2008 GOVERNMENT CONTRACT LAW DECISIONS OF THE FEDERAL CIRCUIT

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TABLE OF CONTENTS

INTRODUCTION

In 2008, the U.S. Court of Appeals for the Federal Circuit issued 242 precedential opinions. Of these, twenty-two were government contract cases. This article discusses all twenty-two precedent-setting opinions involving government contract law issues, setting forth the relevant facts, the Federal Circuit's analysis, and, where appropriate, the ramifications of these cases. The decisions are grouped into the following categories: jurisdiction, bid protests / preferences, contract formation, contract interpretation, contract performance / breach, assignment of claims, damages, attorneys' fees, and attorney sanctions.

I. JURISDICTION

A. Rick's Mushroom Service, Inc., v. United States[1]

In this appeal from an adverse U.S. Court of Federal Claims ("COFC") decision, Rick's Mushroom Service, Inc. ("Rick's") sought to establish that the Government was liable to pay for litigation and rehabilitation costs associated with the clean-up of a spent mushroom substrate ("SMS") transfer site.[2] The Federal Circuit affirmed the COFC's decision dismissing Rick's claim for lack of subject matter jurisdiction.[3]

Rick's predecessor signed a long-term cost-sharing agreement with the National Resources Conservation Service ("NRCS"), a branch of the U.S. Department of Agriculture charged with cooperating with state and local soil and water conservation districts to carry out improvements under the Watershed Protection and Flood Prevention Act.[4] Under the terms of the agreement, Rick's agreed to accept technical assistance from the NRCS in operating its facility in accordance with sound environmental practices, and the NRCS agreed to share the costs with Rick's of implementing those practices.[5]

In 2001, Rick's neighbors, Warren and John Reynolds, and the Wilmington Trust Company (collectively, "Reynolds"), filed suit against Rick's in the U.S. District Court for the Eastern District of Pennsylvania alleging that it operated its SMS transfer facility in violation of federal and state clean water laws.[6] In 2004, the district court issued a permanent injunction requiring Rick's to obtain Pennsylvania Department of Environmental Protection permits as a wastewater and solid waste facility.[7] It found that Rick's had failed to comply with some of the operational requirements of the local environmental management plan agreement and had caused the contamination of the Reynolds's property.[8] After the district court

1. 521 F.3d 1338 (Fed. Cir. 2008).
2. *Id.* at 1341.
3. *Id.* at 1340.
4. *Id.* at 1341.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

issued its order, Rick's agreed to settle the case for $950,000.[9] The NRCS drafted a rehabilitation plan and a roof structure plan to help eliminate some of the problems with waste discharge.[10] It did not indemnify Rick's for its losses in litigation or pay for the new roof structure.[11]

Rick's submitted a $5 million claim under the Contract Disputes Act ("CDA") to the contracting officer at NRCS.[12] The "contracting officer denied the claim, stating that because the contract was not a procurement contract for goods or services, but rather a cooperative agreement, the CDA was inapplicable."[13]

Rick's filed suit in the COFC under three legal theories.[14] In Count I, Rick's claimed it was entitled to recover its legal costs under a theory of "equitable indemnification based on an implied-in-fact warranty arising under the *Spearin*[15] doctrine."[16] The COFC rejected this first claim, concluding that it was precluded by the Anti-Deficiency Act ("ADA").[17] In Count II, Rick's asserted a breach of contract claim.[18] The COFC rejected this second claim because the contract between Rick's and NRCS was a cooperative agreement, not a procurement contract; thus, no basis for jurisdiction existed under the CDA.[19] In Count III, Rick's alleged a professional negligence claim.[20] The COFC rejected this claim because it was a claim sounding in tort.[21] Accordingly, the court dismissed the case for lack of subject matter jurisdiction.[22]

The Federal Circuit affirmed the COFC's dismissal of Rick's claim for lack of subject matter jurisdiction.[23] It reasoned that the jurisdictional reach of the COFC, as set forth in the Tucker Act, is limited to claims "founded either upon the Constitution or any Act of Congress or any regulation of an executive department, or *upon any*

9. *Id.*
10. *Id.* at 1341–42.
11. *Id.* at 1342.
12. *Id.*
13. *Id.*
14. *Id.*
15. *See* United States v. Spearin, 248 U.S. 132 (1918) (awarding contractor damages suffered from a flood caused by a sewer blockage omitted from the contract's specifications, where the contractor complied with all provisions of the specifications).
16. *Rick's Mushroom*, 521 F.3d at 1342 (citing Rick's Mushroom Serv., Inc. v. United States, 76 Fed. Cl. 250, 254 (2007)).
17. *Id.* (citing *Rick's Mushroom*, 76 Fed. Cl. at 261).
18. *Id.* (citing *Rick's Mushroom*, 76 Fed. Cl. at 254).
19. *Id.* (citing *Rick's Mushroom*, 76 Fed. Cl. at 258).
20. *Id.* (citing *Rick's Mushroom*, 76 Fed. Cl. at 254).
21. *Id.* (citing *Rick's Mushroom*, 76 Fed. Cl. at 256).
22. *Id.* (citing *Rick's Mushroom*, 76 Fed. Cl. at 262).
23. *Id.* at 1344.

express or implied contract with the United States, or for liquidated or unliquidated damages *in cases not sounding in tort*."[24] Accordingly, it concluded that because the plain language excludes from COFC jurisdiction claims sounding in tort, the COFC properly dismissed Rick's professional negligence claim.[25]

In addressing Rick's contract claim, the Federal Circuit observed the well-established principles of federal contracting law that the Tucker Act does not extend to every contract[26] and that, to establish jurisdiction in the COFC, "the plaintiff must look beyond the Tucker Act to identify a substantive source of law that creates the right to recovery of money damages against the United States."[27] It concluded that Rick's cost-share agreement with the Government did not contain an express provision providing a substantive right to recover money damages and that, notwithstanding Rick's attempt to rely upon the CDA, the CDA did not provide a substantive right to recover money damages.[28] The Federal Circuit found the COFC's reasoning that the cost-share agreement was not a procurement contract to be persuasive.[29] Furthermore, it found no basis to re-examine the COFC's decision in light of the fact that Rick's claim was based, in part, upon an implied-in-fact contract.[30] That Rick's was unable to identify a money-mandating provision under 28 U.S.C. § 1491(a)(1) or allege an implied-in-fact contract for procurement of goods or services within the CDA proved to be fatal to Rick's contract claim.[31]

The Federal Circuit also rejected Rick's third argument that the Government should be held liable for the costs Rick's incurred in defending the lawsuit against Reynolds because the cost-share agreement, which detailed design specifications for the SMS transfer, gave Rick's an implied warranty that the transfer facility would be adequate and the Government would be liable for any defects.[32] The Federal Circuit reasoned that, in order for Rick's to establish that the COFC possessed jurisdiction to entertain its breach of implied warranty claim, it had to establish that the court possessed jurisdiction over its cost-share agreement.[33] Since the COFC had

24. *Id.* at 1343 (quoting 28 U.S.C. § 1491(a) (2006)).
25. *Id.* (citing 28 U.S.C. § 1491(a)(1)).
26. *Id.* (citing Kania v. United States, F.2d 264, 268 (Ct. Cl. 1981)).
27. *Id.* (citing United States v. Mitchell, 463 U.S. 206, 216 (1983)).
28. *Id.*
29. *Id.* at 1344.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*

already determined that it lacked jurisdiction over that agreement, Rick's was unable to establish that the COFC possessed jurisdiction to entertain its breach of implied warranty claim.[34] The Federal Circuit concluded, furthermore, that the *Spearin* doctrine was inapplicable because, even if the doctrine applied outside of the procurement context, it applied only when the contract contains design specifications, not performance specifications, such as those found in Rick's cost-sharing agreement.[35]

The Federal Circuit concluded, furthermore, that Rick's lawsuit was barred by the Supreme Court's decision in *Hercules, Inc. v. United States*,[36] which held that the company could not recover, from the Government, costs it incurred in defending and settling Agent Orange lawsuits brought by third parties because the ADA "would bar such an open-ended indemnification agreement."[37] The Federal Circuit held that, "[b]ecause the contracting officer would have no authority under the ADA to enter into an indemnity agreement without an appropriation, we cannot find an implied-in-fact warranty by the Government to indemnify Rick's for its litigation costs in defending against third party claims."[38]

The Federal Circuit rejected Rick's claim that it was denied due process, even though the Government had not raised the ADA issue until the supplemental briefing stage.[39] It also rejected Rick's contention that the court improperly denied Rick's discovery regarding whether certain funds had been exhausted.[40] The Federal Circuit held that, because there had never been an appropriation for indemnification of third-party claims, the COFC did not abuse its discretion in disallowing discovery regarding whether the funds were exhausted.[41]

Finally, the Federal Circuit rejected Rick's claim that the COFC abused its discretion in declining to transfer its professional negligence claim to the district court.[42] The court reasoned that, because Rick's had never presented a written professional negligence claim for money damages to the USDA, Rick's had failed to satisfy the

34. *Id.*
35. *Id.* at 1344, 1345.
36. 516 U.S. 417 (1996).
37. *Rick's Mushroom*, 521 F.3d at 1345 (citing *Hercules*, 516 U.S. at 426–28).
38. *Id.* at 1346.
39. *Id.*
40. *Id.* at 1346–47.
41. *Id.* at 1347.
42. *Id.*

exhaustion requirements set forth in 28 U.S.C. § 2675(a), the Federal Tort Claims Act.[43]

B. Distributed Solutions, Inc., v. United States[44]

In *Distributed Solutions, Inc. v. United States*,[45] Distributed Solutions, Inc. ("DSI") and STR, L.L.C. ("STR"), appealed the dismissal of their complaint by the COFC based upon their contention that the court failed to interpret properly the basis of their complaint.[46] The Federal Circuit reversed the COFC's decision, determining that the court possessed jurisdiction to entertain DSI's and STR's complaint because 28 U.S.C. § 1491(b) expressly permits the filing of protests of pre-procurement decisions, such as an agency's determination of a need for property or services.[47] The Federal Circuit remanded the case to the COFC to determine whether the Government's decision to task SRA International, Inc. ("SRA") to select the vendors who would purchase software—instead of procuring the software through a direct competitive process—was a violation of the statute.[48]

The case arose "from a dispute related to the procurement of software for the Joint Acquisition and Assistance Management System program ("JAAMS"), a program initiated by the United States Agency for International Development . . . and the Department of State . . . to develop a common computer platform between the two agencies."[49] The General Services Administration ("GSA") awarded a Millenia Government Wide Acquisition Contract to nine prime contractors, including SRA, to provide technical services and support for information technology purposes.[50] In June 2005, the Government issued a Request for Information ("RFI") soliciting software vendors to provide a self-assessment of their products that satisfied JAAMS requirements and to present product demonstrations, which the RFI specified would be "'for market research purposes only' and would 'not result in a contract award.'"[51] The Government anticipated that it would "'review the results of the vendor self-assessments and the presentations to determine the next course of action for the JAAMS effort.'"[52]

43. *Id.*
44. 539 F.3d 1340 (Fed. Cir. 2008).
45. *Id.*
46. *Id.* at 1343–44.
47. *Id.* at 1346.
48. *Id.* at 1343–44, 1346.
49. *Id.* at 1342.
50. *Id.*
51. *Id.*
52. *Id.*

After its review was complete, the Government decided to pursue another course of action, using SRA to integrate the various acquisition and assistance functions necessary to implement JAAMS.[53] Therefore, under this plan, SRA was tasked with selecting the various vendors needed to provide the necessary software.[54] SRA issued an RFI of its own, and, with approval from the Government, selected and awarded subcontracts to various vendors.[55] Although DSI and STR both submitted and demonstrated software, they were not selected, and, in response, they separately filed protests with the General Accounting Office ("GAO"), which were dismissed because the procurement was not subject to GAO jurisdiction.[56]

DSI and STR consolidated their protest before the COFC.[57] The Government filed a motion to dismiss the complaint for lack of jurisdiction contending that the protest was not viable because the award was a subcontract made by a contractor, not a Federal agency.[58] The COFC determined that the decision to task SRA with selecting software vendors for JAAMS simply added to the work of an already existing task order and that, "because SRA was not a purchasing agent for the Government, the subcontracts awarded were not on behalf of a federal agency and therefore were not subject to a bid protest."[59] Accordingly, the COFC dismissed the complaint.

On appeal, DSI and STR argued that they were not contesting SRA's award of the software subcontracts, but rather the Government's decision to task SRA with awarding subcontracts for the purchase of software.[60] Section 1491(b) of title 28 establishes the jurisdictional prerequisites for the COFC's jurisdiction in bid protest cases.[61] Paragraph (1) of that subsection provides:

> [T]he United States Court of Federal Claims . . . shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation *in connection with a procurement or a proposed procurement*.[62]

53. *Id.* at 1342–43.
54. *Id.* at 1343.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 1343–44.
61. *Id.* at 1344 (citing 28 U.S.C. § 1491(b)(1)).
62. *Id.* at 1344 (quoting 28 U.S.C. § 1491(b)(1)).

The COFC determined that DSI and STR were interested parties for the purpose of the statute and that they had alleged that the Government violated sections of the Competition in Contracting Act,[63] the Small Business Act,[64] and various Federal Acquisition Regulations due to its decision to forego the direct competitive procurement process and to task SRA with the responsibility of indirectly selecting software vendors.[65]

The only remaining issue was "whether the contractors' protest [was] 'in connection with a procurement or a proposed procurement' under the scope of [§] 1491(b)."[66] The Federal Circuit concluded that there was no question that "'the operative phrase 'in connection with' is very sweeping in scope.'"[67] The Federal Circuit noted that Tucker Act did not define the terms "procurement" or "proposed procurement."[68] Therefore, the Federal Circuit adopted the definition of "procurement" found in 41 U.S.C. § 403(2)[69] to define those terms for the purposes of the Tucker Act.[70] Based upon this analysis, the Federal Circuit concluded that "[t]o establish jurisdiction pursuant to this definition, the contractors must demonstrate that the Government at least initiated a procurement, or initiated 'the process for determining a need' for acquisition and assistance solutions for JAAMS."[71]

The Federal Circuit agreed with the trial court that adding work to an existing contract that is within the scope of the contract is not a basis for a protest under § 1491(b)(1).[72] However, the Federal Circuit distinguished this case from *AT&T Communications, Inc. v. Wiltel, Inc.*,[73] noting that, to the extent that "the government used an RFI to solicit information from outside vendors, and then used this information to determine the scope of services required by the government," the COFC possesses jurisdiction to review these "pre-procurement decisions by vesting jurisdiction in the [COFC] over

63. 31 U.S.C. §§ 3551–3556 (2006); 41 U.S.C. §§ 253(a)–(b), 416, 418 (2006).
64. 15 U.S.C. § 631(j)(3) (2006).
65. *Distributed Solutions*, 539 F.3d at 1344–45.
66. *Id.* at 1345.
67. *Id.* (quoting RAM-COR Servs. Group, Inc. v. United States, 185 F.3d 1286, 1289 (Fed. Cir. 1999)).
68. *Id.*
69. Section 403(2) states that "'procurement' includes all stages of the process of acquiring property or services, *beginning with the process for determining a need* for property or services and ending with contract completion and closeout." 41 U.S.C. § 403(2) (2006) (emphasis added).
70. *Distributed Solutions*, 539 F.3d at 1345 (referring to 28 U.S.C. § 1491(b)).
71. *Id.* at 1346.
72. *Id.* (citing AT&T Commc'ns, Inc. v. Wiltel, Inc., 1 F.3d 1201 (Fed. Cir. 1993)).
73. 1 F.3d 1201.

'proposed procurements,'" which "begins with the process for determining a need for property or services."[74] Given that the Government had conducted a proposed procurement, the Federal Circuit concluded that the COFC erred in not exercising its jurisdiction to entertain DSI's and STR's complaint.[75]

C. Phillips/May Corp. v. United States[76]

The appeal in *Phillips/May Corp. v. United States*[77] stemmed from the COFC's determination that the claim of Phillips/May Corp. ("Phillips") was barred by res judicata.[78] The COFC concluded that the doctrine of claim preclusion prevented the court from considering Phillips's inspection claim for "Delay, Mal-Administration of the Contract, Overzealous Inspection and Impossibility" ("Inspection Claim"), because the claim was based upon the same transactional facts as nine claims arising out of a contract for the design, labor, materials, and equipment necessary to construct a religious facility at the Naval Air Station-Joint Reserve Base ("NAS-JRB") in Fort Worth, Texas that had been previously adjudicated by the Armed Services Board of Contract Appeals ("Board").[79]

Phillips submitted ten claims to the contracting officer at NAS-JRB between July 10, 2003, and November 12, 2003.[80] It submitted an Inspection Claim to the contracting officer on November 7, 2003.[81] The contracting officer did not take action on any of the claims within the sixty days prescribed by the statute, so, pursuant to 41 U.S.C. § 605(c)(5), they became appealable as a deemed denial between September 8, 2003, and January 11, 2004.[82] Phillips appealed all but the Inspection Claim to the Board between September 8, 2003, and January 11, 2004.[83] One of the claims was settled, but an administrative judge ("AJ") heard the remaining eight appeals between March 29 and April 2, 2004, and decided them from the bench.[84] The parties ultimately settled the nine Board appeals through a global settlement agreement, and on June 30, 2005, the

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74. *Distributed Solutions*, 539 F.3d at 1346.
75. *Id.*
76. 524 F.3d 1264 (Fed. Cir. 2008).
77. *Id.*
78. *Id.* at 1266–67.
79. *Id.* at 1266.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 1267.

