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Mary Ellen Coster Williams

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2007 GOVERNMENT CONTRACT DECISIONS OF THE FEDERAL CIRCUIT

THE HONORABLE MARY ELLEN COSTER WILLIAMS*

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* Judge, United States Court of Federal Claims, appointed July 2003. J.D., 1977, *Duke University School of Law*; M.A./B.A., 1974, *Catholic University of America*. These summaries reflect the personal views of the author, and they may not be cited as precedent. The author gratefully acknowledges the significant contributions of her law clerk Patrick T. Rothwell, as well as interns Margaret J. Kochuba and Nicole P. Femminella, to this Article.

INTRODUCTION

In 2007, the Federal Circuit issued 326 precedential opinions. Of these, thirty-seven were contract cases on appeal from the Court of Federal Claims and five were appeals in Contracts Disputes Act ("CDA") cases from the boards of contract appeals. This Article discusses twenty-six 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.[1] The decisions are grouped into the following categories: jurisdiction, bid protests, contract interpretation, equitable adjustment/breach, termination, authority, damages, defenses, set-off, and attorney fees.

I. JURISDICTION

A. Suburban Mortgage Associates, Inc. v. United States Department of Housing & Urban Development, 480 F.3d 1116 (Fed. Cir. 2007)

In this significant opinion, the Federal Circuit clarified the jurisdictional boundary between the Tucker Act[2] and the Administrative Procedure Act[3] ("APA").[4] This interlocutory appeal addressed the district court's denial of the government's motion to transfer the case to the Court of Federal Claims ("COFC"). The Federal Circuit has exclusive jurisdiction over an appeal of such a transfer order pursuant to 28 U.S.C. § 1292(d)(4)(A).[5]

The dispute arose from a nursing home's default on a mortgage loan guaranteed by the Department of Housing and Urban

1. This Article addresses all Federal Circuit precedential opinions in contract actions for 2007.
2. 28 U.S.C. § 1491 (2000).
3. 5 U.S.C. § 500 (2000).
4. Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116, 1117 (Fed. Cir. 2007).
5. This provides:

> The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 [transfer to cure for want of jurisdiction] of this title.

28 U.S.C. § 1292(d)(4)(A) (2000).

Development ("HUD").[6] In this guaranty arrangement, HUD became obligated to reimburse Suburban Mortgage if the nursing home defaulted and Suburban Mortgage incurred losses.[7] The parties' agreement dictated that in the event of a default, Suburban Mortgage had to transfer its interest in the mortgage and the mortgaged property to HUD in order to collect the insurance proceeds.[8]

The nursing home defaulted on its mortgage loan, and Suburban Mortgage sought to exercise its contractual right by assigning the defaulted mortgage to HUD, thereafter collecting the insurance proceeds.[9] HUD refused to accept assignment based on its belief that Suburban Mortgage committed fraud or made material misrepresentations to secure the guaranty agreement.[10]

Suburban Mortgage filed suit in the District Court for the District of Columbia. In Count I, Suburban Mortgage sought a declaratory judgment requiring HUD to perform its duties under the agreement, i.e., "to accept assignment of the loan with ultimate reimbursement of the loan balance to Suburban."[11] In Count II, it sought specific performance "in the form of payment of the insured loan amount" and other related expenses.[12] Suburban Mortgage invoked the Fifth Amendment and three statutory bases for the subject-matter jurisdiction of the district court—"federal question" jurisdiction,[13] the Administrative Procedure Act,[14] and the Declaratory Judgment Act.[15]

The district court, citing *Bowen v. Massachusetts*,[16] concluded that it had jurisdiction because Suburban Mortgage sought equitable relief.[17] Furthermore, the district court determined that the COFC could not provide adequate relief, reasoning that even though Suburban Mortgage could largely reduce its claims to a monetary sum, only injunctive relief could address the concerns of bankruptcy, loss of reputation, and lost future profits.[18] The district court

6. *Suburban Mortgage*, 480 F.3d at 1118.
7. *Id.*
8. *Id.*
9. *Id.* at 1118–19.
10. *Id.* at 1119. HUD's allegations of fraud revolved around an individual under indictment who HUD believed owned or controlled both Suburban Mortgage and the nursing home. HUD contended that this owner caused the failure of the nursing home in order to fraudulently collect the insurance proceeds. *Id.* at 1119 n.6.
11. *Id.*
12. *Id.*
13. 28 U.S.C. § 1331 (2000).
14. 5 U.S.C. §§ 701–706 (2000).
15. 28 U.S.C. §§ 2201–2202 (2000).
16. 487 U.S. 879 (1988).
17. *Suburban Mortgage*, 480 F.3d at 1120.
18. *Id.*

dismissed Suburban Mortgage's claims for specific performance because they sounded in contract, but sustained Suburban Mortgage's claim for declaratory relief on the ground that Suburban's challenge to HUD's refusal to accept assignment of the mortgage flowed from statute, not the underlying insurance contract.[19]

The Federal Circuit began its analysis by examining the fundamental precept of sovereign immunity, articulating the requirement that a claimant identify a specific statutory waiver of immunity in order to bring suit against the government.[20] The court laid out the statutory framework governing non-tort claims against the government, citing the Tucker Act's grant of jurisdiction over monetary claims to the COFC, and the APA's grant of jurisdiction to the district courts for review of agency action.[21]

The court explained that Congress reconciled the Tucker Act and the APA by providing in the APA the three specific limitations on the jurisdictional reach of the APA—first, the suit may only seek relief other than "money damages," second, a suit would lie under the APA only if there were "no other adequate remedy" in a court, and third, the suit could not be maintained if "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."[22]

Using colorful language, the Federal Circuit described the first APA limitation—the APA's inapplicability to suits for money—as a relatively "watertight barrier" until the Supreme Court's 1988 decision in *Bowen* caused that barrier to spring a leak "that has threatened to become a gusher."[23] *Bowen* held that the district court had APA jurisdiction over a state's claim that an action to compel payment of Medicaid expenditures did not seek money damages, but rather sought to "enforce the statutory mandate itself, which happens to be one for the payment of money."[24]

Recognizing that *Bowen* created confusion and forum shopping, the Federal Circuit noted that in determining jurisdiction, looking beyond the pleadings to the substance of the claim was necessary.[25] Citing a litany of Federal Circuit opinions harking back to 1994, the court emphasized: "We have cautioned litigants that dressing up a

19. *Id.* at 1120–21.
20. *Id.* at 1121.
21. *Id.* at 1121–22.
22. *Id.* at 1122 (citing 5 U.S.C. §§ 702, 704 (2000)).
23. *Id.*
24. Bowen v. Massachusetts, 487 U.S. 879, 900 (1988).
25. *Suburban Mortgage*, 480 F.3d at 1124.

claim for money as one for equitable relief will not remove the claim from Tucker Act jurisdiction and make it an APA case."[26]

After denuding a claim to its essence, the *Suburban Mortgage* court directed that the court "still must determine whether the claim is excluded from APA jurisdiction by the limitations in 5 U.S.C. §§ 702 and 704."[27] However, in tackling this aspect of the case, the Circuit departed from *Bowen* and its progeny's analytical approach. Instead of attempting to divine whether a claim is for "money damages" or "happens to be for money"—"a distinction . . . at best murky, and at worst without a difference"—the Federal Circuit readjusted the *Bowen* methodology.[28] In charting a different course, the Federal Circuit deferred the inquiry on whether relief sought was for money damages *vel non* to a later, perhaps unnecessary phase of the analysis.[29]

Instead, the Federal Circuit directed that the first step in the inquiry should be to ascertain whether the Court of Federal Claims could provide an adequate remedy for the alleged wrong.[30] The Court concluded that if the complaint sought a monetary reward from the government and the Court of Federal Claims could provide an adequate remedy, then the proper forum would be the COFC under the Tucker Act. In this scenario, there would be no need to address the "money damages" and the "expressly or impliedly forbids" provisions.[31] Since "[t]he three limitations function in the disjunctive, the application of any one is enough to deny a district court jurisdiction under the APA."[32]

Applying this analytical framework, the court held that although Suburban Mortgage's claim was fashioned as one for declaratory and injunctive relief, the substance of the claim was for monetary relief under a contract-based obligation of HUD.[33] The court determined that the COFC could provide an adequate remedy because the monetary relief claimed in the district court was available through a breach-of-contract claim in the COFC.[34]

In discussing the adequacy of Suburban Mortgage's remedy in the COFC, the Federal Circuit recognized that unlike *Bowen*, Suburban Mortgage sought a single payment of the insurance proceeds. In distinguishing *Bowen*, the Circuit articulated a litany of circumstances

26. *Id.*
27. *Id.*
28. *Id.* at 1125.
29. *Id.*
30. *Id.* at 1125 (citing 5 U.S.C. § 704 (2000)).
31. *Id.* at 1126.
32. *Id.*
33. *Id.* at 1127.
34. *Id.* at 1128.

in *Bowen* that were not at play in *Suburban*. Specifically, *Bowen* involved the complex relationship between two sovereigns—the federal and state governments—in administering the Medicaid program,[35] a dispute over a major federal grant involving enormous sums of money, the complex interactions between the governments and the beneficiaries, and the long-term functioning of the program against the backdrop of the statutory requirements governing the Medicaid program.[36] As the Circuit noted, nowhere in *Bowen* did the Court refer to a specific express agreement governing the parties' relationships.[37]

Suburban Mortgage is a watershed decision that should do much to eliminate wasteful litigation on the jurisdictional divide between district courts and the COFC. One district court has already applied *Suburban Mortgage* to "plug the leak" in the "money distinction" barrier separating district court APA jurisdiction from COFC Tucker Act jurisdiction.[38] In *Tortorella v. United States*,[39] the court characterized *Suburban Mortgage* as "aptly summariz[ing] the current state of the law as it pertains to *Bowen*" and limiting *Bowen*.[40] The *Tortorella* court, using a different *Suburban Mortgage* metaphor, stated, "No matter what dressing plaintiffs serve with the Amended Complaint, the taste is overwhelmingly that of a money award. Recognizing as much, plaintiffs in essence concede that most of their case belongs in the Court of Federal Claims."[41]

35. *Suburban Mortgage*, 480 F.3d at 1124 (citing Bowen v. Massachusetts, 487 U.S. 879, 884–85 (1988); Consol. Edison Co. of New York v. U.S. Dep't of Energy, 247 F.3d 1378, 1385 (Fed. Cir. 2001)).

36. *Id.* at 1127.

37. *Id.* The Federal Circuit gave short shrift to plaintiff's other arguments, stating:

> Nor are Suburban's concerns about possible bankruptcy, loss of reputation, and lost future profits a basis for saying that there is not an adequate remedy in the Court of Federal Claims. Those concerns can be alleged by any claimant seeking money from the Government for an allegedly wrongful failure to pay a claim; to the extent they have merit in a given case, money usually can assuage the wrong.

Id.

38. Tortorella v. United States, 486 F. Supp. 2d 159, 163–64 (D. Mass. 2007).

39. 486 F. Supp. 2d 159 (D. Mass. 2007).

40. *Id.* at 163.

41. *Id.* at 164. Commentators characterized the significance of *Suburban Mortgage* from a practitioner's point of view as follows:

> The importance of the case to practitioners is three-fold. First, the Federal Circuit does not disguise its disagreement with *Bowen* or its intent to limit *Bowen* to its fairly unique circumstances. Second, the court is critical of attempts by lawyers to craft claims for relief so as to avoid the COFC. Third, adequacy of remedy at the COFC often will be the deciding factor. In this regard, the court also notes its position that money damages under the Tucker Act are "presumptively an adequate remedy."

B. *Bianchi v. United States, 475 F.3d 1268 (Fed. Cir. 2007)*

In *Bianchi v. United States* (*Bianchi IV*),[42] a contractor sought recovery for two sets of "value engineering change proposal" ("VECP") payments awarded to it by the Armed Services Board of Contract Appeals ("ASBCA"), but paid by the government to a bank as contractor's assignee.[43] The Federal Circuit noted that this case had a "long and tortuous history" originating in claims filed before the ASBCA in 1981.[44] In 1979 and 1980, Mr. Bianchi entered into three contracts to produce military clothing for the government.[45] Bianchi used loans from Bank of America ("the Bank") to finance his performance of the contract, assigning the proceeds and contractual rights to the Bank as security for these loans,[46] some of which the Small Business Administration ("SBA") guaranteed.[47] When the government terminated the contracts, Bianchi defaulted on the loans,[48] and the Bank applied to the SBA for payment on the guaranteed loans. In exchange for payment, the Bank assigned its interest in the guaranteed loans to the SBA.[49]

The contractor alleged that the failure of the government to pay him constituted a breach of a 1988 settlement agreement between him and the government.[50] The COFC held that it lacked subject-matter jurisdiction.[51] On appeal, the contractor made three arguments. First, he argued that the COFC erred in dismissing for lack of subject-matter jurisdiction because he predicated his claims on a breach of a settlement agreement.[52] Second, he argued that the COFC erred in finding that his VECP I claim was time-barred under the statute of limitations, 28 U.S.C. § 2501.[53] Third, Bianchi argued that under the principle of res judicata, prior holdings in the Federal Circuit and Ninth Circuit established that the 1988 settlement

C. Stanley Dees & Thomas C. Papson, *Availability of COFC Remedy Precludes APA Review of Dispute Over Mortgage Guarantee, Federal Circuit Holds*, GOV'T CONTRACTOR, Mar. 28, 2007, at 12, 15.

42. 475 F.3d 1268 (Fed. Cir. 2007).

43. In February 1993, the ASBCA awarded Bianchi VECP royalties in the amount of $58,613.03 plus interest ("VECP I"). In December 2000, the ASBCA awarded Bianchi royalties in the amount of $16,574.74 plus interest ("VECP II"). The government, however, never paid these sums to Bianchi. *Id.* at 1271–72.

44. *Id.* at 1270.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 1273.

51. *Id.* at 1272.

52. *Id.*

53. *Id.*

agreement required the government to pay the VECP awards to him personally.[54]

In 1981, Bianchi brought claims related to the contracts before the ASBCA,[55] and in 1988, Bianchi and the government reached a settlement agreement allowing Bianchi to recover $1.1 million and permitting him to pursue his VECP claims and seek legal fees before the ASBCA.[56] However, the Bank believed that as Bianchi's contract assignee, it should have received the $1.1 million.[57] The Bank brought this argument to the COFC, and in response, the government filed a third-party claim against Bianchi for the money he received under the settlement agreement in 1988.[58] On appeal, the Federal Circuit sided with the Bank in *Bank of America National Trust & Savings Association v. United States* (*Bianchi I*),[59] holding that the SBA's security interest in the contract was subordinate to the Bank's rights.[60] Furthermore, the government had no right to set off Bianchi's debts to the SBA against the money owed to it by the Bank.[61] Under the terms of the 1988 settlement agreement, then, the government could not challenge its settlement with Bianchi.[62]

In 1993, the ASBCA awarded Bianchi recovery on his VECP I claim in the form of royalties.[63] After Bianchi filed for a writ of mandamus to compel the government to pay its VECP I award, the district court found that the Bank as assignee was entitled to the VECP royalties.[64] On appeal to the Ninth Circuit, Bianchi argued that the 1988 settlement agreement entitled him to the VECP I royalties using the Federal Circuit's decision in *Bianchi I*.[65] According to Bianchi, it was irrelevant whether the government also owed royalties to the Bank.[66] However, because the case essentially involved a breach of contract (the 1988 settlement agreement) claim against the United States, the Ninth Circuit found that the district court lacked jurisdiction, holding that the claim instead belonged in the COFC.[67]

54. *Id.*
55. *Id.*
56. *Id.* at 1270–71.
57. *Id.* at 1271.
58. *Id.*
59. 23 F.3d 380, 382 (Fed. Cir. 1994).
60. *Bianchi IV*, 475 F.3d at 1271.
61. *Bianchi I*, 23 F.3d at 384–85.
62. *Id.* at 383.
63. Bianchi v. United States (*Bianchi III*), 68 Fed. Cl. 442, 443 (2005).
64. Bianchi v. Walker (*Bianchi II*), 163 F.3d 564 (9th Cir. 1998).
65. *Id.* at 568.
66. *Id.*
67. *Id.* at 569.

In 2000, the ASBCA awarded Bianchi his VECP II royalties.[68] Then, in 2004, Bianchi filed suit in the COFC, claiming that the 1988 settlement agreement entitled him to both the VECP I and VECP II awards.[69] The COFC agreed that the settlement agreement constituted a contract. Generally, the COFC has jurisdiction over contract disputes involving the U.S. government, but nonetheless the court dismissed Bianchi's case, explaining that it was "an improper attempt to enforce ASBCA awards in the COFC"[70] and that the statute of limitations on the VECP I claim had expired.[71]

On appeal to the Federal Circuit, Bianchi argued that the 1988 settlement agreement was an express contract, and therefore the COFC had jurisdiction.[72] The government argued that Bianchi had not initially raised a breach-of-contract claim—an argument that required the Federal Circuit to parse Bianchi's COFC complaint.[73] The court noted that Court of Federal Claims Rule 8(a)(2), governing pleadings, requires only a short and plain statement of a claim giving the defendant "fair notice" of the claim,[74] a standard that Bianchi's complaint sufficiently met.[75] Therefore, the COFC had jurisdiction—at least as to the claim of a breach of the 1988 settlement agreement.[76]

In reviewing the COFC's dismissal of Bianchi's VECP I claims on the separate ground that they were time-barred under 28 U.S.C. § 2501, which sets forth a six-year statute of limitations, the Federal Circuit held that "all events ha[d] occurred to fix the government's alleged liability" by 1993, when the ASBCA awarded the royalties to Bianchi.[77] The court rejected Bianchi's argument that the cause of action did not arise until 1999, when, after the decision in *Bianchi II*, the Bank received the royalties instead of Bianchi.[78] Because the cause of action with respect to the VECP I claims accrued more than six years before Bianchi filed suit in 2004, the court affirmed the

68. *See* Bianchi v. United States (*Bianchi IV*), 475 F.3d 1268, 1272 (Fed. Cir. 2007) (recounting this phase of the case's procedural history).
69. *Id.*
70. *Id.* (citing Bianchi v. United States (*Bianchi III*), 68 Fed. Cl. 442, 450 (2005)).
71. *Id.* (citing *Bianchi III*, 68 Fed. Cl. at 452).
72. *Id.* at 1273.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 1273–74.
77. *Id.*
78. *Id.*

COFC's ruling that the VECP I claims were time-barred and the COFC lacked jurisdiction over them.[79]

C. *Gonzales & Gonzales Bonds and Insurance Agency, Inc. v. Department of Homeland Security, 490 F.3d 940 (Fed. Cir. 2007)*

In *Gonzales & Gonzales Bonds and Insurance Agency, Inc. v. Department of Homeland Security*,[80] the Federal Circuit vacated a district court order transferring to the COFC plaintiff's claims seeking cancellation of immigration bonds, finding that such claims were not Tucker Act claims for monetary relief.[81] According to its Fourth Amended Complaint, plaintiff sought, under the Little Tucker Act,[82] *monetary damages*, in the form of cancellation of debt, against the Department of Homeland Security ("DHS"), which allegedly had "breached a substantial number of immigration bond contracts with [Gonzales] by failing to comply with its contractual, legal and/or procedural obligations/requirements."[83] The district court found that the claims sought monetary damages in excess of $10,000, and transferred Gonzales' complaint to the COFC.[84]

The district court determined that Gonzales' claims for debt cancellation were functionally equivalent to claims for money

79. *Id.* at 1274–75. Subsequent to this decision, the Supreme Court in *John R. Sand & Gravel v. United States*, No. 06-1164, slip. op. (U.S. Jan. 8, 2008), addressed the question of whether § 2501 is jurisdictional. Applying stare decisis and reaffirming a series of cases dating from the 19th century, the Court answered this question in the affirmative and held that § 2501 serves as a limitation on the scope of the waiver of sovereign immunity and on the jurisdiction of the COFC. *Id.* at 8. The Court found that § 2501 was jurisdictional rather than a waivable affirmative defense because it was a "more absolute[] kind of limitation period" that "seek[s] not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims." *Id.* at 2–3. This decision has practical ramifications—requiring a plaintiff to prove the timeliness of its action as part and parcel of establishing jurisdiction, and requiring courts to consider compliance with the statute of limitations sua sponte.

