YEAR IN REVIEW: THE FEDERAL CIRCUIT'S 2021 GOVERNMENT CONTRACT LAW DECISIONS

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FOREWORD

BY THE HONORABLE HAROLD D. LESTER, JR.**

It has been almost forty years since Congress created the United States Court of Appeals for the Federal Circuit[1] with the goal of ensuring uniform and definitive judicial interpretations of the law applicable to Federal Government contracting.[2] Because, like that of the Court of Claims before it, the precedent of the Federal Circuit guides how procurement laws are interpreted, it is important for practitioners and those whose livelihoods depend on government

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1. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 2, 5, 7, 10, 15, 16, 18, 19, 22, 25, 26, 28, 30, 31, 33, 35, 40, 41, 42, 44, & 50 app. U.S.C.) (merging the Court of Claims with the Court of Customs and Patent Appeals to create the Court of Appeals for the Federal Circuit).

2. *See* Howard T. Markey, *The State of the Court*, 38 AM. U. L. REV. 1093, 1094 (1989); Harold C. Petrowitz, *Federal Court Reform: The Federal Courts Improvement Act of 1982—and Beyond*, 32 AM. U. L. REV. 543, 566 (1983).

contracting to pay attention to the decisions that the Federal Circuit issues.

Sometimes, those decisions can come as a bit of a surprise, particularly when a legal issue takes so long to make it to the Federal Circuit that, based on the number of trial tribunal decisions that have addressed the issue, practitioners start to think of the issue, over time, as well-settled. Back in the 1990s, the General Services Board of Contract Appeals (GSBCA), which at that time possessed jurisdiction under the now-repealed Brooks Act[3] to entertain bid protests in automated data processing equipment (ADP) procurements, established and then reestablished through a number of decisions issued over the course of several years that, if an agency was required but failed to obtain a delegation of procurement authority (DPA) from authorized sources before beginning a procurement, the agency could, in appropriate circumstances, remedy that failure after the fact.[4] It was years before that issue was finally presented to the Federal Circuit, and, when it was, the court disagreed, holding in *CACI, Inc. v. Stone*[5] that, if an agency is required to obtain a DPA for a particular procurement, agency actions to issue a solicitation and proceed through the procurement process without one are simply null and void. The dramatic effect that Federal Circuit guidance on legal issues like that can have on the way that agencies approach their procurement preparations shows the significance of obtaining the Federal Circuit's guidance on issues of importance to the government contracting community.

Each year, the court issues decisions, like *CACI*, that challenge (or uphold) long-held understandings of the law or that resolve disagreements as to what the law is or should be. Last year was no exception. As an example, in *Safeguard Base Operations, LLC v. United States*,[6] the Federal Circuit addressed an issue that was in the making for twenty-five years and had resulted in differing and sometimes conflicting views at the Court of Federal Claims. Prior to 1996, the

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3. 40 U.S.C. § 759(f) (1988) (since repealed).

4. *See, e.g.*, Electronic Sys. & Assocs., Inc. v. Department of the Air Force, GSBCA No. 11883-P, 92-1 BCA ¶ 25,278; International Technology Corp., GSBCA No. 10369-P, 90-1 BCA ¶ 22,582; Racal Information Systems, Inc., GSBCA No. 10264-P, 90-1 BCA ¶ 22,495; Systems American Management Corp., GSBCA No. 9773-P, 89-1 BCA ¶ 21,357; Rocky Mountain Trading Co., Systems Division, GSBCA No. 9569-P, 1988 WL 93499 (Aug. 31, 1988); Computervision Corp., GSBCA No. 8709-P, 87-1 BCA ¶ 19,518.

5. 990 F.2d 1233 (Fed. Cir. 1993).

6. 989 F.3d 1326, 1331 (Fed. Cir. 2021).

Court of Federal Claims possessed jurisdiction under section 1491(a)(1) of the Tucker Act[7] to entertain bid protests in pre-award situations, predicated on the theory that an implied-in-fact contract exists between the government and prospective bidders requiring the government fairly and honestly to consider bids when making an award decision. Post-award protests, however, were heard in the United States district courts. In 1996, Congress enacted the Administrative Dispute Resolution Act (ADRA), effectively transferring the district courts' protest jurisdiction to the Court of Federal Claims and placing jurisdiction for all bid protest challenges—both pre-award and post-award—in a single court under the standard of review set forth in the Administrative Procedures Act (APA).[8] After the ADRA was enacted, however, questions arose about whether implied-in-fact contract bid protest jurisdiction under the Tucker Act, with a standard of review that might differ from the APA standard, survived the ADRA's enactment and remained a viable jurisdictional protest basis, as well as about whether the implied-in-fact contract bid protest theory might have been incorporated into the ADRA protest jurisdiction. Different judges of the Court of Federal Claims, over the years, came to different and conflicting conclusions about those issues,[9] and it was only last year that the Federal Circuit stepped in conclusively to resolve those disagreements and provide precedential guidance that will direct parties' actions in the future and decrease further litigation about them.

This Area Summary, to which the current law clerks for the Civilian Board of Contract Appeals (CBCA) have devoted significant time and energy to develop, marks the thirty-seventh year in which the *American University Law Review* has published an annual summary of significant Federal Circuit decisions from the prior year, which shows the *Law Review*'s commitment to provide a platform for practitioners and others involved in government contracting through which they can

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7. 28 U.S.C. § 1491(a)(1).

8. Resource Conservation Group, LLC v. United States, 597 F.3d 1238, 1242–43 (Fed. Cir. 2010) (citing H.R. Rep. No. 104-841, at 10 (1996); H.R. Rep. No. 104-841, at 10 (1996) (Conf. Rep.)).

9. *Compare* Linc Government Services, Inc. v. United States, 96 Fed. Cl. 672, 693 (2010) *and* L-3 Communications Integrated Sys., L.P. v. United States, 94 Fed. Cl. 394, 398–99 (2010), *with* J.C.N. Constr., Inc. v. United States, 107 Fed. Cl. 503, 515–16 (2012), *and* Castle-Rose, Inc. v. United States, 99 Fed. Cl. 517, 531 (2011), *and* Bilfinger Berger AG Sede Secondaria Italiana v. United States, 97 Fed. Cl. 96, 151–52 (2010), *and* FFTF Restoration Co. v. United States, 86 Fed. Cl. 226, 240–45 (2009).

learn about the latest developments in how to interpret and understand legal issues that affect government contracts. For the fiscal year ending 2021, only four percent of the cases filed with the Federal Circuit were government contract cases, with the majority of the court's docket having been focused on patent cases.[10] Although that percentage might make it seem like government contracts have become a less important part of what the Federal Circuit hears, the percentage is not indicative of the significance of the Federal Circuit's decisions on matters of procurement law to practitioners, contractors, and agency contracting officials. The Federal Circuit last year issued a number of decisions—both precedential and non-precedential—on a myriad of issues affecting bid protests and contract claims of which government contractors should be aware.

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INTRODUCTION

This Area Summary discusses the most significant of the Federal Circuit's government contracting decisions from 2021 and the potential effects of those decisions on issues involving bid protest, contract interpretation, standing, damages, and jurisdiction under the Contract Disputes Act[1] (CDA), among other topics. While the purpose of the year-in-review Area Summary is to provide an overview of the most recent government contracting cases, this Area Summary includes reflections on the Federal Circuit's reasoning and application of precedent to long-standing issues in government contracting law.

1. Contract Disputes Act of 1978, 41 U.S.C. §§ 7101–7109.

I. BID PROTESTS

The Federal Circuit decided a number of bid protest issues in 2021. Section A of this Part will focus on cases addressing bidder standing. Section B reviews decisions relating to jurisdiction. Section C examines timeliness decisions. Section D considers cases concerning contracting officer discretion. Finally, Section E contains an analysis of decisions about the rule of two.

A. Bidder Standing

The Federal Circuit issued two decisions addressing bid protest standing in 2021. In *Asset Protection & Security Services, L.P. v. United States*,[2] the court determined an unresponsive bid based on ambiguity in the solicitation was nevertheless unacceptable, depriving the contractor of bid protest standing because it never had a substantial chance of winning the award.[3] In *HVF West, LLC v. United States*,[4] the court emphasized the necessity of demonstrating prejudice in a bid protest, declining to entertain a protest based merely on a defect in the award process without a showing that the contractor may have been selected for the award.[5]

1. Asset Protection & Security Services L.P. v. United States

a. Procedural history and facts

In 2016, the U.S. Immigration and Customs Enforcement (ICE) issued a solicitation for a services contract to provide detention, food, and transportation services at its Florence Detention Center in Arizona.[6] The solicitation indicated the proposals would be evaluated for both price realism and reasonableness.[7] While the solicitation was pending, a prospective offeror pointed out Arizona's 4.5% business tax and inquired whether ICE would issue a tax exemption to the successful offeror, to which ICE responded in the affirmative.[8] Asset Protection & Security Services, L.P. ("Asset") bid on the proposal,

2. 5 F.4th 1361 (Fed. Cir. 2021).
3. *Id.* at 1366.
4. 846 F. App'x 896 (Fed. Cir. 2021).
5. *Id.* at 899.
6. *Asset Prot.*, 5 F.4th at 1362.
7. *Id.* at 1363.
8. *Id.*

including an explanation that its cost estimates factored in ICE's response to the tax exemption inquiry.[9]

ICE ultimately awarded the contract to Akima Global Services, LLC ("Akima"), determining it offered the best value.[10] Asset filed a bid protest with the Government Accountability Office (GAO) challenging the agency's best value analysis and ICE decided to take voluntary corrective action.[11] The amended solicitation contained two key differences. First, ICE altered its selection criteria for offeror pricing, requesting a firm fixed price offer and focusing only on whether a price was unreasonably high (reasonableness), not whether a price was unreasonably low (realism).[12] Second, ICE corrected its earlier response to the tax inquiry, stating it would not delegate its tax-exempt status to offerors.[13]

Despite the amendments, Asset did not remove the tax-exempt certification language from its proposal.[14] ICE again selected Akima, determining Asset was ineligible because its proposal included the tax-exempt language, rendering it a contingent price.[15] Asset filed another bid protest, contending ICE improperly concluded Asset's bid contained contingency pricing and again challenged ICE's best value analysis.[16] The GAO found ICE had improperly determined the contingency pricing, but that Asset was not prejudiced by the determination because ICE's best value analysis was reasonable.[17] Asset filed a bid protest action at the Court of Federal Claims (COFC), but the court concluded Asset's proposal was non-responsive to the solicitation as amended and, therefore, Asset was ineligible for the contract award.[18] For this reason, the COFC held that Asset lacked standing to bring the protest.[19] Asset appealed to the Federal Circuit.[20]

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 1364.
16. *Id.*
17. *Id.*
18. Asset Prot. & Sec. Servs. v. United States, 150 Fed. Cl. 441, 466 (2020), *aff'd*, 5 F.4th 1361 (Fed. Cir. 2021).
19. *Id.* at 467.
20. *Asset Prot.*, 5 F.4th at 1364.

b. The Federal Circuit's decision

In a unanimous decision, the Federal Circuit upheld the COFC's conclusion that Asset lacked standing because its proposal was not responsive, making it ineligible for the contract award.[21] The COFC's bid protest jurisdiction imposes "more stringent standing requirements than Article III."[22] Bid protest standing, as framed by 28 U.S.C. § 1491(b)(1), requires first that a protestor be an "interested party," and, second, the protestor must demonstrate it was "prejudiced by a significant error in the procurement process, meaning that *but for the error*, it would have had a substantial chance of securing the contract."[23] It was upon this second requirement that the Federal Circuit determined Asset lacked standing because its unresponsive proposal meant it did not have a substantial chance of winning the contract.[24]

Asset admitted its bid's inclusion of the tax exemption constituted error but argued that the error was harmless.[25] It argued that, as a firm-fixed-price offer, the risk and responsibility of the error lay solely with Asset.[26] Instead of addressing Asset's arguments, the government contended the proposal was "unacceptable on its face" and was ineligible for award.[27] The Federal Circuit agreed.[28]

The Federal Circuit, consistent with earlier decisions, wrote that "a proposal that fails to conform to the material terms and conditions of [a] solicitation should be considered unacceptable and a contract award based on such an unacceptable proposal violates the procurement statutes and regulations."[29] Asset's failure to comply with the amendments related to the unavailability of the tax exemption constituted a material divergence from the solicitation, and any

21. *Id.* at 1365.

22. *Id.* (quoting Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1359 (Fed. Cir. 2009)).

23. *Id.* (internal quotations omitted) (quoting CliniComp Int'l, Inc. v. United States, 904 F.3d 1353, 1358 (Fed. Cir. 2018)).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 1365–66 (quoting Allied Tech. Grp. v. United States, 649 F.3d 1320, 1329 (Fed. Cir. 2011)).

agreement formed would lead to significant ambiguity in terms and obligations.[30]

The Federal Circuit also noted that ICE's acceptance of Asset's noncompliant and ambiguous bid would have created a risk of future litigation based on the government's knowledge of the tax exemption error.[31] Where the "government has knowledge, or constructive knowledge, that a contractor's bid is based on a mistake, and the government accepts the bid and awards the contract despite knowledge of this mistake, then a trial court may reform or rescind the contract."[32] Though Asset could not plausibly claim it misread the tax exemption amendment, the government's substantial interest in preventing opportunities for litigation based on its knowledge of the erroneous bid sufficiently justified its rejection of Asset's proposal.[33] The Federal Circuit determined that Asset was an ineligible bidder and did not have a substantial chance of receiving the contract award, thus depriving it of bid protest standing in the COFC.[34]

2. HVF West, LLC v. United States

a. Procedural history and facts

This case stems from a solicitation for the purchase and destruction of surplus military equipment.[35] Although the solicitation described itself as a "sales contract," it requested demilitarization or mutilation services from the winning bidder prior to the transfer of ownership.[36] The solicitation requested only the price each contractor was willing to pay per pound of property, but it did not clearly communicate whether or how the government intended to evaluate non-price criteria, such as technical ability.[37] The contracting officer received four bids including HVF West, LLC ("HVF") and its competitor, Lamb Depollution, Inc. ("Lamb").[38] After determining Lamb offered the best price, the contracting officer evaluated its non-price criteria and

30. *Id.* at 1366.
31. *Id.*
32. *Id.* (internal quotations omitted) (quoting Giesler v. United States, 232 F.3d 864, 869 (Fed. Cir. 2000)).
33. *Id.*
34. *Id.*
35. HVF West, LLC v. United States, 846 F. App'x 896, 897 (Fed. Cir. 2021).
36. *Id.*
37. *Id.*
38. *Id.*

awarded the contract.[39] The contracting officer did not evaluate the non-price criteria of the remaining three bidders.[40]

HVF unsuccessfully protested the award to Lamb at the agency and at the GAO and then filed a bid protest action at the COFC.[41] The COFC has jurisdiction over bid protest actions in connection with a procurement contract, so long as the protestor can show it had a substantial chance of winning the contract.[42] HVF first argued the court had jurisdiction because the solicitation called for the procurement of services rather than its stated description as a sales contract.[43] HVF further argued it had standing by challenging the qualifications of the winning bidder, questioning the qualifications of the two other bidders, and claiming the contracting officer had erred in its evaluation of the non-price criteria of Lamb.[44] Lamb and the government challenged the COFC's subject matter jurisdiction, arguing the contract was in connection to a sale of property, rather than a procurement contract.[45]

The COFC determined it had subject-matter jurisdiction over the case "because the resulting contract from the solicitation at issue was for a mixed transaction—the awardee would be buying property from the government while also providing non-de minimis service to the government."[46] The court subsequently ordered the contract to Lamb.[47] Lamb and the government appealed.[48]

b. The Federal Circuit's decision

The Federal Circuit reversed the COFC decision on the grounds that HVF lacked standing to bring the protest.[49] For this reason, it declined to rule on the other arguments proposed by Lamb and the government, including the distinction between sales and procurement

39. *Id.*
40. *Id.*
41. HVF West, LLC v. United States, 146 Fed. Cl. 314 (2019), *rev'd*, 846 F. App'x 896 (Fed. Cir. 2021).
42. *HVF West*, 846 F. App'x at 897; 28 U.S.C. § 1491(b)(1).
43. *HVF West*, 846 F. App'x at 897.
44. *Id.* at 898.
45. *Id.*
46. 146 Fed. Cl. at 329.
47. *Id.* at 341.
48. 846 F. App'x at 897.
49. *Id.*

contracts and the contracting officer's evaluation of Lamb's non-price criteria.[50]

The court determined HVF failed to demonstrate it had a "substantial chance" of winning the contract, as required by the COFC's bid protest jurisdiction.[51] To demonstrate it had a "substantial chance," HVF would have had to sufficiently challenge the qualifications and eligibility of its competitors.[52] Building on the principles established in *Eskridge & Associates v. United States*,[53] the court explained a "least favored price-ranked bidder has standing only upon mounting a credible challenge to the technical acceptability of the better price-ranked bidders in line and in front of the protesting party."[54] The court found HVF had failed to do so because it only presented "allegations based upon conjecture" that its competitors' proposals fell below the standards set by the solicitation.[55] The Federal Circuit remanded the matter to the COFC for dismissal of the complaint.[56]

c. Takeaways

While neither decision broke new ground on the Federal Circuit's bid protest standing jurisprudence, they do serve to highlight two areas where contractors may incorrectly believe they have standing to challenge contract awards. In *Asset Protection*, the court emphasized the necessity of adhering to the material terms of a solicitation and that any divergence may deprive the COFC of jurisdiction.[57] Perhaps more importantly, the court offered the government wide latitude to reject an ambiguous bid when it may expose the government to future litigation.[58] The court implied that even if a contractor could plausibly claim it submitted its bid, however reasonable, based on a misreading of the solicitation, the government is under no obligation to accept a bid that is contrary to its terms.[59]

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50. *Id.*
51. *Id.*
52. *Id.*
53. 955 F.3d 1339 (Fed. Cir. 2020).
54. *HVF West*, 846 F. App'x at 899.
55. *Id.* at 898–99.
56. *Id.* at 899.
57. Asset Prot. & Sec. Servs., L.P. v. United States, 5 F.4th 1361, 1365 (Fed. Cir. 2021).
58. *Id.* at 1366.
59. *Id.*

HVF West highlights the importance of demonstrating prejudice when bringing a bid protest before the COFC.[60] In declining to rule on any potential deficiencies in the procurement process, such as the government's non-price evaluation, the Federal Circuit emphasized that merely demonstrating an error in the process is insufficient for bid protest standing. Instead, the contractor must show that, but for the error, it had a substantial chance of winning the contract.[61]

