis.⁵⁶⁵

b. The Federal Circuit decision

i. Small business set-aside procedures

Adams argued that the plain language of the Workforce Investment Act (WIA)⁵⁶⁶ indicated that Congress intended to establish a unique procurement method for selecting Job Corps Center operators that required the DOL to maximize competition among the eligible entities except in limited, sole-source situations.⁵⁶⁷ In short, Adams argued that the WIA did not permit the use of small business set-asides.

The Federal Circuit held that the language of the WIA was not ambiguous and that the plain meaning of “competitive basis” does

559. *Id.* at 104–05.

560. *Id.* at 104.

561. *Id.* at 105.

562. *Id.* at 104, 107–08.

563. *Id.* at 109–10.

564. The Rule of Two provides that for most procurements, the contracting officer shall set aside for small businesses any procurement “when there is a reasonable expectation that: (1) Offers will be obtained from at least two responsible small business concerns . . . , and (2) Award will be made at fair market prices.” FAR 19.502-2(b) (2014).

565. *Adams & Assocs. v. United States*, 109 Fed. Cl. 340, 355, 357–58 (2013), *aff’d*, 741 F.3d 102 (Fed. Cir. 2014).

566. *See* 29 U.S.C. § 2887(a)(2)(A) (2012) (outlining the competitive basis selection process for identifying entities to operate Job Corps centers).

567. *Adams & Assocs.*, 741 F.3d at 106–07.

not preclude a limited competition among small businesses.⁵⁶⁸ The court concluded that neither the plain language of the WIA provisions pertaining to Job Corps Centers nor the structure of the provisions forbids the DOL from limiting competition for the Job Corps Centers to small businesses.⁵⁶⁹

ii. “Fair proportion” determination

Adams argued that even if the small business set-aside process was permissible for the Job Corps Center procurements, the DOL did not apply the FAR correctly.⁵⁷⁰ The FAR provides:

The contracting officer shall set aside an individual acquisition or class of acquisitions for competition among small businesses when . . . [a]ssuring that a *fair proportion* of Government contracts in each industry category is placed with small business concerns; and the circumstances described in 19.505-2 or 19.502-3(a) [i.e., the Rule of Two] exist.⁵⁷¹

Adams asserted that the FAR included two requirements for setting aside acquisitions: the “fair proportion” determination and the Rule of Two.⁵⁷² Thus, Adams argued that the contracting officer was required to make a threshold “fair proportion” determination before applying the Rule of Two.⁵⁷³

The Federal Circuit rejected this argument, reasoning that the plain language of the statute repudiated Adams’s argument that the “fair proportion” determination was part of a two-part process executed by a contracting officer.⁵⁷⁴ There was no indication in the Small Business Act—the statute from which the “fair proportion” language originated—that the “fair proportion” determination must have been made on a contract-specific basis.⁵⁷⁵ The Federal Circuit agreed with the COFC that nothing more was required to satisfy the “fair proportion” requirement than to use the mechanisms

568. *Id.* at 107 (showing that the Federal Circuit agrees with the COFC’s holding on the language of WIA).

569. *Id.* at 107–08.

570. *Id.* at 109.

571. FAR 19.502-1(a)(1)–(2) (2014).

572. *Adams & Assocs.*, 741 F.3d at 109.

573. *Id.*

574. *Id.* at 110 (internal quotation marks omitted).