The Federal Circuit issued another decision in 2007 which interpreted § 2501 in the context of a *Winstar*-related breach of contract case, *Bank of America, FSB v. Doumani*, 495 F.3d 1366 (Fed. Cir. 2007). In that case, the court held that a *Winstar* claim's accrual date could be earlier than the December 7, 1989 effective date of the new capital requirements of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989). The Federal Circuit upheld the COFC's finding that the thrift's claim accrued on October 6, 1989, the date when the Office of Thrift Supervision unambiguously demanded accounting changes consistent with FIRREA and inconsistent with the thrift's goodwill contracts with the government. *Doumani*, 495 F.3d at 1373. Judge Mayer dissented, stating that, in his view, Bank of America's claim accrued on August 9, 1989, the date of the enactment of FIRREA. *Id.* at 1375 (Mayer, J., dissenting).

80. 490 F.3d 940 (Fed. Cir. 2007).
81. *Id.* at 942.
82. 28 U.S.C. § 1346 (2000).
83. *Gonzales*, 490 F.3d at 942.
84. *Id.* at 943.

damages, concluding, "[t]here is no substantive difference between a plaintiff paying money and the government returning it, and the plaintiff never having to pay it in the first place."[85] On appeal, the Federal Circuit squarely disagreed with this analysis, explaining that a substantive difference exists between the return of money already paid, and the lack of any payment from the outset.[86] If Gonzales were to prevail in his case, he would not receive any monetary relief, including cash or credit in the form of an offset of other debt.[87] Rather, he would "simply be relieved of any obligation to pay the government under the terms of the immigration bonds."[88] The court, finding that this form of relief could not be characterized as monetary relief for jurisdictional purposes under the Tucker Act, vacated the district court's transfer order and remanded the case with instructions to dismiss.[89]

D. National American Insurance Co. v. United States, 498 F.3d 1301 (Fed. Cir. 2007)

National American Insurance Co. v. United States[90] raised the question of whether a surety under the doctrine of equitable subrogation steps into the shoes of a contractor for the purpose of satisfying the Tucker Act's jurisdictional requirements.[91] The Federal Circuit answered this question in the affirmative, relying on the longstanding principle that a payment-bond surety is equitably subrogated to the rights of the contractor whose debt it discharged.[92]

Innovative PBX Services ("IPBX") and the SBA entered into a contract regarding the replacement of a telephone system at the Department of Veterans Affairs.[93] IPBX subcontracted part of the work to Wiltel Communications, LLC ("Wiltel").[94] The Miller Act[95] required IPBX to execute payment bonds to protect the suppliers of labor and material, as well as performance bonds to protect the

85. *Id.* at 944 (citing Brazos Elec. Power Coop. v. United States, 144 F.3d 784, 787 (Fed. Cir. 1998)).
86. *Id.* at 945.
87. *Id.*
88. *Id.*
89. *Id.* at 945–46.
90. 498 F.3d 1301 (Fed. Cir. 2007).
91. 28 U.S.C. § 1491(a)(1) (2000).
92. *Nat'l Am. Ins. Co.*, 498 F.3d at 1302–03.
93. *Id.* at 1303.
94. *Id.*
95. 40 U.S.C. § 3131(b) (2000).

government.[96] National American Insurance Company ("NAICO") acted as the surety.[97]

When IPBX failed to pay Wiltel $675,000 for labor and material, Wiltel brought a Miller Act claim against NAICO under the payment bonds upon the completion of its work.[98] NAICO settled the claim and instructed the government to cease future payments to IPBX.[99] When the government made its final contract payment to IPBX anyway,[100] NAICO filed suit in the COFC seeking damages of $280,000.[101] The COFC granted summary judgment for NAICO and held first that NAICO was equitably subrogated to the rights of IPBX after having made payments on the payment bond and satisfied all outstanding claims.[102] Furthermore, the court found that "the Tucker Act's waiver of sovereign immunity extended to NAICO as an equitable subrogee of IPBX," and therefore, the government violated its duty as a stakeholder on the payment bond by issuing a payment to IPBX, even after NAICO informed the government that it had a right to the contract funds.[103]

On appeal, the government argued that NAICO could only "stand in the shoes of the subcontractor whom it paid."[104] The Federal Circuit rejected the government's argument, citing longstanding precedent recognizing that "a payment bond surety that discharges a contractor's obligation to pay a subcontractor is equitably subrogated to the rights of both the contractor and the subcontractor."[105] As stated in *Insurance Company of the West v. United States*,[106] "[a] surety bond creates a three-party relationship, in which the surety becomes liable for the principal's debt or duty to the third party obligee (here, the government)."[107]

96. *Nat'l Am. Ins. Co.*, 498 F.3d at 1303 n.1.

97. The Miller Act requires that contractors awarded a contract of more than $100,000 with the United States furnish two bonds: "a performance bond 'for the protection of the Government' and a payment bond 'for the protection of all persons supplying labor and material in carrying out the work.'" *Id.* (quoting 40 U.S.C. § 3131(b) (2000)). "The payment bond provision was designed to provide an alternative remedy to the mechanics' liens ordinarily available on private construction projects," but which cannot attach to government property. *Id.*

98. *Id.* at 1303.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 1304.

105. *Id.*

106. 243 F.3d 1367 (Fed. Cir. 2001).

107. *Nat'l Am. Ins. Co.*, 498 F.3d at 1304 (quoting *Ins. Co. of the W.*, 243 F.3d at 1370).

II. BID PROTESTS

A. *Chapman Law Firm Co. v. Greenleaf Construction Co., 490 F.3d 934 (Fed. Cir. 2007)*

Chapman Law Firm Co. v. Greenleaf Construction Co.[108] is an important decision in two respects. First, the decision reaffirmed that an agency's corrective action resulting from a bid protest is subject to judicial review.[109] Second, the Federal Circuit strictly enforced the Supreme Court's holding in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,[110] denying businesses Equal Access to Justice Act[111] ("EAJA") fees where an agency voluntarily takes corrective action and there has been no court-ordered change in the legal relationship of the parties.[112] In *Chapman*, the Department of Housing and Urban Development ("HUD") solicited services to manage and market single-family housing that HUD owned, using a "cascading" procedure under which non-small businesses were not considered unless the competition from small businesses was inadequate.[113]

Chapman was awarded the contract as a small business, but HUD terminated the contract for convenience and issued a new solicitation.[114] Chapman filed a protest at the COFC, and HUD proposed corrective action.[115] The United States filed a motion to dismiss the protest.[116]

The COFC denied the government's motion, and concluded that the corrective action lacked a rational basis because, *inter alia*, it did not include Greenleaf Construction Company, a competing offeror, in the small business tier despite an intervening SBA determination that Greenleaf was a small business.[117] HUD then agreed to reevaluate proposals and include both Chapman and Greenleaf in the small business tier.[118] Nonetheless, the court did not grant HUD's renewed motion to dismiss because a dismissal might have precluded

108. 490 F.3d 934 (Fed. Cir. 2007).
109. Lower courts have followed *Chapman's* clear directive. *E.g.*, Centech Group, Inc. v. United States, 78 Fed. Cl. 496, 506 (2007); S. Nuclear Operating Co. v. United States, 77 Fed. Cl. 396, 436 (2007).
110. 532 U.S. 598 (2001).
111. 28 U.S.C.A. § 2412(d) (2001).
112. *Chapman Law Firm*, 490 F.3d at 939.
113. *Id.* at 936.
114. *Id.*
115. *Id.* at 937.
116. *Id.*
117. *Id.*
118. *Id.*

Chapman or Greenleaf from applying for EAJA fees, and instead entered judgment for Chapman and Greenleaf, noting that the efforts of Chapman and Greenleaf were instrumental in achieving the final outcome and materially altered the legal relationship among the parties.[119]

On appeal, both Chapman and the United States argued that the COFC erred in denying the initial motion to dismiss.[120] Chapman claimed that the corrective action excluding Greenleaf from the small-business tier of the competitive range was proper because SBA's decision that Greenleaf was a small business came after award to Chapman.[121] The government argued that the corrective action had rendered Chapman's and Greenleaf's claims moot or premature, because the first corrective action restored the parties to their pre-protest positions.[122] The Federal Circuit disagreed with both these arguments and upheld the COFC's denial of the motion to dismiss.[123] The court reasoned that SBA's determination that Greenleaf was a small business applied, and furthermore, that the government had not yet effected a final award but continued to solicit revised proposals.[124] The court went on to explain that because the corrective action had excluded Greenleaf from the small business tier, the COFC properly determined that the corrective action was not reasonable.[125]

However, the Federal Circuit disagreed with the COFC's entry of judgment in favor of Chapman and Greenleaf following the United States' renewed motion to dismiss.[126] The court held that "the availability of EAJA fees [was] not an appropriate consideration for a court when determining how to dispose of a case."[127] Because HUD's revisions to the corrective action plan included Greenleaf in the small business tier, thus resolving the issue and "adequately address[ing] the effects of the challenged action, . . . the Court of Federal Claims had no reasonable expectation that the action would recur," and should have dismissed the case.[128]

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119. *Id.*
120. *Id.* at 938.
121. *Id.*
122. *Id.*
123. *Id.* at 940.
124. *Id.*
125. *Id.*
126. *Id.* at 939.
127. *Id.*
128. *Id.* at 940. The Circuit viewed the agency's *revised* corrective action—taken after the Court found the initial corrective action to be unreasonable—to be "voluntary." *Id.* at 940 n.1.

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

Blue & Gold Fleet, L.P. v. United States[129] was a case of first impression in the Federal Circuit.[130] The case was the first to apply a waiver rule to bid protest actions, setting precedent for future cases in which bidders who fail to object to erroneous solicitations "prior to the close of the bidding process" waive their ability to raise the same objection subsequently in a COFC action.[131]

Blue & Gold Fleet, L.P. was the incumbent contractor for the Alcatraz Island ferry operation when the National Park Service ("Park Service") solicited proposals for a new Alcatraz concession contract, including land and water transportation as well as other concession services.[132] The Park Service awarded the contract to Hornblower, as the offeror with the highest overall score.[133] In 2005, Blue & Gold filed a protest with the Government Accountability Office ("GAO"), as well as an action in the COFC, protesting the award and seeking injunctive relief from the court to prevent award.[134] The GAO dismissed its protest upon commencement of the COFC action.[135]

The COFC entered judgment on the administrative record in favor of the Park Service, rejecting Blue & Gold's contention that because Hornblower failed to include in its proposal wages and benefits for employees as required by the Service Contract Act,[136] the Park Service could not have properly evaluated Hornblower's proposal.[137] However, the solicitation did not require bidders to consider the Service Contract Act.[138] Rather, the Park Service had decided not to apply the Service Contract Act to this procurement during the solicitation phase.[139] As such, the COFC determined that Blue & Gold was, in effect, challenging the terms of the solicitation, and stated "that Blue & Gold 'missed its chance to protest' . . . because [it] . . . did not raise the challenge prior to the submission of the proposals."[140]

129. 492 F.3d 1308 (Fed. Cir. 2007).
130. *Id.* at 1313.
131. *Id.*
132. *Id.* at 1311.
133. *Id.*
134. *Id.* at 1311–12.
135. *Id.* at 1312.
136. 41 U.S.C. §§ 351–358 (2000).
137. *Blue & Gold Fleet, L.P.*, 492 F.3d at 1312.
138. *Id.* at 1313.
139. *Id.*
140. *Id.* at 1312 (quoting Blue & Gold Fleet, L.P. v. United States, 70 Fed. Cl. 487, 513 (2006)).

On appeal, the Federal Circuit affirmed the COFC's conclusion that Blue & Gold's protest was not a challenge to the Park Service's evaluation process, but to its solicitation process, which did not require bidders to consider the Service Contract Act when submitting proposals.[141] The court stated:

> We also hold that a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.[142]

Additionally, the adoption of a waiver rule for bid protest actions would further "the [statutory mandate] that 'the courts . . . give due regard to the interests of national defense and national security *and the need for expeditious resolution of the action*.'"[143] The court found support for its waiver rule in the GAO's timeliness rule, which requires that organizations filing protests based upon apparent improprieties in a solicitation do so prior to bid opening or receipt of initial proposals.[144] The court also cited with approval several COFC decisions, recognizing that it would be inefficient and costly to permit challenges to a solicitation after completing the evaluation and award process.[145]

The court noted that "[t]hese reasons underlying the patent ambiguity doctrine apply with equal force in the bid protest context," preventing a contractor with knowledge of a defect to wait until after the bidding process to raise an objection and "restart the bidding process . . . with increased knowledge of its competitors."[146]

C. *Avtel Services, Inc. v. United States, 501 F.3d 1259 (Fed. Cir. 2007)*

In *Avtel Services, Inc. v. United States*,[147] Avtel Services, Inc. ("Avtel") appealed the COFC's denial of its post-award bid protest challenging its loss of an Army contract to provide maintenance and logistical support for aircraft.[148] In a per curiam decision, the Federal Circuit dismissed Avtel's appeal for lack of jurisdiction based on Avtel's

141. *Id.* at 1313.
142. *Id.*
143. *Id.* (quoting 28 U.S.C. § 1491(b)(3) (2000)).
144. *Id.* at 1314 (citing 4 C.F.R. § 21.2(a)(1) (2007)).
145. *Id.* (quoting Argencord Mach. & Equip., Inc. v. United States, 68 Fed. Cl. 167, 175 n.14 (2005); N.C. Div. of Servs. for the Blind v. United States, 53 Fed. Cl. 147, 165 (2002); MVM, Inc. v. United States, 46 Fed. Cl. 126, 130 (2000); Allied Tech. Group, Inc. v. United States, 39 Fed. Cl. 125, 146 (1997); Aerolease Long Beach v. United States, 31 Fed. Cl. 342, 358 (1994)).
146. *Id.*
147. 501 F.3d 1259 (Fed. Cir. 2007).
148. *Id.* at 1260.

bankruptcy status.[149] While Avtel's protest was pending at the COFC, Avtel entered into an Assignment for the Benefit of Creditors under California Law.[150] Under this agreement, Avtel made a general assignment to another party to liquidate its assets and distribute the proceeds to creditors.[151] The court determined this agreement deprived the Federal Circuit of jurisdiction over the appeal because it precluded the relief Avtel sought—a resolicitation or reevaluation.[152]

Judge Newman dissented, stating that "Avtel's insolvency did not extinguish its existing claims upon the Assignment for the Benefit of Creditors under California law."[153] Judge Newman concluded that Avtel had disputed its inability to perform in a declaration from its former CEO.[154] Judge Newman suggested that relief beyond that sought in the protestor's complaint might have been available under the Tucker Act's provision that "the court may award any relief that the court considers proper."

In filing its complaints starting in 2004, Avtel asked that the contract be awarded to it or subjected to reprocurement. Judge Newman explained that this does not moot any relief "that the court considers proper," an issue not explored.[155] She concluded, "[t]oday's ruling of mootness has potentially broad consequences for government contracting, for it holds that if the losing bidder is pressed into insolvency while its protest is pending, the right to protest a wrongful award disappears. That is not correct law . . . ."[156]

III. CONTRACT INTERPRETATION

A. *Winter v. Bath Iron Works Corp., 503 F.3d 1346 (Fed. Cir. 2007)*

In *Winter v. Bath Iron Works Corp.*,[157] the Federal Circuit vacated and remanded an ASBCA decision granting a contractor an equitable adjustment, finding that the board had misinterpreted the scope of an "all-risk" insurance clause in the contract and wrongfully determined that flushing fuel-delivery piping was a "defect" in a "vessel."[158]

149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* (Newman, J., dissenting).
153. *Id.*
154. *Id.* at 1262.
155. *Id.* at 1262.
156. *Id.* at 1263.
157. 503 F.3d 1346 (Fed. Cir. 2007).
158. *Id.* at 1351–52.

