

GOVERNMENT CONTRACT CASES BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

RICHARD B. CLIFFORD, JR.*

ALAN R. YUSPEH**

LUCY G. GIES***

TABLE OF CONTENTS

Introduction	1418
I. Bid Protests	1420
II. Jurisdiction	1431
A. Establishing a Claim Under the Contract Disputes Act	1431
1. Certification	1432
2. The existence of a dispute	1448
3. CDA claims involving non-monetary disputes .	1454
B. Scope of the Contract Disputes Act	1458
C. Timeliness of Appeals from Final Decision of Contracting Officer	1460
III. Contract Interpretation	1461

* This Article was submitted for publication on January 31, 1994, and is current to that date.

* Mr. Clifford is an associate with the law firm of Howrey & Simon in Washington, D.C. He formerly served as judicial clerk for the Honorable Wilson Cowen, United States Court of Appeals for the Federal Circuit; and previously, for the Honorable Bohdan A. Futey, United States Claims Court.

** Mr. Yuspeh is a partner with the law firm of Howrey & Simon in Washington, D.C. He formerly served as General Counsel to the United States Senate Armed Services Committee.

*** Mrs. Gies is special government contracts counsel with the law firm of Howrey & Simon in Washington, D.C. Mrs. Gies formerly served as the Assistant Director of the Government Contracts Program at George Washington University, the National Law Center and as judicial clerk for the Honorable Oscar H. Davis, United States Court of Claims.

The authors gratefully acknowledge the contributions and assistance provided by Allen Cannon III, Jerone C. Cecelic, Alice Crook, David Johnson, Andrew T. Kerr, Ronald Vogt, and Christina Yu, all of whom are associates at Howrey & Simon.

A. Strict Enforcement of Unambiguous Contract Terms	1462
B. Ambiguous Contract Terms	1467
C. Mandatory Contract Clauses	1469
D. Government Warranty of Specifications	1473
E. Variation in Estimated Quantity Clause	1475
F. Cost Accounting Standards	1479
IV. Void and Voidable Contracts	1482
V. Estoppel Against the Government	1484
VI. Sovereign Act Doctrine	1487
VII. Procedure	1492
A. Discovery Against the Government	1492
B. Sanctions Against the Government	1496
C. Weight Accorded to Contracting Officer Decisions	1498
D. Default Judgment	1500
E. Litigation Authority of the Department of Justice	1502
VIII. Damages	1506
A. Eichleay Formula	1506
B. Duty to Mitigate	1509
C. Debt Collection	1511
D. Equitable Subrogation	1513
IX. Attorney's Fees	1516
A. Equal Access to Justice Act	1516
B. Attorney's Fees for Government Breach of Contract	1518
Conclusion	1519

INTRODUCTION

The U.S. Court of Appeals for the Federal Circuit was particularly active in the government contracts area in 1993. During 1993, the Federal Circuit issued forty precedential government contracts decisions based on appeals either from the United States Court of Federal Claims, formerly the United States Claims Court,¹ or federal agency boards of contract appeals. By comparison, the Federal

1. The U.S. Claims Court was redesignated the U.S. Court of Federal Claims on October 29, 1992. Federal Courts Administration Act of 1992 (FCAA), Pub. L. No. 102-572, § 902(a), 106 Stat. 4506. For clarity, this Article uses the current name of that court.

Circuit issued twenty-one decisions in 1991² and thirty-one decisions in 1992.³

The 1993 term proved notable for the frequency with which the Federal Circuit overturned the decisions of these tribunals. During this term, the appellate court reversed the contract appeals board or the Court of Federal Claims in more than fifty percent of its decisions.⁴ In bid protest cases, the Federal Circuit reversed the General Services Board of Contract Appeals (GSBCA) in three out of five decisions.⁵ In cases involving jurisdictional issues, the court reversed the boards and the Court of Federal Claims on nine of twelve occasions.⁶ For cases involving substantive contract issues, the court reversed the boards and the Court of Federal Claims in eight out of eighteen cases.⁷ Finally, in cases involving procedural issues

2. See Victor J. Zupa & Brian J. Siebel, *Government Contracts: 1992 Analysis and Summary*, 42 AM. U. L. REV. 1109, 1110 (1993).

3. *Id.* The Federal Circuit has jurisdiction over appeals from final decisions of the Court of Federal Claims and from final decisions (with minor exceptions) of the agency boards of contract appeals. 28 U.S.C. § 1295(a)(3) (1988); 41 U.S.C. § 607(g)(1) (1988).

4. This percentage includes only precedential decisions reversing the lower board or court in whole or in part.

5. See *Best Power Technology Sales Corp. v. Austin*, 984 F.2d 1172 (Fed. Cir. 1993), *rev'g* GSBCA No. 11400-P, 92-1 B.C.A. (CCH) ¶ 24,625 (1991); *CACI, Inc. v. Stone*, 990 F.2d 1233 (Fed. Cir. 1993), *rev'g* GSBCA No. 11523-P, 92-1 B.C.A. (CCH) ¶ 24,702 (1991); *AT&T Communications, Inc. v. Witel, Inc.*, 1 F.3d 1201 (Fed. Cir. 1993), *rev'g* GSBCA No. 11857-P, 93-1 B.C.A. (CCH) ¶ 25,314 (1992); *Birch & Davis Int'l, Inc. v. Christopher*, 4 F.3d 970 (Fed. Cir. 1993), *vacating* GSBCA No. 11643-P, 92-3 B.C.A. (CCH) ¶ 25,082 (1992); *Lockheed Missiles & Space Co. v. Bentsen*, 4 F.3d 955 (Fed. Cir. 1993), *aff'g* GSBCA No. 11776-P, 93-1 B.C.A. (CCH) ¶ 25,401 (1992).

6. *Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547 (Fed. Cir. 1993), *aff'g* ASBCA No. 33244, 91-3 B.C.A. (CCH) ¶ 24,132 (1991); *Hartford Accident & Indemnity Co. v. Stone*, 1993 U.S. App. LEXIS 7469 (Fed. Cir. Apr. 5, 1993), *rev'g* ASBCA No. 38023, 91-3 B.C.A. (CCH) ¶ 24,046 (1991); *Fischbach & Moore Int'l Corp. v. Christopher*, 987 F.2d 759 (Fed. Cir. 1993), *rev'g* ASBCA No. 42170, 92-1 B.C.A. (CCH) ¶ 24,511 (1991); *Johnson Controls World Servs., Inc. v. Garrett*, 987 F.2d 738 (Fed. Cir. 1993), *rev'g* ASBCA No. 40233, 91-3 B.C.A. (CCH) ¶ 24,219 (1991); *Ingalls Shipbuilding, Inc. v. O'Keefe*, 986 F.2d 486 (Fed. Cir. 1993), *aff'g* ASBCA No. 38323, 92-1 B.C.A. (CCH) ¶ 24,373 (1991); *Heyl & Patterson v. O'Keefe*, 986 F.2d 480 (Fed. Cir. 1993), *rev'g in part and aff'g in part* ASBCA Nos. 40604, 42589, 91-2 B.C.A. (CCH) ¶ 23,972 (1991); *Sadelmi Joint Venture v. Dalton*, 5 F.3d 510 (Fed. Cir. 1993), *rev'g* ASBCA Nos. 38288, 41025, 91-3 B.C.A. (CCH) ¶ 24,103 (1991); *Garrett v. General Elec. Co.*, 987 F.2d 747 (Fed. Cir. 1993), *aff'g* ASBCA Nos. 36005, 38152, 39696, 91-2 B.C.A. (CCH) ¶ 23,958 (1991); *Sharman Co. v. United States*, 2 F.3d 1564 (Fed. Cir. 1993), *remanding* 24 Cl. Ct. 763 (1991); *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574 (Fed. Cir. 1993), *rev'g* 24 Cl. Ct. 553 (1991).

7. *Aleman Food Servs. v. United States*, 994 F.2d 819 (Fed. Cir. 1993), *rev'g* 25 Cl. Ct. 201 (1992); *Sanchez & Son v. United States*, 6 F.3d 1539 (Fed. Cir. 1993), *aff'g in part and vacating in part* 24 Cl. Ct. 14 (1991); *Alaska Lumber & Pulp Co. v. Madigan*, 2 F.3d 389 (Fed. Cir. 1993), *aff'g in part and rev'g in part* DABCA Nos. 83-301-1, 84-351-1, 91-2 B.C.A. (CCH) ¶ 23,890 (1991); *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575 (Fed. Cir. 1993), *aff'g* ASBCA Nos. 37981, 38166, 38167, 38168, 38467, 40151, 92-2 B.C.A. (CCH) ¶ 24,870 (1992); *General Eng'g & Mach. Works v. O'Keefe*, 991 F.2d 775 (Fed. Cir. 1993), *aff'g* ASBCA No. 38788, 92-3 B.C.A. (CCH) ¶ 25,055 (1992); *S.J. Amoroso Constr. Co. v. United States*, 12 F.3d 1072 (Fed. Cir. 1993), *aff'g* 26 Cl. Ct. 759 (1992); *Blake Constr. Co. v. United States*, 987 F.2d 743 (Fed. Cir. 1993), *rev'g* ASBCA No. 37297, 91-2 B.C.A. (CCH) ¶ 23,810 (1991); *Foley Co. v. United States*,

or recovery of attorney fees, the court reversed the board or court in one out of five instances.⁸

This Article analyzes precedential and significant nonprecedential government contracts decisions by the Federal Circuit. Part I surveys bid protest decisions; Part II reviews the most active area of the court in 1993, jurisdiction; and Part III analyzes cases on contract interpretation. Specifically, Part III addresses decisions on the strict enforcement of contract terms, patent and latent ambiguity, mandatory contract clauses, the Variation in Estimated Quantity Clause, and government warranty of specifications. Part IV reviews a decision concerning void and voidable contracts; Part V discusses estoppel against the Government; and Part VI addresses the Sovereign Act doctrine. Part VII summarizes various procedural decisions involving discovery, sanctions, and default judgment. Part VIII discusses damage calculation and Part IX reviews cases on recovery of attorney's fees.

I. BID PROTESTS

In 1985, Congress passed the Brooks Act,⁹ which granted the GSBGA jurisdiction over bid protests in procurement contracts involving automated data processing equipment (ADPE).¹⁰ Pursuant to an amendment to the Contract Disputes Act of 1978 (CDA),¹¹ the Federal Circuit was in turn granted jurisdiction to review the board's bid protest decisions.¹² In exercising this power during the past seven years, the Federal Circuit has reversed the GSBGA a significant number of times, particularly when the decisions concerned the

11 F.3d 1032 (Fed. Cir. 1993), *aff'g* 26 Cl. Ct. 936 (1992); *Rice v. Martin Marietta Corp.*, 13 F.3d 1563 (Fed. Cir. 1993), *rev'g* ASBCA No. 35895, 92-3 B.C.A. (CCH) ¶ 25,094 (1992); *Godley v. United States*, 5 F.3d 1473 (Fed. Cir. 1993), *vacating and remanding* 26 Cl. Ct. 1075 (1992); *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574 (Fed. Cir. 1993), *rev'g in part and vacating in part* 24 Cl. Ct. 553 (1991); *Winstar Corp. v. United States*, 994 F.2d 797 (Fed. Cir. 1993), *rev'g* 26 Cl. Ct. 904 (1992), *vacated and reh'g in banc granted*, Aug. 18, 1993; *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953 (Fed. Cir. 1993), *rev'g* 26 Cl. Ct. 146 (1992).

8. *In re United States*, Misc. No. 370 (Fed. Cir. Apr. 19, 1993); *In re United States*, Misc. No. 374 (Fed. Cir. Apr. 30, 1993); *Information Sys. & Networks Corp. v. United States*, 994 F.2d 792 (Fed. Cir. 1993), *rev'g* 26 Cl. Ct. 314 (1992); *Boeing Co. v. United States*, 991 F.2d 811 (Fed. Cir. 1993), *rev'g* 25 Cl. Ct. 441 (1992).

9. See 40 U.S.C. § 759 (1988 & Supp. V 1993).

10. See 40 U.S.C. § 759(f)(1) (1988) (providing GSBGA with jurisdiction to hear protests related to purchase, lease, and maintenance of automatic data processing equipment by federal agencies).

11. 41 U.S.C. §§ 601-613 (1988).

12. *Id.* § 607(g)(1) ("The decision of an agency board of contract appeals shall be final, except that . . . a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit.").

board's bid protest jurisdiction.¹³ In 1993, the Federal Circuit continued this trend by reversing the board in three out of five precedential decisions; two of these reversals involved jurisdictional questions.

The Federal Circuit faced a basic jurisdictional issue when it considered whether a procurement constituted an ADPE procurement for purposes of the Brooks Act in *Best Power Technology Sales Corp. v. Austin*.¹⁴ In *Best Power*, the question was whether the GSBCA should determine Brooks Act jurisdiction based on the nature of the item being offered or on the nature of the solicitation issued by the procuring agency.¹⁵ The court concluded that the nature of the solicitation, not the bidder's offered product, provided the appropriate basis for determining the board's protest jurisdiction.¹⁶

Best Power protested the decision of the General Services Administration (GSA) to reject Best Power's offer to enter into a contract under the Multiple-Award Schedule program¹⁷ to provide the Government with uninterruptible power supplies (UPS).¹⁸ On July 27, 1990, GSA issued a solicitation inviting offers for Multiple-Award Schedule contracts, including UPS.¹⁹ Best Power responded by offering a full line of UPS products specifically designed for data processing equipment.²⁰ GSA rejected Best Power's offer after it was unable to negotiate a satisfactory price.²¹

When Best Power protested to the GSBCA, the GSA argued that the board lacked jurisdiction over the protest because the solicitation was not subject to the Brooks Act.²² In rejecting this argument, the

13. See, e.g., *US West Communications Serv., Inc. v. United States*, 940 F.2d 622, 626-27 (Fed. Cir. 1991) (holding that board lacks jurisdiction over bid protest by subcontractor relating to ADPE procurement conducted by management and operating contractor operating nuclear facility for Government); *United States v. Electronic Data Sys. Fed. Corp.*, 857 F.2d 1444, 1447 (Fed. Cir. 1988) (holding that board lacks jurisdiction over Postal Service procurements of ADPE); *Electronic Data Sys. Fed. Corp. v. General Servs. Admin. Bd. of Contract Appeals*, 792 F.2d 1569, 1582-83 (Fed. Cir. 1986) (stating that board lacks jurisdiction over bid protest involving procurement not conducted under Brooks Act).

14. 984 F.2d 1172 (Fed. Cir. 1993).

15. *Best Power Technology Sales Corp. v. Austin*, 984 F.2d 1172, 1175 (Fed. Cir. 1993).

16. See *id.* at 1176 ("[W]e hold that when the GSBCA . . . addresses the question of whether a given procurement is one for ADPE, it must look to the nature of the items called for.").

17. Under the Multiple-Award Schedule program, GSA negotiates and contracts with manufacturers and suppliers to provide generic supplies and services at specific prices. *Id.* at 1174.

18. The term "uninterruptible power supplies" refers to equipment that maintains a steady power supply to electrical equipment in the event of a power outage. *Id.* at 1175.

19. *Id.* at 1174.

20. *Id.* Best Power's UPS products prevent stored data from being lost by monitoring a protected device and, in the event of a power surge, shutting down that device. *Id.*

21. *Id.* at 1175.

22. *Best Power Technology Sales Corp.*, GSBCA No. 11400-P, 92-1 B.C.A. (CCH) ¶ 24,625, at 122,835 (1991), *rev'd*, 984 F.2d 1172 (Fed. Cir. 1993).

board found that Best Power's products were designed solely to be used with computers,²³ concluding that the company's UPS products were ancillary equipment within the meaning of the statutory definition of ADPE.²⁴ The GSBGA then held that the agency properly rejected Best Power's offer.²⁵ Both Best Power and the Government appealed the board's decision.

On appeal, the Federal Circuit agreed with the Government that the GSBGA lacked jurisdiction over the company's protest.²⁶ The court held that the board should have looked to the nature of the solicitation, and not to the product offered by Best, to determine jurisdiction:²⁷ failure to do so, the court admonished, would allow an offeror to dictate Brooks Act jurisdiction based on the type of product it offered.²⁸ The court reasoned that because the UPS sought in the solicitation could be used either for computers or for other non-ADPE, the solicitation was not seeking ADPE.²⁹

The Federal Circuit differed with the GSBGA on other substantive legal issues in the past year. For example, in *CACI, Inc. v. Stone*,³⁰ the court examined whether the lack of a delegation of procurement authority from the GSA Administrator renders a contract void³¹ and whether an agency is permitted to adopt a new theory of its case on appeal.³²

On April 1, 1991, the Department of the Army solicited bids for engineering and data processing support services.³³ CACI and VSE Corporation both submitted proposals.³⁴ The Army awarded the contract to VSE on September 30, 1991, causing CACI to protest the

23. *Id.* at 122,838. The board also found that Best's products were capable of automatically storing, controlling, manipulating, and processing data and information. *Id.* at 122,836.

24. *Id.* at 122,838.

25. *Id.* at 122,839-40 ("We cannot conclude that the agency may not demand a greater reasonable discount than that offered by the protester as a condition to having its products placed on the multiple award schedule.").

26. See *Best Power Technology Sales Corp. v. Austin*, 984 F.2d 1172, 1178 (Fed. Cir. 1993) (stating that GSA reasonably determined that "the solicitation did not constitute a procurement 'subject to' the [Brooks] Act").

27. *Id.* at 1176.

28. *Id.* at 1175.

29. *Id.* at 1177 (finding that UPSs "may be used to protect computers or they may be used to protect other kinds of equipment, such as machine tools").

30. 990 F.2d 1233 (Fed. Cir. 1993).

31. *CACI, Inc. v. Stone*, 990 F.2d 1233, 1235 (Fed. Cir. 1993). To procure ADPE, executive agencies generally need a delegation of procurement authority from the GSA Administrator. 40 U.S.C. § 759(b) (1988). This delegation is not necessary for ADPE procurements involving the national defense and certain "radar, sonar, radio, or television equipment." *Id.* § 759(a)(3)(B)-(D); see also GSA Federal Information Resources Management Regulation (FIRM), 41 C.F.R. §§ 201-1.002-2, 201-4.001 (1993).

32. *CACI, Inc.*, 990 F.2d at 1234.

33. *Id.* at 1233.

34. *Id.*

award to the GSBGA. CACI's protest alleged, inter alia, that the Army violated the Federal Information Resources Management Regulation (FIRMR)³⁵ by failing to obtain a delegation of procurement authority (DPA) from the GSA Administrator before proceeding with the acquisition.³⁶ In response to CACI's motion for summary relief, the Army argued that even though it had not obtained such authority, the deficiency was being corrected and should not render the VSE contract void.³⁷

The GSBGA held that the contract violated the FIRMR, but refused to suspend performance of VSE's contract, finding that the Army required VSE's services and that suspension of contract performance would therefore be disruptive and detrimental to the Government.³⁸ The board denied CACI's protest on the merits,³⁹ concluding that the initial lack of a DPA was not fatal because the Army was taking prompt action to obtain one.⁴⁰ CACI appealed this determination.⁴¹

Before the Federal Circuit, the Army contended that it had misinterpreted applicable regulations in presenting its case to the GSBGA and should have argued that the regulations in effect when the subject solicitation was issued provided blanket authority to contract for data processing support services without a DPA.⁴² The court refused to consider this argument, however, because it was raised for the first time on appeal.⁴³

The Federal Circuit ultimately reversed the GSBGA, holding that the lack of a DPA rendered the Army's contract award to VSE null and void.⁴⁴ The court stated that when illegality is clear, it has no choice but to invalidate the award and the contract.⁴⁵ The court determined that in a case such as this in which "there is a facial absence of actual authority to enter into the contract," the illegality

35. 41 C.F.R. §§ 201-223.1 (1993).

36. CACI, Inc.-Federal, GSBGA No. 11523-P, 92-1 B.C.A. (CCH) ¶ 24,702, at 123,275 (1991), *rev'd*, 990 F.2d 1233 (Fed. Cir. 1993).

37. *Id.* at 123,279-80.

38. *Id.* at 123,279.

39. *Id.* at 123,280.

40. *Id.* at 123,279.

41. CACI, Inc. v. Stone, 990 F.2d 1233, 1235 (Fed. Cir. 1993).

42. *Id.* at 1234.

43. *Id.* at 1235.

44. *Id.* at 1236. In *United States v. Amdahl Corp.*, the court held that a contract award that violates a statute or regulation is void *ab initio*. 786 F.2d 387, 392 (Fed. Cir. 1986). For further discussion of void or voidable contracts, see *infra* Part IV.

45. CACI, Inc., 990 F.2d at 1235.

is "plain and clear," and the board erred in holding that a procurement or contract may proceed without a valid DPA.⁴⁶

The Federal Circuit reversed the GSBGA again in *AT&T Communications, Inc. v. Wiltel, Inc.*⁴⁷ For the first time, the court examined whether a modification to FTS2000 (the Government's comprehensive telecommunications procurement) exceeded the scope of that contract, thereby impermissibly bypassing statutory requirements for competition.⁴⁸

In 1986, the GSA solicited offers for the FTS2000 acquisition. The solicitation covered extensive telecommunication services, provided for offerors to propose additional features and schedules not specifically included in the solicitation, and contained the standard changes and service improvements clauses.⁴⁹ The solicitation also required the contractor to present an annual plan to assess areas of growth, new locations, and the application of new telecommunication services.⁵⁰ The GSA awarded contracts to AT&T and Sprint in 1988.⁵¹ On March 4, 1992, AT&T submitted a proposal to modify the scope of work by adding "T3" circuits as a fourth type of dedicated transmission service under the contract's service improvements clause.⁵² When GSA accepted AT&T's proposed enhancement, Wiltel, Inc., a potential competitor, protested that these additional services exceeded the scope of the FTS2000 contract and argued that they therefore should be the subject of a separate procurement.⁵³

The GSBGA reviewed Wiltel's protest and held that the service improvements clause did not authorize the addition of T3 services to the contract because T3 was a new form of telecommunication service, not an improvement to the existing services, and must, therefore, be the subject of a separate procurement.⁵⁴ In reaching this conclusion, the board focused on the differences between T3 service and the existing T1 service, and the incremental difference

46. *Id.* at 1236.

47. 1 F.3d 1201 (Fed. Cir. 1993).

48. *AT&T Communications, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1202-03 (Fed. Cir. 1993). The General Accounting Office (GAO) and the boards of contract appeals have frequently addressed this issue. See Ralph C. Nash & John Cibinic, *Contract Changes: The Fast Technique When It's Right*, 7 NASH & CIBINIC REPORT ¶ 62, at 163-65 (1993).

49. *AT&T*, 1 F.3d at 1203-04.

50. *Id.* at 1204.

51. *Id.*

52. *Id.*

53. *Id.* at 1203.

54. *Wiltel, Inc. v. General Servs. Admin.*, GSBGA No. 11857-P, 93-1 B.C.A. (CCH) ¶ 25,314, at 126,111 (1992), *rev'd*, 1 F.3d 1201 (Fed. Cir. 1993).

between the cost of a T3 line and a T1 line.⁵⁵ Further, the board found it significant that the GSA had rejected offers to supply T3 services in the original procurement.⁵⁶

On appeal, the Federal Circuit reversed the board.⁵⁷ The court found that the FTS2000 contract envisioned a comprehensive set of telecommunications services that necessarily would require numerous changes throughout its ten-year contract period.⁵⁸ The court then determined that the solicitation specifically contemplated the addition of state-of-the-art technology as it became commercially available.⁵⁹ According to the court, T3 was merely a different kind of dedicated transmission service already required under the contract.⁶⁰

In addition, the court found that the board erred by focusing on the technological differences between T1 and T3 services, instead of comparing the modified contract to the scope of the original contract.⁶¹ The court stated that a major factor in determining the scope of the original contract is whether offerors for the original contract could have anticipated the modification.⁶² The Federal Circuit cited other GSBCA decisions involving the FTS2000 contract,⁶³ supporting its holding that the addition of T3 services was precisely the kind of contract modification that offerors would have anticipated with the availability of more advanced technologies.⁶⁴

55. *Id.* ("We first note that the 'type of work' that T-3 can provide . . . is 'work' that T-1 cannot perform.").

56. *Id.* at 126,113.

57. *AT&T Communications, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1203 (Fed. Cir. 1993). Wiltel has requested a rehearing in banc of the Federal Circuit's panel decision. See 60 Fed. Cont. Rep. (BNA) 166 (Aug. 23, 1993).

58. *AT&T*, 1 F.3d at 1205.

59. *Id.* at 1206.

60. *Id.* (finding that T3 fell within scope of FTS2000 contract because of contractor's obligation to provide improvements).

61. *Id.*

62. *Id.* at 1207 (noting that important factor in determining scope of contract is whether solicitation for original contract advised offerors of "the potential for the type of changes . . . that in fact occurred"). This is similar to prior GAO and court decisions relating to the cardinal change doctrine. The focus of the analysis is the major difference between the two tests; the cardinal change doctrine focuses on the *changes* clause and the scope of the contract, while the Federal Circuit test focuses on the scope of the original competition. See *American Air Filter Co.*, 57 Comp. Gen. 567, 572-73, *aff'd*, 57 Comp. Gen. 285 (1978); *Allied Materials & Equip. Co. v. United States*, 569 F.2d 562, 563-64 (Ct. Cl. 1978); *Nash & Cibinic*, *supra* note 48, ¶ 62, at 163.

63. *AT&T*, 1 F.3d at 1207. The court, however, actually cited only one case, *MCI Telecommunications Corp.*, GSBCA No. 10450-P, 90-2 B.C.A. (CCH) ¶ 22,735 (1990). In that case, the board denied MCI's protest against Sprint's enhancement of its switched voice service. *Id.* The board found that the FTS2000 contract permits the Government to obtain service enhancements as they become available. *Id.*

64. The Federal Circuit's decision is consistent with prior GSBCA and GAO precedent, including prior board decisions dealing with the FTS2000 procurement. See *MCI Telecommunications Corp. v. General Serv. Admin.*, GSBCA No. 11963-P, 93-1 B.C.A. (CCH) ¶ 25,541, at 127,222 (1992) [hereinafter *MCI II*]; *MCI Telecommunications Corp.*, GSBCA No. 10450-P, 90-2

AT&T Communications ratifies previous board decisions finding that contract modifications do not require competition if the change was "within the scope of the competition."⁶⁵ The Federal Circuit, however, explained that the focus of this test is "on what *the competitors* should have anticipated to be within the scope of the competition."⁶⁶ Thus, the Government can preserve its flexibility to choose between soliciting new services or modifying existing contracts by including broad language in solicitations and contracts, and by stating that it will seek contract changes in accordance with technology developed concurrent with performance.⁶⁷

In a dispute over a bid rejected for deficiencies, the Federal Circuit in *Birch & Davis International, Inc. v. Christopher*⁶⁸ vacated the GSBCA's judgment and found that the Agency for International Development (AID) improperly excluded bids containing minor, correctable deficiencies from the competitive range.⁶⁹ In *Birch & Davis*, AID issued a Request for Proposals (RFP) for the design and installation of a computer system for the Egyptian Health Insurance Organization.⁷⁰ Birch & Davis International, Inc. (Birch) submitted three proposals, and four other companies each submitted one proposal.⁷¹ Four of the seven proposals, including two Birch proposals, were found technically acceptable despite numerous deficiencies.⁷² Based on the initial ranking of proposals, the contracting officer then established a competitive range of one offeror.⁷³ Birch protested the contracting officer's decision to exclude it from the competitive range, arguing that the deficiencies in its bid were merely informational.⁷⁴ Birch also alleged that the technical and cost evaluations were fatally flawed.⁷⁵

While acknowledging the contracting officer's broad discretion in establishing a competitive range, the GSBCA noted that the decision to establish an initial competitive range of one offeror was subject to

B.C.A. (CCH) ¶ 22,735, at 114,132 [hereinafter MCI]; see also *Neil R. Gross & Co.*, B-237434, 90-1 C.P.D. ¶ 212, at 2-3, *aff'd*, B-237434.2, 90-1 C.P.D. ¶ 491 (1990).