575. *Id.* (citing 15 U.S.C. § 644(a) (2012)). The statute provides that the “fair proportion” determination is to be made “by the Administration and the contracting procurement or disposal agency” and “may be made for individual awards or contracts or for classes of awards or contracts.” 15 U.S.C. § 644(a).

contemplated by 15 U.S.C. § 644—namely, goal setting by the executive branch, input from the Office of Small and Disadvantaged Business Utilization, and the industry-specific application of size standards by the Office of Management and Budget and the Small Business Administration.⁵⁷⁶

iii. Rule of Two analysis

Adams next argued that the DOL did not apply the Rule of Two correctly.⁵⁷⁷ The Rule of Two provides that for most procurements, the contracting officer shall set aside any procurement for small businesses “when there is a reasonable expectation that: (1) Offers will be obtained from at least two responsible small business concerns . . . ; and (2) Award will be made at fair market prices.”⁵⁷⁸ Adams argued that the Rule of Two “require[d] two separate, but inter-related, decisions—one as to responsibility, and one as to a form of price reasonableness.”⁵⁷⁹ According to Adams, the responsibility determination required examining factors pertaining to whether a prospective contractor is “‘responsible’ before awarding a contract to that contractor,” including the contractor’s “capability, capacity, and past performance.”⁵⁸⁰

The Federal Circuit rejected Adams’s interpretation of the Rule of Two and noted that Adams conflated a set-aside determination with a responsibility determination made pursuant to the FAR.⁵⁸¹ A set-aside determination considers “whether there is a reasonable expectation that at least two responsible small businesses will make an offer at fair market prices,” whereas the responsibility determination considers “whether an individual contractor is responsible in the context of awarding a contract.”⁵⁸² The court thus held that “[t]he DOL was not required to impose the requirements of the [responsibility determination] process onto the small business set-aside determination, and [the DOL] properly applied the Rule of Two.”⁵⁸³

576. *Adams & Assocs.*, 741 F.3d at 110.

577. *Id.* at 110–11.

578. FAR 19.502-2(b) (2014).

579. *Adams & Assocs.*, 741 F.3d at 111 (internal quotation marks omitted).

580. *Id.*

581. *Id.* (citing FAR 9.104-1).

582. *Id.*

583. *Id.*

c. Significance

The Federal Circuit in *Adams* was tasked with interpreting the interplay between the WIA, CICA, and the Small Business Act. Finding that the WIA was “unambiguous as to this issue”⁵⁸⁴ and with these issues fairly well settled under CICA and the Small Business Act, this appeared to be a fairly straightforward case. Indeed, even if the WIA had been ambiguous, the DOL’s regulations appeared to clearly determine these issues and were properly promulgated.

4. Kingdomware Technologies, Inc. v. United States

a. Background

In early 2012, the Department of Veteran Affairs (VA) used the GSA’s Federal Supply Schedule (FSS)⁵⁸⁵ to procure services for Emergency Notification Services in several of its medical centers, and awarded the contract to an FSS vendor that was not a Veteran-Owned Small Business (VOSB).⁵⁸⁶ Kingdomware Technologies, Inc. (“Kingdomware”), a service-disabled veteran-owned small business (SDVOSB), filed a bid protest with the GAO.⁵⁸⁷

Kingdomware asserted that the contract awarded to the non-VOSB FSS vendor was illegal because 38 U.S.C. § 8127(d) requires the VA to first perform and satisfy the Rule of Two analysis before awarding a set-aside procurement contract to a VOSB or SDVOSB.⁵⁸⁸ The VA argued that it was required to perform and satisfy the Rule of Two analysis only when it determines that the analysis “is necessary to meet [its] established contracting goals.”⁵⁸⁹ In rejecting the VA’s argument, the GAO recommended that the VA nullify the current contract award and seek a new contract pursuant to an SDVOSB set-

584. *Id.* at 108 n.4.

585. The GSA established the Federal Supply Schedule (FSS) to provide government agencies with a “simplified process for obtaining commercial supplies . . . at prices associated with volume buying.” Kingdomware Techs., Inc. v. United States, 754 F.3d 923, 925 (Fed. Cir. 2014) (internal quotation marks omitted), *petition for cert. filed*, 2015 WL 410706 (U.S. Jan. 29, 2015) (No. 14-916). Rather than relying on traditional contract tools, agencies can use the FSS to order goods and services at prices indicated in the schedule while also satisfying conditions for “full and open competition.” *Id.*

586. *Id.* at 928.