B. Jurisdiction

The Federal Circuit addressed for the first time since Congress enacted the Administrative Dispute Resolution Act of 1996[62] (ADRA) whether the COFC may exercise its bid protest jurisdiction over an implied-in-fact contract claim.[63] In *Safeguard Base Operations, LLC v. United States*,[64] the court determined such jurisdiction exists only under § 1491(b)(1).[65]

1. Safeguard Base Operations, LLC v. United States

a. Procedural history and facts

This bid protest involved an implied-in-fact contract claim in the procurement context.[66] During the procurement process, disappointed bidder Safeguard Base Operations, LLC ("Safeguard") was eliminated from contention because it omitted price information for sixteen contract line item numbers (CLINs).[67] The Department of Homeland Security (DHS) issued a solicitation for the procurement of dorm management services, which outlined a commercial item acquisition for a firm-fixed-price contract.[68] Among other requirements and considerations, the solicitation required offerors to provide a detailed breakdown of proposed costs by CLIN.[69] The original solicitation informed offerors that the government had

60. HVF West, LLC v. United States, 846 F. App'x 896, 898 (Fed. Cir. 2021).
61. *Id.*
62. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (codified at 5 U.S.C. §§ 570a, 584).
63. Safeguard Base Operations, LLC v. United States, 989 F.3d 1326, 1331 (Fed. Cir. 2021).
64. *Id.* at 1326.
65. *Id.* at 1342.
66. *Id.* at 1331.
67. *Id.* at 1331–32.
68. *Id.* at 1332.
69. *Id.* at 1333.

provided price information for sixteen CLINs, but the form omitted such information.[70] It instructed offerors to not submit their own pricing information for those CLINs.[71] The solicitation also required offerors to submit subtotals for all CLINs.[72] As this was impossible without the sixteen absent CLINs, an offeror informed the government which provided the specific values.[73] Though the government publicly noted the pricing information for the CLINS, it never amended the solicitation.[74] The solicitation also explained that the government may eliminate noncompliant proposals.[75]

During the evaluation process, the government faulted Safeguard's proposal because it had failed to submit the pricing information for the sixteen CLINs.[76] After several rounds of source selection, followed by protest, the government determined Safeguard's proposal was noncompliant and not eligible for award.[77] Safeguard filed a complaint at the COFC, alleging that the "Government arbitrarily and capriciously disqualified Safeguard's proposal and violated an implied contract to fairly and honestly consider Safeguard's proposal."[78] Safeguard asserted the COFC had jurisdiction to consider whether the government violated an implied-in-fact contract that the government would fairly and honestly consider bids.[79]

b. The Federal Circuit's decision

For the first time, the Federal Circuit addressed whether the COFC has jurisdiction over implied-in-fact contracts in the procurement context and, if so, whether it comes from § 1491(a) or (b).[80] The court considered the historical context of the COFC's bid protest jurisdiction to determine if Congress intended to limit the court's jurisdiction over any type of procurement-related dispute.[81] The COFC's jurisdiction was initially limited to monetary relief for bid and

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 1334.
75. *Id.*
76. *Id.* at 1335.
77. *Id.* at 1335–37.
78. *Id.* at 1337.
79. *Id.*
80. *Id.* at 1339.
81. *Id.* at 1339–42.

proposal costs, including relief under an implied-in-fact contract.[82] This jurisdiction is reflected in the language of § 1491(a)(1).[83] The court's jurisdiction expanded after the enactment of the Administrative Procedure Act[84] (APA) and the Federal Courts Improvement Act[85] to include declaratory and equitable relief and, following the Administrative Dispute Resolution Act of 1996[86] (ADRA), expanded again to include jurisdiction over pre-award and post-award protests.[87] Section § 1491(b) codified this change, but the ADRA preserved the implied-in-fact contract language within § 1491(a).[88]

The Federal Circuit determined that the COFC has "jurisdiction over implied-in-fact contract claims in the procurement bid protest context" pursuant to § 1491(b)(1) and only § 1491(b)(1).[89] The court distinguished implied-in-fact contract claims in the procurement context from all other implied-in-fact contract claims because § 1491(b)(2) "explicitly authorizes the [COFC] to grant the relief historically associated with implied contract bid protest claims in the procurement context—'monetary relief limited to bid preparation and proposal costs.'"[90] For this reason, the court held that the COFC had jurisdiction over Safeguard's claim under only § 1491(b)(1).[91]

Once the Federal Circuit established the jurisdiction of the lower court, it turned to Safeguard's remaining arguments. The court affirmed the COFC's holding that the solicitation provided sufficient notice that a proposal may be eliminated for failing to include pricing for the sixteen CLINs.[92] Next, the court held that Safeguard could not clarify its omissions because proposals may be clarified only to resolve minor clerical errors.[93] The court concluded the price information was

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82. *Id.* at 1340 (citing Heyer Prods. Co. v. United States, 140 F. Supp. 409, 413–14 (Ct. Cl. 1956)) (holding that a disappointed bidder has a right to recover bid and proposal costs).

83. *Id.*

84. 5 U.S.C. §§ 551–559.

85. Federal Courts Improvement Act, Pub. L. No. 104-317, 110 Stat. 3847 (1996) (codified at 28 U.S.C. §§ 258, 1932).

86. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (codified at 5 U.S.C. §§ 570a, 584).

87. *Safeguard*, 989 F.3d at 1340–41.

88. *Id.* at 1341.

89. *Id.* at 1342.

90. *Id.* at 1343 (quoting 28 U.S.C. § 1491(b)(2)).

91. *Id.*

92. *Id.*

93. *Id.* at 1346.

a material aspect of the proposal and that Safeguard impermissibly sought to clarify a material omission.[94] For the same reason, the court held that waiver of a material defect would prejudice other offerors, and DHS did not abuse its discretion by declining to waive or clarify Safeguard's omissions.[95] Accordingly, the Federal Circuit affirmed the final judgment of the COFC.[96]

Judge Newman dissented, writing that the court incorrectly assessed the conflict between the solicitation's instructions and the instructions in the question-and-answer document.[97] The solicitation instructing offerors to not submit pricing information for the sixteen CLINs, while simultaneously requesting subtotals including those values, created uncertainty and bias.[98] Judge Newman disagreed with DHS's position that the question-and-answer document providing the values superseded the language of the solicitation.[99] The dissent also declined to join the majority's theory of jurisdiction because the obligation to deal fairly and honestly with offerors is a covenant dictating all government procurement rather than an implied contract or negotiated agreement.[100]

c. Takeaways

Safeguard addressed a complex jurisdictional question while continuing to uphold the discretionary authority of contracting officers. The Federal Circuit read § 1491 so as to allow the case to proceed and determined that DHS had not abused its discretion in eliminating Safeguard's proposal, regardless of any initial flaws in the solicitation process.[101] This case also highlights the holistic approach taken by the court when determining what information is included in the solicitation process. By allowing statements made in a question and answer to supersede the language of the solicitation, the court preserves the government's ability to correct its mistakes and proceed with the bidding process.

94. *Id.*
95. *Id.* at 1348.
96. *Id.* at 1349.
97. *Id.* at 1352 (Newman, J., dissenting).
98. *Id.* at 1352–53.
99. *Id.* at 1352.
100. *Id.* at 1353.
101. *Id.* at 1342, 1348.

C. Timeliness

The Federal Circuit issued two decisions addressing the timing of bid protests and appeals in 2021. In *Harmonia Holdings Group, LLC v. United States*,[102] the court explained when a party has either waived or preserved its right to appeal patent defects in a solicitation, otherwise known as the *Blue & Gold*[103] standard.[104] In *NIKA Technologies, Inc. v. United States*,[105] the court discussed the GAO's automatic stay procedure and adhered to its rigid bid protest timing requirement.[106]

1. Harmonia Holdings Group, LLC v. United States

a. Procedural history and facts

Harmonia Holdings Group, LLC ("Harmonia") bid on a solicitation for a services contract issued by U.S. Customs and Border Protection ("CBP").[107] From July through November 2018, CBP issued ten amendments to the solicitation, which involved a multiple-phase, multiple-factor evaluation.[108] Harmonia submitted a pre-award agency-level protest, challenging one amendment as it related to the evaluation process and another amendment's addition of a Federal Acquisition Regulation (FAR) clause limiting subcontracting.[109] Harmonia contended these amendments were material changes and that offerors should be able to update their entire proposals.[110] CBP denied Harmonia's protest, explaining the amendments were not material changes.[111] CBP then awarded the contract to Harmonia's competitor.[112]

In May of 2019, Harmonia filed a bid protest with the COFC challenging CBP's denial of its pre-award protest and CBP's evaluation of Harmonia's proposal.[113] On cross-motions for judgment on the

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102. Harmonia Holdings Grp., LLC v. United States, 20 F.4th 759 (Fed. Cir. 2021).
103. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308 (Fed. Cir. 2007).
104. *See Harmonia Holdings Grp.*, 20 F.4th at 767–68.
105. NIKA Techs., Inc. v. United States, 987 F.3d 1025 (Fed. Cir. 2021).
106. *See id.* at 1028.
107. *Harmonia Holdings Grp.*, 20 F.4th at 762.
108. *Id.*
109. *Id.* at 763.
110. *Id.*
111. *See id.* (contending that Amendments 9 and 10 were not material changes to the solicitation because they just gave offerors "additional flexibility towards pricing" and "did not change the overall technical solution to be performed").
112. *Id.*
113. Harmonia Holdings Grp., LLC v. United States, 147 Fed. Cl. 749, 751 (2020).

record, the COFC determined Harmonia's protest, "insofar as it involved the same grounds raised in its pre-award protest to the CBP," failed for untimeliness.[114] Quoting its decision *COMINT Systems Corp. v. United States*,[115] the court explained:

> To be sure, where bringing the challenge prior to the award is not practicable, it may be brought thereafter. But, assuming that there is adequate time in which to do so, a disappointed bidder must bring a challenge to a solicitation containing a patent error or ambiguity prior to the award of the contract.[116]

COMINT is an expansion of the reasoning in *Blue & Gold*. Under *Blue & Gold*, a party who fails to object to a patent error in a solicitation prior to the close of bidding waives its ability to raise the same objection at the COFC.[117] The COFC then denied the remainder of Harmonia's protest, determining CBP had properly evaluated the proposals.[118] Harmonia appealed to the Federal Circuit.[119]

b. The Federal Circuit's decision

Harmonia argued that the COFC erred in determining that Harmonia had waived its right to file an action asserting the same challenges it asserted in its pre-award protest.[120] According to Harmonia, the COFC improperly applied the *Blue & Gold* standard because Harmonia had formally preserved its challenge by timely submitting its pre-award protest to the CBP.[121] The Federal Circuit agreed, explaining that the *Blue & Gold* standard is intended to "prevent[] a bidder who is aware of a solicitation defect from waiting to bring its challenge after the award in an attempt to restart the bidding process, 'perhaps with increased knowledge of its competitors.'"[122] Because Harmonia submitted its timely, formal

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114. *Id.*; *see Harmonia Holdings Grp.*, 20 F.4th at 763; Harmonia Holdings Grp., LLC v. United States, 146 Fed. Cl. 799, 803 (2020), *rev'd in part and vacated in part*, 20 F.4th 759 (Fed. Cir. 2021).

115. 700 F.3d 1377 (Fed. Cir. 2012).

116. Harmonia Holdings Grp., LLC v. United States, 146 Fed. Cl. 799, 813 (2020) (emphasis omitted) (quoting COMINT Sys. Corp. v. United States, 700 F.3d 1377, 1382 (Fed. Cir. 2012)).

117. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313 (Fed. Cir. 2007).

118. *Harmonia Holdings Grp.*, 146 Fed. Cl. at 817.

119. *Harmonia Holdings Grp.*, 20 F.4th at 760.

120. *Id.*

121. *Id.* at 766.

122. *Id.* (quoting Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1314 (Fed. Cir. 2007)).

challenge to the solicitation during the bidding process, the Court held the *Blue & Gold* standard and its progeny do not apply.[123] The Federal Circuit reversed the lower court's decision on waiver but recognized the COFC's discretion to allow Harmonia to submit a wholly revised proposal.[124]

2. NIKA Technologies, Inc. v. United States

a. Procedural history and facts

NIKA Technologies, Inc. ("NIKA") bid on an Army Corps of Engineers solicitation seeking services for its Operation and Maintenance Engineering and Enhancement Program but was not awarded the contract.[125] NIKA timely requested and received a written debriefing, and the government alerted NIKA to its right to submit additional questions.[126] NIKA never submitted additional questions and filed a bid protest at the GAO six days after the written debriefing.[127]

Bid protests filed at the GAO invoke an automatic stay of procurement during the pendency of the protest if the agency receives notice within five days of debriefing.[128] In this case, the GAO denied the stay because NIKA did not file its protest until six days after it received the debriefing.[129] NIKA filed an action at the COFC, arguing that, although the debriefing period began upon receipt of the written debriefing, the debriefing period did not end for two further days.[130] NIKA based this argument on the statute that allows unsuccessful bidders to submit additional questions within two days of receiving a written debriefing.[131] The COFC entered judgment in favor of NIKA and instituted the stay.[132] The government appealed the decision to the Federal Circuit, but not before the bid protest had concluded and the stay ended.[133]

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123. *Id.*
124. *Id.* at 760.
125. NIKA Techs., Inc. v. United States, 987 F.3d 1025, 1026 (Fed. Cir. 2021).
126. *Id.*
127. *Id.*
128. 31 U.S.C. § 3553(d); *NIKA Techs.*, 987 F.3d at 1027.
129. *NIKA Techs.*, 987 F.3d at 1027.
130. NIKA Techs., Inc. v. United States, 147 Fed. Cl. 690, 693 (2020), *rev'd*, 987 F.3d 1025 (Fed. Cir. 2021).
131. *Id.* at 693–94.
132. *Id.* at 696.
133. *NIKA Techs.*, 987 F.3d at 1027.

b. The Federal Circuit's decision

The court began by determining that, in most circumstances, this case should be moot considering the order the government challenged expired prior to the appeal.[134] However, the court identified an exception to the mootness doctrine for cases capable of repetition but evading review.[135] The court considered the nature of the appeal and determined the exception applied.[136]

Proceeding to the merits, the court distinguished the effects of filing a bid protest at the GAO rather than the COFC.[137] Bid protestors are encouraged to file at the GAO because the protestor is entitled to invoke a stay on procurement for the duration of the proceedings.[138] To assert such entitlement, the protestor must file either within ten days of the contract award or within five days of debriefing.[139] The parties did not dispute that NIKA missed the first deadline, so the court addressed the issue in terms of the second.[140]

The court held that the plain meaning of the statute is five days after receipt of the debriefing; it is not held open for the two additional days during which a bidder may submit additional questions.[141] The court engaged in an analysis of the statutory language and legislative history in reaching its conclusion.[142] Particularly, it noted that where Congress has wanted to extend the deadline, it has done so explicitly.[143] Notably, NIKA did not submit additional questions because § 23059(b)(5)(C) states that when additional questions are submitted "[t]he agency shall not consider the debriefing to be concluded until the agency delivers its written responses."[144] The court reasoned, therefore, that the deadline is not extended when no additional questions are

134. *Id.*
135. *Id.*
136. *See id.* (noting that because of the statutory time constraint, a party would need to bring the controversy before the court within 100 days, which is "unrealistic, if not impossible").
137. *See id.* at 1028.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 1029.
142. *See id.* at 1028–29 (noting the plain meaning of the statutory language, especially the definitions provided in the statute, and applying them to the court's holding).
143. *Id.* at 1029.
144. *Id.* (alteration in original).

submitted.[145] Accordingly, NIKA did not meet the five-day deadline to file its bid protest, and the court reversed the COFC's decision.[146]

c. Takeaways

Harmonia Holdings explained how the Federal Circuit applies the *Blue & Gold* standard and clarified when a contractor has waived its protest rights over patent defects in a solicitation. *NIKA* clarified when a bid protest will prompt the GAO to initiate an automatic stay on procurement. Though the Federal Circuit adhered to the language of the statute, requiring filing either ten days after award or five days after debriefing, it noted a special circumstance where a contractor submits additional questions. In that circumstance, the five-day clock does not begin until the contractor receives the written debriefing to its additional questions.

D. Contracting Officer Discretion

The Federal Circuit issued three decisions pertaining to a contracting officer's discretion during the award process. In *DynCorp International, LLC v. United States*,[147] the Federal Circuit issued a precedential decision upholding a contracting officer's discretion to determine appropriate proposal assessment techniques.[148] Another precedential decision, *Harmonia Holdings v. United States*,[149] examined the specific procedure of referring small businesses to the U.S. Small Business Administration ("SBA") for a "size determination," again upholding a contracting officer's decision whether such action was appropriate.[150] Finally, in *Zafer Taahut, Insaat Ve Ticaret A.S. v. United States*,[151] the court held that a contracting officer's communication of a deadline extension to all offerors via email provided sufficient notice, even though a technical glitch caused the notice to be posted publicly a day following the original deadline.[152]

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145. *Id.*
146. *Id.*
147. DynCorp Int'l, LLC v. United States, 10 F.4th 1300 (Fed. Cir. 2021).
148. *See id.* at 1316 (finding the army had discretion to adopt an evaluation method aside from a crude price comparison).
149. Harmonia Holdings Grp., LLC v. United States, 999 F.3d 1397 (Fed. Cir. 2021).
150. *See id.* at 1405.
151. 849 F. App'x 260 (Fed. Cir. 2021).
152. *Id.* at 265.