65. *Nash & Cibinic*, *supra* note 48, ¶ 62, at 163.

66. *Id.*

67. *Id.*

68. 4 F.3d 970 (Fed. Cir. 1993).

69. *Birch & Davis Int'l, Inc. v. Christopher*, 4 F.3d 970, 971 (Fed. Cir. 1993).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 972-73.

75. *Id.* at 972.

close scrutiny.⁷⁶ Nonetheless, the board concluded that the determination was reasonable.⁷⁷ Birch appealed to the Federal Circuit.

On appeal, the Federal Circuit vacated the board's decision.⁷⁸ The court noted that the Federal Acquisition Regulation (FAR)⁷⁹ requires a contracting officer to include in the initial competitive range all competitors with a reasonable chance of award.⁸⁰ Thus, the court recognized a tension between a contracting officer's substantial discretion to determine a proposal's merits and the FAR's presumption requiring the inclusion of even questionable bids in the competition.⁸¹ The Federal Circuit agreed with the GSBICA and the GAO in giving "close scrutiny" when a contracting officer determination results in a competitive range of one.⁸² It determined, however, that the GSBICA had not in fact "closely scrutinized" the contracting officer's decision.⁸³ Had the board done so, the court concluded, it would have found that Birch's proposal had a reasonable chance of being selected for award.⁸⁴ Consequently, the court concluded that Birch's proposal should have been included in the competitive range.⁸⁵

The Federal Circuit affirmed one GSBICA bid protest decision in 1993. In *Lockheed Missiles & Space Co. v. Bentsen*,⁸⁶ the Federal Circuit upheld the GSBICA's decision to deny Lockheed Missiles & Space Co., Inc.'s (Lockheed) protest against the award of the Treasury Multi-User Acquisition Contract (TMAC) to AT&T Federal Systems.⁸⁷

On January 4, 1989, the Treasury Department issued a solicitation for office automation systems, software, and maintenance/support

76. *Birch & Davis Int'l, Inc. v. Agency for Int'l Dev.*, GSBICA No. 11643-P, 92-2 B.C.A. (CCH) ¶ 24,881, at 124,097-98 (1992), *vacated*, 4 F.3d 970 (Fed. Cir. 1993).

77. *Id.*

78. *Birch & Davis Int'l*, 4 F.3d at 974.

79. 48 C.F.R. (1994).

80. *Birch & Davis Int'l*, 4 F.3d at 973 (stating that FAR requires contracting officer not to eliminate competitors from initial range if there is "any 'reasonable chance' that they will be selected").

81. *See id.* (noting tension between "necessarily broad discretion of agency to determine what bids are realistically competitive" and FAR, which requires that "when there is doubt, the questionable bid should be included").

82. *Id.* at 974. The court cited to several board and comptroller general decisions upholding this principle. *See Rockwell Int'l Corp. v. United States*, 4 Cl. Ct. 1, 5 (1983) (noting that GAO promotes competition by "giving close scrutiny to such decisions where only one firm remains for negotiations"); *Apt Corp.*, GSBICA No. 9237-P, 88-1 B.C.A. (CCH) ¶ 20,411, at 103,249 (1987) ("A decision which results in the inclusion of only one offeror will be subjected to close scrutiny.").

83. *Birch & Davis Int'l*, 4 F.3d at 974.

84. *Id.*

85. *Id.*

86. 4 F.3d 955 (Fed. Cir. 1993).

87. *Lockheed Missiles & Space Co. v. Bentsen*, 4 F.3d 955, 957 (Fed. Cir. 1993).

services for the Internal Revenue Service.⁸⁸ Section M of the solicitation stated that the award would be made to the offeror whose proposal represented the best overall value to the Government.⁸⁹ Among the offerors submitting proposals were Lockheed, IBM, and AT&T.⁹⁰ Despite making an offer considerably more expensive than Lockheed's and twice as costly as IBM's, AT&T was awarded the contract.⁹¹ IBM and Lockheed protested, alleging that Treasury failed to conduct a proper cost-technical tradeoff.⁹² The GSBGA sustained their protests and ordered Treasury to conduct such an analysis.⁹³ Pursuant to this directive, Treasury performed the analysis and affirmed its decision to award the contract to AT&T.⁹⁴ Lockheed and IBM protested again, but this time the board found that Treasury had adequately supported its selection.⁹⁵ Lockheed then appealed to the Federal Circuit.

The court ruled that procuring agencies are to be accorded great discretion in conducting best value procurements.⁹⁶ Accordingly, it upheld the board's determination that Treasury had conducted an adequate cost-technical tradeoff because the agency properly weighed the technical merit of the AT&T proposal against its comparatively higher cost and reasonably concluded that AT&T represented the best value to the Government.⁹⁷

This decision is not surprising in light of the significant discretion the courts and boards of contract appeals typically afford contracting officers.⁹⁸ These tribunals are reluctant to second-guess an agency's source selection decision and, with rare exception, will not overturn an agency evaluation shown to be reasonably based.⁹⁹ The courts and boards are especially reluctant to overturn an agency's best value determinations because they do not have the necessary expertise or authority to decide the precise needs of a particular agency. The

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 958. Alternatively, the board directed the agency to amend the solicitation if it had in fact intended for cost to play a minimal role in the evaluation. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 959.

97. *Id.* at 959-60.

98. *Id.*

99. *See id.* at 959 (citing numerous cases detailing broad discretion accorded agency evaluation and selection decisions); *see also* Data Gen. Corp. v. United States, 915 F.2d 1544, 1552 (Fed. Cir. 1990) (finding that board erred in its discretion because it disregarded plain meaning of licensing provision).

situation in *Birch & Davis*, where the contracting officer selects a competitive range of one,¹⁰⁰ demonstrates one of the most common exceptions to this general rule. This exception stems from the competition requirements of the Competition in Contracting Act of 1984 (CICA).¹⁰¹ In such a case, the boards appear to believe that Congress' interest in promoting competition overrides the discretion normally afforded agency selection decisions.¹⁰²

In 1993, the Federal Circuit also decided a pre-award bid protest appeal from the Court of Federal Claims. Under the Tucker Act,¹⁰³ the Court of Federal Claims has jurisdiction to consider pre-award protests predicated on an implied-in-fact promise by the Government to "fairly and honestly consider" bids.¹⁰⁴ In *Motorola, Inc. v. United States*,¹⁰⁵ the Federal Circuit determined that the Court of Federal Claims lacked jurisdiction over a bid protest where the protester had not submitted a bid in response to the subject procurement and therefore had no implied-in-fact contract with the Government.¹⁰⁶

Motorola and other contractors responded to the Government's invitation to develop a specification for the procurement of a positioning device known as the Precision Lightweight Global Positioning System Retriever (PLGR).¹⁰⁷ The Government subsequently issued a nondevelopment item solicitation for technical proposals and bid samples for the PLGRs.¹⁰⁸ Motorola did not submit a proposal in response to this solicitation, believing that the Government had improperly restricted the solicitation to nondevelopment item PLGRs.¹⁰⁹

Instead of responding with a proposal, Motorola filed an action in the Court of Federal Claims to enjoin the Government from

100. *Birch & Davis Int'l, Inc. v. Christopher*, 4 F.3d 970, 974 (Fed. Cir. 1993) (noting that contracting officer's selection of competitive range of one warrants close scrutiny by Board of Contract Appeals and Comptroller General).

101. 41 U.S.C. §§ 251-253(c) (1988); see also *United States v. Thorson Co.*, 806 F.2d 1061, 1064 (Fed. Cir. 1986) (stating that CICA was "designed to obtain 'full and open competition' by providing that (1) contractors were given adequate opportunities to bid, and (2) the government received sufficient bids to ensure that it obtained the lowest possible price").

102. *Birch & Davis Int'l*, 4 F.3d at 973-74 (stating that CICA requirement of full and open competition allows court to determine whether "excluded competitors have a reasonable chance of being selected") (emphasis added).

103. 28 U.S.C. § 1491(a)(3) (1988).

104. See *Heyer Prods. Co. v. United States*, 140 F. Supp. 409, 412 (Ct. Cl. 1956) (holding that contractor's manifestation of intent to be bound warrants promise from Government to fairly and honestly consider contractor's bid).

105. 988 F.2d 113 (Fed. Cir. 1993).

106. *Motorola, Inc. v. United States*, 988 F.2d 113, 114 (Fed. Cir. 1993).

107. *Id.* at 114-15.

108. *Id.*

109. *Id.* at 115.

proceeding with selection and award pursuant to the procurement.¹¹⁰ The complaint alleged an implied contract resulting from the Government's request for, and Motorola's submission of, information to assist the Government in developing the solicitation.¹¹¹ Motorola maintained that the Government breached this contract by issuing a solicitation restricted to nondevelopment item PLGRs, and as a result, prevented Motorola from competing.¹¹²

The Court of Federal Claims dismissed Motorola's complaint for failure to state a claim, holding that Motorola was precluded from challenging the nondevelopment item restriction and the bid sample requirement because it had failed to make an offer in response to the solicitation.¹¹³ The court reasoned that responding to a Government request for information differed materially from actually submitting a bid.¹¹⁴ According to the court, a bid, unlike the response that was made by Motorola, bound an offeror to the Government's terms and conditions and thus gave rise to the Government's obligation to consider the submission fairly and honestly.¹¹⁵ In this ruling, the court failed to follow its own precedent from two prior decisions reaching the opposite conclusion.¹¹⁶

In a per curiam opinion, the Federal Circuit affirmed the opinion of the Court of Federal Claims.¹¹⁷ The Federal Circuit, however, attempted to retreat from a categorical requirement for the submission of a bid or proposal as a prerequisite to jurisdiction, carefully noting that "[o]rdinarily a bid is required to establish that a pre-award implied in fact contract exists."¹¹⁸ Moreover, the Federal Circuit adopted the decision of the Court of Federal Claims "to the extent consistent with the above" language.¹¹⁹

Despite this cautionary language, the *Motorola* decision is disappointing because it effectively prohibits the Court of Federal Claims from considering protests of would-be contractors prevented from bidding

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 115-16.

114. *Id.* at 116.

115. *Id.*

116. See *Magnavox Elecs. Sys. Co. v. United States*, 26 Cl. Ct. 1373, 1378 (1992) (rejecting argument that implied-in-fact obligation on behalf of Government fails to arise from single-source procurement because it does not allow solicited responses for competitive bid); *Standard Mfg. Co. v. United States*, 7 Cl. Ct. 54, 57-58 (1984) (holding that statements of interest and capability that do not constitute bids nevertheless constitute contract claims that must be considered fairly and honestly).

117. *Motorola*, 988 F.2d at 114.

118. *Id.* (emphasis added).

119. *Id.*

on procurements due to the restrictive nature of the solicitation.¹²⁰ Nonbidders seeking to challenge the restrictiveness of a solicitation thus may be left without a remedy in federal court, especially in those circuits where § 1491(a)(3) of the Tucker Act has been interpreted to preclude district court jurisdiction over pre-award bid protests.¹²¹

II. JURISDICTION

A. *Establishing a Claim Under the Contract Disputes Act*

Although some fifteen years have passed since the enactment of the CDA,¹²² there remains considerable litigation surrounding the Act's requirement of a "claim." The CDA itself states only that claims must be submitted to the contracting officer in writing, and that claims over \$50,000 must be certified by the contractor.¹²³ The FAR gives additional guidance and defines a claim as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim [under the CDA]."¹²⁴

Most of the litigation surrounding the existence of a "claim" involves two issues: the requirements for a proper certification and the definition of a "dispute."¹²⁵ Neither issue had received much

120. See *id.* (determining that solicitation must be followed by bid in order to create justiciable implied-in-fact contract).

121. There is currently a split among the circuits concerning whether district courts have concurrent jurisdiction with the Court of Federal Claims over pre-award bid protests. Only two circuits have held that federal district courts have pre-award jurisdiction. See *In re Smith & Wesson*, 757 F.2d 431, 435 (1st Cir. 1985) (finding that 28 U.S.C. § 1491(a)(3) did not divest district court of jurisdiction in pre-award construction claims); *Coco Bros. v. Pierce*, 741 F.2d 675, 676 (3d Cir. 1984) (holding that district court has jurisdiction in both pre- and post-award cases). Two other circuits have held that federal district courts lack jurisdiction over pre-award bid protests. See *J.P. Francis & Assocs. v. United States*, 902 F.2d 740, 742 (9th Cir. 1990) (finding that use of term "exclusive jurisdiction" is not ambiguous, despite contrary authority); *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1367 (Fed. Cir. 1983) (stating that statute limits equitable powers in pre-award stage to Claims Court); see also *International Mailing Sys. v. United States*, 3 Fed. R. Serv. 3d (Callaghan) 273 (D.D.C. 1984) (ordering case to be decided in Claims Court); *American Dist. Tel. v. Department of Energy*, 555 F. Supp. 1244, 1247 (D.D.C. 1983) (finding that court did have jurisdiction over post-award contract disputes); *Opal Mfg. Co. v. UMC Indus.*, 553 F. Supp. 131, 132-33 (D.D.C. 1982) (finding that court had no jurisdiction for pre-award contract cases); *London Fog Co. v. Defense Logistics Agency*, No. 4-82-1334 (D. Minn. Dec. 22, 1982) (finding language of statute unambiguous and refusing jurisdiction).

122. 41 U.S.C. §§ 601-613 (1988 & Supp. IV 1992).

123. 41 U.S.C. § 605.

124. Federal Acquisition Regulation, 48 C.F.R. § 33.201 (1993).

125. See, e.g., *Skelly & Loy v. United States*, 685 F.2d 414, 416 (Ct. Cl. 1982); *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 354-55 (Ct. Cl. 1982) (discussing Contract Disputes Act and its legislative history that claim be properly certified); *United States v. Black Hawk Masonic Temple Ass'n*, 798 F. Supp. 646, 648 (D. Colo. 1992) (noting disputes involving interpretation of lease terms are included within Contract Disputes Act).

attention until 1991, when the Federal Circuit issued two decisions that altered the claims litigation landscape. In *United States v. Grumman Aerospace Corp.*,¹²⁶ the Federal Circuit strictly interpreted the FAR provision defining who may properly certify a claim.¹²⁷ The court also held that "the certification requirement is a jurisdictional prerequisite that must be satisfied by the contractor before it may appeal the contracting officer's claim denial."¹²⁸

In that same year, the Federal Circuit added another procedural hurdle to prosecution of a claim under the CDA. In *Dawco Construction, Inc. v. United States*,¹²⁹ the court held that there must be a genuine dispute between the contractor and the Government before a justiciable claim exists under the CDA.¹³⁰ Given that the submission of a proper claim is a jurisdictional prerequisite under the Act,¹³¹ the boards and Court of Federal Claims are compelled to dismiss cases involving claims that do not meet the *Dawco* and *Grumman* requirements.

The Federal Circuit's interpretation of the CDA, manifested in *Dawco* and *Grumman*, has created more confusion than clarity in the claims litigation area. The following section reviews Federal Circuit case law interpreting the requirement for submission of a claim and recent legislative developments designed to remedy the confusion surrounding the contract disputes process.

1. Certification

For claims exceeding \$50,000, the CDA requires that the contractor "certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable."¹³² While the CDA provides the requisite claim certification language, it is silent about who is qualified to certify the claim. The

126. 927 F.2d 575 (Fed. Cir.), *cert. denied*, 112 S. Ct. 330 (1991).

127. *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 580-81 (Fed. Cir.) (rejecting argument that certifying senior company official should have both primary responsibility for execution of contract and physical presence at location of primary contract activity), *cert. denied*, 112 S. Ct. 330 (1991).

128. *Id.* at 579.

129. 930 F.2d 872 (Fed. Cir. 1991).

130. *Dawco Constr., Inc. v. United States*, 930 F.2d 872, 878 (Fed. Cir. 1991) (asserting that actual dispute must exist, not merely disagreement in negotiations that may ultimately lead to dispute).

131. *W.M. Schlosser Co. v. United States*, 705 F.2d 1336, 1337 (Fed. Cir. 1983) (agreeing that if claim is faulty, court has no jurisdiction).

132. 41 U.S.C. § 605(c)(1) (1988 & Supp. IV 1992).

FAR provides guidance in this area under § 33.207(c)(2), which requires that the certifying official be either: "(i) a senior company official in charge at the contractor's plant or location involved; or (ii) an officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs."¹³³

In 1982, the Court of Claims, the predecessor court to the Federal Circuit, held that proper certification is a jurisdictional prerequisite to an appeal from a contracting officer's final decision.¹³⁴ In later cases, the boards of contract appeals and the courts have also held that an improper or defective certification precludes consideration of a claim.¹³⁵ Nine years later, in *Grumman*, the Federal Circuit drastically narrowed the category of individuals who could certify claims on behalf of a corporation by strictly construing the requirements of § 33.207(c)(2).¹³⁶ In particular, the court held that the phrase, "overall responsibility for the conduct of the contractor's affairs," referred to corporate affairs in general, not just to a corporate department, such as financial affairs.¹³⁷ As a result of this narrowed category of acceptable certifiers, many corporate officials with financial responsibilities could no longer certify claims on behalf of their companies because they were not in a position of general corporate responsibility.

The Federal Circuit's rigid interpretation of the FAR in *Grumman* led to extensive litigation over certification and the dismissal of numerous appeals for lack of jurisdiction.¹³⁸ In response, Congress enacted the Federal Court Administration Act (FCAA)¹³⁹ in 1992, which amended the CDA to provide that a "defect in the certification shall not deprive a court or an agency board of contract appeals of

133. 48 C.F.R. § 33.207(c)(2) (1993).

134. *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 355 (Ct. Cl. 1982) (rejecting contractor's argument that its failure to certify its claim was correctable technical defect and holding that absence of certification was jurisdictional defect that could not be corrected on appeal).

135. See, e.g., *Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426, 1427-28 (Fed. Cir. 1989) (finding that proper certification is jurisdictional prerequisite); *Aiken Advanced Sys., Inc., ASBCA No. 39225, 90-1 B.C.A. (CCH) ¶ 22,590, at 113,371 (1990)* (asserting that board has consistently held that "[a] proper certification either repeats the CDA's wording verbatim or asserts its substantial equivalent").

136. *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 580-81 (Fed. Cir.) (finding that overall responsibility required is not satisfied by overall financial responsibility), *cert. denied*, 112 S. Ct. 330 (1991).

137. *Id.* at 581.

138. See, e.g., *Universal Coatings/Won Ill Co. v. United States*, 24 Cl. Ct. 241, 243 (1991); *Reliance Ins. Co. v. United States*, 23 Cl. Ct. 108 (1991); *KDH Corp. v. United States*, 23 Cl. Ct. 34, 42 (1991).

139. Pub. L. No. 102-572, 106 Stat. 4518 (codified at 41 U.S.C. § 605(c) (Supp. IV 1992)).

jurisdiction over that claim."¹⁴⁰ A contractor may now correct a defective certification of a post-FCAA claim at any time prior to entry of a final judgment by a court or board of contract appeals. In addition, the FCAA broadened the category of persons who may certify a claim to include "any person duly authorized to bind the contractor with respect to the claim."¹⁴¹ The new law also provides that interest on a claim begins to accrue from either the date when the contracting officer received the claim or the date of enactment of the FCAA, whichever is later.¹⁴²

While the FCAA has removed the jurisdictional impediments of faulty claim certification as well as the Government's incentive for litigating that issue, the statutory amendments are inapplicable to claims pending before the Court of Federal Claims or boards prior to October 29, 1992, the effective date of the Act.¹⁴³ For these claims, prior law is applicable. Accordingly, the Federal Circuit decided seven certification cases in 1993 under the CDA as it stood prior to the 1992 amendments.¹⁴⁴ In the first six of these cases, the court reversed Armed Services Board of Contract Appeals (ASBCA) decisions that the certifying official or the claim certification language did not meet the FAR requirements.¹⁴⁵ These cases appeared to represent a move away from the rigidity of *Grumman's* narrow categorization of acceptable certifiers, perhaps in response to widespread criticism of the decision and the subsequent enactment of the FCAA.

The most recent certification case, *Newport News Shipbuilding & Dry Dock Co. v. Garrett (Newport News II)*,¹⁴⁶ however, represented a stark departure from this trend. In *Newport News II*, the Federal Circuit not only forcefully reasserted the validity of the *Grumman* categorization, it issued a point-by-point rebuttal to all arguments raised against

140. 41 U.S.C. § 605(c).

141. *Id.*

142. *Id.* § 611.

143. As of September 30, 1992, the close of the last quarter before the effective date of the FCAA, there were 2198 cases docketed at the Armed Services Board of Contract Appeals (ASBCA) alone.

144. *Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1549 (Fed. Cir. 1993); *Santa Fe Eng'rs, Inc. v. Garrett*, 991 F.2d 1379, 1380-82 (Fed. Cir. 1993); *Hartford Accident & Indem. Co. v. Stone*, No. 91-1383, 1993 U.S. App. LEXIS 7469, at *18 (Fed. Cir. Apr. 5, 1993); *Fischbach & Moore Int'l Corp. v. Christopher*, 987 F.2d 759, 763-65 (Fed. Cir. 1993); *Johnson Controls World Servs., Inc. v. Garrett*, 987 F.2d 738, 741 (Fed. Cir. 1993); *Ingalls Shipbuilding, Inc. v. O'Keefe*, 986 F.2d 486, 487 (Fed. Cir. 1993); *Heyl & Patterson, Inc. v. O'Keefe*, 986 F.2d 480, 483-85 (Fed. Cir. 1993).

145. *Santa Fe Eng'rs*, 991 F.2d at 1380-82; *Hartford Accident & Indem. Co.*, No. 91-1383, 1993 U.S. App. LEXIS 7469, at *18; *Fischbach & Moore Int'l*, 987 F.2d at 763-65; *Johnson Controls*, 987 F.2d at 741; *Ingalls Shipbuilding*, 986 F.2d at 487; *Heyl & Patterson*, 986 F.2d at 483-85.

146. 6 F.3d 1547 (Fed. Cir. 1993).

Grumman and the jurisdictional impact of an improper certification.¹⁴⁷ In its lengthy opinion, the court took the unusual step of writing a separate section that responded in detail to the arguments raised in the dissent.¹⁴⁸

Newport News II involved a claim against the Navy, filed in 1986, for roughly \$8.5 million in purportedly allowable and allocable costs arising from the acquisition of Newport News Shipbuilding (NNS) by another company.¹⁴⁹ The NNS Controller, John B. Burling, Jr., who certified the claim, was an elected officer with oversight responsibilities for NNS' accounting and financial activities.¹⁵⁰ He was not, however, the top financial official, and he reported to NNS' director of finance, who, in turn, reported to NNS' vice president of finance.¹⁵¹ Although Burling had authority to sign invoices pertaining to government contracts, he lacked authorization to execute contract documents.¹⁵²

The Navy's contracting officer issued a final decision denying the company's claim,¹⁵³ and NNS appealed to the ASBCA. The board dismissed the appeal for lack of subject matter jurisdiction, finding that Burling was not qualified to certify the claim.¹⁵⁴ NNS then appealed to the Federal Circuit, which affirmed the dismissal.¹⁵⁵

Applying FAR § 33.207(c)(2), the Federal Circuit determined that Burling was not in charge at the contractor's plant or the location involved.¹⁵⁶ Rather, it found that Burling merely had responsibility for the company's accounting matters, which did not include primary responsibility for contract performance.¹⁵⁷ The court also dismissed as self-serving an affidavit that asserted that Burling was vested with unrestricted authority to certify claims; accordingly, the court found the affidavit insufficient to establish that Burling had primary responsibility for contract performance under FAR

147. *Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1550 (Fed. Cir. 1993) (asserting that court was required to decide appeal with *Grumman* as binding precedent).

148. *Id.* at 1556-64.

149. *Id.* at 1549.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Newport News Shipbuilding & Dry Dock Co.*, ASBCA No. 33244, 91-2 B.C.A. (CCH) ¶ 23,865, at 119,559, *aff'd*, 91-3 B.C.A. (CCH) ¶ 24,132, at 120,777 (1991), *aff'd*, 6 F.3d 1547 (Fed. Cir. 1993).

155. *Newport News II*, 6 F.3d at 1549 (affirming that NNS had failed to properly certify its claim).

156. *Id.* at 1555.

157. *Id.*

§ 33.207(c)(2)(ii).¹⁵⁸ Moreover, the court found that Burling worked in the accounting department at NNS' headquarters, which was not the primary location of contract performance for purposes of FAR § 33.207(c)(2)(i).¹⁵⁹

In finding that Burling was not a senior company official or general partner having overall responsibility for the conduct of the contractor's affairs, the court noted the importance of looking beyond formal titles and de facto assertions of authority.¹⁶⁰ The court determined that Burling's responsibility and authority as a corporate officer extended only to financial and accounting matters.¹⁶¹ Even in that area, the court noted, Burling was three levels down from the top. Consequently, the court concluded that Burling lacked authority to certify the NNS claim.¹⁶²

Before reaching its conclusion, the court disposed of several arguments that NNS had raised against dismissal of its claim.¹⁶³ First, NNS asked for an in banc review of *Grumman*.¹⁶⁴ The court refused, noting that its rules only permitted an in banc rehearing in cases "that require answers to a precedent-setting question of exceptional importance,"¹⁶⁵ or where there is a conflict between the panel opinion and Supreme Court or prior Federal Circuit precedent.¹⁶⁶ Finding neither, the court ruled that it was bound to follow precedent set in *Grumman*.¹⁶⁷

Next, NNS argued that the FAR requirements exceeded those specified in the CDA, and were thus invalid.¹⁶⁸ The court, rejecting this argument, repeated and reaffirmed its analysis in *Grumman*, and concluded that the FAR properly "filled in the gaps" left open in the CDA regarding who may certify claims.¹⁶⁹

NNS then argued that Congress did not authorize the Government to promulgate binding regulations affecting jurisdiction.¹⁷⁰ The court rejected this assertion and determined that Congress, under 41 U.S.C. § 607(h),¹⁷¹ authorized the Office of Federal Procurement

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 1550-53.