587. *Id.*

588. *Id.* at 928–29.

589. *Id.* at 929.

aside.⁵⁹⁰ However, the VA responded that it refused to accept the GAO's recommendation.⁵⁹¹

Kingdomware then filed a complaint in the COFC.⁵⁹² The COFC held in favor of the VA and granted the VA's cross-motion for summary judgment, reasoning that Kingdomware's interpretation of § 8127(d) was not supported by the plain language of the statute.⁵⁹³ The COFC held that "the 2006 [Veterans] Act must be construed in light of its goal-setting provisions and thus the statute is at best ambiguous as to whether it mandates a preference for SDVOSBs and VOSBs for all VA procurements."⁵⁹⁴

To reach this holding, the COFC determined that it need not apply deference under *Chevron v. Natural Resources Defense Counsel*⁵⁹⁵ to the VA's interpretation because the regulations themselves did not expressly state that the subsection did not apply to the FSS.⁵⁹⁶ Instead, deference under *Skidmore v. Swift & Co.*⁵⁹⁷ was warranted.⁵⁹⁸ The COFC found that the "clear statement" of the VA's interpretation of the regulations' preamble was entitled to *Skidmore* deference because the only statutory language that the regulations cited verbatim were found to be ambiguous and the regulations were silent as to what role the FSS might play in meeting the goals set by the Secretary.⁵⁹⁹ In light of this level of deference and the "many . . .

590. *Id.*; see also Kingdomware Techs., B-406507, 2012 CPD ¶ 165 (Comp. Gen. May 30, 2012) (same).

591. *Kingdomware Techs., Inc.*, 754 F.3d at 929.

592. *Id.*

593. *Id.* at 929–30.

594. *Kingdomware Techs., Inc. v. United States*, 107 Fed. Cl. 226, 240 (2012), *aff'd*, 754 F.3d 923 (Fed. Cir. 2014), *petition for cert. filed*, 2015 WL 410706 (U.S. Jan. 29, 2015) (No. 14-916).

595. 467 U.S. 837 (1984).

596. *Kingdomware Techs., Inc.*, 754 F.3d at 930. The COFC explained that *Chevron* requires a reviewing court to determine, by statutory construction, first "whether Congress has spoken to the precise question at issue." *Id.* (internal quotation marks omitted). If it has, then the "unambiguously expressed intent" of Congress must prevail. *Id.* (internal quotation marks omitted). Conversely, if Congress has not spoken to the issue or if it has done so ambiguously, then the court must determine "whether the agency's [interpretation] is based on a permissible construction of the statute." *Id.* at 930–31 (alteration in original) (internal quotation marks omitted). If it is, then the agency's interpretation must prevail. *Id.* at 931.

597. 323 U.S. 134 (1944).

598. *Kingdomware Techs., Inc.*, 754 F.3d at 930.

599. *Id.* (citing *Skidmore*, 323 U.S. at 140). The four-factor test for determining the deference given to an agency's rule or interpretation includes (1) the thoroughness of the agency's consideration, (2) the validity of the agency's reasoning, (3) the

blazemarks favoring deference” to the VA’s interpretation, the trial court granted the VA’s cross-motion for summary judgment.⁶⁰⁰

b. The Federal Circuit decision

In a 2–1 decision affirming the COFC’s holding, the Federal Circuit decided the issue under *Chevron*—not *Skidmore*—because “there [were] no factual or mixed factual and legal issues, and the only question [was] one of statutory construction.”⁶⁰¹ Under this test, the court concluded that there was no ambiguity in § 8127 and that Congress’s intent was clear because it directly tied the mandatory Rule of Two contracting procedure of subsection (d) to the achievement of the goals set pursuant to subsection (a).⁶⁰² The court explained that “Congress intended the VA to meet the goals set by the Secretary,” and to meet such goals, “the Secretary ‘shall’ use Rule of Two procedures, ‘may’ use the [§ 8127](b) and (c) contract tools, and may elect to use the FSS at other times so long as the goals are met.”⁶⁰³ Thus, the Federal Circuit resolved the issue at *Chevron* step one and there was no need for further *Chevron* analysis.