Board entered judgment accordingly.[85] As of January 2006,[86] the contracting officer still had not issued a final decision with respect to the Inspection Claim, so, on January 19, 2006, Phillips appealed that claim in the COFC.[87] Following the contracting officer's issuance of his final decision, the Government filed a motion for summary judgment based upon the doctrine of claim preclusion, which the COFC granted.[88]

As the Federal Circuit observed, the doctrine of finality provides that, when a final judgment has been entered on the merits of a case, it is a finality, not only to the claims in controversy, but also to "'any other admissible matter which might have been offered for that purpose.'"[89] The court noted that "[c]laim preclusion applies when: '(1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first.'"[90] Claim preclusion applies to boards of contract appeals that are acting in a judicial capacity and resolving disputes which the parties had an adequate opportunity to litigate.[91]

The Federal Circuit considered and rejected all three of Phillips's arguments that claim preclusion did not apply. In its first argument, Phillips contended that § 609(a)(1)[92] together with § 609(d)[93] of the Contract Disputes Act of 1978 ("CDA"),[94] permits a claimant to split

85. *Id.*
86. The contracting officer denied the claim in its entirety in a decision issued on June 9, 2006, because "'pursuant to the legal principles of res judicata and collateral estoppel,'" the issues raised by the Inspection Claim were included in Phillips's other, finally adjudicated claims. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 1267–68 (quoting Nevada v. United States, 463 U.S. 110, 129–30 (1983)).
90. *Id.* at 1268 (quoting Ammex, Inc. v. United States, 334 F.3d 1052, 1055 (Fed. Cir. 2003)).
91. *Id.* (quoting United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966)).
92. Section 609(a)(1) permits contractors to choose a forum for their appeals: "[I]n lieu of appealing the decision of the contracting officer . . . to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary." 41 U.S.C. § 609(a)(1) (2006).
93. Section 609(d) provides:

> If two or more suits arising from one contract are filed in the United States Court of Federal Claims and one or more agency boards, for the convenience of the parties or witnesses or in the interest of justice, the United States Court of Federal Claims may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

41 U.S.C. § 609(d).
94. 41 U.S.C. §§ 601–613.

claims arising from the same contract between an agency board of contract appeals and the COFC.[95] Conceding that the statute is somewhat ambiguous as to whether it permits "the filing of all claims arising from a single contract in separate fora," or "only claims that do not arise from the same transactional facts," the Federal Circuit examined the history of the CDA.[96] The court noted that, in the Senate Committees on Governmental Affairs and the Judiciary version of the CDA, section 609(d) would have expressly permitted claim splitting.[97] However, Congress removed section 609(d) before it was passed, and the Senate's draft of section 609(e)[98] became section 609(d) in the current version of the statute.[99] The Federal Circuit concluded that "[t]he elimination of original subsection (d) strongly suggests that Congress did not intend to allow contractors to avoid the effects of claim preclusion by splitting factually related claims."[100] The court noted, in addition, that the amendment deleting the original section 609(d) was accompanied by Senate Majority Leader Robert C. Byrd's explanation:

> The amendment . . . is out of a concern that the section might be interpreted as permitting the contractors to split claims arising out of the same set of facts, thereby needlessly multiplying causes of action and encouraging forum shopping. It is not the intention of the committees to change the present law regarding joinder, compulsory counterclaims and definition of separate claims.[101]

Based upon this passage, the Federal Circuit concluded that "Congress definitively rejected the idea that the CDA was abrogating the doctrine of claim preclusion and permitting the splitting of

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95. *Phillips/May*, 524 F.3d at 1268.

96. *Id.* at 1268–69.

97. Section 609(d) provided:

> Except as otherwise provided in this Act, and notwithstanding any statute or other rule of law, or any contract provision, every claim founded upon the same express or implied contract with the United States shall constitute a separate cause of action for purposes of any suit in a court of competent jurisdiction, and such court may, in its discretion, consolidate separate claims for purposes of decision or judgment, or delay acting on claim pending action on another claim.

124 CONG. REC. 36,263 (1978) (emphasis added).

98. Section 609(e) provided for the consolidation of split claims by the Court of Claims:

> If two or more suits arising from one contract are filed in the Court of Claims and one or more agency boards, for the convenience of parties or witnesses, in the interest of justice, *the Court of Claims may order the consolidation* of such suits in that court or transfer any suits to or among the agency boards involved.

Id. (emphasis added).

99. *Phillips/May*, 524 F.3d at 1269.

100. *Id.*

101. *Id.* at 1267 (quoting 124 CONG. REC. 36,267 (1978)).

claims based on the same set of transactional facts."[102] Accordingly, it rejected Phillips's arguments to the contrary.[103]

The Federal Circuit also rejected Phillips's argument that it should be permitted to split its claims because the claims could not have been appealed together.[104] First, the court concluded that, even though the contracting officer did not issue his final decision on Phillips's Inspection Claim until the other nine claims had been adjudicated by the Board, it was within Phillips's control to make all ten claims ripen for review at once.[105] Phillips "could not avoid the application of res judicata through strategic delay."[106] Second, the Federal Circuit concluded that, even though the Inspection Claim did not qualify for the Small Claims Accelerated Procedure under which the Board resolved the other nine claims, nothing in the CDA supported Phillips's contention that a contractor has an absolute right to that accelerated procedure to prevent the application of claims preclusion.[107]

Finally, the Federal Circuit rejected Phillips's contention that the COFC could split the claims because they were factually distinct.[108] The Federal Circuit observed that courts would permit a party to split claims "if, for example, the two claims involve[d] different sets of transactional facts."[109] The court noted that such a determination is made pragmatically, but that, within the contracts context, "claims under a single contract generally must be brought together."[110] Even though the case was decided before the enactment of the CDA, the Federal Circuit adopted the rule applied in *Container Transport International, Inc. v. United States*,[111] that res judicata should bar a second claim that is brought under a "'single, indivisible contract,'" "because '[t]here was no obstacle to putting both aspects of the demand in one suit, and that would be the normal expectation for a claimant [in the circumstances].'"[112] The court, then, demonstrated the significant overlap between the Inspection Claim and the various design change, delay, and overzealous and delayed inspection claims,

102. *Id.* at 1270.
103. *Id.*
104. *Id.*
105. *Id.* at 1271.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*; RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1982).
111. 468 F.2d 926 (Ct. Cl. 1972).
112. *Phillips/May*, 524 F.3d at 1271–72 (alteration in original) (quoting *Container Transp. Int'l*, 468 F.2d at 928–29).

which were the subject of five of the claims before the Board.[113] It concluded that the Inspection Claim and the Board appeals "were based on the 'same set of transactional facts.'"[114] Accordingly, because the parties conceded that the claims involved the same parties and that the Board proceeded to final judgment on the merits, all three claim preclusion factors had been met.[115] Thus, the Federal Circuit concluded that the COFC correctly had determined that Phillips's complaint was barred by claim preclusion.[116]

D. Tamerlane, Ltd. v. United States[117]

In *Tamerlane, Ltd. v. United States*,[118] Mullica West Limited ("Mullica") and Park Terrace Limited ("Park Terrace") challenged the COFC's decision that their breach of contract claims were barred by the six-year statute of limitations found in 28 U.S.C. § 2501.[119] The Federal Circuit held that the COFC correctly had concluded that the statute of limitations period within which Mullica and Park Terrace were required to file their breach of contract claims was not extended by virtue of their entering into subsequent incentive contracts.[120] In addition, the Federal Circuit determined that the COFC had not erred when it stated that its opinions[121] did not propose to dismiss Mullica's and Park Terrace's claims regarding the incentive equity loan contracts because they were not pled in the complaint.[122] Moreover, the circuit court concluded that the COFC did not abuse its discretion when it refused to allow Mullica and Park Terrace to amend their complaint to introduce separate and independent causes of action.[123]

This case arose out of Mullica's and Park Terrace's loans from the Farmers Home Administration of the United States Department of Agriculture ("FmHA") "to further the government's interest in

113. *Id.* at 1272–73.
114. *Id.* at 1273 (quoting Ammex, Inc. v. United States, 334 F.3d 1052, 1055 (Fed. Cir. 2003)).
115. *Id.*
116. *Id.*
117. 550 F.3d 1135 (Fed. Cir. 2008).
118. *Id.*
119. *Id.* at 1136–37. Section 2501 provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (2006).
120. *Id.* at 1145.
121. This appeal stems from three COFC opinions: *Tamerlane, Ltd. v. United States*, 81 Fed. Cl. 511 (2008); *Tamerlane, Ltd. v. United States*, 80 Fed. Cl. 724 (2008); and *Tamerlane, Ltd. v. United States*, 76 Fed. Cl. 512 (2007).
122. *Tamerlane*, 550 F.3d at 1146.
123. *Id.*

providing rental housing for low and moderate income persons."[124] Mullica and Park Terrace contended that the Government breached their loan agreements when the Government refused to allow them to prepay the remaining mortgage balance for the loan to enable them to convert the property from rental housing for low- and moderate-income persons to market-rate rental property.[125] Mullica submitted its initial offer to prepay its loan in an October 1988 letter.[126] The FmHA denied Mullica's request on March 30, 1989.[127] On March 14, 1991, the FmHA offered Mullica an incentive equity loan, requiring Mullica to agree to continue using the property for low- and moderate-income housing for twenty years.[128] Mullica took out this incentive equity loan on June 18, 1991.[129] Park Terrace requested to prepay its loan on November 19, 1991, and the FmHA denied this request in a June 1992 letter, which also included an offer to take out an incentive equity loan similar to the one offered to Mullica.[130] Park Terrace entered into this new incentive equity loan agreement with FmHA in 1993.[131] Mullica and Park Terrace filed suit in the COFC in 2005.[132]

The thrust of Mullica's and Park Terrace's argument on appeal was that, within the meaning of *Franconia Associates v. United States*,[133] the prepayment offers did not constitute "tender" of prepayment.[134] They contend that the Government's response—the offering of incentive loans—constituted a breach of the Government's obligation to accept prepayment at any time.[135] The Federal Circuit disagreed.[136] It determined that the "*Franconia* decision requires no more formalism than the written request to prepay followed by non-acceptance of the request by the government to trigger the running to the statute of limitations."[137] It held that the COFC correctly had ruled that, by the dates that Mullica and Park Terrace had entered into the incentive loans, "breach-triggering rejections had occurred."[138] The Federal

124. *Id.* at 1137.(citing Franconia Assocs. v. United States, 536 U.S. 129, 134 (2002)).
125. *Id.* at 1138–39.
126. *Id.* at 1138.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. 536 U.S. 129, 134 (2002).
134. *Id.* at 1143.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*

Circuit, furthermore, rejected the argument that the prepayment letters "were just part of a mechanical process to get incentives, and were never intended to declare the government in breach of the underlying loan agreements."[139] Accordingly, the Federal Circuit ruled that the six-year statute of limitations expired in 1997 for Mullica and in 1998 for Park Terrace.[140]

II. BID PROTESTS / PREFERENCES

A. Rothe Development Corp. v. Department of Defense[141]

Rothe Development Corp. v. Department of Defense[142] (*Rothe VII*) concerned the constitutionality of 10 U.S.C. § 2323 (Section 1207 of the Small Business Act), which in relevant part "sets a 'goal' that five percent of federal defense contracting dollars for each fiscal year be awarded to certain entities including small business concerns owned and controlled by 'socially and economically disadvantaged individuals.'"[143] At issue here was whether section 1207, on its face, as reenacted in 2006, violated the right to equal protection under the Fifth Amendment of the United States Constitution.[144]

Rothe Development Corporation ("Rothe") bid on a contract with the U.S. Department of the Air Force ("Air Force") to maintain, operate, and repair computer and communications systems at one of the Air Force bases.[145] The solicitation at issue was subject to the section 1207 program, which grants businesses owned by certain minorities and certified as small, disadvantaged businesses a preference. One of Rothe's competitor's, International Computer and Telecommunications, Inc. ("ICT"), which was owned by a Korean-American couple and was certified as a small, disadvantaged business ("SDB"), also bid on the contract.[146] Because of the preference ICT received from the Air Force due to its SDB status, the Air Force awarded the contract to ICT even though Rothe's bid was actually the lowest bid.[147]

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139. *Id.* at 1144.
140. *Id.* at 1145.
141. (*Rothe VII*), 545 F.3d 1023 (Fed. Cir. 2008).
142. *Id.*
143. *Id.* at 1026. The Small Business Act presumes that Black Americans, Asian Americans, Hispanic Americans and Native Americans are socially disadvantaged individuals. *Id.*
144. *Id.* at 1027.
145. *Id.* at 1030.
146. *Id.*
147. *Id.*

Rothe protested the Air Force's award to ICT in the District Court of the Western District of Texas challenging the constitutionality of section 1207.[148] The district court granted summary judgment to the Government,[149] after which Rothe appealed to the Federal Circuit.[150] The Federal Circuit vacated the district court's decision and remanded for further proceedings because "'the district court improperly applied a deferential legal standard rather than "strict scrutiny," and also impermissibly relied on post-reauthorization evidence to support [section 1207's] constitutionality as reauthorized.'"[151] Ultimately, the district court found section 1207 constitutional, holding that "the 2006 Reauthorization of the 1207 Program satisfie[d] the requirements of strict scrutiny," that "Congress had a compelling interest when it reauthorized the 1207 Program," that the "compelling interest was supported by a 'strong basis in the evidence'" and that the 1207 Program was narrowly tailored to that compelling interest.[152]

Rothe appealed, contending that, contrary to the district court's holding, on its face section 1207, as reenacted in 2006, violates the equal protection component of the Fifth Amendment right to due process.[153] The Federal Circuit agreed with Rothe and, as discussed below, reversed the judgment of the district court.[154]

The Federal Circuit began its analysis by explaining that "[b]ecause Section 1207 incorporates an explicit racial classification—the presumption that members of certain minority groups are 'socially disadvantaged' for purposes of obtaining SDB status and the benefits that flow from that status under Section 1207 itself—the statute is subject to strict scrutiny."[155] In applying strict scrutiny, the court considered, inter alia, whether the Government has a "compelling interest in 'remedying the effects of past or present racial discrimination'" and whether Congress had a "strong basis in evidence" to believe that remedial action based on race was

148. *Id.*

149. Rothe Dev. Corp. v. U.S. Dep't of Def. (*Rothe I*), 49 F. Supp. 2d 937, 954 (W.D. Tex. 1999).

150. Rothe initially appealed to the Fifth Circuit, but the Fifth Circuit transferred the case to the United States Court of Appeals for the Federal Circuit based on that part of Rothe's claim was based on the "Little Tucker Act." Rothe Dev. Corp. v. U.S. Dep't of Def., 194 F.3d 622, 625 (5th Cir. 1999) (*Rothe II*).

151. *Rothe VII*, 545 F.3d at 1031 (alteration in original) (quoting Rothe Dev. Corp. v. U.S. Dep't of Def. (*Rothe III*), 262 F.3d 1306, 1312 (Fed. Cir. 2001)).

152. Rothe Dev. Corp. v. U.S. Dep't of Def. (*Rothe VI*), 499 F. Supp. 2d 775, 884 (W.D. Tex. 2007).

153. *Rothe VII*, 545 F.3d at 1035.

154. *Id.*

155. *Id.*

necessary.[156] The district court had held that the Government satisfied its burden of producing a strong basis in the evidence for remedial action based on "non-stale statistical and anecdotal evidence before Congress [that] 'constitute[d] prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting.'"[157] On this point, the Federal Circuit disagreed, explaining that the studies at issue "do not provide a substantially probative and broad-based statistical foundation necessary for the 'strong basis in evidence' that must be the predicate for nationwide, race-conscious action."[158]

Accordingly, the court held section 1207 to be unconstitutional, stating that "because Congress did not have a 'strong basis in evidence' upon which to conclude that DOD was a passive participant in pervasive, nationwide racial discrimination—at least not on the evidence produced by DOD and relied on by the district court in this case—the statute fails strict scrutiny."[159] The Court reversed the judgment of the district court in part, and remanded with instructions to enter a judgment declaring that section 1207, as enacted in 2006, was facially unconstitutional and to enjoin application of the current 10 U.S.C. § 2323.[160]

III. CONTRACT FORMATION

A. Mola Development Corp. v. United States[161]

In *Mola Development Corp. v. United States*,[162] the Federal Circuit addressed two contract issues: (1) when the statute of limitations began to run on a thrift's *Winstar*-related, breach-of-contract claim, and (2) whether the Government intended to form a supervisory merger contract regarding the regulatory treatment of goodwill.[163] The Federal Circuit determined that the statute of limitations was not triggered until regulations promulgated under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") became effective on December 7, 1989.[164] The Federal

156. *Id.* at 1036.
157. *Id.* (alteration in original).
158. *Id.* at 1040.
159. *Id.* at 1050.
160. *Id.*
161. 516 F.3d 1370 (Fed. Cir. 2008).
162. *Id.*
163. *Id.* at 1373. For a brief introduction and background on the *Winstar* line of cases, *see infra* Part VII (discussing the *Winstar* cases, which arose from the 1970s savings and loan crisis).
164. *Mola*, 516 F.3d at 1377.

