

2014

## 2013 Government Contract Law Decisions of the Federal Circuit

Dennis J. Callahan

Jeffery M. Chiow

Lauren B. Kramer

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## 2013 Government Contract Law Decisions of the Federal Circuit

### **Keywords**

Judgments, Federal courts, Bad faith (Law), Judicial review -- United States, Government agencies -- United States -- Rules & practice, Burden of proof -- United States

# 2013 GOVERNMENT CONTRACT LAW DECISIONS OF THE FEDERAL CIRCUIT

DENNIS J. CALLAHAN

JEFFERY M. CHIOW

LAUREN B. KRAMER

OLIYA S. ZAMARAY\*

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\* Dennis J. Callahan is a shareholder, and Jeffery M. Chiow, Lauren B. Kramer and Oliya S. Zamaray are associates in the Government Contracts Practice Group of Rogers Joseph O’Donnell, P.C. ([www.rjo.com](http://www.rjo.com)).

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## INTRODUCTION

In *The Path of the Law*, Oliver Wendell Holmes, Jr. described the legal profession as a study in prediction: people pay lawyers to argue and advise as to the circumstances under which courts will command the power of the state for or against the clients' interests.<sup>1</sup> For

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1. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

government contract lawyers, the U.S. Court of Appeals for the Federal Circuit has the final word (in cases prosecuted that far) in all but a vanishing number of the thousands of bid protests and claims presented each year to procuring agencies, the U.S. Government Accountability Office (GAO), the U.S. Court of Federal Claims, and other administrative and adjudicative bodies.<sup>2</sup>

Perhaps the most striking aspect of the thirteen precedential Federal Circuit decisions discussed in this Article concerns the unpredictability, at the time of initial filing, of the journeys upon which these cases were embarking. A significant number of the tortuous and splintered histories of the cases discussed in this Article—as to forum, jurisdiction, and the merits—likely reflect the selection bias which predicts that the closest cases with the most uncertain outcomes are the ones most likely to be litigated to the fullest extent possible.<sup>3</sup> Drawing from Holmes, through the application of the Federal Circuit’s most recent “prophecies of the past,”<sup>4</sup> we may become more accurate handicappers and better advocates of our clients’ disputes, and thereby better advise when to say “Enough!” or “More!” in negotiations or as to contemplated additional legal process.

## I. JURISDICTION

If it is true that we long for clarity but find uncertainty fascinating,<sup>5</sup> the lawyers litigating the four precedential jurisdictional cases in the 2013 Federal Circuit government contracts corpus enjoyed an enthralling trip to these decisions.<sup>6</sup> Consider the following.

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2. Joseph R. Re, *Brief Overview of the Jurisdiction of the U.S. Court of Appeals for the Federal Circuit Under § 1295(A)(1)*, 11 FED. CIR. B.J. 651, 653–54 (2002) (explaining that Congress granted the Federal Circuit jurisdiction over government contract claims previously heard in the appellate division of the Court of Claims).

3. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17 (1984) (explaining that settlement is most likely in “powerful” cases where the plaintiff and defendant are in general agreement about the outcome but that “[s]ettlement negotiations will most often fail . . . where the dispute is most problematic”).

4. *Holmes*, *supra* note 1, at 457.

5. CARL VON CLAUSEWITZ, ON WAR 97 (Michael Howard & Peter Paret eds. & trans., 1993 ed.) (“Although our intellect always longs for clarity and certainty, our nature often finds uncertainty fascinating.”).

6. Our categorization of the cases—jurisdiction, bid protests, claims, and contractual and statutory interpretation—is, of course, non-exclusive. Our labeling of four decisions as “jurisdiction” cases, for example, does not imply that the cases labeled otherwise did not involve jurisdictional issues, and, of course, the “jurisdiction” cases arose in the context of claims. Our categorization was based on a judgment concerning the most significant instruction passed by the Federal Circuit in each case.

U.S. Marine, Inc. (“USM”) thought it had properly asserted a tort claim against the U.S. Navy for sharing, without permission, its proprietary boat design with another contractor.<sup>7</sup> Tort claims against the government must be filed in federal district court, and the Federal Circuit left little doubt that it agreed with the contractor.<sup>8</sup> But because a split U.S. Court of Appeals for the Fifth Circuit previously had ruled that USM essentially had a breach of contract claim that belonged exclusively in the Court of Federal Claims (a decision the Federal Circuit had no power to overrule), rather than leave a legitimate claimant without a forum, the Federal Circuit demurred, and held that USM could proceed on a contract theory in the Court of Federal Claims.<sup>9</sup>

Sharp Electronics (“Sharp”) and its government adversary agreed that Sharp properly submitted its claim regarding a delivery order from a General Services Administration (GSA) schedule contract to the ordering agency contracting officer.<sup>10</sup> Imagine the lawyers’ surprise when the contract appeals board *sua sponte* found that it lacked jurisdiction because, under the Contract Disputes Act,<sup>11</sup> Sharp Electronics should have instead brought the claim to the GSA schedule contracting officer.<sup>12</sup> After the parties’ jurisdictional assumption was upended, they certainly faced “fascinating uncertainty” on the question before the Federal Circuit.<sup>13</sup>

When Marvin Brandt and the government filed cross suits to determine who held the reversionary interest in an abandoned railroad right-of-way, and, if the government owned the property interest, whether and how much compensation the government owed Brandt, little could the parties have known how much new law their case, eventually fractured, would produce. After eight years of litigation, Brandt’s case gave rise to new procedural law when, after Brandt lost the reversionary interest issue in the trial court, the Federal Circuit allowed Brandt to refile the compensation question in the Court of Federal Claims before he appealed the property interest issue to the U.S. Court of Appeals for the Tenth Circuit.<sup>14</sup> In March

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7. U.S. Marine, Inc. v. United States, 722 F.3d 1360, 1361 (Fed. Cir. 2013).

8. *Id.* at 1374.

9. *Id.*

10. Sharp Elecs. Corp. v. McHugh, 707 F.3d 1367, 1368 (Fed. Cir. 2013).

11. 41 U.S.C. §§ 7101–7109 (2012) (formerly codified at 41 U.S.C. §§ 601–613 (2006)).

12. *Sharp*, 707 F.3d at 1377.

13. *See id.* at 1378 (Plager, J., dissenting) (noting the “uncertainty” created by FAR 8.406-6 as to the scope of a Contracting Officer’s authority); *see also* VON CLAUSEWITZ, *supra* note 5 at 97.

14. Brandt v. United States, 710 F.3d 1369, 1371–72 (Fed. Cir. 2013).

2014, however, the Supreme Court rendered the compensation question moot when it held that the reversionary interest vested in Brandt, not the government.<sup>15</sup>

Last, in the spirit of the “Best Song of 2013,” Northrop Grumman Computing Systems (“Northrop”) “Got Lucky”<sup>16</sup> when the Federal Circuit reversed the Court of Federal Claims.<sup>17</sup> The court determined that even though Northrop thought it was asserting a pass-through claim without naming its assignee, Northrop in fact properly had submitted the claim without mentioning the assignee, thereby preserving jurisdiction, because the assignment was invalid.<sup>18</sup> Because Northrop filed its claim in 2006, if the Federal Circuit had not concluded that there was jurisdiction, Northrop could have been time barred from re-filing the claim.<sup>19</sup>

#### A. United States Marine, Inc. v. United States

The doctrine of sovereign immunity bars suit against the federal government, subject only to congressional consent and the conditions Congress places on allowable suits.<sup>20</sup> The Federal Tort Claims Act (FTCA) waives the federal government’s sovereign immunity as to tort suits that arise under state law, and it grants exclusive jurisdiction over such actions to the federal district courts.<sup>21</sup> The Tucker Act likewise waives the government’s immunity as to contract claims and grants exclusive jurisdiction to the Court of Federal Claims.<sup>22</sup> Which court, then, has jurisdiction in the hybrid situation where the government, by contract, promised not to divulge a contractor’s trade secrets, but did so anyway? Is this an everyday

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15. See *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1268 (2014) (concluding that, in accordance with “basic common law principles,” when the railroad company abandoned its right of way, the easement terminated, thereby conferring Brandt full rights and use of the land).

16. In a poll of music critics, Rolling Stone Magazine named *Get Lucky* by Daft Punk featuring Pharrell and Nile Rodgers the consensus Best Song of 2013. See *100 Best Songs of 2013*, ROLLING STONE, <http://www.rollingstone.com/music/lists/100-best-songs-of-2013-20131204/daft-punk-feat-pharrell-and-nile-rodgers-get-lucky-19691231> (last visited May 12, 2014).

17. *Northrop Grumman Computing Sys., Inc. v. United States*, 709 F.3d 1107, 1113 (Fed. Cir. 2013).

18. *Id.* (holding that Northrop did not assert a pass-through claim because the assignment was invalid under the Anti-Assignment Act).

19. See Contract Disputes Act, 41 U.S.C. § 7103(a)(4)(A) (2012) (requiring contractor claims to be submitted within six years of claim accrual).

20. See generally *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 280 (1983) (“The States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress.”).

21. 28 U.S.C. § 1346(b)(1).

22. *Id.* § 1491(a)(1).

trade secret misappropriation tort committed to the district courts, or is it breach of contract action that only the Court of Federal Claims may hear?

In *United States Marine, Inc. v. United States*,<sup>23</sup> the Federal Circuit suggested that if it had addressed the issue as an initial matter, it may have determined that the contractor primarily alleged a claim for trade-secret misappropriation under state tort law that properly belonged in federal district court, where it was filed.<sup>24</sup> But, the Fifth Circuit previously had held that the contractor's claim was based on an alleged government violation of the limited rights to the technology it was granted by contract, so it transferred the case to the Court of Federal Claims under 28 U.S.C. § 1631.<sup>25</sup> In these circumstances, the Federal Circuit applied the "law of the case" doctrine to find Tucker Act jurisdiction in the Court of Federal Claims, thereby pragmatically elevating the claimant's entitlement to a judicial forum over a more rigid view that would have left a wronged contractor without a remedy.<sup>26</sup>

The unusual procedural posture of the case cautions future litigants against relying on the Federal Circuit's decision to support Tucker Act jurisdiction in potentially hybrid tort/breach claims cases initially filed in the Court of Federal Claims.<sup>27</sup> Indeed, the principal lesson from this case may be one of judicial comity, as the coordinate Circuit Courts of Appeal worked together to give the claimant access to a meaningful remedy, while honoring the Court of Federal Claims's and the Federal Circuit's roles and expertise in matters that pertain to government contracts.

### 1. Background

In 1993, USM designed and built a prototype special-operations boat for the U.S. Navy, "the Mark V."<sup>28</sup> In seeking development contracts that would leverage its initial design, USM submitted technical drawings of the Mark V subject to certain limitations, including the "limited rights" in technical data of the Defense

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23. 722 F.3d 1360 (Fed. Cir. 2013).

24. *Id.* at 1365–66.

25. *Id.* at 1362.

26. *See id.* at 1372–73.

27. *Id.* at 1362 ("Given the decision of the transfer question in this case by the Fifth Circuit, we do not decide the [FTCA versus Tucker Act] question afresh. We ask only whether the Fifth Circuit decision was clearly in error.").

28. *Id.*



Federal Acquisition Regulation Supplement (DFARS).<sup>29</sup> USM's subsequent contracts included its drawings stamped with the "Limited Rights Legend" and incorporated the DFARS's protection of USM's rights in its technical data.<sup>30</sup> After USM built twenty-four Mark Vs, the Navy in 2004 sought design improvements for the craft, and, without disclosing to USM, provided USM's Mark V designs to other firms.<sup>31</sup>

USM brought an FTCA-based claim against the government in the U.S. District Court for the Eastern District of Louisiana, alleging misappropriation of trade secrets under the applicable Virginia statute.<sup>32</sup> The government moved to dismiss, arguing that USM could only sue in the Court of Federal Claims pursuant to the Tucker Act because the parties' rights with respect to the Mark V were governed by a contract.<sup>33</sup> When the district court denied the motion, the government did not request a transfer to the Court of Federal Claims.<sup>34</sup> Ultimately, the Eastern District of Louisiana found the government liable for misappropriation, and, concluding that USM was entitled to a reasonable royalty for the use of its technology by its competitor, awarded USM \$1.45 million.<sup>35</sup>

On appeal, the Fifth Circuit vacated the judgment and remanded the case to the district court with instructions to transfer it to the Court of Federal Claims under 28 U.S.C. § 1631.<sup>36</sup> The appeals court held that the contract's limited rights provision provided the "essential basis" for USM's claim, and that the Navy's potential liability, if any, depended on its contractual non-disclosure obligations.<sup>37</sup> In the Fifth Circuit's view, the trial court would have to determine the scope of the contract's limited rights provisions, a task

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29. *Id.* USM's reserved rights included what is now the clause at FAR 252.227-7013(a)(14) (2013), which states:

Limited rights means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be used by another party . . . .

*Id.*

30. *U.S. Marine*, 722 F.3d at 1362.

31. *Id.* at 1362–63.

32. *Id.* at 1363.

33. *Id.*

34. *See id.* (noting that "the mere existence of potential non-FTCA claims did not eliminate the district court's jurisdiction over the FTCA claim that USM actually asserted").

35. *Id.* at 1364.

36. *Id.*

37. *Id.*

of federal contract interpretation that the Tucker Act forbids district courts from undertaking.<sup>38</sup>

## 2. *Jurisdiction in the Federal Circuit*

The Federal Circuit had immediate jurisdiction over USM's appeal of the district court's transfer order pursuant to 28 U.S.C. § 1292(d)(4)(A).<sup>39</sup> Noting that the order would be correct only if both the district court lacked jurisdiction over USM's action and if the Court of Federal Claims had jurisdiction, the Federal Circuit adopted a path-dependent view of the case, where the jurisdictional statute with which one started the analysis largely determined the outcome.<sup>40</sup>

If one started with the FTCA, the Federal Circuit reasoned that the transfer would be "hard to support" under either of the required predicates for an effective transfer.<sup>41</sup> All parties agreed, and the Fifth Circuit recognized, that misappropriation of a trade secret is a tort under the relevant state law, and that Congress vested exclusive jurisdiction over such claims in the district courts; therefore, Congress barred the Court of Federal Claims from adjudicating disputes pled as torts.<sup>42</sup> Thus, in an FTCA-centric view, the district court, but not the Court of Federal Claims, would have jurisdiction over USM's claims.

If, on the other hand, one began with the Tucker Act, as the Fifth Circuit had, the Federal Circuit reasoned that the issue becomes whether the dispute falls within that statute's commitment of jurisdiction to the Court of Federal Claims.<sup>43</sup> From the vantage that first looks to the limited rights USM granted to the Navy versus those it retained, the Federal Circuit determined that the Fifth Circuit was justified in its view that the Court of Federal Claims was the proper forum.<sup>44</sup> In reaching this conclusion, the Federal Circuit recounted a long line of cases from other Circuits that acknowledged the

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38. USM in fact was a subcontractor to VT Halter Marine, Inc., and did not contract directly with the U.S. Navy on the Mark V. Despite the lack of privity of contract between USM and the Navy, however, the Federal Circuit concluded that USM's right to a breach remedy upon proof had been established "as a matter of binding precedent and judicial estoppel" because the Federal Circuit partially relied on the government's argument in the district court that USM's claims could be heard in the Court of Federal Claims. *Id.* at 1373. As such, the case does not establish that in the normal course subcontractors may challenge the government's use of trade secrets in breach of contract actions under the Tucker Act.

39. *Id.* at 1365.

40. *See id.* at 1365–66 (contrasting the FTCA with the Tucker Act).

41. *Id.* at 1365.

42. *Id.* at 1365–66.

43. *Id.* at 1368.

44. *Id.*

substantial overlap between contract and tort claims in cases brought against the federal government.<sup>45</sup> Just like the Fifth Circuit's decision here, these cases honored the policy of uniform interpretation of government contracts that animates the Tucker Act by transferring the cases to the Court of Federal Claims.<sup>46</sup>

Refusing to state what its conclusion would have been had it been analyzing "the interaction of the FTCA and Tucker Act schemes" on a direct appeal from the Court of Federal Claims, the Federal Circuit observed that the circumstances of each case will determine which "regime is the one that takes precedence."<sup>47</sup> Relying on the "law of the case doctrine," the Federal Circuit noted that unless it determined the Fifth Circuit's judgment was implausible or "clearly erroneous," then it must affirm the transfer order.<sup>48</sup> Given this deferential standard, the Federal Circuit affirmed the Fifth Circuit's transfer direction and its determination that the FTCA should yield to the Tucker Act under the facts presented.<sup>49</sup>

### 3. *Importance of the case*

In so holding, the Federal Circuit continued the Fifth Circuit's judicial comity approach. For its part, the Fifth Circuit's decision recognized that USM likely would have a remedy upon a transfer to the Court of Federal Claims.<sup>50</sup> Indeed, the Fifth Circuit suggested how, in a contract action, USM could overcome the potential standing pitfall due to its status as a subcontractor.<sup>51</sup> Considering the Fifth Circuit finding about USM's status as a subcontractor to VT Halter with respect to the Mark V contracts to be law of the case, the Federal Circuit agreed with its coordinate court's suggestion that USM was within the class of those authorized to recover upon proof of injury from the government's breach of the contracts' limited rights provisions.<sup>52</sup> The Federal Circuit even suggested that USM may

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45. *See id.* at 1368–70 (describing cases from the U.S. Courts of Appeals for the Third, Fifth, Ninth, and Eleventh Circuits).

46. *Id.* at 1368.

47. *Id.* at 1374.

48. *Id.* at 1365.

49. *Id.* at 1374.

50. *See id.* (asserting that "USM may have a meaningful remedy in the Claims Court concern[ing] the possibility that USM has a takings claim").

51. *Id.* at 1372–73. As a subcontractor to VT Halter, USM was not in privity of contract with the Navy. *Id.* at 1364. To enforce its right under a contract theory, the Fifth Circuit suggested that USM may qualify as an implied third-party beneficiary allowed to enforce the contracts' limited-rights provisions under the Tucker Act. *See id.* (noting the conclusion reached in *U.S. Marine, Inc. v. United States*, 478 F. App'x 106, 111–12 (5th Cir. 2012)).

52. *Id.* at 1373 (asserting that eligible parties include only those directly harmed by the breach).

recover for the misappropriation of its trade secrets under a Fifth Amendment takings claim, which also is subject to the Court of Federal Claims's Tucker Act jurisdiction.<sup>53</sup>

Thus, the Fifth Circuit was able to transfer the case to a forum with experience in adjudicating federal contracts and promote uniformity in the development of government contracts jurisprudence without sacrificing a seemingly wronged plaintiff in the process.<sup>54</sup> Moreover, the Fifth Circuit's issuance of its opinion as "non-precedential" under Federal Rule of Appellate Procedure 32.1 may be viewed as that court's deference to the Federal Circuit's experience in delimiting the boundaries between the Tucker Act and the FTCA.<sup>55</sup>

### B. Sharp Electronics Corp. v. McHugh

The approximately 19,000 GSA Federal Supply Schedule contracts account for about \$50 billion, or ten percent, of overall federal procurement spending.<sup>56</sup> Federal agency orders from these contracts give rise to two main contract documents: (1) the schedule contract, negotiated between the supplier and the GSA contracting officer; and (2) the order contract, negotiated between the supplier and the ordering agency contracting officer.<sup>57</sup> These interlocking contract documents contain similar and often identical terms, with the schedule contract setting the parameters under which orders may be placed, and the order contract providing the detailed terms tailored to the specific transaction.<sup>58</sup> Who, then, makes the initial determination under the Federal Supply Schedules Disputes Clause, at Federal Acquisition Regulation (FAR) 8.406-6, regarding contract claims brought by the supplier—the ordering agency contracting officer or the GSA schedule contracting officer?

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53. *Id.*

54. The Federal Circuit's agreement with the Fifth Circuit's suggestion that USM would have a meaningful remedy available to it in the Court of Federal Claims allowed the Fifth Circuit and the Federal Circuit in tandem to promote the divergent interests of preserving congressionally dictated forums and providing compensation for parties aggrieved by the government. *See id.* at 1374 (undermining USM's critique of the Fifth Circuit decision, and stating that the Federal Circuit "[was] not prepared to conclude that this case clearly requires sacrifice of the compensation interest").