Ultimately, the court concluded that the agency was not required to perform a VOSB Rule of Two analysis for every contract so long as § 8127(a)’s goals were satisfied.⁶⁰⁴ Therefore, the Federal Circuit determined that in spite of the Secretary’s goals, the Secretary need not set aside every contract for a Rule of Two analysis before turning to the FSS.⁶⁰⁵ The court noted that since the implementation of the 2006 Veterans Act, the VA has consistently satisfied the requirements for procurements from SDVOSBs and VOSBs.⁶⁰⁶ The VA’s approval of the non-VOSB FSS vendor contracts at issue was not “arbitrary, capricious, or contrary to law” because the Secretary adhered to his statutory directive, which required him to set and meet his goals.⁶⁰⁷

In his dissent, Judge Reyna contended that the 2006 Veterans Act unambiguously required that VA contracting officers perform “a Rule

consistency of the agency’s interpretation over time, and (4) other persuasive powers of the agency. *Skidmore*, 323 U.S. at 140.

600. *Kingdomware Techs., Inc.*, 754 F.3d at 930.

601. *Id.*

602. *Id.* at 931.

603. *Id.*

604. *Id.* at 934.

605. *Id.*

606. *Id.*

607. *Id.*

of Two analysis in every acquisition,” including task and delivery orders under the FSS.⁶⁰⁸ Judge Reyna asserted that “an agency cannot refuse to set aside an acquisition solely because small businesses already receive a fair proportion of the agency’s contracts.”⁶⁰⁹

c. Significance

Under the Federal Circuit’s decision, the VA is permitted to continue to use the FSS program, which the GAO’s decision would have made impractical. Even if the Federal Circuit had determined that the statute was ambiguous, the court would have likely reached the identical conclusion based on the VA’s interpretation of the requirements.

C. Spent Nuclear Fuel: Sacramento Municipal Utilities District v. United States

In 2014, the Federal Circuit decided only one Spent Nuclear Fuel case⁶¹⁰—an unpublished, nonprecedential decision in *Sacramento Municipal Utility District v. United States (SMUD II)*.⁶¹¹ There has been a sharp decline in SNF cases at the COFC over the last few years. In 2013, the Federal Circuit did not decide any SNF cases.⁶¹² However, as recently as 2012 and 2011, the court decided six SNF cases in each calendar year.⁶¹³ Historically, these cases have been focused almost exclusively on how to calculate the damages the government owes to entities that entered into contracts with the Department of Energy (DOE) for the collection and disposal SNF and high-level radioactive waste (“HRW”).⁶¹⁴ As in previous years, this year’s lone

608. *Id.* at 934–35 (Reyna, J., dissenting).

609. *Id.* at 935.

610. The SNF cases relate to billions of dollars in potential damages caused by the government’s failure to begin operations of the Yucca Mountain nuclear fuel repository and the alleged breach of the Department of Energy’s (DOE) Standard Contract. See Steven L. Schooner, *A Random Walk: The Federal Circuit’s 2010 Government Contracts Decisions*, 60 AM. U. L. REV. 1067, 1106–08 (2011).

611. 566 F. App’x 985 (Fed. Cir. 2014).

612. See generally Dennis J. Callahan et al., *2013 Government Contract Law Decisions of the Federal Circuit*, 63 AM. U. L. REV. 1307 (2014).

613. Joel Singer et al., *2011 Government Contract Law Decisions of the Federal Circuit*, 61 AM. U. L. REV. 1013, 1083 (2012); Matthew H. Solomson et al., *2012 Government Contract Law Decisions of the Federal Circuit*, 62 AM. U. L. REV. 907, 957 (2013).