1. DynCorp International, LLC v. United States

a. Procedural history and facts

Six firms submitted proposals for a large Indefinite Delivery, Indefinite Quantity ("IDIQ") contract to perform civilian logistics support for the Department of Defense (DoD).[153] The government evaluated the proposals as a best-value tradeoff between four factors: (1) technical/management; (2) past performance; (3) small business participation; and (4) cost and pricing.[154] The government valued the technical/management factor the most and the cost/price the least.[155] As explained in the solicitation, the government would evaluate cost and pricing based on both cost realism—if the estimate is too low—and price reasonableness—if the proposed price is too high.[156] The government separated the solicitation into cost-plus-fixed-fee and firm-fixed-price-portions.[157] The government had to find the total proposed cost of each portion reasonable, and unreasonableness in either portion would render the offeror ineligible.[158]

After multiple rounds of discussions and proposal revisions among all six firms, the government awarded four IDIQ contracts.[159] After DynCorp lost every bid, it brought a bid protest action in the COFC. DynCorp alleged the government had erred in its price reasonableness analysis by evaluating the reasonableness of only some offers, contrary to the government's requirements in the solicitation.[160] The COFC agreed with DynCorp, but the government elected to take voluntary corrective action before the court entered judgment.[161] The government sought additional pricing from the bidders to assess reasonableness and determined all six offerors had proposed reasonable prices.[162] It returned to the COFC with its findings and awarded the four contracts as originally determined.[163] DynCorp again challenged the government's

153. DynCorp Int'l LLC v. United States, 10 F.4th 1300, 1304–05 (Fed. Cir. 2021).
154. *Id.* at 1305.
155. *Id.*
156. *Id.*
157. *Id.* at 1305–06.
158. *Id.* at 1306.
159. *Id.*
160. DynCorp Int'l LLC v. United States, 148 Fed. Cl. 568, 575 (2020), *aff'd*, 10 F.4th 1300 (Fed. Cir. 2021).
161. *DynCorp Int'l*, 10 F.4th at 1307; *DynCorp Int'l*, 148 Fed. Cl. at 586.
162. *DynCorp Int'l*, 10 F.4th at 1307.
163. *Id.*; *DynCorp Int'l*, 148 Fed. Cl. at 586.

decision, arguing the government "had violated the FAR in its choice of price-analysis techniques and had irrationally concluded" all offerors had proposed reasonable prices.[164] This time, the COFC disagreed with DynCorp, finding the government had complied with the FAR and DynCorp had failed to justify overturning the award.[165] DynCorp appealed to the Federal Circuit.

b. The Federal Circuit's decision

DynCorp premised its argument on the FAR requirement that contracting officers must discuss "deficiencies" and "significant weaknesses" with offerors when identified.[166] DynCorp contended that if the government had determined its proposed price unreasonable, then that would have been a deficiency or significant weakness.[167] This determination would have prompted a discussion, which, according to DynCorp, would have given it an opportunity to revise its technical approach to lower its price, potentially improving its competitive odds.[168] In other words, DynCorp believed the government should have found its proposal unreasonably high, but failed to do so based on the application of inappropriate cost reasonableness analysis techniques.[169]

The Federal Circuit first addressed whether the government violated part 15 of the FAR by ignoring "two 'preferred' price-analysis techniques."[170] The court engaged in a lengthy examination of the language of FAR Part 15 and its own precedent concerning price analysis techniques.[171] It held contracting officers have broad discretion in the techniques they employ for such determinations and found that the relevant language of FAR Part 15 is permissive, rather

164. *DynCorp Int'l*, 10 F.4th at 1308.

165. *Id.* (reasoning that, after the Government took corrective action, DynCorp identified nothing further and simply disagreed with the Government's discretion).

166. *Id.* at 1309; FAR 15.306(d)(3) (2019).

167. *DynCorp Int'l*, 10 F.4th at 1309.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 1309–15 (explaining that the FAR's requirements are not demanding, as the price analysis techniques it provides are examples of encouraged practices for the contracting officer to use, but not requirements; that the FAR provides for agencies to have discretion in evaluating proposals for government contracts; and that contracting officers can use appropriate techniques when pricing information is not provided in bid proposals).

than prohibitive.[172] The requirements imposed on contracting officers to determine if a specific technique is insufficient are not particularly demanding, and the court found the government had adequately made such a determination.[173]

The Federal Circuit next addressed DynCorp's argument that the contracting officer's reasonableness analysis was arbitrary and capricious under the APA for failing to address dramatic disparities in the prices proposed by the different offerors.[174] Again, the court deferred to the contracting officer's determination that each offeror's price was reasonable in relation to its chosen technical approach.[175] The Federal Circuit remained unpersuaded by DynCorp's arguments and affirmed the lower court's dismissal of the bid protest.[176]

2. Harmonia Holdings Group, LLC v. United States

a. Procedural history and facts

The U.S. Census Bureau issued a request for quotations for a contract for programming support services that would be set aside for woman-owned small businesses.[177] The request stated that awards would be made on a best-value basis considering price and four non-price factors.[178] The Government assigned Harmonia Holding Group, LLC ("Harmonia") nine strengths, no weaknesses, and two risks under the first factor, the technical approach.[179] The government awarded the contract to Harmonia's competitor, Alethix, LLC ("Alethix"), determining there were no meaningful distinctions between the second, third, and fourth non-price factors and that the tradeoff was

172. *See id.* at 1310–15 (comparing the relevant language of FAR 15 to the statutory language in areas where FAR does prohibit or condition certain activities).

173. *Id.* at 1314–15 (noting that the record clearly supported the contracting officer's determination that competitive or historical price comparisons were insufficient).

174. *See id.* at 1308, 1315 (explaining that the court reviews government agencies' decisions on contract procurement with the very deferential arbitrary and capricious standard).

175. *Id.* at 1316.

176. *See id.* at 1309, 1315, 1317 (refusing to credit DynCorp's arguments that the Government exceeded its discretion by choosing the specific evaluation technique it employed and that the Government did not adequately explain why it did not employ a simple proposal-to-proposal price comparison).

177. Harmonia Holdings Grp., LLC v. United States, 999 F.3d 1397, 1400 (Fed. Cir. 2021).

178. *Id.*

179. *Id.*

therefore based exclusively on the technical approach.[180] According to the contracting officer, Alethix's technical strengths presented greater benefits to the government than those presented by Harmonia.[181]

Harmonia raised three counts at the COFC: (1) challenging the agency's technical evaluation; (2) alleging the contracting officer violated the FAR by failing to refer Alethix to the SBA for a size determination; and (3) challenging the agency's best value determination.[182] The COFC ruled for the government on the first and third counts, but it dismissed the second count for Harmonia's failure to exhaust administrative remedies.[183] The court found it was without authority to consider the second count because Harmonia had not engaged in the SBA's procedures for bringing a size protest.[184] Harmonia appealed to the Federal Circuit.[185]

b. The Federal Circuit's decision

The Federal Circuit began with a discussion concerning the COFC's dismissal of the second count.[186] According to the lower court, Harmonia had failed to seek a size determination from the contracting officer and thus failed to exhaust its administrative remedies prior to bringing suit.[187] The Federal Circuit determined the COFC had "misapprehended the nature of the allegations recited in Count II and blurred the distinction between a size protest and a bid protest."[188] A "size protest" is "an administrative challenge to an offeror's size . . . filed with the SBA," while a "bid protest" challenges the actions of an agency in connection with a procurement.[189] Though it appeared the second count asserted a size challenge, the Federal Circuit explained it instead asserted the contracting officer violated the FAR by failing to refer Alethix to the SBA for a size determination.[190] For this reason, the

180. *Id.*
181. *Id.*
182. Harmonia Holdings Grp., LLC v. United States, 147 Fed. Cl. 756, 771 (2020), *aff'd*, 999 F.3d 1397 (Fed. Cir. 2021).
183. *Id.* at 789.
184. *Id.* at 778.
185. *Harmonia Holdings Grp.*, 999 F.3d at 1401.
186. *Id.* at 1402.
187. *Id.*
188. *Id.*
189. *Id.* at 1403.
190. *Id.*

Federal Circuit determined the lower court erred in dismissing the second count for failure to exhaust administrative remedies.[191]

The Federal Circuit then determined Harmonia had failed to state a plausible claim that the contracting officer had violated the FAR or abused its discretion by failing to refer Alethix to the SBA.[192] The court determined nothing in the relevant FAR provisions suggested a contracting officer has an affirmative obligation to investigate an offeror's small business status.[193] However, an exception did exist where "a proposal, *on its face*, should lead an agency to the conclusion that an offeror could not and would not comply with the [applicable solicitation requirement]."[194] The Federal Circuit stated "[i]t is well-settled that contracting officers are entitled to exercise discretion upon a broad range of issues confronting them in the procurement process."[195] Harmonia had failed to demonstrate the contracting officer had abused such discretion.[196]

3. Zafer Taahut, Insaat Ve Ticaret A.S. v. United States

a. Procedural history and facts

In 2019, the U.S. Army Corps of Engineers (USACE) issued a solicitation for a firm-fixed-price contract for construction of facilities in Poland.[197] Proposals were to be submitted in two volumes.[198] The first was to include four technical factors—past performance, management plan, technical approach narrative and schedule, and national competitive bidding requirements—while the second was to include price and various administrative requirements.[199] The instructions also explained that, for bids submitted as joint ventures, the agency would consider the experience, past performance, and management approach of each partner as the experience of the joint

191. *Id.*
192. *Id.* at 1405.
193. *Id.* at 1405; *see* FAR 19.301-1(b) (2019).
194. *Harmonia Holdings Grp.*, 999 F.3d at 1406 (quoting Allied Tech. Grp., Inc. v. United States, 649 F.3d 1320, 1330 (Fed. Cir. 2011)).
195. *Id.* (internal quotations omitted) (quoting PAI Corp. v. United States, 614 F.3d 1347, 1351 (Fed. Cir. 2010)).
196. *Id.* at 1407.
197. Zafer Taahut, Insaat Ve Ticaret A.S. v. United States, 849 F. App'x 260, 261 (Fed. Cir. 2021).
198. *Id.*
199. *Id.*

entity.[200] In accordance with the FAR, the solicitation stated that the agency would evaluate based on a best-value tradeoff and would rate past performance based on up to five of the offeror's past project submissions.[201] The solicitation stated a preference for projects completed within the previous six years, emphasizing projects completed more than six years prior might be deemed less relevant.[202]

An amendment to the proposal specified that offerors were to submit proposals by August 7, 2019.[203] Several bidders notified the contracting officer that they encountered technical difficulties submitting offers, prompting the contracting officer to extend the offer deadline by one day.[204] The contracting officer posted a notification about the deadline change and sent follow-up emails to all prospective offerors.[205] However, due to technical difficulties, the notification was not posted until after the August 7th deadline.[206]

The agency received six proposals by the final deadline of August 8, 2019.[207] After evaluation and discussions, the agency determined Warbud SKE Joint Venture ("Warbud") offered advantages over the other offerors in past performance, management plan, and technical approach and schedule.[208] Though more expensive, the agency justified paying a premium for a superior technical proposal.[209] The agency also determined that the proposal submitted by Zafer Taahut, Insaat Ve Ticaret A.S. ("Zafer") presented a slight technical advantage over other similarly rated offers, but the advantage did not warrant paying a premium price.[210] The agency awarded the contract to Warbud.[211]

Zafer initially protested the award at the GAO, challenging the agency's technical evaluation and best value determination, but it

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200. *Id.* at 261–62.
201. *Id.* at 262.
202. *Id.*
203. *Id.* at 263.
204. *Id.*
205. *Id.*
206. *Id.* (explaining a notification of the amendment was posted before the deadline but the content of the amendment was not).
207. *Id.*
208. *Id.*
209. The agency reasoned that reducing the overall risk of cost and schedule growth warranted the premium price. *Id.* at 263–64.
210. *Id.* at 264.
211. *Id.*

withdrew its protest shortly after.[212] Zafer then filed a protest with the COFC.[213] The COFC entered judgment for the government and Warbud, which Zafer appealed to the Federal Circuit.[214]

b. The Federal Circuit's decision

Zafer raised two challenges on appeal.[215] First, it argued that Warbud submitted its proposal late and should have been rejected.[216] According to Zafer, because the agency posted the amendment extending the deadline after the deadline had past, Warbud's submission on August 8th came one day too late.[217] The Federal Circuit disagreed, finding that the contracting officer decided to extend the deadline to August 8th and communicated it via email to all offerors prior to the August 7th deadline.[218] The contracting officer decided in a timely manner and doing so was within his discretion.[219] Zafer further suggested the record contained no evidence of technical difficulties preventing the contracting officer from uploading the notification, but the Federal Circuit disagreed, finding sufficient evidence of technical problems supporting the extension.[220]

Zafer next contended the agency's evaluation of past performance was unreasonable.[221] Here, the Federal Circuit deferred to the contracting officer's broad discretion to carry out the "minutiae of the procurement process."[222] Specifically, a court will afford deference to a contracting officer's determination whether past performance is relevant.[223] The Federal Circuit affirmed the COFC's judgment in favor of the government and Warbud.[224]

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212. *Id.*
213. Zafer Taahut Insaat Ve Ticaret A.S. v. United States, No. 20-41C, 2020 WL 1522571 (Fed. Cl. Mar. 30, 2020), *aff'd*, 849 F. App'x 260 (Fed. Cir. 2021).
214. *Taahut*, 849 F. App'x at 264.
215. *Id.* at 265.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* (finding that the Army Corps itself experienced technical difficulties, which supported the offerors' claims of similar issues).
221. *Id.* at 266.
222. *Id.*
223. *Id.*
224. *Id.* at 267.

c. Takeaways

These three cases showcase the Federal Circuit's reluctance to intervene in the decision-making process of the contracting officer. As demonstrated in *DynCorp*, the FAR confers broad discretion to contracting officers to determine which evaluation techniques to employ, which contractors provide the greatest benefit to the government, and which administrative processes are appropriate. *Harmonia* provides another such example by deferring to the contracting officer's decision to withhold from referring a contractor to the SBA for a size determination.[225] Additionally, a contracting officer may communicate with offerors in a variety of manners, whether by official posting or by email, as in *Zafer*.[226]

E. Rule of Two

In 2021, the Federal Circuit issued four decisions addressing the "Rule of Two."[227] The Rule of Two applies when the contracting officer has a reasonable expectation that two or more verified and capable Service-Disabled Veteran Owned Small Businesses ("SDVOSB"s) will submit offers and that the award can be made at a fair and reasonable price. Under such circumstances, the acquisition must be set aside for SDVOSBs.[228] The court discussed circumstances in which the Rule of Two is triggered in two separate decisions concerning the contractor Land Shark Shredding, LLC.[229] In *Veteran Shredding, LLC v. United States*,[230] the Federal Circuit held that a contracting officer was not obligated to adhere to the Rule of Two when one or both of the contractors presented exceedingly high bids.[231] In a precedential decision, the court in *Veterans4You, LLC v. United States*[232] addressed an apparent constitutional conflict between the U.S. Department of

225. Harmonia Holdings Grp., LLC v. United States, 999 F.3d 1397, 1405 (Fed. Cir. 2021).

226. 849 F. App'x at 265.

227. 38 U.S.C. § 8127(d); *see also* Land Shark Shredding, LLC v. United States (*Land Shark I*), 842 F. App'x 589, 590 (Fed. Cir. 2021); Land Shark Shredding, LLC v. United States (*Land Shark II*), 842 F. App'x 594, 595 (Fed. Cir. 2021); Veteran Shredding, LLC v. United States, 842 F. App'x 606, 607 (Fed. Cir. 2021); Veterans4You LLC v. United States, 985 F.3d. 850, 853 (Fed. Cir. 2021).

228. 38 U.S.C. § 8127.

229. *Land Shark I*, 842 F. App'x at 592; *Land Shark II*, 842 F. App'x at 598.

230. 842 F. App'x 606 (Fed. Cir. 2021).

231. *Id.* at 607.

232. 985 F.3d 850 (Fed. Cir. 2021).

Veterans Affairs (VA) Rule of Two and the "printing mandate" codified in 44 U.S.C. § 501.[233]

1. Land Shark Shredding, LLC v. United States

Land Shark Shredding, LLC ("Land Shark") is an SDVOSB that bid unsuccessfully on two separate solicitations for document shredding and pill-bottle destruction services.[234] Land Shark appealed two separate COFC's bid protest decisions, but the Federal Circuit affirmed both decisions ruling in favor of the government.[235]

a. Land Shark I

i. Procedural history and facts

In what this Area Summary refers to as *Land Shark I*, VA issued a solicitation for shredding services as an SDVOSB set aside based on the contracting officer's determination that at least two SDVOSBs were likely to submit offers at fair and reasonable prices, as mandated under 38 U.S.C. § 8127(d), otherwise known as the Rule of Two.[236] The solicitation stated that VA would assess reasonableness prior to awarding the contract and that VA would deem not per se reasonable proposed prices based on past VA shredding awards.[237] The contracting officer further stated, "[i]t is unknown if the prices would be fair and reasonable."[238]

Two SDVOSBs, including Land Shark, bid on the solicitation, but the contracting officer determined neither of the two was fair and reasonable because both quotes were higher than the incumbent company pricing and government estimates.[239] Accordingly, the contracting officer cancelled the solicitation and reissued it without the SDVOSB set aside.[240] Land Shark filed a protest, prompting corrective action, but the contracting officer again found Land Shark's pricing was not fair and reasonable.[241] Land Shark brought its protest to the COFC, but the court dismissed the protest, holding that Land

233. *Id.* at 853.
234. *Land Shark I*, 842 F. App'x at 593; *Land Shark II*, 842 F. App'x at 595.
235. *Land Shark I*, 842 F. App'x at 590; *Land Shark II*, 842 F. App'x at 595.
236. *Land Shark I*, 842 F. App'x at 590.
237. *Id.*
238. *Id.*
239. *Id.* at 590–91.
240. *Id.* at 591.
241. *Id.*

Shark lacked standing and had failed to state a claim.[242] Land Shark appealed to the Federal Circuit.[243]

ii. The Federal Circuit's decision

The COFC concluded Land Shark lacked standing because it was not an "interested party" under the Tucker Act.[244] Agreeing with the government, the COFC determined Land Shark did not have a substantial chance of winning the contract because its bid "exceeded the VA's designated funding for the solicitation" and an award would have "violated the Anti-Deficiency Act provision disallowing contracting officers from authorizing expenditures that exceed appropriated amounts."[245] The Federal Circuit disagreed, holding that "[s]imply exceeding the agency's target allocation does not deprive a party of the requisite direct economic interest as a matter of law," and concluded that Land Shark had standing because it had a substantial chance of receiving the contract as the lowest bidder.[246]

Proceeding to the merits, the court discussed Land Shark's argument that the requirements of the Rule of Two were triggered, and, therefore, the contracting officer was required to award the contract regardless of the reasonableness of the bids themselves.[247] The court explained first that it was unclear whether the Rule of Two was triggered in the first place, considering the contracting officer's uncertainty whether any proposals would be reasonable.[248] Second, the court noted it had previously held VA can cancel SDVOSB set aside solicitations where there are no reasonable bids, which would be impossible under Land Shark's interpretation of the rule.[249] Indeed, the solicitation indicated a price reasonableness assessment in accordance with FAR 13.106-3 would occur once all bids had been submitted.[250] The court noted that, to the extent Land Shark challenged the validity of the FAR reasonableness assessment, this

242. Land Shark Shredding, LLC v. United States, 145 Fed. Cl. 530, 563 (2019) (concluding there was not a "substantial chance" that Land Shark would receive the contract, and thus it was not an "interested party" and lacked standing).

243. *Land Shark I*, 842 F. App'x at 590.