Circuit also held that documents, negotiations, and the designation of the merger as "supervisory" failed to show the Government's intent to agree to a goodwill contract.[165]

Mola Development Corporation ("Mola") owned a controlling interest in Charter Savings Bank ("Charter"), a troubled savings and loan.[166] Mola identified Merit Savings Bank ("Merit"), another troubled financial institution, as a suitable merger partner with Charter.[167] Mola subsequently met with the Government to discuss the regulatory approval of the proposed merger between Charter and Merit, which required authorization from the Federal Home Loan Bank Board ("FHLBB").[168] In these meetings, "Mola requested that the government classify the merger as supervisory and that it allow Mola to make a non-cash contribution . . . to bring the merged entity into compliance with capital requirements."[169] Although neither request was granted at the time, Mola subsequently filed a formal application with the FHLBB of the proposed merger, which "provided for use of the purchase method of accounting[170] and amortization of any resulting regulatory goodwill[171] over a period not to exceed twenty-five years."[172] After the formal application was submitted, the Government stated that it would not accept the merger without a cash contribution sufficient to the meet the regulatory minimum capital levels.[173] In a subsequent letter, FHLBB preliminarily approved the merger and classified it as "supervisory."[174] However, "[t]he FHLBB's approval letter did not mention regulatory treatment of goodwill."[175] On July 31, 1989, one year after the

165. *Id.* at 1378–80.
166. *Id.* at 1373.
167. *Id.*
168. *Id.*
169. *Id.*
170. The "purchase method of accounting" is addressed in the FHLBB's Internal Memorandum SP-24 dated December 29, 1981. *Id.* at 1379. Where a merger of purchase of assets occurs, this method "calculates combined assets as if the dominant entity purchased the acquired entity by assuming its liabilities." *Id.* This is in contrast to the pooling method, "which aggregates the assets and liabilities of the merging entities." *Id.* The purchase method is the only method that recognizes goodwill as an asset of the merged entity. *Id.*
171. Under FIRREA, "supervisory goodwill" is defined to mean "'goodwill resulting from the . . . combination of any savings association where the market value of the assets acquired was less than the market value of the liabilities at the time of the transaction and where the accounting treatment of the goodwill has been approved by the [FHLBB].'" *Id.* at 1380 n.8 (alterations in original) (quoting H.R. REP. NO. 101-54(I), at 432 (1989), *as reprinted in* 1989 U.S.C.C.A.N. 86, 228).
172. *Id.* at 1373.
173. *Id.* at 1373–74.
174. *Id.* at 1374.
175. *Id.*

merger, the FHLBB designated Charter as a "troubled institution," imposed restrictions on its ability to increase its assets or liabilities, and noted the probability that Charter would not be able to comply with the stricter capital requirements that would soon be imposed by FIRREA.[176] FIRREA, enacted on August 9, 1989, prohibited the use of regulatory goodwill as a capital asset.[177] The newly-created Office of Thrift Supervision subsequently issued regulations implementing FIRREA, which became effective on December 7, 1989.[178] Because Charter was not in compliance with the new regulations, the Government seized Charter and liquidated its assets.[179]

On December 5, 1995, Mola filed a compliant in the COFC arguing, inter alia, "that the implementation of FIRREA breached a contract between Mola and the government."[180] The COFC denied a Government motion to dismiss on the ground that Mola's breach of contract claim was barred by the statute of limitations, but granted summary judgment to the Government, finding no contract between Mola and the Government relating to goodwill.[181] The Government appealed the denial of its motion to dismiss on statute of limitations grounds and Mola appealed the judgment on the merits.[182]

i. Statute of Limitations

Under the Tucker Act, claims against the Government are subject to a six-year statute of limitations.[183] On appeal, the Government argued that the COFC erred in holding that the limitations period did not begin to run until after the FIRREA regulations became effective on December 7, 1989.[184] The Government argued that the statute of limitations began to run when FIRREA was enacted on August 9, 1989, thus precluding Mola's claims filed more than six years later on December 5, 1995.[185] The Federal Circuit rejected the Government's argument, citing *Bank of America FSB v. Doumani*,[186] which held that the mere passage of FIRREA did not trigger the

176. *Id.*
177. *Id.* A more detailed history and circumstances surrounding the thrift crisis and enactment of FIRREA are discussed in *United States v. Winstar Corp.*, 518 U.S. 839, 843–58 (1996).
178. *Mola*, 516 F.3d at 1374.
179. *Id.*
180. *Id.*
181. *Id.* at 1374–75.
182. *Id.* at 1375.
183. *Id.* (citing 28 U.S.C. § 2501).
184. *Id.*
185. *Id.*
186. 495 F.3d 1366 (Fed. Cir. 2007).

limitations period for *Winstar* claims.[187] Alternatively, the Government argued that the statute of limitations began to run on July 31, 1989, when FHLBB designated Charter as a "troubled institution" and imposed restrictions on Charter.[188] The Federal Circuit has recognized instances where the statute of limitations may be triggered before the adoption of FIRREA's implementing regulations, but there must be "'a requirement for [the thrift] to take specific action contrary to its existing contract.'"[189] Although the July 31, 1989 letter imposed restrictions on Charter, these restrictions related to concerns about "management, operating margins, level of tangible capital, and business plan, and were not based on the impending enactment of FIRREA."[190] Accordingly, the Federal Circuit rejected the Government's argument and concluded that that statute of limitations was not triggered until the regulations became effective on December 7, 1989.[191] Because Mola's claims were filed within six years of this date, the statute of limitations did not bar Mola's claim.[192]

ii. Intent to Enter into a Winstar *Contract*

Like any other government contract, in order for a *Winstar* plaintiff to prevail on a breach-of-contract claim, a plaintiff must show, inter alia, intent to enter into a *Winstar* contract.[193] The Federal Circuit has previously found that "'regulatory proclamations are insufficient to create contractual obligations because . . . [m]ere approval of the merger does not amount to [an] intent to contract.'"[194] Although a formal written agreement is not necessary, there must be "something more" than mere regulatory approval of a merger.[195]

On appeal, the Federal Circuit found "no evidence of any negotiations about the regulatory treatment of goodwill that could serve as evidence that the Government agreed to a goodwill contract."[196] Mola argued that the negotiation over the designation of the merger as "supervisory" was in effect a negotiation of the treatment of goodwill because such a designation was necessary

187. *Id.* at 1375.
188. *Mola*, 516 F.3d at 1376.
189. *Id.* (alteration in original) (quoting *Bank of Am.*, 495 F.3d at 1372).
190. *Id.*
191. *Id.* at 1377.
192. *Id.*
193. *Id.* at 1378.
194. *Id.* (alterations in original).
195. *Id.* (quoting D & N Bank v. United States, 331 F.3d 1374, 1379–80 (Fed. Cir. 2003)).
196. *Id.*

under the regulations to allow use of the purchase method of accounting, the only method of accounting recognizing goodwill as an asset.[197] The Federal Circuit disagreed, however, finding that the regulations did not specifically address the purchase method of accounting.[198] Furthermore, "[n]othing in [FHLBB's Internal] Memorandum SP-24 suggest[ed] that whether the merger has been designated as supervisory [wa]s even relevant, let alone determinative, of the availability of the purchase method of accounting."[199] Mola also argued that the Government must have intended to form a contract relating to goodwill because Charter would not have had sufficient capital to meet the regulatory requirements without the inclusion of goodwill in the capital calculation.[200] Relying on previous decisions that rejected similar arguments, the Federal Circuit concluded that the mere fact that the Government approved a merger that, without inclusion of goodwill in Charter's capital calculation, would have resulted in a level below the regulatory minimum does not establish the Government's intent to contract to maintain the same treatment of goodwill.[201] Finding no evidence of intent to contract, the Federal Circuit affirmed the entry of summary judgment in favor of the Government on Mola's breach of contract claim.[202]

Judge Newman dissented on the ruling that there was no contract between Mola and the Government.[203] According to Judge Newman, the written exchanges and agency documentation produced an integrated contract leaving "no doubt" that a contract including supervisory goodwill was intended and formed.[204] Contrary to the majority panel's opinion, Judge Newman argued that the classification of "supervisory" does achieve the regulatory treatment of goodwill, which was essential both to Mola's agreement to acquire Merit and to the merged institution's compliance with capital requirements.[205] As the Supreme Court explained in *Winstar*, it was understood by healthy thrifts that absent accounting for supervisory goodwill there would be little reason to assume the liabilities of a

197. *Id.* at 1379.
198. *Id.*
199. *Id.*
200. *Id.* at 1380.
201. *Id.* (citing D & N Bank v. United States, 331 F.3d 1374, 1380 (Fed. Cir. 2003)).
202. *Id.* at 1381.
203. *Id.* (Newman, J., dissenting). Judge Newman concurred with the panel majority's ruling on the statute of limitations issue. *Id.*
204. *Id.*
205. *Id.* at 1382.

troubled bank.[206] According to Judge Newman, the formal merger application, the negotiations with the Government, and the treatment of the merger as supervisory confirmed a bargained-for exchange resulting in a contractual arrangement that was breached by the enactment of FIRREA.[207]

B. Suess v. United States[208]

In this shareholder derivative suit, the Federal Circuit also addressed the issue of Government intent to enter into a *Winstar* contract. In *Suess v. United States*,[209] the Federal Circuit held that the shareholders of a failed savings and loan did not establish the existence of a contract with the Government pursuant to which the Government guaranteed the continued use of purchase accounting or the amortization of supervisory goodwill.[210]

In 1982, Equitable Savings and Loan Association ("Equitable"), a thrift institution in danger of failure, entered into merger discussions with Benjamin Franklin Federal Savings and Loan Association ("Franklin").[211] In order to complete the merger and obtain the approval of the FHLBB, Franklin representatives presented a business plan for the potential merger between Franklin and Equitable to the Federal Home Loan Bank of Seattle ("FHLB-Seattle").[212] In their presentation, Franklin requested the use of purchase accounting in order to treat goodwill as regulatory capital.[213] Franklin subsequently submitted a proposal to FHLB-Seattle requesting the use of purchase accounting, followed by a formal application for the merger with proposed amortization of the goodwill acquired from the merger over a forty-year period.[214] Thereafter, the FHLBB entered into discussions with Franklin regarding approval of the merger and specifically discussed the use of purchase accounting and the amortization of goodwill over a forty-year period.[215] FHLB-Seattle prepared a merger digest that described the conditional approval of the merger, the key terms of the approval, and stated that the merger would be accounted for under the purchase method.[216] Franklin's

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206. *Id.* at 1384.
207. *Id.* at 1385–86.
208. 535 F.3d 1348 (Fed. Cir. 2008).
209. *Id.*
210. *Id.* at 1362.
211. *Id.* at 1353.
212. *Id.*
213. *Id.*
214. *Id.* at 1354.
215. *Id.*
216. *Id.* at 1354–55.

board approved the merger and, in compliance with the conditions placed by FHLB-Seattle, submitted a financial analysis of the proposed merger based on the usage of purchase accounting and amortization of the acquired goodwill over a period of forty years.[217]

Congress subsequently enacted FIRREA, which required thrifts to maintain a set minimum capital requirement and prohibited the use of supervisory goodwill.[218] Pursuant to FIRREA, the newly created Office of Thrift Supervision issued regulations denying the continued use of supervisory goodwill in the thrifts' accounting procedures.[219] This regulatory change resulted in Franklin becoming insolvent.[220] Suess subsequently brought a derivative suit in the COFC on behalf of Franklin for the losses suffered as a result of the passage of FIRREA.[221]

Over the course of several decisions, the COFC found that a contract arose between Franklin and the Government relating to the merger with Equitable.[222] Specifically, the COFC found that, when considered together, the documents generated during the approval of the merger showed the Government's intent to guarantee continued use of purchase accounting and amortization of goodwill.[223] The COFC found that the Government breached its contract by phasing out the use of goodwill to satisfy regulatory capital requirements, and, following a trial, awarded Suess approximately $52 million in damages.[224] The Government appealed these decisions on several grounds but, most importantly, argued that the COFC "erred as a matter of law in holding that a contract existed between Franklin and the government for the treatment of goodwill arising out of the [merger]."[225]

On appeal, the Federal Circuit agreed with the Government that no contract existed between Franklin and the Government for the treatment of goodwill arising from the merger and reversed the decision of the COFC.[226] Although the Federal Circuit recognized that a contract may result from negotiations involving multiple documents, there must be a clear indication of intent to contract for

217. *Id.* at 1355.
218. *Id.* (citing Financial Institutions Reform, Recovery, and Enforcement Act, 12 U.S.C. § 1464(t) (2006)).
219. *Id.*
220. *Id.* at 1356.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 1358.
225. *Id.*
226. *Id.* at 1359.

concluding that a contract was formed.[227] In order to prove that the Government intended to guarantee continued use of purchase accounting or a specific amortization period, "the party alleging the existence of such a contract must allege 'something more' than the mere approval of the merger by the FHLBB."[228] In past decisions, the Federal Circuit has held that the mere approval of a merger does not amount to intent to contract because the FHLBB must, in serving its regulatory and sovereign functions, approve all mergers.[229] Instead, "'there must be an objective manifestation of voluntary, mutual assent'" to a contract guaranteeing a particular treatment of goodwill.[230]

Reviewing the correspondence, application, and digest relating to the merger between Franklin and Equitable, the Federal Circuit concluded that the documentary evidence showed that FHLBB "approved Franklin's use of purchase accounting and amortization of goodwill", but "did not contractually guarantee Franklin's continued ability to utilize the purchase method of accounting or to amortize goodwill."[231] In an attempt to support the existence of a contract, Suess submitted affidavits by Franklin's president describing negotiations with FHLB-Seattle representatives regarding the use of the forty-year amortization period.[232] Suess also provided affidavits of former FHLBB and FHLB-Seattle officials from 1996 indicating that the Government believed it was contractually obligated to honor the amortization period originally allowed and that the forty-year amortization period was an important part of the consideration received by Franklin for merging with Equitable.[233] The Federal Circuit regarded Franklin's reference to the 1982 negotiations to be "self-serving" and insufficient to prove the Government's intent to contract, especially given the number of documents created at the time of merger that did not mention a contract between Franklin and the FHLBB relating to purchase accounting or the amortization of goodwill.[234] Similarly, the Federal Circuit concluded that affidavits of former FHLBB and FHLB-Seattle officials expressing a belief in 1996 that the approved merger between Franklin and Equitable in 1982

227. *Id.*
228. *Id.* at 1360 (citing D & N Bank v. United States, 331 F.3d 1374, 1378 (Fed. Cir. 2003)).
229. *Id.* (citing *D & N Bank*, 331 F.3d at 1378).
230. *Id.* (quoting Anderson v. United States, 344 F.3d 1343, 1353 (Fed. Cir. 2003)).
231. *Id.* at 1362.
232. *Id.* at 1364.
233. *Id.* at 1364–65.
234. *Id.* at 1364.

committed the Government were insufficient to overcome the lack of any binding language in documents exchanged at the time of the merger agreement.[235] In sum, the evidence did not demonstrate "something more" than mere regulatory approval.[236] Accordingly, because a contract did not arise between Franklin and the Government regarding the Franklin merger, the Federal Circuit reversed the decision of the COFC, vacated the entire award of damages, and remanded the case to the COFC to determine whether any damages were available relating to the Government's breach of contract relating to a separate merger transaction.[237]

IV. CONTRACT INTERPRETATION

A. St. Christopher Associates v. United States[238]

In *St. Christopher Associates v. United States*,[239] the Federal Circuit affirmed a grant of summary judgment for the Government and concluded that the United States Department of Housing and Urban Development ("HUD") did not breach its Regulatory Agreement with St. Christopher Associates L.P. ("St. Christopher") by not considering St. Christopher's request for a rent increase for an apartment project where the Regulatory Agreement did not expressly, nor by implication, require HUD to consider such a request.[240]

On December 19, 1984, HUD entered into a Provisional Workout Arrangement ("PWA") with St. Christopher whereby St. Christopher became the owner of an apartment project in Hartford, Connecticut.[241] Pursuant to the PWA, St. Christopher agreed to make the former owner's mortgage and interest arrearage payments.[242] On December 28, 1984, St. Christopher and HUD executed an Agreement for Modification of Note and Mortgage ("Modification Agreement"), which incorporated the terms of the PWA, and a Regulatory Agreement, which put restrictions on the use and operation of the apartment project.[243] Prior to the execution of the PWA, the Modification Agreement, and the Regulatory Agreement, HUD approved St. Christopher's request for a rent increase based on

235. *Id.* at 1365.
236. *Id.* at 1367.
237. *Id.* at 1368.
238. 511 F.3d 1376 (Fed. Cir. 2008).
239. *Id.*
240. *Id.* at 1378.
241. *Id.*
242. *Id.*
243. *Id.*

the cost of electricity, reserve for replacements, and operational expenses.[244] St. Christopher requested several additional rent increases in the 1980s, but HUD did not approve any of the requests on grounds that it was not obligated to consider the requests because St. Christopher had failed to make the mortgage interest arrearage payments required under the PWA and the Modification Agreement.[245] On January 6, 1989, HUD sent St. Christopher a letter indicating that HUD had not received mortgage interest arrearage payments for 1988 and 1989 and that if HUD did not receive payment within thirty days, it would commence foreclosure proceedings.[246] Although the court could not discern what happened between 1989 and 1996, on November 6, 1996, HUD requested that St. Christopher submit a plan on how it would comply with the PWA.[247] On September 25, 1997, St. Christopher submitted an additional request for a rent increase, but HUD did not respond.[248] On January 3, 2001, HUD issued a Notice of Default and Foreclosure.[249] St. Christopher submitted one last rent increase request on May 29, 2002, which HUD granted on July 2, 2002.[250] St. Christopher filed its lawsuit on September 24, 2003 and later sold the apartment project and paid HUD the outstanding mortgage interest arrearages.[251]