614. Singer et al., *supra* note 613, at 1081 (“[T]here has been a significant number of similar [SNF] cases brought before the Federal Circuit, which have focused primarily on the amount of damages owed to individual plaintiffs.”).

SNF decision also focused on the calculation of damages owed by the government to the contractor.

1. *Background*

In 1983, the Sacramento Municipal Utility District (“SMUD”) entered into a contract with the DOE wherein SMUD agreed to pay \$40 million into the Nuclear Waste Fund in exchange for DOE agreeing to accept and dispose of SMUD’s spent nuclear fuel and high-level radioactive waste (HLW).⁶¹⁵ DOE, which agreed to begin processing the materials in 1998, held several similar contracts with utilities that processed nuclear energy.⁶¹⁶ In the event DOE did not have enough capacity to accept all of the waste, acceptance would be allocated based on the date the fuel had been discharged from its reactor—“oldest fuel first” (OFF).⁶¹⁷ The contract included a provision allowing utilities to exchange or swap acceptance slots such that the utilities could adjust delivery schedules on their own.⁶¹⁸ In 1987, DOE announced that it expected the processing facility’s opening would be significantly delayed, and, in 1989, DOE announced that the facility would not be operational until 2010.⁶¹⁹

SMUD operated the Rancho Seco nuclear plant until it shut down in 1989.⁶²⁰ During decommissioning, SMUD stored SNF and HLW in wet pools and expected that it would continue to do so until DOE accepted the waste.⁶²¹ The annual operating cost of the pools was between \$6 million and \$12 million.⁶²² Because the repositories would not be able to receive the waste, between 1992 and 2001, SMUD built a dual-purpose, dry storage facility called an Independent Spent Fuel Storage Installation (ISFSI).⁶²³ By August 2002, SMUD transferred all of its waste to dry storage and then, within the year, shut down the wet pools.⁶²⁴ SMUD incurred \$78,558,212 in ISFSI-related costs between 1992 and 2003.⁶²⁵

615. *Sacramento Mun. Util. Dist.*, 566 F. App’x at 986–87.

616. *Id.* at 987.

617. *Id.* (internal quotation marks omitted).

618. *Id.*

619. *Id.*

620. *Id.*

621. *Id.*

622. *Id.*

623. *Id.* at 987–88.

624. *Id.* at 988.

625. *Id.*

SMUD filed two separate suits—one for the period from 1992 through 2003 and a second for the period between 2004 and 2009.⁶²⁶ In 1998, SMUD pursued the suit covering the first time period in the COFC (*SMUD I*).⁶²⁷ Determining that SMUD’s decision to build the facilities could be substantially attributed to DOE’s breach, the COFC awarded SMUD \$39,796,234, which accounted for several offsets including a \$4,146,360 offset for SMUD’s decommissioning of the wet pools and transfer of its waste to dry storage.⁶²⁸

SMUD challenged this offset on the ground that it would have achieved a “fuel-out date” (transfer of all waste out of the wet storage) well before 2003 had DOE not breached and actually accepted the waste starting in 1988.⁶²⁹ Therefore, SMUD argued that it did not realize any savings on account of the wet pools.⁶³⁰ SMUD also asserted that another utility may have wished to exchange acceptance slots with SMUD and, had that happened, the utility would have achieved a much earlier fuel-out date as well.⁶³¹ The COFC confirmed the \$4.2 million offset and rejected SMUD’s 2003 fuel-out date, finding that in order to accept the date, it would have to speculate as to the willingness of other utilities to exchange slots with SMUD, which it could not do.⁶³²

The Federal Circuit affirmed in part and reversed in part the lower court’s decision in *SMUD I*, finding that the COFC did not use the correct rate for assessing the value of the government’s partial breach, which led SMUD to pursue the dual-purpose storage.⁶³³ The court found an error in damages calculations with respect to \$13.4 million of offsets but left the \$4.2 million offset alone.⁶³⁴ On remand, the COFC recalculated SMUD’s damages as \$53,159,863 and reaffirmed the \$4.2 million offset for the wet pool savings.⁶³⁵ At this point, DOE sought a stay of execution of judgment in the proceeding pending resolution of SMUD’s second suit (*SMUD II*) that sought damages for 2004–2009.⁶³⁶ The COFC ultimately granted the stay in

626. *Id.* at 988–89.