244. *Land Shark Shredding*, 145 Fed. Cl. at 563; Tucker Act, 28 U.S.C. § 1491(b)(1).

245. *Land Shark Shredding*, 145 Fed. Cl. at 554.

246. *Land Shark I*, 842 F. App'x at 592.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 592–93.

challenge must be brought in federal district court under the APA, rather than a protest action at the COFC.[251] The Federal Circuit, holding that Land Shark had standing but failed to state a claim, affirmed the COFC's decision.[252]

b. Land Shark II

i. Procedural history and facts

Land Shark became the subject of a second Federal Circuit decision after it bid unsuccessfully on a contract for shredding and pill-bottle destruction services.[253] VA issued the solicitation at issue via the General Services Administration ("GSA") Federal Supply Schedule ("FSS") program, which provides agencies with a simplified method for procuring goods and services.[254] Under the Rule of Two, the contracting officer must make a triggering determination that two or more businesses from the categories of veteran-owned small businesses ("VOSB"s) will submit reasonable offers.[255]

After performing initial research through the FSS, the contracting officer identified three SDVOSBs, four VOSBs, thirty-seven small businesses, and seven large businesses "potentially capable" of performing the requisite services.[256] The contracting officer published a request for information on the GSA system, and Land Shark and two small businesses responded.[257] The contracting officer subsequently issued a solicitation set aside for SDVOSB and small businesses using a "tiered or cascading order of precedence" but allowed bids from all businesses.[258] The contracting officer would evaluate the solicitations in tier order, beginning with SDVOSBs.[259]

Land Shark, SafeGuard Document Destruction, Inc. ("SafeGuard"), which qualified as a small business, and a large business all bid on the solicitation.[260] Land Shark's bid was more than five times higher than the two other bids, prompting VA to find Land Shark's bid

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251. *Id.* at 593 (postulating that because the FAR was incorporated by amendment Land Shark was challenging a government regulation regarding procurement).
252. *Id.*
253. *Land Shark II*, 842 F. App'x at 595.
254. *Id.*; FAR 8.402.
255. *Land Shark II*, 842 F. App'x at 595.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.* at 596.
260. *Id.*

unreasonable and award the contract to SafeGuard instead.[261] Land Shark filed a bid protest at the COFC, arguing that the contract was an SDVOSB set-aside and should have been awarded to Land Shark because it had the lowest-priced offer.[262] The COFC found for the government, and Land Shark appealed to the Federal Circuit.[263]

ii. The Federal Circuit's decision

The court first addressed the government's contention that Land Shark lacked standing because its bid was so high it did not have a substantial chance of winning the award.[264] The court disagreed, declining to "establish a bright line rule that a bid in excess of an agency's targeted allocation per se fails the direct economic interest prong of § 1491(b)(1) bid protest jurisdiction."[265] Land Shark had standing because it had advanced a good-faith argument that it would have been awarded the contract absent errors in VA's legal interpretation of the Rule of Two.[266]

Land Shark premised its argument upon the contracting officer's initial research identifying three SDVOSBs that could potentially bid on the solicitation.[267] This finding, it argued, triggered the Rule of Two and required the contracting officer to award it the contract.[268] However, the court determined that the initial research did not create a reasonable expectation that two or more SDVOSBs would actually submit offers.[269] Indeed, following the initial findings, the contracting officer published a request for information about potential offerors.[270] Land Shark was the only SDVOSB that responded, prompting the contracting officer to solicit bids utilizing the tiered ordering of businesses.[271] Therefore, the court concluded, the contracting officer apparently determined that the initial market research was inconclusive as to whether the Rule of Two applied.[272] Because the

261. *Id.*
262. Land Shark Shredding, LLC v. United States, 145 Fed. Cl. 530, 533 (2019).
263. *Land Shark II*, 842 F. App'x at 596.
264. *Id.* at 597.
265. *Id.*
266. *Id.*
267. *Id.* at 597–98.
268. *Id.* at 597.
269. *Id.* at 598.
270. *Id.*
271. *Id.*
272. *Id.*

solicitation was not issued as a full SDVOSB set aside, the Rule of Two was not triggered and the contracting officer was under no obligation to award the contract to Land Shark.[273] Accordingly, the Federal Circuit affirmed the lower court's finding in favor of the government.[274]

2. Veteran Shredding, LLC v. United States

a. Procedural history and facts

VA issued a solicitation for shredding services as an SDVOSB set aside under the Rule of Two.[275] Veteran Shredding, LLC ("Veteran Shredding") submitted a bid, but the contracting officer determined its bid unreasonably high.[276] VA received no other reasonable SDVOSB bids.[277] Accordingly, the contracting officer cancelled the initial proposal and issued a nearly identical proposal set aside for all capable small businesses.[278] Veteran Shredding did not bid, but instead chose to sue, arguing the new proposal should have been set aside for an SDVOSB alone.[279] The COFC entered judgment in favor of the government and Veteran Shredding appealed.[280]

b. The Federal Circuit's decision

The Federal Circuit addressed two arguments raised by Veteran Shredding.[281] First, Veteran Shredding challenged the cancellation of the initial solicitation in the lower court but lost for lack of standing.[282] The Federal Circuit held it could not collaterally attack that judgment on appeal.[283] Nevertheless, the court addressed the merits of the challenge, writing that "excessively high bids provide a 'compelling reason' to cancel a solicitation initially set aside under the Rule of

273. *Id.*
274. *Id.* at 599.
275. Veteran Shredding, LLC v. United States, 842 F. App'x 606, 607 (Fed. Cir. 2021).
276. *Id.* at 607–08.
277. *Id.* at 608.
278. *Id.*
279. Land Shark Shredding, LLC v. United States, 145 Fed. Cl. 530, 549 (2019).
280. *Id.*; Veteran Shredding, LLC. v. United States, 146 Fed. Cl. 543, 581 (Fed. Cl. 2019) (concluding dismissal was warranted because the high bids were a compelling reason justifying the decision to cancel the solicitation).
281. *Veteran Shredding*, 842 F. App'x at 608–09.
282. *Id.* at 608.
283. *Id.*

Two."[284] Veteran Shredding next argued the second solicitation should have been set aside for SDVOSBs.[285] The court noted, however, that VA did not simply reissue the solicitation without again looking into the appropriateness of an SDVOSB set aside.[286] It concluded there was a lack of capable SDVOSBs and instead set aside the solicitation for all small businesses.[287]

3. Veterans4You LLC v. United States

a. Procedural history and facts

The Federal Circuit wrestled with an apparent statutory conflict between VA's Rule of Two and the "printing mandate," codified at 44 U.S.C. § 501.[288] As previously explained, the Rule of Two is a VA-specific contracting preference for SDVOSBs and VOSBs.[289] A subsection of the Rule of Two addresses situations where VA contracts or otherwise arranges with another government agency to acquire goods or services on behalf of VA.[290] Section 8127(i) states that

> [where] the Secretary [of VA] enters into a contract, memorandum of understanding, agreement, or other arrangement with any governmental entity to acquire goods or services, the Secretary shall include in such . . . arrangement a requirement that the entity will comply, to the maximum extent feasible, with the provisions of this section in acquiring such goods or services.[291]

The printing mandate, on the other hand, requires that "[a]ll printing, binding, and blank-book work for Congress, the Executive Office, the Judiciary, other than the Supreme Court of the United States, and every executive department, independent office and establishment of the Government, shall be done at the Government Publishing Office [GPO]."[292] The substantive requirements of this mandate also appear in the FAR.[293]

VA sought to promote its suicide prevention hotline by procuring cable gun locks with information about the crisis line imprinted on the

284. *Id.*
285. *Id.* at 609.
286. *Id.*
287. *Id.*
288. Veterans4You LLC v. United States, 985 F.3d 850, 853 (Fed. Cir. 2021).
289. *Supra* notes 227–28 and accompanying text.
290. *Veterans4You*, 985 F.3d at 853.
291. 38 U.S.C. § 8127(i); *see also Veterans4You*, 985 F.3d at 853.
292. 44 U.S.C. § 501.
293. FAR 8.802(a) (2020); *see also Veterans4You*, 985 F.3d at 854.

lock body and attached label.[294] This information was also to be included on an accompanying wallet card.[295] VA submitted a requisition form to the GPO for both items and the GPO issued a solicitation, with unrestricted competition.[296] Veterans4You, Inc. ("Veterans4You"), a certified SDVOSB, filed a bid protest with the GAO on the basis that the solicitation failed to give preference to SDVOSBs or VOSBs, as mandated under the Rule of Two.[297] The GAO recommended corrective action, concluding that VA failed to alert the GPO to the Rule of Two and that any acquisition performed by the GPO on behalf of VA should conform to its unique requirements to the maximum extent feasible.[298]

Following the GAO's guidance, VA submitted a revised requisition form to the GPO, which included a request that the GPO, to the maximum extent feasible, set aside any procurement resulting from the solicitation for SDVOSBs or VOSBs.[299] However, the GPO's contracting officer determined that, under GPO's Printing Procurement Regulation, the GPO was required to conduct the unrestricted competition and had no authority to employ the Rule of Two.[300] The GPO issued the unrestricted solicitation, which received thirty-four bids, including six SD/VOSBs, and subsequently procured the goods.[301]

Veterans4You filed a pre-award bid protest, contending that VA was not obligated to procure the goods through the GPO and because it violated the Rule of Two.[302] The COFC denied Veterans4You's protest, reasoning that the goods requested fell within the printing mandate.[303] Further, VA had adhered to its obligation under the Rule of Two by requesting that the GPO comply to the maximum extent feasible.[304] Veterans4You filed an appeal with the Federal Circuit.[305]

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294. *Veterans4You*, 985 F.3d at 854.
295. *Id.*
296. *Id.* at 855.
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.* at 856.
302. *Id.*
303. Veterans4You, Inc. v. United States, 145 Fed. Cl. 181, 191 (2019), *rev'd and remanded sub nom.* Veterans4You LLC v. United States, 985 F.3d 850, 855 (Fed. Cir. 2021).
304. *Veterans4You*, 985 F.3d at 856.
305. *Id.* at 853, 856.

b. The Federal Circuit's decision

The Federal Circuit first addressed Veterans4You's argument challenging the constitutionality of the printing mandate. The court noted that this issue had been neither raised before nor decided by the COFC, but the Federal Circuit had jurisdiction nonetheless because the issue was a pure question of law, and the litigants had properly brought it before the court.[306] Veterans4You and amicus Kingdomware Technologies, Inc. ("Kingdomware") urged the court to consider the doctrine of constitutional avoidance in determining whether the printing mandate was constitutional as applied to the facts in this case.[307] The Federal Circuit agreed, construing the printing mandate narrowly to avoid its application to the procurement here.[308] The court determined the solicitation did not involve "printing" within the meaning of the mandate because the goods "are not written or graphic published materials."[309] In reaching this decision, the court analyzed the meaning and history of the term "printing."[310]

The court next turned to the Rule of Two. VA reasoned that the goods fell within the printing mandate and, accordingly, sought the services of the GPO.[311] Adhering to the Rule of Two, VA requested that the GPO set aside the procurement for SDVOSBs and VOSBs.[312] Because the court determined that the printing mandate did not apply, VA was under no obligation to refer the solicitation to the GPO and, therefore, should have conducted the procurement compliant with its own Rule of Two requirements.[313] Thus, the Federal Circuit reversed the COFC decision and remanded the matter for further proceedings.[314]

c. Takeaways

The Federal Circuit has consistently upheld an SDVOSB's right to challenge a decision to stray from the Rule of Two but defers to a contracting officer's decision whether a set aside procurement is appropriate. Both *Land Shark* decisions and *Veteran Shredding* clarify the

306. *Id.* at 857.
307. *Id.*
308. *Id.* at 860, 861.
309. *Id.* at 861.
310. *Id.* at 862, 863.
311. *Id.* at 864.
312. *Id.* at 863, 864.
313. *Id.*
314. *Id.* at 864.

triggering conditions of the Rule of Two. In all three decisions, the contracting officer conducted sufficient market research or engaged in a reasonable price assessment to determine that the Rule of Two did not apply. These decisions, the Federal Circuit reasoned, were within the contracting officers' discretion and properly carried out. *Veterans4You* clarified the specific interplay between the "printing mandate" and the Rule of Two and demonstrated the Federal Circuit's reluctance to promote any friction between the Rule of Two and apparently conflicting statutes.

II. CLAIMS

The Federal Circuit issued decisions in multiple areas affecting the adjudication of government contract claims. Section A of this Part will discuss decisions about standing. Section B will focus on CDA jurisdiction cases. In Section C, we will review contract interpretation decisions. Section D surveys cases concerning damages. Finally, Section E consists of a miscellaneous Section that explores a variety of claims-related topics.

A. Standing

The Federal Circuit issued two precedential decisions in 2021 addressing government contract standing issues. *Authentic Apparel, LLC v. United States*[315] highlights that a contract must reflect an intent to directly benefit a third party for that party to gain third-party-beneficiary status. In *Columbus Regional Hospital v. United States*,[316] the court established that a subgrantee of a Federal Emergency Management Agency (FEMA) Stafford Act[317] grant may have rights under the grant agreement as a third-party beneficiary.[318]

1. Authentic Apparel Group, LLC v. United States

a. Procedural history and facts

In 2010, the U.S. Department of the Army ("Army") gave Authentic Apparel Group, LLC ("Authentic") a license to create and sell items with the Army's trademarks.[319] The license agreement required

315. Authentic Apparel Grp., LLC v. United States, 989 F.3d 1008 (Fed. Cir. 2021).
316. Columbus Reg'l Hosp. v. United States, 990 F.3d 1330 (Fed. Cir. 2021).
317. 42 U.S.C. §§ 5121–5208.
318. *Columbus Reg'l Hosp.*, 990 F.3d at 1345–49.
319. *Authentic Apparel Grp., LLC*, 989 F.3d at 1011.

Authentic to obtain the Army's advance written approval of items prior to sale or distribution.[320] The license agreement provided the Army with sole and absolute discretion to approve Authentic's items and exempted the Army from liability for denying such approval.[321] Of the five-hundred requests for approval that Authentic submitted to the Army between 2011 to 2014, the Army rejected only forty-one.[322] On January 6, 2015, Authentic and Ron Reuben, Authentic's chair, filed a complaint against the United States in the COFC.[323] Appellants alleged breach of contract and the implied duty of good faith and fair dealing.[324] The COFC dismissed Reuben as a co-plaintiff and granted summary judgment in favor of the government.[325]

b. The Federal Circuit's decision

The Federal Circuit affirmed the COFC decision to grant summary judgment.[326] The court determined that Reuben was not a third-party beneficiary to the contract.[327] The court emphasized that third-party beneficiary status is the exception rather than the rule, and the requirements to demonstrate such status are stringent.[328] To demonstrate third-party beneficiary status, a party must demonstrate that the contract evinces both an intention (express or implied) to benefit the party and an intention to do so directly.[329]

Although Reuben, as Authentic's chair stood to benefit indirectly from the license agreement, the court determined such indirect benefit is insufficient to establish third-party-beneficiary status.[330] The license agreement did not mention Reuben's name or otherwise

320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.* at 1011–12.
325. Authentic Apparel Grp., LLC v. United States, 146 Fed. Cl. 147, 179 (2019).
326. *Authentic Apparel Grp., LLC*, 989 F.3d at 1010–11, 1018.
327. *Id.* at 1012–14.
328. *Id.* at 1012 (holding that third-party beneficiary status is "an exception to the general principle" (quoting German All. Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 230 (1912))).
329. *Id.* ("[T]o prove third party beneficiary status, a party must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly." (quoting Glass v. United States, 258 F.3d 1349, 1354 (Fed. Cir. 2001))).
330. *Id.* at 1013.

identify Reuben as an intended beneficiary.[331] Reuben alleged that he was previously the chair of All American Apparel, Inc. ("All American"), which was in some way a predecessor to Authentic.[332] Reuben claimed that the government gave Authentic a more favorable royalty rate in this agreement to benefit Reuben as compensation for its prior breach of an agreement with All American.[333] The court found that, even accepting all of Reuben's allegations as true, the direct benefit of the contract flowed to Authentic rather than to Reuben.[334]

The court additionally determined that the agreement granted the Army broad discretion over approvals.[335] The court also found that trademark law did not render ineffective the exculpatory clauses in the license agreement, which served to bar Authentic from bringing a claim against the Army for the unfavorable exercise of its discretion.[336]

c. Takeaways

This case discusses both third-party standing and contract interpretation. Mere status as a company owner, chair, or shareholder alone is insufficient to demonstrate third party beneficiary status. The court looks to the contract to determine whether it evinces an intention to benefit a party directly. Evidence of indirect benefit is insufficient.

This case should not be interpreted to signify that the government may issue arbitrary rejections and act in bad faith. The government argued such a position, and the court made it clear they were skeptical of the argument. The government has an obligation of good faith and fair dealing. However, in the absence of arbitrary or bad faith actions, the court will not invalidate a contract that grants the government "sole and absolute discretion" over approval merely because that discretion was exercised to the contractor's detriment.[337]

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331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.* at 1014. Authentic Apparel agreed it would "not have any rights" against Army for damages or any other remedy because of Army's "failure or refusal to grant any approval" of products bearing licensed marks or of any advertising and the agreement's approval process vested in Army "sole and absolute discretion" to approve garments bearing Army marks. *Id.* at 1011.
336. *Id.* at 1014–17 (holding that trademark license agreements are not "inherently distinguishable from other types of contracts" and contracting parties are generally "held to the terms for which they bargained").
337. *Id.* at 1014.

2. Columbus Regional Hospital v. United States

a. Procedural history and facts

In 2008, severe storms caused significant damage to Columbus Regional Hospital ("Columbus") in Bartholomew County, Indiana.[338] President Bush declared a disaster under the Stafford Act,[339] which authorized FEMA to provide grant assistance to affected regions.[340] FEMA and Indiana entered into an agreement for disaster assistance. Columbus received assistance funds under that agreement as a subgrantee.[341]

In 2013, the Inspector General (IG) of the DHS found that Columbus had committed procurement violations in connection with four of the grant contracts.[342] The IG recommended that FEMA recover $10.9 million of the grant funds due to the violations.[343] FEMA adopted the IG's recommendations but later reduced the amount to $9,612,831.19.[344]

In 2017, Columbus appealed FEMA's decision within FEMA. FEMA denied the appeal.[345] Columbus did not seek review of FEMA's decision, but in 2018, it filed a claim in the COFC alleging breach of contract.[346] Columbus argued that there was an express contract between Columbus and FEMA and argued in the alternative that there was an implied contract or that Columbus was a third-party beneficiary of the FEMA-Indiana agreement.[347]

The COFC dismissed Columbus's contract-based claims for lack of jurisdiction under Rule 12(b)(1).[348] Although the COFC found that the FEMA-Indiana agreement was an enforceable contract, it concluded that Columbus did not have rights against FEMA under the contract.[349] In denying Columbus's third-party beneficiary status, the COFC relied on *Astra USA, Inc. v. Santa Clara County*,[350] where the

338. Columbus Reg'l Hosp. v. United States, 990 F.3d 1330, 1336 (Fed. Cir. 2021).
339. *Id.*
340. *Id.*
341. *Id.* at 1336–37.
342. *Id.* at 1337.
343. *Id.*
344. *Id.*
345. *Id.*
346. Columbus Reg'l Hosp. v. United States, 145 Fed. Cl. 217, 220–21 (2019).
347. *Id.* at 220.
348. *Id.* at 228.
349. *Id.* at 220, 223–24.
350. 563 U.S. 110, 110 (2011).