St. Christopher argued to the COFC that HUD's failure to act upon its 1997 rent increase request was, inter alia, a breach of contract.[252] The COFC dismissed the complaint for lack of jurisdiction to the extent St. Christopher sought relief based on HUD's alleged violations of section 236 of the National Housing Act, its implementing regulations, and agency guidance, concluding that none of these provides a substantive right to money damages necessary for COFC jurisdiction.[253] Furthermore, the COFC granted summary judgment and found that HUD's failure to respond to the

244. *Id.* at 1379.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* at 1380.
253. *Id.*; *see also* St. Christopher Assocs. v. United States, 75 Fed. Cl. 1, 10 (2006) ("Neither Section 236 of the National Housing Act, the implementing regulations, nor the agency guidance contain express provisions mandating that a mortgager receive money damages if HUD fails to consider a rent increase request."). On appeal, St. Christopher conceded that none of the statutes, regulations or guidance is money-mandating. *St. Christopher Assocs.*, 511 F.3d at 1380 n.2.

rent increase request did not breach the express provisions of the Regulatory Agreement.[254]

On appeal, St. Christopher argued that the COFC erred in granting the Government's summary judgment motion, contending that the Regulatory Agreement expressly and implicitly required the Government to consider the rent increase request.[255] The Federal Circuit disagreed with St. Christopher, however, and determined that the Regulatory Agreement's provisions purporting to establish an express duty by HUD to consider a rent increase were directed to the obligations of the owners in establishing and changing a fair market rental charge.[256] There was no express language in these provisions imposing a duty on HUD.[257]

Turning to the question of whether the Regulatory Agreement implicitly required HUD to consider the rent increase request, "St. Christopher acknowledge[d] that the [contract] d[id] not incorporate by reference any statutory, regulatory, or agency guidance," but argued that "the Regulatory Agreement inherently include[d] an obligation to consider a rent increase request."[258] Reviewing the rental charge provisions in section 236 of the National Housing Act,[259] the Federal Circuit found a requirement on the part of the owner to establish a rental charge and seek the approval of HUD, but found no obligation on the part of HUD to consider a request to increase the rent.[260]

The Federal Circuit did, however, conclude that HUD regulations and agency guidance imposed on HUD an express obligation to consider a rent increase request.[261] First, HUD regulations require, in relevant part, that "[a]fter HUD has considered the request for an increase in rents . . . it will furnish the mortgagor with a written statement of the reasons for approval, adjustment upward or downward, or disapproval."[262] The Federal Circuit concluded this regulation "does indeed obligate HUD to consider and respond to a rent increase request, albeit within an unspecified time period."[263]

254. *St. Christopher Assocs.*, 511 F.3d at 1380. The COFC also found that HUD did not violate the Fifth Amendment takings clause. *Id.* The Federal Circuit affirmed. *Id.* at 1386.
255. *Id.* at 1380.
256. *Id.*
257. *Id.*
258. *Id.* at 1381.
259. 12 U.S.C. § 1715z-1(f)(1)(A) (2006).
260. *St. Christopher Assocs.*, 511 F.3d at 1381.
261. *Id.* at 1382.
262. *Id.* (quoting 24 C.F.R. § 245.325(b) (2008)).
263. *Id.*

Second, a HUD Handbook requires the agency to "[i]ssue decision letters within [thirty] days after receipt of the formal rent increase request" and notes that "requests for additional information must be made in writing and within [thirty] days of receipt of initial package."[264] Like the regulation, the Federal Circuit determined that the HUD Handbook "clearly requires HUD to respond to a rent increase request, or request additional information, within thirty days of the request."[265] Because neither the regulation nor the HUD Handbook were incorporated by reference into the Regulatory Agreement, however, the Federal Circuit would need to hold one or both provisions incorporated by implication.[266]

The Federal Circuit is generally reluctant to incorporate statutory or regulatory provisions into a Government contract unless the contract explicitly provides for their incorporation.[267] In this case, the Federal Circuit found "no reference whatsoever in the Regulatory Agreement to the implementing regulations or to the HUD Handbook."[268] The Federal Circuit distinguished the cases cited by St. Christopher from this case, finding those cases involved express language in contracts that imposed a duty on the Government to act on rent increase requests.[269] "[T]here is simply no Federal Circuit precedent holding that it is proper to read into a contract statutes, regulations, or agency guidance when they are not incorporated by reference into the contract."[270] Because the Regulatory Agreement did not incorporate by implication either the HUD regulation or Handbook, the Federal Circuit found no basis to conclude that HUD breached the contract by failing to consider the 1997 rent increase request and concluded the COFC did not err in granting summary judgment to the Government on the breach-of-contract claim.[271]

264. *Id.* at 1383.
265. *Id.*
266. *Id.*
267. *Id.* at 1384 (citing Smithson v. United States, 847 F.2d 791, 794 (Fed. Cir. 1988)).
268. *Id.*
269. *Id.* (discussing Christopher Village, L.P. v. Retsinas, 190 F.3d 310 (5th Cir. 1999), Brighton Village Assocs. v. United States, 52 F.3d 1056 (Fed. Cir. 1995), and Crest A Apartments Ltd., II v. United States, 52 Fed. Cl. 607 (2002)).
270. *Id.*
271. *Id.* at 1385.

B. Northrop-Grumman Information Technology, Inc. v. United States[272]

In *Northrop-Grumman Information Technology, Inc. v. United States*,[273] the Federal Circuit addressed incorporation by reference in the government contract context and held that a letter containing a warranty of essential need was not incorporated by reference into a contract, thus precluding a contractor from pursuing a breach-of-warranty claim.[274] Furthermore, the Federal Circuit concluded that the contract's integration clause, which did not incorporate the letter containing the warranty, prevented the use of the letter.[275] This decision provides useful guidance on incorporation by reference as well as the drafting and use of integration clauses.

Starburst Software ("Starburst") created a software program known as Omnicast.[276] In 1999, Starburst representatives spoke to an employee at the Army's Communication-Electronics Command ("CECOM") about using Omnicast to increase the efficiency in communications between CECOM's computer systems.[277] Because Starburst did not have an existing contract with the Army, the parties planned to use a preexisting contract between the Air Force and Logicon Inc., now known as Northrop Grumman Information Technology, Inc. ("Northrop"), whereby "Starburst would sell the software to [Northrop]; [Northrop] would lease the software to the Air Force; CECOM would receive the software; and CECOM would transfer money to the Air Force to support Air Force lease payments to [Northrop]."[278] Before the Air Force issued a delivery order for the software and before the Army even received or tested the software, Northrop asked the Army to sign a "Letter of Essential Need," which identified the software as "essential to the operation of" and "integral to" certain Army computer systems.[279] A representative of CECOM signed the letter, and the Air Force subsequently issued a Delivery Order to Northrop.[280] The Delivery Order stated that the "'LEASING TERMS AND CONDITIONS' to Special Offer #330 Revision 03" were incorporated by reference.[281] Those "LEASING TERMS AND

272. 535 F.3d 1339 (Fed. Cir. 2008).
273. *Id.*
274. *Id.* at 1346.
275. *Id.*
276. *Id.* at 1341.
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.* at 1342.
281. *Id.*

CONDITIONS," in turn, stated that it was "'mutually understood and agreed that as inducement for Contractor entering into this Agreement, the Government has provided required information relative to the essential use of the software Asset.'"[282] The Lease Terms and Conditions also contained an integration clause, which, in relevant part, read "[t]he [] applicable Delivery Order and these lease terms and conditions constitute the entire agreement between [Northrop] ("Contractor") and the U.S. Government ("Government") relative to the CECOM Starburst lease transaction under the aforementioned contract."[283] CECOM accepted delivery of the software, and, through the Air Force, paid Northrop for the base period and a one-year renewal term of the contract.[284] Upon testing, however, CECOM discovered that the software did not work effectively with its computer systems in a tactical environment and decided it would not renew the software lease after the one-year renewal term expired in November 2001.[285]

Northrop subsequently filed claims under the Contract Disputes Act with the Contracting Officer, alleging CECOM's non-renewal of the software lease constituted a breach of contract.[286] After the Contracting Officer denied the claims, Northrop filed suit in the COFC arguing that the United States breached its contract by warranting in the Letter of Essential Need that the Omnicast software was essential when actually it was acquired on a test basis and was not essential.[287] Upon cross motions for summary judgment, the COFC held, in relevant part, that the United States could not be liable because "'the Contract d[id] not, as a matter of law, incorporate the Letter of Essential Need by reference.'"[288]

On appeal, the Federal Circuit affirmed the COFC's conclusion that the contract did not incorporate the Letter of Essential Need, thus precluding Northrop's claim for breach of warranty under the contract.[289] Due to the paucity of government contract cases addressing incorporation by reference, the Federal Circuit reviewed several patent cases and cases in other courts to support the following general principle of incorporation by reference:

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282. *Id.* (emphasis omitted).
283. *Id.* (second alteration in original).
284. *Id.*
285. *Id.*
286. *Id.* at 1342–43.
287. *Id.* at 1343.
288. *Id.* (quoting Northrop Grumman Info. Tech., Inc. v. United States, 78 Fed. Cl. 45, 48 (2007)).
289. *Id.* at 1347.

> [T]he language used in a contract to incorporate extrinsic material by reference must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g., as background law or negotiating history).[290]

In this case, by explicitly referring to the "LEASING TERMS AND CONDITIONS" and reciting that they "were incorporated," the Delivery Order properly incorporated these terms and conditions.[291] The Federal Circuit disagreed with Northrop's position, however, that the Terms and Conditions' reference to the Government providing "required information relative to the essential use of the software" incorporated by reference the Letter of Essential Need's statement that the leased software was "essential to the operation of" and "integral to" CECOM's computer systems.[292] The Terms and Conditions "do not refer to the Letter of Essential Need explicitly, as by title or date, or otherwise in any similarly clear, precise matter."[293] Without an explicit reference, the "required information" language in the Terms and Conditions could be interpreted to apply to any number of prior communications between the parties.[294]

Furthermore, the Federal Circuit concluded that the Terms and Conditions' integration clause "prevent[ed]" Northrop from relying on the Letter of Essential Need.[295] The integration clause's language that the Delivery Order and "lease terms and conditions constitute the entire agreement" relating to the lease transaction "neither incorporates the Letter of Essential Need nor permits its incorporation or the incorporation by reference of any other extrinsic document."[296]

The Federal Circuit's decision in *Northrop Grumman Information Technology, Inc. v. United States*, as well as its decision in *St. Christopher Associates v. United States*,[297] provide useful guidance regarding negotiating and drafting government contracts. Both cases are important reminders that the Federal Circuit will be reluctant to incorporate extrinsic material, whether it be a document, regulation,

290. *Id.* at 1345.
291. *Id.* at 1346.
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.* at 1347.
296. *Id.* (emphasis omitted).
297. 511 F.3d 1376 (Fed. Cir. 2008); *see supra* Part IV.A (discussing this case in detail).

or some agency guidance, unless that incorporation by reference is drafted in explicit terms. Parties seeking to use incorporation by reference when drafting government contracts would be wise to follow the Federal Circuit's specific guidance:

> Our Circuit . . . does not require "magic words" of reference or of incorporation. However, we stress that parties contracting with the government may easily avoid or at least minimize the risk of having to litigate this issue by simply adopting widely-used and judicially-approved language of incorporation, such as "is hereby incorporated by reference" or "is hereby incorporated as though fully set forth herein," and by including specific and sufficient information identifying a particular document, such as the title, date, parties to, and section headings of any document to be incorporated.[298]

Parties negotiating government contracts must also be mindful of any integration clause included in the contract and the risks posed by failing to incorporate extrinsic material as an exception to integration language identifying the "entire contract."[299]

V. CONTRACT PERFORMANCE / BREACH

A. *General Injectables & Vaccines, Inc. v. Gates*[300]

General Injectables & Vaccines, Inc. v. Gates[301] (*General Injectables II*) addresses the interpretation of the "excusable delay" provision of Federal Acquisition Regulation ("FAR") 52.212-4(f) as it applies to subcontractors/suppliers.[302] Here, General Injectables and Vaccines, Inc. ("GIV"), petitioned for a rehearing of the court's March 19, 2008 decision in which the court affirmed a decision by the Armed Services Board of Contract Appeals ("ASBCA") to uphold the default

298. *Northrop Grumman Info. Tech.*, 535 F.3d at 1346.

299. Professor Nash's commentary on this case is relevant to the use of integration clauses:

> [The Federal Circuit's decision] appears to lay down a very strict rule that a statement that an agreement constitutes the "entire agreement" of the parties will be dispositive. What the court appears to be requiring is that, if the parties use such a statement that a contractual instrument is fully integrated, they include any incorporated documents as *exceptions* to this integration statement. Indeed, in the court's discussion of prior decisions, it identifies several cases where it has accepted the fact that a document was incorporated by reference because it was included as an exception to such integration language.

Ralph C. Nash, *Incorporation by Reference: Be Explicit!*, 22 NASH & CIBINIC REP. 184, 185–86 (2008) (emphasis in original).

300. 527 F.3d 1375 (Fed. Cir. 2008)

301. *Id.*

302. *Id.* at 1376.

termination of GIV's contract with the Defense Supply Center Philadelphia ("DSCP") to supply flu vaccine.

In support of its petition for a rehearing, GIV contended that the Federal Circuit's "interpretation of the 'excusable delays' provision at issue in this case, FAR 52.212-4(f), conflicts with several Court of Claims decisions."[303] Specifically, GIV alleged that these Court of Claims cases "stand for the proposition that if the contractual delay provision does not separately state that the contractor is liable for the unexcused actions of its subcontractor, then subcontractor delays are excusable as long as the contractor acted reasonably in selecting the subcontractor."[304] Although the court denied GIV's request for a rehearing, it supplemented its March 19, 2008 decision and discussed the new issue of whether any Court of Claims decisions conflicted with the Federal Circuit's interpretation. Ultimately, however, as is discussed in more detail below, the court found none of the Court of Claims cases to be in conflict with Federal Circuit precedent, and thus held that the failure of FAR 52.212-4(f) to state specifically that a contractor is liable for unexcused subcontractor delays does not change the fact that the contractor is liable for such delays.[305]

As background, DSCP awarded a contract to GIV for influenza vaccine for the 2004–2005 flu season. The contract contained FAR 52.212-4(f), which provided essentially that the contractor is liable for default unless the default is the result of an "excusable delay."[306] Further, the contract specified that delivery was "[d]ependent on FDA release of vaccine."[307] Pursuant to the contract, Chiron Vaccines ("Chiron"), located in the United Kingdom ("U.K.") was responsible for the vaccine manufacturing and packaging as a supplier/subcontractor to GIV.[308]

303. *Id.* at 1375. GIV relied on: *Poloron Prods. v. United States*, 116 F. Supp. 588 (Ct. Cl. 1953), *Climactic Rainwear Co. v. United States*, 88 F. Supp. 415 (Ct. Cl. 1950), and *H.B. Nelson Constr. Co. v. United States*, 87 Ct. Cl. 375 (Ct. Cl. 1938).

304. *General Injectables II*, 527 F.3d at 1376.

305. *Id.* at 1378.

306. Specifically, FAR 52.212-4(f) reads as follows:

> The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers.

307. General Injectables & Vaccines, Inc. v. Gates (*General Injectables I*), 519 F.3d 1360, 1362 (Fed. Cir. 2008), *reh'g and reh'g en banc denied*, 519 F.3d 1360 (Fed. Cir. 2008), *supplementing opinion on denial of reh'g*, *General Injectables II*, 527 F.3d 1375 (Fed. Cir. 2008) (alteration in original).

308. *General Injectables I*, 519 F.3d at 1362.

Four months after DSCP awarded the contract to GIV, Chiron notified the FDA that certain lots of its vaccine were contaminated by bacteria and that it would not release any additional lots without United States and United Kingdom approval.[309] As a result of Chiron's manufacturing problems, GIV advised the Government that it would not likely be able to deliver any vaccine.[310] Then, the FDA banned further imports of the specific flu vaccine and ordered that none of the existing U.S. stocks of the vaccine be distributed for use.[311] Thereafter, DSCP terminated GIV's contract for default because GIV "failed to make timely delivery . . . and . . . such failure was not due to excusable delay."[312] The ASBCA affirmed the Government's termination for default.[313]

Before the court, GIV argued, inter alia, that because the "excusable delay" clause "does not separately state that the contractor is liable for the unexcused actions of its subcontractor, then subcontractor delays are excusable as long as the contractor acted reasonably in selecting the subcontractor."[314] The court rejected GIV's reading of the clause and noted that the general rule is that the failure of a contractor's subcontractor does not provide a valid excuse for the prime's nonperformance, unless the subcontractor's failure is also shown to be excusable.[315] In so ruling, the court noted that GIV's contention that failure of a subcontractor results in excusable delay for the prime would "place a contractor who procures contract goods through subcontract in a better position with respect to risk of nonperformance than a contractor who manufactures the contract goods itself."[316] Thus the court reasoned, because Chiron had no excuse, GIV should not be allowed to avoid liability for the breach

309. *Id.* On October 5, 2004, British authorities suspended Chiron's license to operate for three months. *Id.*

310. *Id.*

311. *Id.* at 1363. In GIV's initial appeal to the Court, it argued that FDA release of the vaccine was a "condition precedent to GIV's delivery obligation," but the court rejected this argument, holding that "the essence of contract performance was production of a vaccine that complied with the governing standards applied by the FDA." *Id.* at 1363, 1364.

