A YEAR IN REVIEW: THE FEDERAL CIRCUIT'S 2023 GOVERNMENT CONTRACT LAW DECISIONS

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This Article continues previous in-depth reviews of government contract law cases decided by the Federal Circuit and published by the American University Law Review. *In 2023, the Federal Circuit clarified the appropriate standard of review, emphasizing that, more likely than not, the Boards of Contract Appeals should apply a* de novo *standard of review. Additionally, the court set significant judicial precedent by holding that the issues of party standing, timely raising a solicitation defect, and asserting a sum certain are nonjurisdictional. Finally, the court also issued decisions concerning implied-in-fact contracts, excusable delays, and the importance of reporting unallowable costs.*

FOREWORD

The Honorable Erica S. Beardsley[****]

The U.S. Court of Appeals for the Federal Circuit is an Article III court established in 1982 by merging the U.S. Court of Customs and

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Patent Appeals and the appellate division of the U.S. Court of Claims. The Federal Circuit has nationwide jurisdiction in several areas, including government contracts. Government contracts cases come to the Federal Circuit from the U.S. Court of Federal Claims (COFC) and the Boards of Contract Appeals (the Civilian Board of Contract Appeals (CBCA), the Armed Services Board of Contract Appeals (ASBCA), and the Postal Service Board of Contract Appeals (PSBCA)). However, only three percent of the appeals filed with the Federal Circuit in Fiscal Year (FY) 2023 were government contract cases.

Despite the low percentage of government contracts cases decided by the Federal Circuit every year, the decisions often prove significant. This year, in the wake of the U.S. Supreme Court's decision in *Wilkins v. United States*,[1] the Federal Circuit has reconsidered jurisdictional rules in two cases. In *ECC International Constructors, LLC v. Secretary of the Army*,[2] the Federal Circuit ruled that the regulatory requirement to state a sum certain when submitting a claim under the Contract Disputes Act[3] (CDA) is a mandatory, nonjurisdictional requirement.[4] Similarly, in *M.R. Pittman Group, LLC v. United States*,[5] the Federal Circuit held that the *Blue & Gold*[6] waiver rule regarding solicitation challenges is not a basis for finding a lack of jurisdiction.[7] Because the Supreme Court has noted that "[j]urisdictional rules may . . . result in the waste of judicial resources and may unfairly prejudice litigants,"[8] and has admonished the courts to "police this jurisdictional line," it is not surprising that the Federal Circuit has reconsidered these jurisdictional rules and may be open to reconsidering other jurisdictional rules in future decisions.[9]

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claims. Judge Beardsley clerked for the Honorable James E. Bradberry, Magistrate Judge, U.S. District Court for the Eastern District of Virginia, from 1995–1996. She received her J.D. in 1995 from *William & Mary Law School*.

1. 598 U.S. 152 (2023). In *Wilkins*, the Supreme Court held that § 2409a(g) is a nonjurisdictional claims-processing rule. *Id.* at 165.
2. 79 F.4th 1364 (Fed. Cir. 2023).
3. Contracts Disputes Act, 41 U.S.C. § 7101.
4. *ECC Int'l Constructors*, 79 F.4th at 1379.
5. 68 F.4th 1275 (Fed. Cir. 2023).
6. 492 F.3d 1308 (Fed. Cir. 2007).
7. *Id.* at 1313 (holding that when a party "has the opportunity to object to the terms of a government solicitation containing a patent error" but raises no objection before "the close of the bidding process," the party "waives its ability to" later bring "the same objection . . . in" a COFC "bid protest action").
8. Henderson v. Shinseki, 562 U.S. 428, 434 (2011).
9. Wilkins v. United States, 598 U.S. 152, 157 (2023).

This review of the Federal Circuit's 2023 government contracts decisions provides an overview of significant government contracts cases decided by the Federal Circuit this year, including *ECC International* and *M.R. Pittman*. In addition to the case summaries, the current law clerks of the CBCA have provided observations on the Federal Circuit's reasoning in these cases as well as on how these decisions shape the law of government contracts generally. This review is recommended reading for government contractors, contracting officers, and counsel for both, given the insight provided and the potential effects these decisions will have on bid protests and contract claims litigation. We thank the CBCA Law Clerks—Sophie Marsh, Taylor McDaniels, and Allison Moors—for preparing the analysis of this year's Federal Circuit decisions that you will read below.

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INTRODUCTION

This Area Summary discusses the most significant Federal Circuit government contract cases from 2023 and the potential effects of those decisions on issues involving, *inter alia*, standard of review and jurisdiction. While the primary purpose of the year-in-review Area Summary is to provide an overview of the most recent government contract cases, this Area Summary also includes reflections on the Federal Circuit's reasoning and application of precedent to long-standing issues in government contract law. First, in Part I of this Article, we will discuss the cases that concerned standard of review. Part II will then consider cases about both bid protest and CDA jurisdiction. Finally, in Part III, we will review other cases of importance to government procurement law decided in 2023.

I. STANDARD OF REVIEW

In 2023, the Federal Circuit decided two cases on the topic of standard of review: (1) *Department of Transportation v. Eagle Peak Rock & Paving, Inc.*[10] and (2) *SAGAM Securite Senegal v. United States.*[11] First, the court in *Eagle Peak* explained that termination for default decisions requires *de novo* review based on the evidentiary record and not the Contracting Officer's (CO) reasoning or findings of fact.[12] Accordingly, the court reviewed the record to determine whether timely completion of the contract was impaired rather than examining the CO's justification for the termination.[13] Second, in *SAGAM*, a nonprecedential case, the court found that the Department of Transportation lacked a rational basis for its decision to re-issue its solicitation, and the lower court was justified in ordering the agency to disqualify an offeror from the competition.[14] *SAGAM* offers a good review of the rational basis test for judging agency decisions and the requirements for a court to issue injunctive relief.[15]

A. Department of Transportation v. Eagle Peak Rock & Paving, Inc.

1. Procedural history and facts

In this case, the Department of Transportation's Federal Highway Administration (FHWA) and Eagle Peak Rock & Paving, Inc. (Eagle Peak) entered into a contract for "construction work in Yellowstone National Park."[16] Under the terms of the contract, Eagle Peak was required to submit schedules to the FHWA.[17] Eagle Peak repeatedly submitted schedules that the FHWA rejected for failing to comply with contract requirements, including plans to work during times when work was not allowed (*e.g.*, "during the winter shutdown" and bird migration season).[18] Because the noncompliant schedules suggested

10. 69 F.4th 1367 (Fed. Cir. 2023).
11. No. 2021-2279, 2023 WL 6632915 (Fed. Cir. Oct. 12, 2023).
12. *Eagle Peak Rock & Paving*, 69 F.4th at 1371, 1374.
13. *Id.* at 1371, 1375–76; Wilner v. United States, 24 F.3d 1397, 1401–02 (Fed. Cir. 1994) (explaining that parties start with a clean slate on *de novo* review).
14. *SAGAM Securite Sen.*, 2023 WL 6632915, at *11.
15. *Id.* at *4–11.
16. *Eagle Peak Rock & Paving*, 69 F.4th at 1371.
17. *Id.*
18. *Id.* at 1371–72.

Eagle Peak could not complete the contract on time, the FHWA terminated the contract for default.[19]

The CBCA found that the CO's decision to terminate for default was unreasonable, and the CBCA heavily criticized the CO's reasoning, statements, and considerations.[20] Specifically, the CBCA emphasized the CO's failure to give due consideration to "'the urgency' of the government's needs for [Eagle Peak's] services" as well as Eagle Peak's "mobilization efforts from her assessment of work completed in the first season."[21] The CBCA also expressly declined to decide whether Eagle Peak's progress on the contract was sufficient and whether timely completion was at risk because it already found the termination improper by disagreeing with the CO's reasoning.[22]

2. The Federal Circuit's decision

The Federal Circuit found that the CBCA erred in its application of a *de novo* standard of review.[23] Because the CBCA was required to decide *de novo* whether termination for default was proper, the CBCA should have focused on determining if the record showed whether Eagle Peak would have finished on time instead of focusing on the CO's reasoning, which is usually only considered when the standard of review is either arbitrary and capricious or abuse of discretion.[24] In other words, the CBCA should have looked at the objective evidence in the developed record because, under a *de novo* standard of review, the subjective views of the CO are "irrelevant."[25] Furthermore, under *de novo* review, tribunals may sustain a termination for default even on grounds unknown to the CO at the time so long as the record supports the termination.[26]

Additionally, the Federal Circuit supported its decision by pointing out that there are only two situations in which tribunals would use the arbitrary and capricious or abuse of discretion review instead of *de novo* review: (1) where the CO terminated a contract for reasons unrelated