Supreme Court denied the plaintiffs third-party beneficiary status where granting it would have conflicted with a statutory scheme that gave the government exclusive enforcement power.

b. The Federal Circuit's decision

The Federal Circuit court applied the traditional four-part test to determine whether a government contract existed and agreed with the COFC that the agreement between FEMA and Indiana constituted an enforceable contract.[351]

The court also upheld the COFC dismissal of Columbus's express and implied contract claims but did so on the merits under Rule 12(b)(6), rather than for lack of jurisdiction under Rule 12(b)(1).[352] The court reasoned that Columbus's contract-based claims were not pretextual or frivolous and therefore did not justify a Rule 12(b)(1) dismissal.[353] The court dismissed Columbus's express and implied contract claims under Rule 12(b)(6) because Columbus's allegations did not establish mutual intent to contract.[354]

The court vacated the COFC dismissal of Columbus's third-party beneficiary claim because the court found that the FEMA-Indiana agreement reflected a clear intent to directly benefit a class that includes Columbus.[355] The court distinguished between this case and the *Astra* case because Columbus did not seek enforcement powers that would conflict with the government's enforcement power, but rather sought enforcement rights against the government.[356]

c. Takeaways

So long as a claim for breach of a government contract is non-frivolous, it is sufficient to survive a 12(b)(1) motion to dismiss. However, such a claim that does not establish mutual intent to contract is insufficient to survive a 12(b)(6) motion to dismiss.

FEMA Stafford Act grant agreements can serve as binding contracts between FEMA and the state grantee. Such agreements do not create privity of contract between FEMA and the subgrantee. However, the subgrantee may have third-party rights under the contract as a third-party

351. *Columbus Reg'l Hosp.*, 990 F.3d at 1338–41.
352. *Id.* at 1342–44.
353. *Id.* at 1341–43.
354. *Id.* at 1343–45.
355. *Id.* at 1345–46.
356. *Id.* at 1346–48.

beneficiary if the agreement evinces a clear intent to benefit a class that includes the subgrantee.

B. CDA Jurisdiction

This year, the Federal Circuit decided two precedential and one non-precedential cases addressing the jurisdictional requirements of the CDA. In *Triple Canopy, Inc. v. Secretary of Air Force*,[357] the Federal Circuit found that government contractors must first satisfy mandatory pre-claim procedures before the claim accruals for purposes of the CDA's six-year statute of limitations.[358] In *Creative Management Services, LLC v. United States*,[359] the Federal Circuit reaffirmed the principle that CDA claims do not require a specific form to be adequate, while declining to resolve the issue as to whether the CDA's twelve-month deadline for appealing a final decision is a jurisdictional requirement.[360] In *Nussbaum v. United States*,[361] the Federal Circuit addressed the CDA's one-year time limitation for bringing an appeal to the COFC after a deemed denial.[362]

1. Triple Canopy Inc. v. Secretary of the Air Force

a. Procedural history and facts

Triple Canopy Inc., a private security company, entered into six fixed-price contracts with the DoD to provide security services in Afghanistan.[363] Each contract required Triple Canopy to comply with the local law. FAR 52.229-6, Taxes: Foreign Fixed-Price Contract (Foreign Tax Clause) was incorporated and provided for an increase in the contract price to account for the amount of any after-imposed taxes and duties specifically excluded from the contract price that the contractor is required to pay or bear, including interest or penalty.[364] The Foreign Tax Clause further required the contractor to "take all reasonable action to obtain exemption from or refund of any taxes or duties, including interest or penalty."[365]

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357. 14 F.4th 1332 (Fed. Cir. 2021).
358. *Id.* at 1339–40.
359. 989 F.3d 955 (Fed. Cir. 2021).
360. *Id.* at 961–62.
361. No. 2020-1170, 2021 WL 5353888 (Fed. Cir. Nov. 17, 2021).
362. *Id.* at *2.
363. *Triple Canopy, Inc.*, 14 F.4th at 1334.
364. *Id.*
365. *Id.*

In February 2008, the Government of the Islamic Republic of Afghanistan ("GIRA") required all private security companies in the country to observe Afghan law, including the "Procedure for Regulating Activities of Private Security Companies in Afghanistan" ("PSC Regulation").[366] The PSC Regulation limited the number of personnel for each private security company to 500 persons.[367] On August 13, 2010, the contracting officer requested a formal exemption from the 500 person limit.[368] Triple Canopy submitted the contracting officer's letter requesting the exemption, along with its own request for an exemption from the law.[369] On March 15, 2011, the GIRA required all private security companies to pay a fee of 100,000 Afghan Afghani ("AFN"), or $2,323.42 for each person over the 500-employee limit.[370]

On March 24, 2011, GIRA required Triple Canopy to pay a penalty fee of 37,860,000 AFN ($879,647.95).[371] The DoD representatives again requested an exemption on behalf of Triple Canopy.[372] On April 8, 2011, Triple Canopy appealed the assessment.[373] On April 21, 2011, Triple Canopy notified the contracting officer of its plans to request an equitable adjustment if the appeal was denied.[374] The GIRA reduced the penalty to 18,550,000 AFN ($430,994.97) on July 6, 2011.[375] Triple Canopy paid the reduced penalty on July 18 and 20, 2011.[376]

Six years later, on June 6, 2017, Triple Canopy submitted claims under all six of the contracts to the contracting officer for reimbursement under the Foreign Tax Clause for the penalties paid to GIRA in 2011.[377] When the contracting officer failed to issue a decision, Triple Canopy appealed the contracting officer's deemed denial of its claims to the Armed Services Boards of Contract Appeals (the "Board").[378] The Board denied Triple Canopy's claims as untimely under the CDA because the claims were not submitted to the

366. *Id.* at 1334–35.
367. *Id.* at 1335.
368. *Id.*
369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.* at 1335–36.
373. *Id.* at 1336.
374. *Id.*
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*

contracting officer within six years of the date of accrual.[379] As the CDA does not define claim accrual, the Board looked to the FAR's definition.[380] The FAR defines "accrual of a claim" as the date "when all events[] that fix the alleged liability of either the Government or the contractor and permit assertion of the claim[] were known or should have been known."[381] The Board determined that because Triple Canopy knew it was obligated to pay the assessment to GIRA on March 24, 2011, Triple Canopy's June 6, 2017 claims were untimely.[382] Triple Canopy appealed.[383]

b. The Federal Circuit's decision

The Federal Circuit reversed and remanded the case, finding that Triple Canopy's claims were timely under the CDA.[384] The issue turned on which event fixed the date of liability.[385] Triple Canopy argued that their claims did not accrue until the GIRA completed its appeal process because the Foreign Tax Clause required contractors to take all reasonable actions to obtain an exemption or refund of all taxes and duties before submitting a claim.[386] The government contended that Triple Canopy was not required to appeal the GIRA assessment.[387] After interpreting the plain language of the FAR provision, the contract, and the facts of the particular case, the Federal Circuit disagreed with the government and found that Triple Canopy was required to comply with the Foreign Tax Clause instruction to obtain exemption from any taxes and duties.[388] The Federal Circuit found that under the reasoning in *Kellogg Brown & Root Services, Inc., v. Murphy*,[389] Triple Canopy's appeal of the GIRA assessment was a "mandatory pre-claim procedure."[390] Therefore, the Federal Circuit found that Triple Canopy's claims accrued on July 6, 2011, when GIRA issued its

379. *Id.*
380. *Id.*
381. *Id.* at 1338.
382. *Id.*
383. *Id.*
384. *Id.* at 1342.
385. *Id.* at 1338.
386. *Id.*
387. *Id.*
388. *Id.* at 1339–42.
389. 823 F.3d 622 (Fed. Cir. 2016) (holding that the CDA's six-year limitations period does not begin to run if a claimant cannot file a claim because the claimant did not complete the mandatory pre-claim procedures).
390. *Triple Canopy*, 14 F.4th at 1339–40.

decision to Triple Canopy's April 8, 2011 appeal.[391] Therefore, Triple Canopy's June 6, 2017 claim submission to the contracting officer was timely within the CDA's six-year statute of limitations.[392]

c. Takeaways

As a precedential case, *Triple Canopy* contributes to the existing precedent that establishes when a claim accrues for purposes of the CDA's statute of limitations. Specifically, the Federal Circuit clarified the role of mandatory pre-claim procedures in the CDA claim accrual context. By reaffirming the holding in *Kellogg Brown*, the Federal Circuit makes clear that a contractor is required to exhaust mandatory administrative requirements before appealing a claim to the contracting officer. The Federal Circuit left the factual dispute, as to whether the GIRA's penalty assessment was a tax for purposes of the Foreign Tax Clause, to the Board to consider on remand.

2. Creative Management Services, LLC DBA MC-2 v. United States

a. Procedural history and facts

The Government Services Administration ("GSA") awarded Creative Management Services, LLC, d/b/a MC-2 ("MC-2") a task-order contract to provide marketing and logistical support services for an annual GovEnergy conference in exchange for twelve percent of all revenue generated from the conference.[393] The task order had a base year from August 13, 2009, to August 31, 2010, with four one-year options.[394] The statement of work required MC-2 to hold the collected monies from attendee and exhibitor registration fees in trust for GovEnergy and provide an accounting.[395] The fees held in trust made up the "Reserve" fund for the event.[396] In the statement of the work, the GSA could give written authorization to MC-2 to pay itself from the reserve fund for services provided as well as other monthly expenses, after reviewing the monthly invoice.[397] MC-2 successfully performed the contract in 2009, 2010, and 2011.[398]

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391. *Id.* at 1342.
392. *Id.*
393. Creative Mgmt. Servs., LLC v. United States, 989 F.3d 955, 957 (Fed. Cir. 2021).
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.*
398. *Id.*

After canceling the 2012 conference, the GSA requested on July 18, 2012, that MC-2 return the entire reserve fund along with an accounting of the amounts in the fund over the contract life.[399] MC-2 responded by letter that MC-2 was entitled to the excess revenue, not GSA.[400] In response to MC-2's August 2012 termination-for-convenience proposal, the GSA agreed to open negotiations in May 2013.[401] GSA made a second request in 2014 for all remaining funds.[402] The GSA stated "its 'belief that the Reserve account under the control of MC-2 contained in excess of $1.3 million in 2012.'"[403] MC-2 responded that it had provided the requested information in 2012, that all monies raised by MC-2 for the 2012 conference had been refunded, and that the accounting for previous years was not an issue.[404] Four months later, the GSA contracting officer requested a signed copy of the 2012 letter and objected to MC-2's position that there were no remaining reserve funds and, if there were, MC-2 was entitled to them.[405]

On November 10, 2015, GSA's contracting officer sent a final decision to MC-2 approving a settlement amount of $628,415.37 but denied MC-2's claim. The contracting officer reasoned that MC-2 is likely liable to the government for the unreturned funds and that the settlement amount is significantly less than amount the government believes MC-2 is holding in the reserve fund.[406] The contracting officer found that MC-2 had informed the GSA at the end of the 2011 Conference that there was a surplus of nearly $1.3 million.[407] The contracting officer also found information from MC-2 showing that a reserve fund in the amount of $1.2 million was held in trust for the government.[408] In January 2018, the GSA sent a follow-up letter to MC-2, demanding $660,013.68 plus interest.[409] The GSA stated that the amount was the difference between what MC-2 owed the government, $1,288,429.05 held in trust for the government by MC-2, and the

399. *Id.* at 957.
400. *Id.* at 958.
401. *Id.*
402. *Id.*
403. *Id.*
404. *Id.*
405. *Id.*
406. *Id.* at 958–59.
407. *Id.* at 959.
408. *Id.*
409. *Id.*

settlement amount MC-2 was entitled to for the termination of convenience, $628,415.37.[410]

On December 6, 2018, MC-2 sought a declaratory judgment against the government at the COFC.[411] MC-2 claimed that: (1) GSA did not provide a sum certain until the January 2018 letter; and (2) the November 10, 2015 letter was not a final decision stating a government claim for the refund of the excess fund because it did not state a sum certain.[412] The government moved to dismiss for lack of subject-matter jurisdiction, arguing that MC-2's failed to bring its claim within twelve months of the November 10, 2015 final decision as required by the CDA under 41 U.S.C. § 7104(b)(3).[413]

The COFC agreed with the government that the November 10, 2015, decision was the contracting officer's final decision and dismissed MC-2's claim.[414] The COFC held that GSA had issued a valid CDA claim for the return of the funds; the CDA claim was the subject of a written decision by a GSA contracting officer, and MC-2 had failed to bring the action within twelve months of receiving the contracting officer's final decision.[415] The COFC found that MC-2 could have easily calculated the sum certain when GSA sent several communications in 2012 and 2014 demanding all the remaining monies in the reserve fund.[416] Furthermore, the COFC found that the contracting officer's 2015 decision adequately stated the government's CDA claim when the contracting officer addressed and analyzed the government's demand for the return of the reserve fund.[417] MC-2 appealed to the Federal Circuit, claiming that because the November 10, 2015 decision did not state a sum certain, the COFC had erred when concluding that the November 10, 2015, decision was a final decision for a government CDA claim against MC-2.[418]

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410. *Id.*
411. Creative Mgmt. Servs., LLC v. United States, No. 18-1864C, 2020 WL 102992, at *1 (Fed. Cl. Jan. 8, 2020), *aff'd*, 989 F.3d 955 (Fed. Cir. 2021).
412. *Id.*
413. *Id.* at *5–6.
414. *Id.* at *8.
415. *Id.*
416. *Id.* at *7.
417. *Id.*
418. Creative Mgmt. Servs., LLC v. United States, 989 F.3d 955, 961 (Fed. Cir. 2021).

b. The Federal Circuit's decision

The Federal Circuit panel affirmed the COFC's decision when finding MC-2's declaratory judgment untimely under the CDA.[419] The court first clarified MC-2's argument by explaining that the CDA does not require a final decision to state a sum certain, but only requires the contracting officer to address a CDA claim that itself has a stated sum certain.[420] The Federal Circuit held that there was no particular form or wording necessary for a CDA claim.[421] The only requirement for a CDA claim is that the statement gives the party "adequate notice of the basis and amount of the claim."[422] MC-2 had more than enough notice with the 2012 and 2014 communications from GSA demanding the return of all monies in the reserve fund.[423] As MC-2 was the account holder, MC-2 had access to the information necessary to determine the dollar amount of the government's claim.[424] Furthermore, the Federal Circuit found that GSA had properly characterized the amount of money based on the information GSA possessed that the amount was the surplus at the end of 2011 and consisted of about $1.3 million.[425] Finding that the GSA properly addressed the CDA claims made in the 2015 final decision, the Federal Circuit concluded that MC-2's 2018 complaint was time-barred.[426]

c. Takeaways

In this precedential case, the Federal Circuit reaffirms the principle that courts will not require a specific form or wording for a viable CDA claim. The applicable standard is that there is a clear, unequivocal, and written statement giving the party adequate notice of the basis and amount of the claim. The Federal Circuit found that the merits of the case turned on whether the contractor had adequate notice. The Federal Circuit also shifts the burden of demanding an exact dollar amount from the requesting party if the opposing party can easily access the information themselves. As a procedural matter, the Federal Circuit noted that it would have been appropriate to file a motion to

419. *Id.* at 957.
420. *Id.* at 962.
421. *Id.*
422. *Id.*
423. *Id.*
424. *Id.*
425. *Id.* at 963.
426. *Id.*

dismiss under the Rules of the COFC 12(b)(6) rather than 12(b)(1). The Federal Circuit has already questioned if the CDA's twelve-month statute of limitations is a jurisdictional requirement.[427]

3. Nussbaum v. United States

a. Procedural history and facts

In 2001, Thomas Nussbaum was a subcontractor to Cal Inc., which held a contract with the Federal Bureau of Prison (FBOP) for construction services at the Federal Correctional Institution in Victorville, California (FCI Victorville).[428] Under his subcontract, Mr. Nussbaum supplied materials and performed construction work on boilers at the facility.[429] In 2003, after the project was completed, a state court settled Mr. Nussbaum's fraud claims against Cal Inc. for $80,000 but did not resolve disputed change orders that Mr. Nussbaum was pursuing.[430] Subsequently, Cal Inc., on Mr. Nussbaum's behalf, agreed to issue a draft Standard Form 30 (SF-30), titled "Amendment of Solicitation/Modification of Contract," which Mr. Nussbaum submitted to the FBOP offices in Dublin, California and Grand Prairie, Texas. Attached to the SF-30 was a change order request narrative from Mr. Nussbaum seeking compensation of more than $130,000.[431] The government appears to have acknowledged during litigation that the SF-30 was a CDA claim seeking payment of the change order costs, although the evidence of record suggests that the SF-30 was not certified in accordance with the requirements of the CDA, 41 U.S.C. § 7103(b)(1).[432] The FBOP contracting officer never responded to the SF-30 claim submission.[433] Nevertheless, on March 10, 2010, another employee of the Grand Prairie Field Acquisition Office wrote Mr. Nussbaum that the proposed modification failed to provide the information that the FBOP needed to process it and that any formal request for payment would need to be submitted by the actual contract

427. *See, e.g.*, Guardian Angels Med. Serv. Dogs, Inc. v. United States, 809 F.3d 1244, 1252 (Fed. Cir. 2016).

428. Nussbaum v. United States, No. 2020-1170, 2021 WL 5353888, at *1 (Fed. Cir. Nov. 17, 2021).

429. *Id.*

430. *Id.*

431. Complaint Exhibit 6, Nussbaum v. United States, No 19-cv-00376 (Fed. Cl. Mar. 11, 2019).

432. *Nussbaum*, 2021 WL 5353888, at *1.