The Navy and Bath Iron Works ("BIW") were parties to a fixed-price, incentive fee contract for the construction of six guided missile destroyers.[159] The contract prohibited BIW from carrying insurance "against any form of loss or damage to the vessels or to the materials or equipment therefor [sic]."[160] In lieu of insurance, the contract contained a clause assigning the government to bear the risk of loss that would have been covered by insurance—specifically with respect to "risks of loss of and damage to the vessels."[161] However, the "insurance" clause also provided that the government would not be liable

> for any costs of the Contractor for the inspection, repair, replacement, or renewal of any defects themselves in the vessel(s) or such materials and equipment *due to* (A) defective workmanship, or defective materials or equipment performed by or furnished by the Contractor or its subcontractors or, (B) workmanship, or materials or equipment performed by or furnished by the Contractor or its subcontractors which do(es) not conform to the requirements of the contract. . . .[162]

The contract required BIW to construct the fuel oil fill and transfer ("FOFT") for each of the destroyers.[163] According to the contract, BIW was to flush the FOFT system with fuel after testing to clean the system of accumulated matter, but BIW later revised its Department Operating Instructions to permit flushing the system with fresh water.[164] However, ignoring both the contract provision and the operating instructions, one of BIW's employees flushed a FOFT system with brackish water from the Kennebec River, some of which remained in the FOFT piping for roughly eight months until BIW discovered more than seventy holes resulting from corrosion.[165] The

159. *Id.* at 1348.
160. *Id.*
161. *Id.* The insurance clause provided:

> The Government assumes the risks of loss of and damage to the vessels and such materials and equipment which would have been assumed by the underwriters if the Contractor had procured and maintained throughout the term of this contract, on behalf of itself and the Government, insurance . . . (i) under the forms of Marine Builders Risk (Navy Form-Syndicate) policy . . . as set forth in the pamphlet . . . dated 23 November 1942, or (ii) under any policy forms which the Assistant Secretary of the Navy (RD & A), Insurance Office shall determine were customarily carried or would have been customarily carried by the Contractor in the absence of the foregoing requirement that the Contractor not carry or incur the expense of insurance . . . .

Id. (citation omitted).
162. *Id.*
163. *Id.* at 1349.
164. *Id.*
165. *Id.*

Contracting Officer ("CO") denied BIW's request for an equitable adjustment for the repairs and replacement of the FOFT piping.[166]

On appeal, the ASBCA held that the "defect," as used in the workmanship exception to the insurance clause, was the "'post-hydrostatic test flush of . . . FOFT piping by brackish water.'"[167] The board found that the corrosion was a "fortuitous or casualty loss" under the insurance clause, and that BIW's "investigation, repair [] and replacement of [the] corroded FOFT piping were not within the defective workmanship exception."[168] Accordingly, the board granted BIW an equitable adjustment for all claims save for the cost of re-performing the flush, and awarded the corporation $1.13 million in damages.[169] Later, on reconsideration, the board raised the damages awarded to BIW to $1.17 million.[170]

The Federal Circuit reversed, finding that the board misconstrued the exclusion. The court held that the board erred in determining that the test flush of FOFT piping using Kennebec River water was a "defect in the vessel" because the flush, could not be a defect "in the vessel."[171] Rather, the "defect in the vessel" was the corroded FOFT piping.[172] Since the board determined that the flush of brackish water did not conform to the contract specification, the question was whether the corrosion was "due to" the nonconforming flush, within the meaning of the defective workmanship exception to the insurance clause.[173] The Federal Circuit determined the board made insufficient findings of fact as to whether the flush caused the corrosion and, accordingly, remanded the case to the board for further proceedings.[174]

IV. EQUITABLE ADJUSTMENT/BREACH

A. *Renda Marine v. United States, 509 F.3d 1372 (Fed. Cir. 2007)*

Plaintiff Renda Marine ("Renda"), a marine dredging contractor, and the U.S. Army Corps of Engineers ("Corps") entered into a contract, governed by the Contract Disputes Act[175] ("CDA"), involving

166. *Id.*
167. *Id.* (citing *In re* Bath Iron Works Corp., 06-01 B.C.A. (CCH) ¶ 33,158 (A.S.B.C.A. Dec. 22, 2005)).
168. *Id.* at 1350.
169. *Id.*
170. *Id.*
171. *Id.* at 1351.
172. *Id.*
173. *Id.*
174. *Id.* at 1352.
175. 41 U.S.C. §§ 601–613 (2000).

the dredging of a portion of the Houston-Galveston Navigation Channel.[176] From January through October 2001, Renda submitted seven differing site condition claims to the CO, seeking additional compensation.[177] The CO denied these claims and, in response, Renda filed suit in the COFC on April 11, 2002, seeking $14.2 million.[178] The COFC, after trial, entered judgment for the government on all of Renda's claims.[179]

While Renda's suit was pending in the COFC, on November 26, 2002, the CO issued (and Renda received) a final decision under the contract asserting six government claims against Renda, totaling $11.9 million.[180] Renda had the right to appeal to ASBCA within ninety days of receipt,[181] or to file a lawsuit at the COFC within twelve months.[182] However, Renda did not challenge this final decision in either venue within the statutory time period, but instead sought leave to amend its complaint in the ongoing COFC litigation approximately nineteen months after receiving the final decision.[183] The COFC denied Renda's motion on the ground that Renda was untimely.[184]

On June 1, 2005, between the trial and the issuing of the decision by the COFC, Renda sought reconsideration of the denial of its motion to amend the complaint.[185] According to Renda, "its suit divested the CO of authority to render a final decision on the Government's claims, thereby rendering the CO's final decision a nullity."[186] The COFC denied the motion, stating that Renda could not challenge the decision because it failed to appeal the final decision within the twelve-month period required by the CDA.[187] On appeal, Renda challenged the denial of one of its differing site

176. Renda Marine, Inc. v. United States (*Renda III*), 509 F.3d 1372, 1374 (Fed. Cir. 2007).
177. *Id.*
178. *Id.*
179. *Id.* at 1375.
180. *Id.*
181. *Id.* (citing 41 U.S.C. § 606 (2000)).
182. *Id.* (citing 41 U.S.C. § 609(a)(3) (2000)).
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* (citing Sharman Co. v. United States, 2 F.3d 1564 (Fed. Cir. 1993), *overruled on other grounds by* Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995) (en banc)).
187. *Id.* (citing Renda Marine v. United States (*Renda II*), 71 Fed. Cl. 782, 797 (2006)). At the same time, the Court of Federal Claims entered judgment in favor of the United States. *Id.*

condition claims and the denial of motion for leave to amend the complaint.[188]

The differing site condition claim involved a portion of the channel called the Flare Area, which was widened to allow ships to pass safely.[189] While dredging in the Flare Area, Renda encountered "stiff clays" as opposed to the "soft clays" that Renda expected to find, which allegedly increased Renda's cost of performance.[190] The COFC held that Renda failed to prove that it was entitled to additional compensation because it relied solely on two boring logs, which did not indicate stiff clays, without considering other boring logs that did locate stiff clays.[191]

On appeal, the Federal Circuit found no error in the trial court's findings that stiff clays were foreseeable in the Flare Area.[192] With respect to the trial court's denial of the motion for leave to amend the complaint, the Federal Circuit applied the abuse-of-discretion standard of review.[193] Renda relied on *Sharman Co. v. United States*[194] for the proposition that "[o]nce a claim is in litigation, the Department of Justice gains exclusive authority to act in the pending litigation . . . [a]nd that exclusive authority divests the contracting officer of his authority to issue a final decision on the claim."[195]

In *Sharman*, a CO issued a final decision asserting claims against Sharman for the return of monies that were a "mirror image" or "effectively the same claim" that Sharman had brought before the Claims Court.[196] Because the government's claims were the subject of litigation, the Federal Circuit in *Sharman* held that the CO had no authority to issue a final decision asserting claims against Sharman.[197]

However, in *Sharman*, unlike the instant case, both the government's claim and the underlying CO decision were before the court because the government had asserted a counterclaim.[198] In contrast, Renda failed to timely appeal the CO's final decision, and the government did not file a counterclaim based on that decision.[199] The Federal Circuit held that "[o]nly a court, after hearing argument from both a contractor and the government, may declare a

188. *Id.* at 1375–76.
189. *Id.* at 1376.
190. *Id.*
191. Renda Marine, Inc. v. United States (*Renda I*), 66 Fed. Cl. 639 (2005).
192. *Renda III*, 509 F.3d at 1378.
193. *Id.* at 1379.
194. 2 F.3d 1564 (Fed. Cir. 1993).
195. *Renda III*, 509 F.3d at 1379 (citing *Sharman*, 2 F.3d at 1571).
196. *Sharman*, 2 F.3d at 1570, 1573.
197. *Id.* at 1572.
198. *Id.* at 1568.
199. *Renda III*, 509 F.3d at 1380.

contracting officer's final decision invalid—for whatever reason. A contractor may not do so unilaterally."[200] Because the COFC applied the clear language of the CDA requiring a contractor to appeal a final decision within the prescribed time period, the Federal Circuit held that the COFC did not err when it did not permit Renda to amend its complaint.[201]

B. *ACE Constructors, Inc. v. United States, 499 F.3d 1357 (Fed. Cir. 2007)*

In *ACE Constructors, Inc. v. United States*,[202] the Federal Circuit affirmed the award of an equitable adjustment and the return of liquidated damages to the plaintiff.[203] ACE Constructors, Inc. ("ACE") entered into a contract with the U.S. Army Corps of Engineers ("Corps") to build a structure called the "Ammo Hot-Load Facility" at Biggs Army Airfield at Fort Bliss in El Paso, Texas.[204] The project included construction of roadways, buildings, a storage pad, a loading apron, a loading area for cargo planes, and an airplane taxiway.[205] The "bid solicitation materials," comprised of engineering specifications and architectural drawings, were incomplete and defective.[206] ACE encountered performance difficulties, including: forced alteration of construction procedures, significant unforeseen costs, contract modifications, delays, and changes to the roster of subcontractors.[207] After successful completion of the project, ACE filed several claims for the additional costs arising from the unexpected conditions and defective specifications.[208] The CO granted some claims and denied others.[209] ACE filed suit under the CDA,[210] and after trial the COFC granted an equitable adjustment to ACE.[211]

1. *Profilographic testing of concrete paving*

The first claim on appeal involved the use of "profilographic" testing to measure the smoothness of concrete paving.[212] During

200. *Id.*
201. *Id.*
202. 499 F.3d 1357 (Fed. Cir. 2007).
203. *Id.* at 1365.
204. *Id.* at 1359–60.
205. *Id.* at 1360.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. 41 U.S.C. § 605 (2000).
211. *ACE*, 499 F.3d at 1360.
212. *Id.* at 1360–63.

contract performance, ACE was required by the Corps to use this more expensive form of measuring smoothness rather than the less expensive "straightedge" testing.[213] ACE did so under protest, until the Corps agreed with ACE that the straightedge method was more appropriate for the project.[214] The government challenged the COFC's award of additional costs related to the use of the profilographic test.[215]

First, the government argued that the COFC lacked jurisdiction because the claim in the COFC was not identical to that submitted to the CO. Under the CDA, the contractor must have presented the claim to a CO, who must have issued a final decision regarding that claim in order for the COFC to have jurisdiction.[216] The Federal Circuit agreed with the COFC that the claims before the CO and the COFC did not differ significantly, as ACE presented the profilographic testing claim to the CO based on the same contract provisions, the same requirements of the Corps, the same costs, the same relief, and the same legal theory.[217]

Second, the government argued that the contract unambiguously required profilographic testing.[218] However, the Federal Circuit noted that while certain portions of the contract could be read as making the test obligatory, other portions treated it as optional.[219] The Federal Circuit found that the specification was defective; thus, ACE was entitled to recover, and the court did not need to determine whether the contract was ambiguous.[220]

Finally, the Federal Circuit affirmed the COFC's finding that ACE was reasonable in basing its bid on the less expensive straightedge test, and that the government's requirement to use profilographic testing for a time was a compensable constructive change.[221]

2. *Concrete paving*

The second issue on appeal concerned which concrete paving technique the contract required—fixed-form paving or slip-form paving.[222] While fixed-form paving entails pouring wet concrete into pre-set metal or wooden forms, slip-form paving, a more expensive

213. *Id.* at 1360–61.
214. *Id.* at 1361.
215. *Id.*
216. 41 U.S.C. § 605 (2000).
217. *ACE*, 499 F.3d at 1361.
218. *Id.* at 1361–62.
219. *Id.* at 1361.
220. *Id.*
221. *Id.* at 1363.
222. *Id.* at 1363–64.

and complex technique, relies on temporary forms and relatively dry concrete.[223] ACE argued that even though the less expensive, fixed-form paving was permissible under the contract and was the basis for its bid, the specifications required the more expensive slip-form.[224] Ultimately, the COFC found that, because the Corps designed the project for a slip-form paver, but approved the project for a fixed-form paver, the design specification was defective.[225] As such, the COFC awarded ACE compensation for its additional costs.[226] Noting that "[i]mpracticability of performance is 'treated as a type of constructive change to the contract[] because a commercially impracticable contract imposes substantial unforeseen costs on the contractor,'" the Federal Circuit upheld the COFC's decision entitling the contractor to an equitable adjustment.[227]

3. Differing site condition

The final claim on appeal involved the COFC's finding that ACE encountered a Type I differing site condition.[228] ACE believed that the site would be a "balanced project," in which the amount of dirt excavated from the site would roughly equal the amount needed for fill-ins and embankment requirements.[229] However, the site required approximately 129,000 additional cubic yards of soil.[230] The government did not dispute that this incongruity was the result of a defective specification. The COFC found that the conditions were reasonably unforeseeable and awarded ACE $501,012.49 for direct costs and additional costs due to constructive acceleration.[231] The Federal Circuit affirmed this recovery.[232]

C. ConocoPhillips v. United States, 501 F.3d 1374 (Fed. Cir. 2007)

In a consolidated appeal of two judgments from the COFC, the two plaintiffs, ConocoPhillips and La Gloria Oil and Gas Company ("La Gloria") challenged the COFC's dismissal of claims against the United States. At issue in these cases were multiple contracts for the

223. *Id.*
224. *Id.* The parties submitted a stipulation to the COFC that the contract permitted either form of paving. *Id.*
225. *Id.* at 1364.
226. *Id.*
227. *Id.* (citing Raytheon Co. v. White, 305 F.3d 1354, 1367 (Fed. Cir. 2002) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d (1981))).
228. *Id.* at 1364–65.
229. *Id.* at 1365.
230. *Id.*
231. *Id.*
232. *Id.*

supply of jet fuel with the Defense Energy Support Center.[233] Each contract contained an economic price adjustment clause requiring the contract price to be modified each month in accordance with a Department of Energy publication, the *Petroleum Marketing Monthly* ("PMM").[234] After the contracts had been performed, the plaintiffs filed suit in the COFC seeking reformation of the economic price adjustment clauses so that the amount due to them under the contracts would be increased.[235] The plaintiffs argued that the PMM was not an accurate measure of the changes in the market price for jet fuel, and therefore the use of the clause "violated governing regulations, was the result of a mutual or unilateral mistake, and resulted in a breach of the government's obligation to pay a fair market price for jet fuel."[236] Finally, the plaintiffs sought reformation of the contracts on the basis of alleged constitutional and regulatory violations in connection with the government's small-business set-aside and minority preference programs.[237] The COFC rejected all of these arguments.[238]

On appeal, the plaintiffs argued that the use of the PMM as the basis for price adjustments was contrary to a provision of the Federal Acquisition Regulation ("FAR"), which "allowed the price of goods in certain contracts to be adjusted 'based on increases or decreases from an agreed-upon level in published or otherwise established prices of specific items or the contract end items.'"[239] Plaintiffs claimed that the PMM was "not designed or intended to be used to set or adjust prices, and did not reflect at least the fair market value of military fuel."[240]

Previously, in *Tesoro Hawaii Corp. v. United States*,[241] the Federal Circuit noted that the FAR permitted the same price adjustment clauses to be based on prices "established by reference to either a catalog or market sources independent of the manufacturer or

233. ConocoPhillips v. United States, 501 F.3d 1374, 1376 (Fed. Cir. 2007).
234. *Id.*
235. *Id.*
236. *Id.* at 1376–77.
237. *Id.* at 1377.
238. *Id.*
239. *Id.* (quoting 48 C.F.R § 16.203-1(a) (1994)).
240. *Id.* Further, the plaintiffs tried to assert that the PMM figures did not fall into the FAR's definition of established market prices; that is, the PMM prices were not "current prices that (i) are established in the course of ordinary and usual trade between buyers and sellers free to bargain and (ii) can be substantiated by data from sources independent of the manufacturer or vendor." *Id.* (quoting 48 C.F.R § 15.804-3(c)(2) (1994)).
241. 405 F.3d 1339 (Fed. Cir. 2005).

vendor,"[242] and, therefore, the court held that the use of a price adjustment clause tied to the PMM was authorized under the FAR.[243] However, in this case, plaintiffs alleged not only that the PMM did not represent any manufacturer's or vendor's established price, but also that the PMM was not designed to accurately measure the actual and fair market price of jet fuels; thus, the PMM's prices were not based on "published or otherwise established prices."[244] The COFC rejected this argument, and the Federal Circuit agreed that, in fact, the PMM is a market-based collection of sales figures that constitutes an adequately precise measure of "established prices" to be authorized under the FAR.[245]

The Federal Circuit also rejected plaintiffs' mutual or unilateral mistake argument.[246] The plaintiffs argued that when they entered into the contracts they believed that the PMM accurately reflected market prices and did not appreciate how price changes reported in the *PMM* could vary from those in other market information sources.[247] However, the Federal Circuit found that the method by which prices would be adjusted was clearly set forth in the contracts and that the plaintiffs were obligated to investigate issues regarding the PMM before entering into the contract.[248]

The Federal Circuit agreed with the COFC that the government had not breached its contracts with plaintiffs.[249] The government had made its payments pursuant to the price adjustment clause of the contract and, therefore, plaintiffs had no basis for alleging that a fair price had not been received.[250] The court noted that "if the plaintiffs had wanted the contract price to be adjusted based on a different measure of market price, they should not have agreed to use the PMM."[251]

242. *Id.* at 1347.
243. *Id.* at 1348.
244. *ConocoPhillips*, 501 F.3d at 1377 (citing 48 C.F.R § 16.203-1(a) (1994)).
245. *Id.* at 1378.
246. *Id.* at 1380.
247. *Id.* at 1379–80.
248. *Id.* at 1380 (citing RESTATEMENT (SECOND) OF CONTRACTS § 154(b) (1981), which proposes that a party bears the risk of a mistake if, at the time the contract is entered into, it is aware that it has limited knowledge with respect to facts, but treats the limited knowledge as sufficient).
249. *Id.* at 1381.
250. *Id.*
251. *Id.* at 1380.