19. *Id.* at 1371.
20. *Id.* at 1373–74.
21. *Id.* at 1374. The regulation requires the CO to consider "[a]ny other pertinent facts and circumstances." 48 C.F.R. § 49.402-3(f)(7).
22. *Eagle Peak Rock & Paving*, 69 F.4th at 1378.
23. *Id.* at 1374, 1377–78.
24. *Id.*
25. *Id.* at 1376.
26. *Id.* (citing McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1017 (Fed. Cir. 2003)).

to contract performance; and (2) where the CO terminated a contract for default in a pretextual way (*i.e.,* the CO gave a fake reason for the termination).[27] Because neither of these situations was present, the CBCA was required to conduct a *de novo* review.[28]

3. Takeaways

This precedential case emphasizes the importance of the distinction between different standards of review. The Federal Circuit's decision indicates that more likely than not, the CBCA and the ASBCA will be implementing a *de novo* standard of review because of the limited situations in which the arbitrary and capricious or abuse of discretion standard is appropriate.[29]

Furthermore, when completing a *de novo* review in a termination for default case, the lower courts should evaluate the developed record, analyze evidence on the issue of whether timely completion of the contract was impaired, and avoid considering the subjective thoughts of the CO.[30] Strict adherence to this type of review is required because the CDA "demands an objective inquiry" of whether the termination for default was proper, "not an evaluation of the [CO's] subjective beliefs" on whether the termination for default was proper "when ascertaining whether the government has met its burden."[31]

A. SAGAM Securite Senegal v. United States

1. Procedural history and facts

In this case, the State Department issued a lowest price, technically acceptable "solicitation seeking . . . guard services for the U.S. [E]mbassy in Dakar, Senegal."[32] The solicitation mandated that bidders proposals explain whether their "proposed wages and benefits compl[ied] with [the] host-country [g]overnment['s] . . . official wage and benefit levels."[33] The State Department's solicitation "would also

27. *Id.* at 1376–78.

28. *See id.* (explaining "[t]he Board's threshold analysis . . . was erroneous in going beyond the issues of pretext and a performance basis").

29. *See id.* (describing the threshold inquiry for termination of default cases as having a "limited scope").

30. *Id.* at 1375–76.

31. *Id.* at 1376 (internal quotations omitted) (quoting Empire Energy Mgmt. Sys., Inc. v. Roche, 362 F.3d 1343, 1357 (Fed. Cir. 2004)).

32. SAGAM Securite Sen. v. United States, No. 2021-2279, 2023 WL 6632915, at *1 (Fed. Cir. Oct. 12, 2023).

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

evaluate whether [an] offeror's proposed [solicitation] plan '[was] reasonable and realistic for the work [to be] performed.'"[34]

The State Department received two acceptable proposals from offerors SAGAM Securite Senegal (SAGAM) and Torres-SAS Security LLC Joint Venture (Torres) and sent discussion letters to both offerors asking for clarification on certain aspects of their proposals.[35] In its discussion letter to Torres, the State Department included information it had received from SAGAM's proposal related to SAGAM's proposed compensation plan.[36] Torres and SAGAM submitted revised proposals based on the discussion questions, and the State Department awarded the contract to Torres.[37]

SAGAM protested award of the contract before the Government Accountability Office (GAO), and the "State [Department] agreed to take corrective action."[38] During its corrective action, the State Department realized it had improperly shared SAGAM's compensation plan information with Torres during discussions, thereby violating the Procurement Integrity Act[39] (PIA).[40] The State Department concluded that the PIA violation impacted the procurement and the damage could not be mitigated.[41] The State Department then announced its intention to cancel and re-issue a new solicitation for the work.[42]

SAGAM subsequently filed a pre-award bid protest at the COFC alleging the agency's "decision to cancel and . . . [re-]issue a new solicitation was arbitrary and capricious."[43] The COFC found the State Department's disclosure of SAGAM's proposal information violated the PIA, and its decision to cancel and re-issue the solicitation lacked a rational basis because it did not remedy the violation nor did it prevent Torres from benefiting from the unauthorized disclosure.[44] The COFC concluded that disqualifying Torres from the competition

34. *Id.*
35. *Id.*
36. *Id.* at *1–2.
37. *Id.*
38. *Id.* at *2.
39. Procurement Integrity Act, 41 U.S.C. § 2101. The PIA prohibits agencies and their COs from releasing source selection and contractor bid or proposal information. *Id.* §§ 2101–2102.
40. *SAGAM Securite Sen.*, 2023 WL 6632915, at *2.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at *3.

was the only appropriate remedy and entered an injunction directing the State Department to cancel the re-solicitation, disqualify Torres, and "award the contract to the remaining offeror in the competitive range if that offeror [was] determined to be responsible."[45] The State Department appealed the COFC's decision to the Federal Circuit.[46]

2. The Federal Circuit's decision

The Federal Circuit upheld the COFC's ruling in a nonprecedential decision.[47] First, the court determined that the COFC correctly concluded that the State Department violated the PIA when it shared information related to SAGAM's compensation plan and its compliance with local labor laws with Torres.[48] The court reasoned that the disclosure of SAGAM's compliance with local labor laws violated the PIA because it "was linked to specific aspects of contract performance and contract costs," and thus constituted "cost or pricing data."[49]

Second, the Federal Circuit agreed that canceling and re-issuing the solicitation lacked a rational basis.[50] The court explained that while "the agency is not required to consider and explain every potential remedy, it must provide 'a reasonable corrective action and adequately explain its reasoning for doing so.'"[51] Additionally, the court found that because the government had failed to demonstrate that it considered how to mitigate Torres's knowledge and the harm to SAGAM in a new procurement, it had not shown that re-solicitation was reasonable.[52]

Finally, the court found that the COFC did not abuse its discretion in issuing a permanent injunction disqualifying Torres and directing an award to a responsible remaining offeror.[53] The court began by noting that "'[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course,' . . . '[i]f "a less

45. *Id.*
46. *Id.*
47. *Id.* at *4.
48. *Id.* at *2–4.
49. *Id.* at *5 (internal quotations omitted).
50. *Id.* at *4–6, *11.
51. *Id.* at *5 (quoting Dell Fed. Sys., L.P. v. United States, 906 F.3d 982, 998 (Fed. Cir. 2018)).
52. *Id.* at *6.
53. *Id.* at *8–9.

drastic remedy' is sufficient to address the relevant injury."[54] In considering the government's argument that a remand to the State Department would be a more appropriate remedy, the court also acknowledged that "the government ha[d] some basis for its argument that ordinarily such an important decision should remain within the discretion of the [CO]."[55] However, the court found that the "unusual facts and litigation history of th[e] case" led it to conclude "that the [COFC]'s decision to order disqualification . . . rather than remand to the agency" did not constitute an abuse of discretion.[56] Specifically, the court stated that the record indicated that re-solicitation could not have remedied the PIA violation and thus gave the COFC no assurance that remand would resolve the matter.[57]

3. Takeaways

Although this case is nonprecedential, it is instructive of the type of extraordinary circumstances that merit injunctive relief rather than remanding to the agency's discretion. By finding that a more drastic remedy was needed, the court demonstrated that certain facts and circumstances give rise to a more significant violation.

II. JURISDICTION

In 2023, the Federal Circuit decided several precedential cases concerning jurisdiction. Section A of this Part will focus on cases addressing bid protest jurisdiction, while Section B will review decisions relating to jurisdiction for claims under the CDA.

A. Bid-Protest Jurisdiction

The Federal Circuit issued three cases concerning bid protest jurisdiction: (1) *CACI, Inc.-Federal v. United States*;[58] (2) *M.R. Pittman Group, LLC v. United States*;[59] and (3) *22nd Century Technologies, Inc. v. United States*.[60] In *CACI*, the court held that whether a protestor is an "interested party" under the Tucker Act[61] no longer implicates the

54. *Id.* at *7 (first and third alterations in original) (quoting Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165–66 (2010)).
55. *Id.* at *6, *8.
56. *Id.* at *9.
57. *Id.* at *10.
58. 67 F.4th 1145 (Fed. Cir. 2023).
59. 68 F.4th 1275 (Fed. Cir. 2023).
60. 57 F.4th 993 (Fed. Cir. 2023).
61. Tucker Act, 28 U.S.C. § 1491.

court's subject-matter jurisdiction but is a question of "statutory standing" that should be decided on the merits.[62] Shortly after making the determination in *CACI*, the court issued *M.R. Pittman*, which concluded that the *Blue & Gold* rule[63] is nonjurisdictional because it "seeks to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[64] These two cases signal that the Federal Circuit is open to changing long-standing jurisdictional precedent for bid protests by continuing to distinguish statutory standing and Article III jurisdiction. Finally, in *22nd Century Technologies*, the court held that jurisdictional restrictions in the Federal Acquisition Streamlining Act[65] (FASA) on protests in connection with task and delivery order procurements apply to size protests.[66]

1. CACI, Inc.-Federal v. United States

a. Procedural history and facts

In *CACI*, "[t]he Army issued a solicitation for a Next Generation Load Device Medium [NGLD-M] to encrypt and decrypt sensitive information on the battlefield."[67] In its evaluation of proposals, the Army assessed each proposal "for strengths, weaknesses, significant weaknesses, and deficiencies."[68] If a proposal received one or more deficiencies, it would lead to an unacceptable rating and would be deemed "unawardable."[69] CACI submitted a proposal that received an unacceptable rating because it did not provide two-factor

62. 67 F.4th at 1151–52 (defining "statutory standing" as an issue requiring the court to determine whether the legislature has granted a cause of action to the plaintiff (citing Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 (2014)).