433. *Id.*

holder, Cal Inc.[434] A review of the record shows that the letter did not contain the notification of appeal rights language that the CDA requires.[435]

Nine years later, in March 2019, Mr. Nussbaum filed a lawsuit in the COFC alleging four causes of action: (1) fraudulent and intentional misrepresentation, (2) negligent misrepresentation; (3) breach of the implied covenant of good faith and fair dealing; and (4) unjust enrichment.[436] In response, the government filed a motion to dismiss on two different grounds: first, that the six-year statute of limitations contained in the Tucker Act, 28 U.S.C. § 2501, barred the suit; and, second, that Mr. Nussbaum, as a subcontractor to an entity with a contract with the government, lacked standing to pursue a direct claim against the government.[437] Ultimately, the COFC agreed with the government that Mr. Nussbaum's claims were time-barred but disagreed that 28 U.S.C. § 2501 applied.[438] Instead, the COFC found that the CDA, which creates a separate set of limitations periods for government contracts disputes, applied to Mr. Nussbaum's claim and displaced 28 U.S.C. § 2501.[439] The COFC recognized that, under the CDA, if a contractor receives no response from the contracting officer within sixty days of submitting his claim, the claim is "deemed denied."[440] The COFC further held that, once a claim is deemed denied, "the contractor must file suit in [the COFC] within one year" of that date.[441] Because Mr. Nussbaum did not file his lawsuit with the COFC within one year after the "deemed denial" of his claim, and because the circumstances in the case did not warrant equitably tolling that deadline, the COFC dismissed the lawsuit not for lack of jurisdiction, but for failure to state a claim.[442] Having dismissed the suit on that basis, the COFC did not address the government's additional argument that Mr. Nussbaum, as a subcontractor to the entity holding

434. *Id.*
435. *Id.*
436. *Id.*
437. Nussbaum v. United States, 145 Fed. Cl. 5, 7 (2019), *aff'd*, 2021 WL 5353888 (Fed. Cir. 2021).
438. *Nussbaum*, 2021 WL 5353888, at *1.
439. *Id.*
440. *Nussbaum*, 145 Fed. Cl. at 12–13 (citing 41 U.S.C. § 7103(f)(5)).
441. *Id.* at 13.
442. *Id.*

a contract with the government, lacked standing to sue.[443] Mr. Nussbaum appealed.[444]

b. The Federal Circuit's decision

In its brief to the Federal Circuit, the government argued that a deemed denial "trigger[ed] a requirement that the contractor file a suit in the [COFC] within one year of the deemed denial" and because Mr. Nussbaum had not filed his complaint with the COFC within a year after the date on which his SF-30 claim became "deemed denied," his claim was time-barred.[445] The Federal Circuit agreed.[446] After finding that the CDA applied to Mr. Nussbaum's claim, the Federal Circuit held that Mr. Nussbaum's claim, even though timely submitted to the contracting officer, was not timely challenged before the COFC because they were not filed "within one year of [the deemed] denial of his claim by the contracting officer."[447] The Federal Circuit also held that, in the alternative, Mr. Nussbaum's claim would also be barred under 28 U.S.C. § 2501 because Mr. Nussbaum had not filed his challenge in the COFC within six years after accrual.[448] As the action accrued in 2010, when Mr. Nussbaum's claim was "deemed denied," the 2019 action was untimely.[449] The government did not raise, and the appellate court did not address, any argument about Mr. Nussbaum's standing to pursue the claim as a subcontractor.[450]

c. Takeaways

The government's briefing and the Federal Circuit's non-precedential decision in this appeal are somewhat perplexing. Although the government, in support of its request for dismissal of Mr. Nussbaum's case, potentially could have argued that Mr. Nussbaum, as a subcontractor, lacked standing to pursue a CDA claim against the government in his own name[451] and that the prime contractor's failure

443. *Id.* at 14.
444. *Nussbaum*, 2021 WL 5353888, at *1.
445. Amended Response in the Alternative to Appellee's 3/9/2021 Informal Brief at 13–14, Nussbaum v. United States, No. 2020-1170 (Fed. Cir. Mar. 9, 2021).
446. *Nussbaum*, 2021 WL 5353888, at *2.
447. *Id.* at *3.
448. *Id.*
449. *Id.*
450. *See generally id.* at *1–3.
451. *See, e.g.*, Winter v. FloorPro, Inc., 570 F.3d 1367, 1371 (Fed. Cir. 2009); Lockheed Martin Corp. v. United States, 48 F. App'x 752, 755 (Fed. Cir. 2002).

to provide any certification with the SF-30 claim (with its payment request in excess of $100,000) precluded the COFC's jurisdiction,[452] the government did not raise any such arguments on appeal. Instead, the government focused exclusively on its argument that, under the CDA, the one-year time limit for challenging a "deemed denial" of a claim starts to run on the date that a "deemed denial" occurs and that Mr. Nussbaum had missed his one-year window to file suit from that deadline.[453]

Although the Federal Circuit in *Nussbaum* affirmed the COFC's decision on that basis, the argument appears to directly conflict with the Federal Circuit's long-standing precedential decision in *Pathman Construction Co. v. United States*.[454] In *Pathman*, the Federal Circuit considered a situation similar to the one in *Nussbaum*, where the COFC had dismissed a case as untimely because the contractor had not filed suit within one year after its claim had been "deemed denied."[455] The appellate court rejected the COFC's interpretation of the CDA's "deemed denial" provision. It found that, although a contractor is authorized immediately to file suit under a "deemed denied" theory if the contracting officer fails timely to issue a decision on a claim by the statutory deadline, the CDA "does not require him to do so."[456] The Federal Circuit in *Pathman* held that any appeal from a "deemed denial" is permissive rather than mandatory and that "the [CDA one-year] limitations period does not begin to run until the contracting officer renders an actual written decision on the contractor's claim."[457] The Federal Circuit in *Pathman* also rejected the government's alternate

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452. Although the Federal Circuit has held that a contractor can correct a defective certification accompanying a claim during litigation and that such a defect does not affect the trial tribunal's jurisdiction, the FAR provides that "[f]ailure to certify shall not be deemed to be a defective certification." 48 C.F.R. § 33.201 (2020); *see* DAI Global, LLC v. Administrator of the U.S. Agency for Int'l Dev., 945 F.3d 1196, 1198–99 (Fed. Cir. 2019). Several tribunals have held that the complete absence of a certification for a claim in excess of $100,000 is a jurisdictional defect that precludes judicial review. *See, e.g.*, Scan-Tech Sec., L.P. v. United States, 46 Fed. Cl. 326, 340 (2000); Crooked River Logistics LLC v. U.S. Postal Serv., PSBCA No. 6618, et al., 17-1 BCA ¶ 36,787, at 179,308; Al Rafideen Co., ASBCA No. 59156, 15-1 BCA ¶ 35,983, at 175,808; McAllen Hosps. LP v. Dep't of Veterans Affs., CBCA 2274, et al., 14-1 BCA ¶ 35,758, at 174,969.

453. *Nussbaum*, 2021 WL 5353888, at *2.

454. Pathman Constr. Co. v. United States, 817 F.2d 1573, 1574 (Fed. Cir. 1987).

455. *Id.*

456. *Id.* at 1577.

457. *Id.* at 1574.

argument that the six-year statute of limitations in 28 U.S.C. § 2501 provided an alternate basis for dismissing the suit at issue there.[458] It held that, if the CDA applies, the time limits set forth in the CDA control and render "the six-year statute of limitations in 28 U.S.C. § 2501 is not applicable."[459]

The Federal Circuit's decision in *Nussbaum*—that the one-year statute of limitations for filing suit began to run from the date of the "deemed denial" and that the six-year statute of limitations in 28 U.S.C. § 2501 offers an alternative basis for dismissing a CDA case—appears inconsistent with *Pathman*. A review of the parties' appellate briefing in *Nussbaum* shows that neither party cited *Pathman* in their briefs, and, in its decision in *Nussbaum*, the Federal Circuit similarly did not mention *Pathman*, making it appear that the panel may not have been aware of it.[460] In future cases, the guidance in the court's precedential decision in *Pathman* should continue to control any later-issued decisions that, like *Nussbaum*, appear inconsistent with *Pathman*, unless and until the Federal Circuit, sitting en banc, overrules *Pathman*.[461] Nevertheless, it appears likely that the guidance in *Nussbaum*, even though identified as non-precedential, will create confusion in the future over the effect of a "deemed denial" on the commencement of the CDA statute of limitations.

C. Contract Interpretation

The Federal Circuit issued two precedential decisions in 2021 addressing government contract interpretation issues. *NOAA Maryland, LLC v. Administrator of the General Services Administration*[462] emphasizes the court's commitment to interpreting contract provisions so as to avoid conflict between provisions.[463] In *P.K. Management Group, Inc. v. Secretary of Housing and Urban Development*,[464]

458. *Id.* at 1580.
459. *Id.*
460. Government's Informal Brief (Mar. 9, 2021), Nussbaum v. United States, No. 2020-1170, 2021 WL 5353888 (Fed. Cir. Nov. 17, 2021); Amended Response in the Alt. to Appellee's 3/9/2021 Informal Brief & Addendum in Support of Writ of Mandamus to Remand to Ct. of Claims for Jud. Error, *Nussbaum*, 2021 WL 5353888 (No. 2020-1170); Nussbaum v. United States, No. 2020-1170, 2021 WL 5353888, at *1 (Fed. Cir. Nov. 17, 2021).
461. Newell Cos., Inc. v. Kenney Mfg. Co., 864 F.2d 757, 765 (Fed. Cir. 1988).
462. 997 F.3d 1159 (Fed. Cir. 2021).
463. *Id.* at 1166.
464. 987 F.3d 1030 (Fed. Cir. 2021).

the court made clear its preference for interpreting contract provisions so as to give meaning to all parts of the contract.[465] The Federal Circuit also issued a precedential decision in 2020, *BGT Holdings LLC v. United States*,[466] in which the court interpreted a contract to limit a contracting officer's discretion to deny a request for equitable adjustment.[467]

1. NOAA Maryland, LLC v. Administrator of the General Services Administration

a. Procedural history and facts

On September 2, 2005, GSA entered into a lease agreement with Maryland Enterprises, LLC (NOAA Maryland's predecessor in interest) for a building in Prince George's County, Maryland.[468] Under the terms of the lease agreement, GSA was to compensate NOAA Maryland for "any increase in real estate taxes during the lease term over the amount established as the base year taxes."[469] The lease defined real estate taxes as:

> only those taxes, which are assessed against the building and/or the land upon which the building is located, without regard to benefit to the property, for the purpose of funding general Government services. Real estate taxes shall not include, without limitation, general and/or special assessments, business improvement district assessments, or any other present or future taxes or governmental charges that are imposed upon the Lessor or assessed against the building and/or the land upon which the building is located.[470]

In 2016, NOAA Maryland requested reimbursement from GSA for four taxes (stormwater, transportation, clean water, and education) it paid.[471] The contracting officer denied reimbursement for all four taxes.[472]

NOAA Maryland appealed to the CBCA.[473] The Board decided that the stormwater and transportation taxes fell within the definition of "real estate taxes" such that GSA must reimburse NOAA Maryland for

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465. *Id.* at 1032.
466. 984 F.3d 1003 (Fed. Cir. 2020).
467. *Id.* at 1011.
468. *NOAA Md., LLC*, 997 F.3d at 1161.
469. *Id.*
470. *Id.*
471. *Id.* at 1162.
472. *Id.*
473. *Id.*

them.[474] However, the Board determined that GSA was not required to reimburse for the clean water and education taxes because they were "future tax[es]" imposed after the lease became effective.[475]

b. The Federal Circuit's decision

The Federal Circuit reversed the CBCA decision, deciding that "real estate taxes" were not limited to present taxes under the terms of the lease and that the taxes remaining in dispute (clean water and education) were reimbursable real estate taxes.[476] The court determined that the second sentence in the lease's "real estate tax" definition served to clarify the first sentence rather than create an exception to it and that a tax is therefore a "real estate tax" if it meets the three criteria listed in the first sentence.[477] The court found that the clean water and education taxes met these three criteria and should therefore be reimbursed by GSA.[478]

The court determined that the contract language was unambiguous but reasoned that even if it was ambiguous, it would be construed against the drafter (GSA).[479] The court also declined to interpret the written contract according to what GSA claimed was the parties' original intent, finding no basis in the lease for that intent and finding the language in the agreement contrary to that intent.[480]

c. Takeaways

This case showcases the Federal Circuit's commitment to interpreting contract provisions so that they do not conflict with one another. This decision also highlights the importance of specificity in contract drafting, as the court noted that the interpretation urged by GSA would normally be expressed through different language.

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474. *Id.* at 1164.
475. *Id.* at 1165.
476. *Id.*
477. *Id.* at 1165–66 (noting that the second sentence does not contain "notwithstanding the foregoing," "provided, however, that," or similar language that would signal it was "making an exception to, operating in even partial derogation of, or narrowing the coverage expressly specified in the immediately preceding sentence").
478. *Id.* at 1165.
479. *Id.* at 1169.
480. *Id.* at 1169–70.

2. P.K. Management Group, Inc. v. Secretary of Housing and Urban Development

a. Procedural history and facts

The Department of Housing and Urban Development (HUD) contracted with P.K. Management Group, Inc. (PKMG) for the management of properties in HUD's possession.[481] These properties included those that HUD owns and those that HUD possesses but does not have title to (custodial properties).[482] The contract required PKMG to perform bi-weekly inspections of each property type, with the inspection of HUD-owned properties being more thorough than the inspection of custodial properties.[483] Under the contract, HUD paid PKMG individually for some services and via monthly fee for others.[484]

HUD initially compensated PKMG individually for all inspections, including inspections of custodial properties.[485] HUD then stopped providing individual payments for custodial property inspections.[486] PKMG submitted a claim to the contracting officer.[487] The contracting officer determined that the per-inspection fee in CLIN 0005AA only applied to HUD-owned properties and denied PKMG's claim.[488] PKMG then appealed to the CBCA.[489] The CBCA found the contract language unambiguous and denied PKMG's appeal.[490]

b. The Federal Circuit's decision

The Federal Circuit affirmed the CBCA decision.[491] The court found that the title of CLIN 0005AA (On-Going Property Inspection HUD-Owned Vacant) and CLIN 0005AA's connection with CLIN 0005 (which neither party disputed applied only to HUD-owned properties) indicated that CLIN 00005AA only

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481. P.K. Mgmt. Grp., Inc. v. Sec'y of Hous. & Urb. Dev., 987 F.3d 1030, 1031 (Fed. Cir. 2021).
482. *Id.*
483. *Id.*
484. *Id.*
485. *Id.*
486. *Id.*
487. *Id.*
488. *Id.*
489. *Id.*
490. *Id.* at 1031–32 (finding that accepting PKMG's position would require ignoring explicit terms in the contract contradicting it).
491. *Id.* at 1033.

applied to HUD-owned properties.[492] It was undisputed that all other custodial property services were covered by a monthly fee set out in the only CLIN addressing custodial properties (CLIN 0006).[493] The court determined that this one service (custodial property inspections) was not covered by a different provision.[494] The court held that the contract unambiguously assigned compensation for custodial property inspections under CLIN 0006 rather than CLIN 0005AA.[495]

c. Takeaways

This case demonstrates that the Federal Circuit prefers a contract interpretation that gives meaning to all parts of a contract over one that renders a portion of the contract meaningless. This case also underscores that, where a contract is unambiguous, the plain meaning prevails.

3. BGT Holdings LLC v. United States

a. Procedural history and facts

In 2014, the Navy and BGT Holdings LLC ("BGT") contracted for the construction and delivery of a gas turbine generator.[496] The Navy was to supply BGT with certain government-furnished equipment ("GFE").[497] The Navy informed BGT that it would not deliver an exhaust collector and engine mounts unless BGT provided a "cost savings" to the Navy.[498] BGT did not offer a cost savings for these items.[499] Once the Navy informed BGT that the items had been reallocated and would no longer be available to BGT, BGT purchased the items on the commercial market to continue contract performance.[500] BGT submitted a Request for Equitable Adjustment (REA) for the associated costs.[501]

BGT appealed to the COFC. BGT alleged that the Navy's withdrawal of the items constituted a constructive change, an official change, a

492. *Id.* at 1032.
493. *Id.*
494. *Id.*
495. *Id.* at 1033.
496. BGT Holdings LLC v. United States, 984 F.3d 1003, 1006 (Fed. Cir. 2020).
497. *Id.*
498. *Id.* at 1008.
499. *Id.*
500. *Id.*
501. *Id.*

breach of contract (for failure to deliver the GFE items and for failure to provide an equitable adjustment), and a breach of the implied duty of good faith and fair dealing.[502] The COFC held that BGT contractually waived its claims for constructive change via ratification, official change through waiver of rights under the changes clause, and breach for failure to award an equitable adjustment.[503] The COFC also dismissed BGT's claim of breach of the implied duty of good faith and fair dealing.[504]

b. The Federal Circuit's decision

On appeal, BGT did not challenge the COFC holding that its claim of breach for failure to deliver the items was precluded by the government property clause.[505] The Federal Circuit affirmed the dismissal of the good faith and fair dealing claim but vacated the dismissal of the other claims.[506] The court determined that the Navy was not entitled to withdraw GFE under the government property clause without considering an equitable adjustment, both under the terms of the contract and the FAR.[507] The court reasoned that the contract's requirement that the contracting officer consider REAs did not confer absolute discretion on the contracting officer to grant or deny an adjustment, but imposed a duty to grant an adjustment if BGT could demonstrate that the government's withdrawal of items caused financial loss.[508] The court also determined that BGT's ratification and waiver claims were not precluded because the contract's changes clause did not address ratification nor waiver.[509]

c. Takeaways

This case expresses some of the outer limits on a contracting officer's discretion in considering contractors' REAs. Particularly where a contract requires the contracting officer to consider an equitable adjustment, the contracting officer does not have absolute discretion to deny it. Although contracting officers have discretion when

502. BGT Holdings LLC v. United States, 142 Fed. Cl. 474, 474 (2019), *aff'd in part and vacated in part*, 984 F.3d 1003 (Fed. Cir. 2020).
503. *Id.*
504. *Id.*
505. *Id.*
506. *BGT Holdings LLC*, 984 F.3d at 1017.
507. *Id.* at 1010.
508. *Id.* at 1011.
509. *Id.* at 1014–16.

considering equitable adjustments, they must do so in good faith and reasonably.