627. *Id.* at 988.

628. *Id.*

629. *Id.* (internal quotation marks omitted).

630. *Id.*

631. *Id.*

632. *Id.*

633. *Id.* at 988–89.

634. *Id.* at 989.

635. *Id.*

636. *Id.*

order to determine whether the wet pool savings would apply in the later time period.⁶³⁷

In *SMUD II*, SMUD offered testimony from DOE officials and government experts who explained that slot exchanges would have readily occurred had the DOE performed under the contract.⁶³⁸ One expert, Frank Graves, explained that the OFF ranking would have led to an incursion of an additional \$1.6 billion that could have been mitigated with the use of acceptance slot exchanges.⁶³⁹ Because the utilities were not competitors, utilizing the exchanges was in the self-interest of each.⁶⁴⁰ Using this analysis, Mr. Graves testified that SMUD would have removed all of Rancho Seco's SNF and HLW by 1999.⁶⁴¹ Mr. Graves further offered that the exchange would have cost approximately only \$8.4 million—\$11 million less than the operating costs of the wet pools.⁶⁴² SMUD further established that even in the absence of the economic incentives for exchanges, SMUD would have removed all of the fuel from Rancho Seco between 1999 and 2003 and likely well before that time.⁶⁴³

DOE argued that because SMUD did not challenge the COFC's rejection of its exchange theory on appeal in *SMUD I*, SMUD was collaterally estopped from claiming it would have removed the waste before 2008.⁶⁴⁴ The COFC found that it had already rejected SMUD's exchange theory in *SMUD I* and that, because the utility did not appeal the ruling, SMUD chose to live with the decision.⁶⁴⁵ The COFC also rejected SMUD's contention that collateral estoppel was inapplicable because of a change in law.⁶⁴⁶ The trial court distinguished the other utility cases that accepted Mr. Graves's exchange analysis.⁶⁴⁷ Although it had not determined a specific fuel-out date, the COFC found that barring SMUD from litigating an earlier fuel-out date based on the exchange theory made 2008 the de facto fuel-out date.⁶⁴⁸

637. *Id.*

638. *Id.* at 990.

639. *Id.*

640. *Id.*

641. *Id.*

642. *Id.*

643. *Id.*

644. *Id.* at 991.

645. *Id.*

646. *Id.* at 992.

647. *Id.*

648. *Id.*

The COFC also considered whether the DOE was entitled to an offset for the money saved from wet pool storage from 2004 to 2008 by transferring the spent fuel to dry storage.⁶⁴⁹ Had the DOE not breached, SMUD would have maintained the waste in pools until SMUD delivered the waste to DOE.⁶⁵⁰ The COFC determined that that offset for both wet and dry storage totaled \$34,987,913.⁶⁵¹ The COFC ultimately awarded SMUD just under \$21 million for 2004–2008.⁶⁵² The trial court also applied a negative value (-\$14,284,318) from *SMUD I* to the total award across the two sets of litigation.⁶⁵³

2. *The Federal Circuit decision*

The Federal Circuit first took up the issue of collateral estoppel. The court found that the Federal Circuit's holdings in SNF cases subsequent to *SMUD I* changed the relevant factual and legal landscape.⁶⁵⁴ The Federal Circuit's subsequent acceptance of damage theories based on exchange models constitutes such a change.⁶⁵⁵