164. *Id.* at 1550.

165. *Id.*

166. *Id.* at 1550 n.1.

167. *Id.* at 1550.

168. *Id.*

169. *Id.* at 1551-52.

170. *Id.* at 1552.

171. Contract Disputes Act of 1978, § 8(h), 41 U.S.C. § 607(h) (1988).

Policy to "issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards."¹⁷² Citing *Grumman*, the court concluded that enforcement of FAR § 33.207(c)(2) was within the Office of Federal Procurement Policy's scope of authority.¹⁷³

NNS then argued that the contracting officer waived the certification requirement by issuing a final decision on the claim.¹⁷⁴ In response to this argument, the court rebuked NNS for failing to "come to grips with the extensive precedent holding that proper certification is a 'jurisdictional prerequisite.'"¹⁷⁵ The court then cited a litany of cases establishing that a proper certification is a jurisdictional prerequisite that may be raised at any stage of a proceeding.¹⁷⁶ The court therefore concluded that the decision of the contracting officer waiving certification was invalid, and that there was no claim on which NNS could base its waiver argument.¹⁷⁷

Finally, NNS argued that the ASBCA's application of *Grumman* was an "impermissible retroactive application of a new construction of FAR § 33.207(c)(2)."¹⁷⁸ NNS reasoned that a 1991 interpretation of a regulation should have no bearing on a 1986 certification.¹⁷⁹ In response, the court cited *James B. Beam Distilling Co. v. Georgia*,¹⁸⁰ in which the Supreme Court held that "it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so."¹⁸¹ Thus, because the *Grumman* standards were applied to *Grumman* itself, the court determined that the board properly applied *Grumman* to the NNS claim.¹⁸²

In summary, the court concluded that FAR § 33.207(c)(2) was a valid and proper interpretation of the CDA certification requirement, that an improper certification was indeed a jurisdictional defect, and that *Grumman* would apply retroactively notwithstanding the date of

172. *Newport News II*, 6 F.3d at 1552.

173. *Id.* (noting that "the regulation is clearly within the congressionally delegated authority of the Office of Federal Procurement Policy") (citing *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 578 (1991)).

174. *Id.*

175. *Id.* (citing 41 U.S.C. § 605(a) (1988)).

176. *Id.* at 1553 (citing *United States v. Grumman Aerospace Corp.*, 927 F.2d 575 (Fed. Cir. 1991); *Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426, 1428 (Fed. Cir. 1989); *Thoen v. United States*, 765 F.2d 1110 (Fed. Cir. 1985); *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 355 (Ct. Cl. 1982)).

177. *Id.* at 1553-54.

178. *Id.* at 1554.

179. *Id.*

180. 501 U.S. 529 (1991).

181. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991).

182. *Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1554 (Fed. Cir. 1993).

certification.¹⁸³ *Newport News II* is significant for two reasons. First, it is now apparent that the court does not intend to relax the inflexible standards of *Grumman*, despite the passage of the FCAA. Litigants in cases docketed prior to the FCAA's effective date should therefore expect a literal application of FAR § 33.207(c)(2) as established by *Grumman* and its progeny. It also appears that the court intends *Newport News II* to be the definitive word on arguments that could be raised against the application of *Grumman*.

The court decided six other certification cases in 1993.¹⁸⁴ All six cases were decided prior to *Newport News II*, and were somewhat diminished in significance by that decision. Nevertheless, four of these cases established principles that may be of some value to contractors faced with certification problems.

In the first case, *Ingalls Shipbuilding, Inc. v. O'Keefe*,¹⁸⁵ the Federal Circuit held that a company official with overall responsibility for contract performance was a proper certifying official, even though he was not in charge at the location of contract performance.¹⁸⁶ Ingalls held a contract to construct the LHD-1 Amphibious Assault Ship for the Navy.¹⁸⁷ The company submitted a claim certified by Mr. E.B. Robbins, corporate vice president, to the contracting officer.¹⁸⁸ Mr. Robbins' duties included the power to execute all contracts of a routine nature, and the authority to execute judicial process and pleadings.¹⁸⁹ He also supervised and directed the operations of the contract administration department, negotiated new contracts and claims, and supervised and directed the preparation of contract change estimates.¹⁹⁰ His office, as well as the office of the

183. In a lengthy dissent, Senior Judge Bennett argued that *Grumman* should be reheard in banc. *Id.* at 1564 (Bennett, J., dissenting). Citing the reactions of the bench, the bar, and industry associations, as well as the enactment of the FCAA, Judge Bennett called *Grumman* "flawed precedent" and Congress' action "the ultimate embarrassment to the court." *Id.* at 1565. Judge Bennett's careful and reasoned analysis of *Grumman* can hardly be duplicated in the context of this Article. Suffice it to say, it is unfortunate that his persuasive appeal to abandon *Grumman* fell upon a rather unreceptive audience. While the court was unpersuaded, it is instructive that the majority found it necessary to include in its opinion an equally lengthy rebuttal to all of the arguments raised by Judge Bennett.

184. *Santa Fe Eng'rs, Inc. v. Garrett*, 991 F.2d 1379 (Fed. Cir. 1993); *Hartford Accident & Indem. Co. v. Stone*, No. 91-1383, 1993 U.S. App. LEXIS 7469 (Fed. Cir. Apr. 5, 1993); *Fischbach & Moore Int'l Corp. v. Christopher*, 987 F.2d 759 (Fed. Cir. 1993); *Johnson Controls World Servs., Inc. v. Garrett*, 987 F.2d 738 (Fed. Cir. 1993); *Ingalls Shipbuilding, Inc. v. O'Keefe*, 986 F.2d 486 (Fed. Cir. 1993); *Heyl & Patterson, Inc. v. O'Keefe*, 986 F.2d 480 (Fed. Cir. 1993).

185. 986 F.2d 486 (Fed. Cir. 1993).

186. *Ingalls Shipbuilding, Inc. v. O'Keefe*, 986 F.2d 486, 489-90 (Fed. Cir. 1993).

187. *Id.* at 487.

188. *Id.*

189. *Id.*

190. *Id.*

president to whom he reported, was located at the shipyard where the LHD-1 was under construction.¹⁹¹

The board granted the Government's motion to dismiss for lack of subject matter jurisdiction because Mr. Robbins was not a proper official to certify the claim in accordance with the CDA and the FAR.¹⁹² More specifically, the ASBCA found that Mr. Robbins did not meet the "in charge" language of the CDA and the FAR, as interpreted by *Grumman*.¹⁹³ Among other factors, the board noted that Mr. Robbins was not in charge of the shipyard, and needed the approval of the company president to sign any contract claim over two million dollars.¹⁹⁴

On appeal, the Federal Circuit reversed on the certification issue and remanded the case to the board, holding that *Grumman* did not require the person certifying the claim to be in charge of the entire plant or location; he or she need only be in charge of the contract under which the claim arose.¹⁹⁵ In a footnote, the court observed that "as a kind of short hand, panels [of the board] may have referred to an individual as being 'in charge of the plant' as synonymous with 'in charge of the contract.'"¹⁹⁶ The court specifically noted that in cases where it had used the "in charge of the plant or location" language, it was merely describing factual evidence rather than establishing a legal standard.¹⁹⁷ The court then further examined Mr. Robbins' duties and concluded that the evidence established that he was in charge of the contract.¹⁹⁸

On the day it decided *Ingalls*, the Federal Circuit also decided *Heyl & Patterson, Inc. v. O'Keefe*.¹⁹⁹ In this case, the court held that the

191. *Id.*

192. *Ingalls Shipbuilding, Inc.*, ASBCA No. 38323, 91-2 B.C.A. (CCH) ¶ 23,904, at 119,754 (1991), *rev'd*, 986 F.2d 486 (Fed. Cir. 1993).

193. *Id.*

194. *Id.*

195. *Ingalls Shipbuilding, Inc. v. O'Keefe*, 986 F.2d 486, 489 (Fed. Cir. 1993).

196. *Id.* at 489 n.2.

197. *Id.*

198. The ASBCA utilized the *Ingalls* opinion to provide guidance in two subsequent cases. In *George Hyman Construction Co.*, ASBCA Nos. 44155, 44361, 44362, 93-2 B.C.A. (CCH) ¶ 25,870, at 128,718 (1993), the board used *Ingalls* to conclude that the FAR did not require a minimum presence at the contract site by the certifying official. Thus, an official satisfied the requirements of FAR § 33.207(c)(2)(i) if she visited the job site less than once a week but was present at "significant times." *Id.*

In *Westphal GmbH & Co. KG*, the board also followed the *Ingalls* rationale that the certifying official "need not be in charge of the plant or location, only of the contract." *Westphal GmbH & Co. KG*, ASBCA Nos. 39941, 39943, 40780, 40781, 40782, 93-2 B.C.A. (CCH) ¶ 25,898, at 128,830 (1993). The board in *Westphal* held that the certifying official was a senior company official for purposes of his authority to certify claims because as a branch manager, he had ultimate responsibility for all area projects. *Id.*

199. 986 F.2d 480 (Fed. Cir. 1993).

language used in a certification must only "substantially comply" with the language of the CDA.²⁰⁰

Heyl & Patterson entered into a contract with the Navy to design, fabricate, and install a derrick at the Norfolk Naval Shipyard.²⁰¹ After an exchange of letters regarding an equitable adjustment to the contract, Heyl & Patterson submitted a formal, certified claim to the contracting officer. The certification stated that "the data are accurate and complete," rather than "the *supporting* data are accurate and complete," as required under the CDA.²⁰²

The ASBCA dismissed this claim, holding that it was not properly certified.²⁰³ In particular, the board noted that the lack of the word "supporting" left it "wondering what data it is that is accurate and complete."²⁰⁴ Heyl & Patterson appealed to the Federal Circuit.

The Federal Circuit reversed the board and remanded for adjudication of the claim on the merits.²⁰⁵ The court stated that it had previously considered whether a certification had to use the exact language of the CDA in *United States v. General Electric Corp.*²⁰⁶ In *General Electric Corp.*, the court held that the CDA required only "substantial compliance" rather than literal compliance with the certification language.²⁰⁷ The court in *Heyl & Patterson* also cited precedent for the proposition that "certain 'magic words' [of the CDA certification] need not be used."²⁰⁸ The court concluded that the contractor's omission of the word "supporting" did not affect its substantial compliance with the certification requirement.²⁰⁹ In fact, the court noted that common sense indicates that the contractor would not have submitted the data had it not been supporting.²¹⁰ To infer that the certification was referring to any other data, the court noted, would be nonsensical.²¹¹ The court thus concluded that the board had jurisdiction over the claim.²¹²

200. Heyl & Patterson, Inc. v. O'Keefe, 986 F.2d 480, 483 (Fed. Cir. 1993).

201. *Id.* at 481.

202. *Id.* at 483.

203. Heyl & Patterson, Inc., ASBCA Nos. 40604, 42589, 91-2 B.C.A. (CCH) ¶ 23,972, at 119,987 (1991), *rev'd*, 986 F.2d 480 (Fed. Cir. 1993).

204. *Id.* at 119,986.

205. Heyl & Patterson, Inc. v. O'Keefe, 986 F.2d 480, 485 (Fed. Cir. 1993).

206. 727 F.2d 1567 (Fed. Cir. 1984).

207. *United States v. General Elec. Corp.*, 727 F.2d 1567, 1569 (Fed. Cir. 1984).

208. *Heyl & Patterson*, 986 F.2d at 483 (holding that contractor need not make explicit request for final decision and that request can be implied from context of submission) (citing *Transamerica Ins. Corp. v. United States*, 973 F.2d 1572, 1578 (Fed. Cir. 1992)).

209. *Id.* at 485.

210. *Id.* at 484.

211. *Id.*

212. *Id.* at 485. The ASBCA has considered the impact of *Heyl & Patterson* on its own precedent. In *Cox & Palmer Construction Corp.*, ASBCA No. 43438, 93-3 B.C.A. (CCH) ¶

Less than a month later, the Federal Circuit again reviewed an ASBCA decision on certification, this time focusing on both the qualifications of the certifying official and the sufficiency of the language used in the certification. In *Fischbach & Moore International Corp. v. Christopher*,²¹³ the court again held that the actual certifying language need only substantially comply with the wording in the CDA and the FAR,²¹⁴ and found that an executive vice president is presumed to have the "overall responsibility" for purposes of the second prong of the FAR requirement.²¹⁵

Fischbach and Moore International Corporation (FMIC) was awarded a contract to install classified security systems for the Department of State in certain buildings in China.²¹⁶ The Government never issued a notice to proceed, and eventually terminated the contract for convenience.²¹⁷ Mr. Charles Dirik, FMIC's executive vice president, certified a claim to the contracting officer for termination costs.²¹⁸ In the certification, he used the language "to the best of my understanding and belief" rather than the words "knowledge and belief."²¹⁹ The contracting officer failed to issue a final decision on the claim, and FMIC appealed to the ASBCA.²²⁰

The ASBCA, sua sponte, ordered FMIC to submit evidence that the certification requirement had been met.²²¹ FMIC's submittal included a copy of the corporation's bylaws and an affidavit from Mr. Dirik stating that he was the most senior FMIC official with direct

26,005, at 129,270 (1993), the board found its approach in three earlier cases to be contrary to that in *Heyl & Patterson*. *Id.* (holding contractor claim must repeat CDA wording verbatim or assert CDA's substantial equivalent and finding defective certification because contractor failed to include word "all" in its statement that data submitted to Government was accurate and complete to best of contractor's knowledge) (citing *Triasco Corp.*, ASBCA No. 42465, 91-2 B.C.A. (CCH) ¶ 23,969, at 119,977-78 (1991); *Gauntt Constr. Co.*, ASBCA No. 33323, 87-3 B.C.A. (CCH) ¶ 20,221, at 102,412 (1987) (stating that contractor's use of words "all data used" instead of "the supporting data" rendered contractor's certification unacceptable because contractor's wording restricts certification to "unidentified" data that contractor chose to use); *Duininck Bros.*, ASBCA No. 42680, 91-3 B.C.A. (CCH) ¶ 24,215, at 121,119 (1991) (concluding that contractor's use of words "the following is supporting data" rendered certification ineffective because contractor must certify "all" supporting data, not just data contractor chose to submit)). Accordingly, the court's decision in *Cox & Palmer* renders these cases nonprecedential. *Id.*

213. 987 F.2d 759 (Fed. Cir. 1993).

214. *Fischbach & Moore Int'l Corp. v. Christopher*, 987 F.2d 759, 763 (Fed. Cir. 1993).

215. *Id.*; see also FAR, 48 C.F.R. § 33.207(c)(2)(ii) (1993) (stating that "an officer . . . having overall responsibility for the conduct of the contractor's affairs" may certify claim).

216. *Fischbach & Moore*, 987 F.2d at 760.

217. *Id.*

218. *Id.*

219. *Id.* at 762.

220. *Id.* at 760.

221. *Id.* at 760-61.

knowledge of the China project, and was the most senior official with overall responsibility for the company's affairs on the project.²²²

The ASBCA nonetheless dismissed FMIC's claim for lack of jurisdiction.²²³ The board first held that the use of the word "understanding" instead of "knowledge" rendered the certification fatally defective because the word "understand" was not the substantial equivalent of "knowledge."²²⁴ The board then held that Mr. Dirik, as the person certifying the claim for his company, did not satisfy either prong of the FAR § 33.207(c)(2).²²⁵ For the first prong, the board stated that the company did not submit any evidence as to whom was in charge at the site.²²⁶ For the second prong, the board found that the affidavit did not indicate that Mr. Dirik had "overall responsibility for the contractor's affairs' generally."²²⁷ Upon dismissal, FMIC appealed.²²⁸

Again, the Federal Circuit reversed the ASBCA.²²⁹ With respect to the certification language of the FMIC claim, the court held that under *United States v. General Electric Corp.*,²³⁰ substantial compliance with the language of the CDA is sufficient.²³¹ Furthermore, the court found that the word "understanding" was actually broader than "knowledge,"²³² referring to the Government's attempted distinction

222. *Id.* at 761.

223. *Fischbach & Moore Int'l Corp.*, ASBCA No. 42170, 92-1 B.C.A. (CCH) ¶ 24,511, at 122,330 (1991).

224. *Id.* at 122,332. Other boards of contract appeals have apparently been more lenient than the ASBCA in their acceptance of language that does not "parrot" the FAR. In *Maxima Corp.*, ENGBCA No. C-9208139, B.C.A. (CCH) (1993) (unreported), the Department of Energy Board of Contract Appeals found that a certification that stated that the *company* certified the information was sufficient in that it substantially complied with the FAR. *Id.* at 6-9. In *P.J. Dick Inc. v. General Services Administration*, GSBGA Nos. 11847, 11860, 93-1 B.C.A. (CCH) ¶ 25,411, at 126,603 (1992), the GSBGA approved certification language that did not exactly match the FAR, noting that other BCAs were "extremely restrictive" in this area. *Id.* at 126,604. In contrast, the ASBCA rejected similar certification language that was expressly approved by the contracting officer in *Bontke Bros. Construction Co.*, ASBCA No. 39437, 92-1 B.C.A. (CCH) ¶ 24,611, at 122,770 (1991) (holding that contractor's statement that claim was "accurate and complete to the best of contractor's knowledge" rendered certification defective because contractor failed to certify that supporting data were accurate and complete).

225. *Fischbach & Moore*, 92-1 B.C.A. (CCH) at 122,333.

226. *Id.*

227. *Id.*

228. *Id.* Apparently the Government and the ASBCA were unable to heed the admonition in *Heyl & Patterson* that "the government is not well-advised to challenge every deviation, no matter how slight, meaningless, or harmless." *Heyl & Patterson, Inc. v. O'Keefe*, 986 F.2d 480, 483 n.1 (Fed. Cir. 1993).

229. *Fischbach & Moore Int'l Corp. v. Christopher*, 987 F.2d 759, 763 (Fed. Cir. 1993).

230. 727 F.2d 1567, 1569 (Fed. Cir. 1984) (indicating that certification statement, which was in substantial compliance with CDA, provided board with jurisdiction over dispute).

231. *Fischbach & Moore*, 987 F.2d at 763.

232. *Id.*

as "hyper-technical" and "mere semantics."²³³ The court also rejected the Government's assertion that the certifying official had to have personal knowledge of the supporting data in the claim.²³⁴ According to the court, the phrase "to the best of my knowledge and belief," as stated in the FAR, signifies indirect, rather than direct, knowledge.²³⁵

Regarding the FAR requirements for a certifying official, the Federal Circuit held, in accordance with *United States v. Newport News Shipbuilding & Dry Dock Co. (Newport News I)*,²³⁶ that an executive vice president is presumed to have the overall responsibility for the conduct of the contractor's affairs under FAR § 33.207(c)(2)(ii).²³⁷ Rather than focusing on the evidentiary record to ascertain Mr. Dirik's exact duties, the court found that the Government failed to rebut sufficiently the presumption of overall responsibility accorded Mr. Dirik by virtue of his corporate title.²³⁸ Thus, the court reaffirmed *Newport News I*,²³⁹ concluding that the Government has the burden to submit specific evidence that a given executive vice president lacks the requisite responsibility to make a certification.²⁴⁰

Newport News I and *Fischbach & Moore* together create a presumption in favor of the contractor based solely on the title of the certifying official.²⁴¹ The burden then shifts to the Government to present specific evidence in rebuttal.²⁴² In fact, the court in *Fischbach & Moore* extended the application of the presumption established in *Newport News I*. In *Newport News I*, the Government raised the certification issue in response to the contractor's summary judgment motion rather than waiting until the board raised the issue sua sponte.²⁴³ Thus, in *Newport News I*, the burden shifted to the

233. *Id.*

234. *Id.* at 762.

235. *Id.*

236. 933 F.2d 996 (Fed. Cir. 1991).

237. *Fischbach & Moore*, 987 F.2d at 764 (indicating that in order to show that high-ranking corporate official did not have authority to certify claim, Government must come forth with evidence or substantial allegations showing lack of authority); see also *United States v. Newport News Shipbuilding & Dry Dock Co.*, 933 F.2d 996, 999 n.3 (Fed. Cir. 1991) (finding that corporate executive vice president, by virtue of title, has requisite authority to certify claim); FAR, 48 C.F.R. § 33.207(c) (1993).

238. *Fischbach & Moore*, 987 F.2d at 764-65.

239. See *id.* at 765 (citing *Newport News I* as controlling authority).

240. *Id.* at 764.

241. See *id.* (citing *Newport News I* for proposition that certification by corporate officer indicates corporate assertion that officer has authority to act in situations where corporate officer's title is not inconsistent with his action).

242. See *id.* (stating that to show corporate official did not have authority to certify claim, Government must present evidence indicating lack of authority).

243. *United States v. Newport News Shipbuilding & Dry Dock Co.*, 933 F.2d 996, 996 (Fed. Cir. 1991).

Government to create "a genuine issue of material fact so as to preclude summary judgment."²⁴⁴ In *Fischbach & Moore*, the court itself shifted the burden to the Government after the contractor made a prima facie showing that Mr. Dirik was a certifying official.²⁴⁵

The court in *Fischbach & Moore*, however, fell short of delineating which corporate titles will pass the presumption test.²⁴⁶ In *Grumman*, the court held that a senior vice president and treasurer was not a proper certifying official.²⁴⁷ There, the court stated that "a CEO or one of equivalent status would satisfy the [requirement]."²⁴⁸ While the court in *Fischbach & Moore* cited a CEO as an example of an obviously proper certifying official,²⁴⁹ it took no position on the qualifications of any lower job titles.

Finally, in *Hartford Accident & Indemnity Co. v. Stone*,²⁵⁰ the Federal Circuit again reversed the ASBCA, holding that an insurance company executive responsible for the completion of a construction contract was a proper certifying official.²⁵¹ In *Hartford Accident*, Juno Construction Corporation entered into a contract with the Department of the Army to build an Armed Forces Reserve Center in New Jersey.²⁵² As Juno's surety on the project, Hartford would assume the remaining rights and obligations under the contract in the event that Juno defaulted.²⁵³ Mr. Stephen Pazar of Hartford supervised project performance on the Juno contract.²⁵⁴

A year after project completion, Mr. Pazar certified a claim on behalf of Hartford for money that the Government had allegedly overpaid to Juno.²⁵⁵ The contracting officer denied the claim and

244. *Id.* at 999.

245. See *Fischbach & Moore*, 987 F.2d at 764-65 (stating that Government did not meet its burden of proof concerning lack of authority in case where corporation relied solely on title of executive vice president to establish official's authority to act).

246. *Id.* at 765 (stating only that corporate title of executive vice president fails presumption test).

247. *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 580-81 (Fed. Cir.) (stating that officers whose responsibilities are limited to financial affairs of corporation are not proper certifying officials), *cert. denied*, 112 S. Ct. 330 (1991); see also *Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426, 1429 (Fed. Cir. 1989) (holding that official whose sole responsibility concerned contractor's financial affairs was not proper certifying official).

248. *Grumman*, 927 F.2d at 581.

249. *Fischbach & Moore*, 987 F.2d at 764.

250. No. 91-1383, 1993 U.S. App. LEXIS 7469 (Fed. Cir. Apr. 5, 1993).

251. *Hartford Accident & Indem. Co. v. Stone*, No. 91-1383, 1993 U.S. App. LEXIS 7469, at *12 (Fed. Cir. Apr. 5, 1993).

252. *Id.* at *2.

253. *Id.*

254. *Id.*

255. *Id.* at *3.

Hartford then appealed to the ASBCA.²⁵⁶ As it had done in prior cases, the board raised the issue of proper certification sua sponte.²⁵⁷ Hartford submitted evidence referencing Mr. Pazar's sole responsibility for the completion of the contract, and that he was a "senior company official."²⁵⁸ The board found this evidence insufficient to prove that Mr. Pazar was a proper certifying official because the record did not establish where his position fell within the overall company hierarchy.²⁵⁹ The board noted specifically that none of the proffered evidence contained "an unqualified statement that Mr. Pazar is a company official."²⁶⁰ Thus, the board dismissed Hartford's claim for lack of jurisdiction whereupon Hartford appealed.²⁶¹

The Federal Circuit, reversing the board,²⁶² distinguished the case from *Grumman*.²⁶³ Contrary to the ASBCA, the court found that Mr. Pazar was indeed in charge at the site.²⁶⁴ According to the court, the official need not be the site supervisor in charge of the actual construction work;²⁶⁵ that person, in many cases, would be a subcontractor.²⁶⁶ Consequently, the court reasoned that a qualified certifying official must simply be the individual who has responsibility for the activities at the site on behalf of the contractor.²⁶⁷

As for the requirement that the certifying official be a senior company official, the *Hartford* court rejected the board's argument that Hartford had made no "unqualified statement that Mr. Pazar is a senior company official."²⁶⁸ The court reviewed the statements made by Hartford and concluded that, within the context of a surety taking over a construction project, the company had described Mr. Pazar as a senior official in charge at the location.²⁶⁹ Furthermore, the Federal Circuit found that neither the Government nor the

256. *Id.* (stating that contracting officer denied claim because claim was not properly certified).

257. *Id.* at *4.

258. *Id.*

259. *Id.* at *6.

260. *Id.*

261. *Id.*

262. *Id.* at *12.

263. *Id.* at *10.

264. *Id.* at *12.

265. *Id.*

266. *Id.* at *11-12.

267. *Id.*

268. *Id.*

269. *Id.* at *11.

ASBCA cited any evidence in conflict with Hartford's assertions.²⁷⁰ Thus, the court found that Mr. Pazar was a proper certifying official.

Two other Federal Circuit decisions addressing certification issues deserve brief mention. In *Johnson Controls World Services, Inc. v. Garrett*,²⁷¹ the court confirmed that neither the position in the corporate hierarchy of the person certifying nor the fact that another officer has "overall responsibility" is alone determinative of whether that individual may certify contract claims.²⁷² These facts are only criteria to be taken into account in determining whether an officer has overall responsibility under FAR § 33.207(c)(2).²⁷³ Finally, in *Sadelmi Joint Venture v. Dalton*,²⁷⁴ the court held that a certification signed by a senior official of one member of a joint venture met the CDA requirements when each member of the joint venture was jointly and severally liable for the obligations of the venture.²⁷⁵

Taken together, the Federal Circuit's 1993 certification decisions signal a migration by some members of the court away from the rigid requirements of *Grumman*. Whether the court took this approach on its own, or in response to the criticisms that led to the FCAA amendments,²⁷⁶ the result is the same. First, the certifying official need only be in charge of the contract, not the plant or location of contract performance;²⁷⁷ second, corporate reporting relationships and the sharing of responsibilities are simply factors the tribunal should take into account in determining the qualification of a certifying official;²⁷⁸ third, a presumption exists that an executive vice president is a proper certifying official;²⁷⁹ fourth, the substantial

270. *Id.* at *12-13. Without so stating, the court appears to have used the presumption approach of *Newport News I* and *Fischbach & Moore*. That is, the contractor does not need to present evidence supporting its assertions of proper certification qualifications; rather the burden is on the Government to present evidence rebutting the assertions. See *supra* notes 236-49 and accompanying text (discussing presumption enunciated in *Newport News I* and *Fischbach & Moore*).