D. *North Star Steel Co. v. United States, 477 F.3d 1324 (Fed. Cir. 2007)*

North Star Steel Co. v. United States (*North Star II*)[252] addressed two issues: what constitutes a breach of an "agreement to agree" and what is required to prove economic duress. The Federal Circuit found that the Department of Energy's Western Area Power Administration ("WAPA") did not breach a contract with North Star for future negotiations over rates for "regulatory services" because plaintiff did not establish that the government failed to conduct negotiations in good faith.[253] The Federal Circuit also found that North Star failed to prove that it entered into an amendment to the contract under duress.[254]

North Star needed large amounts of electricity for its steel recycling mill near Kingman, Arizona.[255] WAPA, which delivered hydroelectric power and related services in the central and western United States, owned the only transmission lines in the Kingman area with sufficient voltage to serve North Star's electric power requirements.[256] North Star entered into an agreement with the Arizona Electric Power Cooperative Inc. ("AEPCO"), a generation and transmission cooperative owned by the Department of Agriculture, and Mohave Electric Cooperative ("Mohave"), an Arizona generation and transmission cooperative eligible to purchase power from WAPA, to power its recycling mills.[257]

This action involved the Consolidated Arrangements Contract ("CAC"), entered into on August 17, 1994, between WAPA and AEPCO for the benefit of North Star.[258] The parties adopted a temporary pricing methodology for assessing charges for energy supplied to North Star.[259] The CAC also included a provision which provided that the parties would revisit the charge for regulation services:

> Prior to the conclusion of the first year of normal operations of the North Star Plant, the parties shall jointly establish an appropriate cost-based methodology to review, evaluate, and periodically, if necessary, adjust the percentage associated with the In-Kind Energy payment. After one (1) year of normal operations, the percentage may be adjusted in accordance with said methodology.[260]

252. 477 F.3d 1324 (Fed. Cir. 2007).
253. *Id.* at 1332–33.
254. *Id.* at 1334.
255. *Id.* at 1326.
256. *Id.* at 1327.
257. *Id.*
258. *Id.* at 1326 n.1.
259. *Id.* at 1328.
260. *Id.*

For almost two years, the parties engaged in negotiations regarding "an appropriate cost-based methodology" for the in-kind energy payment, but these negotiations were unsuccessful.[261] WAPA informed North Star that a failure to agree on a revised methodology by July 1, 1998, would result in a continuance of the temporary pricing methodology.[262] North Star replied that its proposed methodology included charges not within the purview of the CAC and that WAPA's calculation of the cost of regulation services was "grossly excessive."[263]

In June 1999, the parties met to discuss WAPA's new payment calculation proposal to add Amendment No. 3 to the CAC.[264] North Star advised AEPCO that none of the proposals were reasonable and cost-based, but that "even an unreasonable lesser charge was preferable to continuation of the charge at the existing level."[265] As such, on September 15, 1999 and on behalf of North Star, WAPA and AEPCO signed Amendment No. 3, which had retroactive effect to August 1, 1999.[266]

On April 27, 2000, North Star filed a breach-of-contract claim in the COFC.[267] The COFC held that WAPA had breached the CAC by failing to produce cost data and to establish a cost-based methodology.[268] The Federal Circuit reversed, elucidating the correct standard for finding a contractual breach as "whether either party failed to negotiate in good faith with respect to an appropriate cost-based methodology."[269] Thus, the court made it clear that, failure on the part of WAPA to utilize a cost-based methodology standing alone would not amount to a breach of contract. Such a failure would

261. *Id.*
262. *Id.* at 1329.
263. *Id.* (citing N. Star Steel Co. (*North Star I*) v. United States, 68 Fed. Cl. 672, 685 (2005)).
264. *Id.*
265. *Id.* (quoting *North Star I*, 68 Fed. Cl. at 689).
266. *Id.*
267. *Id.* at 1329–30. The COFC held that it had jurisdiction over North Star's suit under 28 U.S.C. § 1492(a)(2) because the suit involved a claim arising under section 10(a)(1) of the CDA. *North Star I*, 68 Fed. Cl. at 696.
268. *North Star II*, 477 F.3d at 1330.
269. *Id.* (citing Gardiner, Kamya & Assocs. v. United States, 369 F.3d 1318, 1322 (Fed. Cir. 2004); City of Tacoma v. United States, 31 F.3d 1130, 1132 (Fed. Cir. 1994); Aviation Contractor Employees, Inc. v. United States, 945 F.2d 1568, 1572 (Fed. Cir. 1991)). On appeal, the Federal Circuit first held that the trial court did not have jurisdiction under the CDA pursuant to 28 U.S.C. § 1492(a)(2) because the CDA does not apply to contracts for the provision of services by the government. However, the trial court had jurisdiction to hear North Star's breach of contract claim under the Tucker Act, 28 U.S.C. § 1491(a)(1) (2000), which provides for jurisdiction for claims arising out of express contracts. *Id.* at 1332.

constitute a breach of contract only if WAPA did not negotiate in good faith.[270]

With respect to the duress issue, the Federal Circuit rejected the COFC's holding that the North Star signed the Amendment under duress. A finding of economic duress requires that "(1) [the party alleging duress] involuntarily accepted [another party's] terms, (2) [the] circumstances permitted no other alternative, and (3) such circumstances were the result of [another party's] coercive actions."[271] The Federal Circuit agreed with the COFC's articulation of the three-pronged test, but found that the third prong—that North Star's involuntary acceptance of Amendment No. 3 was the result of WAPA's coercive acts—had not been met because there was no wrongful action by the government.[272] As the Court explained: "[C]oercion requires a showing that the Government's action was wrongful, i.e., (1) illegal, (2) a breach of an express provision of the contract without a good-faith belief that the action was permissible under the contract, or (3) a breach of the implied covenant of good faith and fair dealing."[273] The Federal Circuit noted that there was no evidence that WAPA acted illegally, and the court had already held that WAPA did not breach the contract by failing to utilize a cost-based methodology and that there was no evidence to support a finding of bad faith.[274] Accordingly, the Federal Circuit reversed the judgment in favor of North Star, and remanded the case to the COFC with instructions to enter judgment in favor of the United States.[275]

The court's decision gives significant guidance on two points. First, the decision reiterates the entrenched common-law rule that an agreement to agree imposes a duty on the parties to negotiate in good faith. Second, the Federal Circuit illuminated the type of conduct that would establish lack of good faith, indicating, for instance, that an agency's failure to disclose pertinent data in its possession would be a lack of good faith.[276]

270. *Id.* at 1333.

271. *North Star I*, 68 Fed. Cl. at 722–23 (citing Rumsfeld v. Freedom NY, Inc., 329 F.3d 1320, 1329 (Fed. Cir. 2003)).

272. *North Star II*, 477 F.3d at 1334. The government did not dispute that North Star involuntarily accepted Amendment No. 3, but the Federal Circuit declined to address whether the second prong of the test—circumstances permitted no other alternatives—was met, because it found that the third prong had not been met. *Id.* at 1334 n.8.

273. *Id.* at 1334 (quoting *North Star I*, 68 Fed. Cl. at 721).

274. *Id.*

275. *Id.* at 1334–35.

276. Professor Nash's commentary on this case points out a distinction between the Federal Circuit's articulation of the requirements for demonstrating a lack of

V. TERMINATION

A. *Ryste & Ricas, Inc. v. Harvey, 477 F.3d 1337 (Fed. Cir. 2007)*

In *Ryste & Ricas, Inc. v. Harvey*,[277] the Federal Circuit affirmed the ASBCA's ruling that Ryste & Ricas, Inc.'s ("RRI") termination settlement proposal was untimely filed.[278] Under 48 C.F.R. § 52.259-2(e), when a contract is terminated for the convenience of the government, the contractor may submit a termination settlement proposal within one year from the effective date of termination.[279]

The Army terminated for default RRI's contract for the repair and renovation of a building at Fort Belvoir, Virginia.[280] RRI appealed the default termination to the board, which, on May 29, 2002, converted the termination for default to a termination for the convenience of the government.[281] RRI's previous counsel received the board's decision on June 8, 2002, and claimed that it submitted a termination settlement proposal to the Army on July 23, 2003, but the Army claimed that it never received it.[282] After receiving no response, RRI resubmitted the proposal on October 23, 2003, and after no response to the resubmission, appealed the CO's "deemed denial" to the board.[283]

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good faith in *North Star* and in *Am-Pro Protective Agency v. United States*, 281 F.3d 1234 (Fed. Cir. 2002). He explains:

> [I]t is noteworthy that none of these decisions . . . dealing with lack of good faith in the context of agreements to agree contains any connotation that the contractor must prove *specific intent of the Government to injure the contractor* as an element of the proof of bad faith (or lack of good faith, if you prefer). This is in contrast to the widely discussed decision in *Am-Pro Protective Agency, Inc. v. U[nited] S[tates]*, which has been cited as imposing this requirement in all situations where a contractor alleges bad faith on the part of a Government official. This would indicate that the "specific intent to injure" requirement is only a part of the proof of Government bad faith in selected areas (as we have been arguing repeatedly).

Ralph C. Nash, *Agreements to Agree: What is a Breach?*, 21 NASH & CIBINIC REP. 33, 34–35 (2007) (internal citations omitted).

277. 477 F.3d 1337 (Fed. Cir. 2007).

278. *Id.* at 1338. The ASBCA decision is available at *In re* Ryste & Ricas, Inc., 06-1 B.C.A. (CCH) ¶ 33,124 (A.S.B.C.A. Nov. 10, 2005).

279. A termination "settlement proposal" is "a proposal for effecting settlement of a contract terminated in whole or part, submitted by a contractor or subcontractor in the form, and supported by the data, required by this part." 48 C.F.R. § 49.001 (2007).

280. *Ryste & Ricas*, 477 F.3d at 1338.

281. *Id.* (*In re* citing Ryste & Ricas, Inc., 02-2 B.C.A. (CCH) ¶ 31,883 (A.S.B.C.A. May 29, 2002)).

282. *Id.*

283. *Id.*

The board granted summary judgment in favor of the Army and held that the effective date of termination was June 8, 2002,[284] when RRI's previous counsel received the board decision.[285] Although RRI argued that the "effective date of termination" under 48 C.F.R. § 49.001 (now 48 C.F.R. § 2.101[286]) was September 29, 2002, when the period for appealing the board's decision expired,[287] the board rejected the argument, stating that there was no basis for importing EAJA and Uniform Relocation Act ("URA") tolling requirements into the procedure for submitting termination for convenience settlement proposals.[288]

On appeal to the Circuit, RRI argued that the board erred in determining that the termination settlement proposal was not timely filed because it was not an enforceable final judgment until the 120-day appeal period had expired on September 29, 2002.[289] It also argued that the date when RRI submitted its proposal to the Army was a disputed material fact that precluded the granting of summary judgment.[290]

The Federal Circuit found no error in the board's grant of summary judgment.[291] It found that the clear language of 48 C.F.R. § 52.259-2(e) gave RRI one year from the effective date of termination—which was expressly defined in 48 C.F.R. § 2.101 as the date RRI received the termination notice—to file the termination settlement proposal, and RRI failed to submit its proposal within one year of the June 8, 2002 effective date.[292] Finally, the court disagreed that a genuine issue of material fact existed with respect to the date

284. *Id.* The Federal Circuit's decision states the date of receipt as June 8, 2003, which presumably is a typographical error. *Id.* at 1339.

285. *Id.* at 1338 (citing *In re* Ryste & Ricas, Inc., 06-1 B.C.A. (CCH) ¶ 33,124 (A.S.B.C.A. Nov. 10, 2005)).

286. "Effective date of termination means the date on which the notice of termination requires the contractor to stop performance under the contract. If the contractor receives the termination notice after the date fixed for termination, then the effective date of termination means the date the contractor receives the notice." 48 C.F.R. § 2.101 (2007).

287. *Ryste & Ricas*, 477 F.3d at 1339. 41 U.S.C. § 607(g)(1)(A) (2000) provides that a contractor may appeal a final decision of the Board to the Federal Circuit within 120 days after the date of receipt of a copy of the decision.

288. *Ryste & Ricas*, 477 F.3d at 1339 (citing Melkonyan v. Sullivan, 501 U.S. 89 (1991) (decided under EAJA); Melka Marine, Inc. v. United States, 29 F. App'x 594 (Fed. Cir. 2002) (unpublished decision) (decided under EAJA); Houser v. United States, 12 Cl. Ct. 454 (1987) (decided under URA)).

289. *Id.* at 1340.

290. *Id.*

291. *Id.* at 1341.

292. *Id.*

of submission of the settlement proposal because neither date was within the required one-year deadline.[293]

VI. AUTHORITY

A. *Winter v. Cath-dr/Balti Joint Venture, 497 F.3d 1339 (Fed. Cir. 2007)*

In *Winter v. Cath-dr/Balti Joint Venture*,[294] the Federal Circuit, reversing the conclusion of the ASBCA as to six claims, held that a Resident Officer in Charge of Contracts ("ROICC"), who was also the Project Manager ("PM") at the time, lacked both express and implied authority to direct a contractor to perform changes because the contract explicitly reserved that authority to the CO.[295] However, the Federal Circuit remanded three other claims to the ASBCA to determine whether the CO ratified the ROICC's actions in those instances.[296]

The Navy and Cath-dr/Balti Joint Venture ("Cath") entered into a fixed-price contract for external renovation of a historic dental research facility located at the Great Lakes Navy Training Center in Illinois.[297] The contract incorporated the Naval Facilities Engineering Command ("NAVFAC") Clause 5252.201-9300 Contracting Officer Authority (June 1994) and NAVFAC Clause 5252.242-9300 Government Representatives (June 1994).[298] The former clause authorizes the CO to bind the government to any "contract, modification, change order, letter or verbal direction to the contractor."[299] The latter clause appoints the Engineer in Charge ("EIC") as the CO's authorized representative responsible for monitoring performance and technical management, and grants the CO the sole authority to bind the government to a contract modification.[300] The contract also contained the standard Contracting Officer's Representative ("COR") Clause, which permitted the CO to designate a COR to perform "specific technical or administrative functions."[301]

293. *Id.* at 1342.
294. 497 F.3d 1339 (Fed. Cir. 2007).
295. *Id.* at 1341. The Federal Circuit, however, upheld the ASBCA's decision on one of its other claims because that claim was independently sustainable based on a differing site condition, which the Navy did not appeal. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.* at 1345.

Navy and Cath officials attended a preconstruction conference to "develop a mutual understanding" regarding the administration of the contract.[302] The CO, although required by contract to attend the conference, was not present.[303] At the conference, the Navy presented its detailed guidelines for contract administration, designated the ROICC PM to administer the contract, and directed all correspondence to him.[304]

The Navy also used a slide in its presentation that set forth the parameters for contract modifications. The slide first indicated that modifications could only be written; "[o]ral modifications will not be used."[305] The slide then recognized that there could be two forms of modifications: (1) bilateral modifications, where "the contractor and the ROICC have agreed upon an adjustment to the contract," and (2) unilateral modifications, where "the ROICC can direct the contractor to take some action under the contract."[306]

Cath began performance on January 25, 1999.[307] The Navy reassigned the day-to-day contract administration to EIC Tim Meland, and directed that all correspondence be sent to his attention.[308] In response, Cath sent a request for information ("RFI") seeking "documentation of assignment of authority" and information regarding the "level of authority" of Meland and others.[309] The Navy responded, among other things, that Mr. Meland "[p]repares and/or coordinates . . . contract modifications in support to ensure a satisfactory and timely completion of the projects."[310]

During the performance of the contract, Meland and his successors received requests for clarification of contract requirements and requests for decisions regarding site conditions that might require deviation from the contract specifications.[311] The ROICC PM signed the response to each request.[312]

Once Cath completed its work under the contract, it submitted to the PM a cumulative request for a contract modification and some adjustments.[313] Other than an acknowledgment of receipt, the PM

302. *Id.* at 1342 (quoting contract specification).
303. *Id.*
304. *Id.*
305. *Id.* at 1346.
306. *Id.*
307. *Id.* at 1342.
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.* at 1342–43.
313. *Id.* at 1343.

never formally responded to this request in writing.[314] After waiting for a response from the ROICC office for five months, Cath submitted a certified claim in December 2000.[315]

The final decision of the CO, issued on July 27, 2001, found entitlement to an equitable adjustment for twelve claims.[316] The final decision also recommended a negotiated settlement for the meritorious claims and asked for a final decision to be "held in abeyance subject to further discussions with the ROICC."[317] Although Cath tried to engage in discussions with the Navy on the amount it should receive on its claims, the Navy refused to meet with Cath.[318]

On appeal before the ASBCA, Cath argued, and the ASBCA agreed, that an accounting for the twelve claims was necessary because the July 27 decision was a concession of Cath's entitlement.[319] In response to an Order To Show Cause as to why entitlement should not be granted on these twelve claims, the Navy argued that the decision was not a determination of entitlement.[320] However, the ASBCA disagreed and issued a memorandum on May 6, 2003, indicating that the final decision "clearly concede[s] entitlement."[321] The Navy then issued a second final decision denying all of Cath's claims, including the twelve that the CO previously determined had merit, on the ground that no additional data had been provided.[322]

On appeal of that final decision before the ASBCA, the Navy argued for the first time that Cath was not entitled to compensation because the CO did not direct the changed work. The ASBCA, nonetheless, sustained thirteen of Cath's thirty-seven claims.[323] With respect to all but one of those claims appealed by the Navy, the ASBCA determined that the ROICC PM directed changes not required by the contract that resulted in additional costs.[324] Further, the ASBCA concluded that Cath was entitled to compensation because the PM had "express actual authority" to resolve minor problems.[325] The Navy's RFI response, which indicated that the PM was authorized to provide "'technical and administrative direction to

314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.* at 1344.
325. *Id.*

resolve problems encountered during construction,'" made this express actual authority evident.[326]

In analyzing whether Cath was entitled to an equitable adjustment, the Federal Circuit noted that Cath had the burden of proving that the contract was modified by someone with actual authority, and that apparent authority was not sufficient.[327] The court explained that actual authority can be express or implied.[328] With respect to express authority to bind the government, the court noted that the government gave authority to enter into and modify the contract exclusively to COs.[329] Moreover, COs had the authority to "administer the contract and ensure the contractor's compliance with the contract terms."[330] However, the court recognized that a CO may delegate authority to certain representatives, who may act on behalf of the government during contract administration.[331]

The Federal Circuit found that a *limited* delegation of authority occurred in this case. Specifically, the court cited the clause that permitted the CO to designate a "contracting officer's representative (COR)" to perform "specific technical or administrative functions."[332] Additionally, the "Government Representatives (June 1994)" clause authorized the EIC, as a "representative of the Contracting Officer," to be "responsible for monitoring performance and the technical management of the effort required hereunder."[333]

However, the Federal Circuit held that the CO's delegation of authority did not include the authority to make contract modifications because federal regulations prohibited delegating authority to a COR to modify the contract,[334] and this express limitation was incorporated into a clause of the contract itself.[335] Furthermore, the contract contained additional clauses specifically stating that the only person with the authority to make changes to the contract was the CO.[336]

326. *Id.* (citing the ASBCA opinion, which quoted *In re Urban Pathfinders, Inc.*, 79-1 B.C.A. (CCH) ¶ 13,709, at 67,260 (A.S.B.C.A. 1979)).
327. *Id.*
328. *Id.*
329. *Id.* (citing 48 C.F.R. §§ 1.601(a), 43.102 (2007)).
330. *Id.* (citing 48 C.F.R. §§ 1.602-1, 1.602-2 (2007)).
331. *Id.* (citing JOHN CIBINIC, JR., RALPH C. NASH, JR., & JAMES F. NAGLE, ADMINISTRATION OF GOVERNMENT CONTRACTS 39 (4th ed. 2006)).
332. *Id.* at 1344–45 (citing 48 C.F.R. § 252.201-7000 (2007)).
333. *Id.* at 1345 (quoting NAVFAC Clause 5252.242-9300 Government Representatives (June 1994)).
334. *Id.* (citing 48 C.F.R. § 201.602-2 (1998); 48 C.F.R. § 252.201-7000 (2007)).
335. *Id.*
336. *Id.* (pointing to NAVFAC Clause 5252.201-9300 Contracting Officer Authority (June 1994) and NAVFAC Clause 5252.242-9300 Government Representatives (June 1994)).