55. *U.S. Marine*, 478 F. App'x at 106 n.\* (indicating that under Fifth Circuit rules of practice, the opinion was not selected for publication and is not precedential).

56. *For Vendors—Getting on Schedule*, U.S. GEN. SERVS. ADMIN., [http://www.gsa.gov/portal/content/198473?utm\\_source=FAS&utm\\_medium=print-radio&utm\\_term=HP\\_03\\_Businesses\\_schedule&utm\\_campaign=shortcuts](http://www.gsa.gov/portal/content/198473?utm_source=FAS&utm_medium=print-radio&utm_term=HP_03_Businesses_schedule&utm_campaign=shortcuts) (last updated Mar. 17, 2014).

57. *Sharp Elecs. Corp. v. McHugh*, 707 F.3d 1367, 1375 (Fed. Cir. 2013) (Plager, J., dissenting).

58. *Id.* at 1369.

In *Sharp Electronics Corp. v. McHugh*,<sup>59</sup> a divided Federal Circuit interpreted FAR 8.406-6 as creating an almost irrebuttable presumption that such disputes be decided by the GSA schedule contracting officer in the first instance.<sup>60</sup> The majority so held almost apologetically, acknowledging that the ordering agency contracting officer often has the superior vantage and invited the acquisition regulators to amend FAR 8.406-6 to clarify the roles of the respective contracting officers in addressing disputes.<sup>61</sup>

### 1. Background

The Army procured Sharp copiers under GSA Special Item Number 51-58, lease to ownership plans (“LTOP”) copiers.<sup>62</sup> The LTOP copiers program allows agencies to lease copiers for a defined period of time, at the end of which title vests in the agency.<sup>63</sup> The order contract called for monthly lease payments over a base year and three option years, and the schedule contract included a “Premature Discontinuance Provision” that required the ordering agency to pay, in the event of early termination, the monthly lease charge for any months remaining on the lease.<sup>64</sup>

The Army exercised option years one and two, entered bilateral modifications with Sharp that exercised the first nine months of option year three, but ended the order contract three months short of its full four-year term.<sup>65</sup> Sharp claimed that the early termination triggered the accelerated payments under the schedule contract’s early termination clause, while the Army viewed the order contract modifications as a bilateral agreement to shorten option year three to nine months, rendering the Premature Discontinuance Provision inapplicable.<sup>66</sup>

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59. 707 F.3d 1367 (Fed. Cir. 2013).

60. *Id.* at 1375.

61. Through coordinated action, the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council prepare and issue FAR revisions. FAR 1.201-1(a) (2013).

62. *Sharp*, 707 F.3d at 1371.

63. *See id.*

64. *Id.* at 1370–71. The LTOP program is designed to comply with the Anti-Deficiency Act, which generally limits federal contracts to single year commitments, while the early termination clause gives the supplier assurance that the option years will be exercised. *See* Andrew K. Wible, *Sharp Electronics Corp. v. McHugh: The Not-So-Bright-Line, or How I Learned To Stop Worrying and Love My Schedule CO*, 100 Fed. Cont. Rep. (BNA) 180 (Aug. 13, 2013). Because the lease cost does not include the cost of maintenance and supplies, an agency may choose to absorb the lease costs of unused months where it can secure a better overall deal. *See* FED. ACQUISITION SERV. CONTRACT NO. GS-25F-0037M, AUTHORIZED FEDERAL SUPPLY SCHEDULE PRICE LIST 8 (2001), available at [https://www.gsaadvantage.gov/ref\\_text/GS25F0037M/0MGB8A.2R68F8\\_GS-25F-0037M\\_SCHEDULE36TANDC.PDF](https://www.gsaadvantage.gov/ref_text/GS25F0037M/0MGB8A.2R68F8_GS-25F-0037M_SCHEDULE36TANDC.PDF).

65. *Sharp*, 707 F.3d at 1370.

66. *Id.* at 1371.

Sharp submitted its claim for early termination payments to the Army contracting officer, who took no action, resulting in a “deemed denial” of the claim under 41 U.S.C. § 7103(f)(5).<sup>67</sup> Sharp appealed the contracting officer’s denial of the claim to the Armed Services Board of Contract Appeals (ASBCA).<sup>68</sup> Although Sharp and the Army agreed that Sharp had properly submitted its claim to the ordering agency contracting officer and had properly appealed the deemed denial to the ASBCA, *sua sponte*, the ASBCA determined that it did not have jurisdiction.<sup>69</sup> In the Board’s view, under FAR 8.406-6, the claim should have been put to the GSA schedule contracting officer with any appeal brought to the Civilian Board of Contract Appeals.<sup>70</sup>

Under the Contract Disputes Act, supplier claims, such as Sharp’s claimed entitlement to termination payments, must be submitted to the appropriate contracting officer for a final decision.<sup>71</sup> Thus, if the Army contracting officer’s “deemed denial” of Sharp’s claim did not constitute the “final decision” of the “appropriate contracting officer,” there was no valid basis for the ASBCA’s jurisdiction.<sup>72</sup>

In the context of GSA schedule contracts, FAR 8.406-6, “Disputes,” governs the “appropriate contracting officer” determination. Until 2002, the clause required all disputes under delivery orders to be referred to the schedule contracting officer.<sup>73</sup> In proposing what would become the current rule, the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council stated that the purpose of the revision was “to permit the ordering office contracting officer to issue a final decision regarding disputes pertaining solely to performance of schedule orders.”<sup>74</sup>

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67. *Id.* at 1370.

68. *Id.* Since 2007, there have been two main federal boards of contract appeals. The Armed Services Board of Contract Appeals is responsible for deciding appeals from contracting officer decisions in the Department of Defense, and the Civilian Board of Contract Appeals hears disputes from most other executive agencies, including the GSA. *See* JUDGE WILLIAM A. CAMPBELL ET AL., PRACTICING BEFORE THE FEDERAL BOARDS OF CONTRACT APPEALS 1 (2012). This distinction is important here, as an appeal from a claim denial by the schedule contracting officer would have been to the Civilian BCA and not the Armed Services BCA.

69. *Sharp*, 707 F.3d at 1371.

70. *Id.*

71. 41 U.S.C. § 7103(a)(1) (2012).

72. *Sharp*, 707 F.3d at 1370–71.

73. *Id.*

74. Federal Acquisition Regulation; Federal Supply Schedule Order Disputes and Incidental Items, 65 Fed. Reg. 79,702, 79,702 (proposed Dec. 19, 2000) (to be codified at 48 C.F.R. pts. 8, 51).

The amended rule indicates that whether a dispute concerns the performance of orders under a schedule contract or the terms and conditions of such contracts, the dispute is to be presented to the ordering activity contracting officer.<sup>75</sup> For disputes concerning the performance of orders, the ordering activity contracting officer may either issue a final decision herself and notify the schedule contracting officer of that decision,<sup>76</sup> or forward the dispute to the schedule contracting officer.<sup>77</sup> If, however, the dispute pertains to terms and conditions of the schedule contract, the ordering activity contracting officer must refer the dispute to the schedule contracting officer for resolution, and notify the contractor of the referral.<sup>78</sup> The contractor may appeal final decisions to the Board of Contractor Appeals that services the agency that issued the final decision, or to the Court of Federal Claims.<sup>79</sup> The regulation also directs contracting officers to use alternative dispute resolution procedures under FAR 33.204 and FAR 33.214 “to the maximum extent practicable.”<sup>80</sup>

## 2. *The Federal Circuit’s determination*

On appeal of the ASBCA’s jurisdictional ruling to the Federal Circuit, both parties contended that the Army contracting officer was the appropriate official to issue a final decision.<sup>81</sup> The Army argued that the claim could be resolved with reference solely to the order contract’s modifications that exercised option periods, while Sharp contended that the early termination provision of the schedule contract only needed to be applied, not interpreted.<sup>82</sup>

The Federal Circuit majority purported to establish a bright-line rule under FAR 8.406-6 that requires the schedule contracting officer to settle all disputes that require interpreting the schedule contract regardless of whether the disputes also require interpreting the order or concern performance.<sup>83</sup> Finding that resolving the dispute required not only an analysis of the order contract’s partial exercise of option year three and the Army’s decision not to exercise the final

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75. FAR 8.406-6(a)–(b) (2013).

76. *Id.* 8.406-6(a)(1)(i), (a)(2).

77. *Id.* 8.406-6(a)(1)(ii).

78. *Id.* 8.406-6(b).

79. *Id.* 8.406-6(c).

80. *Id.* 8.406-6(d).

81. *See* Sharp Elecs. Corp. v. McHugh, 707 F.3d 1367, 1371 (2013) (explaining that the Army and Sharp argued, respectively, that the Army contracting officer could resolve the dispute because it related only to the parties’ contractual obligations, and that the issue “constituted an issue of performance under the delivery order”).

82. *Id.*

83. *Id.* at 1373.

three months of the order, but also whether those actions constituted an early termination of the schedule contract, the majority determined that the dispute must be decided by the GSA schedule contracting officer in the first instance.<sup>84</sup> In doing so, the majority observed that the distribution of authority under FAR 8.406-6 “is less than perfect” because it requires a determination by the GSA schedule contracting officer, even where the ordering contracting officer was more familiar with the case.<sup>85</sup> But, if that perceived fault in the FAR 8.406-6 regime should yield to expanded authority of the ordering activity contracting officer, the majority noted that the change must emanate from the Councils in an amendment to the regulation, and not from the courts.<sup>86</sup>

In his dissent, Judge Plager offered a different view of the structure of FAR 8.406-6 and of the majority’s application of its own view.<sup>87</sup> The dissent observed that FAR 8.406-6 “is not the clearest example of regulatory drafting” and noted that schedule contracts and order contracts are designed to work in tandem.<sup>88</sup> Judge Plager concluded that, in many cases, it would be very difficult for the ordering activity contracting officer (“CO”) to draw the line between a breach of the two interlocking agreements.<sup>89</sup> In such circumstances, the dissent reasoned that FAR 8.406-6 allowed the court leeway to establish either a “GSA CO/default rule” or an “agency CO/default,” where disputes presumptively would be directed for appealable, final decisions.<sup>90</sup> Given the superior “available knowledge and expertise of the agency contracting officer” and the seeming rejection of the “GSA CO/default rule” embodied in the 2002 amendment, Judge Plager opted for the alternative default rule—“agency CO/default.”<sup>91</sup> Under this rule, disputes would be presented to the GSA schedule contracting officer only when it was “necessary to invoke the special expertise of the schedule CO to construe the schedule contract provisions.”<sup>92</sup>

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84. *Id.* at 1374–75 (suggesting that where the ordering activity contracting officer merely had to apply, but not interpret, an undisputed schedule contract term, she properly could do so).

85. *Id.* at 1375.

86. *Id.*

87. *See id.* at 1377–78 (Plager, J., dissenting) (explaining how previously, the rule did not give as much authority to the ordering agency’s contracting officer in resolving contract disputes as the current rule).

88. *Id.* at 1378.

89. *See id.* at 1379–80 (referring to that fine line as the “conundrum in this case”).

90. *Id.* at 1382.

91. *Id.* at 1381.

92. *Id.* at 1382.



Regarding the application of the majority's stated rule, Judge Plager questioned "how bright" was the court's bright-line rule, by asking rhetorically, that when the question at issue is the interpretation and performance of the order contract by the parties, why would it not fall into the domain of the agency contracting officer?<sup>93</sup>

### 3. *Importance of the case*

Given the majority's broad interpretation of what disputes "pertain[] to the terms and conditions of schedule contracts" under FAR 8.406-6(b), it seems that when a contractor is at an impasse with the ordering agency, the safer course is to seek a final decision from the GSA schedule contracting officer.<sup>94</sup> As a practical matter, and although FAR 8.406-6 provides that all claims be channeled through the ordering activity contracting officer, the contractor most often must submit the claim directly to the schedule contracting officer.<sup>95</sup> Indeed, as was the case here, many claims presented to contracting officers are never acted upon and are deemed denied under 41 U.S.C. § 7103(f)(5).<sup>96</sup> The majority here indicated that Sharp could resubmit its claim to the GSA schedule contracting officer,<sup>97</sup> a position the dissent did not find in the rule, but noted it "apparently permit[ed]."<sup>98</sup>

Above all, however, *Sharp Electronics* positions FAR 8.406-6 as a settlement-forcing rule, which would be consistent with the Contract Disputes Act. The requirement that all claims first be submitted to the ordering activity contracting officer makes sense, as it is the agency that will ultimately be responsible for paying any negotiated settlement or judgment and thus is the entity with an interest in settling disputes early, before they develop into certified claims under FAR 33.206 and FAR 33.207.<sup>99</sup> As noted in both opinions, the

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93. *Id.*

94. See FAR 8.406-6(b) (2013) (stating that disputes involving the contract terms and conditions should be referred to the scheduling contract officer).

95. *Id.*

96. *Sharp*, 707 F.3d at 1377 (Plager, J., dissenting). It is no small irony that jurisdiction often depends on the correct contracting officer doing nothing with a submitted claim.

97. *Id.* at 1375.

98. See *id.* at 1381, 1383 n.10 (noting that in *GTSI Corp. v. Equal Emp't Opportunity Comm'n*, CBCA 2718, 12-2 BCA ¶ 35,141, the contractor "solve[d] the conundrum" of whom to submit the claim by presenting identical claims to both the ordering activity contracting officer and the GSA schedule contracting officer); Wible, *supra* note 64, at 2 (stating that "in practice" the ordering agency contracting officer "never" refers claims to the schedule contracting officer, and the contractor must do so itself, "even though the FAR makes no provision for such action").

99. FAR 8.406-6(a)(1)(i), 8.406(a)(2). Both opinions questioned the practice where contractors submit claims directly to schedule contracting officers, seemingly

ordering agency contracting officer is the official in the process dictated by the FAR who is most familiar with the facts of the contract, and who thus holds the best hope of understanding the dispute's history and development.<sup>100</sup>

Typically, as disputes arise contractors will attempt to engage the ordering agency contracting officer in negotiations to resolve assertions of entitlement to equitable adjustments to the contract price.<sup>101</sup> If the contracting officer does not offer a satisfactory settlement, the contractor sometimes will present a draft claim to the contracting officer to prompt settlement.<sup>102</sup> The requirement of FAR 8.406-6 that the contractor first present claims to the ordering agency contracting officer, even where the schedule contracting officer must issue the "final decision," can be seen as a last-ditch settlement-forcing mechanism before the matter is put before a contracting officer whose agency does not have the same stake in the dispute. The requirement also supports the government policy, articulated at FAR 33.204, "to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level" and before submission of a claim.<sup>103</sup>

It took a full ten years for the amended FAR 8.406-6 to reach the Federal Circuit.<sup>104</sup> To the degree that *Sharp Electronics* adds new uncertainty to disputes under delivery orders to those that already exist when claims proceed beyond the ordering activity contracting officer, for both contractor and agency alike, the case counsels renewed emphasis on identifying, addressing, and resolving disputes as early as possible.

### C. Brandt v. United States

The Tucker Act grants jurisdiction to the Court of Federal Claims to hear cases against the United States on any claim based on a constitutional matter, congressional act, executive regulation, or any

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contrary to FAR 8.406-6, which states such referrals must be made by the activity contracting officer. The court's observation may prompt vendors and contracting officers alike to heed this provision of the rule.

100. *Sharp*, 707 F.3d at 1375, 1381 (Plager, J., dissenting).

101. *Id.* at 1369 (majority opinion).

102. *See id.* at 1370 (noting that *Sharp* presented such a claim with the Army contracting officer after the Army failed to fully exercise option year three).

103. FAR 33.204; *see also* *Pathman Constr. Co. v. United States*, 817 F.2d 1573, 1578 (Fed. Cir. 1987) (finding that "[a] major purpose of the Disputes Act was to induce resolution of contract disputes with the government by negotiation rather than litigation." (internal quotation marks omitted)).

104. *Sharp*, 707 F.3d at 1369 n.1.

express or implied contract with the United States.<sup>105</sup> At 28 U.S.C. § 1500, however, Congress divested this jurisdictional conferral for “any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States.”<sup>106</sup> What happens, then, when the district court has entered judgment, but the time for filing an appeal has not yet expired? May the plaintiff file a claim in the Court of Federal Claims based on the same operative facts, or would the Court be divested of jurisdiction under § 1500?

### 1. Background

In *Brandt v. United States*,<sup>107</sup> the Federal Circuit directly addressed for the first time whether a claim is “pending” for purposes of § 1500 after judgment is entered but before the time for filing an appeal has expired.<sup>108</sup> In this case, the United States filed suit in July 2006 in the U.S. District Court for the District of Wyoming, seeking declaratory judgment as to a right-of-way that crossed defendant Marvin M. Brandt’s property.<sup>109</sup> Brandt counterclaimed to quiet title in his favor, or, alternatively, to receive compensation for a taking of his property.<sup>110</sup> In April 2008, the court granted summary judgment in favor of the government as to the right-of-way and warned Brandt that the Court of Federal Claims would have exclusive jurisdiction over a takings compensation claim in excess of \$10,000.<sup>111</sup> Brandt sought to have his takings claim transferred to the Court of Federal Claims, and the government opposed.<sup>112</sup> In March 2009, the court

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105. 28 U.S.C. § 1491(a)(1) (2012) (“[A]ny claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”).

106. *Id.* § 1500.

107. 710 F.3d 1369 (Fed. Cir. 2013).

108. *See id.* at 1375 (noting the split of authority on the issue within the Court of Federal Claims). *Compare* *Vero Technical Support, Inc. v. United States*, 94 Fed. Cl. 784, 795 (2010) (holding that a suit is “pending” under § 1500 until one renounces his appeal rights, the time for appeal has run, or the appeal has been finally adjudicated), *and* *Jachetta v. United States*, 94 Fed. Cl. 277, 283 (2010) (same), *with* *Young v. United States*, 60 Fed. Cl. 418, 425 (2004) (holding that no suit is pending following a district court’s entry of judgment), *and* *Bolduc v. United States*, 72 Fed. Cl. 187, 196 (2006) (same), *aff’d*, 248 F. App’x 162 (Fed. Cir. 2007).

109. *Brandt*, 710 F.3d at 1371. *Brandt* is a rails-to-trails case under National Trails System Improvements Act of 1988, 16 U.S.C. §§ 1244, 1248, which sets the conditions under which abandoned railroad easements may be converted into recreational easements for trails open to the general public. In *Brandt*, the property interest at issue was an abandoned railroad right-of-way across the Brandt property that the government planned to convert. *Brandt*, 710 F.3d at 1371–72.

110. *Id.* at 1371.

111. *Id.*

112. *Id.* at 1372.

entered judgment for the government, denied Brandt's motion to transfer, and dismissed Brandt's takings claim.<sup>113</sup>

2. *The Federal Circuit clarifies § 1500*

On April 28, 2009, Brandt filed a takings claim in the Court of Federal Claims.<sup>114</sup> The next day, he appealed the district court's judgment on the property reversion issue to the U.S. Court of Appeals for the Tenth Circuit.<sup>115</sup> In October 2009, the Court of Federal Claims stayed Brandt's case pending resolution of the Tenth Circuit appeal.<sup>116</sup> In November 2011, upon the government's motion, the Court of Federal Claims lifted the stay and dismissed the claim.<sup>117</sup> In doing so, the court held:

- (1) Brandt's case was pending within the meaning of § 1500 when he filed in the Court of Federal Claims because the time for filing a notice of appeal to the Tenth Circuit had not yet expired; and
- (2) Brandt's takings claim filed in the Court of Federal Claims was for or in respect to the claims filed in the Wyoming district court because they shared substantially the same operative facts.<sup>118</sup>

The Federal Circuit began its analysis as to whether § 1500 applied, requiring dismissal for lack of subject matter jurisdiction, with a two-part inquiry. It first examined whether there was another "suit or process" pending in another court, and if so, whether the claims asserted in the other case were "for or in respect to" the same claim asserted in the later-filed Court of Federal Claims action.<sup>119</sup> First, the court noted that a counterclaim was indisputably a "suit or process" within the meaning of § 1500.<sup>120</sup> It then addressed the primary issue:

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113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1373. This appeal was not determined until September 11, 2012, when the Tenth Circuit affirmed the district court's judgment in favor of the government. *Id.* at 1372.