271. 987 F.2d 738 (Fed. Cir. 1993).

272. *Johnson Controls World Servs., Inc. v. Garrett*, 987 F.2d 738, 741-42 (Fed. Cir. 1993).

273. *Id.* at 741. The court noted that more than one person in a company can have overall responsibility for corporate affairs so as to qualify as a certifying official. *Id.* The court also made it clear that a person can satisfy the "overall responsibility" even though he or she has to report to other individuals. See *id.* at 741-42 (noting that regulation refers to "an officer" having overall responsibility as opposed to "the officer" having overall responsibility).

274. 5 F.3d 510 (Fed. Cir. 1993).

275. *Sadelmi Joint Venture v. Dalton*, 5 F.3d 510, 511-12 (Fed. Cir. 1993).

276. See Lynda T. O'Sullivan & Mark P. Willard, *Government Contracts: 1991 Analysis and Summary*, 41 AM. U. L. REV. 911, 915-17 (1992) (analyzing *Grumman* dissent and reviewing criticisms of *Grumman* decision, including proposals to amend FAR certification requirements).

277. *Ingalls Shipbuilding, Inc. v. O'Keefe*, 986 F.2d 486, 489-90 (Fed. Cir. 1993).

278. *Johnson Controls World Servs., Inc. v. Garrett*, 987 F.2d 738, 741 (Fed. Cir. 1993).

279. *Fischbach & Moore Int'l Corp. v. Christopher*, 987 F.2d 759, 764-65 (Fed. Cir. 1993); *United States v. Newport News Shipbuilding & Dry Dock Co.*, 933 F.2d 996, 999 n.3 (Fed. Cir. 1991).

equivalent of the words used in the FAR is sufficient for proper certification—the contractor need not use “magic words.”²⁸⁰ Additionally, the responsibilities of the certifying official must be reviewed in the context of the setting of the contract.²⁸¹ Finally, the presumption in favor of the contractor that the certifying agent was qualified, announced in *Fischbach & Moore* and *Newport News I*, may go beyond the company titles and may apply in cases where the contractor merely asserts that the certifying official meets the requirements, without submitting supporting evidence.²⁸² The latest Federal Circuit decision in this area, *Newport News II*, however, indicates the preference of at least some of the Federal Circuit judges to preserve the status quo established in *Grumman*.²⁸³

As stated previously, except as to cases pending before the Court of Federal Claims or the boards prior to October 29, 1992,²⁸⁴ these certification cases most likely were rendered moot with the passage of the FCAA. The Act, however, left some issues unanswered. For example, the FCAA states that in the case of a defective certification, “the court or agency board shall require a defective certification to be corrected.”²⁸⁵ What happens if an error is not discovered before final action, or the contractor cannot or will not correct the certification?²⁸⁶ Another issue concerns when and how an official has been

280. *Fischbach & Moore*, 987 F.2d at 763.

281. *Hartford Accident & Indem. Co. v. Stone*, No. 91-1383, 1993 U.S. App. LEXIS 7469, at *10-12 (Fed. Cir. Apr. 5, 1993).

282. *Id.* at *11-12.

283. See *Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1554-56 (Fed. Cir. 1993) (holding that official who certified claim was not qualified to do so because he only had responsibility for contractor's financial affairs and accounting activities and did not have responsibility for contract performance and therefore could not properly certify claim under CDA).

284. The Government evidently has no intention of giving up on the advantage it held prior to the passage of the FCAA. In *Engineered Maintenance Services*, ASBCA No. 45261, 94-1 B.C.A. (CCH) ¶ 26,292, at 130,780 (Aug. 16, 1993), the Government sought to dismiss an appeal of a defectively certified claim because the appeal was dated October 28, 1992, but postmarked on October 29, 1992. The Government asserted that because it was possible that the appeal was in the control of the Postal Service prior to the effective date of the FCAA, the board should apply the old law. *Id.*

285. FCAA, Pub. L. No. 102-572, § 907(a), 106 Stat. 4506, 4518 (to be codified at 41 U.S.C. § 605(c)).

286. The House Report on P.L. 102-572 suggests that the term “technically defective” was to be used to describe certification defects that could be corrected before final action. See H.R. REP. NO. 1006, 102d Cong., 2d Sess. 28 (1992), reprinted in 1992 U.S.C.A.N. 3921, 3937 (stating that to avoid needless repetition of administrative and judicial processes, contractor should be able to amend certification during litigation where certification defect was not due to bad faith, fraud, or reckless and intentional disregard of statutory certification requirements). The term, however, is not reflected in the enacted statute. The obvious issue then is whether a substantive defect can simply be corrected by the contractor before final disposition of the claim.

"duly authorized."²⁸⁷ These and other issues promise that certification will not fade away as a problem for contractors.

2. *The existence of a dispute*

Few decisions of the Federal Circuit have created as much controversy and confusion as *Dawco Construction, Inc.*²⁸⁸ As stated previously, the Federal Circuit in *Dawco* held that there must be a dispute between the contractor and the Government before the contractor may advance a claim cognizable under the CDA.²⁸⁹ After *Dawco*, the courts and boards generally concluded that the parties must first come to something of an impasse before the demand of the contractor may be transformed into a CDA claim.²⁹⁰

In 1992, however, the Federal Circuit held in *Transamerica Insurance Corp. v. United States*²⁹¹ that the courts and the boards should apply a "common sense" analysis in determining the existence of a dispute.²⁹² In this regard, the *Transamerica* decision appeared to signal a departure from the rigid application of the *Dawco* "dispute" requirement.²⁹³ In 1993, the Federal Circuit addressed the *Dawco* requirement on two occasions.

In the first case, *Heyl & Patterson, Inc. v. O'Keefe*,²⁹⁴ the court appeared to follow the *Transamerica* reasoning, moving further away from a strict interpretation of *Dawco* that negotiations be complete before the contractor may advance a claim.²⁹⁵ In *Santa Fe Engineers*,

287. The House Report on P.L. 102-572 provides examples of "technically defective" certifications, such as "certification by the wrong or incorrect representative of the contractor (when the person making the certification was authorized by the contractor to certify on its behalf)." *Id.* One must question, however, how such a certification can be defective if the Act permits certification by individuals authorized by the contractor. Clearly, the boards and courts will eventually be faced with the issue of whether contractor designation of certifying individuals alone is sufficient to satisfy the amended CDA.

288. 930 F.2d 872 (Fed. Cir. 1991).

289. See *Dawco Constr., Inc. v. United States*, 930 F.2d 872, 878 (Fed. Cir. 1991).

290. See, e.g., *Facilities Sys. Eng'g Corp. v. United States*, 25 Cl. Ct. 761, 765 (1992) ("For purposes of the CDA, a dispute arises only when the parties have reached an impasse in their negotiations.") (citing *Dawco Constr.*, 930 F.2d at 879); *Essex Electro Eng'rs, Inc. v. United States*, 22 Cl. Ct. 757, 765 (1991) ("[T]he parties must have reached something approaching impasse . . . before a claim can arise."), *aff'd*, 960 F.2d 1576 (Fed. Cir.), *cert. denied*, 113 S. Ct. 408 (1992).

291. 973 F.2d 1572 (Fed. Cir. 1992).

292. See *Transamerica Ins. Corp. v. United States*, 973 F.2d 1572, 1579 (Fed. Cir. 1992) (applying common sense analysis to question of whether dispute exists, and holding that "[t]here is no necessary inconsistency between the existence of a valid CDA claim and an expressed desire to continue to mutually work toward a claim's resolution").

293. See *Zupa & Siebel*, *supra* note 2, at 114-15 (criticizing rigid *Dawco* dispute requirements because of potential to create confusion and uncertainty in area of claim certification).

294. 986 F.2d 480 (Fed. Cir. 1993).

295. See *Heyl & Patterson, Inc. v. O'Keefe*, 986 F.2d 480, 486 (Fed. Cir. 1993) (finding that negotiations between contractor and Government will not preclude existence of claim in dispute under CDA).

Inc. v. Garrett,²⁹⁶ however, the second case, the court was unwilling to extend the *Transamerica* analysis to any stage of the proceedings prior to a breakdown in negotiations.²⁹⁷

While its impact on jurisdiction was not immediately recognized, the Government has developed the "dispute" requirement established in *Dawco* into a highly effective tool for dismissing claims and prolonging litigation.²⁹⁸ With the certification issue tentatively resolved by the FCAA amendments to the CDA, questions arising from *Dawco* as to whether a dispute exists will likely become one of the most common jurisdictional controversies in the contract disputes process.

The Federal Circuit further refined the *Dawco* rule in *Heyl & Patterson, Inc. v. O'Keefe*.²⁹⁹ There, the court held that, while it is not necessarily inconsistent with the CDA to continue to negotiate a valid claim towards a resolution, the contractor must explicitly or implicitly request a final decision on the claim before advancing a cognizable dispute claim under the CDA.³⁰⁰

In this case, the contractor, Heyl & Patterson, entered into a contract with the Department of the Navy to design, fabricate, and install a derrick at the Norfolk Navy Shipyard.³⁰¹ On November 3, 1987, Heyl & Patterson submitted to the contracting officer a request for an equitable adjustment which was not certified and contained no request for a final decision.³⁰² Instead, the letter asked only for a "preliminary position" and offered to engage in negotiations.³⁰³ Heyl & Patterson submitted a second letter providing additional cost details on the claim, decreasing the amount requested, and stating that it would submit a "formal request" after a proposed meeting with

296. 991 F.2d 1579 (Fed. Cir. 1993).

297. *Santa Fe Eng'rs, Inc. v. Garrett*, 991 F.2d 1579, 1582 (Fed. Cir. 1993) (holding that no claim in dispute existed at time contractor sent proposal to Navy for sole reason that no Navy representative had denied contractor's right to compensation). The court distinguished the *Transamerica* facts because in that case there was positive proof that the contractor's claim was in dispute at the time it was submitted to the government contract officer. *Id.* at 1584. Therefore, the court in *Santa Fe* is apparently refusing to extend the "common sense" dispute analysis from *Transamerica* to any point in the contractual relationship before the Government denies the contractor's right to compensation.

298. See Zupa & Siebel, *supra* note 2, at 1123 (asserting that "cases that cite *Dawco* are too numerous"); see also ABA Section Urging New FAR Definition to State that Matter Need Not Be "In Dispute," 59 Fed. Cont. Rep. (BNA) 181-82 (Feb. 15, 1993) (discussing ABA's suggested revisions to FAR intended to address decisions like *Dawco* and eliminate "in dispute" requirement for government contract claims).

299. 986 F.2d 480 (Fed. Cir. 1993).

300. See Heyl & Patterson, Inc. v. O'Keefe, 986 F.2d 480, 484-86 (Fed. Cir. 1993).

301. *Id.* at 481.

302. *Id.* at 481-82.

303. *Id.* at 481.

the contracting officer.³⁰⁴ Heyl & Patterson sent a third letter containing a certification and stating that the company was "anxious to proceed with the settlement."³⁰⁵ The letter offered to provide the Navy with more information if necessary.³⁰⁶

After the contracting officer denied the claim, Heyl & Patterson appealed to the ASBCA.³⁰⁷ The board dismissed the appeal for lack of jurisdiction, concluding that the claimed amount was not in dispute at the time Heyl & Patterson submitted each of the three letters because the parties were still conducting negotiations.³⁰⁸ The board followed the holdings of *Essex Electro Engineers, Inc. v. United States*³⁰⁹ and *Sun Eagle Corp. v. United States*³¹⁰ and concluded that Heyl & Patterson's use of the word "claim" coupled with its transmission of a certification did not transform the cost submission into a claim.³¹¹ Accordingly, the appeal was dismissed.³¹²

Heyl & Patterson appealed to the Federal Circuit. The court agreed with the board that the three letters indicated that the parties were negotiating and further noted that none of the three letters either explicitly or implicitly requested a final decision.³¹³ The court therefore affirmed the decision of the board that the Heyl & Patterson submission was not the subject of a dispute and therefore did not constitute a CDA claim.³¹⁴

Significantly, the court in *Heyl & Patterson* attempted to distance itself from the strict interpretations of *Dawco* expressed in the *Essex Electro* and *Sun Eagle* cases cited by the board.³¹⁵ Rather than agreeing with the board that negotiations must clearly end for a dispute to exist, the court simply concluded that the board's factual findings were not arbitrary or capricious, nor were they unsupported

304. *Id.* at 482, 485.

305. *Id.* at 481-82.

306. *Id.*

307. Heyl & Patterson, Inc., ASBCA Nos. 40604, 42589, 91-3 B.C.A. (CCH) ¶ 24,233, at 121,995 (1991).

308. *Id.* at 121,996.

309. 22 Cl. Ct. 757, 765 (1991) (holding that parties must be unable to resolve dispute amongst themselves before there can be claim), *aff'd*, 960 F.2d 1576 (Fed. Cir.), *cert. denied*, 113 S. Ct. 408 (1992).

310. 23 Cl. Ct. 465, 473 (1991) ("[A] claim only exists when the parties have clearly abandoned negotiations . . ."), *modified in part*, 1991 U.S. Cl. Ct. LEXIS 388 (Aug. 7, 1991).

311. *Heyl & Patterson*, 986 F.2d at 482.

312. *Id.*

313. *Id.* at 485-86. The court explained that a request for a final decision does not require the use of certain "magic words," but can be implied from the context of the submission. *Id.* at 483.

314. *Id.* at 486.

315. See *id.* at 485 (indicating that existence of negotiations is not necessarily inconsistent with claim in dispute under CDA).

by substantial evidence.³¹⁶ The court then attempted to bridge the gap between *Dawco* and *Transamerica*. Citing *Transamerica*, the court agreed that "[t]here is no necessary inconsistency between the existence of a valid CDA claim and an expressed desire to continue to mutually work toward a claim's resolution."³¹⁷ Rather than deciding whether the negotiations in *Heyl & Patterson* precluded the existence of a claim, the court found that the lack of either an explicit or implicit request for a final decision defeated the presence of a claim.³¹⁸

In *Santa Fe Engineers, Inc. v. Garrett*,³¹⁹ the Federal Circuit retroactively applied the rule enunciated in *Dawco*.³²⁰ Santa Fe Engineers and the Navy entered into a contract for the construction of a space shuttle facility in California.³²¹ After discovering that soil conditions were unsuitable and would prevent the construction of a ramp, the Navy issued a stop-work order and then requested that Santa Fe submit an adjusted cost proposal reflecting a downward equitable adjustment in the contract price for the deletion of the ramp from the scope of work.³²² In response, Santa Fe submitted a cost proposal including a request for a time extension.³²³ Santa Fe also informed the Navy that it considered its cost proposal to be a claim and proceeded to certify it in compliance with the CDA.³²⁴

Over the next two and one-half years, Santa Fe and the Navy engaged in meetings and correspondence in an attempt to effect the proposed changes.³²⁵ During the course of this exchange, the Government requested, and Santa Fe provided, additional information in support of the cost proposal.³²⁶ Santa Fe also requested additional meetings with the Navy in order to continue negotiations and, at one point, reduced the amount of time in its extension request.³²⁷

Finally, approximately two and one-half years after Santa Fe had submitted its cost proposal, the Navy informed the contractor that it found insufficient justification for a time extension.³²⁸ At that

316. *Id.*

317. *Id.* at 486.

318. *Id.*

319. 991 F.2d 1579 (Fed. Cir. 1993).

320. *Santa Fe Eng'rs, Inc. v. Garrett*, 991 F.2d 1579, 1582 (Fed. Cir. 1993).

321. *Id.* at 1580.

322. *Id.*

323. *Id.*

324. *Id.* at 1581.

325. *Id.*

326. *Id.*

327. *Id.* at 1582-83.

328. *Id.* Santa Fe submitted its original cost proposal in August 1984 and the Navy rejected the time extension in March 1987. *Id.*

point, Santa Fe wrote to the Navy and asked the contracting officer to issue a written final decision concerning the cost proposal claim.³²⁹ Santa Fe did not attach a claim certification to this letter.³³⁰ The contracting officer denied the claim, and Santa Fe appealed to the ASBCA.³³¹

The ASBCA dismissed the Santa Fe appeal, holding that at the time Santa Fe submitted its certified claim, the parties were not in dispute.³³² Although the board did find that a dispute existed as of Santa Fe's last letter to the Navy, it noted that the letter was not accompanied by a claim certification and therefore could not be considered a claim.³³³

Santa Fe appealed this decision to the Federal Circuit. The court affirmed, finding that during the two and one-half year exchange, the Navy had never actually denied Santa Fe's right to compensation.³³⁴ Rather, as evidenced by the meetings and correspondence, the Navy was in the process of collecting more information from and negotiating with Santa Fe in order to reach a decision.³³⁵ As the court noted, it was not until the Navy notified Santa Fe that there was insufficient justification for a time extension that Santa Fe responded with a request for a final written decision.³³⁶ At this point, the court stated, the parties reached an "impasse" and a disputed claim arose.³³⁷

The Federal Circuit also agreed with the ASBCA that Santa Fe's request for a final decision was not properly certified.³³⁸ Santa Fe had not executed a new certification when it requested the final decision, and the previous certification was ineffective because it did not relate to a then-existing dispute.³³⁹ Even if the certification was somehow valid, the court reasoned, Santa Fe had subsequently provided the Navy with additional data which was never certified.³⁴⁰

The court also distinguished *Santa Fe* facts from the *Transamerica* decision, finding in *Transamerica*, unlike in *Santa Fe*, a preexisting

329. *Id.*

330. *Id.* at 1581.

331. *Id.*

332. *Id.* at 1583.

333. *Id.*

334. *Id.* at 1582, 1595.

335. *Id.* at 1582-83.

336. *Id.* at 1583.

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* at 1583-84.

dispute when the contractor requested further negotiations.³⁴¹ According to the court, *Transamerica* stood for the proposition that a request for further negotiations does not vitiate an already cognizable CDA dispute.³⁴² Because Santa Fe certified its submission prior to the onset of a dispute, it did not advance a claim under the CDA.³⁴³

Heyl & Patterson and *Santa Fe* left unresolved the debate over whether the "impasse" analysis of *Dawco* and its progeny should prevail over the "common sense analysis" of *Transamerica*. Although *Santa Fe* seems to permit *Transamerica*-type negotiations only after the existence of a valid dispute, some boards seem willing to allow them before that stage. For example, in *Saco Defense, Inc.*,³⁴⁴ the ASBCA stated that the "impasse" and "abandonment of negotiations" tests of *Essex Electro* and *Sun Eagle* could "lead to perverse results, inconsistent with the purposes of the CDA."³⁴⁵ The board reasoned that requiring such a deadlock could drag out negotiations and discourage contractors from pursuing serious negotiations.³⁴⁶ As a result, some boards have applied *Dawco* and *Transamerica* in a liberal manner to avoid dismissal of claims, perhaps based in part on the widespread criticism of *Dawco*.³⁴⁷ Some boards have found that a contractor's initial submission of a demand for compensation sets up a dispute, while a subsequent submittal establishes a valid CDA claim.³⁴⁸ Nevertheless, other decisions evidence a firm adherence to the standards enunciated in *Dawco*.³⁴⁹

341. *Id.*

342. *Id.* at 1583.

343. *Id.* at 1583-84.

344. ASBCA Nos. 44792, 45171, 93-3 B.C.A. (CCH) ¶ 26,029, at 129,387 (1993).

345. *Saco Defense, Inc.*, ASBCA Nos. 44792, 45171, 93-3 B.C.A. (CCH) ¶ 26,029, at 129,387 (1993).

346. *Id.*

347. For example, in *Bill Strong Enterprises, Inc.*, the board found that a dispute existed where the parties disagreed as to the amount of the claim, despite the absence of a request for a contracting officer's decision or a breakdown of negotiations. *Bill Strong Enters., Inc.*, ASBCA Nos. 42946, 43896, 93-3 B.C.A. (CCH) ¶ 25,961, at 129,097 (1993).

348. See, e.g., *Raven Indus., Inc.*, ASBCA Nos. 44048, 44049, 93-3 B.C.A. (CCH) ¶ 26,031, at 129,391 (1993) (stating that delay costs included in request for equitable adjustment were in dispute because they had been submitted to contracting officer previously); *Conference Communications, Inc.*, ASBCA No. 44295, 93-1 B.C.A. (CCH) ¶ 25,558, at 127,295 (1992) (holding that invoice was not in dispute when submitted, but letter sent later converted it into CDA claim); *Electrodynamics, Inc.*, ASBCA No. 43224, 93-1 B.C.A. (CCH) ¶ 25,303, at 126,054-55 (1992) (calling first submittal routine request for payment and second submittal valid claim because it was in response to contracting officer's decision disallowing bulk of claimed costs). The court in *Electrodynamics* held that the contracting officer's decision more appropriately placed the matters into dispute. *Electrodynamics*, 93-1 B.C.A. (CCH) at 126,054-55.

349. See, e.g., *CPT Corp. v. United States*, 25 Cl. Ct. 451, 456 (1992) (finding no claim where parties are in negotiation posture, even if contractor invokes CDA and refers to submittal as claim); *Reflectone, Inc.*, ASBCA No. 43081, 93-1 B.C.A. (CCH) ¶ 25,512, at 127,056 (1992) (determining that request for equitable adjustment could not be claim because amount had

By nature, board and court decisions concerning the "dispute" requirement tend to be highly fact-oriented.³⁵⁰ The most practical solution may be to amend the FAR to eliminate the dispute requirement.³⁵¹ The ABA Public Contract Law Section has recommended such a change,³⁵² but the Department of Justice has vigorously opposed that approach.³⁵³ No matter what form it takes, relief is essential. As Professor Nash stated: "Wouldn't it be nice (and productive too) if both the Government and its contractors could spend their litigation dollars resolving substantial disputes?"³⁵⁴

3. CDA claims involving non-monetary disputes

The Federal Circuit has traditionally recognized that the boards of contract appeals are empowered to adjudicate non-monetary disputes, such as contract terminations for default.³⁵⁵ In *Overall Roofing & Construction, Inc. v. United States*,³⁵⁶ however, the Federal Circuit held that the Court of Federal Claims lacked jurisdiction over non-monetary claims because that court only has jurisdiction "to the extent that the government has waived its sovereign immunity."³⁵⁷ Statutory and judicial precedent indicated that suits before the Court of Federal Claims were "limited to demands for money presently due and owing."³⁵⁸ In 1992, Congress enacted the FCAA in an effort to render the jurisdiction of the Court of Federal Claims coextensive with that of the boards, thereby overruling *Overall Roofing* and expanding the court's jurisdiction to embrace certain non-monetary

never been requested prior to submittal). *But see* Hughes Aircraft Co., Electron Dynamics Div., ASBCA No. 43877, 93-3 B.C.A. (CCH) ¶ 26,133, at 129,902 (1993) (acknowledging that where Government denies entitlement liability, dispute arises on contractor's initial quantification of claim, thus allowing valid CDA claim to be filed immediately).

350. *See CPT Corp.*, 25 Cl. Ct. at 454-56 (basing discussion of "dispute" requirement on complex fact pattern); *Reflectone, Inc.*, 93-1 B.C.A. (CCH) at 127,056 (relying heavily on specific facts of case in reaching decision).

351. *See ABA Section Proposes Amendment of FAR Definition of Contract 'Claim'*, 59 Fed. Cont. Rep. (BNA) No. 11, at 370 (Mar. 22, 1993) (reporting ABA sentiment that would "eliminate the sources of increasing litigation" regarding dispute requirement).

352. *See id.*

353. *See Justice Opposes ABA Sections Recommendations Regarding Definition of Contract 'Claim'*, 59 Fed. Cont. Rep. (BNA) No. 16, at 552 (Apr. 26, 1993) (discussing Justice Department's assertion that amendment "would be inconsistent with well-settled law and purposes of the Contract Disputes Act").

354. Ralph C. Nash & John Cibinic, *Contract Disputes Act Claims: Improvements in the Rules*, 7 NASH & CIBINIC REP. ¶ 1, at 5 (1993).

355. *See* *Malone v. United States*, 849 F.2d 1441, 1444 (Fed. Cir. 1988) (noting that boards of contract appeals "have historically accepted appeals from a [contracting officer's] decision terminating a contract for default before either the government or the contractor submitted a monetary claim").

356. 929 F.2d 687 (Fed. Cir. 1991).

357. *Overall Roofing & Constr., Inc. v. United States*, 929 F.2d 687, 688 (Fed. Cir. 1991).

358. *Id.* at 689.

disputes.³⁵⁹ The legislation, however, left largely unresolved the question of what kinds of non-monetary disputes constitute appealable CDA claims. That issue was discussed by the court in *Garrett v. General Electric Co.*,³⁶⁰ an appeal of an ASBCA decision.

In *Garrett*, the Federal Circuit considered whether the Navy's directive to General Electric (GE) to correct or replace defective jet engines was an appealable claim under the CDA.³⁶¹ The court held that the Navy's directive was a choice of remedy under the contract and, as such, constituted an appealable claim under the Act.³⁶²

GE entered into a contract with the Navy to manufacture approximately 1200 jet engines for use in the F/A-18A aircraft.³⁶³ After accepting several of these new engines, the Navy discovered that a certain engine component caused damage to both the engine and the aircraft.³⁶⁴ Based on GE's investigation, performed under a separate contract, the Navy concluded that latent defects caused the engine failures and the contracting officer directed GE to replace the defective parts at no additional cost to the Government.³⁶⁵ GE appealed the contracting officer's decision. The ASBCA exercised jurisdiction over GE's appeal, holding that the contracting officer's final decision was a demand for relief that met the definition of a "claim" under both the FAR and the CDA.³⁶⁶

The Federal Circuit affirmed the ASBCA's exercise of jurisdiction.³⁶⁷ In determining whether the Navy's directive constituted an appealable claim, the court looked to the FAR, the language of the contract, and the facts of the case.³⁶⁸ It noted that the GE contract reiterated the language of the FAR by defining a claim as a written demand for the payment of money, the adjustment or interpretation of contract terms, or "other relief" arising under or relating to the contract.³⁶⁹ The court reasoned that the Navy's directive to replace

359. Federal Courts Administration Act of 1992 (FCAA), Pub. L. No. 102-572, § 907(b)(1), 106 Stat. 4506, 4519 (codified as amended at 28 U.S.C. § 1491(a)(2) (Supp. IV 1992)) (including non-monetary disputes in jurisdiction of Court of Federal Claims).

360. 987 F.2d 747 (Fed. Cir. 1993).

361. *Garrett v. General Elec. Co.*, 987 F.2d 747, 749 (Fed. Cir. 1993).