As to implied authority, the Federal Circuit described the issue as a "much closer case."[337] The court noted that Cath complied with the Navy's instructions for day-to-day contract administration.[338] However, the court determined that the Navy's instructions contradicted the clear language of the contract, and that the terms of the contract must govern.[339]

In the Court's view, the ROICC PM "could not have had the *implicit* authority to authorize contract modifications" because the contract language and government regulations incorporated into the contract "*explicitly* stated that only the CO had authority to modify the contract."[340] While a government employee has the implied authority to bind the federal government in contract when it is an integral part of his duties,[341] the Federal Circuit found that, in the face of such contractual and regulatory language, modifying the contract could not be an integral part of the ROICC PM's duties.[342] Accordingly, the Court held that the PM lacked implied authority to modify the contract.[343]

In the absence of actual or implied authority to bind the government, Cath argued that the changes directed by the CO had been ratified and were therefore binding. As evidence of ratification, Cath pointed to the July 27, 2001 Final Decision, which reflected that a person with actual authority and sufficient knowledge of the material facts endorsed the actions of the ROICC PM.[344]

The Federal Circuit recognized that "[r]atification requires knowledge of material facts involving the unauthorized act and approval of the activity by one with authority."[345] Because of a dispute over whether the CO had knowledge of such material facts, and the lack of findings by the ASBCA, the Federal Circuit remanded the case to the ASBCA to consider whether the July 27, 2001 Final Decision constituted ratification of three of the ROICC PM's contract modifications.[346]

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337. *Id.* at 1346.
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.* (citing H. Landau & Co. v. United States, 886 F.2d 322, 324 (Fed. Cir. 1989)).
342. *Id.*
343. *Id.*
344. *Id.* at 1346–47. The ASBCA had not considered ratification since it determined that the ROICC PM had actual authority to modify the contract. *Id.* at 1347.
345. *Id.* at 1347 (citing Harbert/Lummus Agrifuels Projects v. United States, 142 F.3d 1429, 1433–34 (Fed. Cir. 1998)).
346. *Id.* at 1348.

Judge Prost dissented in part on the ground that remand was unnecessary and that the CO's July 27, 2001 decision did not constitute a ratification of the PM's unauthorized change orders.[347]

Professor Nash commented that *Winter* has practical ramifications for contractors:

> It seems quite clear from the facts that both parties to the contract (including the Navy CO) believed, during contract administration, that the ROICC/Project Manager had the authority to work out routine specification problems as they arose. But the contract contained all of the protective clauses that guarded the Government against this practical result. While the contractor under the unique facts of this case may eventually recover under the ratification theory, the decision serves as a strong warning to contractors that they should not work with a Government agency to achieve effective performance of the contract by resolving routine specification problems with the personnel at the site of the work. Rather, as long as protective clauses are included in their contract, they should only resolve specification problems after they have received written direction from a designated CO.[348]

VII. DAMAGES

A. *Citizens Federal Bank v. United States, 474 F.3d 1314 (Fed. Cir. 2007)*

In squarely confronting the issue of the proper standard of causation for assessing damages, the Federal Circuit stated in *Citizens Federal Bank v. United States*[349]:

> Our cases dealing with the proper standard of causation may appear superficially somewhat inconsistent in applying the "substantial factor" and "but for" theories. We discern a common thread among them, however: the selection of an appropriate causation standard depends upon the facts of the particular case and lies largely within the trial court's discretion.[350]

The Federal Circuit explained that the method used by a trial court to determine damages is reviewed for an abuse of discretion.[351] The *Citizens Federal* majority affirmed the COFC's use of the "substantial factor" standard.[352]

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347. *Id.* at 1349 (Prost, J., dissenting).
348. Ralph C. Nash, *Contracting Officer Authority: A Strict Requirement*, 21 NASH & CIBINIC REP. 153, 156 (2007).
349. 474 F.3d 1314 (Fed. Cir. 2007).
350. *Id.* at 1318.
351. *Id.* (citing Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1461 (Fed. Cir. 1998) (en banc)).
352. *Id.* at 1319–20.

Judge Rader dissented on the grounds that only the "but for" standard is proper, citing the recent ruling in *California Federal Bank v. United States*[353] that *Myerle v. United States*[354] set forth the proper test for causation.[355]

During the federal savings and loan crisis of the 1980's, the Federal government created a coping strategy whereby healthy federal savings and loan companies, known as "thrifts," could acquire failing thrifts and then account for the deficits they assumed using a fictional accounting concept known as "regulatory goodwill."[356] The government entered into numerous agreements with these thrifts, permitting them to count the regulatory goodwill toward federal capital requirements and amortize it over an extended period of time.[357]

The Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") subsequently eliminated the use of regulatory goodwill, and also prevented the thrifts from counting subordinated debt toward their regulatory capital.[358] As a result, many thrifts failed and were liquidated by federal regulators.[359] The thrifts sued in the COFC, alleging that FIRREA constituted a breach of contract and claiming damages under various theories.[360] In *United States v. Winstar Corp.*,[361] the Supreme Court established that the passage of FIRREA constituted a breach of contract, but the Court did not address damages.[362] Thus, the Federal Circuit has evaluated damages with respect to each *Winstar*-related case on an individual basis.[363]

Pursuant to an assistance agreement with the government, Citizens Federal Bank obtained $35.9 million in regulatory goodwill for its 1986 acquisition of a financially troubled thrift, followed by another $17 million for a similar acquisition in 1988.[364] After FIRREA, Citizens Federal Bank dealt with the reduction in its regulatory capital by exchanging non-cumulative preferred stock for its

353. 395 F.3d 1263, 1267 (Fed. Cir. 2005).
354. 33 Ct. Cl. 1 (1897).
355. *Citizens Fed. Bank*, 474 F.3d at 1322 (Rader, J., dissenting).
356. *Id.* at 1316 (majority opinion) (indicating that "regulatory goodwill" is the term applied to "excess of the amount paid for the acquired thrift over that entity's value.").
357. *Id.*
358. *Id.* (citing Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183).
359. *Id.*
360. *Id.*
361. 518 U.S. 839 (1996).
362. *Citizens Fed. Bank*, 474 F.3d at 1316 (citing *Winstar Corp.*, 518 U.S. at 910).
363. *Id.*
364. *Id.* at 1317.

subordinated notes and reducing its assets to stay in capital compliance.[365] Following trial, the COFC ruled that the government breached its assistance agreement with Citizens Federal, awarding the bank total mitigation damages of $18.6 million—transaction costs of $3,802,901 for the exchange of preferred stock for debt; $266,000 for the difference between the dividend rate on the preferred stock and the interest rate on the subordinated notes; and $14,615,000 as compensation for diminished cash flow due to adverse tax consequences of the exchange.[366]

On appeal, the Federal Circuit considered Citizens Federal's damages claims using the "substantial factor" theory of causation.[367] The court observed that *Winstar* cases apply differing standards of causation when determining damages, including the "but-for" theory of causation,[368] and the "substantial factor" test.[369] The *Citizens Federal* court found that there was no "broad rule" dictating the use of any particular theory and affirmed the COFC's use of the substantial factor theory.[370]

The court then addressed the government's claim that the mitigation damages claimed by Citizens Federal due to refinancing costs were not attributable to the government's breach because its agreement with Citizens Federal did not expressly authorize the use of subordinated debt as regulatory capital in the first place.[371] The government also argued that the adverse tax consequences suffered by Citizens Federal were not a foreseeable result of FIRREA.[372] The Federal Circuit rejected these arguments,[373] finding that Citizens Federal's post-FIRREA strategy of refinancing its subordinated debt through preferred stock was "a commercially reasonable effort to maintain its debt-to-equity ratio, and fair and reasonable efforts to mitigate are all that the law requires."[374] With regard to the foreseeability of adverse tax consequences, the court stated that "[i]f it was foreseeable that the breach would cause the other party to obtain additional capital, there is no requirement that the particular

365. *Id.*
366. *Id.*
367. *Id.* at 1318.
368. *Id.* at 1319 (citing First Heights Bank, FSB v. United States, 422 F.3d 1311 (Fed. Cir. 2005); La Van v. United States, 382 F.3d 1340 (Fed. Cir. 2004)).
369. *Id.* (citing Energy Capital Corp. v. United States, 302 F.3d 1314 (Fed. Cir. 2002); Bluebonnet Sav. Bank v. United States, 266 F.3d 1348 (Fed. Cir. 2001)).
370. *Id.*
371. *Id.* at 1320.
372. *Id.*
373. *Id.*
374. *Id.* at 1321 (quoting Home Sav. of Am., FSB v. United States, 399 F.3d 1341, 1351) (Fed. Cir. 2005)).

method used to raise that capital or its consequences also be foreseeable."[375] The Federal Circuit affirmed the award of $18,683,901 in damages.[376]

B. Hughes v. United States, 498 F.3d 1334 (Fed Cir. 2007)

In this *Winstar*-related breach-of-contract case, the Federal Circuit held that a contract with the government that gave a thrift favorable regulatory treatment shifted the risk of regulatory change onto the private parties, thereby shielding the government from liability for breach of contract from regulatory changes resulting from FIRREA.[377]

El Paso Federal Savings and Loan Association ("Old El Paso"), an undercapitalized thrift, entered into a merger agreement whereby Old El Paso underwent a supervisory conversion to merge into El Paso Savings Association ("New El Paso").[378] New El Paso was a wholly-owned subsidiary of the El Paso Holding Corporation ("EPHC"),[379] and Alfred Hughes, the EPHC president and majority shareholder, entered into the merger agreement in connection with the supervisory conversion.[380] Under the conversion, Old El Paso would be merged into New El Paso, and EPHC would acquire Old El Paso in exchange for fourteen real estate parcels valued at $47.3 million and $11.5 million in cash.[381] The merger agreement required the "'amortization of goodwill arising from purchase method accounting, for regulatory purposes, by use of the straight-line method over a 25-year period.'"[382]

EPHC included this merger agreement in its application for approval of the merger and supervisory conversion with the Federal Home Loan Bank Board ("FHLBB").[383] After negotiations, the real estate parcels were valued at $35 million.[384] The FHLBB issued an approval letter for the merger and conversion on May 13, 1988,[385] and issued a forbearance letter to Old El Paso, granting certain forbearances, including a goodwill accounting forbearance

375. *Id.*
376. *Id.* at 1322.
377. Hughes v. United States, 498 F.3d 1334, 1339 (Fed Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3305 (U.S. Nov. 27, 2007) (No. 07-735).
378. *Id.* at 1335.
379. *Id.*
380. *Id.*
381. *Id.*
382. *Id.*
383. *Id.* at 1335–36.
384. *Id.* at 1336.
385. *Id.*

amortizing the goodwill by New El Paso over a twenty-five year period.[386]

Two weeks later, EPHC and the Federal Savings and Loan Insurance Corporation ("FSLIC") issued a Regulatory Capital Maintenance Dividend Agreement ("Dividend Agreement"), under which, in return for the FSLIC's approval of the acquisition of control of Old El Paso, EPHC was required to "infuse sufficient additional capital" into New El Paso so that it could maintain its regulatory capital requirements.[387] Included in the Dividend Agreement was a miscellaneous provision, which stated that "'[a]ll references to regulations of the Board or the FSLIC used in this Agreement shall include any successor regulation thereto, it being expressly understood that subsequent amendments to such regulations may be made and that such amendments may increase or decrease the Acquiror's obligation under this Agreement.'"[388]

A year later, however, the newly-passed FIRREA limited the ability of thrifts like New El Paso to include goodwill in regulatory capital,[389] which caused New El Paso's regulatory capital to fall out of compliance with required levels.[390] When this happened, the Office of Thrift Supervision placed New El Paso in a receivership and subsequently liquidated the thrift.[391]

Hughes and EPHC filed an action claiming that FIRREA's enactment was a breach of the contract which permitted New El Paso to count supervisory goodwill towards its regulatory capital.[392] The trial court found that the government was not liable to EPHC because EPHC assumed the risk of regulatory change in the Dividend Agreement.[393] That Agreement, however, did not bind Alfred Hughes, and since he did not assume the risk of regulatory change,[394] he was awarded $46.5 million in damages for his investments.[395]

On appeal, the Federal Circuit held that it was bound by prior decisions, which, with respect to identical goodwill promises in their forbearance letters and identical risk-shifting clauses in their Dividend Agreements, shifted the risk of regulatory change to the

386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.* at 1337 (citing United States v. Winstar Corp., 518 U.S. 839, 856–60 (1996)).
390. *Id.*
391. *Id.*
392. *Id.*
393. *Id.*
394. *Id.*
395. *Id.*

private parties.[396] The court then found that nothing in the Dividend Agreement in the present case distinguished it from these prior cases.[397]

The Federal Circuit then addressed whether Hughes, despite not having signed the Dividend Agreement containing the risk-shifting provision, was a party to the Agreement such that the risk-shifting provision precluded his recovery.[398] The court here followed *Franklin Federal Savings Bank v. United States*,[399] to find that the approval letter and the forbearance letter were not separate contracts, but rather "regulatory approvals that could only become enforceable by . . . the Dividend Agreement."[400] In both *Franklin* and the instant case, the individual plaintiffs were not signatories to the Dividend Agreement; the Dividend Agreement did not incorporate any other related contractual documents, and the identical forbearance letters were not addressed to the individual shareholder.[401] If Hughes was a party to the overarching agreement, he too assumed the risk of regulatory change, and therefore could not recover from the government.[402]

C. Grumman Aerospace Corp. v. Wynne, 497 F.3d 1350 (Fed. Cir. 2007)

This important decision revisits the evidentiary predicate necessary for a tribunal to award damages using the jury verdict method. Due to woefully inadequate evidence in *Grumman Aerospace Corp. v. Wynne*,[403] the Federal Circuit affirmed the ASBCA's decision to deny recovery on successful claims using the jury verdict method.[404]

In December 1985, as part of the Avionics Modernization Program ("AMP"), the Air Force awarded Grumman Aerospace a contract to "design, manufacture, and furnish kits to upgrade the avionics" of F-111 aircraft.[405] While executing the contract, a series of disputes arose between Grumman and the Air Force, in which Grumman asserted that it had incurred "unanticipated costs" due to insufficient data from the Air Force.[406] On March 30, 1994, Grumman submitted

396. *Id.* (citing Franklin Fed. Sav. Bank v. United States, 431 F.3d 1360, 1369 (Fed. Cir. 2005); Admiral Fin. Corp. v. United States, 378 F.3d 1336, 1339 (Fed. Cir. 2004)).
397. *Id.* at 1338.
398. *Id.* at 1339.
399. 431 F.3d 1360 (Fed. Cir. 2005).
400. Hughes v. United States, 498 F.3d 1334, 1340 (Fed. Cir. 2007) (citing *Franklin Fed. Sav. Bank*, 431 F.3d at 1365–66).
401. *Id.*
402. *Id.* at 1341.
403. 497 F.3d 1350 (Fed. Cir. 2007).
404. *Id.* at 1359.
405. *Id.* at 1354.
406. *Id.* at 1355.

a certified claim for twenty-nine items totaling $65 million in damages, plus interest calculated on a "total cost" method.[407] On September 30, 1994, the CO granted some damages on a few claims, but denied liability under the total cost method.[408]

Grumman appealed this decision to the board and included a claim for jury verdict damages.[409] When the board requested additional proof on damages and costs, Grumman retained an accounting firm that, applying the modified total cost method, calculated damages at almost $50.4 million.[410] Grumman eventually lowered its damages request to between $22.7 and $25.8 million.[411] In the alternative, Grumman sought jury verdict damages for the fourteen claims upheld by the board, but the board rejected the jury verdict method, citing insufficient evidence.[412] The board then awarded damages in the amount of $387,067 plus interest on six claims.[413]

The jury verdict method considers the entire record to estimate damages.[414] The Federal Circuit articulated the requisites for awarding damages based on a jury verdict method: "(1) that clear proof of injury exists; (2) that there is no more reliable method for computing damages; and (3) that the evidence is sufficient for a court to make a fair and reasonable approximation of the damages."[415] The court also noted that the jury verdict method may only be used when "more exact" techniques are not appropriate.[416]

The Federal Circuit found no abuse of discretion in the board's finding of a lack of evidence to support a jury verdict, noting that the board had closely considered an extensive number of documents, hundreds of pages of cost information, and a large amount of testimony before reaching its conclusion.[417] For example, the board found that an internal memorandum purporting to show the number of man-hours expended did not distinguish between work within the scope of the contract and outside it, suggesting that the damages