312. *Id.* at 1363. (alterations in original).

313. *Id.*

314. *General Injectables II*, 527 F.3d 1375, 1376 (Fed. Cir. 2008). In support of its contention, GIV attempts to distinguish the provision at issue, FAR 52.212-4(f), to other FAR provisions also concerning reasonable delay, FAR 52.249-8(c) and FAR 52.249-14(a). Because these other FAR provisions, in contrast to FAR 52.212-4(f), specifically refer to the liability of contractors for default of subcontractors, GIV maintains that the absence of any reference to subcontractors in FAR 52.212-4(f) is intentional and means that contractors are not liable for production failures by their subcontractors. *General Injectables I*, 519 F.3d at 1365.

315. *Id.*

316. *General Injectables II*, 527 F.3d at 1377.

when Chiron could not have avoided the liability had it been a prime contractor. The court concluded that GIV "bore the risk of not being able to perform unless it could show that the reason for its failure to perform fell within the causes set forth in the 'excusable delay' clause. It could not shift that risk to the Government simply by subcontracting production of the vaccine to a third party."[317]

B. International Technology Corp. v. Winter[318]

In *International Technology Corporation v. Winter*,[319] the Federal Circuit addressed, inter alia, the issue of establishing differing site conditions in the context of a breach of contract claim. Initially, International Technology Corporation ("ITC") filed a claim for an equitable adjustment of costs on behalf of its subcontractor at the Armed Services Board of Contract Appeals ("ASBCA" or "the Board").[320] The contract at issue was a cost-plus-fixed fee for the treatment of contaminated soil at a Navy facility in California.[321] The ASBCA denied the claim based on the limitation of costs clause in ITC's prime contract.[322]

ITC appealed to the Federal Circuit. First, the court agreed that the Board was correct to deny ITC's claim.[323] Next, the court addressed a second contention raised by ITC that it had a valid pass-through claim[324] for breach of contract based on the Government's misrepresentation of the site conditions, i.e., differing site conditions, at the Navy facility.[325] The court declined to decide this argument, however, finding that even if it was decided in favor of ITC, ITC would not prevail in the case as it failed on the first two prongs of the differing site conditions claim.[326] Finally, the court turned to the main focus of its decision—ITC's differing site conditions claim.

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317. *Id.* at 1379.
318. 523 F.3d 1341 (Fed. Cir. 2008), *reh'g denied*, No. 2007-1276, 2008 U.S. App. LEXIS 17319 (Fed. Cir. July 21, 2008).
319. *Id.*
320. *Id.* at 1344.
321. *Id.*
322. *Id.* at 1346.
323. *Id.* at 1347.
324. "A pass-through claim allows a prime contractor to assert against the government a claim for harm caused by the government to a subcontractor where the subcontractor could hold the prime contractor liable for that harm." *Id.* ITC asserts that its subcontractor relied on the Government's misrepresentation in bidding on the subcontract. *Id.*
325. *Id.*
326. *Id.* at 1348–49. The court notes a number of difficulties with ITC's pass-through theory, including "(1) whether a subcontractor pass-through claim can be based on representations appearing in the prime contract and (2) whether the

On this point, ITC alleged that ITC's subcontractor, based on the Government's representations, "assumed that the contaminated soil contain[ed] an overall clay content of less than 10% clay".[327] Because the content of clay turned out to be much greater than ten percent, ITC's subcontractor incurred greater than expected costs.[328] Although, as the court explained, "[a] misstatement as to site conditions in a government contract can support a claim for breach of contract," in order to be successful on such a claim, the contractor must establish four elements.[329] At issue here are the first two elements: First, that the "the contractor must prove that a reasonable contractor reading the contract documents as a whole would interpret them as making a representation as to the site conditions," and second, that "the contractor must prove that the actual site conditions were not reasonably foreseeable to the contractor, with the information available to the particular contractor outside the contract documents, i.e., that the contractor 'reasonably relied' on the representations."[330]

With regard to the first element, the court applied *de novo* review as it involves "a matter of contract interpretation and thus presents a question of law"[331] and placed itself into the shoes of a reasonable and prudent contractor. Ultimately, however, the court concluded that "a reasonable contractor would [not] have read the contract as representing that the soil would contain less than ten percent clay" based on the contract documents.[332] Turning to the second element—whether a contractor reasonably relied upon a representation—the court found that the subcontractor "could not have reasonably relied on any representation as to the clay content of the soil because it knew that, due to flaws in the sampling methodology," it could not rely upon the methodology.[333]

It is interesting to note that, in a footnote, the court expressed skepticism that a breach requires a showing of Government culpability as the ASBCA so noted.[334]

Limitation of Cost clause limits the prime contractor's ability to assert a pass-through claim based on breach of the subcontract." *Id.* at 1348.

327. *Id.* at 1348.
328. *Id.* at 1346.
329. *Id.* at 1348.
330. *Id.* at 1348–49.
331. *Id.* at 1350 (citing H.B. Mac, Inc. v. United States, 153 F.3d 1338, 1345 (Fed. Cir. 1998) (internal citations omitted)).
332. *Id.* at 1352 n.6.
333. *Id.* at 1353.
334. *Id.* at 1349 n.5.

C. CHE Consulting, Inc. v. United States[335]

CHE Consulting, Inc. v. United States[336] (*CHE II*) addresses the issue of supplementation of the administrative record in a pre-award bid protest. CHE Consulting ("CHE") protested at the COFC[337] the decision of the United States Naval Oceanographic Office ("NAVO") to solicit a single provider for hardware and software maintenance of a complex computer system.[338] The COFC, after requesting that NAVO supplement the administrative record,[339] denied CHE's protest, finding that NAVO's decision to solicit a single provider was reasonable and did not violate the Competition in Contracting Act ("CICA").[340] CHE subsequently appealed this decision to the Federal Circuit contending that the COFC's decision to require NAVO to supplement the administrative record, and relying on that supplemented record, violated the Administrative Procedure Act ("APA") and that NAVO's single provider contract violates CICA.[341]

The Court of Appeals for the Federal Circuit ("CAFC") determined that the unsupplemented administrative record was sufficient to support NAVO's position. The court explained: "NAVO had established a rational basis to combine hardware and software maintenance services into one contract before the trial court requested supplementation," and thus "[t]he additions to the administrative record were . . . not necessary."[342] In response to CHE's contention that NAVO had an obligation to point to past experiences to substantiate its concerns, the court pointed to the "full and open competition" policy of CICA, and explained that "CICA imposes no obligation to supply a historical record of failures in

335. No. 2007-5172, 2008 Fed. Cir. WL 5397566 (Fed. Cir. Dec. 30, 2008).
336. *Id.*
337. Prior to its COFC protest, CHE filed an agency level protest addressing the same issue, which was denied on the basis that NAVO provided a reasonable basis for its need to bundle services into a single contract. *Id.* at *2.
338. CHE Consulting, Inc. v. United States (*CHE I*), 78 Fed. Cl. 380, 387–88 (Fed. Cl. 2007), *aff'd*, *CHE II*, 2008 WL 539756, at *5. Previously, upon CHE's request to the General Services Administration ("GSA"), the entity administering the procurement for NAVO, GSA had separated the maintenance contract into two separate contracts—one contract for hardware and one contract for software. *CHE II*, 2008 WL 539756 at *1. NAVO, however, rejected the separated contracts and demanded a single provider for both software and hardware maintenance. *Id.*
339. Specifically, Judge Wheeler recommended that NAVO supplement the administrative record with a cost analysis and market survey of other federal agencies with the same availability requirements as NAVO, with similar finger-pointing disputes over maintenance obligations as claimed by NAVO and the effect on the competition and performance in those other agencies of separated solicitations. *CHE II*, 2008 WL 539756, at *2.
340. *CHE I*, 78 Fed. Cl. at 387.
341. *CHE II*, 2008 WL 539756 at *1.
342. *Id.* at *3.

order to substantiate a risk" and that, in fact, "NAVO has a responsibility to assess risks and avoid them before they become a historical fact."[343] Further, the court recognized "that agencies have discretion to use competitive procedures that are 'best suited under the circumstances of the procurement' . . . [and that] NAVO need not suffer some maintenance failures in order to substantiate its assessment of risks or other potential 'circumstances of the procurement.'"[344]

Because the court found that NAVO's decision to procure a single source was rational, it declined "to opine about the legal consequences of NAVO's supplementation of the administrative record in light of APA requirements."[345]

VI. ASSIGNMENT OF CLAIMS

A. Delmarva Power & Light Co. v. United States[346]

In *Delmarva Power & Light Co. v. United States*,[347] the Federal Circuit held that the United States may waive the prohibition in the Anti-Assignment Act[348] against the assignment of claims against the United States and thereby validate an otherwise prohibited claim.[349] In this case, the Federal Circuit concluded that the Government's recognition and written acceptance of a claim in the lower court constituted a valid assignment.[350]

This case arose out of the Federal Government's program to remove and dispose of spent nuclear waste created during the operation of nuclear electric generating facilities.[351] Delmarva Power and Light ("Delmarva") and Atlantic City Electricity Co. ("Atlantic City") (collectively the "Assignors") owned minority undivided interests in nuclear facilities owned and operated by PSEG Nuclear, LLC and Public Service Electric and Gas Co. (collectively "PSEG").[352] In 1999, the Assignors entered into Transfer Agreements with PSEG agreeing to transfer their interest in the nuclear facilities for thirty million dollars.[353] The agreements contained provisions which

343. *Id.* at *4.
344. *Id.*
345. *Id.* at *5.
346. 542 F.3d 889 (Fed. Cir. 2008).
347. *Id.*
348. 41 U.S.C. § 15 (2006).
349. *Delmarva Power*, 542 F.3d at 893–94.
350. *Id.* at 894.
351. *Id.* at 890.
352. *Id.* at 891.
353. *Id.*

transferred "'[a]ll claims of Seller relating to or pertaining to the Department of Energy's defaults . . . including all claims for failure by the Department of Energy to take Spent Nuclear Fuel.'"[354]

In 2004, Delmarva and Atlantic City filed separate complaints in the COFC seeking damages from the United States for the Department of Energy's breach of its contracts to begin the removal of the nuclear waste from PSEG's nuclear facilities, in which Delmarva and Atlantic City had a minority interest.[355] The Assignors primarily argued that the Government's breach of contract constituted a taking of their former property interests, for which they were entitled to just compensation, because the Government's breach of the removal contracts diminished the value of the nuclear plants, and thus resulted in Delmarva and Atlantic City receiving less money in the sale of their interest in the plants.[356]

PSEG invoked the arbitration clause of the Transfer Agreements and argued that the Assignor's taking claims were assigned to PSEG.[357] After arbitrators sustained PSEG's contention, "[t]he Assignors moved the Court of Federal Claims to vacate the arbitration award."[358] The COFC subsequently asked the Government whether it waived its rights under the Assignment of Claims Act, which prompted the following response from the Government:

> [T]he Government is exercising its sole discretion to accept the assignments of those claims that the plaintiffs purported to make to PSEG Nuclear, to the extent that we have been made aware of those claims through the plaintiffs' complaint in this action and through the assignment provisions in the purchase and sale agreements that have been included in the appendices to some of the briefing in this case.[359]

The COFC granted summary judgment for the Government and dismissed the case, finding that the Government properly waived its right under the Assignment of Claims Act to invalidate the assignments, that the assignments included the takings claims and that, having assigned its taking claims to PSEG, the Assignors had no basis to assert their claims against the Government.[360]

On appeal, the Federal Circuit affirmed the COFC, concluding that the Government has the authority to waive the prohibition in the

354. *Id.* (alterations and omissions in original).
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.* (alterations in original).
360. *Id.* at 892.

Anti-Assignment Act on the assignment of claims and that it properly did so in this case.[361] In reviewing the language of the assignment clause in the Transfer Agreement, the Federal Circuit first concluded that the takings claims fall within "'claims ... relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract'" and "'claims for failure by the Department of Energy to take Spent Nuclear Fuel.'"[362] Because the taking claims are included in the assigned claims, the only issue is whether the Anti-Assignment Act barred the assignments.[363]

The Anti-Assignment Act consists of two statutory provisions that broadly prohibit transfers of contracts involving the United States or assignment of claims against the United States.[364] Specifically, under the first provision,

> No contract . . . or any interest therein, shall be transferred by the party to whom such contract . . . is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned.[365]

Under the second provision, which is relevant to this case, an "assignment of any part of a claim against the United States Government or of an interest in the claim . . . may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued."[366] Both provisions have exceptions for assignments to "financing institution[s]."[367]

Reviewing this statutory language relating to the assignment of claims, the Federal Circuit concluded that this language includes takings claims.[368] Furthermore, claims in this case had been contested by the Government, their amount was undecided, no warrant for their payment was issued, and PSEG did not fall into the exception for financing institutions.[369] Having found the Anti-Assignment Act barred the assignment of the taking claims, the Federal Circuit concluded that "[t]he only basis upon which the assignments could be validated . . . is if the government validly waived" its application to the takings claims.[370]

361. *Id.* at 894.
362. *Id.* at 892 (omissions in original).
363. *Id.*
364. *Id.* (quoting Fireman's Fund Ins. Co. v. England, 313 F.3d 1344, 1349 (Fed. Cir. 2002)).
365. *Id.* (quoting 41 U.S.C. § 15(a)) (alteration and omissions in original).
366. *Id.* (quoting 31 U.S.C. § 3727(a)(1), (b)) (omission in original).
367. *Id.*
368. *Id.* at 893.
369. *Id.*
370. *Id.*

Relying on *Tuftco Corp. v. United States*,[371] the Federal Circuit concluded that there was no valid reason why the Government should not be able to waive the Anti-Assignment Act's prohibition on the assignment of claims and that, in this case, the Government properly waived its right.[372] In *Tuftco*, the COFC "held that the government validly waived the prohibitions against the assignment of government contracts" because the contracting officer was fully aware of the assignments of certain contracts to Tuftco, recognized the assignment and communicated the recognition of the assignments.[373] Using the reasoning in *Tuftco*, the Federal Circuit found that the Government's written acceptance of claims in the COFC was a recognition of an otherwise invalid assignment.[374] Although the assignment of contracts provision and the assignment of claims provision related to different aspects of dealing with the Government, both provisions were for the protection of the Government.[375] Accordingly, if the "government conclude[d] that it [was] appropriate and in its best interest to accept the assignment, it [could] do so."[376] Such recognition and acceptance of an assignment would make the assignment valid.[377]

VII. DAMAGES

The next four cases are *Winstar*-related damage cases that the Federal Circuit decided in 2008.[378] The *Winstar* line of cases arose from the savings and loan crisis of the late 1970s and early 1980s, in which Government regulators encouraged many healthy thrifts to acquire one or more troubled or failing thrifts.[379] In exchange for agreeing to acquire unhealthy thrifts, Government regulators entered into contracts or "assistance agreements" with the acquirers that generally permitted them to account for a "fictitious intangible asset" on their books called "supervisory goodwill" that "'reflected the amount by which the assumed liabilities of the acquired thrifts exceeded the value of the acquired assets.'"[380] The acquiring institutions were allowed to count this asset towards its regulatory

371. 614 F.2d 740 (Ct. Cl. 1980).
372. *Delmarva Power*, 542 F.3d at 893.
373. *Id.*
374. *Id.*
375. *Id.* at 893–94.
376. *Id.* at 894.
377. *Id.*
378. United States v. Winstar Corp., 518 U.S. 839 (1996).
379. Granite Mgmt. Corp. v. United States (*Granite II*), 511 F.3d 1360, 1361 (Fed. Cir. 2008).
380. *Id.* (quoting Granite Mgmt. Corp. v. United States (*Granite I*), 416 F.3d 1373, 1376 (Fed. Cir. 2005)).

reserve capital requirements and to amortize its value over a number of years.[381]

The enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"),[382] prohibited the practice of including supervisory goodwill as regulatory capital.[383] Without the ability to account for supervisory goodwill toward their regulatory capital requirements, many acquiring thrifts' capital position worsened, causing many to take action to maintain regulatory capital compliance. In *United States v. Winstar Corp.*,[384] the Supreme Court held that the enactment of FIRREA constituted a breach of the assistance agreements, which promised supervisory goodwill accounting as well as other forbearances, and that the Government was liable for damages.[385]

A. Granite Management Corp. v. United States[386]

Granite Management Corporation ("Granite") acquired four unhealthy thrifts in 1986.[387] Granite consolidated these thrifts into one thrift called First Nationwide Bank ("First Nationwide"), turned it into a financially healthy institution, and then sold it to First Madison in 1994.[388] Granite brought suit in the COFC seeking damages for the Government's breach of its assistance agreement with Granite by the enactment of FIRREA.[389] On appeal in 2005, the Federal Circuit reversed in part the COFC's decision to grant the Government summary judgment and remanded the question of "'whether First Nationwide could have been sold for more if it had included "supervisory goodwill"'" as an asset.[390]

In answering this question, the COFC found that Granite failed to prove that it could have sold First Nationwide for more than it did, had it been allowed to transfer supervisory goodwill.[391] The COFC relied on the language of the assistance agreements in finding (1) that the agreements required Granite to obtain prior written approval from federal regulators in order to transfer the terms and