63. The *Blue & Gold* rule was articulated in *Blue & Gold Fleet, L.P. v. United States*, which held "that a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the [COFC]." 492 F.3d 1308, 1313 (Fed. Cir. 2007).

64. *M.R. Pittman Grp.*, 68 F.4th at 1280 (internal quotations omitted) (quoting Henderson v. Shinseki, 562 U.S. 428, 435 (2011)).

65. Federal Acquisition Streamlining Act, Pub. L. No. 103-355, 108 Stat. 3243 (1994) (codified as amended in scattered sections of 10 U.S.C. and 41 U.S.C.).

66. 22nd Century Techs., Inc. v. United States, 57 F.4th 993, 999 (Fed. Cir. 2023).

67. 67 F.4th at 1148.

68. *Id.*

69. *Id.*

authentication for all modes of operation as required by the solicitation.[70] CACI's proposal was nevertheless included in the competitive range because "only minor revisions to [CACI's] proposal [would] be required to rectify [the] issue . . . ."[71] CACI made the requested revisions, but the Army still assigned three deficiencies to its proposal.[72] As a result, CACI was ineligible for the award, and the Army awarded the contract to the Sierra Nevada Corporation (SNC) and General Dynamics Mission Systems (GDMS).[73]

CACI filed a bid protest at the COFC challenging the deficiencies assigned to its proposal.[74] During the proceedings, the issue of whether CACI lacked standing due to an organizational conflict of interest (OCI) arose.[75] The Army characterized the issue as jurisdictional, meaning the defense could not be waived or mitigated.[76] Neither the CO nor the Army had determined whether CACI's proposal contained an OCI prior to the filing of CACI's complaint.[77] However, in support of its motion to dismiss, the Army submitted a declaration from the CO which read, "[a]t the request of counsel for the Government . . . CACI would not have been eligible for [an] award due to an unmitigable OCI."[78] Using this declaration, the Army argued that because CACI's proposal contained an OCI, it did not have a substantial chance of securing the award, and thus was not an interested party,[79] and therefore lacked standing.[80] CACI contended that the OCI should not be determined *de novo* by the COFC because the CO's declaration did

70. *Id.*

71. *Id.* (first alteration in original).

72. *Id.* at 1148–49.

73. *Id.* at 1149.

74. *Id.*

75. *Id.* The Federal Acquisition Regulation (FAR) governs organizational conflicts of interest. The FAR characterizes OCIs as "limitations on contracting as the means of avoiding, neutralizing, or mitigating . . . conflicting roles that might bias a contractor's judgment." 48 C.F.R. § 9.505.

76. *CACI, Inc.-Fed.*, 67 F.4th at 1149.

77. *Id.* at 1149–50.

78. *Id.* (first and third alterations in original) (internal quotations omitted).

79. An interested party is an "actual or prospective bidder[] or offeror[] whose direct economic interest would be affected by the award of the contract or failure to award the contract." Rex Serv. Corp. v. United States, 448 F.3d 1305, 1307 (Fed. Cir. 2006) (internal quotations omitted) (quoting Am. Fed'n of Gov't Emps. v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001)).

80. *CACI, Inc.-Fed.*, 67 F.4th at 1150.

not follow the Federal Acquisition Regulation's (FAR) procedure, or, in the alternative, no OCI was present.[81]

The COFC, in its decision, disregarded the CO's declaration and conducted its own *de novo* review, dismissing CACI's complaint for lack of subject-matter jurisdiction (*i.e.*, lack of standing).[82] Additionally, for good measure, the COFC noted that the Army had not erred in assigning CACI's proposals deficiencies.[83] CACI appealed to the Federal Circuit.[84]

b. The Federal Circuit's decision

On appeal, the Federal Circuit found that whether a protestor is considered an interested party does not affect a court's Article III jurisdiction but rather is a question of "statutory standing."[85] Because statutory standing is not jurisdictional, an initial determination by a court that the protestor is an interested party "is not required before addressing the merits."[86] Accordingly, the court held that the COFC erred in both treating the issue of statutory standing as jurisdictional and for dismissing the case for lack of subject-matter jurisdiction.[87]

To support its ruling, the Federal Circuit held the same for questions of prejudice, writing, "the issue of prejudice is no longer jurisdictional unless it implicates Article III considerations, and our cases to the contrary are no longer good law."[88] The court explained that the issue of prejudice is similar to statutory standing but occurs after the record has been closed and an error has been found.[89]

The Federal Circuit also addressed the question of whether the COFC properly conducted a *de novo* review of whether an OCI was present when the issue had not been addressed initially by the CO.[90] The court reasoned that because judicial review of agency action is generally limited to the grounds outlined in the agency's original

81. *Id.* The FAR, in relevant part, provides that COs are to "[i]dentify and evaluate potential [OCIs] as early in the acquisition process as possible." 48 C.F.R. § 9.504(a)(1).
82. *CACI, Inc.-Fed.*, 67 F.4th at 1150.
83. *Id.*
84. *Id.* at 1151.
85. *Id.*
86. *Id.* at 1152.
87. *Id.* at 1151.
88. *Id.* at 1153.
89. *Id.* at 1153–54.
90. *Id.* at 1153.

determination, a court typically cannot make a *de novo* finding regarding whether a protestor was an interested party.[91] Thus, the court held that the COFC erred in conducting a *de novo* review on CACI's purported OCI, and the appropriate course of action would have been to remand the issue to the Army to have the CO conduct an OCI analysis.[92] Finally, while the COFC's *de novo* review was erroneous, the court affirmed on the merits and found that the COFC "did not err in sustaining the [CO's] finding of technical deficiency," affirming the COFC's ultimate determination.[93]

c. Takeaways

The primary takeaway from *CACI* is that issues of standing and prejudice are now considered merits issues and no longer implicate the COFC's jurisdiction.[94] Specifically, the court held that the issues concern "statutory standing" and any cases claiming the opposite are "no longer good law in this respect."[95] Hence, these issues will need to be resolved on the merits and may no longer be the basis for motions to dismiss for lack of subject-matter jurisdiction, meaning these potential defenses may be waived if not timely raised.[96] Overall, this holding likely indicates that more cases will be resolved on the merits and reduce the risk of litigants raising procedural defects late in the litigation process.

2. M.R. Pittman Group, LLC v. United States

a. Procedural history and facts

The U.S. Army Corps of Engineers (USACE) issued a solicitation for a contract to repair pump units at Wilkinson Canal Pump Station in

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91. *Id.*; Andrew Guy & Kayleigh Scalzo, *Federal Circuit Weighs in on Bid Protest Standing*, NAT'L DEF. INDUS. ASS'N (June 30, 2023), https://www.nationaldefensemagazine.org/articles/2023/6/30/federal-circuit-weighs-in-on-bid-protest-standing [https://perma.cc/23XZ-48S5].

92. *CACI, Inc.-Fed.*, 67 F.4th at 1153; *see The Federal Circuit Reconsiders the Impact of Standing and Prejudice on the Court of Federal Claims' Bid Protest Jurisdiction*, CROWELL & MORING LLP (May 22, 2023), https://www.crowell.com/en/insights/client-alerts/the-federal-circuit-reconsiders-the-impact-of-standing-and-prejudice-on-the-court-of-federal-claims-bid-protest-jurisdiction [https://perma.cc/Z8M6-HGJJ] (discussing the *CACI* decision and its effect on protesters).

93. *CACI, Inc.-Fed.*, 67 F.4th at 1155–56.

94. *Id.* at 1151.