The Federal Circuit also found that in *SMUD I*, the question at issue was whether the fuel-out date occurred *before* 2003.⁶⁵⁶ In the present litigation, the question was whether the fuel-out date occurred in a year *after* 2003 (and before 2009).⁶⁵⁷ Additionally, in the previous case, the exchange model was speculative as to the DOE's acceptance rate; in the present case, the exchange model applied the acceptance rate dictated by a previous case.⁶⁵⁸ The court also found that the issue had not actually been litigated.⁶⁵⁹ The trial court expressly refused to allow the parties to litigate the fuel-out date.⁶⁶⁰ Further, while SMUD did accept the \$4.2 million offset for 2003 in *SMUD I*, that acceptance had no bearing on whether or not the matter was litigated for *SMUD II*.⁶⁶¹ The Federal Circuit's precedent applying the 1987 removal rates displaced the COFC's

649. *Id.*

650. *Id.*

651. *Id.* at 993.

652. *Id.*

653. *Id.*

654. *Id.* at 994.

655. *Id.*

656. *Id.*

657. *Id.*

658. *Id.* at 995.

659. *Id.*

660. *Id.*

661. *Id.*

determination in *SMUD I* that the “exchange theory [would] require[] improper speculation.”⁶⁶² Accordingly, the court found that collateral estoppel did not apply to the question of setting a fuel-out date based on the exchange theory.⁶⁶³ It therefore concluded that the COFC should have allowed SMUD to litigate the question.⁶⁶⁴ The court also found that the COFC’s initial determination of a \$4.2 million annual wet pool offset was upheld on appeal and, therefore, “became the law of the case” and could not be supplanted by the COFC in the *SMUD II* proceeding.⁶⁶⁵

Finally, the court found that the COFC erred when it combined the awards in *SMUD I* and *SMUD II* for the purpose of reducing SMUD’s total award.⁶⁶⁶ SMUD sought damages in two successive suits because it continued to incur mitigation costs over time.⁶⁶⁷ The COFC determined that DOE was entitled to \$34 million in offsets for the *SMUD II* timeframe and that SMUD had proved only \$20 million in damages.⁶⁶⁸ However, rather than using the offsets to reduce the damages to zero, the COFC applied the excess offsets of \$14 million to the amount DOE owed under *SMUD I*.⁶⁶⁹ Accordingly, the court found that, by staying the *SMUD I* award pending the damages determination of *SMUD II*, the COFC constructively awarded the DOE \$14.3 million—an outcome violating the principle that a breaching party’s offset cannot exceed the non-breaching party’s damages.⁶⁷⁰ Ultimately, the court reinstated the \$53,139,863 *SMUD I* award for the 1992–2003 period, vacated the COFC’s 2004–2008 award, and remanded for further consideration.⁶⁷¹

3. Significance

As an unpublished decision premised on some complicated facts, it is difficult to see *SMUD II* as providing much significant guidance for government contract practitioners going forward. To the extent that it

662. *Id.*

663. *Id.*

664. *Id.*

665. *Id.*

666. *Id.* at 996.

667. *Id.* The court dictated this procedure, developed under *Indiana Michigan Power Co. v. United States*, 422 F.3d 1369 (Fed. Cir. 2005), to limit an SNF plaintiff’s damages and, conversely, to limit the DOE’s claimed offsets. *Id.*

668. *Id.*

669. *Id.*

670. *Id.* at 996–97.