407. *Id.* at 1356.
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.*
412. *Id.* (citing *In re* Grumman Aerospace Corp., 06-1 B.C.A. (CCH) ¶ 33,216, at 164,621 (A.S.B.C.A. Feb. 27, 2006)).
413. *Id.*
414. *Id.* at 1358 (citing Raytheon Co. v. White, 305 F.3d 1354, 1367 (Fed. Cir. 2002)).
415. *Id.* (quoting Dawco Constr., Inc. v. United States, 930 F.2d 872, 880 (Fed. Cir. 1991)).
416. *Id.*
417. *Id.* at 1359.

suffered resulted from Grumman's own mistakes.[418] Moreover, Grumman mistakenly relied on the cost figures from the CO's review of Grumman's request for an equitable adjustment and prematurely destroyed project records preventing substantiation of its claim.[419]

Finally, the board found that Grumman's damage figures wrongfully relied on a consultant's report, which was not based on actual costs.[420] Furthermore, that same report did not attempt to evaluate independently the reasonableness of Grumman's costs, but instead relied on the Source Selection Advisory Council analysis report that only set forth "acceptable parameters."[421] Considering the record, the Circuit found that the trial court had not erred in finding that the evidence Grumman presented "did not support a fair and reasonable approximation of damages."[422]

Judge Newman dissented on the grounds that the result was grossly unfair to the contractor, stating that the board had failed to fully consider the three prerequisite considerations to applying the jury verdict method.[423] In light of this, Judge Newman found that the board had essentially failed to make "its best estimate of a fair and just award based on the best available information," noting that "[i]t is neither fair nor just to deny compensation simply because it is hard to measure."[424] To support a jury verdict, a contractor must present real evidence based on actual information demonstrating the amount of work completed for which the government was responsible.[425]

D. *International Data Products Corp. v. United States, 492 F.3d 1317 (Fed. Cir. 2007)*

In this case, the Federal Circuit addressed a contractor's post-termination warranty and upgrade obligations and the "total contract price" of an indefinite delivery, indefinite quantity ("ID/IQ") contract in the context of applying the termination for convenience

418. *Id.*
419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.*
423. *Id.* at 1360 (Newman, J., dissenting) (citing the three prerequisite factors for the application of the jury verdict method set forth in *Dawco Constr., Inc. v. United States*, 930 F.2d 872, 880 (Fed. Cir. 1991)).
424. *Id.* The Federal Circuit's decision in *Grumman* has been recognized as instructive on the standard for evidence required for jury verdict awards in government contract litigation. For an analysis of the illustrative value of *Grumman*, see generally Ralph C. Nash, *Postcript V: The "Jury Verdict" Approach*, 21 NASH & CIBINIC REP. ¶ 70 (2007) (highlighting the importance of presenting real evidence, or in the alternative, well-documented estimates of work performed).
425. Nash, *supra* note 424, at ¶ 70 (suggesting a review of engineering notebooks or employee interviews as means of proving the actual work completed).

clause's cap on recovery.[426] International Data Products ("IDP") was awarded an SBA Section 8(a) contract to supply computers to the Air Force.[427] The contract was a one-year fixed price ID/IQ contract with four one-year options and had a minimum purchase requirement of $100,000, an estimated quantity of $100 million, and a maximum quantity of $729 million.[428] In 1998, IDP lost its section 8(a) status when it was purchased by Dunn Computer Corporation ("Dunn"), a large business.[429] As required by section 637(a)(21)(A) of the Small Business Act, the Air Force, after purchasing $35 million in equipment from IDP, terminated the IDP's contract because IDP no longer qualified as a small business.[430]

Following termination of the contract, the Air Force insisted that IDP provide warranty and upgrade services.[431] The warranty and upgrade clause required the contractor to "'provide users with a minimum 5 year . . . full parts and labor warranty for all offered products (excluding software)'" and a "'three year on site, 24 hour fix or replace on hardware warranty and a two year upgrade warranty on software.'"[432] Because the continuing warranty costs threatened its existence, IDP ceased all warranty and upgrade services.[433]

The COFC held that the termination for convenience terminated IDP's obligation to continue providing warranty and upgrade services.[434] The Federal Circuit reversed and held that the termination for convenience did not extinguish IDP's obligations to provide warranty and upgrade services.[435]

In addition, IDP sought the warranty and upgrade costs it incurred.[436] IDP's theories of recovery of termination costs included (1) expectation damages, (2) warranty services under an express contract, (3) warranty services under an implied-in-fact contract, (4) warranty work under a theory of constructive change, equitable adjustment or cardinal change, and (5) *quantum meruit*.[437]

426. Int'l Data Prods. Corp. v. United States (*IDP III*), 492 F.3d 1317 (Fed. Cir. 2007).
427. *Id.* at 1320.
428. *Id.* at 1320–21.
429. *Id.* at 1321.
430. *Id.*
431. *Id.*
432. *Id.* at 1322 (quoting the warranty clause of IDP's contract).
433. *Id.* at 1321.
434. *Id.* at 1320 (citing Int'l Data Prods. Corp. v. United States (*IDP II*), 70 Fed. Cl. 387, 394 (2006); Int'l Data Prods. Corp. v. United States (*IDP I*), 64 Fed. Cl. 642, 650–51 (2005)).
435. *Id.* at 1323.
436. *Id.*
437. *Id.*

The Federal Circuit rejected all these theories. IDP's expectancy damage theory was predicated on a termination clause in the contract, which stated that

> The Government shall pay . . . reasonable, allowable, and allocable costs, determined in accordance with FAR Part 31, incurred by the contractor, prior to the date of termination for completed work that has not previously been paid for; for work in process and materials directly related to the terminated portion of the contract . . . .[438]

However, the same clause provided that the "termination amounts payable and any amounts for items delivered under the contract" could not exceed "total contract price."[439] Because the Court deemed the total contract price to be the $35 million IDP had been paid, IDP had no further rights under the termination for convenience clause.[440]

IDP argued that "total estimated quantities" reflected the "needs" of the government and converted the contract from an ID/IQ contract into a requirements contract, and that it was "led to believe it would receive a minimum of $100 million in orders" and thus was entitled to expectancy damages in that amount.[441] On appeal, the Federal Circuit rejected IDP's reading of the amended contract, stating that IDP "never could have expected to automatically receive all of those orders [for $100 million worth of equipment]."[442]

The Federal Circuit rejected IDP's other damage theories as well. First, the court dismissed IDP's contention that it was entitled to termination costs under an express contract because the Air Force continued to demand performance, holding that the contract terminated upon notice to IDP.[443] There was no implied-in-fact contract to provide warranty services because IDP itself disputed the continued existence of the contract and an obligation to perform.[444] Theories of recovery based on constructive change, equitable adjustment, or cardinal change were rejected because the Air Force did not demand work above and beyond the scope of the contract.[445] Finally, the court rejected recovery in *quantum meruit* on the basis that the COFC lacks jurisdiction over implied-in-law contracts.[446]

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438. *Id.*
439. *Id.* at 1324.
440. *Id.*
441. *Id.*
442. *Id.*
443. *Id.* at 1325.
444. *Id.*
445. *Id.*
446. *Id.* at 1325–26 (referencing 28 U.S.C. § 1491(a)(1) (2000)).

VIII. DEFENSES

A. *Carabetta Enterprises, Inc. v. United States, 482 F.3d 1360 (Fed. Cir. 2007)*

Carabetta Enterprises, Inc. v. United States[447] contains an important analysis of the interrelationship between the sovereign acts doctrine and the impossibility defense.[448] The case has significant implications for the government's role as a contractor in the commercial marketplace and its ability to rely on its sovereign status to excuse it from contractual liability.

The plaintiffs in this case, known collectively as "Carabetta," were owners of low-income housing properties insured by the federal government under the National Housing Act ("NHA").[449] In 1987, Congress passed the Emergency Low Income Housing Preservation Act ("ELIHPA"), authorizing the Department of Housing & Urban Development ("HUD") to guarantee equity loans on properties under NHA Section 241(f), so long as the owners complied with applicable HUD regulations.[450]

In 1994, Carabetta entered into an agreement with HUD (the "Repayment Agreement"), under which HUD agreed to insure loans on eight Carabetta properties, the proceeds from which Carabetta agreed to invest in achieving regulatory compliance.[451] Carabetta achieved regulatory compliance in 1995.[452] The Repayment Agreement provided that once Carabetta achieved regulatory compliance, HUD would insure twenty-five specified Carabetta properties plus one additional property.[453]

In 1997, before HUD processed Carabetta's loans, Congress passed the Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act ("Appropriations Act"), which prohibited section 241(f) equity

447. 482 F.3d 1360 (Fed. Cir. 2007).
448. *Id.*
449. *Id.* at 1362 (citing National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934), *amended by* Pub. L. No. 87-70, § 101, 75 Stat. 149, 150–51 (1961); Pub. L. No. 90-448, § 201, 82 Stat. 476, 498–501 (1968) (codified at 12 U.S.C. § 1715 (2000))).
450. *Id.* at 1363 (citing Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988) (codified at 12 U.S.C. § 1715 (2000))).
451. *Id.*
452. *Id.*
453. *Id.* (indicating that the insurance of a twenty-seventh property was designated as "subject to appeal").

loans.[454] Due to the passage of the Appropriations Act, HUD was no longer able to issue the Section 241(f) equity loans it had promised Carabetta in the 1994 Repayment Agreement.[455] Instead, HUD was authorized to issue Carabetta capital loans directly to low-income properties, with discretionary authority to distribute $75 million among the properties.[456] Accordingly, HUD issued $25 million in direct loans to seven Carabetta properties and used the remaining $50 million to fund other properties.[457] Carabetta subsequently brought suit in the COFC alleging that HUD's failure to use the additional $50 million to fund the rest of its properties as specified in the Repayment Agreement constituted a breach of contract.[458]

The government raised the defenses of impossibility and the "sovereign acts doctrine," arguing that the Appropriations Act constituted a sovereign act which rendered HUD's performance of the Repayment Agreement impossible.[459] The COFC held that while the Appropriations Act was a sovereign act, it did not render HUD's performance impossible because HUD retained discretionary authority to substitute capital loans for the section 241(f) equity loans it had promised Carabetta.[460]

On appeal, the Federal Circuit considered HUD's liability in light of the impossibility and sovereign acts doctrines.[461] Under the sovereign acts doctrine, "'the United States when sued as a contractor cannot be held liable for an obstruction to the performance of [a] particular contract resulting from its public and general acts as a sovereign.'"[462] However, the court held that "even if the sovereign acts doctrine applies, 'it does not follow that discharge will always be available, for the common-law doctrine of impossibility imposes additional requirements before a party may avoid liability for breach.'"[463]

The court explained that pursuant to the doctrine of partial impossibility or partial impracticability, an obligor retains his contractual duties when he can render a reasonable substitute performance for something that has become impossible to perform

454. *Id.* (citing the Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1999, Pub. L. No. 105-276, 112 Stat. 2461 (1998)).
455. *Id.*
456. *Id.* at 1363–64.
457. *Id.* at 1364.
458. *Id.*
459. *Id.*
460. *Id.*
461. *Id.* at 1365.
462. *Id.* (quoting United States v. Winstar Corp., 518 U.S. 839, 895 (1996)).
463. *Id.* (quoting *Winstar*, 518 U.S. at 904).

as originally agreed upon.[464] In the instant case, the Federal Circuit declared that while the Appropriations Act "made it impossible for HUD to insure any of the section 241(f) loans for Carabetta's . . . properties . . . [it] provided HUD with the authority and capacity to render reasonable substitute performance" by issuing $75 million in capital loans.[465]

By accepting the initial $25 million in capital loans for seven of its properties following the passage of the Appropriations Act, Carabetta indicated that it would accept the capital loans as a substitute for the section 241(f) equity loans.[466] As such, HUD should have proceeded to complete its substitute performance by using the remaining $50 million to fund the rest of Carabetta's properties.[467] Because HUD "[did] not suggest that it lacked the capacity or authority to provide capital loans for the . . . properties in dispute . . . [nor did it show] that providing capital loans was unreasonable as a form of substitute performance," the Federal Circuit affirmed the COFC's ruling on HUD's liability.[468]

B. City Line Joint Venture v. United States, 503 F.3d 1319 (Fed. Cir. 2007)

In *City Line Joint Venture v. United States*,[469] the Federal Circuit held that the "sovereign acts" doctrine did not discharge the government from contractual liability when Congress enacted legislation that intentionally abrogated HUD's contractual obligation to permit the plaintiff-property owner to prepay a forty-year HUD-insured mortgage.[470]

This case is one of many involving statutes related to low-income multi-family housing built in the 1960s and 1970s: the Emergency Low Income Housing Preservation Act of 1987[471] and the Low Income Housing Preservation and Resident Homeownership Act of 1990 ("LIHPRHA").[472] The statute at issue here, LIHPRHA, was designed to preserve such low-income housing by disallowing prepayment of

464. *Id.*
465. *Id.* at 1365–66.
466. *Id.* at 1366.
467. *Id.*
468. *Id.* In *Carabetta*, the Federal Circuit also addressed a damages claim, and affirmed the COFC's denial of three components of damages: (1) a "tax gross-up" on the proceeds of capital loans that should have been issued; (2) additional damages attributable to the rehabilitation loans for the remaining properties that did not receive capital loans; and (3) damages attributable to an additional property. *Id.* at 1367–70.
469. 503 F.3d 1319 (Fed Cir. 2007).
470. *Id.* at 1323.
471. Pub. L. No. 100-242, § 202, 100 Stat. 1877 (1988).
472. Pub. L. No. 101-625, tit. VI, 104 Stat. 4249 (1990).

HUD-insured mortgages without securing HUD's approval and meeting other conditions.[473]

City Line Joint Venture ("City Line") was a developer of a low-income multi-family rental housing project in Maryland. Under § 221(d)(3) of the National Housing Act, City Line received a HUD-insured low-interest mortgage loan from a private lender to construct a housing project.[474] A provision of the secured note covering the loan prohibited prepayment of the mortgage (without prior approval from HUD) prior to twenty years from the date of the note's final endorsement by the Federal Housing Commissioner.[475] City Line also signed a Regulatory Agreement with HUD in return for the loan, under which City Line agreed to certain housing project restrictions on tenant income, rental rates, and the rate of return to the investor.[476] The agreement provided that City Line was bound "'so long as the contract of mortgage insurance continues in effect, and during such further period of time as the Commissioner shall be the owner, holder, or reinsurer of the mortgage,' or obligated to insure a mortgage on the property."[477] Thus, a prepayment of the mortgage would constitute an exit from the housing project restrictions.[478]

The note, and a supplemental note that was signed after the construction of the housing project,[479] were endorsed by the Federal Housing Commissioner in 1971.[480] Simultaneously, the lender sold the mortgage to the Government National Mortgage Association ("GNMA").[481] City Line defaulted on the loan soon thereafter.[482] GNMA assigned its mortgage rights to the insurer HUD, who then became the lender.[483] HUD and City Line entered into workout agreements and had outside capital infused into the projects, which ultimately eliminated all mortgage arrears.[484]

As stated above, LIHPRHA disallowed prepayments of the kind of HUD-insured mortgage loan into which City Line entered. Later, the Housing Opportunity Program Extension Act of 1996[485] restored

473. *City Line*, 503 F.3d at 1322.
474. *Id.* at 1321.
475. *Id.* After twenty years, HUD approval was not needed. *Id.*
476. *Id.*
477. *Id.* (quoting the Regulatory Agreement).
478. *Id.*
479. *Id.*
480. *Id.*
481. *Id.*
482. *Id.*
483. *Id.*
484. *Id.*
485. Pub. L. No. 104-20, 110 Stat. 834 (1996).

these prepayment rights to City Line as of April 29, 1996.[486] On August 13, 1997, City Line prepaid the mortgage on its housing project, thereby exiting the HUD program.[487]

City Line filed suit in the COFC in November 1996 arguing that the enactment of LIHPRHA and HUD's enforcement of the Act unlawfully deprived it of its contractual right to prepay its mortgage after twenty years and exit the program.[488] Granting summary judgment for the government, the COFC held that the enactment of LIHPRHA was a "public and general act" and applied the sovereign acts doctrine as a defense to City Line's breach-of-contract claim.[489]

The Federal Circuit reversed and remanded for further proceedings on the claim.[490] Since HUD was the assignee of the mortgage, the note, and the supplemental note as of 1977, the government did not dispute the fact that it was in privity of contract with City Line both at the time LIHPRHA was enacted in 1990 and on August 31, 1990 when City Line was entitled under the contract to exercise its prepayment right.[491]

The Federal Circuit noted that it had already considered the application of the sovereign acts doctrine in connection with the enactment of both ELIHPA and LIHPRHA in the context of a takings claim in *Cienega Gardens v. United States* (*Cienaga VIII*).[492] *Cienega VIII* also involved owners of low-income housing whose prepayment rights were taken away by ELIHPA and LIHPRHA.[493] The *City Line* court characterized *Cienega VIII* as holding that the enactment of those statutes "directly and intentionally abrogated the mortgage prepayment clauses."[494] More specifically, *Cienega VIII* held that the owners whose prepayment rights were taken away by ELIHPA and LIHPRHA were similarly situated to the plaintiffs in *United States v. Winstar Corp.*,[495] in which the Court held that "the abrogation by legislation of clear, unqualified contract rights requires a remedy,

486. *City Line*, 503 F.3d at 1319. The statute prevented City Line from raising rents for at least an additional two months (restricted until at least June 26, 1996), until after it prepaid. *Id.*
487. *Id.*
488. *Id.* City Line also filed a Fifth Amendment claim in the alternative seeking compensation for what it argued was a regulatory taking. *Id.*
489. *Id.* The trial court indicated that it would not reach the regulatory taking claim while the contract claim remained outstanding. *Id.* at 1323.
490. *Id.* at 1323.
491. *Id.* at 1322.
492. 331 F.3d 1319, 1334–35 (Fed. Cir. 2003).
493. *Id.* at 1325.
494. *City Line*, 503 F.3d at 1323 (citing *Cienega VIII*, 331 F.3d at 1334).
495. 518 U.S. 839, 896 (1996).

even in a highly regulated industry (banking), because the contracts embodied the commitments of the contracting parties."[496]

Applying *Cienega VIII*, the *City Line* court stated, "While this analysis of ELIHPA and LIHPRHA occurred in the takings context, our reasoning and understanding of their effects have equal relevance to the application of the sovereign acts doctrine as applied to a breach-of-contract claim with respect to the same legislative enactments."[497] Accordingly, the Federal Circuit determined that the government could not use the impossibility defense to avoid liability under City Line's breach-of-contract claim.[498]

C. *Long Island Savings Bank, FSB v. United States, 503 F.3d 1234 (Fed. Cir. 2007)*

In *Long Island Savings Bank, FSB v. United States* (*Long Island III*),[499] the Federal Circuit held that a *Winstar*-related contract between a thrift and the government was tainted by fraud from its inception and void *ab initio*.[500] The Circuit determined that the bank's failure to disclose that its chief executive officer ("CEO") had breached his fiduciary duties to the bank—by receiving compensation from his law firm for directing its mortgage work to that firm—constituted fraud and was a prior material breach of the contract.[501] This holding reversed the COFC's entry of summary judgment denying the government's counterclaim and affirmative defenses and award of $435,755,000 in damages to the Long Island Savings Bank, FSB

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496. *Cienega VIII*, 331 F.3d at 1334 (citing *Winstar*, 518 U.S. at 896–97). *Cienega VIII* further explained why the enactment of ELIHPA and LIHPRHA could not shield the government from liability:

> The purpose of contracts is precisely to fix obligations and entitlements so that they will not be affected by subsequent background changes. . . . To hold otherwise would mean that Congress could have changed the mortgage contracts in *any* way to affect *any* of the rights established by the contracts—including changing the contracts to extend their term from forty to, for example, eighty years—and the Owners would be without a remedy. Again, this is not and cannot be the law.