117. *Id.* at 1373. The government's motion was prompted by the then-recent Supreme Court decision in *United States v. Tohono O'odham Nation*, in which the Court held that "two suits are for or in respect to" each other under § 1500 "if they are based on substantially the same operative facts, regardless of the relief sought in each suit." 131 S. Ct. 1723, 1731 (2011). *Tohono O'odham Nation* thus established that quiet title and takings compensation portions of the *Brandt* case were "for or in respect to" each other under § 1500, but did not necessarily settle whether the Wyoming suit was "pending" under the statute at the time of Brandt's Court of Federal Claims filing. *See id.*

118. *Brandt*, 710 F.3d at 1373 (internal quotation marks omitted).

119. *Id.* at 1374.

120. *Id.*

was Brandt's suit "pending" after judgment and before Brandt filed his notice of appeal?<sup>121</sup>

The court observed that the statutory text requires that a case must be pending in any other court to divest the Court of Federal Claims of jurisdiction.<sup>122</sup> Recognizing that a case is closed from the district court's docket after judgment is entered and that a new case is open at a court of appeals only after an appeal has been filed, the court held that during the interim period, the case is not open in either court.<sup>123</sup> This means, the court reasoned, "there is a period of time when a case is not, as the statute requires, 'pending in any other court.'"<sup>124</sup> The Federal Circuit therefore reversed the Court of Federal Claims's dismissal for lack of jurisdiction and remanded the case.<sup>125</sup>

In concurrence, Judge Prost urged the Federal Circuit to overturn the order-of-filing rule established in *Tecon Engineers, Inc. v. United States*,<sup>126</sup> which held that a later-filed action in another court does not divest the Court of Federal Claims of jurisdiction.<sup>127</sup> In Judge Prost's view, *Tecon Engineers* created a loophole to subvert the purpose of § 1500 that allows plaintiffs to avoid § 1500's jurisdictional bar by filing in the Court of Federal Claim before filing a related appeal or district court suit.<sup>128</sup> Judge Prost believed this "defeats Congress's unequivocally clear purpose for the statute" and renders § 1500 "without meaningful force."<sup>129</sup>

### 3. Importance of the case

The tactical loophole exploited by Brandt and explained by Judge Prost invites the potential for duplicative and wasteful litigation. Indeed, here Brandt's U.S. Supreme Court appeal in the quiet title action was successful and title to the property reverted to the Brandts,<sup>130</sup> rendering the takings claim in the Court of Federal Claims moot.<sup>131</sup>

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121. *Id.* at 1375.

122. *Id.* at 1378.

123. *Id.* at 1378–79. In other words, the mere possibility of appeal does not make a claim "pending" for purposes of § 1500; it is only after the filing of the notice of appeal that the case becomes "pending" in another court. *Id.* at 1378.

124. *Id.* at 1379.

125. *Id.* at 1370.

126. 343 F.2d 943 (Cl. Ct. 1965).

127. *Id.* at 949.

128. *Brandt*, 710 F.3d at 1381 (Prost, J., concurring).

129. *Id.* at 1381–82.

130. *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1268 (2014).

131. *See id.* at 1263 n.3 (noting that the compensation case had been stayed pending resolution of the reversionary interest case by the Supreme Court).

D. Northrop Grumman Computing Systems, Inc. v. United States

*Northrop Grumman Computing Systems v. United States*<sup>132</sup> proves that sometimes two wrongs can make a right. The Federal Circuit ruled that Northrop had presented a valid termination claim to the contracting officer, giving rise to appellate jurisdiction, where Northrop had both failed to (1) notify Immigration and Customs Enforcement (ICE) that it had assigned the revenue stream under the contract to a financing institution and (2) state that its claim was a pass-through claim on behalf of that third party.<sup>133</sup> Because Northrop's original assignment was void for lack of agency notice under the Anti-Assignment Act,<sup>134</sup> the Federal Circuit reasoned Northrop had properly, if inadvertently, submitted a claim on its own behalf.<sup>135</sup>

1. Background

In July 2001, ICE issued a commercial item delivery order to Northrop's predecessor entity, Logicon FDC, under which Northrop was to lease and provide support for commercial computer network monitoring software produced by a third party, Oakley Networks ("Oakley").<sup>136</sup>

The agreement between Northrop and ICE stated that Northrop would provide both the software and services through a lease for a twelve-month base period and three twelve-month options.<sup>137</sup> The total value, if ICE exercised all options, was to be approximately \$3.6 million.<sup>138</sup> A separate agreement between Northrop and Oakley required Northrop to pay an up-front fee to Oakley of approximately \$2.9 million.<sup>139</sup> Four days later, ICE handed Northrop an "essential use statement" in order to facilitate third party funding for Oakley software.<sup>140</sup> Northrop entered into a third agreement, this one with ESCgov, Inc. ("ESCgov"), to finance its lease of the Oakley software.<sup>141</sup> Under that agreement, ESCgov would pay Northrop approximately \$3.3 million in exchange for

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132. 709 F.3d 1107 (Fed. Cir. 2013).

133. *Id.* at 1113.

134. 41 U.S.C. § 15 (2012).

135. *Northrop*, 709 F.3d at 1113.

136. *Id.* at 1109.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

Northrop's assignment of all payments to ESCgov.<sup>142</sup> The government did not know about the assignment to ESCgov until it was revealed through discovery in this matter.<sup>143</sup>

In the month after the delivery order was executed, it was amended to address "Northrop's first-priority status, the government's best efforts to secure funding, and a prohibition on the government substituting comparable software for the Oakley software."<sup>144</sup> All of these amendments were apparently intended to ensure the government exercised all options.

Notwithstanding the post-award contract modifications identifying the essential nature of the Oakley software and the expected four-year term, the government failed to exercise any of the delivery order options.<sup>145</sup> The government asserted that it was not terminating Northrop's contract, but that it was unable to fund the options because of a lack of appropriations.<sup>146</sup> Northrop filed a timely certified claim with the contracting officer, alleging breach of the modified delivery order, and seeking \$2.7 million in damages.<sup>147</sup>

Upon the contracting officer's denial, Northrop appealed to the Court of Federal Claims.<sup>148</sup> When the government learned of Northrop's assignment of claims to ESCgov, it sought dismissal on grounds that Northrop's claim was invalid for failing to provide adequate notice of the nature of its claim.<sup>149</sup> The Court of Federal Claims dismissed Northrop's claim because Northrop failed "to alert the contracting officer to the potential application of the Anti-Assignment Act and *Severin* doctrine [and] also to put him on notice" about other issues associated with pass-through claims.<sup>150</sup>

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142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 1110.

148. *Id.*

149. *Id.*

150. *Id.* (alteration in original) (internal quotation marks omitted) (referring to *Severin v. United States*, 99 Ct. Cl. 435 (1943)). While Northrop's first claim was pending it submitted a very similar claim to the contracting officer, this time detailing the financing arrangement. The contracting officer refused to issue a final decision on Northrop's second claim, and Northrop appealed the deemed denial of its second claim to the Court of Federal Claims, which dismissed it based on the contracting officer's inability to address a claim that arose from the same operative facts Northrop's pending claim. *Id.* at 1111. While advancing its second claim, Northrop appealed the denial of its first claim to the Federal Circuit. *Id.*

## 2. *The Federal Circuit finds Northrop's assignment invalid*

On appeal, the Federal Circuit noted that jurisdiction over a Contract Disputes Act (CDA) claim is premised on a final decision over a valid claim, so that a defect in Northrop's claim would destroy jurisdiction.<sup>151</sup> It then examined decisions establishing the minimum requirements for a CDA claim,<sup>152</sup> including primarily *Reflectone, Inc. v. Dalton*.<sup>153</sup> In *Reflectone*, the Federal Circuit held that the FAR "sets forth the only three requirements of a non-routine 'claim' for money: that it be (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain."<sup>154</sup> The court went on to say that a claim does not need to comply with a particular form or wording, but it must provide "a clear and unequivocal statement that gives the contracting officer sufficient notice of the claim."<sup>155</sup>

The Federal Circuit held that because Northrop failed to notify the government of the assignment, it became "null and void" under the Assignment of Claims Act, 31 U.S.C. § 3727.<sup>156</sup> The court stated, however, that a failed attempt to assign a claim against the United States does not forfeit the claim but will leave it as it was before the attempted assignment.<sup>157</sup> Thus, Northrop was the proper party to bring this claim, and the *Severin* doctrine did not apply in this case.<sup>158</sup> The court held, therefore, Northrop's failure to notify the contracting officer about financing information did not deprive him of adequate notice concerning the basis of Northrop's otherwise valid claim.<sup>159</sup>

## 3. *Importance of the case*

Northrop's circumstance highlights the potential liabilities that may arise with greater frequency as the government strives for strategic sourcing and reduced costs, especially in its information technology purchases. Here, the prime contractor (Northrop) and the subcontract vendor (Oakley) sought to expedite their revenue by

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151. *Id.* at 1111–12 (citing *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010); *Sharman Co. v. United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993)).

152. *Id.* at 1112.

153. 60 F.3d 1572 (Fed. Cir. 1995).

154. *Id.* at 1575.

155. *Northrop*, 709 F.3d at 1112.

156. *Id.* at 1113. The court's decision conflates the Anti-Assignment Act (not relevant here) with the Assignment of Claims Act, 31 U.S.C. § 3727 (2012), which was implicated by Northrop's assignment of proceeds to ESCgov. See *Northrop*, 709 F.3d at 1113.

157. *Northrop*, 709 F.3d at 1113.

158. *Id.*

159. *Id.*



exchanging what all parties reasonably expected to be a four-year annuity for a lump sum payment.<sup>160</sup> When the government changed tack, stopping the contract and its revenue at one year, the contractors naturally sought to avoid being the ones left holding the bag.<sup>161</sup> While the Federal Circuit's opinion is silent regarding whether and how the agreements between the contractors addressed the possibility that options would not be exercised, the decision emphasizes that prime contractors augment their risk by ignoring the government notice provisions of the Anti-Assignment Act.<sup>162</sup>

## II. BID PROTESTS

Two of the Federal Circuit's precedential bid protest decisions in 2013, *Orion Technology, Inc. v. United States*<sup>163</sup> and *Glenn Defense Marine Asia, PTE Ltd. v. United States*,<sup>164</sup> involved "second bite at the apple" cases, where the protesters were denied relief by the GAO and then filed substantively similar bid protests in the Court of Federal Claims.<sup>165</sup> And in the third case, *Croman Corp. v. United States*,<sup>166</sup> Croman Corporation waited until other protesters' claims were dismissed by the GAO before filing its protest in the Court of Federal Claims.<sup>167</sup> In addition to the Federal Circuit's merits decisions, these cases highlight the amount of adjudicative process available to disappointed offerors in "second bite at the apple" cases, an opportunity that disappointed bidders<sup>168</sup> increasingly are taking advantage of.<sup>169</sup> With contracts at stake often in the hundreds of

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160. *Id.* at 1109.

161. *Id.*

162. *Id.* at 1113.

163. 704 F.3d 1344 (Fed. Cir. 2013).

164. 720 F.3d 901 (Fed. Cir. 2013).

165. See Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 WIS. L. REV. 1225, 1248 (explaining that the Competition in Contracting Act prevents the GAO's dismissal of a bid protest "from impacting the protester's right to seek a second bite at the apple through a [Court of Federal Claims] complaint").

166. 724 F.3d 1357 (Fed. Cir. 2013).

167. *Id.* at 1361–62.

168. Just like disappointed bidders, intervenors in cases where the GAO has sustained a protest sometimes seek to reinstate their awards by filing Court of Federal Claims cases, arguing that the agency's intention to implement the GAO's allegedly arbitrary and capricious recommended corrective action is itself arbitrary and capricious. See, e.g., *Turner Constr. Co. v. United States*, 645 F.3d 1377, 1382–83 (Fed. Cir. 2011); *CBY Design Builders v. United States*, 105 Fed. Cl. 303, 308–09 (2012).

169. In their article, Metzger and Lyons counted eleven published "second bite" cases in 2005 and seven in 2006. Metzger & Lyons, *supra* note 165, at 1234 & n.50. Unpublished research conducted by one of the authors here (Callahan) and others for the Court of Federal Claims Bar Association identified twenty-one, eighteen, and twenty "second bite" decisions published by the Court of Federal Claims in 2010, 2011, and 2012, respectively. See Dennis J. Callahan *et al.*, Table of "True Second

millions or billions of dollars, even the most substantial legal fees incurred in such serial bid protest litigation may pale in comparison. In addition to strategic advantages that may be gained in prolonged bid protest litigation,<sup>170</sup> it is not at all unusual for “second bite” protests to pay off.<sup>171</sup>

#### A. Orion Technology, Inc. v. United States

The Federal Circuit’s January 14, 2013, opinion in *Orion Technology, Inc. v. United States*, provides insight, although not perfect clarity, concerning the Federal Circuit’s view on three issues of potential importance to bid protest litigants at the Court of Federal Claims. First, in the holding for which the decision is most likely to be cited, the court held that under the specific facts of that case, Orion Technology, Inc. (“Orion”) had standing to challenge the agency’s discretionary decision to exclude Orion’s facially deficient proposal from consideration for award.<sup>172</sup> That determination, as explained below, provides a potential check on agency decisions that might have previously been insulated from review based on standing grounds.<sup>173</sup> Second, the court upheld as reasonable the agency’s decision not to consider Orion’s proposal or to allow Orion an opportunity to cure its defects where problems in its proposal submission precluded effective agency review.<sup>174</sup> Third, the court’s opinion could be read as a decision *on the merits* of Orion’s bid protest by the Federal Circuit.<sup>175</sup> Whether the Federal Circuit’s review of bid

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Bite” Cases (June 2013) (unpublished table of cases) (on file with authors and the *American University Law Review*).

170. See, e.g., Metzger & Lyons, *supra* note 165, at 1240 (“As long as the marginal profit earned by extending the legacy contract exceeds the cost of the protest . . . the temptation to engage in strategic behavior is always present. Alternatively, a failed bidder may stay the award through a GAO protest and then seek settlement with the awardee by getting a portion of the contract as a subcontractor.”). Incumbent contractors who lose re-competed contracts may file low-probability protests in order to prolong their incumbency, and upon losing at the GAO, where the stay of award may be automatic, seek a voluntary stay from the agency or an injunction against effecting the new award while the “second bite” protest is pending at the Court of Federal Claims. *Id.* Or the disappointed bidder may prolong the bid protest process as leverage in negotiating with the awardee for a portion of the work. *Id.*

171. See, e.g., Lab. Corp. of Am. v. United States, 108 Fed. Cl. 549, 569 (2012); Contracting, Consulting, Eng’g, LLC v. United States, 104 Fed. Cl. 334, 360 (2012); HP Enter. Servs., LLC v. United States, 104 Fed. Cl. 230, 246 (2012) (granting the plaintiff’s motion for judgment).

172. Orion Tech., Inc. v. United States, 704 F.3d 1344, 1349 (Fed. Cir. 2013).

173. See *infra* Part II. A. 2. (discussing the court’s analysis on the appropriate test for determining standing).

174. *Orion*, 704 F.3d at 1349.

175. *Id.* at 1347.

protest decisions from the Court of Federal Claims authorized the court to reject Orion's protest in the absence of a final decision on the merits by the Court of Federal Claims is an interesting question not addressed by the opinion.

### 1. Background

Orion submitted a proposal to the Army's Mission and Installation Contracting Command competing for a Support Base Services ("SBS") Multiple Award Task Order Contract ("MATOC") set aside for small businesses.<sup>176</sup> The objective of SBS was to obtain services in support of the Army's mobilization, demobilization, deployment, redeployment, and restationing of its active duty and reserve personnel.<sup>177</sup> SBS establishes contract support to minimize the number of mobilized Reserve Component ("RC") units and soldiers providing non-inherently governmental functions addressed in twelve task areas identified in the SBS Performance Work Statement ("PWS").<sup>178</sup> The Army intended to award six to eight contracts on a best value basis<sup>179</sup> for this five-year program with a ceiling of \$983 million.<sup>180</sup> The relevant solicitation provisions indicated that noncompliance with the proposal requirements "may" result in elimination from the competition.<sup>181</sup>

Although Orion submitted its proposal prior to the deadline set in the Request for Proposals (RFP), it failed to timely submit proprietary cost/pricing information for five of its eight proposed subcontractors.<sup>182</sup> Eight days past the submission deadline, the Army rejected two packages purporting to provide Orion's missing subcontractor cost data.<sup>183</sup> Orion protested the rejection of its proposal to the Army and the GAO, both of which denied Orion's protest for failing to supply required information in its proposal.<sup>184</sup> The Army later amended the solicitation and "sought new cost/price proposals from [] qualifying offerors."<sup>185</sup> Orion attempted to

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176. *Id.* at 1346.

177. *Orion Tech., Inc. v. United States*, 102 Fed. Cl. 218, 219 n.2 (2011), *aff'd*, 704 F.3d 1344.

178. *Id.*

179. *Id.* at 220.

180. *M—Support Base Services*, FEDBIZOPPS.GOV, <https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=17d0bfc33fb434c3772ced44a64d839b> (last visited May 12, 2014).

181. *Orion*, 704 F.3d at 1346.

182. *Id.*

183. *Id.* (noting that the packages were returned unopened due to their untimeliness).

184. *Id.* at 1347.

185. *Id.*

resubmit its proposal and thereby cure any prior defects, but the Army rejected Orion's proposal on the basis that its prior elimination excluded Orion from the competition.<sup>186</sup> Orion again protested to the agency and the GAO, but both dismissed Orion's challenge for lack of standing because it was not an "interested party."<sup>187</sup> Then Orion protested to the Court of Federal Claims.<sup>188</sup> The agency moved to dismiss for lack of standing and, in the alternative, for judgment on the administrative record.<sup>189</sup> The court held that Orion lacked standing to bring a bid protest under 28 U.S.C. § 1491(b)(1) because it had submitted a non-compliant proposal.<sup>190</sup> The court thus dismissed the government's motion for judgment on the administrative record as moot, but indicated that if Orion had standing, the court would have denied Orion's protest on the merits.<sup>191</sup>

2. *Orion has standing entitling it to judicial review of the agency's exercise of discretion*

The court began by analyzing whether the pre-award "non-trivial competitive injury" test or the more stringent post-award "substantial chance" test of standing applied to the post-submission but pre-award elimination of an offeror's proposal.<sup>192</sup> Siding with the government, the court determined that the more lenient standard applicable to pre-award protests did not apply.<sup>193</sup> That standard, articulated in *Weeks Marine, Inc. v. United States*,<sup>194</sup> sets out an exception to the general requirement for an offeror to show that it had a substantial chance of winning an award because in pre-bid, pre-award protests "it is difficult, if not impossible, to establish a substantial chance of winning the contract."<sup>195</sup>

The Army had rejected Orion's proposal for failing to comply with bid submission requirements.<sup>196</sup> Notwithstanding the missing data,

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186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*; see also 28 U.S.C. § 1491(b)(1) (2012) (conferring jurisdiction on the Court of Federal Claims "to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract").

191. See *Orion*, 704 F.3d at 1347 (reasoning that, due to Orion's missing information, the Army made a rational decision to exclude Orion from competition).

192. *Id.* at 1348.

193. *Id.*

194. 575 F.3d 1352 (Fed. Cir. 2009).

195. See *Orion*, 704 F.3d at 1348 (citing *Weeks Marine*, 575 F.3d at 1361–62) (noting the reason behind the exception created in *Weeks Marine*).

196. *Id.* at 1346–49.