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381. *Granite II*, 511 F.3d at 1361 (Fed. Cir. 2008) (citing *Granite I*, 416 F.3d at 1376).
382. Pub. L. No. 101-73, 103 Stat. 183 (1989).
383. *Granite II*, 511 F.3d at 1361 (citing *Granite I*, 416 F.3d at 1377).
384. 518 U.S. 839 (1996).
385. *Id.* at 910.
386. 511 F.3d 1360 (Fed. Cir. 2008).
387. *Id.* at 1361.
388. *Id.* at 1361–1362.
389. *Id.* at 1362.
390. *Id.* (quoting *Granite I*, 416 F.3d 1373, 1384 (Fed. Cir. 2005)).
391. *Id.*

benefits of the assistance agreements, and (2) that federal regulators would not have approved a transfer of supervisory goodwill in Granite's sale of First Nationwide to First Madison.[392] The COFC determined that because the sale was between two financially healthy institutions, such a transfer "would have been completely counter to the purpose of regulatory forbearances."[393] Thus, Granite failed to prove its injury because, if regulators would have refused to allow Granite to transfer its accounting of supervisory goodwill, then the supervisory goodwill would have been worthless and would not have affected the proceeds garnered in First Nationwide's sale to First Madison.[394]

The Federal Circuit affirmed the COFC's reasoning and factual findings and held that Granite failed to prove it suffered any calculable damages and, therefore, did not address the additional arguments considered by the COFC.[395]

B. First Federal Lincoln Bank v. United States[396]

In another *Winstar*-related case, *First Federal Lincoln Bank v. United States*,[397] the Federal Circuit held that the COFC erred by improperly calculating damages based on lost deposits by calculating the amount of losses as valued as of date of trial, rather than as of the date of the breach.[398]

In 1982, First Federal Lincoln Bank ("First Federal") received separate regulatory approval to acquire three financially troubled thrifts, Great Plains Federal Savings and Loan Association of Falls City, Nebraska ("Great Plains"), Tri-Federal Savings and Loan Association of Wahoo, Nebraska ("Tri-Federal"), and First Federal Savings and Loan Association of Norfolk, Nebraska ("Norfolk").[399] At the time of FIRREA's enactment, First Federal claimed "$29,977,465 of remaining goodwill from the three mergers combined."[400] Because the enactment of FIRREA in 1989 barred the use of supervisory goodwill to satisfy regulatory capital requirements, First Federal's capital position worsened, prompting criticism from federal

392. *Id.* at 1363.
393. *Id.* at 1362 (quoting Granite Mgmt. Corp. v. United States, 74 Fed. Cl. 155, 162 (Fed. Cl. 2006)).
394. *Granite II*, 511 F.3d at 1363.
395. *Id.* at 1364–65.
396. 518 F.3d 1308 (Fed. Cir. 2008).
397. *Id.*
398. *Id.* at 1322.
399. *Id.* at 1311.
400. *Id.* at 1313.

regulators regarding its financial health.[401] In response to this criticism and to improve its capital position, First Federal reduced its business operations by shrinking its deposit base and closing several branches from 1990-1993.[402] Claiming that this contraction of its business resulted in lost profits and lost franchise value, First Federal brought suit in the COFC for breach of contract by the enactment of FIRREA.[403]

In a first trial on liability, the COFC found that an assistance agreement, permitting the accounting of supervisory goodwill, existed only in relation to the Great Plains merger and not to the Tri-Federal or Norfolk mergers.[404] In its trial on damages, First Federal sought the value for lost profits and lost franchise value resulting from the loss of actual deposits and loss of growth opportunities.[405] The COFC awarded damages for the value of the deposits lost from 1990–1993, but rejected First Federal's claims for "lost profits and lost deposit growth as speculative."[406] In calculating the damages for the value of deposits First Federal lost during its period of contraction, the COFC approximated the value of the lost deposits by using data based on the market as of 2001, the year of the trial, instead as of the date of the breach.[407]

On appeal, the Federal Circuit accepted the COFC's determination regarding the Government's breach and liability but overturned the damages award, holding that damages should have been calculated based on the value of the lost deposits when the breach occurred.[408] Because the breach occurred during 1990–1993 when the deposits were lost, damages should have been calculated with data relevant to that period rather than with data relevant to 2001.[409]

The Federal Circuit stated that, with the general exception for calculating expectancy damages, "'the appropriate date for calculation of damages is the date of the breach.'"[410] Disagreeing with First Federal, the Federal Circuit held that a claim to recover the value of lost deposits was not a claim for expectancy damages and,

401. *Id.* at 1314. In particular, regulators criticized First Federal's earning performance, classified asset level, and level of its total assets. *Id.*
402. *Id.*
403. *Id.* at 1315.
404. *Id.*
405. *Id.*
406. *Id.*
407. *Id.*
408. *Id.* at 1316.
409. *Id.*
410. *Id.* (quoting Energy Capital Corp. v. United States, 302 F.3d 1314, 1330 (Fed. Cir. 2002)).

therefore, the general exception did not apply.[411] Instead, the Federal Circuit viewed the claim as one for lost "income-generating property," which is "properly determined as of the time the property is lost (usually the time of the breach)."[412]

In dissent, Judge Mayer disagreed with the majority's conclusion that the award of lost deposits associated with franchise value was somehow distinguishable from a claim for "lost profits," a type of expectancy damages.[413] Judge Mayer considered "the difference between the two types of awards as one of semantics, not substance" and would have affirmed the trial court's calculation of damages as of the date of trial, rather than at the time of the breach, as reviewed for clear error.[414]

After finding error with the COFC's calculation of damages, the Federal Circuit then considered "whether First Federal is entitled to recover lost franchise value at the date of the breach."[415] The Federal Circuit answered this question in the negative, on the grounds that First Federal neither made nor provided any evidentiary support for a claim to recover the value of the lost deposits as of the time of the breach.[416] Because First Federal failed to seek damages based on the date of the breach and failed to present evidence to determine deposit values in the 1990-1993 period, the Federal Circuit reversed the COFC's award of damages, foreclosing any possible recovery by First Federal. Judge Mayer's dissent called this result "fundamentally unjust," especially considering that the "government's liability for breach of contract is undisputed."[417]

The Federal Circuit's opinion in *First Federal* renders a harsh conclusion for plaintiffs who, as the non-breaching party, were left without any recovery. Practitioners may be well advised to and seek multiple, alternative measures of damages, and to provide the court with evidentiary support for various alternative damages models.

C. American Savings Bank v. United States[418]

In a third *Winstar*-related case, the Federal Circuit affirmed the COFC's award for damages and offsets in relation to voided Note

411. *Id.* at 1316–17.
412. *Id.* at 1317.
413. *Id.* at 1324 (Mayer, J., dissenting in part).
414. *Id.* at 1324–25.
415. *Id.* at 1318 (majority opinion).
416. *Id.*
417. *Id.* at 1327.
418. 519 F.3d 1316 (Fed. Cir. 2008).

Forbearance, but reversed the COFC's award of restitution damages in relation to voided Warrant Forbearance.[419]

In 1988, American Savings and Loan Association of Stockton, California ("American Savings") failed and was taken over by the Federal Savings and Loan Insurance Corporation ("FSLIC").[420] The FSLIC approved a plan that permitted Robert Bass and his associated investors (the "Bass Investors"), to divide American Savings into a liquidating and operating thrift ("New West" and "New American," respectively) and to allow Keystone Holdings Partners, L.P., a partnership formed by the Bass Investors, to use wholly-owned entities to acquire American Savings.[421] To facilitate this complex transaction, the Government made certain forbearances. Under the transaction, New West issued an eight-billion-dollar note, guaranteed by the FSLIC, to New American, which received Note Forbearance from the FSLIC that excused New American from complying with the regulatory requirement of supporting the note with a proportionate amount of capital.[422] In addition, the assistance agreement provided that FSLIC would receive stock warrants from New American giving it a thirty percent ownership interest.[423] In exchange for the stock warrants, FSLIC granted New American a Warrant Forbearance that reduced the amount of regulatory capital New American was required to maintain to remain in capital compliance.[424]

As the usual story-line in *Winstar*-related cases goes, the passage of FIRREA in 1989 resulted in a breach by the Government of the assistance agreement and the Note and Warrant Forbearances became void.[425] As a result, New American was forced to use existing capital to support the eight-billion-dollar note to maintain capital compliance.[426] Additionally, while the use of the Warrant Forbearance was void, the FSLIC still received the benefit of the warrants in 1996 when Washington Mutual acquired New American in a stock transaction.[427] In the New American acquisition, the Government received Washington Mutual stock, which it subsequently sold, netting $651.7 million.[428]

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419. *Id.* at 1328.
420. *Id.* at 1318.
421. *Id.* at 1318–19.
422. *Id.* at 1319.
423. *Id.*
424. *Id.* (citing Am. Sav. Bank, F.A. v. United States, 62 Fed. Cl. 6, 10 (Fed. Cl. 2004)).
425. *Id.*
426. *Id.* at 1322.
427. *Id.* at 1324 (citing *Am. Sav.*, 62 Fed. Cl. at 15).
428. *Id.* (citing *Am. Sav.*, 62 Fed. Cl. at 15).

On the issue of liability, the Federal Circuit affirmed the COFC's findings both that a *Winstar*-type contract existed and was breached, and that the "Material Change of Law" clause in the assistance agreement was not a "general risk allocation" provision that precluded a claim for damages relating to the Note and Warrant Forbearances.[429] The COFC awarded damages relating to the Government's breach of its promise to grant note forbearance by calculating the actual costs New American was forced to pay capital providers in the form of interest and dividend payments for the pre-existing assets used to meet the capital requirements, offset by the benefit gained from holding those assets.[430] The COFC also granted restitution damages to plaintiffs based on its finding that the assistance agreement's Warrant Forbearance provision was divisible from the rest of the contract.[431]

On appeal, the Federal Circuit affirmed the COFC's damages and offset calculations. The Government argued that New American did not suffer injuries because it would still have incurred the cost of raising the same capital absent the breach, and that plaintiffs were not entitled to damages since they used existing capital at the time of the breach to satisfy the regulatory capital requirements.[432] The court rejected both of these arguments and relied on a prior decision, *Home Savings of America v. United States*,[433] to hold that the COFC was correct in calculating New American's damages as the costs paid to capital providers necessary to maintain capital compliance after the FIRREA voided the Note Forbearance promised by the assistance agreement.[434] In its reasoning, the Federal Circuit stated that, "[a]bsent the breach, this capital would have been available to Plaintiffs for other profitable uses or for repayment to investors to avoid the ongoing costs of maintaining the capital."[435] The court also relied on *Home Savings* to affirm the method of calculation used to determine the offset amount as the value of the benefits gained from the "real assets used to meet regulatory capital requirements."[436]

429. *Id.* at 1321 (citing *Am. Sav.*, 62 Fed. Cl. at 511, 513).
430. *Id.* at 1323 (citing Am. Sav. Bank, F.A. v. United States, 74 Fed. Cl. 756, 761 (Fed. Cl. 2006)).
431. *Id.* at 1324 (citing *Am. Sav.*, 62 Fed. Cl. at 16).
432. *Id.* at 1322.
433. 399 F.3d 1341 (Fed. Cir. 2005) (finding Government liable for breaching a promise to plaintiff thrift by enactment of FIRREA).
434. *Am. Sav.*, 519 F.3d at 1323.
435. *Id.*
436. *Id.* (citing Am. Sav. Bank, F.A. v. United States, 74 Fed. Cl. 756, 761 (Fed. Cl. 2006)).

On the issue of Warrant Forbearance, the Federal Circuit reversed the decision of the COFC, disagreeing with the COFC's finding that the assistance agreement was divisible and held that an award for partial restitution damages was not appropriate.[437] At trial, the COFC considered evidence suggesting that during negotiations of the assistance agreement, plaintiffs made clear that the warrants would be revocable upon the Government's breach and, therefore, determined that the issuance of stock warrants and the Warrant Forbearance was an arrangement that could be "unwound" from the contract.[438] On appeal, the Federal Circuit looked to both the language of the assistance agreement and the negotiation history of the parties', and held that the parties did not intend for their agreement to be divisible.[439] Without divisibility of contract, the award for partial restitution was reversed, and the Federal Circuit remanded the case to the COFC to determine if damages might be appropriate under an alternative theory.[440]

D. Fifth Third Bank v. United States[441]

In *Fifth Third Bank v. United States*,[442] the Federal Circuit affirmed the COFC's application of the criteria plaintiffs must meet to succeed on a claim to recover expectancy damages, stating such findings should be reviewed for clear error.[443]

Citizens Bank ("Citizens"), which was acquired by Fifth Third Bank ("Fifth Third"), agreed to acquire failing thrifts in six separate transactions between the years of 1982–1985.[444] In each of these acquisitions, Citizens entered into an assistance agreement with federal regulators that permitted Citizens to account for supervisory goodwill towards its minimum regulatory capital requirements and to amortize it as an asset over a period of years.[445] As with other *Winstar*-type contract cases, the Government breached the assistance

437. *Id.* at 1325.
438. *Id.* (citing Am. Sav. Bank, F.A. v. United States, 62 Fed. Cl. 6, 18 (Fed. Cl. 2004)).
439. *Id.*
440. *Id.* at 1328.
441. 518 F.3d 1368 (Fed. Cir. 2008).
442. *Id.*
443. *Id.* at 1377.
444. Fifth Third Bank v. United States, 71 Fed. Cl. 56, 63–64 (Fed. Cl. 2006).
445. *Id.* In a first appeal in this case, the Federal Circuit reversed the COFC on the issue of liability and held that the parties had formed a contractual relationship and that the Government was liable for breach as a result of the enactment of FIRREA. Fifth Third Bank of W. Ohio v. United States, 402 F.3d 1221, 1236–37 (Fed. Cir. 2005).

agreements with the passage of FIRREA in 1989.[446] With the elimination of this special accounting treatment, Citizens needed to improve its capital position and sought to do so by selling its Cincinnati branch in 1991 and converting from a mutual to a stock company in 1992.[447] Fifth Third, as successor to Citizens, brought this suit asserting that but-for the Government's breach, Citizens would not have entered into these transactions until a later year when market conditions improved.[448] Fifth Third sought damages equal to lost proceeds resulting from the forced sale of the Cincinnati branch, as well as the loss of the branch's operating profits from the time Citizens was forced to sell the branch to the time when it would have actually sold it, and for lost proceeds from the premature mutual to stock company conversion.[449]

At the conclusion of the damages trial, the COFC allowed Fifth Third to recover the lost proceeds from the sale of the Cincinnati branch and the lost proceeds from the premature conversion.[450] The COFC denied recovery of damages for lost operating profits from the premature sale of the Cincinnati branch as too speculative.[451]

On appeal, the Federal Circuit reviewed the COFC findings based on a clear error standard and affirmed the COFC's ruling on liability and damages.[452] The Federal Circuit examined the COFC's reasoning with respect to its findings on each of the requirements for recovering expectancy damages—foreseeability, causation, and certainty in proof of damages—and found no clear error in any of COFC's findings.[453] With regard to causation, the Federal Circuit affirmed the COFC's conclusion that but-for the enactment of FIRREA, Citizens' decision to sell the Cincinnati branch and convert from a mutual to stock company might not have occurred.[454] On the issue of foreseeability, the COFC's finding that a prudent regulator would or should have foreseen that the Government's breach of the assistance agreements would result in the acquiring thrift's need to raise additional capital and sustain other damages was without clear

446. The Court made note of the extensive litigation that has arisen as a result of the *Winstar* decision in 1996 and stated that the Government's brief reports that an additional 26 *Winstar*-related cases remain pending. *Fifth Third Bank*, 518 F.3d at 1371 n.5.
447. *Id.* at 1372.
448. *Id.*
449. *Id.*
450. *Id.* at 1374.
451. *Id.* at 1378.
452. *Id.* at 1375-78.
453. *Id.*
454. *Id.* at 1378.

error.[455] The court expressly rejected the Government's argument that the damages from the conversion and sale were not foreseeable at the time the parties entered into the contract because they could not have known unfavorable market conditions would exist at the time Citizens would undertake these actions in response to the Government's breach.[456] The court explained that to recover expectancy damages, a showing that the Government could foresee the type of likely response of the other party in the event of its own breach was adequate to prove foreseeability; thus, the ability to foresee the circumstances existing at the time of the breach that might add to plaintiff's damages is not required.[457] On the issue of certainty of proof of damages with respect to the calculation of damages caused by the premature conversion, the court rejected the Government's argument that "conversion proceeds are not a proper measure of expectancy damages."[458] The Federal Circuit held that proceeds from a conversion can be recovered.[459]

On cross-appeal, Fifth Third sought to recover the denied lost operating profits from the premature sale of the Cincinnati branch. The Federal Circuit agreed with the COFC's finding that the calculation of such profits were too speculative and that "it was not reasonably certain that the Cincinnati assets would have earned profits during the entire period in question" and that the COFC did not err in "reject[ing] the notion that the bank's expanded asset base . . . would have realized profits at a rate similar to that of the actual bank's profits."[460]

E. Pacific Gas & Electric Co. v. United States[461]

In this case, the Federal Circuit held that, when calculating expectancy damages, the proper construction of a "no-breach scenario" must represent what both parties anticipated they would receive under their bargain at a time when both parties believed that performance under the contract was possible.[462]

In 1983, Congress enacted the Nuclear Waste Policy Act of 1982 ("NWPA")[463] that, among other goals, sought to establish "federal