95. *Id.*

96. *Id.*

Plaquemines Parish, Louisiana.[97] The USACE posted the solicitation on beta.SAM.gov, "the government-wide point of entry providing electronic access to '[g]overnment business opportunities greater than $25,000.'"[98] The webpage included a link to the solicitation and noted it was "a 100% Small Business Set Aside Procurement."[99] The solicitation also stated that "[a]ll Small Business concerns representing itself as such . . . under [North American Industry Classification System] (NAICS) Code: 811310 may submit offers."[100] The solicitation itself, however, did not include a reference to NAICS Code 81130.[101]

M.R. Pittman Group, LLC (M.R. Pittman) submitted the lowest bid out of four companies that responded to the solicitation but was not awarded the contract because it did not qualify as a small business under NAICS Code 81130.[102] As a result, in February 2021, M.R. Pittman filed a bid protest at the GAO arguing that, because the solicitation omitted NAICS Code 811310, the contract could not be treated as a small business set-aside.[103] The GAO dismissed the protest and held that M.R. Pittman failed to timely challenge the solicitation.[104] M.R. Pittman appealed to the COFC.[105]

During litigation, the government filed a motion to dismiss arguing that under the *Blue & Gold* rule,[106] M.R. Pittman waived its protest grounds by failing to raise the issue of the omitted NAICS code prior to the close of bidding.[107] The COFC, after a hearing on the merits, agreed with the government, concluding that the error in USACE's solicitation was "apparent from the onset," so M.R. Pittman waived its

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97. M.R. Pittman Grp., LLC v. United States, 68 F.4th 1275, 1277–78 (Fed. Cir. 2023).

98. *Id.* at 1278 (alteration in original).

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

100. *Id.* (second alteration in original) (internal quotations omitted). "The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy." *North American Industry Classification System*, U.S. CENSUS BUREAU, https://www.census.gov/naics [https://perma.cc/6WW3-89F8].

101. *M.R. Pittman Grp.*, 68 F.4th at 1278.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *See supra* text accompanying note 63 (defining the *Blue & Gold* rule).

107. *M.R. Pittman Grp.*, 68 F.4th at 1279.

protest grounds.[108] Consequently, the COFC determined that the waiver deprived the court of subject-matter jurisdiction.[109] M.R. Pittman filed a motion for reconsideration, which was denied, and then appealed to the Federal Circuit arguing that the trial court erred in dismissing on jurisdictional grounds because the *Blue & Gold* rule does not implicate subject-matter jurisdiction.[110]

b. The Federal Circuit's decision

On appeal, the Federal Circuit addressed whether the waiver is jurisdictional and whether the COFC's application of the rule was improper for both procedural and substantive reasons.[111] First, regarding jurisdiction, the Federal Circuit agreed with M.R. Pittman that the *Blue & Gold* waiver rule is nonjurisdictional, stressing the distinction between "'jurisdictional prescriptions' and 'nonjurisdictional claim-processing rules.'"[112] The Federal Circuit explained that the rule was nonjurisdictional because it is essentially a procedural obligation placed on the protestor.[113] Because the COFC had proper subject-matter jurisdiction, dismissal by the Federal Circuit was not required, and thus the Federal Circuit considered the merits of the case.[114]

Second, in its discussion of the merits, the Federal Circuit dismissed M.R. Pittman's contentions that the COFC committed a procedural error when deciding its case.[115] Finally, the court considered whether the *Blue & Gold* waiver rule applied.[116] In determining that M.R. Pittman waived its protest grounds, the Federal Circuit found that the error was patent, an obvious mistake, and should have been raised before the end of the bidding process.[117] Consequently, the COFC's judgment was affirmed based on a failure to state a claim rather than a lack of subject-matter jurisdiction.[118]

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108. *Id.*
109. *Id.*
110. *Id.* at 1279–80.
111. *Id.* at 1280.
112. *Id.* (quoting Fort Bend County v. Davis, 139 S. Ct. 1843, 1849 (2019)).
113. *See id.* (holding that the rule was closer to a procedural duty promoting bidding efficiency).
114. *Id.* at 1281.
115. *Id.* at 1281–83. The discussions concerning these arguments are not applicable to this Area Summary.
116. *Id.* at 1283.
117. *Id.*
118. *Id.* at 1285.

c. Takeaways

Like *CACI, M.R. Pittman* signals potential changes to jurisdictional precedent in bid protests.[119] The Federal Circuit and the COFC previously held that a lack of subject-matter jurisdiction should be found if a protestor failed to raise a solicitation defect after a deadline had passed.[120] However, *M.R. Pittman* overruled those prior holdings, explaining that the *Blue & Gold* rule should be considered a nonjurisdictional, statutory standing issue.[121] Notably, this case built on the Federal Circuit's finding in *CACI*, adding the *Blue & Gold* waiver rule to matters that will no longer be considered jurisdictional.[122] Because these issues are no longer jurisdictional bars to recovery, there is a possibility that more protests will be brought because protestors will have the opportunity to litigate these issues on their merits.

3. 22nd Century Technologies, Inc. v. United States

a. Procedural history and facts

In March 2015, the Army issued a solicitation for the Responsive Strategic Sourcing for Services Indefinite Delivery, Indefinite Quantity Contract (RS3 IDIQ Solicitation) seeking "'knowledge-based support services for requirements with Command, Control, Communications, Computers, Intelligence, Surveillance, and Reconnaissance related needs.'"[123] The RS3 IDIQ Solicitation itself was not restricted to small businesses but it permitted the Army to restrict competition for future task orders to small businesses.[124] 22nd Century Technologies (22nd Century) submitted its proposal in response to the RS3 IDIQ

119. *Compare* CACI, Inc.-Fed. v. United States, 67 F.4th 1145, 1151 (Fed. Cir. 2023) (stating that statutory waiver issues deal with whether the plaintiff has made a recoverable claim and not jurisdiction), *with M.R. Pittman Grp.*, 68 F.4th at 1280 (holding the statutory waiver test is nonjurisdictional and refers instead to a plaintiff's procedural duty).

120. *See* Comint Sys. Corp. v. United States, 700 F.3d 1377, 1382 (Fed. Cir. 2012) (expanding *Blue & Gold*'s holding to all pre-award objections); Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1315 (Fed. Cir. 2007) (determining the COFC's jurisdictional statute's requirement for promptness constructively waives a party's ability to protest following the conclusion of bidding).

121. *M.R. Pittman Grp.*, 68 F.4th at 1280.

122. *Id.*

123. 22nd Century Techs., Inc. v. United States, 57 F.4th 993, 996 (Fed. Cir. 2023) (internal quotations omitted).

124. *Id.*

Solicitation in May 2015.[125] At the time, 22nd Century was a small business,[126] and the Army awarded 22nd Century a contract under the RS3 IDIQ Solicitation in March 2019.[127]

In December 2020, the Army issued a task order request for proposals (RFP) under the RS3 IDIQ Solicitation and limited the eligible awardees to small businesses.[128] The task order RFP required each offeror to represent whether it was a small business in its proposal.[129] In February 2021, 22nd Century submitted a proposal representing it was "'a small business for this [RS3] IDIQ,' i.e., at the time of its original RS3 IDIQ proposal," even though it no longer qualified as a small business.[130]

The Army awarded the task order to 22nd Century in May 2021, rejecting two other bidders, Fibertek, Inc. and Ideal Innovations, Inc.[131] Shortly thereafter, both companies filed size protests with the Small Business Administration (SBA), "alleging that 22nd Century was ineligible for the award because it was not a small business."[132] In June 2021, the SBA issued two size determinations "finding that 22nd Century was 'other-than-small'" and therefore did not meet the requirements of the task order RFP.[133] On appeal to the SBA Office of Hearings and Appeals (OHA), the SBA's original findings were confirmed.[134] As a result, the Army terminated the task order.[135]

22nd Century filed a bid protest with the COFC in September 2021 requesting that the court "set aside [the] OHA's size determination and enjoin the Army from terminating the task order."[136] The COFC dismissed the case, finding that the Federal Acquisition Streamlining Act[137] of 1994 (FASA)—which limited the court's jurisdiction over task and delivery order contracts—barred the COFC from hearing 22nd Century's claims.[138]

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125. *Id.* at 997.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. Federal Acquisition Streamlining Act, 10 U.S.C. § 3406.
138. *22nd Century Techs.*, 57 F.4th at 997–98 (citing 10 U.S.C. § 3406(f)).

b. The Federal Circuit's decision

The Federal Circuit affirmed that the COFC lacked jurisdiction to hear 22nd Century's protest because, under FASA, the court may only consider task order protests if the order at issue (1) "'increases the scope, period, or maximum value of the contract under which the order is issued;'" or (2) is valued over $25 million.[139]

In so doing, the court rejected 22nd Century's argument that its claim was not barred under FASA because FASA applied only to bid protests, not size protests.[140] Referencing *Harmonia Holdings Group, LLC v. United States*,[141] the court noted that size protests and bid protests were distinct: "A 'size protest' refers to an administrative challenge to an offeror's size which is filed with the SBA. A 'bid protest,' by contrast, generally challenges actions that an agency takes, or fails to take, in connection with a procurement or proposed procurement."[142]