D. Damages

This year, the Federal Circuit issued three significant decisions on damages. In two cases, *Shell Oil Co. v. United States*[510] and *Pacific Coast Community Services, Inc. v. United States*[511], the Federal Circuit applied the long-standing contract principle that speculative damages are never recoverable. In the precedential case, *Shell Oil Co.*, the Federal Circuit examined the relationship between the partial breach doctrine, res judicata principles, and future damages to hold that a party reserves its rights to recover damages in the future when experiencing a partial breach in a contract.[512] While non-precedential, *Pacific Coast Community Services, Inc.* reaffirmed the requirement that contractors must prove damages.[513] The Federal Circuit, in another precedential case, *Boaz Housing Authority v. United States*[514], distinguished between a breach of contract claim and a statutory entitlement claim and found that money damages are the default remedy for a breach of contract claim.[515]

1. Shell Oil Co. v. United States

a. Procedural history and facts

Shell Oil Company, Texaco, Inc., and Union Oil Company of California entered into contracts with the U.S. government to provide aviation gas (avgas) to the U.S. military during World War II ("Avgas Contracts").[516] The government agreed to reimburse the oil companies for new or additional taxes, fees, or charges the oil companies would be required to pay to any municipal, state, or federal law in the United States or foreign country.[517] The oil companies entered into contracts with Eli McColl to dispose of the acid waste produced by avgas at a site

510. 7 F.4th 1165 (Fed. Cir. 2021).
511. 858 Fed App'x 343 (Fed. Cir. 2021).
512. 7 F.4th at 1171–72, 1174.
513. 858 Fed App'x at 344.
514. 994 F.3d 1359 (Fed. Cir. 2021).
515. *Id.* at 1367–68.
516. *Shell Oil Co.*, 7 F.4th at 1167.
517. *Id.*

in Fullerton, California.[518] After the war, the parties terminated the McColl contract and closed the disposal site.[519]

i. Shell I

Forty-five years after the site closed, the United States and the State of California sued the oil companies under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980[520] (CERCLA) for cleanup costs arising from the acid waste generated from the World War II Avgas Contracts.[521] The U.S. District Court for the Central District of California found the oil companies and the United States jointly and severally liable for the remediation costs but allocated all of the costs to the government after finding that the government was the "arranger" for the disposal.[522] The Ninth Circuit affirmed the liability decision but found that the government was only responsible for cleaning up the benzol waste which made up only 5.5% of the total waste.[523]

When the district court transferred the indemnification counterclaims to the COFC, the oil companies voluntarily dismissed the claims to pursue administrative remedies at the GSA.[524] The oil companies returned to the COFC when GSA denied the oil companies' claim for reimbursement of environmental remediation costs at the McColl site under the Avgas Contracts.[525] The COFC granted summary judgment in favor of the oil companies.[526] However, the COFC judge was found to have not disclosed a financial conflict of interest, and the Federal Circuit vacated the lower court's decision.[527] On remand, the COFC granted summary judgment for the government.[528] The Federal Circuit reversed and remanded the case, finding that the plain language of the charges provisions required the government to

518. *Id.* at 1168.
519. *Id.*
520. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675.
521. *Shell Oil Co.*, 7 F.4th at 1168.
522. *Id.*
523. *Id.*
524. *Id.*
525. Shell Oil Co. v. United States, 148 Fed. Cl. 781, 794 (2020), *aff'd*, 7 F.4th 1165 (Fed. Cir. 2021).
526. *Id.* at 782.
527. *Shell Oil Co.*, 7 F.4th at 1169.
528. *Shell Oil Co.*, 148 Fed. Cl. at 782.

indemnify the oil companies for the CERCLA costs.[529] In a damages trial, the court awarded the oil companies a hundred percent of the remediation costs incurred at the McColl site through November 30, 2015, including interest, for a total of $99,509,847.32.[530] The Federal Circuit affirmed the judgment, and the government paid the oil companies in 2019.[531]

ii. Shell II

As remediation of the site was ongoing, the oil companies sued the government at the COFC on November 22, 2019, this time demanding reimbursement of remediation costs and interests incurred after November 30, 2015.[532] The COFC granted summary judgment in favor of the oil companies, finding the government liable for the remediation costs incurred after November 30, 2015, through November 15, 2019, for a total of $1.6 million.[533] Subsequently, the government appealed on two grounds: (1) the COFC erred when failing to apply res judicata principles to the allegedly redundant costs and, (2) the court misinterpreted the savings clause of the Contract Settlement Act of 1944's ("CSA") repealing statute.[534]

b. The Federal Circuit's decision

The Federal Circuit affirmed the COFC's decision.[535] The Federal Circuit rejected the government's first argument that the COFC failed to apply res judicata principles to the redundant costs.[536] Relying on precedent, the Federal Circuit found that res judicata does not bar subsequent claims to recover future damages under a claim for partial breach.[537] A party commits a partial breach when the non-breaching party has performed its contractual duties, but the breaching party's obligations are ongoing.[538] Under the partial breach doctrine, damages that were unavailable in a prior action because they had not

529. *Shell Oil Co.*, 7 F.4th at 1169.
530. *Id.*
531. *Id.*
532. *Shell Oil Co.*, 148 Fed. Cl. at 781.
533. *Id.* at 796.
534. *Shell Oil Co.*, 7 F.4th at 1171.
535. *Id.* at 1176.
536. *Id.* at 1174.
537. *Id.* at 1173–74 (citing Ind. Mich. Power Co. v. United States, 422 F.3d 1369, 1376 (Fed. Cir. 2005)).
538. *Id.* at 1173.

yet accrued can be bought in a subsequent action.[539] Therefore, the Federal Circuit found that, when a breach is partial, a party could only recover damages for nonperformance at the time of the first claim and "may not recover damages for anticipated future nonperformance."[540] The Federal Circuit agreed with the COFC's finding that the oil companies' first lawsuit had to be classified as a partial breach because the oil companies could only seek indemnification of cleanup costs as the costs were being incurred.[541] The Federal Circuit reasoned that, even if the oil companies had sought future costs in the first action, those costs would have been considered speculative damages and put aside in the judgment.[542]

Second, the Federal Circuit rejected the government's proposition that the government did not have a duty to pay the oil companies until 2011, when the oil companies exhausted their administrative remedies.[543] Instead, the court agreed with the COFC that the government's duty to indemnify the oil companies was triggered when the oil companies were found liable under the CERCLA in the 1990s, before the CSA's repeal.[544] While the *Christian* doctrine required the courts to read a left-out clause into the contract as a matter of law when the clause is otherwise required by regulation, the Federal Circuit found that exhaustion requirements were not mandatory in government war contracts at the time of the Avgas Contracts, nor were the CSA procedures meant to be retroactively applied.[545]

c. Takeaways

In this precedential case, the Federal Circuit further clarifies how the res judicata principle applies to the partial breach doctrine. This year, the Federal Circuit has twice emphasized the contract principle that speculative damages are precluded from recovery in government contract cases.[546] If the Federal Circuit had not found that the partial

539. *Id.*
540. *Id.* at 1171–72 (quoting *Ind. Mich. Power Co.*, 422 F.3d at 1376).
541. *Id.* at 1172–73.
542. *Id.* at 1173.
543. *Id.* at 1175–76.
544. *Id.* at 1175.
545. *Id.* at 1176.
546. In another decision issued in 2021, *Pacific Coast Community Services, Inc. v. United States*, the Federal Circuit emphasizes the requirement that damages must be proven to be recoverable. 858 F. App'x 343, 346 (Fed. Cir. 2021). Here, the Federal Circuit turns to that contract principle in the context of the partial breaches and res judicata

breach exemption applied, there is the possibility that future contractors would be reluctant to enter into similar contracts with the government.

2. Boaz Housing Authority v. United States

a. Procedural history and facts

Under section nine of the U.S. Housing Act of 1937,[547] Congress allocated a Capital Fund and an Operating Fund to provide financial assistance to public housing agencies ("PHA") that develop and operate public housing projects.[548] The PHAs entered into an annual contribution contract ("ACC") with HUD to receive an operating subsidy in exchange for complying with the agency's regulations and statute.[549] Under HUD regulations, when there are insufficient funds available, HUD has the discretion to revise the amounts of the operating subsidies on a pro-rata basis.[550] In 2012, Congress only funded eighty percent of the total operating subsidies and instructed HUD to take in account the PHAs' excess operating fund reserves when determining the 2012 operating subsidy for each PHA.[551] HUD distributed the operating subsidies but did not calculate the funding on a pro-rata basis.[552]

The PHAs filed a breach of contract claim against the United States at the COFC, seeking compensatory damages for the difference between what they should have received on a pro-rata basis and the amount actually received.[553] The COFC denied the government's motion to dismiss for lack of jurisdiction, finding that the ACCs were contracts in which money damages were an award.[554] The COFC rejected the government's argument that the true nature of the claim was the violation of a non-money mandating statute, thus precluding money damages as an award for a breach.[555] Instead, rather than an injunction for a violation of a statute or regulation, the COFC found

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to preserve the rights of parties for future contract breaches. *Shell Oil Co.*, 7 F.4th at 1173–74.

547. United States Housing Act of 1937, 42 U.S.C. § 1437.
548. *Id.* § 1437g(d)–(e).
549. Boaz Hous. Auth. v. United States, 994 F.3d 1359, 1362 (Fed. Cir. 2021).
550. *Id.*
551. *Id.* at 1362–63.
552. *Id.*
553. San Antonio Hous. Auth. v. United States, 143 Fed. Cl. 425, 425 (2019).
554. *Id.* at 466.
555. *Id.*

that the PHAs were seeking compensatory damages for a breach of contract as the government failed to meet its past-due obligation.[556] The COFC granted summary judgment in favor of the PHAs, finding that the government was liable for paying the pro-rata basis.[557] The government appealed the judgment.[558]

b. The Federal Circuit's decision

The Federal Circuit affirmed COFC's judgment denial of the motion to dismiss, finding that the PHAs satisfied the jurisdictional requirement of the Tucker Act because they had a money-mandating claim against the United States.[559] The COFC has jurisdiction under the Tucker Act over claims against the United States based on the Constitution, Act of Congress, regulation, or express or implied contract with the United States.[560] The plaintiff must identify a separate source of substantive law that creates the right to money; a money-mandating source.[561] The Federal Circuit found that there is a presumption that money damages are a remedy for most contracts in a civil context.[562] None of the following three exceptions to the presumption are applicable to the PHAs' situation: express contract provisions that disavow money damages; agreements about the conduct of parties in a criminal case lacking a promise that the United States could be held liable for monetary damages; and cost-sharing agreements with the government.[563]

The Federal Circuit grounded its decision in three main points. First, monetary damages are implied in most instances as contracts do not normally contain express provisions specifying the basis for monetary damages.[564] Second, the Federal Circuit distinguished this case from *Lummi Tribe of the Lummi Reservation v. United States*,[565] finding that the PHA's complaint sought compensatory damages for a breach

556. *Id.* at 450.
557. *Id.* at 1363–64.
558. Boaz Hous. Auth. v. United States, 994 F.3d 1359, 1364 (Fed. Cir. 2021).
559. Tucker Act, 28 U.S.C. § 1491(a)(1) (granting jurisdiction to the COFC to decide claims founded on "any express or implied contract with the United States"); *Boaz Hous. Auth.*, 994 F.3d at 1366, 1370.
560. 28 U.S.C. § 1491(a)(1).
561. *Boaz Hous. Auth.*, 994 F.3d at 1364.
562. *Id.*
563. *Id.* at 1364–65.
564. *Id.* at 1365.
565. Lummi Tribe of the Lummi Rsrv., Wash. v. United States, 870 F.3d 1313 (Fed. Cir. 2017).

of contract rather than the equitable relief that the plaintiffs sought in *Lummi*.[566] Third, the Federal Circuit rejected the government's analogy to *National Center for Manufacturing Services v. United States*,[567] finding that the true nature of the claims asserted in *NCMS* was a request for specific performance rather than compensation for damages.[568] In short, the Federal Circuit disposed of the government's remaining jurisdiction and motion to dismiss arguments by finding that the PHA's contract claims met the Tucker Act's jurisdictional requirement when the claim was based on a money mandating source of law, the ACCs.[569]

c. Takeaways

As a precedential case, *Boaz Housing Authority* provides a roadmap as to how the Federal Circuit distinguishes between statutory entitlement claims and breach of contract issues. Here, the main difference between the cases cited by the government was that HUD purposefully entered into contracts with the PHAs creating a separate money-mandating source of law for the PHAs (and the government) to assert rights in case of a breach. Without those contracts, the PHAs would most likely not have been able to bring a breach of contract case to the COFC under the Tucker Act's jurisdictional requirements.[570]

E. Miscellaneous

The following cases address important, but less prevalent issues in government contracting addressed by the Federal Circuit in 2021. In *Future Forest, LLC v. Secretary of Agriculture*,[571] the Federal Circuit discussed the implied duty of good faith and fair dealing for an IDIQ contract.[572] The court examined a contractor's ability to challenge a government decision not to exercise an option in *Kurkjian v. Secretary of the Army*.[573] In *Pacific Coast Community Services, Inc. v. United States*,[574] the court addressed the connection between contractor payment and

566. *Boaz Hous. Auth.*, 994 F.3d at 1367.
567. 114 F.3d 196 (Fed. Cir. 1997).
568. *Boaz Hous. Auth.*, 994 F.3d at 1368.
569. *Id.* at 1371.
570. Tucker Act, 28 U.S.C. § 1491(a)(1) (granting jurisdiction to the COFC to decide claims founded on "any express or implied contract with the United States").
571. Future Forest, LLC v. Sec'y of Agric., 849 F. App'x 922 (Fed. Cir. 2021).
572. *Id.* at 926.
573. Kurkjian v. Sec'y of the Army, No. 2020-2201, 2021 WL 3520624 (Fed. Cir. Aug. 11, 2021) (per curiam).
574. Pac. Coast Cmty. Servs., Inc. v. United States, 858 F. App'x 343 (Fed. Cir. 2021).

contractor performance in a firm-fixed-price contract.[575] In *JKB Solutions & Services, LLC v. United States*,[576] the court held that services are not commercial items and that, if a services contract includes the standard commercial items contract clause from the FAR, the clause will not be enforced. Holdings such as the one in *JKB Solutions* have been the subject of significant concern and commentary in the government contracts legal community.[577] In *Stone v. Secretary of Veterans Affairs*,[578] the court found that FAR provisions are controlling when determining how to calculate equitable adjustments for increases in wage and fringe benefit determinations.[579] *Coastal Park, LLC v. United States*[580] concerned a GSA real-estate auction contract in which the purchaser was found to be liable for default damages when failing to timely complete the transaction.[581]

1. Future Forest, LLC v. Secretary of Agriculture

a. Procedural history and facts

In 2004, the Forest Service awarded a ten-year indefinite-delivery indefinite-quantity contract to Future Forest for thinning National Forests in Arizona.[582] The contract guaranteed a minimum of 5,000 acres per year, for a total of 50,000 acres over the ten-year contract.[583] The Forest Service stated that it anticipated releasing 15,000 acres per year, for a total of 150,000 acres by the end of the contract.[584] The Forest Service issued task orders releasing 71,737.90 acres.[585]

In 2017, Future Forest submitted a certified claim to the contracting officer for $14,743,430.72.[586] Future Forest claimed that the Forest Service breached its duty of good faith and fair dealing by failing to order Future Forest's services for 150,000 acres by the end of the

575. *Id.* at 344–45.
576. JKB Sols. & Servs., LLC v. United States, 18 F.4th 704 (Fed. Cir. 2021).
577. *Id.* at 710.
578. Stone v. Sec'y of Veterans Affs., No. 2020-1732, 2021 WL 4851262 (Fed. Cir. Oct. 19, 2021) (per curiam).
579. *Id.* at *3.
580. Coastal Park LLC v. United States, No. 2020-1687, 2021 WL 3661115 (Fed. Cir. Aug. 18, 2021).
581. *Id.* at *1–3.
582. Future Forest, LLC v. Sec'y of Agric., 849 F. App'x 922, 924 (Fed. Cir. 2021).
583. *Id.*
584. *Id.*
585. *Id.*
586. *Id.*

contract.[587] The contracting officer denied Future Forest's claim, determining that the Forest Service had met any reasonable expectations derived from the contract.[588]

Future Forest appealed to the CBCA.[589] The Board denied the appeal, holding that the parameters of reasonable expectations were dictated by the minimum guaranteed in the written contract.[590]

b. The Federal Circuit's decision

The Federal Circuit affirmed the Board's decision.[591] The court determined that the implied duty of good faith and fair dealing could not be used to expand the Forest Service's minimum obligation under the contract.[592] The contract required that the Forest Service order a minimum of 50,000 acres, and the Forest Service's order of 71,737.90 acres met this obligation.[593]

c. Takeaways

The implied duty of good faith and fair dealing protects the parties' reasonable expectations under the contract.[594] The written language of the contract dictates the parameters of "reasonable expectations."[595] Representations made by agency personnel cannot expand the "reasonable expectation[s]" beyond those justified by the contract.[596] In an IDIQ contract, the government is not bound by inaccurate estimates and is only obligated to order the guaranteed minimum.[597] Once that obligation has been met, the duty of good faith and fair dealing cannot be used to expand that obligation.[598]

587. *Id.*
588. *Id.*
589. *Id.*
590. *Id.* at 925–26.
591. *Id.* at 927.
592. *Id.*
593. *Id.*
594. *Id.* at 926.
595. *Id.*
596. *Id.* at 927.
597. *Id.*
598. *Id.*

2. Kurkjian v. Secretary of the Army

a. Procedural history and facts

On February 28, 2012, the government contracted with Catherine Kurkjian to provide document preparation and technical support to the Food Engineering Services Team ("FEST") at Natick Labs.[599] The contract consisted of a base year and three one-year options.[600] During the base year period of performance, Kurkjian expressed concern about Salmonella testing for some of the food products she was working on and declined to work on products that appeared to involve Salmonella issues.[601] Kurkjian engaged in screaming matches with other employees and expressed that she believed there was a conspiracy against her.[602]

On January 9, 2013, agency management informed Kurkjian of their decision not to exercise the option year and asked Kurkjian to stop work immediately.[603] They told Kurkjian to submit a voucher for $1,702 (the remainder of what she was owed for the base year), but she did not do so.[604] Kurkjian submitted a claim to the contracting officer, seeking compensation for the $1,702 remaining on her base year contract, $112,703 for the three unexercised option years, $338,106 in treble punitive damages, $4,000 in attorneys' fees, and CDA interest.[605] The contracting officer denied Kurkjian's claim, except for the $1,702 remaining on the base year contract.[606]

Kurkjian appealed to the ASBCA.[607] The Board denied Kurkjian's appeal.[608] The Board rejected the argument that the government wrongfully terminated the base year contract because Kurkjian had been paid for about ninety-five percent of the work, and the government had attempted to pay her the rest.[609] The Board also rejected the argument that the government wrongfully failed to