362. *Id.*

363. *Id.* at 748.

364. *Id.*

365. *Id.* at 748-49. The contract provided that in the event of latent defects, remedies would include correction or replacement at no additional cost, reduction in contract price for delays, or repayment of an equitable portion of the contract. *Id.* at 748.

366. *General Elec. Co.*, ABSCA Nos. 36005, 38152, 91-2 B.C.A. (CCH) ¶ 23,958, at 119,947 (1991) (stating that contracting officer's decisions constituted one of three types of claims over which court has jurisdiction), *aff'd*, 987 F.2d 747 (Fed. Cir. 1993).

367. *Garrett*, 987 F.2d at 748.

368. *Id.* at 749-50.

369. *Id.* at 749.

the defective parts at no additional cost constituted "other relief."³⁷⁰ As such, where the FAR and the contract defined "claim" to include a demand for "other relief" arising under or relating to the contract, the Navy's choice of a remedy under the contract constituted a claim against the Government under the CDA.³⁷¹

In the first post-FCAA Federal Circuit case to address the jurisdiction of the Court of Federal Claims over non-monetary claims, the court announced that the Court of Federal Claims has jurisdiction over actions that were awaiting final judgment upon enactment of the FCAA.³⁷² In *Sharman Co. v. United States*,³⁷³ the Federal Circuit held that a contractor's appeal of a default termination, while improperly entertained by the Court of Federal Claims initially, was presently subject to the jurisdiction of that court.³⁷⁴

Sharman entered into a contract with the U.S. Marine Corps to manufacture steel water tanks.³⁷⁵ When steel prices escalated, Sharman repudiated the contract.³⁷⁶ The Government then terminated Sharman's contract for default and, in a separate letter, later sought the return of unliquidated progress payments.³⁷⁷

Sharman filed suit in the Court of Federal Claims seeking to convert the default termination of the contract into a termination for convenience and to recover all uncompensated costs, including progress payments and other monies.³⁷⁸ The Government moved to dismiss for lack of subject matter jurisdiction, arguing that there was no final decision under the CDA.³⁷⁹

The Court of Federal Claims denied the Government's motion to dismiss the company's default termination claim.³⁸⁰ The court held that in light of *Overall Roofing*, it would not have jurisdiction over the

370. *Id.* Although the FCAA was not applicable in this case, the court did note that, in light of the expanded jurisdiction of the Court of Federal Claims, the decision "preserves jurisdictional parity between the Court of Federal Claims and the boards," as envisioned by the CDA, by providing the boards with jurisdiction over the instant non-monetary dispute. *Id.* at 750.

371. *Id.* at 749. In addition, the court noted that the ASBCA's decision was final because it resolved all the open issues and had "immediate legal consequences." *Id.* at 751.

372. *Sharman Co. v. United States*, 2 F.3d 1564, 1573 (Fed. Cir. 1993).

373. 2 F.3d 1564 (Fed. Cir. 1993).

374. *Sharman*, 2 F.3d at 1573.

375. *Id.* at 1566.

376. *Id.*

377. *Id.* at 1567.

378. *Sharman Co. v. United States*, 24 Cl. Ct. 763, 765 (1991), *rev'd*, 2 F.3d 1564 (Fed. Cir. 1993).

379. *Id.*

380. *Id.* at 768.

default termination standing alone.³⁸¹ The court concluded, however, that it had jurisdiction to entertain the default termination claim because it was closely related to the monetary claim for return of unliquidated progress payments.³⁸² The court found a close relation between the claims because Sharman had filed an amended complaint specifically challenging the Government's right to the unliquidated progress payments, and the Government then filed a counterclaim for recovery of these payments.³⁸³ The court ultimately held that the Government was entitled to the return of unliquidated progress payments.³⁸⁴

On appeal, the Federal Circuit reversed, finding that the money claim advanced by Sharman was separate and distinct from the default termination decision.³⁸⁵ Regarding the default termination, the court noted that, at the time of its decision, the Court of Federal Claims correctly determined that *Overall Roofing* deprived it of jurisdiction when the default termination claim stood alone.³⁸⁶ The FCAA, however, which went into effect on October 29, 1992, expanded the jurisdiction of the Court of Federal Claims to include non-monetary disputes.³⁸⁷ The Federal Circuit also noted that the FCAA applied to any case that had not been the subject of a final judgment before the FCAA's enactment date.³⁸⁸ The court therefore remanded the case to the Court of Federal Claims for a decision on the merits.³⁸⁹

381. *Id.* at 766 (citing *Overall Roofing & Constr., Inc. v. United States*, 929 F.2d 687 (Fed. Cir. 1991)).

382. *Id.* at 767. The Federal Circuit commented that the Court of Federal Claims did not explain how the default termination notice and the Government's demand for return of progress payments constituted a final decision and, ultimately, a claim under the CDA. *Sharman Co. v. United States*, 2 F.3d 1564, 1567 (Fed. Cir. 1993).

383. *Sharman*, 2 F.3d at 1568, 1570.

384. *Id.* at 1566.

385. *Id.* at 1570. The court analyzed the chronology of the notice of default termination and the letters between Sharman and the contracting officer, and concluded that prior to Sharman's filing of a complaint in the Court of Federal Claims, there had never been a contracting officer's final decision, and thus no dispute or claim on which an appeal could be based. *Id.* at 1569-73.

386. *Id.* at 1572.

387. See FCAA, 28 U.S.C. § 1491(a)(2) (Supp. IV 1992) (providing for jurisdiction over non-monetary disputes). The Act, in relevant part, states: "[T]he Federal Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract." *Id.*

388. *Sharman*, 2 F.3d at 1572.

389. *Id.* at 1573.

B. Scope of the Contract Disputes Act

In *Burnside-Ott Aviation Training Center, Inc. v. United States*,³⁹⁰ the Federal Circuit determined that the Court of Federal Claims had CDA jurisdiction over a claim for increased costs arising from a Department of Labor (DOL) decision.³⁹¹ The court reversed the lower court's ruling that the claim was within the exclusive jurisdiction of the DOL under the contract's "Disputes Concerning Labor Standards" clause.³⁹²

Burnside-Ott contracted with the Navy to provide helicopter maintenance services. Under the Service Contract Act of 1965,³⁹³ Burnside-Ott was required to pay its employees minimum wages and fringe benefits determined by the DOL.³⁹⁴ The contract contained a DOL wage determination, which established wage rates for technicians and aircraft workers.³⁹⁵ During contract performance, several technician employees of Burnside-Ott filed a complaint with the DOL regarding their wage rates.³⁹⁶ After an investigation, the DOL issued a new wage determination for the option year of the contract that deleted the technician classification and later ordered Burnside-Ott to reclassify its technicians as higher-paid aircraft workers for the base year of the contract.³⁹⁷ After exhausting its right to an administrative appeal at the DOL, Burnside-Ott paid its technician employees as aircraft workers for the base and option years of the contract.³⁹⁸ The company then submitted a claim to the contracting officer, seeking reimbursement of these costs.³⁹⁹

390. 985 F.2d 1574 (Fed. Cir. 1993).

391. *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1575 (Fed. Cir. 1993).

392. *Id.* at 1580, 1583. The clause stated: "Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR Parts 4.6, and 8." *Id.* at 1578.

393. 41 U.S.C. §§ 351-358 (1988) (setting forth service contract labor standards for government contracting).

394. *See Burnside-Ott*, 985 F.2d at 1575 (establishing that Labor Department applied Service Contract Act of 1965 to Burnside-Ott contract); *see also* Service Contract Act of 1965, 41 U.S.C. § 351(a)(1) (stating that Secretary of Labor determines minimum wages paid to workers performing government contract).

395. *Burnside-Ott*, 985 F.2d at 1576.

396. *See id.* (reporting that employee complaints rejected their "technician" classification, which commanded lower minimum wage).

397. *Id.*

398. *See id.* (stating that Burnside paid higher rate after Labor Department handed down final decision).

399. *Id.*

After the contracting officer denied the claim, Burnside-Ott sued in the Court of Federal Claims on five alternative grounds: (1) the Price Adjustment clause of the contract, (2) the Changes clause of the contract, (3) breach of contract, (4) equitable estoppel, and (5) mutual mistake.⁴⁰⁰ Relying on *Emerald Maintenance, Inc. v. United States*,⁴⁰¹ the Court of Federal Claims, inter alia, ruled that the "Disputes Concerning Labor Standards" clause of the contract divested the court of jurisdiction over the claim because the dispute "arose exclusively out of the labor standards provisions of the contract" and therefore fell within the exclusive jurisdiction of the DOL.⁴⁰²

In reversing the Court of Federal Claims' decision, the Federal Circuit determined that the claim centered on the parties' mutual rights and obligations under the contract, not on matters reserved exclusively to the DOL.⁴⁰³ The court reasoned that Burnside-Ott was requesting a determination of the effect of the DOL's decision on its contract rights rather than challenging the decision of the DOL.⁴⁰⁴ Even though the Labor Department ruling formed part of the "factual predicate" of the action before it, the court concluded that the contractor had nonetheless advanced a CDA claim involving the terms and conditions of the contract.⁴⁰⁵ In so holding, the court distinguished the case from *Emerald Maintenance* on the grounds that Burnside-Ott, unlike *Emerald Maintenance*, had both challenged the DOL ruling through that agency's administrative process and paid its employees higher wages in accordance with the DOL's final decision.⁴⁰⁶

Thus, in *Burnside-Ott*, the court effectively limited the application of the somewhat inflexible rule enunciated in *Emerald Maintenance*.⁴⁰⁷ The *Burnside-Ott* decision recognizes an important distinction between the review of the propriety of a DOL wage determination and a request to decide which party bears the risk of increased contract

400. *Id.* at 1576-77.

401. 925 F.2d 1425 (Fed. Cir. 1991) (holding that Department of Labor had jurisdiction over claims involving determination of prevailing wage rate).

402. *Burnside-Ott*, 985 F.2d at 1575 (citing *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 24 Cl. Ct. 553, 561-63 (1991)).

403. *See id.* at 1580 (maintaining that existence of factual issue reserved exclusively to Department of Labor does not preclude Claims Court's jurisdiction over case).

404. *Id.*

405. *See id.* ("Because the DOL's ruling in this case forms only part of the factual predicate, the Claims Court does have jurisdiction over [Burnside's CDA claim].").

406. *Id.*; *see also supra* note 401 and accompanying text (discussing holding of *Emerald Maintenance*).

407. *See Burnside-Ott*, 985 F.2d at 1580 (distinguishing *Emerald Maintenance* from *Burnside-Ott* based on factual and procedural differences).

costs resulting from that determination.⁴⁰⁸ In the latter case, questions of contract interpretation are presented and judicial review is necessary to ensure that the contractor does not bear the burden of cost increases where the Government, either through its actions or contractual obligations, is liable to the contractor for some or all of these costs.⁴⁰⁹ In apparent recognition of this distinction, at least two other Court of Federal Claims judges have narrowly construed *Emerald Maintenance* and asserted jurisdiction over such claims.⁴¹⁰

C. *Timeliness of Appeals from Final Decision of Contracting Officer*

Under the CDA, a contractor must appeal an adverse decision of the contracting officer to the Court of Federal Claims within twelve months of receipt of the decision.⁴¹¹ The CDA time limit on appeals is jurisdictional and cannot be waived.⁴¹² In *Wood-Ivey Systems Corp. v. United States*,⁴¹³ the Federal Circuit held that the filing of an appeal in the Court of Federal Claims on the first business day after the expiration of this twelve-month period was timely where the last day of that period fell on a Saturday.⁴¹⁴

Wood-Ivey, pursuant to a Navy contract to manufacture a shipboard aircraft altitude positioning system, filed a claim for an equitable adjustment and received the contracting officer's final decision denying its claim on December 8, 1989.⁴¹⁵ The statutory twelve-month period for appealing this decision to the Court of Federal Claims ended on December 8, 1990, which was a Saturday.⁴¹⁶ Under Court of Federal Claims Rule (RCFC) 6(a), when a filing deadline falls due on a Saturday, Sunday, or legal holiday, the last timely day for filing the pleading is deemed to be the next working day.⁴¹⁷ Accordingly, Wood-Ivey filed its complaint on the following

408. *Id.*

409. *See id.* at 1580-81 (allowing contractor to bring contract claim against Government to recover amount of cost increases).

410. *See United Int'l Investigative Servs. v. United States*, 26 Cl. Ct. 892, 902 (1992) (stating that Labor Department does not have exclusive jurisdiction over labor-related disputes); *Aleman Food Servs. Inc. v. United States*, 25 Cl. Ct. 201, 208 (1992) (granting jurisdiction where certain contract provisions required Claims Court review), *rev'd on other grounds*, 994 F.2d 819 (Fed. Cir. 1993).

411. *See* 41 U.S.C. § 609(a)(1), (3) (1988 & Supp. IV 1992).

412. *See Borough of Alpine v. United States*, 923 F.2d 170, 173 (Fed. Cir. 1991) (enforcing CDA time limit and stating that Claims Court lacks power to review untimely appeals).

413. No. 92-5019 (Fed. Cir. Sept. 9, 1993).

414. *Wood-Ivey Sys. Corp. v. United States*, No. 92-5019, slip op. at 7 (Fed. Cir. Sept. 9, 1993).

415. *Id.* at 1-2.

416. *Id.* at 2.

417. *CT. FED. CLAIMS R.* 6(a); *see also* *Structural Finishing, Inc. v. United States*, 14 Cl. Ct. 447, 450 (1988) (extending time limit of RCFC 6(a) where deadline falls on Saturday).

Monday.⁴¹⁸ The Court of Federal Claims, however, dismissed the case as untimely, reasoning that RCFC 6(a) could not be applied to expand the statutory time periods for filing a CDA claim because such periods are jurisdictional.⁴¹⁹

Wood-Ivey appealed the dismissal to the Federal Circuit, which vacated and remanded for adjudication on the merits.⁴²⁰ The court analogized RCFC 6(a) to Federal Rule of Civil Procedure 6(a), which several courts have found applicable to statutory periods for filing a claim.⁴²¹ The court further noted that the Court of Federal Claims had previously applied its time limit rules to suits against the Government with no incident.⁴²² Finally, the court found that the application of RCFC 6(a) to the CDA twelve-month statute of limitations did not enlarge the statutory jurisdiction of the court.⁴²³

III. CONTRACT INTERPRETATION

On several occasions during 1993, the Federal Circuit applied well-established rules of contract interpretation to determine the parties' rights and obligations under government contracts.⁴²⁴ Following these rules, judges normally determine first whether the contract is ambiguous, meaning whether it is subject to more than one reasonable interpretation.⁴²⁵ If the contract is ambiguous, they determine

418. *Wood Ivey*, No. 92-5019, slip op. at 2.

419. *Id.* at 2-3.

420. *Id.* at 1.

421. *Id.* at 3-4 (citing *Union Nat'l Bank v. Lamb*, 337 U.S. 38, 40-41 (1949); *Frey v. Woodward*, 748 F.2d 173, 175 (3d Cir. 1984); *Jackson v. United States Postal Serv.*, 666 F.2d 258, 259-60 (5th Cir. 1982); *Milam v. United States Postal Serv.*, 674 F.2d 860, 862 (11th Cir. 1982); *Kollios v. United States*, 512 F.2d 1316, 1317 (1st Cir. 1975); *Johnson v. Flemming*, 264 F.2d 322, 323 (10th Cir. 1959)).

422. *Wood-Ivey*, No. 92-5019, slip op. at 3-4 (citing *Structural Finishing, Inc. v. United States*, 14 Cl. Ct. 447, 450 (1988)).

423. *Id.* at 5-6. Indeed, the GSCBA reached a similar decision with respect to the 10-day filing period for suspension of contract awards in bid protest cases. *See Syscon Corp.*, GSCBA No. 10890-P, 91-1 B.C.A. (CCH) ¶ 23,523, at 117,945-46 (1990). The GAO reached the opposite conclusion, however, holding that the last timely day is the working day *before* the Saturday, Sunday, or legal holiday on which the 10th day falls. *See Econ Inc.*, B-223923, 86-2 C.P.D. ¶ 489, at 2 n.1 (1986).

424. *See, e.g., Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993) (discussing established approach to problems of contract ambiguity); *Alaska Lumber & Pulp Co. v. Madigan*, 2 F.3d 389, 392 (Fed. Cir. 1993) (applying traditional methods of interpretation toward government contract); *Aleman Food Servs., Inc. v. United States*, 994 F.2d 819, 822 (Fed. Cir. 1993) (applying "plain language" rule for government contract interpretation).

425. *See, e.g., Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1429 (Fed. Cir. 1990) (agreeing that contrary contract interpretations by opposing parties were both reasonable); *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986) ("It is a generally accepted rule . . . that if a contract is reasonably susceptible [to] more than one interpretation, it is ambiguous.").

whether the ambiguity is patent or latent.⁴²⁶ If the ambiguity is obvious, or patent, then the contractor's failure to seek clarification precludes recovery.⁴²⁷ If the ambiguity is found to be not obvious, or latent, then the court applies the rule of *contra proferentum* to construe the contractual term against the Government.⁴²⁸

A. *Strict Enforcement of Unambiguous Contract Terms*

In three decisions in 1993, the Federal Circuit continued its practice of strictly enforcing unambiguous contract terms. In *Aleman Food Services, Inc. v. United States*,⁴²⁹ the Federal Circuit looked to the plain meaning of a contract in addressing the Federal Government's liability for a state-mandated change in rates for workers' compensation and employment insurance.⁴³⁰ The Federal Circuit held that a contract clause providing for a price adjustment based on a DOL wage determination does not apply when a state government, rather than the DOL, increases state workers' compensation and unemployment insurance rates.⁴³¹

Aleman was awarded a fixed-price contract to provide food services at Lackland Air Force Base in Texas.⁴³² The contract required Aleman to obtain workers' compensation and unemployment compensation insurance.⁴³³ The contract also included a Price Adjustment clause providing for an equitable adjustment when Aleman changed its wage rates or fringe benefits in response to a revised DOL determination.⁴³⁴ Shortly before DOL issued a new wage determination increasing the prevailing wage rate, the State of Texas increased workers' compensation insurance premiums and the unemployment tax rate.⁴³⁵ The Air Force compensated Aleman for the increases in workers' compensation and unemployment insurance resulting from DOL's increased wage determination by applying the

426. Compare *Fruin-Colnon Corp.*, 912 F.2d at 1429 (explaining presence of latent defect) and *Edward R. Marden Corp.*, 803 F.2d at 705 (finding facially different interpretations indicative of latent defect) with *Ring Constr. Corp. v. United States*, 162 F. Supp. 190, 192 (Ct. Cl. 1958) (finding patent defect in government contract).

427. See *WPC Enters., Inc. v. United States*, 323 F.2d 874, 876-77 (Ct. Cl. 1963) (expressing contractor's duty to inquire about major patent discrepancy).

428. See *Blount Bros. Constr. Co. v. United States*, 346 F.2d 962, 973 (Ct. Cl. 1965) (ruling that existence of latent defect in government contract must be construed against drafter).

429. 994 F.2d 819 (Fed. Cir. 1993).

430. *Aleman Food Servs., Inc. v. United States*, 994 F.2d 819, 820 (Fed. Cir. 1993).

431. *Id.* at 823.

432. *Id.* at 820.

433. *Id.*

434. *Id.*

435. *Id.*

earlier Texas insurance rates to the new wage base.⁴³⁶ Aleman submitted a claim for its increased costs due to the increase in workers' compensation and unemployment insurance rates for both its initial wage base and for the increased wage base resulting from the DOL determination.⁴³⁷ The contracting officer denied the claim.⁴³⁸

On appeal to the Court of Federal Claims,⁴³⁹ the court held that Aleman was entitled to compensation for the increased costs associated with the rate change because the service contract mandated that Aleman provide its employees with workers' compensation and unemployment insurance at the higher rate.⁴⁴⁰ The court reasoned that these increased costs were "fringe benefits" for purposes of the Price Adjustment clause.⁴⁴¹ Reversing the Court of Federal Claims, the Federal Circuit determined that the Price Adjustment clause granted the contractor an equitable adjustment solely for changes to wages and fringe benefits resulting directly from a DOL wage determination.⁴⁴² Because the increased labor rates were the result of a change in Texas state law and not a direct result of the DOL determination, the court found that Aleman was not entitled to compensation for these additional labor costs.⁴⁴³

The Federal Circuit also looked to the plain meaning of contract terms in *Sanchez & Son, Inc. v. United States*⁴⁴⁴ and confirmed the traditional rule that the Government is entitled to strict compliance with the terms of the contract.⁴⁴⁵ Sanchez received a contract to construct an artificial battlefield for the Department of the Army.⁴⁴⁶

436. *Id.*

437. *Id.*

438. *Id.*

439. *Aleman Food Servs., Inc. v. United States*, 25 Cl. Ct. 201 (1992), *rev'd*, 994 F.2d 819 (Fed. Cir. 1993).

440. *See Aleman*, 994 F.2d at 820, 821 (clarifying that Clause 71 of contract obligated Aleman to comply with Labor Department determination of minimum prevailing fringe benefits).

441. *See Aleman*, 25 Cl. Ct. at 209 ("Because of [the costs' classification as fringe benefits], the modification of the contract in response to the wage determination should have included the entire increase in Aleman's cost.").

442. *See Aleman*, 994 F.2d at 823 (stating that expenses from fringe benefits are not compensable under Price Adjustment clause because Labor Department did not cause increases).

443. *Id.* at 822.

444. 6 F.3d 1539 (Fed. Cir. 1993).

445. *Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1542 (Fed. Cir. 1993); *see also* S.S. Silberblatt, Inc. v. United States, 433 F.2d 1314, 1323 (Ct. Cl. 1970) (characterizing Government's insistence on compliance with contract specifications as proper). As an exception to this rule, the Federal Circuit has held that the Government is not entitled to demand strict compliance if the work performed is adequate for its intended purpose and the cost of correcting the work is economically wasteful. *Granite Constr. Co. v. United States*, 962 F.2d 998, 1007-08 (Fed. Cir. 1992), *cert. denied*, 113 S. Ct. 965 (1993).

446. *Sanchez*, 6 F.3d at 1541.

The contract required the use of steel-sheathed cable for a data transmission line.⁴⁴⁷ Sanchez experienced delivery problems from its steel-sheathed cable supplier and therefore offered to provide aluminum-sheathed cable as a substitute.⁴⁴⁸ The Army rejected Sanchez's offer, asserting that aluminum would not block magnetic interference as well as steel.⁴⁴⁹

Sanchez incurred performance delays as a result of the additional time required to obtain steel-sheathed cable and submitted a claim for the associated costs.⁴⁵⁰ The contracting officer denied the claim, and Sanchez appealed to the Court of Federal Claims.⁴⁵¹ The Court of Federal Claims granted the Government's motion for summary judgment, finding that the Government was entitled to the steel-sheathed cable it had contracted to receive.⁴⁵² Sanchez appealed to the Federal Circuit.

The Federal Circuit held that Sanchez failed to carry the burden of demonstrating that aluminum-sheathed cable was suitable for the intended purpose.⁴⁵³ According to the court, Sanchez, at the very least, was required to proffer evidence that the aluminum-sheathed cable possessed the same magnetic interference blocking properties as the steel-sheathed cable.⁴⁵⁴ Because Sanchez had produced no such evidence, the court found that summary judgment was properly entered against it.⁴⁵⁵

The Federal Circuit similarly looked to the plain meaning of a contract clause dealing with purchase credits in a timber sales contract in *Alaska Lumber & Pulp Co. v. Madigan*.⁴⁵⁶ In *Alaska Lumber*, the court held that the contract clause allowed purchase credits to be offset against other contracts only for the period that Alaska Lumber was paying more than the base rate.⁴⁵⁷

Alaska Lumber entered into a timber purchase contract with the Forest Service in 1956. Pursuant to the contract, the company was required, inter alia, to build roads to remove the timber, and the Forest Service was obligated to compensate the company for its road

447. *Id.* at 1542.

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.*

452. *Sanchez & Son, Inc. v. United States*, 24 Cl. Ct. 14, 15 (1991), *aff'd in part and vacated in part*, 6 F.3d 1539 (Fed. Cir. 1993).

453. *Sanchez*, 6 F.3d at 1542.

454. *Id.*

455. *Id.*

456. 2 F.3d 389 (Fed. Cir. 1993).

457. *Alaska Lumber & Pulp Co. v. Madigan*, 2 F.3d 389, 393 (Fed. Cir. 1993).

construction costs.⁴⁵⁸ Every five years, the stumpage rate that Alaska Lumber was to pay for the timber was redetermined.⁴⁵⁹ The stumpage rate, however, could not fall below the contract's minimum base rate.⁴⁶⁰ The contract also permitted Alaska Lumber to apply for a rate redetermination based on adverse economic conditions.⁴⁶¹ The parties later incorporated a purchaser credit system into the contract allowing Alaska Lumber to apply credits earned through road construction for the purchase of timber on the contract at issue as well as other timber sales contracts.⁴⁶² Alaska Lumber, however, was only allowed to use credits to offset the above-base-rate portion of the stumpage rate.⁴⁶³ The contract required the company to reimburse the Forest Service for purchaser credits transferred to other contracts that were subsequently rendered ineffective by a change in stumpage rates.⁴⁶⁴

During the years 1981-1985, the Forest Service established a stumpage rate significantly in excess of the base rate.⁴⁶⁵ In June 1982, Alaska Lumber requested a rate redetermination.⁴⁶⁶ In May 1983, the Forest Service granted the request and reduced the stumpage rate to the base rate retroactive to July 1982.⁴⁶⁷ The Forest Service then billed Alaska Lumber for the amount of purchaser credit the company had transferred to other contracts since 1981.⁴⁶⁸ Alaska Lumber paid the amount billed and then filed a claim for reimbursement.⁴⁶⁹ When the contracting officer denied the claim, the company appealed to the Agriculture Board of Contract Appeals.⁴⁷⁰

The board determined that when Alaska Lumber's stumpage rate was reduced to the base rate, there was no margin above base against

458. *Id.* at 390.

459. *See id.* (defining "stumpage rate" as specified rate paid for removed timber).

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.* at 391.

464. *Id.*

465. *See id.* (explaining that new stumpage rate was \$86.29 per board foot while base rate was \$1.48 per board foot).

466. *See id.* (adding that, in requesting determination, ALP claimed adverse economic conditions).

467. *See id.* (stating that Government adjusted stumpage rate to match base rate of \$1.48 per board foot).

468. *See id.* (reporting Forest Service's assertion that rate redetermination rendered previously used purchaser credits ineffective).