455. *Id.* at 1375-1377.
456. *Id.* at 1376.
457. *Id.*
458. *Id.* at 1380.
459. *Id.* 1380–81.
460. *Id.* at 1379.
461. 536 F.3d 1282 (Fed. Cir. 2008).
462. *Id.* at 1290–91.
463. Pub. L. No. 97-425, 96 Stat. 2201 (1983).

responsibility" for the storage and disposal of spent nuclear fuel ("SNF") and high-nuclear level waste ("HLW") and to establish a fund subsidized by utility companies to pay for federal waste removal and disposal.[464] Pursuant to this Act, the United States Department of Energy ("DOE") was charged with taking title and disposing of the SNF and HLW from the utility companies "'as expeditiously as practicable,'" but obligated to accept the waste no later than January 31, 1998.[465] Pursuant to the NWPA, the DOE entered into a series of standard contracts with the utility companies generating this waste. The terms of the standard contracts required the utility companies to pay a one-time fee to cover the fuel used to generate electricity prior to April 7, 1983, and to commit to paying quarterly fees into DOE's Nuclear Waste Fund (the "NWF").[466] The standard contracts, however, did not set forth a firm rate at which the DOE would accept and dispose of the SNF and HLW once it began its performance under the contract.[467] Instead, the contract established a procedure by which DOE would file two types of annual reports: one to project the ability of DOE facilities to accept SNF and HLW, the other to issue "annual acceptance priority rankings beginning April 1, 1991."[468] In turn, the standard contracts bound utility companies to file "a delivery commitment schedule to DOE to identify SNF/HLW ready for delivery."[469]

In 1987 Congress enacted an amendment to the NWPA, through which a new DOE directive, relating to waste repository construction, essentially rendered the original mandate that DOE begin accepting SNF and HLW by January of 1998 impossible.[470] Upon the enactment of this amendment, it was well recognized in the industry that the Government would not be able to perform pursuant to the terms of the standard contracts.[471] The DOE also recognized this inevitability, as its 1991 report made projections for waste acceptance contingent on the repeal of certain provisions of the 1987 NWPA Amendment.[472]

In 1998, the Government breached the standard contracts by failing to begin accepting title and disposing of SNF and HLW.[473] In

464. *Pac. Gas & Elec.*, 536 F.3d at 1285.
465. *Id.* (quoting Nuclear Waste Policy Act of 1982, 42 U.S.C.A. § 10222(a)(5)(A) (2006)).
466. *Id.* at 1284.
467. *Id.* at 1285.
468. *Id.* at 1286.
469. *Id.*
470. *Id.* at 1287.
471. *Id.*
472. *Id.*
473. *Id.* at 1290.

fact, at the time of the decision, the Government still had not begun to perform under the contract, while many utility companies have continued to pay into the NWF, as well as pay for storage costs for the nuclear waste still remaining in their possession.[474] The Pacific Gas & Electric Company ("PG&E"), as well as numerous other utility companies, filed an action in the COFC, seeking to recover damages based on the Government's partial breach of the standard contract.[475]

After holding that the Government was liable for a partial breach of the standard contract, the COFC ran into the problem of calculating the proper measure of PG&E's damages because of the absence of a firm rate of acceptance at which the DOE would have begun accepting SNF / HLW had a breach not occurred. An essential term of the contract, the COFC properly looked to the annual reports the DOE issued as part of the acceptance schedule process to discern how much and how quickly PG&E would have been able to unload its stored waste beginning in January of 1998.[476] The COFC decided to use the numbers contained in the 1991 DOE report to determine the likely acceptance rate had DOE performed.[477]

On appeal, the Federal Circuit disagreed with the COFC's use of the 1991 numbers to calculate damages, holding that in constructing what Government performance would have been in a non-breach scenario, the court should have applied the rate of acceptance that was projected at a time when both parties still believed that performance under the contract was still possible.[478] The court reasoned that because the COFC had found that both parties recognized that the 1987 NWPA Amendment had the effect of making the Government's performance under the contract impossible, subsequent reports were "tainted by the impending breach."[479] Thus, the Federal Circuit held that the 1987 report—the last report filed before the Government's breach was believed to be inevitable—was the "most reasonable measure of the contractual acceptance rate."[480]

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474. *Id.* at 1284.
475. *Id.* at 1287; *see also* Ind. Mich. Power Co. v. Dep't of Energy, 88 F.3d 1272, 1277 (D.C. Cir. 1996) (establishing that DOE breached its "statutory obligation" by not performing by the January 31, 1998 deadline).
476. *Pac. Gas & Elec.*, 536 F.3d at 1288.
477. *Id.*
478. *Id.* at 1292.
479. *Id.*
480. *Id.* The Federal Circuit affirmed and reversed two other issues on appeal—COFC's ruling on the exclusion of Greater Than Class C waste from the Standard Contract and on the denial to grant plaintiff's motion based on the COFC Rule 54(b)—for reasons set forth in the companion case *Yankee Atomic Elec. Co. v. United States* (*Yankee Atomic II*), 536 F.3d 1268 (Fed. Cir. 2008).

F. Yankee Atomic Electric Co. v. United States[481]

In the companion case to *Pacific Gas*, the Federal Circuit squarely established that, while a trial court may apply the "substantial factor" test to establish causation in SNF/HLW cases, a plausible "but-for" world must still be established to calculate expectancy damages.[482]

While the *Pacific Gas* court erred by applying the wrong projected numbers to calculate the DOE's waste acceptance rate had it performed under the terms of the contract, the Federal Circuit held in *Yankee Atomic Electric Co. v. United States*[483] that the COFC erred by failing to establish causation by failing to apply *any* DOE acceptance rate of SNF and HLW at all.[484] The Federal Circuit held that the COFC's finding of what the DOE's waste acceptance rate would have been was based on "assumption and approximation [and was] not enough to support a finding of causation under the substantial factor test."[485] In remanding the case, the Federal Circuit directed the COFC to apply the acceptance rate identified in the *Pacific Gas* decision to determine causation and damages.[486] These companion cases are important in that the Federal Circuit has established that the projected waste acceptance rate contained in the 1987 DOE report as the standard by which plaintiffs can readily use to calculate damages in similar actions asserting a breach of the standard contract. In this decision, the Federal Circuit opts for uniformity, rather than approaching subsequent cases relating to the Government's breach on a case-by-case basis.

The Federal Circuit also considered three additional questions. First, it considered the COFC's decision to award two of the plaintiffs, Maine Yankee Atomic Power Company ("Maine Yankee") and Connecticut Yankee Atomic Power Company ("Connecticut Yankee") (collectively, "the Yankees"), damages based on their pre-breach

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481. 536 F.3d 1268 (Fed. Cir. 2008).
482. *Id.* at 1272–73. The Federal Circuit noted that the substantial factor test has also been applied in *Winstar* cases pursuant to their ruling in *Citizens Fed. Bank v. United States*, 474 F.3d 1314 (Fed. Cir. 2007), which the Honorable Mary Ellen Coster Williams noted in last year's summary of Federal Circuit government contract decisions. Mary Ellen Coster Williams, *2007 Government Contract Decisions of the Federal Circuit*, 57 AM. U. L. REV. 1075, 1114 (2008). In the instant case, the Federal Circuit restated that damages are recoverable under the substantial factor test if "'(1) the damages were reasonably foreseeable by the breaching party at the time of contracting; (2) the breach is a substantial causal factor in the damages; and (3) the damages are shown with reasonable certainty.'" *Yankee Atomic II*, 536 F.3d at 1273 (citing Ind. Mich. Power Co. v. United States, 422 F.3d 1369, 1373 (Fed. Cir. 2005)) (emphasis omitted).
483. 536 F.3d 1268 (Fed. Cir. 2008).
484. *Id.* at 1273–74.
485. *Id.*
486. *Id.*

efforts of "reracking."[487] Both Maine Yankee and Connecticut Yankee chose to rerack their wet pools in 1993 and 1995, respectively, more than four years before the Government's breach.[488] On appeal, the Federal Circuit considered the record replete with support that the plaintiffs undertook this action believing that the Government was going to commit a breach and that this process, which increases SNF storage capacity, was a "commercially reasonable" decision and "foreseeable" to the DOE.[489] Thus, in deferring to the COFC's election to apply the substantial factor test, the Federal Circuit affirmed the COFC finding as to foreseeability and remanded the question of "whether the Government's partial breach of contract was a substantial factor in causing the Yankees to rerack."[490]

On appeal, the Federal Circuit considered two other issues which, as incorporated by reference, applied as a holding in *Pacific Gas* as well. First, the Federal Circuit upheld COFC's finding that the standard contract included Greater Than Class C ("GTCC") waste and, therefore, the plaintiffs may recover storage expenses for this type of waste.[491] GTCC waste is a radioactive byproduct of nuclear power generation, but not explicitly referred to in the standard contracts.[492] By affirming GTCC inclusion in the standard contract, the Federal Circuit allowed the Yankees to seek damages on their storage costs of GTCC waste. Secondly, on cross-appeal by the Yankees, the Federal Circuit affirmed the COFC decision to deny the Yankees' motion to enter a partial judgment and retain jurisdiction over their claims for future damages, under COFC Rule 54(b).[493] The Federal Circuit held that "[t]he Court of Federal Claims did not have jurisdiction to consider the Yankees' demand for future damages."[494]

G. Amber Natural Resources v. United States[495]

In *Amber Natural Resources v. United States*, the Federal Circuit held that a statutory breach of a contract constituted repudiation by the Government and allowed the non-breaching party to recover on a claim for restitution.[496]

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487. *Id.* (citing Yankee Atomic Elec. Co. v. United States (*Yankee Atomic I*), 73 Fed. Cl. 249, 326 (Fed. Cl. 2006)).
488. *Id.* at 1275.
489. *Id.* at 1276 (quoting *Yankee Atomic I*, 73 Fed. Cl. at 279, 283).
490. *Yankee Atomic II*, 536 F.3d at 1276–77.
491. *Id.* at 1278–79.
492. *Id.* at 1277.
493. *Id.* at 1282.
494. *Id.*
495. 538 F.3d 1358 (Fed. Cir. 2008).
496. *Id.*

Pursuant to the authority granted to the Secretary of the Interior by the Outer Continental Shelf Lands Act of 1953 ("OCSLA"),[497] numerous leases were granted to private entities from the 1960s through the 1980s to explore, develop and extract oil and gas resources in the outer continental shelf.[498] The leases were usually for a period of five years, but could be extended by the grant of a "suspension" authorized by the Department of the Interior (the "Department").[499] These suspensions were important because they allowed lessees to extend the term of their lease and continue their exploratory efforts.[500] In consideration for these leases, the plaintiffs collectively paid $1.1 billion dollars to the Government.[501]

In 1972, Congress enacted the Coastal Zone Management Act ("CZMA"),[502] which encouraged states "to develop coastal management plans" that, once adopted, required federal agencies conducting activities affecting coastal zones to act in accordance with the state plans, as judged by the states themselves through a review and certification process.[503] Initially, the Department did not consider the sale of leases to be an activity within the statute's scope, and that interpretation was upheld in a Supreme Court decision in 1984.[504] In response, Congress amended the CZMA in 1990 (the "1990 CZMA Amendments"), which brought the sale of leases within the scope of the statute and established more lengthy and burdensome procedures for federal agencies to follow to obtain approval of their coastal activities, which ultimately gave the states greater ability to halt certain activities and make them more expensive to pursue.[505]

While the 1990 CZMA Amendments made it clear that the Department's sale of leases fell within the scope of the CZMA, the Department and lessees still was believed that the activity of granting suspensions did not.[506] The State of California challenged suspensions granted in 1999, asserting that the suspensions did not conform to the procedures established in the 1990 CZMA

497. Pub. L. No. 83-212, 67 Stat. 462 (1953).
498. *Amber*, 538 F.3d at 1362. The outer continental shelf is defined by the Court as "including all submerged land that is beyond the outer limits of state jurisdiction . . . and within the limits of national jurisdiction." *Id.*
499. *Id.* at 1362.
500. *Id.*
501. *Id.* at 1367.
502. Pub. L. No. 92-583, 86 Stat. 1280 (1972).
503. *Amber*, 538 F.3d at 1363 (citing 16. U.S.C. § 1452 (2006)).
504. *Id.* at 1364. The Supreme Court held that the CZMA did not apply to the sale of leases in *Sec'y of the Interior v. California*, 464 U.S. 312 (1984).
505. *Amber*, 538 F.3d at 1364.
506. *Id.* at 1364-65.

Amendments.[507] Thus, the Department was forced to revoke the suspensions pursuant to the decision in *California v. Norton*,[508] which held that the 1990 CZMA Amendments applied to suspension activity.[509]

In 2002, the lessees filed suit in the COFC, asserting that the 1990 CZMA Amendments breached their lease agreements, and sought rescission of their contracts, restitution, and recovery of the sunk costs expended to exploit their leases as damages.[510] The COFC held that the Government was indeed liable, finding that the 1990 CZMA Amendments "constituted an anticipatory repudiation of the lease agreements" and granted the lessees restitution damages in the amount of $1.1 billion dollars—the amount the lessees had paid for their leases—but denied any recovery for sunk costs.[511] The COFC found the Government liable because the 1990 CZMA Amendments clearly contradicted the terms of section 1 of the leases, which specified the procedures the Department would follow in approving or granting discretionary lease suspensions and also incorporated by reference the statutes and regulations in existence at the time of the leases' execution, by imposing different procedures and regulations upon their agreements.[512] Thus, the COFC found that the new procedures and regulations imposed by the 1990 CZMA Amendments constituted an anticipatory repudiation by the Government of the lease agreements.[513]

On appeal, the Federal Circuit affirmed the COFC's award of restitution damages and its finding of liability, relying in large part on the reasoning in *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*,[514] which involved similar leases with similar provisions.[515] However, the Federal Circuit disagreed with the COFC's finding that the 1990 CZMA Amendments themselves constituted a breach or repudiation at the time of its enactment, recognizing that neither the Government nor the lessees believed the 1990 CZMA Amendments applied to the activity of granting suspensions and, therefore, at the time of its enactment, neither party considered there to exist a

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507. *Id.* at 1365.
508. 150 F. Supp. 2d 1046, 1053 (N.D. Cal. 2001).
509. *Amber*, 538 F.3d at 1365.
510. *Id.* at 1366.
511. *Id.* at 1366–67.
512. *Id.* at 1369.
513. *Id.*
514. 530 U.S. 604 (2000) (reversing Federal Circuit reversal of COFC decision awarding restitution to oil companies for payments on oil lease contracts).
515. *Amber*, 538 F.3d at 1368.

breach.[516] Instead, the Federal Circuit concluded that only after the *Norton* decision in 2001 did the Government begin to repudiate the lease agreements by following the ruling of that case and applying the 1990 CZMA Amendments to the activity of granting lease suspensions.[517] Notwithstanding this disagreement, the Federal Circuit affirmed the COFC's award for restitution damages on the ground that restitution is an appropriate remedy for repudiation of a contract.[518] The court rejected the Government's argument that restitution of the entire amount paid for the leases is improper where the plaintiffs were purchasers of the leases from the original leaseholders, as many leases were bought at a discount.[519] The Federal Circuit held that restitution in the amount of the original payment to obtain the leases was not a "windfall" to plaintiffs and was recoverable based on the new leaseholder's contractual right to "stand in the shoes" of the original leaseholders.[520]

The Government put forth numerous arguments questioning its liability and the extent and existence of plaintiffs' alleged injuries, based largely on the argument that the lessees had no "clear, unqualified right" to be granted requested suspensions at all, as they were always discretionary.[521] The Federal Circuit rejected the Government's arguments, holding that while the lessees might not have had a clear right to a suspension, they did bargain for a set of procedures and standards that would that would govern the Department's decision to grant or deny lease suspensions, and the leases contained a guarantee that future statutes or regulations would not alter those agreed upon procedures.[522] The Government also made various arguments based mostly on causation and waiver, each of which the court rejected.[523]

On cross-appeal, plaintiffs urged the Federal Circuit to award them restitution based on the amount of "benefit" the Government received as a result of the plaintiffs' efforts under the terms of the leases, measured by the sunk costs expended by plaintiffs to so perform.[524] Plaintiffs argued that they were required to take actions to explore and develop the natural resources and that, if successful,

516. *Id.* at 1369.
517. *Id.* at 1370.
518. *Id.* at 1377.
519. *Id.*
520. *Id.* at 1378.
521. *Id.* at 1371.
522. *Id.* at 1371-72.
523. *Id.* at 1376.
524. *Id.* at 1379.

the Government would receive royalties on their profits.[525] The Federal Circuit refused to award restitution according to this measure because of the "inherently uncertain nature of calculating the benefit conferred by the lessees' due diligence activities."[526]

VIII. ATTORNEYS' FEES / EAJA

A. Impresa Construzioni Geom. Domenico Garufi v. United States[527]

In *Impresa Construzioni Geom. Domenico Garufi v. United States*,[528] a contractor appealed the decision of the COFC to dismiss as untimely the contractor's application for fees and expenses pursuant to the Equal Access to Justice Act ("EAJA").[529] The fees and expenses sought by Impresa Construzioni Geom. Domenico Garufi ("Impresa") stemmed from a bid protest filed in 1999 in the COFC challenging the award of a contract by the Department of the Navy.[530] Although the COFC denied Impresa's protest,[531] this decision was reversed on appeal by the Federal Circuit.[532] On remand, the COFC granted the protest but denied Impresa's claim for bid preparation and proposal costs.[533] Impresa filed an appeal of the court's denial to the Federal Circuit, but subsequently filed a motion to withdraw the appeal and issue final judgment in favor of the Government. On March 11, 2005, the Federal Circuit granted Impresa's motion, issuing the mandate on that same date.[534]