Orion's bid was within the competitive range that the Army established after it had excluded Orion's bid but before it responded to Orion's initial GAO protest.<sup>197</sup> Importantly, the solicitation language was permissive, providing the Army with discretion in deciding whether to exclude Orion's proposal.<sup>198</sup>

Although it was "beyond question that the Army had the discretion to keep Orion's proposal alive," the court recognized that denying Orion standing would bar any challenge to the Army's discretionary decision.<sup>199</sup> The court clarified that "the mere timely submission of a proposal" does not automatically confer standing.<sup>200</sup> Orion had standing, the court found, because the Army, using its discretion, chose not to keep Orion's proposal, but Orion's original proposal was within the later-established competitive range.<sup>201</sup> The court distinguished these circumstances from *COMINT Systems Corp. v. United States*,<sup>202</sup> in which the court denied COMINT standing because it had no substantial chance of winning the contract due to its low technical rating.<sup>203</sup>

This first holding of *Orion* has the potential to help a protester who can articulate some abuse of discretion in the source selection process despite a determination by the agency that the protester's offer is ineligible for award.<sup>204</sup> Under this holding, a protester who has been excluded from the competition for some defect in its proposal may contest an award to—or inclusion in the competitive range of—an offeror with the same defect.<sup>205</sup> After *Orion*, so long as that exclusion decision is discretionary, the protester will be able to challenge, as disparate treatment, an agency's decision to exclude its offer while keeping another with a similar defect.<sup>206</sup> Even so, where the agency can show it has no discretion to keep a non-conforming offer, a protester aware that another offeror made the same mistake

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197. *Id.* at 1349.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. 700 F.3d 1377 (Fed. Cir. 2012).

203. *Orion*, 704 F.3d at 1349–50 n.1 (citing *COMINT*, 700 F.3d at 1383–84).

204. *Id.* at 1349.

205. *See id.* (reasoning that because the Army could have reviewed Orion's revised proposal—which was in the competitive price range—but chose not to, Orion has standing to contest the award to another offeror); *Orion Tech., Inc. v. United States*, 102 Fed. Cl. 218, 224 (2011) (noting that the Army evaluated other offeror's revised proposals but refused to evaluate Orion's revised proposal), *aff'd*, 704 F.3d 1344.

206. *Orion*, 704 F.3d at 1349.

may not be found to have standing to challenge the agency's failure to exclude the other offeror.<sup>207</sup>

The court, therefore, reversed the Court of Federal Claims's decision that Orion lacked standing.<sup>208</sup> Rather than remand to the Court of Federal Claims to consider Orion's protest, the Federal Circuit proceeded to deny Orion's protest on the merits.<sup>209</sup>

### 3. *Agencies have substantial discretion in procurement decisions*

In addressing the merits of the protest, the Federal Circuit reinforced the well-established rule that "[a]gencies are entitled to a high degree of deference when faced with challenges to procurement decisions."<sup>210</sup> Protests can only succeed when the agency's determination is clearly irrational and unreasonable.<sup>211</sup> The reviewing court determines "whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion," which requires the unsuccessful bidder to show the award decision lacked a rational basis.<sup>212</sup>

Applying this high standard to Orion's facts, the court noted that the solicitation gave the Army discretion to reject incomplete proposals, such as Orion's.<sup>213</sup> Further, the Army previously explained to Orion that the missing information made it impossible to conduct a cost realism analysis.<sup>214</sup> The lack of subcontractor cost data required the agency to make assumptions, which it said it could not make.<sup>215</sup> The Army's explanation of this basis, the court concluded, was coherent and reasonable.<sup>216</sup> The court also noted that the agency was under no obligation to enter discussions to allow Orion to fix the defects in its submission.<sup>217</sup> In fact, the court noted, doing so prior to

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207. See *Philips Healthcare Informatics, B-400733.8 et al.*, 2009 CPD ¶ 246, at \*3 (Comp. Gen. Dec. 2, 2009) (finding the protester lacked standing to pursue a protest that the awardee, like the protester, had submitted an improper conditional offer at least where "there was another proposal besides the awardee's eligible for award"); see also *Orion*, 704 F.3d at 1349 (focusing on the fact that the Army had discretion to decide whether or not to exclude Orion's proposal).

208. *Orion*, 704 F.3d at 1349–50.

209. *Id.* at 1350.

210. *Id.* at 1351 (citing *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001)).

211. *Id.* (citing *R & W Flammann GmbH v. United States*, 339 F.3d 1320, 1322 (Fed. Cir. 2003)).

212. *Id.* (quoting *Impresa Construzioni*, 238 F.3d at 1332–33).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

a competitive range determination was prohibited by FAR 52.215-1(c)(3)(ii).<sup>218</sup>

4. *The Federal Circuit can affirm on any basis supported by the record*

The court held that it could “affirm a decision of the trial court upon any ground supported by the record.”<sup>219</sup> It then indicated that the Court of Federal Claims had reviewed an extensive record and would have found the agency’s actions reasonable if not mooted by the standing decision.<sup>220</sup> In the court’s view, because the parties had once again briefed the merits on appeal,<sup>221</sup> “it [was] proper to consider the reasonability of the Army’s actions.”<sup>222</sup>

The court’s pronouncement appears to be inconsistent with its statutory authority to review “final decisions” of the Court of Federal Claims; it unquestionably ignores two of the three claims advanced by Orion in its protest; and it offends the requirement that review under the Administrative Procedure Act (APA) consider the entire administrative record.<sup>223</sup> Moreover, the cases the court cites for the proposition that it can affirm the Court of Federal Claims on any ground supported by the record do not appear to justify such a liberal construction of appellate authority.<sup>224</sup>

Orion sought a rehearing at the Federal Circuit on this basis, but its request was denied without explanation.<sup>225</sup> In its petition, Orion argued three points: (1) the Federal Circuit lacks original jurisdiction to “affirm” a non-existent final decision or judgment; (2) the Federal Circuit’s decision was premised upon only part of the administrative record and did not benefit from argument on the protest merits; and (3) Counts II and III of Orion’s protest were

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218. *Id.*; see also FAR 52.215–1(c)(3)(ii) (2013) (providing limited conditions under which a late proposal, modification, or revision will be accepted).

219. *Orion*, 704 F.3d at 1350 (citing *Datascope Corp. v. SMEC, Inc.*, 879 F.2d 820, 822 n.1 (Fed. Cir. 1989)).

220. *Id.*

221. *Id.*

222. *Id.*

223. See 28 U.S.C. § 1295(a)(3) (2012) (conferring jurisdiction on the Federal Circuit for appeals from final decisions of the Court of Federal Claims); *Orion Tech., Inc. v. United States*, 102 Fed. Cl. 218, 224 (2011) (noting Orion’s three claims for relief were that the Army lacked a rational basis to exclude its proposal from the pool of competition, that the Army lacked a rational basis for refusing to evaluate its proposal, and that the Army’s refusal to evaluate its revised proposal violated certain regulations), *aff’d*, 704 F.3d 1344.

224. See *Orion*, 704 F.3d at 1350; see also *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957) (per curiam) (“A successful party in the District Court may sustain its judgment on any ground that finds support in the record.”); *Datascope Corp. v. SMEC, Inc.*, 879 F.2d 820, 822 n.1 (Fed. Cir. 1989) (“Appellees always have the right to assert alternative grounds for affirming the judgment that are supported by the record.”).

225. See Order Denying Panel Rehearing, *Orion*, 704 F.3d 1344 (No. 12-5062).

independent of the merits of Count I and not ruled upon by either the Court of Federal Claims or the Federal Circuit.<sup>226</sup>

By statute, the Federal Circuit is only authorized to review “final decisions” of the Court of Federal Claims.<sup>227</sup> Further, under 28 U.S.C. § 1491(b)(1) the Court of Federal Claims is the sole court entitled to “render judgment” on a bid protest in excess of \$10,000.<sup>228</sup> The standards set forth in the APA, 5 U.S.C. § 706, apply to bid protests, including the requirement that the court decide based upon access to the entire record.<sup>229</sup> Orion argued that these authorities required the Federal Circuit to remand to the Court of Federal Claims rather than affirm a non-final decision.<sup>230</sup>

The language of the opinions that the court cited supports the proposition that a litigant is not prevented procedurally from advancing an argument on appeal that is supported by the record.<sup>231</sup> In this regard, both cited cases addressed the procedural impact of a party’s attempt, or failure, to file a cross-appeal of the reviewing court’s authority to consider those issues.<sup>232</sup> The Supreme Court, in *Jaffke v. United States*,<sup>233</sup> ultimately remanded that case for further consideration, refusing to decide the issue of the impact of improperly excluded evidence, an affidavit, in the first instance.<sup>234</sup> *Jaffke*, thus, does not stand for the proposition the Federal Circuit advanced.<sup>235</sup>

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226. See Plaintiff-Appellant’s Petition for Panel Rehearing at 1–2, *id.* (No. 12-5062), 2013 WL 1821856, at \*1–3 (arguing that the Federal Circuit did not have the full administrative record and that, consequently, its affirmance violated 28 U.S.C. § 1491).

227. 28 U.S.C. § 1295(a)(3).

228. *Id.* § 1491(b)(1).

229. *Id.* § 1491(b)(4); see 5 U.S.C. § 706 (“In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party . . .”).

230. Plaintiff-Appellant’s Petition, *supra* note 226, at 1.

231. *Orion*, 704 F.3d at 1350; see also *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957) (per curiam) (holding that when a party is successful in a district court, it may “sustain its judgment on any ground that finds support in the record”).

232. See *Jaffke*, 352 U.S. at 281 (explaining that when a district court erroneously excluded an admissible affidavit, the Court of Appeals can rule on its admissibility even when a cross-appeal was not filed); *Datascope Corp. v. SMEC, Inc.*, 879 F.2d 820, 822 n.1 (Fed. Cir. 1989) (noting that it is improper to file a “cross-appeal for the sole purpose of preserving [one’s] right to offer arguments in support of the judgment”).

233. 352 U.S. 280 (1957) (per curiam).

234. *Jaffke*, 352 U.S. at 281.

235. Compare *id.* (stating that a cross-appeal was not required for the Court of Appeals to determine the admissibility of an affidavit and remanding for the Court of Appeals to make this determination because it had not initially passed on the issue), with *Orion*, 704 F.3d at 1350 (deciding the issue of reasonableness when the trial court analyzed the issue but discarded it as moot). Note that the Federal Circuit cited *Orion* for this same proposition in *Croman Corp. v. United States*, 724 F.3d 1357, 1367 n.3 (Fed. Cir. 2013). In *Croman*, the Court of Federal Claims had issued a “belts and



B. Glenn Defense Marine (Asia), PTE Ltd. v. United States

*Glenn Defense Marine (Asia), PTE Ltd. v. United States* involved a disappointed offeror's post-award protest of a Navy contract award that was denied by the Court of Federal Claims.<sup>236</sup> In a split decision, a majority of the Federal Circuit affirmed the lower court decision and addressed important issues involving (1) an agency's evaluation of offerors' past performance; (2) the burden of a lower-priced, lower-rated offeror to establish competitive prejudice; and (3) the contents of the court's administrative record following a protest proceeding at the GAO.<sup>237</sup>

1. Agency discretion in past performance evaluations

The majority's decision highlights the seemingly growing burden on protesters seeking to challenge an agency's discretionary past performance evaluation and raises questions about the efficacy of the APA to review the soundness of agency interpretations of past performance materials.

The solicitation provided that the contract would be awarded to the proposal "most advantageous to the Government" based on an evaluation of the following factors in descending order of importance: "Technical Approach, Past Performance, and Price."<sup>238</sup> The Navy selected MLS-Multinational Logistic Services Ltd. ("MLS") for award and the respective evaluations of MLS and Glenn Defense Marine (Asia), PTE Ltd. ("GDMA") were as follows:<sup>239</sup>

<i>Offeror</i>	<i>Technical Approach</i>	<i>Past Performance</i>	<i>Evaluated Price</i>
MLS	Better	Better	\$2,537,414
GDMA	Better	Less Than Satisfactory	\$1,548,200

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suspenders" decision holding both that the agency's evaluation had a rational basis and that Croman had not demonstrated prejudice in any event. *Croman Corp. v. United States*, 106 Fed. Cl. 198, 217–18, 220–21 (2012), *aff'd*, 724 F.3d 1357. The court essentially said it need not address prejudice where it found a rational basis—a proposition that is less troubling than in *Orion*, where the Federal Circuit effectively found that it could act as the trier of fact so long as it determines a sufficient record is available. *See id.* at 221 (explaining that because it found a rational basis for the agency decision, the plaintiff did not meet its burden to show clear and convincing evidence that there was prejudice).

236. *Glenn Def. Marine (Asia), PTE Ltd. v. United States*, 105 Fed. Cl. 541, 545, 583 (2012), *aff'd*, 720 F.3d 901 (Fed. Cir. 2013).

237. *Glenn Def.*, 720 F.3d at 908, 910-11 & n.8.

238. *See id.* at 904 (noting that the combination of non-price factors was far more important than price).

239. *Glenn Def.*, 105 Fed. Cl. at 545, 553.

Despite GDMA's 64% price advantage, the Navy concluded that MLS's proposal represented the "best value" because of MLS's superior rating under the Past Performance factor.<sup>240</sup>

Significantly, GDMA's "Less Than Satisfactory" past performance rating was based on questionnaires completed by five references, which rated GDMA's overall performance respectively as "Outstanding," "Outstanding," "Better," "Better," and "Satisfactory."<sup>241</sup> Some of the questionnaire responses included negative comments regarding certain aspects of GDMA's performance.<sup>242</sup> Despite the overall ratings of Satisfactory or Better, the Navy relied upon the negative narrative comments to justify its "Less Than Satisfactory" overall rating of GDMA's past performance.<sup>243</sup>

Notwithstanding the disconnect between the Navy's "Less Than Satisfactory" rating and the uniformly higher overall ratings of GDMA's references, the majority held that the Navy's rating possessed the "rational basis" required to withstand APA review.<sup>244</sup> The Federal Circuit reasoned that, despite GDMA's generally higher performance ratings of "Satisfactory" or "Better" overall, the entire record included negative narrative comments and low ratings in several categories, which offered a reasonable basis for the Navy's conclusion.<sup>245</sup> The majority relied upon "the broad discretion courts afford agencies in the negotiated procurement process" and noted that the agency's interpretation of the past performance questionnaires was "entitled to considerable deference."<sup>246</sup>

By affording the Navy so much deference and discretion to disregard the overall ratings of the references that provided the context of their narrative comments, the majority's decision appears to weaken judicial review of past performance evaluations.<sup>247</sup> As Judge Moore noted in her dissent, there was a fundamental disconnect in the Navy's evaluation of GDMA's past performance that was not explained in the record:

The purported basis for such a low rating was negative comments that some of GDMA's references included in the past performance

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240. *Id.* at 554–55.

241. *Id.* at 549, 552.

242. *Id.* at 549.

243. *Id.* at 552.

244. *Glenn Def. Marine (Asia) PTE Ltd. v. United States*, 720 F.3d 901, 910 (Fed. Cir. 2013).

245. *Id.* at 909.

246. *Id.* at 908, 910.

247. *See id.* at 912 (Moore, J., dissenting) (noting that the Navy's rating of GDMA's past performance "lacks a rational basis, both legally and mathematically").

questionnaires they submitted. GDMA's references, however, did not themselves believe that their own negative comments warranted such a low rating. And GDMA's references were uniquely positioned to consider the appropriate impact to give their own negative comments on GDMA's overall rating, given their interaction with GDMA over the course of the contracts at issue . . . . GDMA received two "Outstanding," two "Better," and one "Satisfactory" rating. In what universe do these ratings average out to an overall rating of "Less than Satisfactory"?<sup>248</sup>

The majority essentially held that the deference afforded by the APA allowed the evaluators to choose among the negative and positive information about GDMA's past performance (rather than harmonizing this information).<sup>249</sup> This decision appears to allow agencies to selectively interpret and apply past performance questionnaires, further adding to agencies' broad evaluative discretion.<sup>250</sup> If unchecked by future decisions, APA review will impose little meaningful discipline upon this process.<sup>251</sup>

2. *Prejudice and the lower-priced, lower-rated protester: Narrowing the ratings gap is not enough*

The majority opinion created a difficult prejudice showing for protesters with lower-priced, lower-rated proposals. The majority essentially held that merely arguing that the ratings gap would have been narrowed rather than overcome entirely is insufficient to show a "substantial chance" of receiving the award.<sup>252</sup>

GDMA argued that, in light of its 64% price advantage over MLS, there was a substantial chance that the Navy would have found GDMA's proposal to be the best value if GDMA narrowed the past performance deficit with MLS from "Better" vs. "Less Than Satisfactory" to "Better" vs. "Satisfactory."<sup>253</sup> GDMA asserted that there was at least a substantial chance that the Navy would conclude

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248. *Id.* at 913.

249. *See id.* at 910 (majority opinion) (noting that although the Navy provided GDMA an opportunity to respond to concerns about its past performance, GDMA's subsequent corrective action lacked the detail necessary to effectively address the deficiencies).

250. *See id.* (holding that because the Navy established a rational basis for the "Less than Satisfactory" rating, the court could not overturn it).

251. *See id.* at 914 (Moore, J., dissenting) (discussing how the Navy's conclusions about GDMA's past performance are divorced from the underlying data).

252. *See id.* at 912 (majority opinion) ("GDMA does not provide anything but conjecture that even with a 'Satisfactory' rating it would have had a substantial chance of prevailing in the bid.")

253. *Id.* at 908–09.

that MLS's one-tier advantage under the Past Performance factor did not warrant paying its significantly higher price.<sup>254</sup>

The Federal Circuit ruled that GDMA failed to establish prejudice, noting that prejudice is a "question of fact" reviewed for "clear error," rather than a legal issue entitled to *de novo* appellate review.<sup>255</sup> Applying this standard, the Federal Circuit noted that a one-tier elevation to GDMA's past performance rating still would have left it behind the awardee on this factor, thus "GDMA [did] not provide anything but conjecture that even with a 'Satisfactory' rating it would have had a substantial chance of prevailing in the bid."<sup>256</sup>

The Federal Circuit's reasoning raises the question of how a protester can ever offer more than "conjecture" when arguing prejudicial error.<sup>257</sup> When asserting prejudice, a protester necessarily speculates about "what might have been" had the evaluation gone differently.<sup>258</sup> The protest process does not currently require or provide an opportunity for the Source Selection Authority ("SSA") to address how her best value tradeoff analysis might have been affected by a change in the underlying evaluation.<sup>259</sup> In fact, such second-guessing in the heat of litigation is judicially disfavored under the "post hoc rationalization" doctrine.<sup>260</sup>

In this case, GDMA enjoyed a significant 64% price advantage.<sup>261</sup> Why would there not be *at least* a "substantial chance" that the Navy would opt for the cost savings offered by GDMA if its past performance rating was only one rating less than that assigned to MLS? The majority's holding that GDMA did not offer enough evidence appears to raise the bar on lower-priced protesters asserting that a reasonable evaluation would have narrowed the technical gap between itself and the higher-priced awardee.

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254. *See id.* at 906–09, 912 (rejecting GDMA's argument that with a "Satisfactory" rating, it would have had a substantial chance of success on the bid).

255. *Id.* at 912.

256. *Id.*

257. *See id.* at 914 (Moore, J., dissenting) (finding that GDMA had a substantial chance at winning the contract because its price was 64% lower than MLS and was only slightly lower than MLS in past performance).

258. Even the majority speculated what could have been if GDMA received a higher past performance rating. *See id.* at 912 (majority opinion) (affirming the finding of the Court of Federal Claims that even if GDMA had received a higher past performance rating, it was unclear whether that would have led GDMA to be awarded the contract).

259. *See id.* at 911 (stating that the court, out of deference, does not second guess the minute details of the procurement process).

260. *See id.* at 911 n.8 (rejecting GDMA's assertion that certain Navy submissions were post hoc rationalizations).

261. *Id.* at 914 (Moore, J., dissenting).