469. *Id.*

470. *Id.*

which the company could apply its credit.⁴⁷¹ The board thus concluded that all purchaser credits received from 1981 forward were properly payable to the Government.⁴⁷² In so doing, the board focused entirely on two provisions in the Alaska Lumber contract. Section 4C-2 provided: "Effective Purchaser Credit transferred from this contract subsequently determined to be ineffective under terms of this contract shall be replaced by cash payments."⁴⁷³ In addition, section 4C-3 provided: "Transferred Purchaser Credit may not be used to cover payments for Base Rates"⁴⁷⁴

The Federal Circuit construed the above provisions to mean that Alaska Lumber could transfer its purchaser credit to other contracts during the 1981-82 period in which it was buying timber at prices above the base rate.⁴⁷⁵ When Alaska Lumber was purchasing timber at the base rate, however, it could not transfer the credit to other contracts.⁴⁷⁶ The Federal Circuit concluded, therefore, that Alaska Lumber could transfer purchaser credits so long as the company was paying above the base rate.⁴⁷⁷

It should be noted, however, that the Federal Circuit in *Alaska Lumber* failed to recognize that the base rate had been *retroactively* reduced and that Alaska Lumber had already applied purchaser credit to all of the stumpage rate value above the base rate it incurred between January 1981 and July 1982 on the contract at issue and other contracts.⁴⁷⁸ The use of purchaser credits had already, in effect, reduced Alaska Lumber's stumpage rate for this period to the base rate.⁴⁷⁹ Thus, allowing the company to transfer the excess purchase credits earned on the contract would result in Alaska Lumber paying less than the base rate.⁴⁸⁰ The AGBCA found that allowing Alaska Lumber to receive purchaser credit on other contracts for this period would relieve the company of the obligation to pay the

471. Alaska Lumber & Pulp Co., AGBCA Nos. 83-301-1, 84-351-1, 91-2 B.C.A. (CCH) ¶ 23,890, at 119,684-85 (1991), *aff'd in part and rev'd in part*, 2 F.3d 389 (Fed. Cir. 1993). One administrative law judge concurred in the judgment, concluding that the purchaser credit modification should have been rescinded. *Id.* at 119,694 (Eaton, A.L.J., concurring).

472. *Id.* at 119,685.

473. *Id.* at 119,681.

474. *Id.*

475. Alaska Lumber & Pulp Co. v. Madigan, 2 F.3d 389, 392 (Fed. Cir. 1993).

476. *Id.* at 392-93.

477. *Id.*

478. See *id.* at 391 (stating that Forest Service's grant of reduced rates was retroactive from January 1, 1981 to July 1, 1982).

479. Alaska Lumber & Pulp Co., AGBCA Nos. 83-301-1, 84-351-1, 91-2 B.C.A. (CCH) ¶ 23,890, at 119,686 (1991), *aff'd in part and rev'd in part*, 2 F.3d 389 (Fed. Cir. 1993).

480. See *id.* (adding that payment of less than base rate is "contrary to the clear language of the contract").

base rate.⁴⁸¹ The Federal Circuit did not adequately address this finding in its decision.

B. *Ambiguous Contract Terms*

In *Community Heating & Plumbing Co. v. Kelso*,⁴⁸² the Federal Circuit upheld an ASBCA determination that a contract clause was not latently ambiguous.⁴⁸³ Community Heating entered into a contract with the U.S. Navy to remove and replace a condensate and steam system.⁴⁸⁴ The contract drawings depicted condensate lines penetrating concrete walls.⁴⁸⁵ The drawings also contained annotations that reflected the existence of manhole walls and building walls.⁴⁸⁶ The annotations provided that a steel sleeve or caulking was required to be placed over the condensate line and that an existing manhole had to be patched with concrete.⁴⁸⁷

Because Community's estimate was relatively low in comparison to the Government's estimate and to the next low bidder's proposal, the Government sought verification of Community's bid by meeting with the company to determine its understanding of the scope of the project.⁴⁸⁸ After the meeting, Community's representative wrote to the contracting officer clarifying its interpretation that certain conduit sleeves shown on the contract drawings were only for the new manholes.⁴⁸⁹ The Government responded to Community's letter without expressly objecting to the company's interpretation, but stated that the award would only be made in "strict accordance with the terms of the Invitation for Bids."⁴⁹⁰ Community subsequently confirmed its bid, and the Navy awarded the contract to Community.⁴⁹¹ After the contract was awarded, the Government directed Community to furnish conduit sleeves in new and existing manholes.⁴⁹² Community then brought a claim for additional compensa-

481. See *id.* (stressing that base rate was offset by transfer and use of purchaser credit).

482. 987 F.2d 1575 (Fed. Cir. 1993).

483. *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1579 (Fed. Cir. 1993).

484. *Id.* at 1577.

485. *Id.* at 1579.

486. *Id.*

487. *Id.* at 1579 n.4.

488. *Id.*; see also Competition in Contracting Act, 41 U.S.C. § 253b(d) (1988) (stating that bid verification in such circumstances is required); FAR, 48 C.F.R. § 14.406(1) (requiring contracting officer to seek bid verification when there appears to be mistake in bid).

489. *Community Heating*, 987 F.2d at 1578.

490. *Id.*

491. *Id.*

492. *Id.*

tion, arguing that the contract only required installation of conduit sleeves at new manholes.⁴⁹³

The ASBCA ruled in favor of the Government, holding that the contract was "unambiguous" because the contract clearly required installation of conduit sleeves for both new and existing manholes.⁴⁹⁴ The board concluded that Community's construction of the contract was unreasonable and should be rejected.⁴⁹⁵

Before the Federal Circuit, Community argued that the contract contained a latent ambiguity and that the Government acquiesced to its pre-award interpretation of the contract.⁴⁹⁶ The Federal Circuit, however, held that Community's pre-award letter did not bind the Government to Community's interpretation because that interpretation was unreasonable.⁴⁹⁷ Analyzing Community's claim in accordance with well-established principles of contract interpretation, the court determined that even if the contract was ambiguous, the ambiguity was patent, not latent.⁴⁹⁸ Because the Government's response to Community's pre-award letter did not address the issue of conduit sleeves, the court concluded that Community had an obligation to request further clarification of the issue.⁴⁹⁹ By failing to request additional clarification from the Government, the court concluded that Community bore the risk of the erroneous interpretation.⁵⁰⁰

In contrast, the Federal Circuit held that a contract term in *Sanchez & Son, Inc. v. United States*⁵⁰¹ could be subject to more than one reasonable interpretation, and that triable issues of fact existed concerning whether the contract was patently ambiguous.⁵⁰² The dispute in *Sanchez* centered on whether the contract required the installation of rollover protection structures (ROPS) on a specific piece of equipment.⁵⁰³ The contract included, for reference, a safety manual that listed the equipment requiring ROPS.⁵⁰⁴ Despite the fact that trenchers were not specifically included in the safety manual listing, the Government directed Sanchez to install ROPS on

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.*

497. *Id.*

498. *Id.*

499. *Id.* at 1580.

500. *Id.*

501. 6 F.3d 1539 (Fed. Cir. 1993).

502. *Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993).

503. *Id.* at 1542.

504. *Id.* at 1544-45.

the trenchers.⁵⁰⁵ Sanchez submitted claims for the costs associated with the delay in obtaining steel-sheathed cable and costs of installing ROPS on its trenchers.⁵⁰⁶ When the contracting officer denied the claims, Sanchez appealed to the Court of Federal Claims.⁵⁰⁷

The court granted the Government's motion for summary judgment, concluding that the contract plainly required ROPS on the trenchers.⁵⁰⁸ Sanchez then appealed to the Federal Circuit, which vacated the grant of summary judgment on the ROPS claim.⁵⁰⁹ The Federal Circuit held that the Court of Federal Claims incorrectly determined that the contract terms, with regard to the trenchers, were unambiguous as a matter of law.⁵¹⁰ Furthermore, the court stated that Sanchez's reading of the contract may be reasonable because trenchers were not specifically listed among the equipment requiring ROPS.⁵¹¹ The existence of a genuine issue of material fact concerning how the safety manual could be read and interpreted by engineers and experts in the field, therefore, precluded summary judgment.⁵¹²

C. Mandatory Contract Clauses

The "Christian" doctrine, first stated in the Court of Claims decision in *G.L. Christian & Associates v. United States*,⁵¹³ provides that a contract clause required by regulation will be read into a contract, if it does not otherwise appear there, if incorporation of the clause furthers a significant or deeply ingrained public procurement policy.⁵¹⁴ In 1993, the Federal Circuit addressed the issue of incorporation of contract clauses under the Christian doctrine on two occasions.

In *General Engineering & Machine Works v. O'Keefe*,⁵¹⁵ the Federal Circuit held that the Christian doctrine may be used by the Government to incorporate a clause requiring segregation of material handling costs.⁵¹⁶ General Engineering and the Navy entered into

505. *Id.* at 1542.

506. *Id.*

507. *Sanchez & Son, Inc. v. United States*, 24 Cl. Ct. 14, 15 (1991), *aff'd in part and vacated in part*, 6 F.3d 1539, 1540 (Fed. Cir. 1993).

508. *Id.* at 21-22.

509. *Sanchez & Son*, 6 F.3d at 1543-44.

510. *Id.*

511. *Id.*

512. *Id.*

513. 320 F.2d 345 (Ct. Cl. 1963).

514. *G.L. Christian & Assocs. v. United States*, 320 F.2d 345, 350 (Ct. Cl. 1963).

515. 991 F.2d 775 (Fed. Cir. 1993).

516. *General Eng'g & Mach. Works v. O'Keefe*, 991 F.2d 775, 779 (Fed. Cir. 1993).

a contract in 1982, the terms of which required General Engineering to provide supplies and services to a shock test facility.⁵¹⁷ The Request for Proposal (RFP) contained a provision for reimbursement of General Engineering's costs of furnishing incidental material in addition to a percentage for handling as specified by General Engineering.⁵¹⁸ Defense Acquisition Regulation (DAR) 7-103.7⁵¹⁹ was specifically incorporated into the contract.⁵²⁰ Another provision, which directed invoices to be prepared in accordance with DAR 7-901.6,⁵²¹ was not incorporated.⁵²² DAR 7-103.7 was more general in nature than DAR 7-901.6.⁵²³ The latter provision allowed reimbursement of material handling costs only if the costs were clearly excluded from the hourly rate that General Engineering included in its invoice for the material handling charge.⁵²⁴

General Engineering, however, did not keep the material handling costs in a separate cost pool.⁵²⁵ After completion of the last order on the contract, a government audit of General Engineering's material handling costs disclosed the fact that this amount was not recorded independently of the hourly rate calculation.⁵²⁶ The contracting officer then issued a demand for repayment of the charges for the material handling fees.⁵²⁷ Although General Engineering took notice of this demand by beginning installment repayments, the company simultaneously submitted a claim for reimbursement of those same payments.⁵²⁸ The contracting officer denied the claim and General Engineering appealed to the ASBCA.⁵²⁹

On appeal, the board held that DAR 7-901.6 was required to have been incorporated into the contract.⁵³⁰ Noting that General Engineering's failure to segregate its material handling costs resulted in those costs being included in the hourly rate, the board could not

517. *Id.* at 777.

518. *Id.*

519. Defense Acquisition Regulation (DAR), 32 C.F.R. § 7-103.7 (1982).

520. *General Eng'g*, 991 F.2d at 777.

521. DAR, 32 C.F.R. § 7-901.6.

522. *General Eng'g*, 991 F.2d at 777.

523. *Id.*

524. *Id.* at 777-78. A separate cost pool is necessary to prevent the double billing of material handling costs in both the hourly rate and the material handling rate. *Id.*

525. *Id.* at 778.

526. *Id.*

527. *Id.*

528. *Id.*

529. *General Eng'g & Mach. Works*, ASBCA No. 38788, 92-3 B.C.A. (CCH) ¶ 25,055, at 124,867, *aff'd*, 991 F.2d 775 (Fed. Cir. 1993).

530. *Id.* at 124,871 (finding that Government was justified in obtaining repayment because General Engineering failed to maintain separate cost pool).

determine whether General Engineering charged the Government twice for the same expense.⁵³¹ Accordingly, the ASBCA denied the company's appeal.⁵³²

The Federal Circuit affirmed the ASBCA's ruling.⁵³³ According to the court, the purpose of DAR 7-901.6—to discourage the unnecessary and wasteful spending of government funds—was sufficiently ingrained in policy to trigger application of the Christian doctrine.⁵³⁴ The court therefore concluded that DAR 7-901.6 was incorporated into the contract by operation of law.⁵³⁵ In so doing, the court determined that the inclusion of two "payments" clauses in the contract did not create an inconsistency;⁵³⁶ DAR 7-901.6 merely defined the application of DAR 7-103.7.⁵³⁷

The Federal Circuit also addressed the Christian doctrine in *S.J. Amoroso Construction Co. v. United States*,⁵³⁸ and again applied the doctrine in favor of the Government.⁵³⁹ In *Amoroso*, the court specifically held that the doctrine may cause the incorporation of a Buy American Act (BAA) clause different from the one actually incorporated by the drafter.⁵⁴⁰

Amoroso and the Corps of Engineers entered into a contract for the construction of a commissary.⁵⁴¹ The contract included the BAA-Supplies Clause (FAR Clause 52.225-3)⁵⁴² rather than the appropriate BAA-Construction Clause (FAR Clause 52.225-5).⁵⁴³ Under the BAA-Supplies Clause, the end item delivered to the Government must be manufactured in the United States even though each component comprising the end item need not be manufactured domestically.⁵⁴⁴ Under the BAA-Construction Clause, however, each component delivered to a job site must be produced domestically.⁵⁴⁵

Amoroso's steel subcontractor proposed to supply steel manufactured by a foreign entity, and informed Amoroso that it would incur significant extra expense if required to supply domestically manufac-

531. *Id.* at 124,872.

532. *Id.*

533. *General Eng'g*, 991 F.2d at 780.

534. *Id.*

535. *Id.*

536. *Id.* at 781.

537. *Id.*

538. 12 F.3d 1072 (Fed. Cir. 1993).

539. *S.J. Amoroso Constr. Co. v. United States*, 12 F.3d 1072, 1075 (Fed. Cir. 1993).

540. *Id.* at 1077.

541. *Id.* at 1073.

542. 48 C.F.R. § 52.225-3 (1986).

543. *Id.* § 52.225-5.

544. *Id.* § 52.225-3(a).

545. *Id.* § 52.225-5(a).

tured steel.⁵⁴⁶ When Amoroso sought clarification from the contracting officer concerning the acceptability of foreign steel, the contracting officer denied its use, citing the BAA-Construction Clause.⁵⁴⁷ Consequently, the subcontractor supplied U.S.-manufactured steel and made a claim for the increased costs, which Amoroso submitted to the contracting officer on the subcontractor's behalf.⁵⁴⁸

Following the contracting officer's denial of the claim, Amoroso appealed to the Court of Federal Claims.⁵⁴⁹ The court affirmed the contracting officer's decision, finding that the BAA-Construction Clause should be incorporated into the contract pursuant to the Christian doctrine.⁵⁵⁰ The court reasoned that because supplying foreign steel would contravene the requirements of the BAA-Construction Clause, the Government was entitled to domestic steel at no increased cost, notwithstanding the fact that the BAA-Supplies Clause included in the contract may have permitted the use of foreign steel.⁵⁵¹

Amoroso appealed to the Federal Circuit, which affirmed the decision of the Court of Federal Claims.⁵⁵² The appellate court held that the BAA-Construction Clause fulfilled an important statutory purpose, demonstrated by the separate statutory references within the BAA⁵⁵³ designed to foster procurement of contracts for public works (construction contracts) and materials for public use (supply contracts).⁵⁵⁴ Accordingly, the court affirmed the lower court's decision that the Christian doctrine required the inclusion of the BAA-Construction Clause in the contract.⁵⁵⁵

Judge Plager concurred in the ruling despite his view that the case should have been decided as a matter of contract interpretation.⁵⁵⁶ According to Judge Plager, both the Corps and Amoroso understood the BAA-Construction Clause to be the operative BAA clause under the contract.⁵⁵⁷ The judge disagreed with employing the Christian

546. *Amoroso*, 12 F.3d at 1073-74.

547. *Id.* at 1074.

548. *Id.*

549. *S.J. Amoroso Constr. Co. v. United States*, 26 Cl. Ct. 759 (1992), *aff'd*, 12 F.3d 1072 (Fed. Cir. 1993).

550. *Id.* at 765-66.

551. *Id.* at 768-77.

552. *Amoroso*, 12 F.3d at 1078.

553. 41 U.S.C. § 10 (1988).

554. Compare 41 U.S.C. § 10b (outlining guidelines for public works contracts) with 41 U.S.C. § 10d (outlining guidelines for public use contracts).

555. *Amoroso*, 12 F.3d at 1078.

556. *Id.* at 1078-79 (Plager, J., concurring).

557. *Id.* at 1079.

doctrine when the case could be resolved on more conventional contract interpretation grounds.⁵⁵⁸

D. Government Warranty of Specifications

The Government commonly employs two broad types of specifications in government contracting: design specifications and performance specifications.⁵⁵⁹ Design specifications are usually very detailed, requiring a "build to print" approach from which the contractor generally is not permitted to deviate.⁵⁶⁰ Performance specifications, by contrast, normally set forth only the performance characteristics of an end product and permit the contractor to determine much or all of the design or process at issue.⁵⁶¹ For this reason, performance specifications are generally not found to dictate the precise details of a contractor's performance.⁵⁶²

When the Government provides design specifications, the Government makes an implied warranty of their adequacy.⁵⁶³ This warranty, in turn, usually operates to make the Government liable for any problems regarding the end product that were incurred by a contractor following the specifications.⁵⁶⁴ Accordingly, contractors wishing to take advantage of this warranty attempt to show that a given specification is a design specification. It is well settled, however, that although the Government may specify a minor "design" requirement for some aspect of a performance specification, that requirement alone does not transform an overall performance specification into a design specification.⁵⁶⁵

In *Blake Construction Co. v. United States*,⁵⁶⁶ the Federal Circuit held that the mere fact that a specification cannot be performed precisely does not, by itself, transform a "design" specification into a "performance" specification.⁵⁶⁷ The *Blake* decision is consistent with prior

558. *Id.* at 1079-80.

559. See generally JOHN CIBINIC, JR. & RALPH C. NASH, JR., *ADMINISTRATION OF GOVERNMENT CONTRACTS* 199-212 (2d ed. 1986).

560. *Id.*

561. *Id.*

562. *Id.*

563. See, e.g., *Inlet Co.*, ASBCA No. 9095, 1964 B.C.A. (CCH) ¶ 4093, 19,998-20,001 (1964) (finding that Government did not provide contractors with design specific contract, and therefore, there was no implied warranty).

564. *Id.*

565. *Id.*

566. 987 F.2d 743 (Fed. Cir.), cert. denied, 114 S. Ct. 438 (1993).

567. *Blake Constr. Co. v. United States*, 987 F.2d 743 (Fed. Cir.), cert. denied, 114 S. Ct. 438 (1993).

case law establishing that one or more minor aspects of a specification will not operate to change its overall character.⁵⁶⁸

Blake entered into a contract with the Navy to construct replacement medical facilities.⁵⁶⁹ The contract drawings indicated that an electrical conduit would be installed in the overhead area along the central corridor of the facilities.⁵⁷⁰ The drawings also contained certain "diagrammatic notes" providing, *inter alia*, that the contractor "shall relocate [conduit] feeders as per existing conditions and shall coordinate with other trades."⁵⁷¹ Blake's subcontractor proceeded to install the conduit underground along the corridor, asserting that the drawing notes permitted the subcontractor to relocate the conduit so as to avoid conflict with other trades, such as mechanical and plumbing.⁵⁷² After the Government required the subcontractor to relocate the conduit to the overhead area, the subcontractor, through Blake, submitted a claim for the costs of the cable relocation.⁵⁷³ The contracting officer denied the claim and Blake appealed to the Court of Federal Claims.⁵⁷⁴

Before the court, Blake argued that the conduit specifications were performance specifications that described one objective—installation of the conduit so as to avoid conflict with other trades.⁵⁷⁵ In support of that contention, Blake pointed to notes on the specifications expressly requiring the avoidance of other trades.⁵⁷⁶ Blake argued that, because the conduit could not be installed exactly as depicted in the drawings, the specifications lacked the clear "road map" characteristic of design specifications and were by definition performance specifications.⁵⁷⁷

In response to these arguments, the Court of Federal Claims found that the specifications were performance specifications primarily because the diagrammatic notes indicated that the drawings did not

568. See, e.g., *Zinger Constr. Co. v. United States*, 807 F.2d 979, 981 (Fed. Cir. 1986) (stating that "labels do not independently create, limit, or remove a contractor's obligations"); *Penguin Indus., Inc. v. United States*, 530 F.2d 934, 937 (Cl. Ct. 1976) (noting that terms "design specification" and "performance specifications" are not self-determining); *Aleutian Constructors v. United States*, 24 Cl. Ct. 372, 379 (1991) (finding that most contracts contain both specifications).

569. *Blake Constr.*, 987 F.2d at 744.

570. *Id.*

571. *Id.*

572. *Id.*

573. *Id.* at 744-45.

574. *Id.* at 745.

575. *Id.*

576. *Id.*

577. *Id.*

have to be followed exactly.⁵⁷⁸ The court concluded that the government directive to relocate the conduit constituted a constructive change to the contract.⁵⁷⁹ Accordingly, the court awarded Blake an equitable adjustment for the additional costs incurred for relocation.⁵⁸⁰

The Federal Circuit reversed the Court of Federal Claims, observing that the real issue was not whether the drawings and notes should be labeled "design" or "performance" specifications, but how much discretion the specifications gave the contractor in the placement of the conduit.⁵⁸¹ The court noted that, although the drawings gave the contractor some discretion to work around other trades, the trial court had defined too broadly the amount of discretion permitted.⁵⁸² On these bases, the court found that the fact that the conduit could not be installed overhead in the precise manner depicted by the drawings did not automatically relieve the contractor of the obligation to install the conduit overhead.⁵⁸³ The court therefore concluded that the Government properly ordered the relocation of the conduit, and vacated the judgment of the court below.⁵⁸⁴

E. Variation in Estimated Quantity Clause

The "Variation in Estimated Quantity" clause is normally included in unit-price contracts when the exact contract quantity cannot be determined with reasonable accuracy.⁵⁸⁵ The clause entitles a

578. *Blake Constr. Co. v. United States*, 25 Cl. Ct. 177, 182-83 (1992), *rev'd*, 987 F.2d 743 (Fed. Cir. 1993).

579. *Id.*

580. *Id.* at 189.

581. *Blake Constr.*, 987 F.2d at 746.

582. *Id.*

583. *Id.* at 747.

584. *Id.*

585. Ralph C. Nash & John Cibinic, *Variation in Estimated Quantity Clause: Groping For Meaning*, 3 NASH & CIBINIC REP. ¶ 65, at 137; see 48 C.F.R. § 52.212-11 (1992). This section is referred to as the Variation in Estimated Quantity clause. The clause provides:

If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity.

48 C.F.R. § 52.212-11.

The clause is essentially the same as it appeared in the Armed Services Procurement Regulation (ASPR), the predecessor regulation to the FAR. See 32 C.F.R. § 18.509-5 (1969). The last sentence of the clause was incorporated into the provision by ASPR Revision No. 27, dated April 15, 1968. The note accompanying ASPR Revision No. 27 provides:

The clause in 7-603.27 "Variation in Estimated Quantities," is revised to make more explicit that only the quantities which exceed 115%, or are less than 85% of the

contractor to a price adjustment when the Government's requirements deviate from the estimated contract quantity by more than a stated percentage.⁵⁸⁶ The purpose of the clause is to allocate the risk of increased costs, resulting from the quantity variation, to the Government.⁵⁸⁷ Notwithstanding the clear intent of the clause, courts had employed two different methods of calculating an equitable adjustment under the clause. In 1993, the proper approach was firmly resolved by the Federal Circuit in *Foley Co. v United States*.⁵⁸⁸

In *Victory Construction Co. v. United States*,⁵⁸⁹ the Court of Claims first determined that a proponent of an equitable adjustment under the clause must establish that the unit costs had increased or decreased as a result of the difference in quantity and that an adjustment under the clause must be based on the difference in cost directly attributable to the quantity variation, such as economies of scale.⁵⁹⁰ The court concluded that the clause did not contemplate the complete repricing of the work for purposes of calculating an equitable adjustment.⁵⁹¹

The Corps of Engineers Board of Contract Appeals reached the opposite conclusion in *Bean Dredging Corp.*⁵⁹² In *Bean Dredging*, the contractor sought a price adjustment after the Government ordered quantities in excess of the upper threshold percentage set forth in the contract.⁵⁹³ Citing *Victory Construction*, the Government maintained that the contractor had not established that the cost of producing units above the threshold percentage was greater than the cost of producing units under the threshold.⁵⁹⁴ The board, however, held that the proper basis for determining an equitable adjustment under the "Variation in Estimated Quantity" clause was the difference between the cost of producing the units outside the percentage range

estimated quantities are subject to adjustment under this clause.

ASPR Rev. No. 27 (Apr. 15, 1968). Interestingly, the note accompanying the revision provides a much clearer statement of the method of calculating an equitable adjustment under the clause than ASPR Revision No. 27 itself. Had the language of the note been substituted for ASPR Revision No. 27, it is likely that the clause would never have been the subject of such extensive litigation.

586. Nash & Cibinic, *supra* note 585, ¶ 65, at 137-38.

587. Nash & Cibinic, *supra* note 585, ¶ 65, at 137.

588. 11 F.3d 1032 (Fed. Cir. 1993).

589. 510 F.2d 1379 (Ct. Cl. 1975).

590. *Victory Constr. Co. v. United States*, 510 F.2d 1379, 1386 (Ct. Cl. 1975).

591. *Id.* at 1386-87.

592. ENGBCA No. 5507, 89-3 B.C.A. (CCH) ¶ 22,034, at 110,824 (1989) (finding that contractor was entitled to repricing of contract price).

593. *Bean Dredging Corp.*, ENGBCA No. 5507, 89-3 B.C.A. (CCH) ¶ 22,034, at 110,816 (1989).

594. *Id.* at 110,819-21.

and the contract unit price.⁵⁹⁵ The board stated that the *Victory Construction* interpretation was mere dicta and would impermissibly preserve the profit or loss bid by the contractor in the unit price.⁵⁹⁶

The Federal Circuit resolved this difference in 1993 in *Foley Co. v. United States*, holding that recovery under the "Variation in Estimated Quantity" clause requires proof of an actual increase or decrease in costs due solely to the quantity variation.⁵⁹⁷ In *Foley*, the contractor agreed to remove and dispose of sludge at a unit price of \$308 per ton, based on an estimated quantity of 6600 tons.⁵⁹⁸ Ultimately, Foley removed 23,937.51 tons of sludge.⁵⁹⁹ While the Government paid Foley \$308 per ton for 115% of the estimated quantity under the contract, it compensated Foley for the remaining sludge removal at \$295 per ton.⁶⁰⁰ Foley submitted a claim for the difference between the \$308 and \$295 unit prices of the sludge removed in excess of 115% of the estimate.⁶⁰¹

The contracting officer denied Foley's claim, determining that the "Variation in Estimated Quantity" clause only entitled Foley to its actual costs plus a reasonable profit for removal of sludge in excess of 115% of the contract estimate.⁶⁰² Because this amount was less than that already paid to Foley for the additional work, the contracting officer demanded a refund.⁶⁰³

Foley filed a complaint in the Court of Federal Claims, maintaining entitlement to the \$308 original unit price for sludge removal in excess of 115% of the estimated contract quantity.⁶⁰⁴ The Government argued that it was entitled to a downward equitable adjustment

595. *Id.* at 110,822-23.