671. *Id.* at 997.

has any significance, *SMUD II* provides some guidance with regard to collateral estoppel and damage calculations generally. In particular, the Federal Circuit confirmed that significant changes in decisional law can preclude the application of collateral estoppel⁶⁷² and that through the application of an offset that exceeds its damages a party should not be allowed to end up better off for having breached a contract.⁶⁷³

However, the usefulness of the case to most government contract practitioners is likely limited. In addition to the fact that it is nonprecedential, SNF cases like *SMUD II* generally have not been viewed by government contract practitioners as cases that offer much guidance outside of the calculation of damages. Indeed, “[w]hile many of the issues discussed in these cases are unique to SNF area and, therefore, will likely be of little utility to most practitioners, other issues relating to the calculation of damages generally may have applicability and utility beyond the SNF context.”⁶⁷⁴

CONCLUSION

Many of the Federal Circuit’s decisions in 2014, including some of the most significant ones, are inconsistent with the critics’ claims of formalism and favorable treatment for the government. Indeed, the court in some instances arrived at significant decisions wholly incompatible with an inflexible, formalistic approach. Most significantly in *Metcalf*, the court invalidated arguments that an allegation of a breach of the duty of good faith against the government required the contractor to prove bad faith and a specific intent to harm.⁶⁷⁵ In other instances, the court also arrived at decisions inconsistent with formalism and favorable treatment of the government. For example, in *Estes Express*, the court avoided a simple formalistic approach that would have denied jurisdiction to hear a claim from a contractor that did not have a contract with the

672. *Id.* at 994.

673. *Id.* at 997 (“[A] breaching party should never be placed in a better position as a result of its breach.”).

674. Singer et al., *supra* note 613, at 1083.

675. See *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 987, 990, 992–95 (Fed. Cir. 2014) (reversing the lower court’s decision and holding that determining whether the government breached the duty of good faith and fair dealing requires consideration under broader standards).

government, and in *Shell Oil*, the court interpreted “charges” somewhat broadly to protect contractors from unforeseen results.⁶⁷⁶

While the Federal Circuit in 2014 had some very significant cases that were inconsistent with formalism and government favoritism, there were some cases that appeared to show a preference for formalism. *Bell/Heery* allowed the government to avoid any contractual obligations or duties as it observed and participated in and seemingly approved a process that resulted in substantial losses for the contractor.⁶⁷⁷ *Veridyne* allowed a government agency, MARAD, to retain the work performed by a contractor at no cost where the court did not dispute the COFC’s findings that MARAD participated in a fraud against another agency, the SBA.⁶⁷⁸ Finally, *Century Exploration* allowed the government to make unilateral changes to its contracts as long as the contracts are subject to regulations and the government follows certain formalities when changing regulations that are incorporated into the contract.⁶⁷⁹

Ultimately, this Article is a snapshot—a look at one year’s worth of decisions. There will always be some cases that appear to favor contractors and others that appear to favor the government. One key benchmark for analysis should be that these cases balance out—and recently that appears to be the case in the Federal Circuit’s government contract jurisprudence.

676. See *Shell Oil Co. v. United States*, 751 F.3d 1282, 1285, 1290–92 (Fed. Cir. 2014) (internal quotation marks omitted) (reversing the lower court’s decision and finding that “charges” may be interpreted to mean costs under CERCLA (internal quotation marks omitted)); *Estes Express Lines v. United States*, 739 F.3d 689, 691–92, 694 (Fed. Cir. 2014) (overturning the lower court’s decision and finding privity beyond a formal contract between the subcontractor and the government).

677. See *Bell/Heery v. United States*, 739 F.3d 1326, 1328–29, 1331–36 (Fed. Cir. 2014) (rejecting each of the contractor’s arguments regarding contractual obligations imposed on the government).

678. See *Veridyne Corp. v. United States*, 758 F.3d 1371, 1373, 1375, 1378–79, 1380–82 (Fed. Cir. 2014) (denying the contractor any quantum meruit recovery despite acknowledging the Maritime Administration’s knowledge and participation in the fraud).

679. See *Century Exploration New Orleans, LLC v. United States*, 745 F.3d 1168, 1169–70, 1176, 1178–79 (Fed. Cir. 2014) (concluding that the regulations issued by the government did not constitute a breach because the government’s lease with Century was expressly subject to regulations that provide for the prevention of waste and conservation of natural resources under OSCLA), *cert. denied*, 135 S. Ct. 1175 (2015).