3. *For another day: Reliance upon legal memoranda included in the administrative record*

One interesting issue raised in *Glenn Defense* is whether post hoc explanations of an agency's evaluation provided by the agency's attorney during a GAO protest may be used to fill factual gaps in the record of the agency's evaluation.<sup>262</sup>

The Navy's legal memorandum in response to GDMA's supplemental protest at the GAO contained what appeared to be the attorney's personal conclusions about the scope, magnitude, and complexity of offerors' past performance examples.<sup>263</sup> In the subsequent Court of Federal Claims case, the trial judge appeared to rely upon these assertions as evidence and not merely as argument regarding the content of the agency record before the GAO.<sup>264</sup>

On appeal, GDMA argued that the allegations and rationalizations provided in the memorandum lacked evidentiary support, as the Navy attorney was not a member of the evaluation team, nor were the allegations supported by an evaluator's declaration.<sup>265</sup> In response, the government cited 31 U.S.C. § 3556, which provides that the agency reports required by 31 U.S.C. § 3553(b)(2) and the GAO decision "shall be considered to be part of the agency record subject to review."<sup>266</sup> The government posited that the Navy attorney's explanation to the GAO was part of the administrative record and it would be up to "the trial judge in each [Court of Federal Claims] case to decide the weight to accord such evidence."<sup>267</sup>

Although the Federal Circuit suggested in dicta that the lower court's reliance on the attorney's unsupported explanation may have been improper, it did not reach the question.<sup>268</sup> In the Federal Circuit's view, even if the memorandum was not considered, the contemporaneous record provided a rational basis for the agency's

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262. See *id.* at 911 n.8 (majority opinion) (finding that even if the purported post hoc rationalization materials were not appropriate to consider, the Navy's rating still had a rational basis).

263. Brief of Plaintiff/Appellant Glenn Defense Marine (Asia), PTE, Ltd. at 29–30, *Glenn Def.*, 720 F.3d 901 (No. 2012-5125), 2012 WL 4762506.

264. *Glenn Def. Marine (Asia), PTE Ltd. v. United States*, 105 Fed. Cl. 541, 573–75 (2012), *aff'd*, 720 F.3d 901.

265. Brief for Plaintiff/Appellant, *supra* note 263, at 34; see also *id.* at 55–56 (citing *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983), for the proposition that post hoc rationalizations by agency counsel are irrelevant to judicial review).

266. *Id.* at 41; 31 U.S.C. § 3556 (2012).

267. Brief of Defendant-Appellee the United States at 41 n.21, *Glenn Def.*, 720 F.3d 901 (No. 2012-5125), 2012 WL 5865521.

268. See *Glenn Def.*, 720 F.3d at 911 n.8 ("Even if the submissions were not appropriately considered . . . the Navy's rating of MLS's past performance does not lack a rational basis.").

past performance ratings.<sup>269</sup> Yet, in making this observation, the Federal Circuit noted that in certain situations, such as where the protest prompts a post-award conflict-of-interest investigation, courts “routinely consider” evidence developed in answer to a protest.<sup>270</sup>

It is uncontroversial that the agency report required by § 3553(b)(2) along with the GAO’s final recommendation “shall be considered . . . part of the agency record subject to review” in a subsequent Court of Federal Claims bid protest.<sup>271</sup> Oftentimes, the protester’s and intervenor’s GAO pleadings also become part of the administrative record and may be relied upon for limited purposes.<sup>272</sup> Nevertheless, it is hard to believe Congress intended § 3556 to authorize the Court of Federal Claims to rely on post hoc explanations of agency attorneys who had no involvement in an evaluation to supply the “rational basis” required under APA review.<sup>273</sup> In light of the Federal Circuit’s acknowledgments that the entire GAO record should be part of the administrative record before the Court of Federal Claims and that portions of the record sometimes must be created post-award, however, it seems certain that in coming years litigants will continue to press the courts to rely on evidentiary gap fillers that were developed in previous GAO bid protest proceedings.<sup>274</sup>

### C. *Croman Corp. v. United States*

*Croman Corp. v. United States* is another case where the protester brought an action in the Court of Federal Claims after an unsuccessful GAO bid protest.<sup>275</sup> The decision highlights the

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269. *Id.*

270. *Id.* (quoting *Turner Constr. Co. v. United States*, 645 F.3d 1377, 1386 (Fed. Cir. 2011)).

271. 31 U.S.C. § 3556.

272. *See, e.g., Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1378–79 (Fed. Cir. 2009) (discussing the protester’s motion to supplement the administrative record with legal pleadings before the GAO and the Court of Federal Claims’s treatment thereof). The contents of GAO pleadings may be relevant to establishing when the government was put on notice of certain issues, or of the reasonableness of an agency’s decision to take corrective action in response to a protest.

273. *See Glenn Def.*, 720 F.3d at 911 n.8 (noting GDMA’s argument that the Court of Federal Claims improperly relied on post hoc rationalizations and the court’s decision that the Court of Federal Claims’s determination did not lack rational basis); *see also* 31 U.S.C. § 3556 (stating that in an action based on a procurement, the procurement reports along with any recommendation of the Comptroller General pertaining to the procurement shall be considered as part of the record).

274. *See Glenn Def.*, 720 F.3d at 911 n.7 (citing *Turner Constr.*, 645 F.3d at 1386).

275. *See* 724 F.3d 1357, 1361–62 (Fed. Cir. 2013).

presumption of good faith afforded to agency officials and arguably endorses a somewhat formulaic approach to agency decision-making.

In *Croman*, the U.S. Forest Service solicited firefighting helicopter service.<sup>276</sup> The RFP was set aside for small business awards of thirty-four contract line items (CLINs), each associated with a medium or heavy lift helicopter in a particular location.<sup>277</sup> The Federal Circuit addressed two challenges that bidder Croman Corporation (“Croman”) brought against the Forest Service’s corrective action and ultimate award decision.<sup>278</sup>

1. *Croman failed to offer clear and convincing evidence of agency bad faith*

First, Croman contended that the government had no rational basis for deleting four of thirty-four helicopter CLINs.<sup>279</sup> Croman asserted that the Forest Service’s proffered funding constraints were pretextual, as evidenced by the agency’s later procurement of those four CLINs via a separate procurement with no new funding appropriated.<sup>280</sup> The Federal Circuit’s opinion indicated that Croman acknowledged that if there were real funding concerns, a decision to cancel CLINs would have been rational.<sup>281</sup> Therefore, the court reasoned, the “gravamen” of Croman’s complaint was that the agency failed to act in good faith by misrepresenting the reason for the partial cancellation of the solicitation.<sup>282</sup> Citing the presumption that government officials act in good faith, the Federal Circuit held that Croman had failed to offer clear and convincing evidence that the agency acted in a manner other than good faith.<sup>283</sup> The court cited *Kalvar Corp. v. United States*<sup>284</sup> for the proposition that a court could not “abandon the presumption of good faith dealing” without “well-nigh irrefragable proof.”<sup>285</sup> Applying that high standard, Croman’s first protest allegation was, not surprisingly, denied.<sup>286</sup>

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276. *Id.* at 1359.

277. *Id.*

278. *Id.* at 1362.

279. *Id.* at 1362–63.

280. *Id.* at 1364.

281. *Id.*

282. *Id.*

283. *Id.*

284. 543 F.2d 1298 (Fed. Cl. 1976).

285. *Croman*, 724 F.3d at 1364 (citing *Kalvar*, 543 F.2d at 1301–02).

286. *See id.* (holding that Croman’s speculations were not enough to overcome the presumption that the government acted in good faith; thus, Croman failed to meet its burden).

2. *The agency's use of computer software to evaluate tradeoffs was permissible*

More interesting was Croman's second ground, which alleged that the agency violated FAR 15.308 where its source selection decision failed to account for the relative strengths and weaknesses among proposals or to adequately explain the agency's tradeoff decisions.<sup>287</sup> To award the fifteen CLINs at issue in the protest, the agency had to choose among thirty-two helicopters proposed by sixteen offerors.<sup>288</sup> The agency plugged into a computerized "optimization model" ("OM") all of the relevant data, including price, payload, past performance, experience and other data probative of the proposed helicopters' technical merits.<sup>289</sup> The agency also assigned relative weights to each of the factors included in the OM.<sup>290</sup> The OM provided recommended awards for each of the fifteen CLINs.<sup>291</sup> The technical evaluation team then validated the OM by rechecking the inputs and outputs and determined that no changes needed to be made.<sup>292</sup> It forwarded the fifteen recommended line item awards to the SSA, who also reviewed the award recommendation and attachments which set forth the OM's results.<sup>293</sup> The SSA concluded that the recommendation reflected the "best overall value to the Government, considering that our intent was to emphasize technical superiority (especially payload capacity) over low price."<sup>294</sup>

The Federal Circuit upheld the awards, concluding that the agency performed a proper trade-off analysis resulting in a reasonable award decision.<sup>295</sup> The court ruled that the OM outputs, including side-by-side comparisons of each offer and the trade-off, by CLIN, of price and technical merit, considered the proper variables and provided the analysis required in source selection trade-offs.<sup>296</sup>

This decision might at first glance appear to endorse the use of a mechanical trade-off process that bid protest decisions that the GAO has consistently rejected.<sup>297</sup> Croman had specifically alleged before

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287. *Id.* at 1365.

288. *Id.* at 1362.

289. *Id.* at 1366–67.

290. *Id.* at 1361.

291. *Id.* at 1362.

292. *Id.*

293. *Id.*

294. *Id.* at 1365 (internal quotation marks omitted).

295. *Id.* at 1365, 1367.

296. *Id.* at 1365.

297. *See, e.g.*, The Clay Group, LLC, B-406647 et al., 2012 CPD ¶ 214 (Comp. Gen. July 30, 2012) (sustaining a protest challenging an agency's procurement of bathroom paper products where source selection was based on mechanical



the Court of Federal Claims that use of the OM was an impermissible mechanical evaluation that created false precision.<sup>298</sup> Upon closer examination, this decision is consistent with relevant GAO and Court of Federal Claims decisions concerning what are called “mechanical evaluations” and which are sometimes criticized for “false precision.”<sup>299</sup>

In denying the protest, the Federal Circuit specifically distinguished the Court of Federal Claims’s decision in *Serco Inc. v. United States*,<sup>300</sup> observing that *Serco* found that conclusions without evidence of the underlying tradeoff calculations fail to comply with FAR and deprive courts of a basis to review the award decision.<sup>301</sup> The *Serco* protests sustained by the Court of Federal Claims challenged the GSA’s reliance on a scoring method that distinguished proposals based upon differences in points scores that were meaningless because they took imprecise inputs and extrapolated very precise outputs.<sup>302</sup>

In *Croman*, the Federal Circuit affirmed the Court of Federal Claims’s finding that the SSA properly relied upon the detailed evaluation data in the attachments to the award recommendation.<sup>303</sup> In upholding the award, the court may have been motivated by the notion that it would be counter-productive to prevent agencies from using decision-making tools to assist with the labor and information-intensive process of analyzing complex proposals.<sup>304</sup> At least where an agency can articulate the considerations that were built into the evaluation tool, where the weighting of factors is consistent with the solicitation, and where the SSA validates the results and explains any

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comparisons of point scores, without a consideration of the underlying qualitative distinctions between quotations); *Opti-Lite Optical*, B-281693.2, 99-1 CPD ¶ 61 (Comp. Gen. July 15, 1999) (denying a protest challenging a contract awarded by the U.S. Department of Veterans Affairs and acknowledging that traditional responsibility factors can be used as evaluation factors for the award decision).

298. See *Croman*, 724 F.3d at 1366.

299. See, e.g., *Serco Inc. v. United States*, 81 Fed. Cl. 463, 465 (2008) (providing an example of a Federal Claims decision criticizing the false precision of technical calculations); see also sources cited *supra* note 297 (providing examples of GAO decisions sustaining bid protests where source selection was based on mechanical evaluations of point scores).

300. 81 Fed. Cl. 463 (2008).

301. See *Croman*, 724 F.3d at 1366 n.2 (quoting *Serco*, 81 Fed. Cl. at 497).

302. See *Serco*, 81 Fed. Cl. at 465, 489, 495 (involving many large IT service contractors protesting the award of Alliant government-wide acquisition contracts by the GSA, which were based solely upon falsely precise technical distinctions without any accompanying explanation and did not take into account the differences in pricing).

303. See *Croman*, 724 F.3d at 1365 (noting that the SSA reviewed the award recommendation attachments and that these attachments demonstrated that a proper tradeoff analysis was conducted).

304. See *id.* at 1361 (explaining that the OM was developed to review and evaluate more efficiently what previously had required the contracting officer significant time and effort to conduct manually).

trade-offs, it only makes sense to rely upon software to accelerate the analysis, minimize errors, and illustrate tradeoff alternatives.<sup>305</sup>

### III. CLAIMS

The difficulty in predicting the outcomes of the cases we have categorized as “claims” cases stems from the substantive uncertainty and the unusual circumstances from which they arose. The issues addressed by the Federal Circuit in these cases ranged from the tangible and salient—the reasonableness of costs incurred in feeding a rapidly increasing number of troops in a dynamic war zone—to the intangible and subtle—whether certain actuarial assumptions regarding pension fund accruals comply with the Cost Accounting Standards.<sup>306</sup>

#### A. Kellogg Brown & Root Services, Inc. v. United States

The Federal Circuit in *Kellogg Brown & Root Services, Inc. v. United States*<sup>307</sup> primarily examined the reasonableness of costs under a cost reimbursement contract.<sup>308</sup> The court largely upheld the legal and factual findings of the Court of Federal Claims.<sup>309</sup> In doing so, the Federal Circuit created important jurisprudence in denying certain costs as unreasonable and by limiting the reach of the False Claims Act.

In 2009, Kellogg Brown & Root Services, Inc. (“KBR”) filed a claim in the Court of Federal Claims, seeking approximately \$41 million in unpaid costs related to its dining facility at Camp Anaconda in Iraq.<sup>310</sup> In response, the U.S. Department of Justice (DOJ) filed counterclaims alleging that KBR managers had violated the Anti-Kickback Act and had defrauded the government by accepting kickbacks from a subcontractor.<sup>311</sup> These violations, argued the DOJ, caused KBR to forfeit any claims it had against the United States and required that it reimburse the government monies paid on the

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305. *See id.* (pointing out that the OM’s objective of determining an overall best value for the government for each line and item and doing so efficiently).

306. *See infra* Part III.A. (discussing *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1352 (Fed. Cir. 2013), a case regarding costs related to a dining facility for troops at Camp Anaconda in Iraq); *infra* Part III.B. (discussing *Gen. Dynamics Corp. v. Panetta*, 714 F.3d 1375 (Fed. Cir. 2013), a case regarding compliance with Cost Accounting Standards when the company used partial-year valuation in computing its retirement plan forward pricing rates).

307. 728 F.3d 1348 (Fed. Cir. 2013), *corrected on denial of reh’g en banc*, Nos. 2012-5106, 2012-5115, 2014 WL 1284763 (Fed. Cir. Mar. 28, 2014) (per curiam).

308. *Id.* at 1352.

309. *Id.* at 1372.

310. *Id.* at 1352.

311. *Id.* at 1364–65 (referring to prohibitions of the Anti-Kickback Act, 41 U.S.C. §§ 51–58 (2012)).

tainted contract.<sup>312</sup> After a ten-day bench trial, the Court of Federal Claims awarded KBR \$11,792,505.31 plus interest in reasonable reimbursable costs and expenses under FAR 31.201-3.<sup>313</sup> The court also awarded the government \$38,000 on its Anti-Kickback Act counterclaim but denied its fraud claims, including an assertion under the False Claims Act.<sup>314</sup> On cross-appeals, KBR argued that the Court of Federal Claims had incorrectly assessed cost reasonableness and erroneously calculated its base fee.<sup>315</sup> For its part, the government claimed that the Court of Federal Claims had improperly dismissed its False Claims Act allegation and had improperly limited the Anti-Kickback Act penalties.<sup>316</sup> Although the Federal Circuit rejected many of the parties' claims, it reversed and remanded for recalculations of KBR's base costs and Anti-Kickback Act penalties.<sup>317</sup>

1. *The history of the LOGCAP III contract and related subcontracts*

In late 2001, the government awarded the Army Logistics Civil Augmentation Program Contract ("LOGCAP III") in support of Operation Iraqi Freedom.<sup>318</sup> Under the LOGCAP III Indefinite Delivery, Indefinite Quantity ("IDIQ") contract KBR was to perform logistics support services in Kuwait and Iraq on a cost-plus-award-fee basis.<sup>319</sup>

Once the aerial offensive in Iraq began in March 2003, and the number of ground troops swelled, the Army expanded dining facility services to fifty sites in Iraq, including Camp Anaconda, just north of Baghdad.<sup>320</sup> In June 2003, KBR offered prequalified subcontractors a master agreement under which KBR could expedite performance through work releases.<sup>321</sup> Based largely on recommendations from KBR's Regional Food Service Manager for Iraq, Terry Hall, and his Deputy, Luther Holmes, Tamimi Global Company, Ltd. ("Tamimi") received a master agreement.<sup>322</sup> By the time of this award, however, Hall and Holmes had begun accepting kickbacks from Tamimi Vice President Shabbir Khan.<sup>323</sup> In April 2003, Hall and Holmes each

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312. *Id.* at 1365–66.

313. *Id.* at 1358.

314. *Id.*

315. *Id.*

316. *Id.* at 1367, 1369.

317. *Id.* at 1372.

318. *Id.* at 1353.

319. *Id.*

320. *Kellogg Brown & Root Servs., Inc. v. United States (Kellogg II)*, 103 Fed. Cl. 714, 749 (2012), *aff'd in part, rev'd in part*, 728 F.3d 1348.

321. *Id.* at 718–19.

322. *Kellogg*, 728 F.3d at 1353–54.

323. *Id.* at 1353.

received \$5,000 from Khan.<sup>324</sup> The kickbacks continued through January 2004 and eventually totaled approximately \$38,000.<sup>325</sup>

On July 22, 2003, the Army required KBR to provide dining facility services in four separate structures at Camp Anaconda for 18,700 personnel.<sup>326</sup> KBR selected Tamimi for this work and decided to pay the subcontractor based on the actual headcount of troops served or the projected headcount provided by the Army, whichever was greater.<sup>327</sup>

On September 4, 2003, the Army instructed KBR to build two new dining facilities at Camp Anaconda.<sup>328</sup> KBR, in turn, instructed Prime Projects International (“PPI”) to begin construction in October 2003, although no contract or Statement of Work was in place.<sup>329</sup> The Army took the position that construction was outside the scope of LOGCAP III, so KBR could not seek reimbursement for the construction costs under that contract.<sup>330</sup> In response, KBR devised a solution whereby Tamimi would subcontract the construction to PPI and build that cost into the rates Tamimi charged KBR.<sup>331</sup>

After providing services for many months without a written contract, on November 3, 2003, KBR issued Tamimi a material requisition that priced six months of Tamimi’s Anaconda work at \$111,650,000.<sup>332</sup> After numerous extensions and travails, including internal concerns about Tamimi’s high rates, KBR sanctioned the requisition on April 26, 2004.<sup>333</sup>

In late 2003, both the Army and the Defense Contract Audit Agency (DCAA) began scrutinizing KBR’s cost submissions.<sup>334</sup> The DCAA particularly focused on Tamimi’s subcontracts, as the per person/per day rate was unusually high.<sup>335</sup> When KBR raised the issue, Tamimi indicated that it would not sign a new change order or

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324. *See id.* (explaining how Mr. Khan financed a four-day trip for Mr. Hall and gave him \$10,000, which he split evenly with Mr. Holmes).

325. *Id.* at 1353, 1367 n.21.

326. *Kellogg II*, 103 Fed. Cl. at 749.

327. *Kellogg*, 728 F.3d at 1354 (explaining that due to a variety of circumstances, Tamimi began operations at Anaconda before KBR had formally approved the work release or generated the required requisitions to pay Tamimi).

328. *Id.*

329. *Kellogg II*, 103 Fed. Cl. at 724.

330. *Kellogg*, 728 F.3d at 1354.

331. *Kellogg II*, 103 Fed. Cl. at 725.

332. *Id.*

333. *Kellogg*, 728 F.3d at 1354–55.

334. *Id.* at 1355.