596. *Id.* at 110,821-22; *see also* Burnett Constr. Co. v. United States, 26 Cl. Ct. 296, 297 (1992) (concluding that contractor was entitled to equitable adjustment under "Variations in Estimated Quantity" clause); Aoki Corp., ENGBCA No. PCC-62, 91-2 B.C.A. (CCH) ¶ 23,848, at 119,523 (1991) (finding that contractor was entitled to equitable adjustment in accordance with *Bean*); B&L Constr. Co., ENGBCA No. 5700, 91-1 B.C.A. (CCH) ¶ 23,575, at 118,207 (1990) (allowing contractor equitable adjustment based on Government's estimates because contractor had not recorded his own actual costs); B&L Constr. Co., ENGBCA No. 5772, 91-1 B.C.A. (CCH) ¶ 23,612, at 118,322 (1990) (finding that Government may use its own equipment cost guide in determining equitable adjustment due contractor); Wayne L. Grist, Inc., ENGBCA No. 5503, 90-2 B.C.A. (CCH) ¶ 22,915, at 115,047 (1990) (finding that contractor was entitled to equitable adjustment for costs incurred when Government did not provide survey bench marks as required). *But see* Clement-Mtarri Co., ASBCA No. 38170, 93-2 B.C.A. (CCH) ¶ 25,567, at 127,332 (1992) (rejecting *Bean* and finding that contractor was not entitled to cost of overrun quantity).

597. *Foley Co. v. United States*, 11 F.3d 1032, 1035-36 (Fed. Cir. 1993).

598. *Id.* at 1033.

599. *Id.*

600. *Id.*

601. *Id.*

602. *Id.*

603. *Id.*

604. *Id.*

in the unit contract price under the precedent established in *Bean Dredging* and adopted by the court in *Burnett Construction v. United States*.⁶⁰⁵ On cross-motions for summary judgment, the court determined that the *Victory Construction* case was controlling and rejected the pricing methodology established by *Bean Dredging* and *Burnett Construction*.⁶⁰⁶ The court granted Foley's motion for summary judgment, holding that recovery under the "Variation in Estimated Quantity" clause requires proof of an actual increase or decrease in costs resulting from the quantity variation.⁶⁰⁷ The court concluded that the Government had not proven that Foley experienced a per unit cost decrease for the removal of sludge over the threshold percentage.⁶⁰⁸ The court also granted Foley recovery of the full amount of its claim.⁶⁰⁹

On appeal, the Federal Circuit affirmed the lower court, determining that the plain meaning of the "Variation in Estimated Quantity" clause requires that an equitable adjustment be based on increases or decreases in actual costs.⁶¹⁰ The court noted that the Government's interpretation of the clause would require "the establishment of a new unit price for the overrun amounts by an equitable adjustment of the contractor's unit profit, even where the contractor's unit costs remained constant."⁶¹¹ Rejecting the Government's attempts to distinguish the *Victory Construction* decision from the instant case, the court stated that *Victory Construction* was binding precedent and must be followed.⁶¹² The court therefore concluded that Foley was entitled to payment at the contract unit price for the sludge it removed in excess of the 115% of the contract estimate.⁶¹³

Whether or not *Victory Construction* was in fact controlling precedent, the Federal Circuit in *Foley* properly interpreted the "Variation in Estimated Quantity" clause to prohibit the entire repricing of

605. *Foley Co. v. United States*, 26 Cl. Ct. 936, 944 (1992). Interestingly, the Department of Justice took inconsistent legal positions in the Court of Federal Claims in *Foley* and *Burnett* in its attempt to deny each contractor recovery. See *id.*; *Burnett Constr. Co. v. United States*, 26 Cl. Ct. 296, 296 (1992).

606. *Foley*, 26 Cl. Ct. at 941-44.

607. *Id.* at 936.

608. *Id.* at 944.

609. *Id.* at 946.

610. *Foley Co. v. United States*, 11 F.3d 1032, 1036 (Fed. Cir. 1993).

611. *Id.* at 1034.

612. *Id.* at 1035-36.

613. *Id.* Judge Lourie concurred in the result on the basis of the precedential authority of *Victory Construction*. *Id.* at 1036 (Lourie, J., concurring). While Judge Lourie opined that the "Variation in Estimated Quantity" clause "should be interpreted to require a determination of a net increase or decrease in total cost resulting from the quantity variation, rather than a change in unit cost," he believed that the *Victory Construction* precedent was controlling. *Id.*

quantities exceeding 115% of the contract estimate and to limit the adjustment only to those changes that were solely the result of the differences in quantities.⁶¹⁴ As Professor Cibinic has noted, repricing these quantities, as the board did in *Bean Dredging*, is contrary to the equitable adjustment principles which were designed to keep the contractor "whole" when the Government modifies a contract.⁶¹⁵ Under the *Bean Dredging* rationale, the contractor can recover losses on the adjusted units for underbid contracts and the Government can recover a contractor's excess profits on adjusted units for overbid contracts.⁶¹⁶ While such a result may foster equity between the parties, it is well beyond the scope of the "Variation in Estimated Quantity" clause. The significance of the Federal Circuit decision in *Foley* is that its standard will preserve any loss or excess profit built into the contract unit price, thereby promoting the intent and purpose of the clause.

F. Cost Accounting Standards

One of the most important decisions issued by the Federal Circuit this year focused on cost accounting standards. The court in *Rice v. Martin Marietta Corp.*⁶¹⁷ reversed the ASBCA and held that DAR 15-203(c)⁶¹⁸ requires contractors to deduct from their costs a pro rata share of general and administrative (G&A) expenses based on unallowable costs.⁶¹⁹ Due to this change in accounting standards, the Federal Circuit's decision is likely to have an immediate impact on all contractors performing cost reimbursement-type contracts who previously aligned their accounting practices to conform to the ASBCA decision. The ultimate result of *Martin Marietta* is that contractors will now recover less from the Government in cost-reimbursement contracts.

Martin Marietta entered into a fixed-price incentive contract in 1979.⁶²⁰ The contract included DAR 15-203(c), which stated in part

614. The *Victory Construction* decision involved a pre-ASPR Revision No. 27 Variation in Estimated Quantity clause, but relied on the Revision to support its conclusion. *Victory Constr. Co. v. United States*, 510 F.2d 1379, 1381 (Ct. Cl. 1975). Accordingly, the board in *Bean Dredging* characterized the *Victory Construction* interpretation as dicta and did not feel bound to follow the decision. *Bean Dredging Co.*, ENGBCA No. 5507, 89-3 B.C.A. (CCH) ¶ 22,034, at 110,821-22 (1989).

615. Nash & Cibinic, *supra* note 585, ¶ 65, at 139.

616. Nash & Cibinic, *supra* note 585, ¶ 65, at 139.

617. 13 F.3d 1563 (Fed. Cir. 1993).

618. DAR, 32 C.F.R. § 15.203(c) (1984).

619. *Rice v. Martin Marietta Corp.*, 13 F.3d 1563, 1565-66 (Fed. Cir. 1993).

620. *Martin Marietta Corp.*, ASBCA No. 35895, 92-3 B.C.A. (CCH) ¶ 25,094, at 125,083 (1992), *rev'd*, 13 F.3d 1563 (Fed. Cir. 1993).

that unallowable costs "shall be included in the base and bear their *pro-rata* share of G&A costs."⁶²¹ Martin Marietta's expenses included a tax gross-up expense, which resulted from payments made to offset an employee's tax liability as a result of being reimbursed for relocation expenses.⁶²² This tax gross-up expense was unallowable under DAR 15-205.25(c)(4).⁶²³ Martin Marietta did not include this expense in its G&A allocation base (referred to by the Federal Circuit as the cost input base) because it did not consider the expense related to the production of goods and services.⁶²⁴ The Defense Contract Audit Agency concluded that this expense, even though unallowable, must be included in the cost input base.⁶²⁵ Because the cost input base is the denominator in the G&A allocation rate (total G&A divided by cost input base), any increase to the base would reduce the rate, thus resulting in a reduction in the amount of G&A allocated to the contract.⁶²⁶ Unable to reach an agreement on this issue, the contracting officer issued a final decision holding that the tax gross-up expense must be included in the cost input base.⁶²⁷

On appeal to the ASBCA, Martin Marietta argued that the tax gross-up expense was properly excluded from the cost input base.⁶²⁸ Alternately, it asserted that assuming that the expense should be included in the base, a pro rata share of G&A based on this or other unallowable costs should not be subtracted from the total G&A allocated to the contract.⁶²⁹ To support this position, Martin Marietta argued that Cost Accounting Standard (CAS) 410 requires G&A to be allocated only to final cost objectives.⁶³⁰ Martin Marietta further contended that attributing any G&A to unallowable costs, as required by DAR 15-203(c), would constitute an allocation rather than an allowability decision. This result would put DAR 15-203(c) in conflict with CAS 410.⁶³¹ According to Martin Marietta, because the CAS supersedes the DAR,⁶³² the CAS must prevail and G&A cannot be split into allowable and unallowable G&A.⁶³³

621. *Id.* at 125,084-85.

622. *Id.* at 125,096.

623. *Id.* at 125,086 (citing DAR, 32 C.F.R. § 15-205.25(c)(4)).

624. *Id.*

625. *Id.* at 125,098.

626. *Id.* at 125,089.

627. *Id.* at 125,095.

628. *Id.*

629. *Id.*

630. *Id.*

631. *Id.*

632. *Id.*

633. *Id.*

The ASBCA held in favor of the Government on the first issue, ruling that unallowable expenses must be included in the cost input base.⁶³⁴ Martin Marietta did not appeal this part of the decision. On the second issue, the board held that CAS 410 and DAR 15-203(c) were in conflict and that DAR 15-203(c) was therefore unenforceable.⁶³⁵ The board concluded that unallowable costs "should not be burdened with a *pro-rata* share of G&A expense."⁶³⁶

On appeal, the Federal Circuit reversed the board and held that there was no conflict between DAR 15-203(c) and CAS 410 because DAR 15-203(c) was not an allocability provision.⁶³⁷ The court held that disallowing the share of G&A that is proportionate to unallowable costs requires a subtraction step, but does not require that any of the G&A be allocated to any unallowable costs.⁶³⁸ The court reasoned that DAR 15-203(c) does not cause the proportionate share of G&A expenses to become a component of the unallowable direct costs.⁶³⁹ Furthermore, because the G&A expense itself is only an approximation of the G&A related to the contract, the court determined that requiring unallowable costs to "bear their *pro-rata* share of G&A costs" does not mean that these costs have been allocated to the unallowable costs.⁶⁴⁰ The court concluded that DAR 15-203(c) operates to disallow G&A expenses in proportion to unallowable costs *after* the G&A expense has been allocated to a final cost objective.⁶⁴¹

As a result of this decision, contractors who have been calculating G&A in accordance with the earlier ASBCA decision must now adjust their practice. In addition, these contractors face the prospect that the Government may try to recover the now-disallowed G&A.

IV. VOID AND VOIDABLE CONTRACTS

The Federal Circuit considered one case during 1993 concerning whether a contract is *void ab initio* or merely voidable.⁶⁴² Courts treat a contract that is *void ab initio* as if it never existed, thereby

634. *Id.* at 125,096-97; *see also* Martin Marietta Corp., ASBCA No. 14159, 71-1 B.C.A. (CCH) ¶ 8783 (1971), *overruled by* Martin Marietta Corp., ASBCA No. 35895, 92-3 B.C.A. (CCH) ¶ 25,094, at 125,096 (1992) (stating that 1971 decision was overruled to extent that "it permitted exclusion of costs from a total cost allocation base solely because they were unallowable costs").

635. *Martin Marietta*, 92-3 B.C.A. (CCH) at 125,099-101.

636. *Id.* at 125,101.

637. *Rice v. Martin Marietta Corp.*, 13 F.3d 1563, 1570-71 (Fed. Cir. 1993).

638. *Id.* at 1569.

639. *Id.*

640. *Id.* at 1566.

641. *Id.* at 1569-70.

642. *Godley v. United States*, 5 F.3d 1473, 1475 (Fed. Cir. 1993).

allowing the Government to avoid obligations it otherwise assumed.⁶⁴³ For this type of contract, the contractor normally is entitled only to the "value of the benefit" it has conferred to the Government through performance.⁶⁴⁴ A voidable contract, however, may become fully enforceable unless the Government exercises its rights to avoid liability in a timely manner.⁶⁴⁵

In *Godley v. United States*,⁶⁴⁶ the Federal Circuit vacated and remanded a grant of summary judgment against the Government on a contract claim that the court below determined was voidable.⁶⁴⁷ Godley offered to build a postal facility and lease it to the Postal Service with an option to buy.⁶⁴⁸ The Postal Service accepted Godley's offer and the transaction was handled by an agent of the Postal Service.⁶⁴⁹ In September 1989, the agent was indicted for conspiracy and bribery, implicating a subcontractor under the Godley contract.⁶⁵⁰ The agent pleaded guilty to several counts of conspiracy and bribery in November 1989.⁶⁵¹ Mr. Godley, however, was neither involved in, nor aware of, the bribery scheme.⁶⁵²

In October 1989, Godley completed construction of the facility, the Postal Service took possession shortly thereafter, and the parties entered into a final lease agreement in December 1989.⁶⁵³ In March 1990, the Postal Service informed Godley that the contract was not valid because it was tainted by the agent's illegal conduct. The Postal Service offered to renegotiate the contract, but stopped payment under the lease.⁶⁵⁴

Godley submitted a breach of contract claim, which was denied by the contracting officer.⁶⁵⁵ He then appealed to the Court of

643. See generally *id.* (explaining general scope and purpose of rule that contracts are *void ab initio* due to fraud); *United States v. Amdahl Corp.*, 786 F.2d 387, 391 (Fed. Cir. 1986) (citing *Amdahl*, GSBGA No. 7859-P-R, 85-3 B.C.A. (CCH) ¶ 18,221, at 91,451 (1985) (holding that rescission, though inequitable, voided contract)); *J.E.T.S., Inc. v. United States*, ASBCA No. 28642, 87-1 B.C.A. (CCH) ¶ 19,569, at 98,912 (1987) (recognizing that courts have determined that void contract entitles Government to refund of all monies paid), *aff'd*, 838 F.2d 1196 (Fed. Cir.), *cert. denied*, 486 U.S. 1057 (1988).

644. See *Ace Van & Storage, Inc.*, ASBCA No. 23759, 83-1 B.C.A. (CCH) ¶ 16,547, at 82,296 (1983) (discussing differences between void and voidable contracts).

645. See *id.* (describing requirement for timely Government election on voidable contracts).

646. 5 F.3d 1473 (Fed. Cir. 1993).

647. *Godley v. United States*, 5 F.3d 1473, 1476 (Fed. Cir. 1993).

648. *Id.* at 1474.

649. *Id.*

650. *Id.*

651. See *id.* (citing *United States v. Paramore*, No. 91-6630, 1992 U.S. App. LEXIS 13606 (4th Cir. June 10, 1992)).

652. *Id.*

653. *Id.*

654. *Id.*

655. *Id.*

Federal Claims and filed a motion for summary judgment.⁶⁵⁶ The court granted Godley's motion, holding that "[w]here the prime contractor is innocent of wrongdoing, the government must exercise [its] right to avoid the contract within a reasonable time of learning that it is tainted by wrongdoing. The failure to do so results in the loss of the right of avoidance."⁶⁵⁷ Because the Postal Service's acceptance of the building and the lease agreement occurred well after the agent's indictment, the court found that the Government waived its right to void the contract.⁶⁵⁸ The Government appealed the decision to the Federal Circuit.⁶⁵⁹

On appeal, the Federal Circuit reversed the lower court, noting that in general, a government contract tainted by fraud is *void ab initio*.⁶⁶⁰ According to the court, however, "[i]llegal acts by a Government contracting agent do not alone taint a contract."⁶⁶¹ Rather, some causal link between the illegality and the contract provisions must also be present.⁶⁶²

The Federal Circuit found the record to be insufficient to determine whether the agent's illegal conduct tainted the contract.⁶⁶³ Accordingly, the Federal Circuit vacated the grant of summary judgment and remanded the case for further fact finding regarding the extent to which the illegal acts tainted the contract.⁶⁶⁴ In this regard, the Federal Circuit's decision is somewhat confusing. Although the court found the record inadequate to resolve the threshold question of whether the contract was void (and therefore seemed to suggest that the contract was not voidable), the court also stated that the contract may in fact be voidable.⁶⁶⁵ Hence, the Federal Circuit's instructions on remand were less than clear.

656. *Godley v. United States*, 26 Cl. Ct. 1075, 1079 (1992), *vacated*, 5 F.3d 1473 (Fed. Cir. 1993).

657. *Id.* at 1081.

658. *Id.*

659. *Godley v. United States*, 5 F.3d 1473 (Fed. Cir. 1993).

660. *Id.* at 1475 (citing *J.E.T.S., Inc. v. United States*, 838 F.2d 1196, 1200 (Fed. Cir.), *cert. denied*, 486 U.S. 1057 (1988)).

661. *Id.* at 1476.

662. *Id.*

663. *Id.*

664. *Id.*

665. *See id.* (noting that Government's acceptance of and entry into building were factors relevant to issue of whether option to void voidable contract was exercised, but, in themselves, do not prove contract was voidable rather than *void ab initio*).

V. ESTOPPEL AGAINST THE GOVERNMENT

Settled precedent holds that in the area of government contract law the Government is bound by the acts of its authorized representatives,⁶⁶⁶ even if their decisions are erroneous or otherwise unfavorable to the Government.⁶⁶⁷ In certain circumstances the Government may be estopped from escaping liability for the acts or omissions of its authorized representatives if they have been reasonably relied on by the contractor.⁶⁶⁸

In 1990, the Supreme Court issued a decision in *Office of Personnel Management v. Richmond* that was viewed by some courts as a death knell to the application of estoppel against the Government.⁶⁶⁹ In that case, a government employee provided incorrect advice to Mr. Richmond, causing him to lose six months of federal benefits.⁶⁷⁰ Richmond sought to estop the Office of Personnel Management (OPM) from enforcing statutory entitlement requirements that would have denied him his benefits. The Supreme Court held that estoppel cannot be used against the Government to abrogate a statutory or regulatory requirement.⁶⁷¹ To hold otherwise, the Court reasoned,

666. See generally *Cooke v. United States*, 91 U.S. (1 Otto) 389 (1875).

667. *Broad Ave. Laundry & Tailoring v. United States*, 681 F.2d 746, 749 (Ct. Cl. 1982) (noting that although contracting officer's modification of contract was erroneous, it was within officer's actual authority to make mistakes of law and, thus, Government was estopped from repudiating contract); *Winn-Senter Constr. Co. v. United States*, 75 F. Supp. 255, 260 (Ct. Cl. 1948) (holding that, under circumstances of case, it was not unfair to hold Government liable for carrying out order made by mistake); *Liberty Coat Co., ASBCA No. 4119*, 57-2 B.C.A. (CCH) ¶ 1576, at 5672 (1957) (holding that where contracting officer makes deviations in contract within scope of officer's authority, Government is bound by officer's representations).

668. See, e.g., *JANA, Inc. v. United States*, 936 F.2d 1265, 1270 (Fed. Cir. 1991) (identifying four elements of successful estoppel claim in government contracts context: "(1) the government must know the true facts; (2) the government must intend that its conduct be acted on or must so act that the contractor asserting the estoppel has a right to believe it is so intended; (3) the contractor must be ignorant of the true facts; (4) the contractor must rely on the government's conduct to his injury"); *American Elec. Lab. v. United States*, 774 F.2d 1110, 1113 (Fed. Cir. 1985) (holding that Government was estopped from denying payments over contract price where such extra payments were held out as inducement to continued performance); *EMECO Indus., Inc. v. United States*, 485 F.2d 652, 657-60 (Ct. Cl. 1973) (applying four elements of estoppel in case where Government was estopped from repudiating implied contract).

669. 496 U.S. 414 (1990); see also *Ralph C. Nash & John Cibinic*, 5 NASH & CIBINIC REP. ¶ 7, at 18 ("The Supreme Court has taken a dim view of the application of [estoppel] against the Federal Government.").

670. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 417-18 (1990). The employee provided Mr. Richmond with erroneous information as to the amount he was allowed to earn before he would lose his entitlement to disability benefits. *Id.*; see, e.g., *Michigan v. City of Allen Park*, 954 F.2d 1201, 1217 (6th Cir. 1992) ("When public funds are involved the Supreme Court has adopted 'a most strict approach to estoppel claims.'") (citing *Richmond*, 496 U.S. at 426).

671. *Richmond*, 496 U.S. at 423-24.

would undermine the ability of Congress to control government spending.⁶⁷²

Despite the Court's use of some broad language hinting that estoppel may never issue against the Government,⁶⁷³ a careful reading of the case indicates that *Richmond* stands only for the proposition that the Government cannot be estopped where the estoppel would cause it to pay money from the public treasury in contravention of a statute or regulation.⁶⁷⁴ Since *Richmond*, however, the Federal Circuit has struggled to determine whether estoppel is ever available against the Government. For example, in *JANA, Inc. v. United States*,⁶⁷⁵ the court stated in dicta that it is "not entirely clear whether the defense of estoppel is still available against the government in light of the Supreme Court's decision [in *Richmond*]." ⁶⁷⁶ Several cases in the Court of Federal Claims have followed suit, adopting the expansive view of *Richmond*, as expressed in *JANA*.⁶⁷⁷

In 1992, the Federal Circuit appeared to liberalize its view on the availability of estoppel. The court observed in *Brush v. Office of Personnel Management*,⁶⁷⁸ that *Richmond* was "dictated by the principle that the federal treasury will be protected from the disbursement of monies for a purpose not provided for by Congress."⁶⁷⁹ The court thus hinted that estoppel could still issue against the Government in certain instances.

In 1993, the Federal Circuit provided further clarification of its view of estoppel in *Burnside-Ott Aviation Training Center v. United States*.⁶⁸⁰ In *Burnside-Ott*, the contractor maintained, inter alia, that the Government was estopped from denying liability for the contractor's

672. *Id.* at 429.

673. The Supreme Court remarked that "not a single case has upheld an estoppel claim against the government for the payment of money." *Id.* at 427. The Court also noted that "[a]s for monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds." *Id.* at 434.

674. See *id.* (stating that "whether there are any extreme circumstances that might support estoppel in a case not involving payment from the Treasury is a matter we need not address").

675. 936 F.2d 1265 (Fed. Cir. 1991).

676. *JANA, Inc. v. United States*, 936 F.2d 1265, 1270 (Fed. Cir. 1991).

677. See *Tri-O, Inc. v. United States*, 28 Cl. Ct. 463, 473 (1993) (stating that "it is dubious whether [estoppel] may be asserted against the Government in light of *Office of Personnel Management v. Richmond*"); *Clawson v. United States*, 24 Cl. Ct. 366, 370 (1991) (citing *Richmond* and noting that estoppel against Government, if it may ever form basis of monetary relief, will operate only when conduct of government agent was within that agent's authority).

678. 982 F.2d 1554 (Fed. Cir. 1992).

679. *Brush v. Office of Personnel Management*, 982 F.2d 1554, 1562 (Fed. Cir. 1992).

680. 985 F.2d 1574 (Fed. Cir. 1993).

increased labor costs.⁶⁸¹ The Government initially represented that certain classes of workers could be employed under the contract, but later altered the classification scheme, so as to delete those same classes.⁶⁸²

The Court of Federal Claims held that, as a matter of law, estoppel was inapplicable because the contractor had no valid right to recovery that would entitle it to prevail against the Government.⁶⁸³ The court also stated that in *Richmond*, the Supreme Court "all but slammed closed the door on equitable estoppel claims against the government."⁶⁸⁴ Burnside-Ott appealed to the Federal Circuit.⁶⁸⁵

The Federal Circuit held that the Court of Federal Claims improperly relied on *Richmond* to conclude that the contractor's estoppel claim was barred as a matter of law:

In particular, the Claims Court erred in concluding that *Richmond* stands for the proposition that equitable estoppel will not lie against the government for any monetary claim. The *Richmond* holding is not so broad. *Richmond* is limited to "claim[s] for payment of money from the Public Treasury contrary to a statutory appropriation."⁶⁸⁶

Because Burnside-Ott's assertion to the right of reimbursement was grounded in contract rather than statute, and the entitlement was not contrary to statute or regulation, the court found that *Richmond* was simply inapplicable.⁶⁸⁷ In so doing, the court left open the opportunity for plaintiffs to assert equitable estoppel against the Government in appropriate contract cases.⁶⁸⁸

681. *Burnside-Ott Aviation Training Ctr. v. United States*, 985 F.2d 1574, 1576-77 (Fed. Cir. 1993). The contractor claimed relief from the Government on five alternative bases: (1) a price adjustment clause in the contract, (2) a changes clause in the contract that provides for equitable adjustment, (3) breach of contract, (4) mutual mistake, and (5) equitable estoppel. *Id.*

682. *Id.* at 1575-76.

683. *Burnside-Ott Aviation Training Ctr.*, 24 Cl. Ct. 553, 564 (1991) (analogizing equitable estoppel to "a shield," court noted that party asserting such claim must have valid claim that would otherwise entitle it to recovery).

684. *Id.*

685. *Burnside-Ott*, 985 F.2d at 1574.

686. *Id.* (quoting *Office of Personnel Management v. Richmond*, 496 U.S. 414, 424 (1990)).

687. *Id.*

688. The Court of Federal Claims has relied on *Burnside-Ott* and *Brush* to open the door to estoppel claims. See *Peters v. United States*, 28 Cl. Ct. 162, 168-69 (1993) (holding that discharged servicemen could not assert estoppel claim against Air Force, but recognizing that Federal Circuit had indicated in *Burnside-Ott* that *Richmond* "should not be extended beyond its precise holding").