Id.

497. *City Line*, 503 F.3d at 1323. *City Line* appears to presuppose that the "sovereign acts" doctrine is a subset of the standard contract law defense of "impossibility."

498. *Id.*

499. 503 F.3d 1234 (Fed. Cir. 2007), *petition for reh'g denied*, Long Island Sav. Bank, FSB v. United States, 2007 U.S. App. LEXIS 30345 (Fed. Cir., Dec. 28, 2007) (en banc).

500. *Id.* at 1237.

501. *Id.* A previous panel decision in this case held that the thrift's claims against the government were forfeited under 28 U.S.C. § 2514 (2000). Long Island Sav. Bank, FSB v. United States (*Long Island II*), 476 F.3d 917, 933 (Fed. Cir. 2007). Sitting en banc, the Federal Circuit vacated that decision and returned the case to the original panel for revision. *Long Island III*, 503 F.3d at 1237.

("LISB") and the Long Island Savings Bank of Centereach ("Centereach") after trial.[502] This case provides a model as to how the Federal Circuit analyzes an affirmative defense of fraud in the inception of the contract and its relationship to a prior material breach-of-contract defense. Accordingly, an extended summary is provided.

1. The contract

In April 1982, the Federal Savings and Loan Insurance Corporation ("FSLIC") merged two failing thrifts into Suffolk County Federal Savings and Loan Association ("Suffolk").[503] In October 1982, the FSLIC solicited acquirers of Suffolk because Suffolk was continuing to decline.[504] Of the six bids received, LISB's was the most favorable "because it proposed the least amount of financial assistance from the FSLIC" and because LISB had a "proven record of sound financial management."[505] The parties executed a final Assistance Agreement on August 17, 1983, under which Suffolk converted from a mutual savings and loan association to a federal stock savings bank and changed its name to Centereach.[506] LISB acquired Centereach as a wholly owned subsidiary through a one hundred percent common stock purchase in the amount of \$100,000.[507] In return, the government made a cash contribution of \$75 million to Centereach within three business days of acquisition and a total infusion of \$122 million based on the Assistance Agreement and other agreements.[508] Like other *Winstar* cases, the government agreed that LISB and Centereach could, under accounting rules that were formerly in effect, account for approximately \$625.4 million of goodwill to be amortized over forty years using the straight-line method.[509]

502. *Long Island III*, 503 F.3d at 1237. On Feb. 1, 2007, the Federal Circuit reversed the trial court's judgment and held that the banks' claims against the government were forfeited under 28 U.S.C. § 2514. *Long Island II*, 476 F.3d at 933. However, after a petition for panel rehearing and rehearing en banc, and a response from the government were filed, the court, acting en banc, returned the case to the original panel for revision. *Long Island III*, 503 F.3d at 1237. The panel withdrew and vacated its February 1, 2007 opinion and replaced it with the present opinion. *Id.*

503. *Long Island III*, 503 F.3d at 1237.

504. *Id.*

505. *Id.*

506. *Id.*

507. *Id.*

508. *Id.* at 1237–38.

509. *Id.* at 1238 (citing United States v. Winstar Corp., 518 U.S. 839, 853–56 (1996)).

The Assistance Agreement conditioned the government's acceptance of its contractual obligations by requiring a certificate from the chairman of the board of LISB, James Conway, that certain representations and warranties in the Assistance Agreement were true and substantially correct and that no event had occurred that would constitute a breach.[510] Among these representations and warranties were that "LISB is not in violation of any applicable statutes [and] regulations" and that "all information furnished by LISB in connection with this Agreement or the Master Agreement do not contain any untrue statement of a material fact or omit to state a material fact necessary to be stated in order to make the statements contained therein not misleading."[511] Conway signed this certification.[512]

2. LISB CEO's law firm compensation

At the same time as serving as chairman of the board and CEO of LISB and Centereach, Conway was also compensated by the law firm Conway & Ryan.[513] Conway & Ryan was LISB and Centereach's "primary outside counsel" and performed their mortgage closing services and occasional foreclosure proceedings.[514] The mortgage matters were a "substantial portion" of the law firm's revenues.[515] As the COFC stated, "[f]rom 1982 to 1991, Conway caused LISB to utilize the firm as LISB's sole mortgage closing counsel, and he ensured that the firm had the exclusive right to represent LISB in connection with all mortgage closings without action from the Board."[516] While Conway ceased practicing law after becoming CEO of LISB, he continued to receive compensation from the law firm, including income from the bank's mortgage closings, receiving at least $3.5 million between 1980 and 1989, for a total of $10.9 million collectively with his daughter and daughter-in-law.[517] Neither Conway nor LISB disclosed to the regulators the compensation he and his family received, but instead, LISB submitted misleading answers regarding Conway's remuneration from his law firm in its application

510. *Id.*
511. *Id.* (emphasis omitted).
512. *Id.*
513. *Id.* at 1239.
514. *Id.*
515. *Id.*
516. *Id.* (quoting Long Island Sav. Bank, FSB v. United States (*Long Island I*), 54 Fed. Cl. 607, 610 (2002)).
517. *Id.*

to the FHLBB for conversion and in subsequent FHLBB thrift examinations.[518]

In its summary judgment briefs, the government submitted an affidavit from its supervisory agent responsible for recommending approval of LISB's acquisition of Centereach.[519] The affidavit stated that if Conway had revealed his kickback scheme or that he was violating anti-kickback laws, the regulator would have recommended discontinuance of negotiations with LISB for its acquisition of Suffolk, and that the FSLIC and FHLBB would not have provided regulatory assistance or financial assistance to a thrift involved in "the type of serious impropriety at issue in this case."[520]

3. FIRREA and the investigation of Conway's kickback scheme

On August 9, 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").[521] FIRREA restricted Centereach's ability to count supervisory goodwill and capital credit towards its regulatory capital requirements.[522] FIRREA caused Centereach's capital ratio to decline from plus eight percent to minus eleven percent.[523] The management of LISB and Centereach restructured the thrift by shrinking it, including selling branches, securities, loans, paying down borrowing, merging LISB and Centereach, and writing off goodwill.[524]

In February 1990, Conway hired an outside law firm to advise the thrifts regarding a potential lawsuit against the government.[525] In preparation for litigation and regulatory examinations, the outside law firm conducted a "due diligence" inquiry and discovered Conway's compensation scheme.[526] The outside law firm advised Conway to retain his own counsel in August 1990.[527] Conway subsequently resigned from LISB and Centereach in June 1992.[528] In September 1992, LISB and Centereach informed the Office of Thrift Supervision ("OTS") of the facts concerning Conway's relationship with his law firm.[529]

518. *Id.* at 1240.
519. *Id.*
520. *Id.* at 1240–41.
521. Pub. L. No. 101-73, 103 Stat. 83 (1989).
522. *Long Island III*, 503 F.3d at 1241.
523. *Id.*
524. *Id.*
525. *Id.*
526. *Id.*
527. *Id.*
528. *Id.*
529. *Id.* at 1242.

In February 1993, OTS investigated Conway's law-firm compensation and found that Conway "engaged in violations of federal conflict-of-interest and disclosure regulations, participated in conflicts of interest constituting an unsafe or unsound practice within the meaning of 12 C.F.R. § 571.7, and breached his fiduciary duty owed to Long Island Savings."[530] In February 1994, Conway entered into a consent order with OTS in which Conway agreed to be banned from the thrift and banking industry and to pay $1.3 million in restitution to LISB.[531]

In February 1998, Conway pled guilty to a violation of 18 U.S.C. § 215, a criminal statute which governs the receipt of commissions or gifts for procuring loans by an "officer, director, employee, agent, or attorney of a financial institution."[532] In his plea, he agreed that in his capacity as CEO of LISB, he used his influence to retain his law firm for mortgage closings while receiving compensation from the same firm.[533] Subsequently, Conway was disbarred for professional misconduct related to this kickback arrangement.[534]

4. Court of Federal Claims proceeding

In August 1992, LISB and Centereach filed suit in the COFC alleging that the government breached its contractual obligation by enacting FIRREA.[535] In February 2001, the government answered the complaint, and asserted several affirmative defenses and counterclaims, including forfeiture of plaintiffs' claims "'because the thrifts committed fraud in the performance of the alleged contract.'"[536] On December 9, 2002, the trial court granted summary judgment in favor of the plaintiffs on the government's affirmative defenses and counterclaims: "(1) plaintiffs' claims are forfeited under a special plea in fraud pursuant to 28 U.S.C. § 2514; (2) common law fraud renders the contract unenforceable; (3) the contract should be rescinded and $122 million repaid to the government; and (4) plaintiff's prior material breach precludes damages."[537]

The COFC held that "Conway and his firm's status as affiliated persons did not cause LISB to be in violation of the Assistance

530. *Id.* (citation omitted).
531. *Id.*
532. *Id.* at 1242 & n.1 (quoting 18 U.S.C. § 215 (2000)).
533. *Id.* at 1242.
534. *Id.* (citing *In re* Conway, 712 N.Y.S.2d 610, 611 (N.Y. 2000)).
535. *Id.* at 1241–42.
536. *Id.* at 1242–43 (internal citation omitted).
537. *Id.* at 1243 (quoting Long Island Sav. Bank, FSB v. United States (*Long Island I*), 54 Fed. Cl. 607, 609 (2002)).

Agreement."[538] The court also held that it could not "conclude that LISB, as a corporate entity, acted fraudulently."[539] Further, the court did not impute Conway's conduct to LISB.[540] After trial, the court held the government liable for the breach and awarded $435,755,000 in damages to LISB and Centereach.[541] The government appealed the damages award and the denial of its affirmative defenses.[542]

5. *Federal common law fraud*

The government argued that the plaintiffs committed fraud in the inducement and fraud in the performance of the contract, which rendered the Assistance Agreement unenforceable.[543] Although the parties' briefs framed the issue in terms of the government's special plea in fraud, the Federal Circuit determined that the issue of federal common law fraud was properly before the court, citing the Supreme Court's statement in *Winstar* that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[544] Federal common law governed the action under the Assistance Agreement.[545]

The Federal Circuit cited the Restatement of Contracts for the proposition that a misrepresentation may prevent the formation of the contract, i.e., "void" a contract, or may make a contract "voidable."[546] The court then quoted its own precedent that "the general rule is that a government contract tainted by fraud or wrongdoing is void *ab initio*."[547] Specifically, prior Federal Circuit precedent barred recovery in the case of a government contractor's false certification.[548] Accordingly, the Federal Circuit held that to

538. *Id.* (quoting *Long Island I*, 54 Fed. Cl. at 612–14) (internal quotation marks omitted).
539. *Id.* (quoting *Long Island I*, 54 Fed. Cl. at 614–18) (internal quotation marks omitted).
540. *Id.* (citing *Long Island I*, 54 Fed. Cl. at 618–19).
541. *Id.* (citing Long Island Sav. Bank, FSB v. United States (*Long Island II*), 67 Fed. Cl. 616, 618 (2005)).
542. *Id.* (citing *Long Island I*, 67 Fed. Cl. at 618).
543. *Id.* at 1244.
544. *Id.* at 1245 (quoting United States v. Winstar Corp., 518 U.S. 839, 895 (1996)).
545. *Id.* (quoting pertinent portion of section 16 of the Assistance Agreement which states that "[t]his Agreement and the rights and obligations under it shall be governed by the law of the State of New York to the extent that Federal law does not control").
546. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 163–164 cmt. a (1981)).
547. *Id.* (quoting Godley v. United States, 5 F.3d 1473, 1476 (Fed. Cir. 1993)).
548. *Id.* at 1246 (citing J.E.T.S., Inc. v. United States, 838 F.2d 1196, 1197 (Fed. Cir. 1988)). In *United States v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372 (D.C. Cir. 2000), the D.C. Circuit disagreed with the Federal Circuit's conclusion that

prove that a contract is tainted from its inception by fraud and thus void *ab initio*, "the government must prove that the contractor (a) obtained the contract by (b) knowingly (c) making a false statement."[549]

The Federal Circuit found that Conway, as CEO of LISB, submitted a false certification and that such statement should be imputed to LISB.[550] Conway signed a certification stating that the representations and warranties of LISB set forth in the Assistance Agreement were true and substantially correct as of the purchase date and that no event occurred which would constitute a breach.[551] LISB represented and warranted in the Assistance Agreement that it was "not in violation of any applicable statutes, regulations, or orders."[552] The government argued that the Assistance Agreement required LISB to comply with 12 C.F.R. § 563.17(a) (1984), requiring the thrifts to "maintain safe and sound management," and that 12 C.F.R. § 563.39 (1984) required thrift officers to abstain from breaching fiduciary duties involving personal profit.[553] The Federal Circuit noted that the COFC found that Conway and his firm's impropriety under banking laws was clear based on the evidence, and that Conway admitted that he committed a crime by accepting $3,194,103.87 in compensation from his law firm intending to be influenced and rewarded for steering mortgage closings to the law firm.[554] As a result, the Federal Circuit found that Conway both breached his fiduciary duties to LISB and Centereach and personally profited from the breach.[555]

However, unlike the trial court, the Federal Circuit held that LISB was being operated in an unsafe and unsound manner—contrary to its representation and warranty in the Assistance Agreement—because Conway breached his fiduciary duties.[556] The Federal Circuit upheld the trial court's determination that Conway knew his representations and warranties in the certificate were false.[557]

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government contracts tainted by fraud or wrongdoing are "void *ab initio*," as reflected in *J.E.T.S.* and *Godley*, stating that these latter opinions "vastly expand the normally minute group of contracts treated as void,"—"void" being a designation that the D.C. Circuit regards as limited to a "handful" of contracts "that are seen as being in fundamental violation of policy." *Id.* at 1376–77.

549. *Long Island III*, 503 F.3d at 1246.
550. *Id.*
551. *Id.*
552. *Id.*
553. *Id.* at 1246–47.
554. *Id.* at 1247.
555. *Id.*
556. *Id.*
557. *Id.* at 1248.

The Federal Circuit then turned to the issue of whether Conway's knowledge was properly imputable to the thrift.[558] Since there was no dispute that Conway was an agent of the bank and had knowledge of his kickback scheme, the appellate court stated that the general rule favoring imputation applied.[559] The Federal Circuit reversed the trial court's finding of no imputation, reasoning that the adverse interest exception did not apply because Conway had not "*entirely* abandoned LISB's interest for his own," since the LISB benefited from the legal services provided by Conway's firm and the false certification enabled LISB to acquire Centereach on favorable terms.[560]

Finally, the Federal Circuit analyzed whether there was a causal link between the fraud and the contract.[561] The court found that the government justifiably relied on Conway's misrepresentation because it contracted for full disclosure of any conflicts of interest in order to assure the safe and sound management of the thrift, and inferred—based upon an affidavit—that plaintiffs would not have received the contract had the regulators known of the scheme.[562] Specifically, the court credited the affidavit of a government supervisory agent, which had been submitted on motions for summary judgment, and determined that: "[T]he only reasonable inference is that had the plaintiffs stated the truth about Conway, they would not have received the contract. The plaintiffs have set forth no affirmative evidence such that a reasonable jury could have concluded otherwise."[563]

558. *Id.* at 1249. Although the Federal Circuit found that there was an open question whether federal common law or state law applied to imputation of knowledge, it nonetheless found that the legal principles were, in this case, largely identical in federal and state law:

> In general, knowledge acquired by an agent acting within the scope of his or her agency is imputed to the principal and the latter is bound by that knowledge even if the information is never actually communicated. An exception to this rule occurs when the agent has abandoned his or her principal's interests and is acting entirely for his or her own or another's purposes.

Id. (quoting Christopher S. v. Douglaston Club, 713 N.Y.S.2d 542, 543 (N.Y. App. Div. 2000) (emphasis omitted)).

559. *Id.*

560. *Id.* at 1250.

561. *Id.* at 1250–51 (citing Godley v. United States, 5 F.3d 1473, 1476 (Fed. Cir. 1993)) (holding that, for a government contract to be tainted by fraud and, thus, void *ab initio*, a causal link between the fraud and the contract must be established).

562. *Id.*

563. *Id.* at 1251 (holding that issues of fact are genuine for summary judgment purposes "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party" (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986))).