335. *See id.* (noting that KBR had begun recompeting many of its Tamini contracts to find a more competitive price).

submit to a new pricing structure.<sup>336</sup> In response, KBR ceased all payments to Tamimi.<sup>337</sup> KBR ultimately agreed to pay actual headcount plus twelve percent on Tamimi's unpaid invoices.<sup>338</sup> This resulted in an overall price reduction of \$16,560,000, with \$4,907,319 allocated to Anaconda.<sup>339</sup> On August 12, 2004, KBR extended Tamimi's performance period, lowered the rates, and implemented the negotiated price reduction.<sup>340</sup> Nonetheless, KBR decided to withhold payment on outstanding invoices because of lingering questions about Tamimi's rates.<sup>341</sup>

Meanwhile, KBR attempted to recompetite the work at Anaconda.<sup>342</sup> On July 15, 2004, KBR issued an RFP to which Tamimi and two other offerors responded.<sup>343</sup> KBR awarded the work to a new subcontractor, who proved unable to perform, and KBR was forced to extend Tamimi's contract to November 30, 2004.<sup>344</sup> Recognizing KBR's inability to secure a capable replacement subcontractor, Tamimi insisted on a long-term extension.<sup>345</sup> Eventually, the parties agreed to extend Tamimi's performance by a year and effected additional discounts of \$22,721,827.<sup>346</sup>

During those negotiations, the government continued to investigate the dining facility charges at Anaconda and other sites.<sup>347</sup> In March 2005, the Army and KBR settled the "actual headcount vs. projected headcount" issue.<sup>348</sup> This settlement was modified on several occasions, and the government ultimately determined that

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336. *Kellogg II*, 103 Fed. Cl. at 730.

337. *Id.*

338. *Id.* at 731.

339. *Id.* at 731–32.

340. *Id.* at 732.

341. *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1355 (Fed. Cir. 2013), *corrected on denial of reh'g en banc*, Nos. 2012-5106, 2012-5115, 2014 WL 1284763 (Fed. Cir. Mar. 28, 2014) (per curiam).

342. *Id.*

343. *Kellogg II*, 103 Fed. Cl. at 734. Tamimi first attempted to contract directly with the Army to provide dining facility services at Anaconda, offering a lower rate than KBR and noting that it owned all of dining facility buildings and controlled all of the personnel who worked there. *Id.* The Army rejected the offer and chastised Tamimi for illegally soliciting a direct contract with the Army while working under LOGCAP III. *Id.*

344. *Id.*

345. *Id.* at 735.

346. *See id.* at 735, 741 (calculating the total amount of discounts Tamimi conceded and the additional discount provided by the year extension).

347. *Kellogg*, 728 F.3d at 1356–57.

348. *See id.* at 1357 (describing the disagreement over whether the contracts require KBR to be prepared to serve the number of troops based on a projected headcount or based on the actual number of troops present as the "boots-through-the-door controversy").

KBR had unreasonably overcharged in the amount of \$41.1 million in costs and fee.<sup>349</sup>

2. *KBR's suit and the government's counter-suit*

KBR sued the Army for the nearly \$41.1 million in costs and mark-ups that the Army had withheld.<sup>350</sup> The government countersued, seeking forfeiture of KBR's claims under the False Claims Act, penalties under the Anti-Kickback Act, and other damages—all premised on Hall and Holmes's receipt of kickbacks from Tamimi.<sup>351</sup>

Following a ten-day trial, the Court of Federal Claims first addressed the reasonableness of KBR's claimed subcontractor (i.e., Tamimi) costs under FAR 52.216-7.<sup>352</sup> First, the court considered KBR's position that because the negotiations, which resulted in a \$27 million credit to KBR, were reasonable, the result of those negotiations too must be reasonable.<sup>353</sup> The court rejected KBR's major premise that the negotiations were conducted reasonably<sup>354</sup> and thus found that KBR's reliance on the process to inform the reasonableness of the outcome was misplaced.<sup>355</sup>

Second, the court was not persuaded by KBR's reliance on the "headcount" settlement, which used an agreed-upon pricing model<sup>356</sup> because, in the court's view, the model was not designed to, and was

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349. *Id.*

350. *Kellogg*, 728 F.3d at 1352; *see also Kellogg Brown & Root Servs., Inc. v. United States (Kellogg I)*, 99 Fed. Cl. 488, 492 (2011) (explaining that KBR filed suit to recover over \$41 million in unpaid costs from the government for services performed at Camp Anaconda in Iraq from July to December 2004), *aff'd in part, rev'd in part*, 728 F.3d 1348.

351. *Kellogg*, 728 F.3d at 1352, 1357–58; *see also Kellogg I*, 99 Fed. Cl. at 439 (describing the nature of the government's affirmative defenses and counterclaims, which alleged that the contract with Kellogg was tainted by kickbacks involving the subcontractor Tamimi in violation of the Anti-Kickback Act, the Special Plea in Fraud Act, the False Claims Act, and engaged in common law fraud).

352. *Kellogg II*, 103 Fed. Cl. 714, 749 (2012) (describing the standard for reasonable costs by citing to the FAR, which provides that the standard is dependent on the particular circumstances at hand), *aff'd in part, rev'd in part*, 728 F.3d 1348.

353. *Id.* at 753, 756.

354. *See id.* at 757–59 (detailing how the negotiator did not have a target price during the negotiations; was not knowledgeable about the contractual situation at Anaconda; kept very limited and partially erroneous records; accepted Tamimi's position that it was owed \$42 million by KBR, rather than the approximately \$2.5 million supported by documentation; and did not know that KBR was withholding funds due to Tamimi).

355. *Id.*

356. *See id.* at 724 (explaining that under the agreed pricing model in question, KBR agreed to pay the subcontractor a price that would be based upon either an "actual headcount of troops" at the base in question, or a "projected headcount provided by the Army, whichever was greater").

not capable of, accurately assessing the price reasonableness of any individual site.<sup>357</sup>

Last, the court rejected KBR's argument that its proposed analysis should be used instead of the DCAA's audit findings.<sup>358</sup> Although the court agreed that the DCAA's audit failed to take into account certain factors that made Camp Anaconda a unique dining facility challenge, it was not persuaded by KBR's proffered alternative analysis.<sup>359</sup>

The court found, however, that KBR had justified the reasonableness of *some* of the prices at Anaconda that were challenged by the government.<sup>360</sup> Noting that some disputed charges were less than those proposed by would-be subcontractors in response to a July 2004 RFP, and determining that these competitive bids were probative of the reasonableness of KBR's prices, the court concluded that KBR was entitled to an additional \$11,460,940.31 plus fees.<sup>361</sup>

As to the government's Anti-Kickback Act<sup>362</sup> counterclaim, the court held that the government was entitled to reimbursement, but not to civil penalties.<sup>363</sup> The court opined that the government could recover civil penalties from an employer under the doctrine of respondeat superior, but found that there was not sufficient evidence that KBR management had knowledge of Hall and Holmes's kickback

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357. *See id.* at 742–43 (describing the “parametric [statistical] model” used by KBR to estimate the agreed pricing cost as one that failed to produce reliable data for individual sites, like Anaconda Camp).

358. *Id.* at 768.

359. *See id.* (clarifying that the fact that the DCAA had “difficulties controlling the internal compass of its own [audit] process” did not amount to a finding that KBR's costs were themselves reasonable and did not warrant relieving the contractor of the burden to demonstrate the reasonableness of its proffered costs).

360. *See id.* at 768–71 (exercising its discretion to rely on “*any* evidence demonstrating price reasonableness that was presented at trial” and proceeding to determine that KBR charged a reasonable price for services provided at the camp in December 2004).

361. *Id.* at 770–71.

362. The Anti-Kickback Act contains two civil remedy provisions:

(1) The United States may, in a civil action, recover a civil penalty from any person who knowingly engages in conduct prohibited by section 53 of this title . . . [and;] (2) [t]he United States may, in a civil action, recover a civil penalty from any person whose employee, subcontractor or subcontractor employee violates section 53 of this title by providing, accepting, or charging a kickback.

41 U.S.C. § 55(a) (2012).

363. *See Kellogg II*, 103 Fed. Cl. at 773 (ruling that it would be inappropriate to hold KBR liable under a vicarious liability theory because of lack of evidence on the record that Messers. Hall and Holmes's superior, Mr. Gatlin, had “direct knowledge of—and thus acquiesced in—” their improper conduct).

activity.<sup>364</sup> It therefore only held KBR strictly liable for the \$38,000 proven value of the kickbacks under 41 U.S.C. § 55(a)(2).<sup>365</sup>

The court had earlier granted KBR's motion to dismiss the government's False Claims Act Claim.<sup>366</sup> The court observed that the government had not alleged KBR submitted inflated costs as a result of the kickbacks.<sup>367</sup> Because the government could not tie the kickbacks to anything about KBR's reimbursement vouchers, the government failed to meet a necessary element of a False Claims Act claim.<sup>368</sup>

### 3. *The Federal Circuit's decision*

On appeal, asserting entitlement to the full \$41.1 million withheld, KBR argued that the lower court committed legal error by applying the incorrect standard of review to the reasonableness-of-costs inquiry.<sup>369</sup> KBR stated that the court should have awarded all fees absent a showing of "gross misconduct," "arbitrary action," or "clear abuse of discretion."<sup>370</sup> Finding no support for KBR's suggested standard in the text of FAR 31.201-3 or court precedent, the Federal Circuit upheld the standard as articulated and applied by the Court of Federal Claims.<sup>371</sup>

Applying the clear error standard to the lower court's factual determinations, the Federal Circuit held that the Court of Federal Claims properly weighed the "many fact-intensive and context-specific factors" as to KBR's performance—including its negotiations with subcontractors, the Army's war-time directives, and the Global Dining Facility Settlement—in determining which costs were reasonable.<sup>372</sup> The Federal Circuit also held that the lower court was within its discretion in calculating reasonable costs, particularly in

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364. *Id.* at 772–73. The court also held that Hall and Holmes did not possess sufficient managerial authority for their actions to be directly imputed to KBR. *Id.* at 773–74.

365. *Id.* at 772, 776.

366. *Id.* at 748.

367. *See Kellogg I*, 99 Fed. Cl. 488, 513 (2011) (explaining that the government alleged facts too attenuated to show that KBR submitted a false claim).

368. *Id.*

369. *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1359 (Fed. Cir. 2013), *corrected on denial of reh'g en banc*, Nos. 2012-5106, 2012-5115, 2014 WL 1284763 (Fed. Cir. Mar. 28, 2014) (per curiam).

370. *See id.* (arguing that cost reimbursement contracts require only that contractors give their "best efforts" in performing the contract).

371. *Id.* at 1360, 1372.

372. *See id.* at 1360–64 (reviewing the trial court's factual determinations, including its assessment of KBR's negotiations with Tamimi and its evaluation of Army's directives to KBR under a clear error standard).



light of KBR's burden of proving the reasonableness of its costs pursuant to FAR 31.201-3(a).<sup>373</sup>

KBR succeeded in challenging the calculation of its base fee.<sup>374</sup> The Court of Federal Claims calculated KBR's fees as one percent of its *reasonable* costs.<sup>375</sup> The contract, however, required a payment of one percent of *all* fee-bearing costs, not just reasonable costs.<sup>376</sup> The Federal Circuit therefore reversed and remanded with instructions to recalculate the proper base fee.<sup>377</sup>

The government challenged, unsuccessfully, the lower court's findings as to the False Claims Act<sup>378</sup> and other fraud-based theories.<sup>379</sup> The Federal Circuit reversed only the Court of Federal Claims's findings with respect to Anti-Kickback Act penalties.<sup>380</sup>

The Federal Circuit found that the lower court correctly dismissed the False Claims Act counterclaim.<sup>381</sup> To prevail under the False Claims Act, the Federal Circuit noted, the government was required to show that KBR had knowingly submitted a false or fraudulent claim for payment and that the United States suffered damage as a result.<sup>382</sup> Although the government argued that KBR's invoices were tainted by the kickbacks received by Hall and Holmes, the court held that the government failed to properly plead that the invoices submitted by KBR were inflated by the kickbacks and were therefore false or fraudulent, or that KBR had knowledge of any inflation due to kickbacks.<sup>383</sup> This failure in pleading, said the court, required dismissal of the False Claims Act counterclaim.<sup>384</sup>

The Federal Circuit reversed the lower court's findings as to the Anti-Kickback Act, holding that the proper test is not the position of the bad actors within the corporate hierarchy, but whether they were

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373. *Id.* at 1359.

374. *Id.* at 1364.

375. *Id.* The Court of Federal Claims awarded the one percent base fee as reasonable, which amounted to \$11,460,940.31. *Id.*

376. *Id.*

377. *Id.*

378. 31 U.S.C. §§ 3729–3733 (2012).

379. *Kellogg*, 728 F.3d at 1365, 1367, 1371 (upholding the trial court's dismissal of the government's challenges to claims under the Special Plea in Fraud, the False Claims Act, and common law-fraud claims).

380. *Id.* at 1370.

381. *Id.* at 1367.

382. *Id.*

383. *See id.* (noting that the government only makes the argument that the invoices "were false or fraudulent because the subcontract itself was tainted by kickbacks").

384. *Id.*

acting within the scope of their employment.<sup>385</sup> Because evidence showed Hall and Holmes were acting within the scope of their employment, the court found that KBR should be held vicariously liable under § 55(a)(1).<sup>386</sup> It therefore reversed and remanded with instructions to recalculate damages under the Anti-Kickback Act.<sup>387</sup>

Both parties sought a panel rehearing and a rehearing en banc. After briefing, the requests were denied.<sup>388</sup>

#### 4. *Importance of the case*

In upholding the rejection of KBR's claimed costs as unreasonable, this case set an important precedent that financial decisions made by contractors, even in meeting warzone exigencies, may be second-guessed by the agency and invalidated by the courts. KBR unsuccessfully argued that the government has traditionally assumed all risk in cost-reimbursement contracting, absent gross misconduct by the contractor.<sup>389</sup> But in rejecting this theory, and by applying its own assessment of the reasonableness of costs incurred, the court dramatically shifted the risk to the contractor who, despite having incurred costs, may not recover these costs if the prices are later deemed "unreasonable."<sup>390</sup> The impact of this decision cannot yet be known, but it is likely going to chill contractors' enthusiasm for entering into cost-reimbursement contracts under exigent circumstances.

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385. *Id.* at 1369. The court also held that the Anti-Kickback Act is outside the scope of the RESTATEMENT (SECOND) OF AGENCY § 217 (1957), which limits vicarious liability for the purposes of punitive damages. *Kellogg*, 728 F.3d at 1370.

386. *See Kellogg*, 728 F.3d at 1369–70 (recalling that as a general rule and absent special circumstances, the knowledge of employees or agents is to be imputed to their corporations or principals).

387. *Id.* at 1370. Judge Newman dissented to the Anti-Kickback portion of the decision on the grounds that no evidence was presented the KBR knew of or benefited from the kickbacks. *See id.* at 1372–73 (Newman, J., dissenting).

388. The panel granted in part the government's petition for rehearing but only for the limited purpose of deleting the words "at the Court of Federal Claims" from its opinion. *Kellogg Brown & Root Servs, Inc. v. United States*, Nos. 2012-5106, 2012-5115, 2014 WL 1284763, at \*1 (Fed Cir. Mar. 28, 2014) (en banc) (per curiam). The petition was denied in all other respects. *Id.*

389. *Kellogg*, 728 F.3d at 1359. Two contractor trade groups, the National Defense Industrial Association and the Professional Services Council, filed an amicus brief before the Federal Circuit arguing that KBR should have received the full \$41.1 million in costs. They contended that the FAR does not permit the type of risk shifting undertaken by the court, and that doing so would undermine a contractor's desire to undertake risky cost reimbursement projects. *See* Brief of *Amici Curiae* Professional Services Council & National Defense Industrial Association in Support of *Kellogg Brown & Root Services, Inc.* at 11–12, *Kellogg*, 728 F.3d 1348 (No. 12-5106), 2013 WL 144334.

390. *Kellogg*, 728 F.3d at 1352, 1359.

The second significant result of this decision is that the court denied the government's attempt to bootstrap violations of the Anti-Kickback Act into violations of the False Claims Act.<sup>391</sup> In recent years, the government has aggressively sought to coningle the False Claims Act and Anti-Kickback statutes, including the pursuit of novel theories of liability based on contractor certifications.<sup>392</sup> Here, although the government tried to assert a per se False Claims Act violation based on the kickbacks received by Hall and Holmes, the court stated that it would examine the pleading requirements of the statutes separately and found that, because there was no argument that KBR's invoices were actually inflated due to the kickbacks, the submitted claims (including the certification that KBR was in compliance with applicable laws) were not "false."<sup>393</sup> This scrutiny by the Federal Circuit of the actual content of False Claims Act allegations may be cold comfort to contractors, as the government is forewarned to better plead its False Claims Act allegations.

#### B. General Dynamics Corp. v. Panetta

In *General Dynamics Corporation v. Panetta*,<sup>394</sup> the Federal Circuit upheld a decision of ASBCA denying an appeal by General Dynamics Corporation ("General Dynamics"). At issue was the contracting officer's final determination that General Dynamics failed to comply with Cost Accounting Standard ("CAS") 412 when the company used partial-year asset valuation in computing its retirement plan forward pricing rates.<sup>395</sup>

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391. *See id.* at 1365 (reviewing and addressing the government's claims under the False Claims Act and the Anti-Kickback Act separately because "liability under one statute does not automatically trigger liability under the other[.]").

392. This aggressive stance is most often seen in the healthcare context, and has been integrated into recent legislation. For example, the Patient Protection and Affordable Care Act (signed into law in March 2010) provides that a claim resulting from a violation of the healthcare anti-kickback statute is per se a violation of the False Claims Act. Patient Protection and Affordable Care Act, 42 U.S.C. § 1320a-7b(g) (2012); *see also* United States *ex rel.* McNutt v. Haleyville Med. Supplies, 423 F.3d 1256, 1257 (11th Cir. 2005) (holding that a violation of Anti-Kickback Act can serve as basis for a violation of False Claims Act when claims contain certification of compliance with the law); United States v. Kellogg Brown & Root Servs., Inc., 800 F. Supp. 2d 143, 147, 157 (D.D.C. 2011) (refusing to dismiss the government's complaint under the False Claims Act on the basis of the implied certification theory); United States *ex rel.* Pogue v. Am. Healthcorp, 914 F. Supp. 1507, 1513 (M.D. Tenn. 1996) (holding that because the defendants concealed their illegal activity from the government in order to receive fraudulent Medicare payments, there was a valid claim under the False Claims Act).

393. *Kellogg*, 728 F.3d at 1365, 1367.

394. 714 F.3d 1375 (Fed. Cir. 2013).

395. *Id.* at 1376.

The controversy arose out of the methodology General Dynamics used to account for its incurred pension costs, and, accordingly, how much of those costs could be billed to the government.<sup>396</sup> CAS 412 provides guidance for calculating pension cost.<sup>397</sup> In estimating pension costs, the CAS 412 calculation calls for a number of actuarial assumptions regarding the future conditions affecting pension cost.<sup>398</sup> Each actuarial assumption used to measure pension costs must be separately identified and must represent the contractor's best estimates of anticipated experience under the plan, considering both past experiences and reasonable expectations of future adjustments.<sup>399</sup> In addition, actuarial assumptions must "reflect long-term trends so as to avoid distortions caused by short-term fluctuations,"<sup>400</sup> and include "mortality rate, employee turnover, compensation levels, earning on pension plan assets, [and] changes in values of pension plan assets."<sup>401</sup>

Under the terms of its cost-type contracts, General Dynamics was required to project future values of its pension funds.<sup>402</sup> To comply with this requirement, the company took the actual market value of the fund and applied an assumption about the fund's rate of future growth.<sup>403</sup> General Dynamics and the government agreed on a yearly growth rate of 8% for the pension fund for the period 2004 to 2008.<sup>404</sup>

General Dynamics conducted two valuations of its pension fund, the second of which was challenged by the government as noncompliant with CAS 412.<sup>405</sup> First, as of January 1 of each year, General Dynamics calculated the pension costs it was permitted to charge to the government by determining the actual value of its pension plan.<sup>406</sup> Retaining the 8% yearly growth assumption, this

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396. *Id.* at 1376–77.