However, the court explained it "never suggested that size protests offered a separate basis for [COFC] jurisdiction" than bid protests under the Tucker Act.[143] Instead, the COFC would normally have jurisdiction over a SBA decision when made "'in connection with a proposed procurement'" under § 1491(b)(1).[144] Thus, although 22nd Century's protest related to its unfavorable size determination, it nevertheless was properly considered a bid protest under § 1491(b)(1). Accordingly, because FASA barred the court from exercising jurisdiction under § 1491(b)(1) for task order protests, and none of FASA's exceptions applied, the COFC was barred from exercising jurisdiction over 22nd Century's protest.[145]

The Federal Circuit also dismissed 22nd Century's alternative argument that the termination of its task order was improper.[146] The court found that 22nd Century's termination claim failed because (1) it had not filed a claim with the CO as required by the CDA and (2) it

139. *Id.* at 998–1000.
140. *Id.* at 999–1000.
141. 999 F.3d 1397 (Fed. Cir. 2021).
142. *22nd Century Techs.*, 57 F.4th at 999 (quoting *Harmonia Holdings Grp.*, 999 F.3d at 1402–03).
143. *Id.*
144. *Id.*
145. *Id.* at 999–1000.
146. *Id.* at 1000.

knew of "no case authorizing" 22nd Century's requested injunctive relief against termination.[147]

c. Takeaways

In *22nd Century Technologies*, the Federal Circuit made it clear that FASA's restrictions on task order protests apply equally to various forms of bid protests, including those related to size.[148] However, it is important to note that the court's opinion focuses specifically on the arguments and facts presented in this case; some avenues for protest may still be open to contractors. For example, a contractor protesting against another offeror's determination as a small business may be able to argue that "allowing companies that do not qualify as small" to compete increases the scope of an overlying IDIQ contract, which is one of the FASA exceptions on task order bid protests.[149]

The case also serves as a reminder of the importance of accurate self-representation in task order procurements. The SBA "determines the size status of a concern . . . as of the date [it] submits a written self-certification."[150] Thus, contractors must review their self-certifications to ensure their size status is accurately reflected at the time of certification or risk disqualification from competition by a size protest.

B. Contracts Disputes Act Jurisdiction

This year, the Federal Circuit issued two precedential cases concerning jurisdiction under the CDA: (1) *ECC International Constructors, LLC v. Secretary of the Army*[151] and (2) *Lockheed Martin Aeronautics Co. v. Secretary of the Air Force.*[152] In *ECC International*, the court continued the trend seen in *CACI* and *M.R. Pittman* of removing jurisdictional barriers, this time in CDA litigation, by holding that including the sum-certain requirement is a "nonjurisdictional

147. *Id.*
148. *Id.* at 999.
149. Craig A. Holman & Thomas A. Pettit, 22nd Century Technologies, Inc. v. United States*: The Federal Circuit Limits the Court of Federal Claims' Jurisdiction over Size Protests in Connection with Task and Delivery Order Procurements*, ARNOLD & PORTER (Feb. 15, 2023), https://www.arnoldporter.com/en/perspectives/advisories/2023/02/22nd-century-technologies-inc-v-united-states [https://perma.cc/G8DK-PG7M].
150. 13 C.F.R. § 121.404(a).
151. 79 F.4th 1364 (Fed. Cir. 2023).
152. 66 F.4th 1329 (Fed. Cir. 2023).

requirement subject to forfeiture."[153] In *Lockheed Martin*, the court held that a tribunal does not have jurisdiction over a contractor directly appealing a CO's unilateral price determination under a definitization clause because the definitization action is not a "government claim."[154]

1. ECC International Constructors, LLC v. Secretary of the Army

a. Procedural history and facts

In 2010, the USACE awarded ECC International Constructors, LLC (ECCI) a contract "to design and construct a Special Operations Forces Joint Operations Center" compound in Afghanistan for $29,186,338.00.[155] Alleging 329 days of government-caused delay, ECCI submitted a request for equitable adjustment to the CO seeking $13,519,913.91 on February 12, 2014.[156] Because "ECCI did not receive a final decision" from the CO, the nonresponse was deemed a denial.[157] On October 23, 2014, ECCI filed an appeal with the ASBCA.[158] This appeal "began a complex negotiation and litigation history," with a hearing on the merits occurring from February 24, 2020 to March 6, 2020.[159]

Three months after the hearing concluded, on June 23, 2020, the USACE filed a motion to dismiss for lack of jurisdiction, arguing that the claim submitted by ECCI on February 12, 2014 "failed to state a sum certain for each distinct claim."[160] Notably, the government did not raise any issue about the sum-certain requirement during the litigation process.[161] Additionally, the motion "came after the CDA's six-year statute of limitations had run," barring ECCI the opportunity to refile.[162] The ASBCA "granted the government's motion and dismissed the overall claim."[163] On appeal, the Federal Circuit

153. *ECC Int'l Constructors*, 79 F.4th at 1380; *see also* CACI, Inc.-Fed. v. United States, 67 F.4th 1145, 1151 (Fed. Cir. 2023); M.R. Pittman Grp., LLC v. United States, 68 F.4th 1275, 1280–81 (Fed. Cir. 2023).
154. *Lockheed Martin Aeronautics Co.*, 66 F.4th at 1336–38.
155. *ECC Int'l Constructors*, 79 F.4th at 1368.
156. *Id.*
157. *Id.* at 1369.
158. *Id.*
159. *Id.*
160. *Id.* at 1369–70.
161. *Id.* at 1369.
162. *Id.* at 1380.
163. *Id.* at 1370.

addressed "whether the sum-certain requirement is jurisdictional in light of recent Supreme Court precedent."[164]

b. The Federal Circuit's decision

The Federal Circuit held that "the requirement to state a sum certain in submitting a claim under the CDA is a mandatory, nonjurisdictional requirement."[165] In its discussion, the court noted that a federal court's subject-matter jurisdiction is often conflated with the "ingredients" of a federal claim for relief.[166] To assist in distinguishing the two, the Federal Circuit invoked a clear statement rule prescribed by the Supreme Court in several of its recent decisions[167]: a procedural requirement will be treated as jurisdictional only if Congress "clearly states" it is.[168] The Federal Circuit determined that Congress did not provide a clear statement concerning the sum-certain requirement in the CDA.[169] In so deciding, the court highlighted that the sum-certain requirement is located in the FAR, and not the CDA.[170] Additionally, the court dismissed the government's argument that the CDA's use of the word "claim" was sufficient to establish a sum certain as a jurisdictional requirement, explaining that "a sum certain is not necessarily an inherent part of every claim."[171]

Additionally, in support of its finding, the court analogized the sum-certain requirement to other rules deemed nonjurisdictional by federal courts.[172] The court reasoned that the "similarity between the

164. *Id.*; *see* Boechler, P.C. v. Comm'r, 596 U.S. 199, 203 (2022) (holding that a procedural requirement is jurisdictional only if Congress "clearly states" that it is); *see also* MOAC Mall Holdings LLC v. Transform Holdco LLC, 598 U.S. 288, 298 (2023) (discussing that Congress must clearly convey its intent that a statutory precondition be treated as jurisdictional and that it is insufficient that a jurisdictional reading is merely "plausible").

165. *ECC Int'l Constructors*, 79 F.4th at 1380.

166. *Id.* at 1376 (quoting Arbaugh v. Y&H Corp., 546 U.S. 500, 503 (2006)).

167. *Id.* at. 1370–73.

168. *Boechler*, 596 U.S. at 203.

169. *ECC Int'l Constructors*, 79 F.4th at 1371.

170. *Id.* at 1371–72; 48 C.F.R. § 2.101; *cf.* 41 U.S.C. §§ 7101–7109 (omitting any mention of a "sum certain").

171. *ECC Int'l Constructors*, 79 F.4th at 1373–74.