6. Prior material breach

As an alternative ground for its reversal, the Federal Circuit held that even if the Assistance Agreement was not void, the doctrine of prior material breach would have precluded plaintiff's recovery.[564] Under the doctrine of prior material breach,

> when a party to a contract is sued for breach, it may defend on the ground that there existed a legal excuse for its nonperformance at the time of the alleged breach. Faced with two parties to a contract, each of whom claims breach by the other, courts will "often . . . impose liability on the party that committed the first material breach."[565]

The Federal Circuit agreed with the government's argument that the false certification constituted an uncured material breach for four reasons.[566] First, because the Assistance Agreement conditioned the government's obligations on the receipt of the certification, the falsity of such certification represented a failure of performance.[567] Second, the thrift's failure of performance was material given the facts identified as supporting causation and the case law holding "that any degree of fraud is material as a matter of law."[568] Third, the thrift's failure of performance was deemed uncured because its certification was a material condition precedent to the government's contractual obligations, and because the trial court found that the government relied on the certification.[569] Fourth, LISB's false certification preceded the government's enactment of FIRREA.[570] Accordingly, the Federal Circuit held that the false certification constituted a prior material breach which provided an independent basis for precluding a damages award to the plaintiffs.[571]

564. *Id.*
565. *Id.* (quoting Barron Bancshares, Inc. v. United States, 366 F.3d 1360, 1380 (Fed. Cir. 2004)). The court approvingly cited past precedent that referenced § 237 cmt. b of the Restatement (Second) of Contracts, including *Barron*, 366 F.3d at 1380–81, and *Christopher Village, L.P. v. United States*, 360 F.3d 1319, 1334 (Fed. Cir. 2004).
566. *Long Island III*, 503 F.3d at 1251–52.
567. *Id.* at 1252 & n.4 (citing RESTATEMENT (SECOND) OF CONTRACTS § 235 cmt. a & b (1981)).
568. *Id.* at 1252 (quoting *Christopher Village*, 360 F.3d at 1335).
569. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 242 (1981)).
570. *Id.*
571. *Id.* at 1253.

IX. SET-OFF

A. *J.G.B. Enterprises, Inc. v. United States, 497 F.3d 1259 (Fed. Cir. 2007)*

In *J.G.B. Enterprises, Inc. v. United States*,[572] the Federal Circuit held that the government could not withhold money owed to a subcontractor who was also a third-party beneficiary as a way to offset a claim the government had against the prime contractor.[573] The plaintiff, J.G.B. Enterprises, Inc. ("JGB") was a subcontractor to a contract between Capital City Pipes ("CCP") and the Defense Supply Center Columbus ("DSCC").[574]

On October 27, 1999, JGB informed the DSCC contracting officer that it had not received payment from CCP on several contracts, and would therefore discontinue all future shipments until the payment problems were sorted out.[575] On November 2, 1999, the CO responded that she was aware of the problem and that CCP would be debarred from government contracting if the payment issues were not resolved.[576] Ultimately, JGB and CCP agreed that an escrow agent would receive the government's payments and disburse them to JGB as appropriate.[577] On November 10, 1999, CCP petitioned to have the remittance address on the contract switched to the escrow agent selected by JGB.[578] When the change in payment arrangements were made, JGB shipped the product to the government.[579]

However, when the government paid JGB, it reduced the payment to recoup other debts owed to the government by CCP on contracts not involving JGB.[580] JGB filed suit in the COFC to recover the withheld funds.[581] After trial, the court determined that the government did not have set-off rights that permitted the government to withhold payments to JGB representing amounts owed it by CCP, the prime contractor.[582]

On appeal, the Federal Circuit noted that "the government has the right to offset debts owed to it by the same contractor absent explicit

572. 497 F.3d 1259 (Fed. Cir. 2007).
573. *Id.* at 1260.
574. *Id.*
575. *Id.*
576. *Id.*
577. *Id.*
578. *Id.*
579. *Id.*
580. *Id.* at 1260–61.
581. *Id.* at 1261.
582. *Id.*

contractual, statutory, or regulatory provisions stating otherwise,"[583] and that the same right to a set-off extended to any contract between the contractor and the government, not simply the contract upon which the debt exists.[584]

In *Schneider Moving & Storage Co. v. Prosser's Moving & Storage Co.*,[585] the Supreme Court held that a third-party beneficiary to a contract, when suing to enforce that contract against a promisor, was subject to all of the defenses the promisor would have against the original promisee.[586] The Federal Circuit, however, distinguished *Schneider Moving & Storage Co.* from the present case, by stating that the right of set-off is "not a contract *defense*," but instead "a device that facilitates the efficient reconciliation of competing *claims* between the same parties."[587] Because the right to claim a set-off requires competing claims between the same parties, the government had to have a valid claim against JGB, not CCP, in order to set off its payment to JGB.[588]

X. ATTORNEY FEES

A. Hubbard v. United States, 480 F.3d 1327 (Fed. Cir. 2007)

Hubbard v. United States[589] deals with the proper relationship between damages received and attorney fees awarded in a contract suit. In this case, the Federal Circuit vacated an award of $125,186.92 in attorney fees and costs and remanded the case for reconsideration.[590]

In 1984, Bill Hubbard entered into a contract with the government under which he agreed to build and operate a mini-storage facility at a naval air station.[591] As part of the contract, the Navy was to provide personnel to operate both the facility and a rental office known as the

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583. *Id.* (citing United States v. Munsey Trust Co., 332 U.S. 234, 239 (1947); Applied Cos. v. United States, 144 F.3d 1470, 1476 (Fed. Cir. 1998)).
584. *Id.* (citing Cecile Indus., Inc. v. Cheney, 995 F.2d 1052, 1054 (Fed. Cir. 1993)).
585. 466 U.S. 364 (1984).
586. *Id.* at 370.
587. *J.G.B. Enter.*, 497 F.3d at 1261–62 (citing Citizen Bank of Md. v. Strumpf, 516 U.S. 16, 18 (1995)) ("The right of set-off . . . allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A.").
588. *Id.* at 1262 (citing RESTATEMENT (SECOND) OF CONTRACTS § 309 cmt. c (1981)) ("[C]laims and defenses of the promisor against the promisee arising out of separate transactions do not affect the right of the beneficiary except in accordance with the terms of the contract.").
589. 480 F.3d 1327 (Fed. Cir. 2007).
590. *Id.* at 1335.
591. *Id.* at 1329.

Rent All Center.[592] In return, Hubbard was to give the Navy 17.5% of the business' gross revenue.[593] In 1993, a new commander of the base moved the Rent All Center to a new location and took several other actions adverse to Hubbard.[594]

In 1995, Hubbard brought a breach-of-contract action in the COFC, alleging that the moving of the Rent All Center site, together with the Navy ending phone service to the rental site before it was moved, reducing the hours of the Rent All Center, failing to post signs notifying customers of the new office's location, allowing firefighters to conduct training at the facility, and permitting other contractors to park at the storage facility (which Hubbard alleges damaged a concrete slab on which Hubbard planned to build another storage building), violated the Navy's contractual obligations.[595]

The COFC found the government acted in bad faith in taking some of these actions and thus breached the contract with Hubbard.[596] The court refused to award Hubbard the $627,000 in lost profits he sought, ruling that Hubbard failed to show that his losses were caused by the breach.[597] Instead, the court awarded damages of $400, based on the cost of repaving the concrete slab.[598] The court held that "[b]ecause of the clear bad faith shown by the Navy . . . Mr. Hubbard has been forced to appeal to this court . . . . Accordingly, plaintiff is entitled to recover all its attorney costs."[599] The amount of the fee and the way it was determined are the principal issues in the appeal.[600]

The EAJA states that "a court shall award to a prevailing party other than the United States fees and other expenses . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[601] The government pressed two arguments on appeal as to why Hubbard was not entitled to any attorney fees. First, the government argued that because Hubbard recovered only nominal damages, he should not recover attorney fees.[602] The government pointed to *Farrar v. Hobby*,[603]

592. *Id.*
593. *Id.*
594. *Id.*
595. *Id.*
596. *Id.* at 1329–30.
597. *Id.* at 1330.
598. *Id.*
599. *Id.*
600. *Id.* at 1332.
601. 28 U.S.C. § 2412(d)(1)(A) (2000).
602. *Hubbard*, 480 F.3d at 1331.
603. 506 U.S. 103 (1992).

where the Supreme Court explained that "[w]hen a plaintiff recovers only nominal damages . . . the only reasonable fee is usually no fee at all."[604] However, the Federal Circuit distinguished *Farrar*, explaining that Hubbard's award could not be termed nominal because "the $400 damages in this case were not 'nominal' in the sense in which the Supreme Court apparently used that term in *Farrar*."[605] Second, the government challenged the COFC's finding that the government's position was not substantially justified.[606] The Federal Circuit upheld the COFC's determination because there was bad faith in the conduct that gave rise to this case.[607]

The Federal Circuit agreed that the attorney fees awarded were excessive.[608] The court looked at *Hensley v. Eckerhart*,[609] which focused on the relationship between the result of the case and the attorney fees awarded under the fee-shifting provision of the Civil Rights Act, and ruled that these principles should also apply to the fee-shifting provision of the EAJA.[610] *Hensley* stated that the "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."[611] After satisfying this first step, a court must look to a number of factors to see if the award should be increased or decreased.[612] As *Hensley* explained, "the most critical factor is the degree of success obtained."[613]

Using *Hensley* as a guide, the Federal Circuit found that while the trial court completed the first step of the *Hensley* analysis, it failed to determine if there were circumstances present that would render the award excessive.[614] The bad faith shown by the government in the pre-litigation phase of this case did not erase the fact that Hubbard was not successful in this case.[615] Hubbard asked the trial court for damages in the amount of $627,000 but received only $400.[616] The

604. *Id.* at 104.
605. *Hubbard*, 480 F.3d at 1332 (explaining that the "nominal damages" at issue in *Farrar*—damages awarded when the plaintiff has established the merits of the claim but have shown no real injury—are different from the "nominal damages" at issue in a case like *Hubbard*, where the plaintiff proved real injury but could not prove the exact amount).
606. *Id.*
607. *Id.*
608. *Id.* at 1334.
609. 461 U.S. 424 (1983).
610. *Hubbard*, 480 F.3d at 1332–33.
611. *Id.* at 1332 (citing *Hensley*, 461 U.S. at 433).
612. *Id.*
613. *Id.* (citing *Hensley*, 461 U.S. at 436).
614. *Id.* at 1333.
615. *Id.*
616. *Id.*

$110,000 attorney's fee was 275 times greater than the amount of the recovery, and no explanation existed as to how the fee was reasonable "in light of 'the degree of success obtained.'"[617]

B. *Centex Corp. v. United States, 486 F.3d 1369 (Fed. Cir. 2007); First Heights Bank, FSB v. United States, 486 F.3d 1369 (Fed. Cir. 2007)*

In this consolidated appeal, the Federal Circuit held that an award of attorney fees for "bad faith" conduct was not available when the conduct related to the substantive claim of the party seeking fees.[618] In so doing, the court upheld the COFC's denial of attorney fees sought by plaintiffs who argued that the government acted in bad faith both before and after the enactment of the "Guarini Amendment," which eliminated certain favorable tax treatment that plaintiffs received in exchange for acquiring failing thrifts insured by the government.[619]

Under the common law "American Rule," a party generally may not collect its attorney fees from the loser, but fee-shifting is permitted under certain exceptions, including when the prevailing party's opponent has acted in bad faith.[620] The trial court held that it could not consider government agents' pre-1993 conduct because it was extrajudicial, meaning it did not implicate the judicial process.[621] Instead, the "primary conduct" of the government agents in promoting the Guarini Amendment related to the substantive claim of the plaintiffs.[622] Awarding attorney fees in this instance, according to the trial court, would frustrate the intent of the American Rule to protect a defendant's right to argue a nonfrivolous defense to a claim, even if the claim arose from bad faith conduct.[623] The Federal Circuit agreed with the COFC that "authorizing a court to shift fees based solely on bad faith conduct that forms the basis for the substantive claim for relief would undermine the American Rule by

617. *Id.* (quoting *Hensley*, 461 U.S. at 436).
618. Centex Corp. v. United States, 486 F.3d 1369, 1371 (Fed. Cir. 2007).
619. *Id.* Previously, the plaintiffs prevailed on their claim that Congress's enactment of the Guarini Amendment breached their contracts with the government and were awarded damages. *Id.* (citing First Heights Bank, FSB v. United States, 422 F.3d 1311 (Fed. Cir. 2005); Centex Corp. v. United States, 395 F.3d 1283 (Fed. Cir. 2005)).
620. *Id.* (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247, 259 (1975)).
621. *Id.*
622. *Id.* at 1371–72.
623. *Id.* at 1372 (citing Shimman v. Int'l Union of Operating Eng'rs, 744 F.2d 1226, 1231 (6th Cir. 1984)).

penalizing a party who raises good faith defenses to claims of liability for bad faith conduct."[624]

C. *Richlin Security Service Co. v. Chertoff, 482 F.3d 1358 (Fed. Cir. 2007)*

On petition for rehearing, the Federal Circuit reaffirmed its prior holding in *Richlin Security Service Co. v. Chertoff* (*Richlin I*)[625] that EAJA allows recovery of paralegal fees as "expenses" and not as part of "attorney's fees," and that recovery for paralegal fees is limited to the attorney's costs, not market rates.[626] The Federal Circuit's prior holding was contrary to that of the Eleventh Circuit.[627] In its petition for rehearing, Richlin claimed that other circuits followed the Eleventh Circuit approach and, accordingly, the Federal Circuit was in conflict with those circuits as well.[628] However, the Federal Circuit distinguished these cases by noting that the cases appeared to have only addressed the issue of whether paralegal fees were available at all under EAJA, rather than whether they are "expenses" or "attorney's fees."[629] The Circuit denied the request for rehearing.[630] Judge Plager dissented on the basis of his previous dissent in the underlying opinion, concluding that paralegal services should be compensated based upon prevailing market rates.[631] Judge Plager found that the majority opinion was "at variance with Supreme Court law" which interpreted a reasonable attorney's fee to compensate not only work performed personally by members of the bar, but also the work of others whose labor contributed to the attorney work product billed to the client.[632] The United States Supreme Court granted a petition for a writ of certiorari.[633]

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624. *Id.*
625. 472 F.3d 1370 (Fed. Cir. 2006).
626. Richlin Sec. Serv. Co. v. Chertoff (*Richlin II*), 482 F.3d 1358, 1359 (Fed. Cir. 2007).
627. *Id.* (citing Jean v. Nelson, 863 F.2d 759, 778 (11th Cir. 1988), *aff'd on other grounds*, Immigration & Naturalization Serv. v. Jean, 496 U.S. 154 (1990)).
628. *Id.* (citing Role Models Am., Inc. v. Brownlee, 353 F.3d 962, 974 (D.C. Cir. 2004); Hyatt v. Barnhart, 315 F.3d 239, 255 (4th Cir. 2002); Stockton v. Shalala, 36 F.3d 49, 50 (8th Cir. 1994); Miller v. Alamo, 983 F.2d 856, 862 (8th Cir. 1993)).
629. *Id.*
630. *Id.*
631. *Id.* at 1360.
632. Richlin Sec. Serv. Co. v. Chertoff (*Richlin I*), 472 F.3d 1370, 1381 (Fed. Cir. 2006) (Plager, J., dissenting).
633. Richlin Sec. Serv. Co. v. Chertoff, 128 S. Ct. 3023 (U.S. Nov. 13, 2007) (No. 06-1717).

CONCLUSION

Several of the Federal Circuit's government contract decisions issued in 2007 are noteworthy. Of major significance in the jurisdictional area are two developments. First, in *Suburban Mortgage*, the Federal Circuit altered the analytical framework for assessing whether jurisdiction lies in the COFC under the Tucker Act or in the district courts under the Administrative Procedure Act.[634] Because the Federal Circuit is the sole appellate tribunal resolving appeals of district court transfer orders, *Suburban Mortgage* should eliminate some of the jurisdictional uncertainty which has plagued litigants and the lower courts.

Also of paramount importance in the jurisdictional arena is a decision by the Supreme Court in *John R. Sand & Gravel*, affirming the Federal Circuit's holding that the statute of limitations governing actions in the COFC, 28 U.S.C. § 2501, is jurisdictional.[635] This decision too will have important ramifications for practitioners. A plaintiff will have the burden of proving the timeliness of its action in establishing jurisdiction. Trial courts must sua sponte examine whether an action is timely filed under the statute of limitations as part of ascertaining their own jurisdiction. In addition, the prospect of applying the doctrine of equitable tolling to § 2501 does not look promising in the wake of this opinion.[636]

The court also clarified certain aspects of government contract law. In bid protests, *Blue & Gold Fleet* makes it clear that a protestor challenging a solicitation must do so prior to the end of the bidding process.[637] In the area of damages, the court gave helpful guidance in two respects. In the *Winstar* context, the Court clarified that trial courts have the discretion to employ either the "but for" or the "substantial factor" standard for causation. *Grumman* drove home the reality that concrete evidence is required before a trial tribunal can employ the jury verdict method of assessing damages even when liability has been demonstrated.[638]

634. Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116, 1117 (Fed. Cir. 2007); *see* discussion *supra* Part I.A.

635. John R. Sand & Gravel Co. v. United States, No. 06-1164, 2008 WL 65445, at *2 (U.S. Jan. 8, 2008).

636. In discussing the "jurisdictional" type of limitations statutes, the *John R. Sand & Gravel* Court stated: "[t]he Court has often read the time limits of these statutes as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period." *Id.* at *3.

637. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313 (Fed. Cir. 2007); *see* discussion *supra* Part II.B.

638. Grumman Aerospace Corp. v. Wynne, 497 F.3d 1350, 1358 (Fed. Cir. 2007); *see* discussion *supra* Part VII.C.

Three additional decisions could have ramifications for government contract practitioners. In the area of authority, *Winter v. Cath* teaches that the court will weigh strict adherence to contractual clauses more heavily than the equities.[639] *Long Island Savings Bank* held that the bank's *Winstar* contract was tainted by fraud based upon conduct of its CEO in receiving kickbacks from his law firm for directing the bank's mortgage closing work the law firm's way.[640] Given this fraud, the court found the *Winstar* goodwill contract void *ab initio*, precluding any recovery, and reversing the COFC's award of some $435 million.[641] In so holding, the Federal Circuit articulated an expansive view of the type of conduct which can void a contract *ab initio*—a view in direct conflict with that of the D.C. Circuit.[642] Finally, under *Carabetta*, the sovereign acts doctrine will not relieve the government of its contractual responsibilities when substitute performance is available.[643]

639. Winter v. Cath-dr/Balti Joint Venture, 497 F.3d 1339 (Fed. Cir. 2007); *see* discussion *supra* Part VI.A.
640. Long Island Sav. Bank, FSB (*Long Island III*) v. United States, 503 F.3d 1234 (Fed. Cir. 2007); *see* discussion *supra* Part VIII.C.
641. *Long Island III*, 503 F.3d at 1237.
642. *Id.* at 1245–46 (citing United States v. Jamieson Sci. & Eng'g, Inc., 214 F.3d 1372, 1377 (D.C. Cir. 2000)).
643. Carabetta Enters., Inc. v. United States, 482 F.3d 1360 (Fed. Cir. 2007); *see* discussion *supra* Part VIII.A.