397. 48 C.F.R. pt. 9903.412 (2013).

398. FAR 9904.412-30(a)(3) (2013).

399. *Id.* 9904.412-50(b)(2).

400. *Id.* 9904.412-50(b)(4).

401. *Id.* 9904.412-30(a)(3).

402. *See* *Gen. Dynamics Corp. v. Panetta*, 714 F.3d 1375, 1376 (Fed. Cir. 2013) (enumerating the types of contracts entered into by the company, which require compliance with the terms of the Cost Accounting Standards); *id.* at 1380 (Wallach, J., dissenting) (explaining that the company is obligated to project future values for its pension funds, as per its agreements with the government).

403. *See id.* at 1377 (majority opinion).

404. *Id.*

405. *See id.* at 1377–78 (describing the company's challenged practice of valuating its pension fund by combining the pre-set 8% rate and an actual growth rate for the first half of the year in question, to determine its yearly forward pricing rates).

406. *Id.*

calculation compared the expected value from the prior year's estimation with actual value on January 1 of the new year.<sup>407</sup>

Second, under the FAR, General Dynamics calculated the retirement plan forward pricing rate ("RPFPR") for new contracts and contract modifications to estimate the future value of its pension fund.<sup>408</sup> The RPFPR calculation involved a projection of pension plan asset values for the current base year as well as projections between three and nine years out.<sup>409</sup> The parties did not dispute the Federal Circuit's understanding that the CAS 412 regulations govern the RPFPR projections required by the FAR.<sup>410</sup>

For twenty-five years, General Dynamics "variably used" midyear asset values, instead of January 1 values, in setting its updated RPFPR proposal for a base year.<sup>411</sup> For the period January 1 to the midyear date, General Dynamics applied the *actual growth rate* of its pension; then, from the midyear date until the end of the base year, General Dynamics applied the 8% per year rate, pro-rated.<sup>412</sup> The Federal Circuit referred to this approach as use of a "blended" rate.<sup>413</sup> General Dynamics then applied the long-term 8% rate for the remaining years for a three to nine year projection in the RPFPR.<sup>414</sup>

While the government and General Dynamics agreed that the appropriate assumed growth rate was 8% per annum, they did not agree on the value against which the 8% growth rate would be applied.<sup>415</sup> The government argued that the 8% rate must be applied to the value of the fund on January 1 of the year in which General Dynamics made the projection.<sup>416</sup> General Dynamics argued that rather than being required to ignore variations in the market between January 1 and the time of valuation under the CAS, it could appropriately use the most current value of the pension fund.<sup>417</sup>

In 2006, the Defense Contract Management Agency (DCMA) notified General Dynamics that the company's use of a "blended

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407. *Id.*

408. *See id.* (quoting FAR 42.1701(b), which states the contracting officer must require the contractor's forward pricing rate proposal to be based on accurate, up-to-date, and complete data).

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. *See id.* at 1377-78 (observing that the Defense Contract Management Agency notified General Dynamics that its use of the blended rate failed to comply with the CAS and proceeded to issue two notices of non-compliance with the CAS on this basis).

416. *Id.* at 1378-79.

417. *Id.* at 1378.

rate” did not comply with CAS 412.<sup>418</sup> In 2007, the Contracting Officer issued a final notice of noncompliance with CAS 412, prompting General Dynamics to submit a compliant retirement plan using the 8% rate from January 1.<sup>419</sup> In 2008, however, General Dynamics again submitted a retirement plan using the blended rate for the base year, after which the contracting officer issued a second final determination of noncompliance with CAS 412.<sup>420</sup> This time, General Dynamics appealed to the ASBCA.<sup>421</sup>

The ASBCA denied General Dynamics’s appeal, finding the company’s substitution of a midyear value and a blended rate in place of the 8% long-term estimate rate constituted “actuarial assumptions” because they were “estimate[s] of future conditions affecting pension cost” as defined in CAS 412-30(a)(3).<sup>422</sup> The actuarial assumptions were, in turn, encompassed by the prohibitions of CAS 412-50(b)(4).<sup>423</sup> The ASBCA further observed that General Dynamics’s use of partial-year asset data reflected short-term fluctuations that introduced distortion prohibited by CAS 412-50(b)(4).<sup>424</sup>

General Dynamics argued on appeal that the ASBCA erred as a matter of law when it determined that the company violated CAS 412-50(b)(4) by using the partial-year asset valuation and the subsequent blended rate in making its RPFPR.<sup>425</sup> General Dynamics offered the following arguments in favor of its position. First, it noted that it had been using this method for twenty-five years without government objection, presumably making an estoppel argument that the court’s opinion did not specifically address.<sup>426</sup> The company next contended that its use of a current, midyear value was not an estimate of future conditions; it was, instead, “a historical fact.”<sup>427</sup> Last, General Dynamics maintained that because the midyear value and the resulting blended rate were not actuarial assumptions under CAS 412-30(a)(3), the company’s use of these values could not violate CAS 412-50(b)(4), which only applies to actuarial assumptions.<sup>428</sup>

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418. *Id.* at 1377.

419. *Id.*

420. *Id.*

421. *Id.* at 1378.

422. *Gen. Dynamics Corp.*, ASBCA No. 56744, 11-2 BCA ¶ 34,787.

423. *See id.* at 18–19 (ruling that General Dynamics’s methodology reflected the types of short-term fluctuations and distortions that the CAS specifically intended to avoid).

424. *Id.*

425. *Gen. Dynamics*, 714 F.3d at 1378.

426. *Id.*

427. *Id.*

428. *See id.* (elaborating on General Dynamics’s reasoning that forcing contractors to use the government’s less accurate accounting method led to conflicting

The government offered three principal responses to General Dynamics's arguments. First, the government argued that General Dynamics's use of midyear market value of its pension plan and the subsequent blended rate are both "actuarial assumptions" under CAS 412-30(a)(3).<sup>429</sup> The government next noted that the actuarial assumptions (relying on midyear values) necessarily reflected short-term fluctuations and caused distortions in violation of CAS 412-50(b)(4).<sup>430</sup> Lastly, the government maintained that "the relative accuracy" of General Dynamics's method was "irrelevant," because the purpose of the CAS regulations "is uniformity and consistency, not accuracy."<sup>431</sup> Notably, the government did not offer any evidence that General Dynamics's approach caused actual harm to the government.

1. *The Federal Circuit's decision*

Laying foundation for its ruling, the majority began by explaining that the CAS seek to create uniformity in how contractors calculate and assign costs to government contracts.<sup>432</sup> Quoting CAS 412-20(a), the majority explained that the purpose of the CAS is to "enhance uniformity and consistency."<sup>433</sup> The fact that General Dynamics's methodology is more accurate was deemed irrelevant where it "does not promote such uniformity and consistency."<sup>434</sup> The court then stated that "uniformity and consistency are *clearly missing* in General Dynamics's methodology" and that "[t]he practice espoused by General Dynamics is thus *contrary* to uniformity and consistency" and that the company's "*random or arbitrary sampling* dates throughout the year does not promote such uniformity and consistency."<sup>435</sup> Thus, pursuant to the reasoning below, the majority found that General Dynamics's use of midyear market values and the subsequent blended rate for the base year violated CAS 412-50(b)(4).<sup>436</sup>

The majority found first that both the midyear market value and the subsequent blended rate are actuarial assumptions.<sup>437</sup> The court observed that the parties agreed the assumed 8% return from January

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obligations with FAR, CAS, and Truth in Negotiations Act (TINA) provisions requiring contractors to produce accurate estimates).

429. *Id.* at 1378–79.

430. *Id.* at 1379.

431. *Id.*

432. *Id.* at 1376 (citing *Gates v. Raytheon Co.*, 584 F.3d 1062, 1064 (Fed. Cir. 2009)).

433. *Id.* at 1379.

434. *Id.* at 1379–80.

435. *See id.* at 1380 (emphasis added) (observing that General Dynamics has used valuation dates from January, June, July, August, and October, varying both the month and dates within each month).

436. *Id.* at 1379.

437. *Id.*

1 was an actuarial assumption regardless of the actual value of the assets on January 1; thus, both the date chosen and the rate applied were actuarial assumptions.<sup>438</sup> Likewise, the decision to use a day other than January 1 and then “blending” that value with a pro-rated 8% growth rate was an actuarial assumption because it effectively substituted a new rate and base date in place of the original 8% growth rate from January 1.<sup>439</sup> In other words, the new blended rate from the midyear date was as much “an estimate of future conditions affecting pension cost” as the original 8% rate from January 1.<sup>440</sup> Thus, both the choice of a specific midyear date and the resulting blended rate were actuarial assumptions governed by CAS 412-50(b)(4).

The majority next found that General Dynamics’s use of the midyear value and the resulting blended rate violated CAS 412-50(b)(4) because it did not effectively reflect long-term trends and avoid short-term fluctuations as called for by CAS 412-50(b)(4).<sup>441</sup> The majority observed that the use of a midyear value is necessarily indicative of short-term changes because the value is only based on the short-term trend from January 1 to that midyear point.<sup>442</sup>

In concluding that the methodology utilized by General Dynamics ran counter to the CAS, the court reasoned that “the presumed accuracy of the midyear value in the base year does not make the use of that value and the subsequent blended rate compliant with CAS.”<sup>443</sup> The court observed that the FAR does not mention accuracy, short- or long-term, as General Dynamics’s approach offers.<sup>444</sup> Further, even if General Dynamics’s approach was an accurate representation over the short term, it was only because it impermissibly reflected short-term fluctuations.<sup>445</sup> Besides, the court observed, General Dynamics’s “accuracy” argument ignored the fact that the forward pricing rate is not only for the base year, but for a projection from three to nine years into the future.<sup>446</sup> While acknowledging that the record contained no evidence that General Dynamics self-selected a midyear date to take advantage of a short-

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438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.*

445. *See id.* (finding that General Dynamics’s method improperly locked-in the short-term fluctuation and caused a distortion that altered the level of growth for the remaining projection).

446. *Id.*



term market change, the court expressed concern that the company's practice created potential for abuse, "manipulation by self-interested selection of the pricing date."<sup>447</sup>

In dissent, Judge Wallach opined that the court's decision incorrectly interpreted applicable law and contravened practical policy considerations.<sup>448</sup> Specifically, Judge Wallach explained that the ASBCA's decision rested on two invalid assumptions, either of which, if corrected, would be sufficient to mandate reversal.<sup>449</sup>

First, the company's use of current, intra-year data was not, in Judge Wallach's view, an "actuarial assumption" within the meaning of CAS 412.<sup>450</sup> It was, instead, the market value on that date and applying the 8% growth rate, agreed upon by the parties, does not transform the data to a "future condition."<sup>451</sup> Thus, Judge Wallach found that CAS 412 was inapplicable to General Dynamics's decision to use intra-year data rather than January 1 data, because neither actually qualified as an actuarial assumption.<sup>452</sup> Further, Judge Wallach observed an incongruity in the majority's opinion where it first agreed that "[a]s a matter of principle, . . . a value of the plan assets on a given day is a historical fact, not an actuarial assumption," but then inexplicably went on to conclude that the decision to use a day other than January 1 was an actuarial assumption because it "effectively substitut[ed] a new rate and base date in place of the original 8% growth rate from January."<sup>453</sup>

Judge Wallach explained that the majority's analysis incorrectly assumed that calculating the projected market value for next January 1 must begin from the market value on January 1 of the current year.<sup>454</sup> However, the agreed upon 8% assumed growth rate does not require a particular growth per year, but rather assumes a specific

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447. *See id.* at 1380 (finding that the risk of manipulation was "contrary to the goals of uniformity and consistency"). The Federal Circuit found "premature and not persuasive" General Dynamics's argument that using the government's less accurate methodology created a conflict with other CAS, FAR, and TINA provisions. *Id.* First, the court noted no inconsistent obligations, leaving open the possibility of some unforeseen conflict in a future case. *Id.* Second, the court opined that to the extent CAS and FAR conflict as to the allocability of costs, the more specific CAS provisions would apply. *See id.* (citing *United States v. Boeing Co.*, 802 F.2d 1390, 1395 (Fed. Cir. 1986) (holding that CAS regulations trump Defense Acquisition Regulations)).

448. *See id.* (Wallach, J., dissenting) (arguing that the majority misinterpreted the notion of actuarial assumption and incorrectly applied CAS 412 to General Dynamics's use of intra-year data).

449. *Id.*

450. *Id.*

451. *Id.* at 1381.

452. *Id.*

453. *Id.* (first two alterations in original).

454. *Id.*

daily growth rate.”<sup>455</sup> The 8% growth rate, therefore, could be applied on July 1 rather than January 1.<sup>456</sup> Judge Wallach noted that “the precatory language of CAS 412 promoting ‘uniformity and consistency’ is not an independent obligation,” and the government had not carried its burden to prove that the approach employed by General Dynamics violated of the applicable regulations.<sup>457</sup> Judge Wallach further reasoned that if uniformity was the government’s primary concern, then it could have employed other requirements such as mandating that contractors set out value estimates for specified midyear dates.<sup>458</sup>

Second, Judge Wallach explained that even if the data that was used could be considered an actuarial assumption, it does not necessarily follow that it reflected short-term changes in value trends.<sup>459</sup> In fact, the record showed that General Dynamics’s data led to more accurate projections.<sup>460</sup> Judge Wallach observed that the majority found fault with the “random” nature of the days chosen by General Dynamics to update its retirement forward pricing rates, where, in fact, the company’s pricing rates were updated and resubmitted in response to events including significant changes in benefit provisions, future workforce projections, restructuring of workforces, or acquisitions, divestitures, plan mergers, regulatory changes, or bidding on a major new contract.<sup>461</sup> Judge Wallach explained that these types of events do not occur at the same time or with the same frequency from year to year.<sup>462</sup>

In response to the concern that General Dynamics’s methodology could be used in the future to game the system, Judge Wallach remarked that the concern was wholly “unsupported by the record.”<sup>463</sup> Because General Dynamics adjusted the “sum compensable” by the government to market fluctuations, its

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455. *Id.*

456. *Id.*

457. *Id.* at 1382.

458. *Id.* Judge Wallach agreed that the position articulated by the government and adopted by the majority brings CAS 412 into conflict with the FAR requirement that forward pricing rates be accurate, complete, and current at the date of submission. *Id.* (quoting FAR 42.1701(b), which calls for the use of up-to-date information to calculate the forward pricing rate).

459. *Id.* at 1380–81 (citing CAS 412-50(b)(4)).

460. *Id.* at 1382.

461. *Id.* at 1383; *see also* Gen. Dynamics Corp., ASBCA No. 56744, 11-2 BCA ¶ 34,787, at 7 (listing the types of events that might have led General Dynamics to update its rates).

462. *Gen. Dynamics*, 714 F.3d at 1383 (Wallach, J., dissenting).

463. *Id.*

methodology did not give General Dynamics an advantage.<sup>464</sup> Judge Wallach found no evidence of any actual or hypothetical harm to the government.<sup>465</sup> Judge Wallach concluded his dissent with a resounding policy argument, stating that the court “should not require companies to abandon decades-long practices that are compliant with the CAS for less accurate calculating methods suggested by the Government.”<sup>466</sup>

## 2. *Importance of the case*

The Federal Circuit’s decision appears to reflect the court’s view that the purpose of CAS 412—to create uniformity in how pension costs are allocated to the government—requires the rejection of any method for the valuation of a company’s pension fund that may create the potential for manipulation, even if the method is more accurate than a compliant CAS 412 approach.

### C. *Haddon Housing Associates v. United States*

In *Haddon Housing Associates v. United States*,<sup>467</sup> the Federal Circuit resolved cross appeals by the U.S. Department of Housing and Urban Development (HUD) and co-plaintiffs Haddon Housing Associates and the Housing Authority of the Township of Haddon.<sup>468</sup> In exploring the so-called “prevention doctrine,” the Federal Circuit re-emphasized that in order to be entitled to judicial redress contractors must complete all of the steps of asserting the claim before the agency.

#### 1. *Background*

Haddon Housing Associates leased a housing facility for low-income elderly residents in New Jersey’s Haddon Township, to the Housing Authority of the Township of Haddon (collectively, we refer to the developer/lessor and the Housing Authority as “Haddon”).<sup>469</sup> Under the Housing Act of 1937,<sup>470</sup> Haddon had entered into a housing assistance payments contract (“HAP Contract”) with HUD to provide low-income housing in that facility.<sup>471</sup> The HAP Contract represents the federal government’s share of the housing subsidy that

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464. *Id.* at 1383–84.

465. *Id.*

466. *Id.* at 1384.

467. 711 F.3d 1330 (Fed. Cir. 2013).

468. *See id.* at 1332–36.

469. *Id.* at 1332.

470. 42 U.S.C. § 1437f (2012).

471. *Haddon*, 711 F.3d at 1332.

benefits the low-income tenant.<sup>472</sup> A key variable that determines the HAP Contract amount is the fair market rental value of the subsidized unit, which is subject to periodic adjustment based on developments in the local low-income housing market, as reflected in “comparability studies” framed by HUD and conducted by the property manager or local housing authority.<sup>473</sup>

The submission of rent adjustment requests was a condition precedent to obtaining HAP Contract adjustments.<sup>474</sup> The Court of Federal Claims held that, in connection with the rent adjustments for the years 2001 and 2003, “Haddon was excused from performance of the condition precedent [pursuant to] the ‘prevention doctrine.’”<sup>475</sup> Under the prevention doctrine, the court held that Haddon’s failure to submit rent adjustment requests in 2001 and 2003 was a direct result of HUD’s previous denials.<sup>476</sup> Finding that the government materially contributed to Haddon’s failure to fulfill the condition precedent, the lower court concluded that Haddon was excused from performance.<sup>477</sup> Comparatively, the court found that government denials did not cause Haddon’s failure to submit adjustments in 2002.<sup>478</sup>

## 2. *The prevention doctrine does not apply*

On appeal, the Federal Circuit noted that under the prevention doctrine, the non-occurrence of a condition precedent by Party A is a defense for Party B in a breach action.<sup>479</sup> The doctrine is based on the principle that a contracting party has an inherent duty to refrain from blocking its counterparty’s performance.<sup>480</sup> Thus, failing to fulfill the condition precedent is excused when the other party hinders or prevents the party from doing so.<sup>481</sup>

Observing no error in the lower court’s factual findings, the Federal Circuit nevertheless concluded that the facts did not justify application of the prevention doctrine to excuse Haddon’s failure to

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472. *Id.* at 1332–33.

473. *Id.* at 1333.

474. *Id.* at 1335 (referencing the lower court’s fact finding in *Haddon Hous. Assocs. v. United States*, 99 Fed. Cl. 311 (2011)).

475. *Id.*

476. *Id.*

477. *Id.*

478. *Id.*

479. *Id.* at 1338 (observing that the prevention doctrine has long been applied by the Federal Circuit’s “sister circuits with relative consistency”).

480. *Id.*

481. *Id.* (referencing RESTATEMENT (SECOND) OF CONTRACTS § 245 (1981); 13 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 39:4 (4th ed. 1993 & Supp. 2012)).

make rent adjustment requests in 2001 and 2003.<sup>482</sup> That is, while HUD's denials of prior rent adjustment requests and other agency actions may have discouraged Haddon, HUD's actions did not excuse Haddon's failure to make the adjustment requests required under the HAP Contract.<sup>483</sup> The Federal Circuit observed that trial testimony showed Haddon's frustration with HUD's insistence on comparability studies, but noted that HUD did nothing to prevent Haddon from submitting the requests.<sup>484</sup> As a result, Haddon was not entitled to the adjustment in a lawsuit that it did not first request from the agency.<sup>485</sup>

In dicta, the Federal Circuit observed that the partial breach action Haddon elected to bring held important implications for its suit.<sup>486</sup> If, instead, Haddon had pursued a claim for anticipatory repudiation, it could have treated HUD's actions as a total breach, terminated the contract, and filed suit.<sup>487</sup> Under those circumstances, the government would have been relieved of any continuing duty to perform according to the contract.<sup>488</sup> But, because Haddon elected to pursue a claim for partial breach and the government continued performing, Haddon could not refuse to perform its obligations under the contract.<sup>489</sup> If accepted, Haddon's argument—that it could recover in the lawsuit rent adjustments it never requested from HUD—would create a situation where Haddon would gain the benefit of the government's continued performance while Haddon was exempted from performing on the contract.<sup>490</sup> Having rejected Haddon's reliance on the prevention doctrine, the Federal Circuit denied Haddon's claim for HAP Contract adjustments for 2001 and 2003.<sup>491</sup>

The *Haddon* decision applies the familiar ripeness-of-claims principle to the merits of a contract breach action. Just as claimants in many circumstances must exhaust administrative remedies before filing in court,<sup>492</sup> so, too, must contractor claimants under the

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482. *Id.*

483. *Id.* (holding that while the previous denials may have discouraged Haddon from making requests, HUD did not "impede" Haddon from doing so).