172. *Id.* at 1375–77; Arbaugh v. Y&H Corp., 546 U.S. 500, 515 (2006) (holding that Title VII's employee numerosity requirement was nonjurisdictional because it was identified in a provision that "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the . . . courts" (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982)); MOAC Mall Holdings LLC v. Transform Holdco LLC, 598 U.S.

sum-certain requirement and other requirements the Supreme Court has deemed nonjurisdictional leads us to conclude that the sum-certain requirement fits comfortably within the class of mandatory, nonjurisdictional claim-processing rules that concern the elements of a claim."[173] Finally, the court wrote about the implications of finding that the sum-certain requirement is nonjurisdictional.[174] The court clarified that including a sum certain is still mandatory for a party submitting a claim under the CDA, and claims lacking a sum certain may be denied by the CO or dismissed by the boards and the COFC.[175] Notably, the Federal Circuit emphasized that its holding requires a party to challenge a deficient sum certain before litigation has far progressed or the defense may be waived.[176]

Accordingly, the Federal Circuit reversed the ASBCA's dismissal and remanded the matter back to the ASBCA "to evaluate whether the government forfeited its right to challenge ECCI's satisfaction of the sum-certain requirement."[177] The Federal Circuit determined that if the ASBCA found that the government did forfeit this defense, the ASBCA was to consider the case on the merits.[178]

c. Takeaways

The holding in *ECC International* indicates a high probability that the Federal Circuit will reach the same conclusion regarding other claim requirements listed in the FAR but not in the CDA itself.[179] The court explained that because the CDA grants the boards and the COFC jurisdiction over claims, but is silent on the sum-certain requirement, the "crux" of the grant of jurisdiction is *the claim itself*—not the sum-certain requirement.[180] The court characterized the sum-certain requirement as an element of a claim that a claimant must satisfy to

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288, 300 (2023) (explaining that § 363(m) of the Bankruptcy Code is not jurisdictional because it does not contain a "clear tie" to the Code's jurisdictional provisions); Copen v. United States, 3 F.4th 875, 879–82 (6th Cir. 2021) (concluding that the Federal Tort Claims Act's sum-certain requirement is nonjurisdictional).

173. *ECC Int'l Constructors*, 79 F.4th at 1377.

174. *Id.* at 1379–80.

175. *Id.* at 1380.

176. *Id.*

177. *Id.*

178. *Id.*

179. *See supra* notes 169–70 and accompanying text; *see also ECC Int'l Constructors*, 79 F.4th at 1372 (noting that the Federal Circuit generally turns to the FAR for guidance because the CDA does not explain the elements of a claim).

180. *ECC Int'l Constructors*, 79 F.4th at 1377.

recover, rather than a jurisdictional rule that can be raised at any point.[181] Importantly, this decision places responsibility on the government to timely raise the issue of a missing sum certain or risk forfeiture of such defense.[182] Consequently, similar to the bid protest jurisdiction cases previously discussed, litigants will likely raise fewer procedural defect defenses late in the litigation process.[183]

2. Lockheed Martin Aeronautics Company v. Secretary of the Air Force

a. Procedural history and facts

In this case, the U.S. Air Force contracted with Lockheed Martin Aeronautics Company (Lockheed Martin) for upgrades to F-16 aircraft.[184] The Air Force issued two "Undefinitized Contract Actions" under the contract that allowed Lockheed Martin to start performance before the parties agreed on a price, with a "definitization clause" providing that the parties would decide on a price at a later date.[185] According to the clause, if the parties could not agree on a price, the CO would make the pricing decision unilaterally.[186] The parties could not agree on a price, so, per the definitization clause, the CO unilaterally decided on a price of approximately $1 billion.[187]

Lockheed Martin disagreed with the CO's unilateral price decision and appealed directly to the ASBCA, arguing that the ASBCA had jurisdiction to hear the claim because the CO's unilateral decision was a "government claim" capable of appeal directly to the ASBCA.[188] The ASBCA dismissed Lockheed Martin's claim for lack of jurisdiction because it found that the CO's unilateral decision on price, as a

181. *Id.* at 1380.
182. *Id.*
183. *See id.* (discussing claims that do not state a sum certain may be denied by a CO and dismissed on appeal); *see also* CACI, Inc.-Fed. v. United States, 67 F.4th 1145, 1151–52 (Fed. Cir. 2023) ("[T]echnical deficiencies issues . . . could themselves be viewed as statutory standing issues."); M.R. Pittman Grp., LLC v. United States, 68 F.4th 1275, 1280 (Fed. Cir. 2023) (explaining that a party's failure to object to government solicitation terms containing a patent error before the bidding process ends waives its capacity to raise the objection later).
184. Lockheed Martin Aeronautics Co. v. Sec'y of the Air Force, 66 F.4th 1329, 1333 (Fed. Cir. 2023).
185. *Id.* at 1331.
186. *Id.*
187. *Id.* at 1333.
188. *Id.* at 1333–34.

definitization action required by the contract, was not a government claim.[189] Lockheed Martin appealed the dismissal to the Federal Circuit, arguing that this was a government claim because the CO's action was an "adjustment of contract terms" that sought relief from the contractor by imposing prices and demanding performance.[190] Moreover, Lockheed Martin argued that the phrase "subject to Contractor appeal" in the definitization clause was also an indication that definitizations are government claims.[191]

b. The Federal Circuit's decision

The Federal Circuit found that the CO's unilateral decision on the price was not a government claim and thus could not be directly appealed to the ASBCA.[192] As a result, the ASBCA did not have jurisdiction over Lockheed Martin's claim.[193] The Federal Circuit explained that this was not a government claim because it was not a "demand" or "assertion" to seek relief.[194] Instead, this was government administration of a contract term that sought no relief.[195] In other words, the government was simply doing what the contract prescribed.[196]

The Federal Circuit also rejected Lockheed Martin's argument that it was a government claim because the claim was an assertion seeking relief from the CO's adjustment of the contract terms.[197] The Federal Circuit rejected this argument because the CO was not adjusting anything; rather, the CO was simply following the instructions from the terms that already existed (the definitization clause) when it unilaterally decided on a price, and one cannot "adjust" contract terms when establishing prices "where none existed before."[198] The Federal Circuit likewise rejected Lockheed Martin's argument that the phrase "subject to Contractor appeal" in the definitization clause means that the definitizations are government claims.[199] The Federal Circuit

189. *Id.* at 1334.
190. *Id.* at 1337 (internal quotations omitted).
191. *Id.* at 1338 (internal quotations omitted).
192. *Id.* at 1336.
193. *Id.* at 1338.
194. *Id.* at 1336.
195. *Id.*
196. *Id.* at 1337.
197. *Id.*
198. *Id.*
199. *Id.* at 1338.

reasoned that even though the word "appeal" means that there can be a claim, it is incorrect to assume that the word "appeal" must necessarily imply a government claim.[200] Rather, the word "appeal" implies either type of claim: a contractor claim or a government claim.[201] The Federal Circuit also added that, if anything, the claims here would be contractor claims, not government claims, because the contractor is the one making a demand or assertion (by appealing the CO's unilateral definitization of price) seeking relief (in the form of changing the contract price that the CO unilaterally decided).[202]

The Federal Circuit differentiated this contract action from three other actions that are considered government claims: (1) an inspection clause of a contract allowing the government to inspect performance of the contract and reject defective goods at no cost to the government; (2) the CO refusing to pay the contractor the balance due under the contract where the contractor failed to perform in a timely manner; and (3) a termination for default.[203]

The inspection clause in (1) is a government claim because the government is making a demand (rejecting defective goods) to seek relief (at no cost to the government).[204] The decision not to pay the contractor in (2) is a government claim because the government is making a demand (not releasing money to the contractor) to seek relief (withholding money because the contractor breached the contract by failing to finish on time).[205] And the termination for default in (3) is a government claim because the government is making a demand (the termination for default) to seek relief (having the contractor stop performance of the contract).[206]

Finally, the Federal Circuit stated that the only claim here is by Lockheed Martin.[207] Lockheed Martin can still appeal this claim, but only as a contractor claim, which requires appealing to the CO before appealing to the board or court.[208]

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200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 1336.
204. *Id.*
205. *Id.*
206. *Id.* at 1336–37.
207. *Id.* at 1337.
208. *Id.*

c. Takeaways

The main takeaway from this precedential case is that a CO's unilateral price determination under a definitization clause is not a government claim appealable to a board or court under the CDA because it is not a demand or assertion by the government seeking relief against the contractor. Here, instead of making a demand seeking relief, the CO was "simply following the agreed upon procedures" to determine the final contract price after performance began.[209] A tribunal thus does not have jurisdiction where a contractor directly appeals this type of government action.[210]

III. MISCELLANEOUS

In 2023, the Federal Circuit decided two nonprecedential cases and one precedential case that do not neatly fit into one category: (1) *Indiana Municipal Power Agency v. United States*;[211] (2) *E&I Global Energy Services, Inc. v. United States*;[212] and (3) *Secretary of Defense v. Raytheon Co.*,[213] respectively.

In *Indiana Municipal Power*, the court affirmed a well-reasoned analysis due to the high threshold of proving a contractual obligation arising out of legislation.[214] In *E&I*, the court held that sureties acting as guarantors for a prime contractor (*i.e.*, entities that agree to pay any debts owed by the prime contractor incurred during the performance of a contract) are likely other government contractors whose delay creates an excusable delay for the prime contractor.[215] Lastly, in *Raytheon*, the court found failing to disclose to the government (1) time spent outside of normal business hours on lobbying and policies and (2) time spent on planning mergers, acquisitions, or divestitures before taking any action violates the FAR because these two cost categories are expressly unallowable costs.[216]

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209. *Id.* at 1336.
210. *Id.* at 1338.
211. 59 F.4th 1382 (Fed. Cir. 2023).
212. No. 2022-1472, 2022 WL 17998224, at *1 (Fed. Cir. Dec. 30, 2022).
213. 56 F.4th 1337 (Fed. Cir. 2023).
214. Ind. Mun. Power Agency v. United States, 154 Fed. Cl. 752, 756 (Fed. Cl. 2021), *aff'd*, 59 F.4th 1382 (Fed. Cir. 2023); *Ind. Mun. Power Agency*, 59 F.4th at 1384.
215. *E&I Glob. Energy Servs.*, 2022 WL 17998224, at *3–5.
216. *Raytheon Co.*, 56 F.4th at 1341–43.