599. Kurkjian v. Sec'y of the Army, No. 2020-2201, 2021 WL 3520624, at *1 (Fed. Cir. Aug. 11, 2021) (per curiam).
600. *Id.*
601. *Id.* at *2.
602. *Id.*
603. *Id.* at *2–3.
604. *Id.* at *3.
605. *Id.*
606. *Id.*
607. *Id.*
608. *Id.*
609. *Id.*

exercise the contract options, because the contract did not require the government to do so, and its failure to do so was neither arbitrary and capricious nor motivated by bad faith.[610]

b. The Federal Circuit's decision

The Federal Circuit affirmed the Board's decision.[611] The court agreed with the Board that Kurkjian's base contract was not terminated and that, in the absence of a termination, no cure notice or termination notice was required.[612]

Additionally, the court determined that, in the absence of a contractual provision restricting the government's discretion to exercise an option, a contractor can only recover for the government's failure to do so if the government acted in bad faith.[613] The court deferred to the Board's factual determination that the government failed to exercise the option because of Kurkjian's behavior rather than because of her concerns about Salmonella.[614]

c. Takeaways

The government has discretion over whether to exercise option years unless the contract limits its discretion. In the absence of such a provision, a contractor may only recover for the government's failure to exercise an option if the government acted in bad faith.[615] Given that government officials are presumed to discharge their duties in good faith, it can be difficult to prove bad faith.[616]

3. Pacific Coast Community Services, Inc. v. United States

a. Procedural history and facts

In September 2012, Federal Protective Service ("FPS") awarded a firm-fixed-price contract for administrative support services to Pacific Coast.[617] The contract provided that the contractor was responsible for submitting accurate invoices and accounting for any variances between

610. *Id.*
611. *Id.* at *6.
612. *Id.* at *4.
613. *Id.* at *5.
614. *Id.* at *5–6.
615. *See supra* note 598 and accompanying text.
616. *Kurkjian*, 2021 WL 3520624, at *5.
617. Pac. Coast Cmty. Servs., Inc. v. United States, 858 F. App'x 346, 347 (Fed. Cir. 2021).

contract requirements and work actually performed.[618] The contract also provided that submission of false invoices would be subject to contractual and legal actions.[619] The contracting officer did not believe that Pacific Coast had actually worked all of the hours it invoiced for, and FPS began deducting from its monthly payments.[620]

Pacific Coast brought a claim in the COFC, alleging that FPS underpaid Pacific Coast and thereby breached the contract.[621] Rather than arguing that it submitted accurate invoices, Pacific Coast argued that its invoices did not have to reflect the true number of work hours performed.[622] The COFC granted the government's motion to dismiss for failure to state a claim.[623]

b. The Federal Circuit's decision

The Federal Circuit affirmed the COFC decision.[624] The court determined that the firm-fixed-price nature of the contract did not signify Pacific Coast was owed the firm-fixed monthly price regardless of its performance.[625] The court held that while "[a] firm-fixed-price contract requires the contractor to charge the government a fixed price for services[,] . . . [it] does not provide that the government must pay that price when the contractor does not deliver the services."[626] The court expressed that untethering the contract's fixed price from the contract's deliverable requirements would necessitate reading terms out of the contract.[627]

c. Takeaways

The firm-fixed-price nature of a contract does not serve to disaggregate contractor payment from contractor performance. While contractors are entitled to the fixed price listed in a contract for services rendered, they are not entitled to that amount for work not actually performed.

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618. *Id.*
619. *Id.* at 347–48.
620. *Id.* at 348.
621. Pac. Coast Cmty. Servs., Inc. v. United States, 147 Fed. Cl. 811, 812 (Fed. Cl. 2020), *aff'd*, 858 F. App'x 346 (Fed. Cir. 2021).
622. *Id.* at 816.
623. *Id.* at 812.
624. *Id.* at 347.
625. *Id.* at 348.
626. *Id.*
627. *Id.* at 349.

4. JKB Solutions & Services, LLC v. United States

a. Procedural history and facts

In 2015, the Army and JKB Solutions & Services, LLC ("JKB"), entered into an indefinite-delivery/indefinite-quantity contract for the provision of instructional services for a course taught to military personnel.[628] JKB agreed to provide services for a maximum of fourteen classes per year.[629] The contract expressly stated that it incorporated by reference the version of the clause at FAR 52.212-4[630] that was in effect at that time, which was titled "Contract Terms and Conditions – Commercial Items (May 2015)."[631] Within that clause is a provision permitting the government to terminate all or part of the contract for its sole convenience.[632] If the government terminated for convenience, the contractor will be paid "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination."[633]

For each of the three years that the contract was in effect, the Army issued a year-long task order listing a total price for fourteen classes, but, each year, the Army ultimately used JKB's services for fewer than fourteen classes.[634] The Army compensated JKB for each class that JKB taught rather than for the total price listed in the task orders.[635]

In 2019, JKB claimed breach at the COFC, arguing that the government was obligated to order and JKB was entitled to payment for fourteen classes for each year of the contract.[636] The government disagreed that the contract created that obligation but argued that, even if it did, the government's reduction in quantity was a constructive termination for convenience and that the contractor had not sought such costs in its complaint.[637] The COFC granted the government's

628. JKB Sols. & Servs., LLC v. United States, 18 F.4th 704, 706 (Fed. Cir. 2021).
629. *Id.*
630. 48 C.F.R. § 52.212-4 (2015).
631. *JKB Sols. & Servs.*, 18 F.4th at 706–07.
632. *Id.* at 707.
633. 48 C.F.R. § 52.212-4(l).
634. *JKB Sols. & Servs.*, 18 F.4th at 707.
635. *Id.*
636. JKB Sols. & Servs., LLC v. United States, 150 Fed. Cl. 252, 254 (Fed. Cl. 2020), *vacated*, 18 F.4th 704 (Fed. Cir. 2021).
637. *Id.*

motion for summary judgment.[638] Although JKB argued that the commercial items clause containing the termination for convenience provision upon which the government relied was incorporated into its contract in error and that the services JKB provided were not commercial items, the COFC determined that the clause was not limited to commercial item contracts only.[639] Since FAR 52.212-4 was incorporated in JKB's contract and JKB could be terminated for convenience under that clause, the court, invoking the doctrine of constructive termination for convenience, determined that JKB could only recover costs (termination for convenience costs) that it did not seek in its complaint.[640]

b. The Federal Circuit's decision

On appeal, the Federal Circuit vacated the COFC decision.[641] The court recognized the government's right, in appropriate circumstances, to exercise its contractual right to terminate a contract for convenience.[642] Nevertheless, the court found that the contract clause allowing for convenience terminations that was incorporated into JKB's contract, FAR 52.212-4, was for use only in commercial item contracts.[643] The Federal Circuit found that the clause "does not apply to service contracts," like the contract at issue.[644] The court therefore held that the convenience termination clause in FAR 52.212-4 was inapplicable to this contract and unenforceable.[645] Addressing the government's argument that the clause was binding because it was expressly incorporated into the contract without objection from JKB when the contract was executed, the court found that the government was "conflat[ing] two separate concepts: (1) whether JKB Solutions manifested its acceptance of the terms of the contract, such that it is bound by them, and (2) whether the termination for convenience clause that the contract incorporates by reference applies to the

638. *Id.* at 257.
639. *Id.* at 255–56.
640. *Id.* at 257.
641. *JKB Sols. & Servs.*, 18 F.4th at 711.
642. *Id.* at 708–09 (noting that a contracting officer may terminate a contract for the government's convenience if the contract has an applicable termination convenience clause and, in the absence of bad faith, a clear abuse of discretion or a fully performed contract).
643. *Id.* at 710.
644. *Id.*
645. *Id.*

contract, i.e., has effect."[646] "Giving the incorporated termination for convenience clause no effect," the appellate court found, "does not 'deny the Government the benefit of its bargain'" but only precludes reliance on "a FAR provision that, on its face, applies only to commercial item contracts."[647] The Federal Circuit then remanded the case to the COFC to "consider whether the *Christian* doctrine"—established in *G.L. Christian & Associates v. United States*[648]—"applies to incorporate a termination for convenience clause and whether, in light of [the Federal Circuit's] case law, the doctrine of constructive termination for convenience applies in these circumstances."[649]

c. Takeaways

The Federal Circuit's conclusion that services cannot be commercial items has caused confusion in the procurement community.[650] The clause that the Federal Circuit rendered effectively unenforceable as applied to services contracts, FAR 52.212-4, contains more than just the termination for convenience provision for contracts into which it is incorporated. It also contains those contracts' provisions governing payments, contract changes, excusable delays, terminations for cause, assignments, and more.[651] The Federal Circuit's decision leaves open the possibility that parties who have entered into commercial services contracts will have to try to read other clauses in the FAR into their contracts under the *Christian* doctrine to supplant necessary provisions that the Federal Circuit appears now to have held are unenforceable.

At least one commentator has noted that the Federal Circuit made a false distinction between commercial item contracts and service contracts, when the proper distinction would have been between a commercial services contract and a non-commercial services contract.[652] The version of the FAR that was in effect at the time of JKB's contract award, incorporating language from 41 U.S.C. § 103(7) (2018) (since amended), defined a "commercial item" as including "[s]ervices of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog

646. *Id.* at 711.
647. *Id.* (quoting JKB Sols. & Servs., LLC v. United States, 150 Fed. Cl. 252, 256 (2020)).
648. 312 F.2d 418 (Ct. Cl. 1963).
649. *JKB Solutions & Servs.*, 18 F.4th at 711.
650. 35 Nash & Cibinic Rep. NL ¶ 72.
651. 48 C.F.R. § 52.212-4 (2015).
652. 35 Nash & Cibinic Rep. NL ¶ 72.

or market prices for specific tasks performed . . . and under standard commercial terms and conditions."[653] In its decision holding that services contracts are not commercial items, the Federal Circuit did not cite to or reference the statutory or FAR definitions of a "commercial item." Another commentator has noted that, "[i]f taken to its logical conclusion, this remarkable decision would mean that no commercial 'item' provision in the [FAR] applies to services even if incorporated in the contract, effectively overturning a decades-long understanding that the commercial item definition encompasses both goods and services."[654] Some have questioned whether contractors will be as willing to contract with the government in the absence of applicable commercial terms.[655]

We note that, effective December 6, 2021, FAR 52.212-4 was amended to implement section 836 of the John S. McCain National Defense Authorization Act[656] (NDAA) for Fiscal Year (FY) 2019, Pub. L. 115-232, which replaced the definition of "commercial item" previously set forth at 41 U.S.C. § 103 (2018) into separate definitions of "commercial product" and "commercial service," at 41 U.S.C.A. §§ 103 and 103a (2022).[657] The clause at FAR 52.212-4 is now titled "Contract Terms and Conditions—Commercial Products and Commercial Services."[658] The extent to which the rationale underlying the Federal Circuit's decision in *JKB Solutions* will apply to the revised clause is uncertain.

5. Billie O. Stone v. Secretary of Veterans Affairs

a. Procedural history and facts

In 2009, Mr. Stone entered into a multi-year contract with VA to provide janitorial and food support services to an inpatient facility.[659] The contract incorporated FAR 52.222-43, which required contractors to pay employees wages and fringe benefits in accordance with the

653. 48 C.F.R. § 2.101 (2015).

654. Richard Arnholt, *Did the Federal Circuit Just Eliminate Commercial Services?*, BASS, BERRY & SIMS PLC (Dec. 1, 2021), https://www.bassberrygovcontrade.com/commercial-services-federal-circuit [https://perma.cc/WU87-495B].

655. *Id.*

656. John S. McCain National Defense Authorization Act, Pub. L. 115-232, 132 Stat. 1859 (2018).

657. 86 Fed. Reg. 61,017 (Nov. 4, 2021).

658. *Id.* at 61,033.

659. Stone v. Sec'y of Veterans Affs., No. 2020-1732, 2021 WL 4851262, at *1 (Fed. Cir. Oct. 19, 2021) (per curiam).

Department of Labor (DOL) wage determination for each year.[660] In 2013, the DOL requested VA to withhold funds from Mr. Stone's contracts and transfer the funds to the DOL when the DOL determined that Mr. Stone owed $104,800.27 in back wages to his employees for work between November 2011 and September 2013.[661] That same year, Mr. Stone submitted a request for an adjustment in the amount of $116,866.40 for the increases in prevailing wages and fringe benefits based on a predicted 2,080 hour work year and the loss of equipment and supplies.[662] Based on the actual hours each employee worked, VA agreed to pay Mr. Stone $21,865.37 for increases in health and welfare benefits.[663] After VA transferred that amount directly to the DOL, along with Mr. Stone's last contract payment and the payments for the loss of equipment and supplies, the DOL determined that Mr. Stone still owed $62,117.37.[664]

Mr. Stone submitted a certified claim to VA requesting the difference between the amount he requested, and the amount awarded by VA, among other costs.[665] VA denied his claim on the basis that the $21,865.37 was determined by the actual hours his employees worked.[666]

Mr. Stone filed an appeal at the CBCA.[667] The Board denied Mr. Stone's motion for summary judgment, finding that Mr. Stone had not produced any evidence raising a genuine issue as to the claimed amount.[668] The Board found that Mr. Stone's request was based on a projected hours worked calculation rather than the actual hours worked as required by FAR 52.222-43.[669] Furthermore, the Board granted VA's motion for summary judgment, determining that FAR 52.222-43 also excludes administrative costs from adjustments for increasing wage and fringe benefits.[670] The Board found that Mr. Stone could not recover his claim for harm and damages because the

660. *Id.*
661. *Id.*
662. *Id.* at *2.
663. *Id.*
664. *Id.*
665. *Id.*
666. *Id.*
667. *Id.*
668. *Id.*
669. *Id.*
670. *Id.* at *3.

damages were remote and speculative. Mr. Stone appealed to the Federal Circuit.[671]

b. The Federal Circuit's decision

The Federal Circuit affirmed the Board's judgment.[672] Reviewing the Board's conclusions of law without deference, the Federal Circuit agreed with the Board that Mr. Stone had failed to meet the summary judgment standard when he could not raise a genuine dispute of material fact.[673] Mr. Stone was unable to show that his actual increases in wage and fringe benefit determinations exceeded the amount VA calculated.[674] While Mr. Stone claimed that his employees worked 2,080 hours a year, he was not able to show that they actually worked those hours as required by FAR 52.222-43(d).[675]

c. Takeaways

Even though the contractor did have a dispute as to how to calculate the adjustment, the Federal Circuit held that the requirements in the FAR which determined how adjustments are to be calculated controlled. The Federal Circuit reaffirmed the requirement that damages must be proven to be recoverable. As the contractor could not show that the actual hours his employees worked differed from VA's calculation, the contractor had no genuine issue of material fact to raise at either the Board or the Federal Circuit.

6. Coastal Park LLC v. United States

a. Procedural history and facts

Coastal Park LLC placed and won a $3.1 million bid to purchase the former U.S. Coast Guard Housing complex in Elizabeth City, North Carolina.[676] The contract required Coastal Park to deposit ten percent of the purchase price ($310,000) with the GSA.[677] The remaining balance was due on the closing date.[678] The contract contained a

671. *Id.*
672. *Id.* at *5.
673. *Id.*
674. *Id.* at *3–4.
675. *Id.* at *4.
676. Coastal Park LLC v. United States, No. 2020-1687, 2021 WL 3661115, at *1 (Fed. Cir. Aug. 18, 2021).
677. *Id.*
678. *Id.*

default clause stating that the contractor forfeited the deposit if found to be in default of the contract.[679] GSA granted several extensions to the closing date in order to give Coastal Park enough time to conduct an inspection.[680] The last extension extended the closing date to November 7, 2016.[681] On that day, Coastal Park failed to provide the final balance or an additional ten percent deposit to extend the closing date to November 14, 2016.[682] GSA informed Coastal Park that it would have until November 9th to cure the issue by paying the outstanding balance or Coastal Park would forfeit the $310,000 deposit.[683] Coastal Park rejected the notice to cure and did not pay the outstanding balance.[684] Finding Coastal Park in default, GSA sold the property to another bidder.[685] At the COFC, Coastal Parks sued on several claims, including the return of the $310,000 deposit.[686] When the court denied Coastal Park's motion for summary judgment, Coastal Parks appealed to the Federal Circuit.[687]

b. The Federal Circuit's decision

The Federal Circuit affirmed the COFC's judgment finding that the contract provisions plainly entitled the government to retain the deposit as a remedy for default.[688] When GSA declared Coastal Park to be in default, the default provision clearly stated that the deposit paid to the government was subject to forfeit by the purchaser.[689] The Federal Circuit rejected Coastal Park's arguments.[690] First, the Federal Circuit found that the time of the essence principle applied to this case and that the failure to perform within the fixed dates of performance

679. *Id.* at *3.
680. *Id.* at *1–2.
681. *Id.* at *1.
682. *Id.* at *2.
683. *Id.*
684. *Id.*
685. *Id.*
686. Coastal Park LLC v. United States, 147 Fed. Cl. 179, 181 (Fed. Cl. 2020), *aff'd*, 2021 WL 3661115 (Fed. Cir. Aug. 18, 2021).
687. *See Coastal Park*, 2021 WL 3661115, at *2; *Coastal Park*, 147 Fed. Cl. at 185 (denying Coastal Park's motion because Coastal Park's failure to tender payment amounted to default, which entitled the United States to retain Coastal Park's deposits).
688. *Coastal Park LLC*, 2021 WL 3661115, at *2.
689. *Id.* at *3.
690. *Id.*

was a condition for default.[691] Second, the contract provision for remedies for default was appropriate, and liquidated damages were not applicable as the government did not grant a further extension, as required by the contract.[692] Last, the contract clearly required that any changes to the closing date had to be in writing, making any oral agreements insufficient in binding the government.[693]

c. Takeaways

This case addresses how the time of the essence principle is applied to default conditions. Even if there are other provisions providing for other remedies, the default remedies are controlling. In future auction cases with the government, it is important for purchasers to understand the default conditions of a contract and the relevant requirements for each remedy.

CONCLUSION

The Federal Circuit decided a number of important cases over the past year. The court defined the scope of the implied duty of good faith and fair dealing in IDIQ contracts in *Future Forest*, delineated when a claim accrues for CDA statute of limitations purposes in *Triple Canopy*, and clarified the COFC bid protest jurisdiction for implied-in-fact contracts in *Safeguard*. It is imperative that government contracts practitioners remain abreast of the Federal Circuit's decisions as they are issued to keep up with ongoing developments in procurement law.

691. *Id.*
692. *Id.*
693. *Id.* at *4.