On July 5, 2005, Impresa filed in the COFC an EAJA Application for Fees and Other Expenses relating to its successful bid protest. Ultimately, the court held that Impresa's EAJA application was untimely because it occurred more than thirty days after the Federal Circuit's final judgment on March 11, 2005.[535] Specifically, the court

525. *Id.* at 1380.
526. *Id.* at 1381.
527. 531 F.3d 1367 (Fed. Cir. 2008).
528. *Id.*
529. 5 U.S.C. § 504 (2006).
530. Impresa Construzioni Geom. Domenico Garufi v. United States (*Impresa V)*, 73 Fed. Cl. 718, 719 (Fed. Cl. 2006).
531. Impresa Construzioni Geom. Domenico Garufi v. United States (*Impresa I*), 44 Fed. Cl. 540, 556 (1999).
532. Impresa Construzioni Geom. Domenico Garufi v. United States (*Impresa II*), 238 F.3d 1324, 1341 (Fed. Cir. 2001).
533. Impresa Construzoni Geom. Domenico Garufi v. United States (*Impresa III*), 61 Fed. Cl. 175, 184 (2004).
534. Impresa Construzioni Geom. Domenico Garufi v. United States (*Impresa IV*), 125 Fed. App'x 310 (Fed. Cir. 2005).
535. Impresa Construzioni Geom. Domenico Garufi v. United States (*Impresa VI*), 531 F.3d 1367, 1369 (Fed. Cir. 2008). Initially, the COFC rejected Impresa's July 5, 2005 EAJA application as premature under the "mistaken belief that a final judgment

held that since Impresa had voluntarily requested dismissal of its appeal, that judgment was final and not appealable as of its issue date. Impresa appealed the court's decision.[536]

The Federal Circuit's decision in response to Impresa's appeal addressed the issue of when a voluntary dismissal becomes a "final judgment" for purposes of the EAJA. The court began by explaining that in accordance with the EAJA, "a party that prevails against the United States in a civil action may recover attorney fees and expenses if certain criteria are met,"[537] but that to be timely under the EAJA, a party must submit an application "'within thirty days of final judgment in the action.'"[538] The EAJA defines "final judgment" as "a judgment that is final and not appealable."[539] The Government specifically noted that it would be highly unlikely that the Supreme Court would grant a certiorari petition for a case, such as this, where the appeal in the circuit court had been dismissed without prosecution.[540] Accordingly, novel in this case is the court's assessment of whether a single rule should apply when calculating EAJA time or whether a case-by-case determination is required when judgment arises from voluntary dismissal.

The Federal Circuit looked first to a United States Supreme Court decision, *Melkonyan v. Sullivan*,[541] which addressed "[t]he question of finality for EAJA purposes."[542] There, although the Court ruled that "the filing period under the EAJA starts to accrue only after the time to appeal has expired for all parties," it did not address "the circumstance of a final judgment entered on voluntary dismissal."[543] Next, because the Federal Rules do not address "whether a final judgment entered on an unopposed motion for dismissal is amendable to appeal,"[544] the court turned to consideration of how this issue has been handled by different circuit courts.

The Federal Circuit's survey of the circuits revealed that, in general, the circuits have found that a single rule should apply in calculating EAJA time periods regardless of whether an appeal is

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had not yet issued." *Impresa V*, 73 Fed. Cl. at 719. The court remedied this error when Impresa filed a motion to resubmit its EAJA application by deeming the application filed on July 5, 2005.

536. *Id.* at 721–22.
537. *Impresa VI*, 531 F.3d at 1369.
538. *Id.* (citing 28 U.S.C. § 2412(d)(1)(B) (2006)).
539. 28 U.S.C. § 2412(d)(2)(G).
540. *Impresa VI*, 531 F.3d at 1371.
541. 501 U.S. 89 (1991).
542. *Impresa VI*, 531 F.3d at 1369 (citing *Melkonyan*, 501 U.S. at 89).
543. *Id.* (citing *Melkoynan*, 501 U.S. at 89).
544. *Id.*

likely to be filed.[545] Although two of the circuits have instead adopted a "functional approach" to this issue, which requires consideration by the court of whether an appeal could have been taken by either party on a case by case basis,[546] the court ultimately found that:

> Precedent weighs against creating a special category for voluntary dismissals in cases originating in the Court of Federal Claims, whereby it would be necessary to determine whether a petition for certiorari can be filed or might be granted, in order to calculate the period for filing an application under the EAJA.[547]

The court also explained that "the better procedure is to avoid preliminary litigation of time periods for EAJA filings when there has been a voluntary dismissal, at least where the order of dismissal does not specifically prohibit appeal," reasoning that a case-by-case determination of the time for filing an EAJA petition when a judgment arises from voluntary dismissal, "would contravene the purpose of the 1985 amendments to 'give both courts and litigants clear guidance on what is expected and avoid the unnecessary confusion which accompanied this issue in the past.'"[548] Finally, the court explained that "[t]he issue before us is not whether the [Supreme] Court might grant certiorari if Impresa had filed such a petition; the issue is whether the 30-day EAJA period will start and end during the [ninety] days available for Impresa to request certiorari."[549] As such, the court adopted "a uniform rule for EAJA petitions in the Court of Federal Claims, whereby appeal rights from voluntary dismissals are presumed unless expressly disclaimed or specifically prohibited."[550] Accordingly, the court reversed the COFC decision that Impresa's EAJA application was untimely and remanded it back to the lower Court for a determination on the merits.[551]

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545. *Id.* at 1369–70 (citing Hoa Hong Van v. Barnhart, 483 F.3d 600 (9th Cir. 2007), Adams v. SEC, 287 F.3d 183 (D.C. Cir. 2002), and Scafar Contracting, Inc. v. Sec'y of Labor, 325 F.3d 422 (3d Cir. 2003)).

546. *Id.* at 1370–71 (citing Briseno v. Ashcroft, 291 F.3d 377 (5th Cir. 2002) and Bryan v. Office of Pers. Mgmt., 165 F.3d 1315 (10th Cir. 1999)).

547. *Id.* at 1371-72.

548. *Id.* at 1371 (quoting H.R. Rep. No. 99-120 at 7 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 135, which stressed that the time for filing an EAJA fee application should not be a "trap for the unwary resulting in the unwarranted denial of fees").

549. *Id.*

550. *Id.* at 1372.

551. Circuit Judge Rader dissented stating:

> In this case, Impresa moved without opposition to voluntarily dismiss its appeal. Our court issued the mandate—by all measures a final judgment because it covered the entire case and all issues. The grant of the voluntary dismissal ended the litigation with a judgment that is "final and not appealable."

Id. (citing Melkonyan v. Sullivan, 501 U.S. 89, 95–96 (1991)).

IX. ATTORNEY SANCTIONS

A. 1-10 Industry Associates, LLC v. United States[552]

In *1-10 Industry Associates, LLC, v. United States*,[553] a United States Postal Service ("USPS") attorney, Mr. Michael F. Kiely, appealed from an order issued by the COFC imposing the sanction of reprimand for: (1) a representation that the Government made in its brief that the COFC perceived to be erroneous, and (2) an episode involving Mr. Kiely's appearance before the COFC in a previous case.[554] The Federal Circuit reversed and remanded the COFC's order finding that Mr. Kiely had breached the duty of candor because the Government, in its brief, had made no affirmative representation as to when it first knew of the basis for a counterclaim and, in any event, "the court was aware of the uncontested facts showing that the contracting officer was not the first person in the government to know of the surcharges" that served at the basis of the Government's counterclaim.[555] The Federal Circuit also concluded that the COFC abused its discretion by failing to give Mr. Kiely proper notice that his alleged misconduct would be considered sanctionable conduct.[556]

Within a month of filing the Government's answer, Mr. Kiely met with counsel for 1-10 Industry Associates, LLC ("1-10") in November 2004, to discuss a possible settlement of the case.[557] During the course of that conversation, Mr. Kiely learned that it was 1-10's practice to add a fifteen percent charge to each electric bill and, thus, "the Government might have a counterclaim to recoup surcharges previously collected by 1-10."[558] However, Mr. Kiely believed it was necessary to establish independently that 1-10 imposed a surcharge upon the Government's purchase of electricity in order to assert a counterclaim to collect the surcharges 1-10 assessed the Government.[559] In November 2005, Mr. Kiely deposed two of 1-10's officials, one of whom admitted that 1-10 added a fifteen-percent

552. 528 F.3d 859 (Fed. Cir. 2008).
553. *Id.* The underlying dispute between the USPS and 1-10 Industry Associates, LLC ("1-10") concerns a lease in which the USPS agreed to pay for electricity supplied by 1-10 to USPS in connection with the space USPS leased from 1-10. *Id.* at 861. The parties disagreed about the amounts due to 1-10, and 1-10 filed suit in the COFC seeking $56,818.18 in unpaid electrical charges. *Id.* USPS's answer to the complaint consisted of a general denial. *Id.*
554. *Id.* at 866.
555. *Id.* at 870.
556. *Id.* at 861, 869.
557. *Id.* at 861.
558. *Id.* at 861–62.
559. *Id.* at 862.

surcharge to electricity bills sent to the USPS.[560] In February 2006, Mr. Kiely met with the contracting officer to discuss the possibility of asserting a counterclaim regarding the surcharges.[561] The contracting officer denied any knowledge of such surcharges, but, after reviewing the file on the lease, the contracting officer issued a demand letter to 1-10 seeking recoupment of the previous surcharges.[562] Following the contracting officer's issuance of his demand letter, on May 5, 2006, the Government filed a counterclaim in the amount of $106,076.14 for surcharges on electricity bills since 1990.[563]

In June 2006, 1-10 moved to dismiss the Government's counterclaim.[564] 1-10 characterized the counterclaim as a compulsory counterclaim, which under Court of Federal Claims Rule 13(a) ("RCFC"), was required to be filed at the time of the answer.[565] Moreover, it argued that the counterclaim was untimely because the Government had "known of the surcharges for at least ten years, based upon copies of authorized payments of electricity invoices from 1996 showing '+15%' on their face."[566]

The Government's response, signed by Mr. Kiely, did not dispute 1-10's timeliness arguments.[567] Rather, it contended that the propriety of its counterclaim should be measured under RCFC 13(e), "which provides that the court 'may permit a party to amend a pleading to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.'"[568] The Government asserted that, for the purposes of RCFC 13(e), the counterclaim did not "mature" until the contracting officer issued his final decision; so, the Government argued that the one-month lapse of time between the contracting officer's decision and the filing of the counterclaim should not disqualify it under RCFC 13(e).[569] In the course of describing the contracting officer's final decision, the Government's brief asserted that "'the contracting officer has stated that he was not aware of the claim until February of 2006.'"[570] No mention was made of Mr. Kiely's first learning in November 2004 of the possible grounds for a counterclaim until the time that Mr. Kiely

560. *Id.*
561. *Id.*
562. *Id.*
563. *Id.*
564. *Id.*
565. *Id.*
566. *Id.*
567. *Id.*
568. *Id.* at 862–63.
569. *Id.* at 863.
570. *Id.*

informed the contracting officer of the surcharges in the spring of 2006.[571]

The COFC conducted a telephonic hearing on 1-10's motion to dismiss on November 13, 2006.[572] The court announced that it would dismiss the Government's counterclaim because it was compulsory and, as such, was untimely filed.[573] It concluded further that some of the statements Mr. Kiely made during the hearing raised the question of whether sanctions were appropriate.[574]

On November 17, 2006, the COFC issued an order directing Mr. Kiely to show cause "why he should not be sanctioned under RCFC 11(c) 'for making misrepresentations to the court.'"[575] The court noted that the Government's statement that the contracting officer's failure to mention the 1996 bill showing "+15%," or the November 2005 deposition testimony of 1-10's employee who explained the regular practice of the fifteen-percent surcharge "'left [the Court] with the impression that the Government officials did not know about the counterclaim until sometime shortly before February of 2006.'"[576] Mr. Kiely responded to each of the factual items in the court's show cause order as the basis for its charge that he misled the court.[577] Mr. Kiely argued that he should not be sanctioned for the omission of facts the Government deemed not necessary or relevant to his theory of the case and that, since the court was itself aware of the Government's knowledge of the basis for a counterclaim before the supposedly misleading reference to February of 2006, he should not be sanctioned for the failure to mention facts he considered to be irrelevant to the Government's case when the court already had such information.[578]

On March 17, 2007, the COFC imposed the sanction of reprimand upon Mr. Kiely.[579] The COFC ruled that Mr. Kiely had made misrepresentations concerning the counterclaim by omitting facts from its opposition to the motion to dismiss relating to when the Government first learned of its counterclaim.[580] The court further determined that the timing of when USPS first became aware of the surcharge issue was highly relevant not only to when the claim first

571. *Id.* at 862, 863.
572. *Id.* at 863.
573. *Id.* at 864.
574. *Id.*
575. *Id.*
576. *Id.* (alterations in original).
577. *Id.* at 865.
578. *Id.*
579. *Id.*
580. *Id.* at 866.

matured under RCFC 13(e) but also to whether the Government "'had failed to set up the counterclaim "through oversight, inadvertence, or excusable neglect" under RCFC 13(f).'"[581]

Relying upon the advisory committee notes to RCFC 11, the court pointed out that it was obligated to consider circumstances in which the person in question had engaged in similar conduct in other litigation.[582] The COFC referred to an incident in a prior case in which Mr. Kiely had been involved while employed as an attorney at the Department of Justice, and where Mr. Kiely sought to introduce at trial a document that had not previously been identified.[583] The court expressed dissatisfaction with the affidavit filed by Mr. Kiely in connection with that incident.[584] In acknowledging that the show cause order had not mentioned the previous incident, the COFC stated that "'the court does not read RCFC 11(c)(1)(B) as requiring it to describe in its order every factor that might impact its decision to impose sanctions.'"[585]

On appeal to the Federal Circuit, Mr. Kiely contended that the COFC violated the due process provisions found in RCFC 11(c)(1)(B) that require the court to give notice of "'the specific conduct that appears to violate subsection (b),'" in order to permit the party an opportunity to show cause why no sanction for the conduct is warranted.[586] The Federal Circuit noted that it had reviewed the complete trial transcripts in the earlier case and that, on May 7, 2003, the date that Mr. Kiely's allegedly questionable conduct occurred,[587] the COFC had not referenced RCFC 11 or directly indicated to Mr. Kiely that his conduct might be subject to sanctions under that rule.[588] Moreover, the Federal Circuit noted that, on June 12, 2003, when the COFC returned to the issue of Exhibit 23, the plaintiff conceded that the document had not been subject to a previous discovery request, the court granted the Government's motion to have the document introduced as rebuttal evidence, and the COFC expressed its appreciation of both parties' conduct.[589] Based upon this analysis, the Federal Circuit concluded that, as of the close of the record in the earlier case, "Mr. Kiely had no reason to

581. *Id.*
582. *Id.*
583. *Id.* at 866.
584. *Id.* at 867.
585. *Id.*
586. *Id.*
587. Mr. Kiely sought to introduce a daily report document (Exhibit 23) as rebuttal evidence. *Id.* at 868.
588. *Id.*
589. *Id.*

think that he had engaged in possibly sanctionable conduct."[590] Thus, the Federal Circuit concluded that the COFC's failure to provide Mr. Kiely with notice that his prior conduct provided evidence of a pattern of misconduct was reversible error.[591]

The Federal Circuit applied the objective test of "'reasonableness under the circumstances'"[592] to conclude that the COFC's determination that Mr. Kiely breached his duty of candor was erroneous.[593] Importantly, the Federal Circuit noted that context matters.[594] It specifically referred to *Young v. City of Providence*,[595] in which "the court held that counsel could not be charged with misrepresenting a fact to the court when the court itself knew the true facts and thus could not have been misled by the less-than-clear assertions by the party subject to the sanctions order."[596] The Federal Circuit concluded that, on the Government's theory of the case, the counterclaim had not matured for jurisdictional purposes until the contracting officer issued its final decision asserting the Government's counterclaim.[597] Thus, the Government did not unreasonably delay in filing its counterclaim when it did so one month after the contracting officer issued his final decision.[598]

The Federal Circuit acknowledged that the Government may have been misguided in its legal theory, but Mr. Kiely had made no affirmative misrepresentation as to when the Government first knew of the basis for a counterclaim, and "the court was aware of the uncontested facts showing that the contracting officer was not the first person in the government to know of the surcharges."[599] The Federal Circuit ruled that a neutral reading of the Government's opposition motion to dismiss in the context of the motion itself revealed that the COFC erred when it read into Mr. Kiely's response an assertion that the contracting officer was the first person in the Government to know of the surcharges because the court knew otherwise.[600] Accordingly, the Federal Circuit reversed and remanded

590. *Id.*
591. *Id.* at 869.
592. *Id.* (citing White v. Gen. Motors Corp., Inc., 908 F.2d 675, 680 (10th Cir. 1990)).
593. *Id.*
594. *Id.* at 870.
595. 404 F.3d 4 (1st Cir. 2005).
596. *1-10 Industry*, 528 F.3d at 869, (citing *Young*, 404 F.3d 4 (1st Cir. 2005)).
597. *Id.* at 870.
598. *Id.*
599. *Id.*
600. *Id.*

the COFC's decision, with instructions to erase the sanctions against Mr. Kiely.[601]

601. *Id.*