A. Indiana Municipal Power Agency v. United States

1. Procedural history and facts

In 2009, Congress passed the American Recovery and Reinvestment Act[217] of 2009 (Recovery Act).[218] Section 1531 of the law authorized issuance of Direct Payment Build America Bonds (BABs) to state and local governments to encourage borrowing for public investment projects.[219] Under section 1531, issuers of Direct Payment BABs were entitled to a refund from the Internal Revenue Service (IRS) of thirty-five percent of the interest payable under the BABs.[220]

In 2011 and 2013, Congress passed legislation automating the "cancellation of budgetary resources provided by discretionary appropriations or direct spending law," which included payments to issuers of Direct Payment BABs at the rate provided for in the Recovery Act.[221] As a result, the government stopped making payments based on the Recovery Act's thirty-five percent rate in 2013.[222]

The plaintiffs in this case were public power entities that "issued Direct Payment BABs to fund capital investments in projects that provide electric power to more than 300 municipalities in nine states."[223] Collectively, the plaintiffs issued approximately $4 billion in Direct Payment BABs before January 2011.[224]

In December 2020, the plaintiffs filed suit at the COFC, seeking damages for the government's failure to make direct cash payments equal to thirty-five percent of each interest payment made for their

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217. Pub. L. No. 111-5, 123 Stat. 115 (codified as amended in scattered sections of 16 U.S.C., 26 U.S.C., and 42 U.S.C.).

218. *Ind. Mun. Power Agency*, 154 Fed. Cl. at 755.

219. *Id.* at 755–56; *see* 26 U.S.C. § 54AA (2010) (repealed in 2017 for bonds issued after December 31, 2017) (authorizing tax credits to state and local governments that issued BABs to incentivize government borrowing).

220. *Ind. Mun. Power Agency*, 154 Fed. Cl. at 756.

221. *Id.* (internal quotations omitted) (quoting 2 U.S.C. §§ 900(c)(2), 901(a)); *see also* Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. § 900 (mandating sequestration of resources used for direct spending accounts, and omitting the Direct Payment BABs program and payments to public power entities from the short list of programs exempt from sequestration); American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (codified in scattered sections of 2 U.S.C., 7 U.S.C., 26 U.S.C., and 42 U.S.C.) (implementing the spending reductions and sequestrations required by the 1985 Budget Control Act, including the cancellation of payments to issuers of Direct Payment BABs).

222. *Ind. Mun. Power Agency*, 154 Fed. Cl. at 757.

223. *Id.* at 756.

224. *Id.*

Direct Payment BABs.[225] The plaintiffs argued section 1531 of the Recovery Act created a contractual obligation for payment of the thirty-five percent interest, which the government violated when it stopped the payments.[226]

The COFC dismissed the plaintiffs' claims, finding that the plaintiffs had not successfully pleaded a plausible contractual relationship with the government based on the Direct Payment BABs provision in the Recovery Act.[227] In other words, the COFC determined that the plaintiffs had not shown the required elements to bind the federal government in contract.[228] Citing Supreme Court precedent, the COFC noted that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'"[229]

To determine whether Congress intended to bind the government contractually with the Recovery Act, the COFC looked to the plain language of the statute.[230] The court found that section 1531 of the Recovery Act does not frame the payments it authorizes as a contractual obligation;[231] instead, the COFC determined that section 1531 "merely set[] forth a payment program for issuers of qualifying bonds."[232]

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225. *Id.* at 757.

226. *Id.* The plaintiffs also alleged that the government violated section 1531 of the Recovery Act, which is outside the scope of this Article.

227. *Id.* at 767–68.

228. *Id.* The required elements to bind the United States government in contract are "(1) mutuality of intent to contract, (2) consideration, (3) lack of ambiguity in offer and acceptance, and (4) authority on the part of the government agent entering the contract." *Id.* (quoting Suess v. United States, 535 F.3d 1348, 1359 (Fed. Cir. 2008)).

229. *Id.* at 767 (internal quotations omitted) (quoting Dodge v. Bd. of Educ. of Chi., 302 U.S. 74, 79 (1937)).

230. *Id.* (citing Am. Bankers Ass'n v. United States, 932 F.3d 1375, 1382 (Fed. Cir. 2019)).

231. *Id.*

232. *Id.*

2. The Federal Circuit's decision

In a brief nonprecedential opinion, the Federal Circuit upheld the COFC's decision and "adopt[ed] its published opinions as [its] own."[233]

3. Takeaways

Although the Federal Circuit did not offer its own analysis of the claims in *Indiana Municipal Power*, its adoption of the COFC's "well-reasoned analysis" offers insight into how the court views implied-in-fact contracts.[234] Going forward, plaintiffs will face a high bar if they try to demonstrate that Congress intended to bind the government contractually through legislation and should be prepared to point to clear statutory language when arguing such a contract exists.

B. E&I Global Energy Services, Inc. v. United States

1. Procedural history and facts

The Department of Energy's Western Area Power Administration (WAPA) contracted with Isolux to build a high-voltage electricity substation in South Dakota where other sureties guaranteed to pay any debts Isolux owed to third parties (*e.g.*, subcontractors) regarding the performance of the contract.[235] WAPA terminated the contract with Isolux, and the sureties subsequently hired E&I Global Energy Services, Inc. (E&I) to replace Isolux.[236] Consequently, WAPA awarded E&I the contract originally awarded to Isolux.[237] E&I and the sureties agreed not to enter into "any settlement with respect to any Third Party Claim."[238] The subcontractors remained the same before and after E&I became the prime contractor for the project.[239]

Once E&I became the prime contractor, it immediately faced delays and issues with its subcontractors.[240] Isolux owed money to the subcontractors who refused to work because of the unpaid debts;[241] the

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233. Ind. Mun. Power Agency v. United States, 59 F.4th 1382, 1384 (Fed. Cir. 2023).
234. *Id.*
235. E&I Glob. Energy Servs., Inc. v. United States, No. 2022-1472, 2022 WL 17998224, at *1 (Fed. Cir. Dec. 30, 2022).
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*

sureties did not pay the subcontractors even though they were obligated to do so.[242] Because the subcontractors refused to work and the sureties did not pay them, E&I decided to pay the subcontractors so the project could be completed.[243] However, after E&I paid the subcontractors, it faced financial difficulty and asserted that it missed the contract deadline as a result.[244] WAPA then terminated E&I for default for not finishing the contract on time.[245]

E&I claimed that the termination for default was improper, citing an excusable delay resulting from its payment of Isolux's debt to the subcontractors, leading E&I to lack the funds necessary to timely complete the contract.[246] WAPA denied these claims, and E&I appealed to the COFC.[247] The court found for WAPA and held that the delay was inexcusable because the court viewed E&I's decision to pay the subcontractors as voluntary as well as a breach of its agreement with the sureties not to settle any third-party claims.[248] E&I appealed the court's decision to the Federal Circuit.[249]

2. The Federal Circuit's decision

The Federal Circuit found that the COFC erred in dismissing E&I's complaint because the delay could plausibly have been an excusable delay.[250] The court explained that the delay was likely caused both by subcontractor delays due to unforeseeable causes, as well as the acts of another contractor (the sureties), both of which are excusable delays.[251] The sureties should be treated as other contractors because, although they were not contract awardees, they issued bonds guaranteeing that Isolux's project under the contract would be completed and they would pay the subcontractors any unfulfilled debts Isolux owed them.[252] Furthermore, the Federal Circuit concluded that the sureties likely caused an unforeseeable delay because they were obligated to pay the debt Isolux owed the subcontractors.[253] This led

242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at *3.
247. *Id.* at *2.
248. *Id.* at *4.
249. *Id.* at *2.
250. *Id.* at *4–5.
251. *Id.*
252. *Id.* at *1, *3.
253. *Id.* at *3–4.

to E&I paying the subcontractors who delayed work until receiving payment, which was an excusable, foreseeable subcontractor delay.[254] Ultimately, this unforeseen payment led to E&I's inability to pay other expenses on the contract, resulting in E&I missing the contract deadline.[255] The court explained that the issue of whether E&I's decision to pay its subcontractors was "voluntary" could not be resolved from the developed record.[256]

Additionally, the Federal Circuit found that the government had not established that E&I breached its contract with the sureties because there was only a payment made to third parties (the subcontractors who refused to work), not necessarily a settlement, because the payment did not include any release of claims as required for a settlement.[257] In sum, the Federal Circuit did not decide this was an excused delay;[258] instead, it decided that the termination for default was likely incorrect and the contractor "is entitled to try to" prove its excusable delay.[259]

3. Takeaways

The main takeaway from this nonprecedential case is that sureties who act as guarantors for a prime contractor (*i.e.*, who agree to pay debt owed by the prime contractor incurred during the performance of the contract) are likely other government contractors in the context of excusable delays, and that if these other government contractors cause a delay, the delay is likely excusable.[260] However, the Federal Circuit has not definitively stated that these types of sureties are other government contractors and instead only stated that the delay caused by these sureties "closely matches" the type of excusable delay caused by other contractors.[261]

254. *Id.* at *4.
255. *Id.* at *5.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *See supra* notes 250–59 and accompanying text.
261. *E&I Glob. Energy Servs.*, 2022 WL 17998224, at *4.