484. *Id.* at 1339.

485. *Id.* at 1340.

486. *Id.* at 1339.

487. *Id.* (referencing 13 WILLISTON & LORD, *supra* note 481, § 39:32).

488. *Id.*

489. *Id.* (referencing *Haddon Hous. Assocs. v. United States*, 99 Fed. Cl. 311, 334 n.35 (2011), in which that court cited 13 WILLISTON & LORD, *supra* note 481, § 39:32)).

490. *Id.* at 1340.

491. *Id.*

492. *See, e.g., Estate of Hage v. United States*, 687 F.3d 1281, 1290 (Fed. Cir. 2012) (holding that ranchers with permits to graze livestock on federal land who claim compensation for improvements must first seek valuation of improvements from the

Contract Disputes Act.<sup>493</sup> Unless truly prevented by its government counterpart, a contractor claimant must satisfy all of its contractual prerequisites to be entitled to relief.

#### IV. CONTRACT AND STATUTORY INTERPRETATION

Perhaps no legal dispute better exemplifies the uncertainty that exists at the outset of litigation than when both parties read the same words of a statute or contract and arrive at irreconcilable conclusions about what those words mean. When Rockies Express, a government contracting novice, entered into a multi-billion dollar agreement with the U.S. Department of Interior (“Interior”), it did not believe Interior could simply walk away for its own convenience, opportunistically citing as the basis the agency’s own drafting omissions.<sup>494</sup> The Federal Circuit agreed.<sup>495</sup>

When TKC Aerospace leased a corporate jet to the Department of Homeland Security at a discount due to the Coast Guard taking certain day-to-day maintenance responsibilities, neither party anticipated that downtime required to repair major corrosion would result in the loss of nine months’ worth of revenue.<sup>496</sup> It was a toss-up as to which of several conflicting contract provisions would determine the outcome.<sup>497</sup> Only Judge Reyna sided with TKC Aerospace; the majority did not.<sup>498</sup>

Res-Care, Inc., categorized as a large business, thought that the Workforce Investment Act’s requirement for Job Corps contracts to be let on a “competitive basis” required unbiased consideration of all sources and did not allow the Department of Labor to restrict competition to small businesses.<sup>499</sup> Thus, when the agency solicited a Workforce Investment Act contract set aside for small business, there was no available compromise solution to this binary problem.<sup>500</sup> The Federal Circuit agreed.<sup>501</sup>

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agency concerned); *Strategic Hous. Fin. Corp. v. United States*, 608 F.3d 1317, 1332 (Fed. Cir. 2010) (establishing that a party seeking recovery of internal-revenue taxes or penalties must first exhaust administrative remedies under IRS regulations).

493. 41 U.S.C. § 7103(a)(1) (2012); *see also* *Bowers Inv. Co. v. United States*, 695 F.3d 1380, 1383 (Fed. Cir. 2012) (noting that a final decision by a contracting officer is a prerequisite to pursuing a claim before the Court of Federal Claims under § 7104(b)(1)).

494. *Rockies Express Pipeline LLC v. Salazar*, 730 F.3d 1330, 1333–35 (Fed. Cir. 2013).

495. *Id.* at 1342.

496. *TKC Aerospace, Inc. v. Napolitano*, 535 F. App’x 931, 934–35 (Fed. Cir. 2013).

497. *Id.* at 933–34.

498. *Id.* at 938–39.

499. *Res-Care, Inc. v. United States*, 735 F.3d 1384, 1386–87 (Fed. Cir. 2013).

500. *Id.* at 1386.

501. *Id.* at 1391.

## A. Rockies Express Pipeline LLC v. Salazar

*Rockies Express Pipeline LLC v. Salzar*<sup>502</sup> arose from a Royalty-in-Kind Precedent Agreement and two Firm Transportation Service Agreements (“FTSAs”) between Rockies Express Pipeline LLC (“Rockies Express”) and Mineral Management Service, a unit of the U.S. Department of the Interior.<sup>503</sup> In 2005, Rockies Express and Interior contracted to build a pipeline to ship natural gas from Wyoming to Eastern Ohio.<sup>504</sup> Rockies Express would build the pipeline, and Interior would pay a reservation charge for at least ten years to reserve at least 2.5% of the gas shipped on the pipeline.<sup>505</sup> The parties first entered into a Precedent Agreement, which bound them to enter into FTSAs and Negotiated Rate Agreements to control the shipping of the gas.<sup>506</sup> The Precedent Agreement allowed Interior to terminate only if “directed by Legislative Action or required by a change in the Federal or State policy to discontinue taking gas in kind . . . upon (30) thirty days written notice to [Rockies Express].”<sup>507</sup> More than a year after executing an FTSA for the western section of the pipeline, Interior determined that FAR provisions should be incorporated into the FTSA for the eastern section.<sup>508</sup> Unable to agree upon the terms of the Eastern FTSA, Rockies Express terminated the Precedent Agreement on December 11, 2008, on the grounds that Interior had materially breached the agreement.<sup>509</sup> Nine months later, the Interior Secretary announced the agency’s intention to end all royalty-in-kind agreements effective October 2009.<sup>510</sup>

After an adverse contracting officer decision, Rockies Express appealed to the Civilian Board of Contract Appeals.<sup>511</sup> The Board held that the Precedent Agreement was a procurement contract subject to its jurisdiction, which the agency had breached by failing to enter into an Eastern FTSA.<sup>512</sup> The Board limited damages, however, to charges through October 2009, when the contract would have

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502. 730 F.3d 1330 (Fed. Cir. 2013).

503. *Id.* at 1333.

504. *Id.*

505. *Id.*

506. *Id.* at 1333–34.

507. *Id.* at 1334 (alterations in original) (emphasis omitted).

508. *Id.*

509. *Id.* at 1334–35.

510. *Id.* at 1335.

511. *Id.*

512. *Id.*

been terminated under Interior's change in policy as to royalty-in-kind agreements.<sup>513</sup>

On cross-appeals, the Federal Circuit affirmed jurisdiction.<sup>514</sup> The court noted that the CDA does not expressly define "procurement" and applied its definition, developed in Tucker Act cases, to hold that "procurement" means "all stages of the process of acquiring property or services, beginning with the process of determining a need for property or services and ending with contract completion and closeout" to define the Board's jurisdiction.<sup>515</sup> Because the Precedent Agreement was an agreement to enter into future contracts and included the "hallmarks of a traditional contract," such as negotiated essential terms and conditions supported by consideration, it was properly considered a "procurement" for purposes of Board jurisdiction.<sup>516</sup>

On the merits, the court examined whether Interior had breached the Precedent Agreement, and if so, the extent of damages. Its resolution of those issues provides guidance on the court's approach to contract interpretation, including the effect of the *Christian* doctrine on the legality of a contract, and what constitutes a change in federal policy affecting the enforceability of otherwise valid federal contracts.<sup>517</sup>

Regarding liability, the court found the Precedent Agreement to be legal and enforceable.<sup>518</sup> As an initial matter, the court summarily rejected Interior's contention that the contract was illegal because it failed to include FAR provisions or a termination clause.<sup>519</sup> In doing so, the Federal Circuit noted that Interior did not contest liability under the Western FTSA which itself had no FAR clauses or

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513. *Id.*

514. *Id.* at 1337.

515. *Id.* at 1336 (citing 41 U.S.C. § 403(2) (2006)).

516. *Id.*

517. *See id.* at 1337-39 (discussing whether the Department of Interior breached the Precedent Agreement and noting that a violation of the *Christian* doctrine does not render a contract illegal); *see also* G.L. Christian & Assocs. v. United States, 312 F.2d 418, 423 (Ct. Cl. 1963) (holding that if the parties neglected to include a clause in the government contract required by regulation, courts will read that clause into the contract as a matter of law). The court in *Christian* applied standard language that normally appeared in government contracts regarding the government's ability to terminate the contract for convenience, and held that, but for illegal conduct, the contractor cannot recover unearned but anticipated profits, even though the termination for convenience clause was not actually in the contract. *See Christian*, 312 F.2d at 423.

518. *Rockies Express*, 730 F.3d at 1339.

519. *Id.* at 1337.



termination clause.<sup>520</sup> The court noted Rockies Express's lack of experience in government contracting and held "when the issue of legality is very close" it is just to the contractor and the government "to uphold the award unless its invalidity is clear."<sup>521</sup> Moreover, in answer to Interior's defense that under the *Christian* doctrine the lack of a termination for convenience clause voided the Precedent Agreement, the court held that 42 U.S.C. § 15902 specifically exempts royalty-in-kind contracts from provisions normally required by procurement statutes, while also noting that "violation of the *Christian* doctrine does not render a contract illegal; it permits the court to cure the defect and include the clause after the fact."<sup>522</sup> Last, the court found Interior's failure to seek a FAR deviation itself a breach of its commitments in the Precedent Agreement.<sup>523</sup>

Regarding damages, the court held that the Secretary's announced intention to terminate the royalty-in-kind program was not a change in federal policy that required or entitled Interior to terminate the Precedent Agreement and thus excuse its failure to perform.<sup>524</sup> First, the court noted that the Secretary's instructions as to the termination of the royalty-in-kind programs included a principle that all existing contracts, such as Rockies Express's, would be honored.<sup>525</sup> Second, the court read Precedent Agreement Section 3(b) as requiring that "any policy change . . . must carry the same significance as Legislative Action," which requires various actions, including publication in the Federal Register and public comment.<sup>526</sup>

Since there was no actual change in federal policy, the court found that the Board had improperly limited damages to the period ending October 2009 and should have instead awarded compensatory damages through the end of the contract period.<sup>527</sup> On this ground, the court reversed and remanded for a finding as to compensatory damages with the instruction that Rockies Express was entitled to "recover its pecuniary loss of anticipated and unearned profits" for the contract term offset by costs avoided or monies gained through any mitigation efforts.<sup>528</sup>

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520. *Id.* at 1338 ("To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." (quoting *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970))).

521. *Id.* (quoting *John Reiner & Co. v. United States*, 325 F.2d 438, 440 (Ct. Cl. 1963)).

522. *Id.* (citing *Christian*, 312 F.2d at 427).

523. *See id.* at 1338–39.

524. *See id.* at 1340.

525. *Id.*

526. *Id.* (citing 5 U.S.C. § 552(a)(1)(D)–(E) (2006)).

527. *Id.* at 1341.

528. *Id.* at 1342.

B. TKC Aerospace, Inc. v. Napolitano

The court in *TKC Aerospace, Inc. v. Napolitano*<sup>529</sup> examined specific provisions of a contract between TKC Aerospace, Inc. (“TKCA”) and the U.S. Coast Guard for a leased aircraft. While the majority and dissenting opinions appear to provide little in the way of exportable insight into the Federal Circuit’s approach to contract interpretation, their starkly contradictory conclusions are noteworthy.

Under the contract, TKCA was responsible, through an on-site program manager, for routine aircraft maintenance performed by Coast Guard personnel.<sup>530</sup> After corrosion on the aircraft caused the aircraft to become unavailable for use, the Coast Guard withheld approximately \$500,000 in aircraft availability payments to TKCA.<sup>531</sup> The contracting officer denied TKCA’s certified claim for payment.<sup>532</sup> On appeal, the Civilian Board of Contract Appeals held that, under the terms of the contract, TKCA was responsible for all maintenance, even if Coast Guard personnel performed it.<sup>533</sup> The Board also noted that, while the cause of the corrosion was unknown, the Coast Guard had followed all maintenance procedures required by contract, and that TKCA had failed to establish that the corrosion was other than ordinary wear and tear for which the contract assigned TKCA the risk of loss.<sup>534</sup> The Board further rejected TKCA’s argument that the Coast Guard was required to give notice before withholding payments under these circumstances.<sup>535</sup> TKCA appealed, but the Court upheld the Board’s decision.<sup>536</sup>

Judge Reyna’s dissent opined that the Coast Guard had taken on the obligation to detect and prevent corrosion under the contract, and that the contractual risk of loss provision was not limited to “accidental” damage.<sup>537</sup> He also would have held that substantial evidence did not support a finding that corrosion was due to wear and tear, and that the Coast Guard was required to alert TKCA to downtime before damages could accrue.<sup>538</sup>

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529. 535 F. App’x 931 (Fed. Cir. 2013).

530. *Id.* at 933.

531. *Id.* at 934.

532. *Id.* at 935.

533. *Id.*

534. *Id.*

535. *Id.*

536. *Id.* at 935, 937–39.

537. *Id.* at 939, 941 (Reyna, J., dissenting).

538. *Id.* at 941.

C. *Res-Care, Inc. v. United States*

In *Res-Care, Inc. v. United States*,<sup>539</sup> the Federal Circuit restated its statutory construction methodology in the context of the Workforce Investment Act of 1998 (WIA). At issue was whether the Court of Federal Claims erred when it found that the U.S. Department of Labor was permitted under 29 U.S.C. § 2887(a)(2)(A) to select a contractor to operate a Job Corps Center (JCC) program through a set-aside for small businesses, where the WIA directs that such work be let on a “competitive basis.”<sup>540</sup> The Court of Federal Claims found that the phrase “competitive basis” in § 2887(a)(2)(A) did not mean “full and open competition,” as the large-business appellant, *Res-Care*, argued.<sup>541</sup> The Federal Circuit thus affirmed the lower court’s ruling that the WIA’s “competitive basis” requirement is satisfied so long as the “Rule of Two” is met, meaning that the agency has a founded expectation that at least two capable small businesses will vie for the contract.<sup>542</sup>

To interpret the statutory language in dispute, the Federal Circuit followed a familiar formula. The court began its analysis with the language of the statute itself.<sup>543</sup> It reasoned that when the statutory language is clear, the language itself controls, and the court cannot look to regulations for guidance.<sup>544</sup> Citing Supreme Court precedent, the Federal Circuit emphasized that statutory language is not determined in a vacuum but is considered in its statutory context.<sup>545</sup>

To interpret the term “competitive basis,” the Federal Circuit presumed that it has its ordinary meaning.<sup>546</sup> Looking to the dictionary definitions of “competitive” and “competition,” the Federal Circuit observed that neither definition required that a contest be open to all potential bidders; but rather, selection criteria could be used to define a smaller range of permitted competitors.<sup>547</sup> The Federal Circuit noted

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539. 735 F.3d 1384 (2013).

540. *See Res-Care, Inc. v. United States*, 107 Fed. Cl. 136, 141–42 (2012) (defining competitive bidding as “a minimum of two potential bidders”).

541. *Res-Care, Inc.*, 735 F.3d at 1389.

542. *Id.* at 1391.

543. *Id.* at 1387.

544. *Id.* (citing *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1320 (Fed. Cir. 2003)).

545. *Id.* (citing *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993)).

546. *Id.* (observing that the WIA did not define the term “competitive basis,” the court determined that dictionary definitions would provide guidance on its ordinary meaning).

547. *Id.*

that in certain contexts, Congress has intended for limited set-asides for small businesses to be “competitive.”<sup>548</sup>

The Federal Circuit ultimately determined that, contrary to Res-Care’s position, “competitive basis” under the WIA was not synonymous with the requirement for “full and open competition” found in the Competition in Contracting Act (“CICA”).<sup>549</sup> The court observed that Congress did not, in drafting 29 U.S.C. § 2887, borrow CICA’s “full and open competition” terminology; § 2887 simply states that selection of a JCC contractor shall occur “on a competitive basis.”<sup>550</sup> The Federal Circuit cited the “cardinal doctrine of statutory interpretation” that presumes Congress intends different meanings for different terms used within related statutes.<sup>551</sup> To persuade the court to look beyond the plain meaning of a statute, which is controlling when unambiguous, a party must show that the legislative history demonstrates an “extraordinary showing of contrary intentions.”<sup>552</sup> Here, the Federal Circuit observed that nothing in the legislative history of the WIA supported Res-Care’s position that the WIA was intended to prohibit the use of small business set-asides, which is a widespread government practice, in this particular context.<sup>553</sup> Thus, the Federal Circuit upheld, as meeting the requirement for a “competitive basis,” the source selection confined to multiple small businesses bidding to operate a JCC.<sup>554</sup>

#### CONCLUSION

Weary reader, congratulations on making it this far. You now understand what happened last year at what is effectively the highest court passing judgment on government contract disputes. In this respect, you have an advantage over the vast majority of lawyers who practice in this area of law. We assume the number who make it from front to back will be few but mighty—like Spartan warriors guarding the pass at Thermopylae. Certainly Justice Holmes would be proud.

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548. *Id.*; see also 41 U.S.C. § 152(4) (2012) (defining “competitive procedures” to include competition limited to further Small Business Act); *id.* § 3303(b) (providing that “competitive procedures” shall be used for small business set-asides).

549. *Res-Care, Inc.*, 735 F.3d at 1389.

550. *Id.*

551. *Id.*

552. *Id.* (quoting *Garcia v. United States*, 469 U.S. 70, 75 (1984), in which the Court “caution[ed] that resort[ing] to legislative history to interpret an unambiguous statute should only occur in ‘rare and exceptional circumstances’”).

553. *Id.*

554. *Id.* at 1388.

We authors, always fascinated by the uncertain, eagerly await new decisions from the Federal Circuit, which may better distinguish, for example, procurement contracts from cooperative agreements.<sup>555</sup> Other decisions may refine our understanding of the interplay among various statutes and regulations enacted over the last half-century by various Congresses and more than a half-dozen Presidents.<sup>556</sup> Where there is tension and uncertainty among the vast volumes of potentially relevant laws, regulations, and case precedents, we will see how the Federal Circuit resolves the inevitable disputes. Plus, new contracts are being written and breached every day. For these reasons, we look forward to sharing our thoughts again next year and having the benefit of yours as well.

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555. See *CMS Contract Mgmt. Servs. v. United States*, 110 Fed. Cl. 537, 541 (2013). In 2012, the GAO concluded that the agreements at issue are not cooperative agreements, as HUD's solicitation indicated, but are procurement contracts subject to the Competition in Contracting Act. *Assisted Hous. Servs. Corp.*, B-406738 et al., 2012 CPD ¶236, at 14 (Comp. Gen. Aug. 15, 2012). When the agency ignored the GAO's recommendation, several would-be contractors challenged HUD's action in the Court of Federal Claims. The court reached the opposite conclusion from the GAO. *CMS Contract Mgmt. Servs.*, 110 Fed. Cl. at 564. As of this writing, the appeal has been briefed and argued to the Federal Circuit, and the parties are awaiting the final word on the solicitation.

556. See, e.g., *Kingdomware Techs., Inc. v. United States*, 107 Fed. Cl. 226, 230 (2012). In another case in which the GAO and the Court of Federal Claims reached different conclusions on an issue, the court concluded that the Department of Veterans Affairs need not determine whether certain of its procurements should be set aside for service-disabled veteran-owned small businesses under 38 U.S.C. § 8127(d) (2012). *Kingdomware*, 107 Fed. Cl. at 244; see also *Kingdomware Techs., Inc.—Reconsideration*, B-407232.2, 2012 CPD ¶ 351, at \*1 (Comp. Gen. Dec. 13, 2012) (announcing that in light of the Court of Federal Claims's resolution of the issue, the GAO will no longer entertain protests based solely on the issue). The GAO decision marked a cease-fire in a series of contradictory decisions between the Office and the Court of Federal Claims. This issue, too, is now before the Federal Circuit for final resolution.