C. Secretary of Defense v. Raytheon Co.

1. Procedural history and facts

In this case, the Secretary of Defense ("the Secretary") had a contract with Raytheon.[262] Raytheon was audited by the Defense Contract Audit Agency (DCAA), which found that Raytheon's timekeeping policies caused it to overcharge the government by receiving reimbursements for expressly unallowable costs.[263] Raytheon appealed this decision to the ASBCA, arguing that its timekeeping policies did not violate the FAR and it did not overcharge the government.[264]

Raytheon's timekeeping policies at issue involved its government-relations group and its corporate-development group.[265] Regarding the government-relations group, Raytheon billed the government for the government-relations employees' salaries without recording, and thus without retracting, certain time these employees spent on lobbying activities.[266] Essentially, Raytheon billed the government for time spent on lobbying activities.[267] Raytheon instructed its government-relations employees to record their time "spent on lobbying activities" so that accountants would know to withdraw these expenses from the cost submissions sent to the government for reimbursement.[268] However, Raytheon also instructed these employees not to record time worked outside of the "scheduled working day" even though such after-hours work was part of their regular duties.[269] Therefore, the government-relations employees did not record the time they spent on lobbying activities outside of 8 AM to 5 PM, Monday through Friday, and because they did not record this time for the accountants, the accountants did not retract this time from Raytheon's cost submissions sent to the government.[270] The government therefore reimbursed Raytheon for these hours spent on lobbying activities.[271]

Regarding its corporate-development group, Raytheon directed employees to record time spent on acquisitions and divestitures

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262. Sec'y of Def. v. Raytheon Co., 56 F.4th 1337, 1338 (Fed. Cir. 2023).
263. *Id.* at 1340.
264. *Id.*
265. *Id.* at 1339.
266. *Id.* at 1339–40.
267. *Id.* at 1339.
268. *Id.*
269. *Id.* at 1339–40.
270. *Id.*
271. *Id.* at 1340.

(unallowable costs) *only after* Raytheon submitted indicative offers to the identified targets (for acquisitions) and *only after* a decision was made to go to market with offering materials (for divestitures).[272] In other words, the time spent planning these decisions *before* the decisions were actually made was not recorded as time spent on acquisitions and divestitures and thus was not reported as time to be withdrawn from Raytheon's costs submittals.[273] Thus, Raytheon requested reimbursement for this time, and the government paid.[274]

The Secretary argued that Raytheon's billing policies were inconsistent with the FAR, which states (1) lobbying costs are unallowable and thus may not be charged to the government; (2) after-hours work on unallowable activities should be accounted for; and (3) costs associated with "planning . . . mergers and acquisitions" are unallowable.[275] The Secretary stated that this resulted in Raytheon overcharging the government for expressly unallowable costs.[276]

Conversely, Raytheon argued that the government was not overcharged for lobbying costs because Raytheon employees were only paid for a 40-hour work week and the time spent on non-reported lobbying occurred outside of the regular 40 hours per week.[277] Raytheon also argued that the government was not overcharged for corporate-development costs because there is not a bright line between unallowable organizational-planning costs and allowable economic or market-planning costs.[278] Raytheon argued that the FAR instead distinguishes between general (allowable) and specific (unallowable) acquisition planning costs, and the unreported time here was spent on general acquisitions.[279]

The ASBCA found that Raytheon's timekeeping policies did not violate the FAR, and thus, Raytheon did not overcharge the government.[280] The Secretary appealed the ASBCA's decision to the Federal Circuit.[281]

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272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.* at 1341; 48 C.F.R. §§ 31.205-22, 31.201-6(e)(2), 31.205-27(a)(1) (2024).
276. *Raytheon Co.*, 56 F.4th at 1341.
277. *Id.* at 1342.
278. *Id.* at 1344.
279. *Id.*
280. *Id.* at 1340–41.
281. *Id.* at 1341.

2. The Federal Circuit's decision

The Federal Circuit found that Raytheon overcharged the government because its billing policies violated the FAR provision expressly providing that lobbying and organization costs (acquisitions) are considered unallowable costs.[282]

Concerning the policies related to Raytheon's government-relations group, the Federal Circuit stated that their "time-paid accounting is a fiction that necessarily overcharges the government when it ignores time spent working on unallowable [lobbying] activities after regular business hours. Raytheon's lobbyists worked on unallowable activities after-hours, and their salaries necessarily compensated them for that time."[283] The Federal Circuit determined that the government was improperly charged for the after-hours time spent on lobbying because the hours were not reported as time spent on lobbying in the cost submittals for reimbursement from the government.[284]

Next, the Federal Circuit explained that a salary compensates an employee regardless of the hours the employee spends working, and that, by definition, a salary reflects extra time worked outside of normal business hours.[285] When Raytheon did not report the time its employees spent on lobbying outside of normal business hours, its employees' actual time spent was greater than what it reported to the government.[286] Hence, when Raytheon asked the government to reimburse these employees' salaries (which compensate and account for this extra or after-hours time spent on lobbying), and the government did reimburse these salaries, Raytheon was necessarily reimbursed for the extra time spent on lobbying, which is unallowable.[287]

In regard to Raytheon's billing policies for its corporate-development group, the Federal Circuit found that Raytheon similarly overcharged the government by submitting costs to the government that should have retracted time spent on the unallowable costs of planning mergers.[288] By recording time spent on acquisitions and divestitures (unallowable costs) only after Raytheon submitted

282. *Id.* at 1345.
283. *Id.* at 1342.
284. *Id.* at 1343.
285. *Id.* at 1342 & n.3.
286. *Id.* at 1343.
287. *Id.* at 1342.
288. *Id.* at 1344.

indicative offers to the identified targets (for acquisitions) and decided to go to market with offering materials (for divestitures), Raytheon did not accurately report the time spent on the planning leading up to these decisions.[289] These unallowable costs on time spent planning acquisitions were thus included in the cost submittals and subsequently reimbursed by the government.[290] The Federal Circuit found that Raytheon's policies drew "bright lines that start the clock on unallowable time at points obviously later than the FAR permits."[291]

Finally, the Federal Circuit rejected Raytheon's argument that the FAR is unclear because the FAR clearly states that "[e]conomic planning costs do not include organization or reorganization costs covered by [FAR] 31.205-27."[292] The court proclaimed that the FAR does not facially state that general acquisition costs are allowed while specific acquisition costs are not, but even if it did, Raytheon spent time on non-reimbursable specific acquisitions.[293]

3. Takeaways

The main takeaway in this precedential case is that contractors must report all time spent on unallowable costs. Because time spent on lobbying and organizational planning (*e.g.*, mergers and acquisitions) is unallowable, policies that do not require reporting time spent on these activities ultimately result in overcharging the government.

CONCLUSION

The Federal Circuit decided several important government procurement cases this past year. In *Eagle Peak,* the court clarified that termination for default cases requires a *de novo* standard of review, not an arbitrary and capricious or abuse of discretion standard of review.[294] The court also changed longstanding precedent by deciding that the issue of whether a protestor is an interested party is a nonjurisdictional question of statutory standing to be decided on the merits in *CACI*,[295] and by deciding that the sum-certain requirement for a claim is

289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.* (alteration in the original) (internal quotations omitted) (quoting 48 C.F.R. § 31.205-12 (2024)).
293. *Id.*
294. *See supra* notes 13–15 and accompanying text.
295. *See supra* note 62 and accompanying text.

nonjurisdictional in *ECC International*.[296] Government procurement attorneys should stay up to date with Federal Circuit decisions to ensure compliance with specific clarifications as well as broad changes in government procurement law.

296. *See supra* notes 165–69 and accompanying text.