VI. SOVEREIGN ACT DOCTRINE

Under the Sovereign Act doctrine, the United States, as a contractor, may not be held responsible for the "public and general" acts of the United States as a sovereign.⁶⁸⁹ In this regard, congressional failure to appropriate sufficient funds under a contract,⁶⁹⁰ an Executive order fixing the work week at forty-eight hours,⁶⁹¹ a rise in interest rates,⁶⁹² and imposition of an embargo⁶⁹³ have all been considered sovereign acts for which the Government may not be held liable for breach of contract. Although a contracting agency may not bargain away the Government's right to perform its sovereign duties, the contracting officer has discretion to include a provision in the contract entitling the contractor to a price adjustment if sovereign acts render performance more costly.⁶⁹⁴ Such a provision, however, must convey a right of recovery against the Government in unmistakable terms.⁶⁹⁵

In 1993, the Federal Circuit issued two opinions concerning the sovereign act defense that are difficult to reconcile. Both cases involved changes in government policy affecting a discrete industry. In each case, the court reversed the decision of the Court of Federal Claims, focusing on the provisions of the contract to determine whether the contractor had assumed the risk of increased costs

689. See, e.g., *Horowitz v. United States*, 267 U.S. 458, 461 (1925) (agreeing with Court of Claims precedent that United States, as party to contract, cannot be sued for obstruction of performance of contract resulting from public and general acts as sovereign); *Atlas Corp. v. United States*, 895 F.2d 745, 754 (Fed. Cir.) (noting that under Sovereign Act doctrine, Government "is not contractually liable for acts taken in its sovereign capacity for the public good"), *cert. denied*, 498 U.S. 811 (1990). For an excellent discussion of the Sovereign Act doctrine, see Ronald G. Morgan, *Identifying Protected Government Acts Under the Sovereign Acts Doctrine: A Question of Acts and Actors*, 22 PUB. CON. L.J. 223 (1993).

690. See *Winston Bros. v. United States*, 130 F. Supp. 374, 383 (Ct. Cl. 1955) (holding that failure to appropriate requisite funds did not create government liability where contract specifically released Government from such liability).

691. See *Clemmer Constr. Co. v. United States*, 71 F. Supp. 917, 919 (Ct. Cl. 1947) (holding that contractor was not entitled to recovery for increased costs of completion resulting from Government's mandating minimum 48-hour work week).

692. See *Anthony P. Miller, Inc. v. United States*, 161 Ct. Cl. 455, 462-64 (1963) (describing how private bidder on construction project lost deposit to government agency when increase in interest rate made initial bid untenable).

693. See *Horowitz*, 267 U.S. at 460 (describing how government agency's embargo on shipment of silk resulted in \$10,811.84 loss to private contractor).

694. See *Gerhardt F. Meyne Co. v. United States*, 76 F. Supp. 811, 815-16 (Ct. Cl. 1948) (noting that contracting officer cannot agree to refrain from exercising sovereign power, but may contract to assume increased costs resulting therefrom).

695. *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 618-19 (D.C. Cir. 1992) (describing history and precedent of "unmistakability doctrine" as applied to government contracts).

resulting from the sovereign act. In *Winstar Corp. v. United States*,⁶⁹⁶ the Federal Circuit determined that changes in existing law enabled the Government to vitiate its contractual obligations,⁶⁹⁷ while in *Hughes Communications Galaxy, Inc. v. United States*,⁶⁹⁸ the court held that a specific contract clause rendered the Government liable for changes in policy.⁶⁹⁹

During the early 1980s, Winstar and other plaintiffs entered into agreements with the Federal Savings and Loan Insurance Corporation (FSLIC) to acquire troubled savings and loans, whereby the FSLIC promised to fulfill certain monetary contributions and other contractual responsibilities.⁷⁰⁰ The agreements also incorporated any resolutions and letters of the Federal Home Loan Bank Board (the Bank Board) concerning the acquisitions in connection with the Bank Board's approval.⁷⁰¹ In July 1984, the Bank Board issued a "forbearance letter" confirming that, for purposes of reporting to the Bank Board, Winstar and other plaintiffs would be permitted to amortize intangible assets over thirty-five years.⁷⁰² At the time of the transactions, supervisory goodwill was an intangible asset critical to the transactions.⁷⁰³

After these transactions, Congress passed the Financial Institution, Reform, Recovery and Enforcement Act of 1989 (FIRREA),⁷⁰⁴ which abolished the Bank Board and charged the Office of Thrift Supervision (OTS) with developing new capital standards for savings associations.⁷⁰⁵ FIRREA and the OTS essentially phased out supervisory goodwill as an appropriate asset,⁷⁰⁶ causing financial loss

696. 994 F.2d 797 (Fed. Cir. 1993).

697. *Winstar Corp. v. United States*, 994 F.2d 797, 807-08 (Fed. Cir. 1993) (noting that under Sovereign Act doctrine, burden of change in law is borne by private party unless contract specifically places liability for such changes on Government), *vacated and reh'g in banc granted*, Aug. 18, 1993.

698. 998 F.2d 953 (Fed. Cir. 1993).

699. *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 958-59 (Fed. Cir. 1993) (holding that specific clause in contract shifted financial responsibility to Government and thus vitiated Sovereign Act doctrine defense).

700. *Winstar Corp.*, 994 F.2d at 803 (describing substance of "Assistance Agreement" between Winstar and FSLIC).

701. *Id.*

702. *Id.*

703. *Id.* at 804 (noting that had Winstar been unable to include supervisory goodwill within its capital assets, it "would have been subject to immediate liquidation").

704. Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C. (Supp. IV 1992)).

705. 12 U.S.C. §§ 1437(a), 1464(t)(1)(A) (Supp. IV 1992); see *Winstar Corp.*, 994 F.2d at 804-05 (describing effects of new regulatory scheme and transfer of authority from Bank Board to Office of Thrift Supervision).

706. See 12 U.S.C. § 1464(t)(3) (limiting amount of supervisory goodwill in calculating core capital to applicable percentage of total assets as set forth under new regulatory scheme); *Winstar Corp.*, 994 F.2d at 805 (describing Office of Thrift Supervision's efforts to limit use of

to plaintiffs. Winstar, for example, had serious difficulties meeting the new statutory requirements and ended up in receivership.⁷⁰⁷

Winstar and the other plaintiffs filed actions in the Court of Federal Claims alleging breach of contract.⁷⁰⁸ The court held that the Government breached an implied-in-fact contract existing between it and Winstar when Congress enacted FIRREA, which limited the amortization period to twenty years.⁷⁰⁹ The court entered judgments in favor of Winstar and all of the other plaintiffs.⁷¹⁰

The Government appealed to the Federal Circuit, contending that the Bank Board issued the forbearance letter and similar documents in the exercise of its regulatory function and represented only a statement of compliance with then-existing regulations which were perforce subject to change.⁷¹¹ The Federal Circuit concluded that FIRREA constituted a sovereign act by Congress, having "general applicability for the public good" and not targeted specifically at the plaintiffs.⁷¹² Accordingly, the Federal Circuit reversed the Court of Federal Claims after determining that the plaintiffs had assumed the risk under the contract that the law would change.⁷¹³ The court found that Winstar, the Bank Board, and the FSLIC all had agreed to act in accordance with the law, but did not limit their obligation in unmistakable terms to the law in effect at the time of contract formation.⁷¹⁴ Later in the 1993 term the Federal Circuit entered an order withdrawing its opinion in *Winstar*, vacating the panel's decision.⁷¹⁵ The court, sitting in banc, will rehear the issues presented in *Winstar* later this term.

In the second sovereign act case, *Hughes Communications Galaxy, Inc. v. United States*,⁷¹⁶ Hughes and NASA entered into a contract in 1985 under which NASA agreed to use its best efforts to launch Hughes' satellites as part of the space shuttle program.⁷¹⁷ The contract

supervisory goodwill as asset under FIRREA mandate).

707. *Winstar Corp.*, 994 F.2d at 805.

708. See *Winstar Corp. v. United States*, 21 Cl. Ct. 112 (1990) (noting that Winstar filed claim for, inter alia, breach of contract); *Winstar Corp. v. United States*, 25 Cl. Ct. 541, 549 (1992) (ruling that FIRREA regulations constituted breach of contract).

709. *Winstar Corp.*, 25 Cl. Ct. at 549.

710. *Id.* at 553.

711. *Winstar Corp.*, 994 F.2d at 807.

712. *Id.* at 809.

713. *Id.* at 811.

714. See *id.* (noting that risks associated with regulatory changes must fall on plaintiffs in absence of any specific contractual provision).

715. *Winstar Corp. v. United States*, No. 92-5164 (Fed. Cir. Aug. 18, 1993) (granting rehearing in banc).

716. 998 F.2d 953 (Fed. Cir. 1993).

717. *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 955-57 (Fed. Cir. 1993).

contained a specific provision obligating NASA to provide launch services in accordance with government policy approved by President Reagan in 1982.⁷¹⁸ The contract also contained a general provision that obligated NASA to provide services consistent with U.S. law and policy.⁷¹⁹ In 1986, after the Challenger space shuttle tragedy, President Reagan issued an order that restricted NASA from any further involvement in the business of launching commercial spacecraft.⁷²⁰ NASA subsequently advised Hughes that it would be unable to launch the Hughes' satellites.⁷²¹

Hughes filed an action in the Court of Federal Claims, alleging breach of contract by NASA, and further, that NASA abrogated its contract rights in violation of the Fifth Amendment.⁷²² On cross-motions for summary judgment, the court ruled in favor of NASA.⁷²³ The court based its decision on the fact that the exclusion of Hughes' satellites from shuttle launches was the result of a valid sovereign act—a policy decision issued by the President acting within the scope of his authority.⁷²⁴

On appeal, the Federal Circuit reversed the lower court's ruling. Without citation to *Winstar*, the Federal Circuit ruled that under the specified contract language referring to the policy approved by the President in 1982, the Government, in unmistakable terms, waived its right to escape liability for later sovereign acts amending that policy.⁷²⁵ Further, by including this specific language in the contract, the court concluded that the parties allocated the risk of change in government policy to NASA, and that NASA was responsible for the cost of changes resulting from the revision.⁷²⁶

The *Hughes* decision appears in conflict with *Winstar*. In *Winstar*, the Federal Circuit found that the parties failed to agree in unmistakable terms that the Government would compensate *Winstar* for changes in the law, and therefore ruled against the contractor.⁷²⁷

718. *Id.* at 956.

719. *Id.*

720. President's Statement on the Building of a Fourth Shuttle Orbiter and the Future of the Space Program, 22 WEEKLY COMP. PRES. DOC. 1103-04 (Aug. 15, 1986); see also *Hughes Communications*, 998 F.2d at 956-57 (describing NASA's response to President Reagan's order).

721. *Hughes Communications*, 998 F.2d at 957 (describing correspondence between NASA and Hughes subsequent to President Reagan's order).

722. *Hughes Communications Galaxy, Inc. v. United States*, 26 Cl. Ct. 123 (1992), *rev'd*, 998 F.2d 953 (Fed. Cir. 1993).

723. *Id.* at 140.

724. *Id.* at 139-40.

725. *Hughes Communications*, 998 F.2d at 958-59.

726. *Id.*

727. See *Winstar Corp. v. United States*, 994 F.2d 797, 810-11 (Fed. Cir. 1993) (noting absence of necessary language in contract), *vacated and reh'g in banc granted*, Aug. 18, 1993.

The court in *Winstar*, therefore, determined that specific contractual references to existing law, i.e., the ability to amortize supervisory goodwill over thirty years, did *not* limit the parties' obligation in unmistakable terms to the law in effect at the time of contract formation.⁷²⁸ By contrast, the court in *Hughes* concluded that a contract provision referencing the then-current government launch policy for the space shuttle obligated the Government to compensate Hughes for any changes in the policy.⁷²⁹

As previously noted, the Federal Circuit is now reviewing the *Winstar* case in banc and is expected to resolve any apparent conflict with *Hughes*. As the *Hughes* panel recognized, there is a crucial distinction between enjoining the Government from engaging in sovereign activity and apportioning liability under a government contract for sovereign acts.⁷³⁰ While in some instances an award of compensation may effectively prohibit the legislative or executive branch from exercising sovereign power, the Government should not be given *carte blanche* to disavow its contractual obligations (and thereby the rights of contractors) without providing remuneration for the injuries it has caused. As the court in *Hughes* stated:

In its contractual capacity, the government executes countless agreements with private entities to receive and provide services, goods, and supplies. These contracts routinely include provisions shifting financial responsibility to the government for events which might occur in the future. That some of these events may be triggered by sovereign government action does not render the relevant contractual provisions any less binding.⁷³¹

In short, the Government's power to regulate must operate within the context of contractors' rights. It is hoped that the majority of judges participating in the in banc reconsideration of *Winstar* will recognize the important and fundamental distinction between the Government's right to exercise its sovereign power and the Government's contractual liability for sovereign acts.

VII. PROCEDURE

A. *Discovery Against the Government*

During 1993, the Federal Circuit issued two unpublished decisions ruling on government mandamus petitions arising from discovery

⁷²⁸. *Id.* at 811.

⁷²⁹. *See Hughes Communications*, 998 F.2d at 958-59.

⁷³⁰. *Id.*

⁷³¹. *Id.*

disputes in a lawsuit brought by McDonnell Douglas and General Dynamics against the Department of the Navy.⁷³²

In the first opinion, *In re United States*,⁷³³ the Federal Circuit considered whether the Court of Federal Claims had the authority to order the Air Force to permit additional contractor personnel access to information classified under a "Special Access Program."⁷³⁴ McDonnell Douglas Corporation and General Dynamics Corporation filed suit against the Government after the Navy terminated for default their contract to design, fabricate, and produce the A-12 stealth aircraft.⁷³⁵ McDonnell Douglas and General Dynamics alleged that the Navy breached its contract by failing to convey "superior knowledge" about problems and solutions that prior manufacturers encountered under the B-2 and A-117A stealth aircraft programs.⁷³⁶

Some of the information pertaining to this suit was classified as "Special Access," a level of security classification beyond Top Secret.⁷³⁷ McDonnell Douglas and General Dynamics initially requested that the Government grant permission to seventeen people to review Special Access Program information concerning the Air Force B-2 and A-117A stealth aircraft.⁷³⁸ The Secretary of the Air Force issued a detailed decision granting access to ten people, but cited the importance of maintaining the highest level of secrecy with respect to this information.⁷³⁹ In February 1993, McDonnell Douglas and General Dynamics requested that two more people be granted access to the Special Access Programs.⁷⁴⁰ The Acting Secretary of the Air Force rejected the requests without providing any rationale for denying additional clearance.⁷⁴¹

In March 1993, the Court of Federal Claims determined that McDonnell Douglas and General Dynamics had adequately supported their need for two additional people and ordered the Air Force to provide access for those individuals.⁷⁴² The court noted that the Air Force provided no further rationale for its refusal, other than

732. *In re United States*, Misc. No. 370 (Fed. Cir. Apr. 19, 1993); *In re United States*, Misc. No. 374 (Fed. Cir. Apr. 30, 1993).

733. Misc. No. 370 (Fed. Cir. Apr. 19, 1993).

734. Misc. No. 370, slip op. at 1.

735. *Id.*

736. *Id.*

737. *Id.*

738. *Id.*

739. *Id.*

740. *Id.* at 2.

741. *Id.*

742. *Id.* at 3.

"national security."⁷⁴³ The court also questioned the basis of the Air Force determination that ten trustworthy people with security clearances presented no danger to national security, while twelve people would constitute such a threat.⁷⁴⁴ The Court of Federal Claims then denied the Air Force's motion for a stay of the order, and the Government petitioned the Federal Circuit for a stay and a writ of mandamus.⁷⁴⁵

The Federal Circuit granted both the stay and the writ of mandamus,⁷⁴⁶ holding that the court below lacked the authority to review and reverse the Secretary of the Air Force's decision concerning the number of persons granted access to classified Special Access Programs.⁷⁴⁷ Further, the Federal Circuit rejected the Court of Federal Claims' view that the Secretary's decision to limit the number of people granted access was an affront to the court's authority to manage and direct discovery. The Federal Circuit found that the Air Force did not challenge the lower court's authority, nor did it deny the contractors the opportunity to review the documents in question.⁷⁴⁸ Rather, the Air Force merely limited the number of persons eligible to conduct that review.⁷⁴⁹ In addressing the issue of whether the court had the power to review the Secretary's decision to deny access to classified documents, the Federal Circuit cited *Department of Navy v. Egan*⁷⁵⁰ and "its progeny" for the proposition that, absent a controlling statute, the grant of a security clearance is within the sole discretion of the executive branch.⁷⁵¹ The court thus concluded that neither it nor the Court of Federal Claims had the power or

743. *Id.*

744. *Id.*

745. *Id.*

746. *Id.* at 3, 10.

747. *Id.* at 8.

748. *Id.* at 5.

749. *Id.*

750. 484 U.S. 518 (1988).

751. *In re United States*, Misc. No. 370 (Fed. Cir. Apr. 19, 1993) (holding that in absence of congressional mandate, military personnel claiming superior officers violated their constitutional rights have no remedy) (citing *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)); see, e.g., *Schlesinger v. Councilman*, 420 U.S. 738, 757-58 (1975) (explaining that military has special characteristics that strongly urge against civilian court intervention in military justice system); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (holding that request from Kent State students to review training procedures of National Guard was nonjusticiable claim as areas of military training are vested in Legislative and Executive Branches of Government and cannot be challenged by citizenry in court); *Burns v. Wilson*, 346 U.S. 137, 142, 144 (1953) (stating that civil courts have limited function of ensuring that military courts have given full and fair hearing to individual's claims); *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) (holding that judiciary is not competent to review questions of Army personnel assignments and loyalty).

discretion to review the Secretary of the Air Force's decision limiting access to Special Access Programs.⁷⁵²

In the second opinion, *In re United States*,⁷⁵³ the Federal Circuit addressed the propriety of a Court of Federal Claims order requiring the Air Force to disclose to plaintiffs' counsel certain classified, Special Access Program information for which the Air Force had asserted the Military and State Secrets Privilege.⁷⁵⁴ In an unpublished decision, the Federal Circuit ruled that absent questions as to the classification or sensitivity of the information, the Court of Federal Claims lacked authority to order disclosure of the Special Access Program information.⁷⁵⁵

The facts of this case were the same as those described in the previous case, but the dispute here centered on access for the companies' counsel to certain highly classified information under other Special Access Programs to which employees of McDonnell Douglas and General Dynamics had previously been granted access.⁷⁵⁶ The Air Force invoked the Military and State Secrets Privilege to deny access.⁷⁵⁷

The Court of Federal Claims reviewed the Acting Secretary of the Air Force's affidavits, both public and classified, and supported his decision to invoke the privilege.⁷⁵⁸ After determining that the Secretary was the correct person to invoke the privilege, the Court of Federal Claims concluded that the right of the Air Force to invoke the privilege had to be balanced against the plaintiffs' rights to discuss fully their case with counsel.⁷⁵⁹ Consequently, the court modified the Secretary's decision and granted one attorney from each company the right to be briefed on the classified information by their client.⁷⁶⁰ The court also denied the Government's request for a protective order and for a stay and certification.⁷⁶¹ The Government immediately petitioned the Federal Circuit for a writ of mandamus to vacate the Court of Federal Claims' disclosure order.⁷⁶² The Federal Circuit, *ex parte*, granted the Government's

752. Misc. No. 370, slip op. at 7.

753. Misc. No. 374 (Fed. Cir. Apr. 30, 1993).

754. *In re United States*, Misc. No. 374, slip op. at 1 (Fed. Cir. Apr. 30, 1993).

755. *Id.* at 4.

756. *Id.* at 1.

757. *Id.* at 2.

758. *Id.* at 2-3.

759. *Id.* at 3.

760. *Id.*

761. *Id.*

762. *Id.* at 4.

request for a stay of the disclosure order pending review of the issues.⁷⁶³

Upon its review, the Federal Circuit held that the issue involved in both of these cases was the same; whether a "trial court has authority to reverse special access decisions made by a service secretary under Executive Order 12,356."⁷⁶⁴ The court reiterated that the Secretary of the Air Force was the appropriate official to invoke the Military and State Secrets Privilege, and that special access determinations are committed by law to agency heads.⁷⁶⁵ The Federal Circuit further stated that appropriate circumstances exist to invoke the privilege any time there is a reasonable danger that "compulsion of the evidence will expose military [information] which, in the interest of national security, *should not be divulged*."⁷⁶⁶ Because the Court of Federal Claims failed to consider the reasonable danger that military secrets could be divulged, the Federal Circuit held that the lower court's decision to order access to the classified information was improper.⁷⁶⁷

The Federal Circuit also held that the court below erred by considering the plaintiffs' need for the information.⁷⁶⁸ According to the court, when the Military and State Secrets Privilege has been invoked, the trial courts are prohibited from considering the plaintiffs' need for the information.⁷⁶⁹ In such instances, the sole consideration becomes whether the privilege was properly invoked.⁷⁷⁰ In the opinion of the Federal Circuit, the privilege is properly invoked if the classification is not fraudulent or incorrect and if the documents do in fact contain military secrets.⁷⁷¹ Here, the appellate court noted that, although the Court of Federal Claims acknowledged that the Navy's national security concerns were

763. *Id.*

764. *Id.* Executive Order No. 12,356 governs access to classified material. Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982).

765. *Misc. No. 374*, slip op. at 4.

766. *Id.* at 5 (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (emphasis added)).

767. *Id.* at 7, 9.

768. *Id.* at 8.

769. *Id.*; see also *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953) (holding that once military files formal claim of privilege showing reasonable possibility of military secret involvement such filing represents sufficient showing of privilege to foreclose demand for discovery even where request is based on necessity).

770. *Misc. No. 374*, slip op. at 8-9.

771. *Id.* at 8.

legitimate, it nonetheless ordered disclosure,⁷⁷² an act in excess of its authority.⁷⁷³

The above cases demonstrate that the courts grant extensive discretion to the Government in determining which materials merit classified treatment and who, if anyone, is entitled to review such restricted material. Such discretion is granted even when the documents in question pertain to issues in ongoing litigation. With these decisions, the Federal Circuit drew a distinction between discovery matters, which are directed by the courts, and classification issues, which are controlled by the executive branch. The court's rulings thus conceivably allow the Government to affect the outcome of complex litigation, as in the A-12 case, by declining to provide access to a sufficient number of personnel. As a result, the trial judge is left without the means to afford the plaintiff full, appropriate, and expeditious discovery. One solution to this dilemma is for the courts to perform a limited review of the special access decision by treating it as a *de facto* denial of access.

B. Sanctions Against the Government

Despite the Government's broad discretion in discovery issues concerning classified information, the following case demonstrates that the Government's discretion in other discovery matters is far from unfettered. In *M.A. Mortenson Co. v. United States*,⁷⁷⁴ the Federal Circuit examined the issue of whether the United States waived its sovereign immunity to an award of sanctions for abusing the discovery rules of the Court of Federal Claims⁷⁷⁵ and held that such immunity in fact no longer existed.⁷⁷⁶

M.A. Mortenson Company filed suit on behalf of itself and several subcontractors in the Court of Federal Claims against the Veterans Administration for additional costs incurred in constructing a veterans' hospital.⁷⁷⁷ Pursuant to a pretrial discovery order, Mortenson filed its first set of discovery requests in August 1987.⁷⁷⁸ The Government failed to respond, and Mortenson filed a motion to

772. *Id.* at 9.

773. *Id.* The Federal Circuit did not rely on the Court of Federal Claims' finding that the Navy's concerns were valid. Rather, it independently determined that the United States had established a reasonable danger that military secrets would be divulged. *Id.*

774. 996 F.2d 1177 (Fed. Cir. 1993).

775. *M.A. Mortenson Co. v. United States*, 996 F.2d 1177, 1178 (Fed. Cir. 1993).

776. *Id.* at 1184.

777. *M.A. Mortenson Co. v. United States*, 15 Cl. Ct. 362, 363 (1988).

778. *Id.*

compel discovery.⁷⁷⁹ In addition, Mortenson requested attorney's fees and costs incurred in settling the discovery dispute.⁷⁸⁰ The Court of Federal Claims granted Mortenson's motion to compel discovery and adopted a detailed discovery schedule, but did not rule on the request for fees.⁷⁸¹ After the Government failed to comply with either the court's discovery schedule and a second court order directing compliance, the Court of Federal Claims assessed evidentiary sanctions against the Government pursuant to the Rule of the United States Claims Court (RCFC) 37(b)(2).⁷⁸² The Court of Federal Claims also directed the Government to pay attorney's fees and costs associated with the discovery dispute.⁷⁸³

Mortenson next sought a partial judgment against the Government in the amount of the sanctions.⁷⁸⁴ In response, the Government argued that sovereign immunity precluded imposition of such sanctions.⁷⁸⁵ The Court of Federal Claims rejected the Government's argument and entered partial judgment for the plaintiff.⁷⁸⁶

On appeal, the Federal Circuit upheld the imposition of monetary sanctions.⁷⁸⁷ In so doing, the court determined that the Equal Access to Justice Act (EAJA)⁷⁸⁸ waived the United States' sovereign immunity to "ensure that the United States as a litigant in a civil action would be subject to court-awarded fees to the same extent as would be a private party."⁷⁸⁹ The Federal Circuit found that the EAJA waived the Government's immunity with respect to discovery sanctions awarded pursuant to Federal Rule of Civil Procedure 37.⁷⁹⁰ The court could find no basis to distinguish between the abilities of the other federal trial courts to award monetary sanctions against the United States for abuse of the discovery process and the Court of Federal Claims' ability to do so.⁷⁹¹ The Federal Circuit, therefore,

779. *Id.*

780. *Id.*

781. *Id.*

782. *Id.* RCFC 37(b)(2) provides: "If a party . . . fails to obey an order to provide or permit discovery, . . . the court may make such orders in regard to the failure as are just" *Id.*

783. *M.A. Mortenson*, 15 Cl. Ct. at 363.

784. *Id.*

785. *Id.* at 364.

786. *Id.* at 365.

787. *M.A. Mortenson Co. v. United States*, 996 F.2d 1177, 1183 (Fed. Cir. 1993).

788. 28 U.S.C. § 2412(b), (d) (1988).

789. *M.A. Mortenson*, 996 F.2d at 1180.

790. *Id.* at 1181-82 (citing FED. R. CIV. P. 37).

791. *Id.* at 1184.

affirmed the Court of Federal Claims' entry of partial judgment for Mortenson.⁷⁹²

C. Weight Accorded to Contracting Officer Decisions

Under the CDA, both the Court of Federal Claims and the boards of contract appeals review de novo the decisions of contracting officers.⁷⁹³ Accordingly, a contracting officer's findings of fact cannot "be binding in any subsequent proceeding."⁷⁹⁴ This rule, which recognizes that the contracting officer must "wear two hats" in the disputes process, ensures that the contractor receives full judicial review of an adverse contracting officer decision while preserving the opportunity for an early administrative settlement of the contractor's claim.⁷⁹⁵ What significance, however, should a reviewing body accord to a contracting officer's findings of fact when the decision favors the contractor, as opposed to the Government?

In *Wilner v. United States*,⁷⁹⁶ the Federal Circuit held, inter alia, that a contracting officer's final decision favorable to a contractor may be considered an evidentiary admission against interest by the Government.⁷⁹⁷ Wilner was engaged by the Navy to construct a training facility.⁷⁹⁸ Delays during construction postponed project completion by 447 days.⁷⁹⁹ Wilner filed a delay claim with the Navy and was awarded compensation based upon 260 days of delay.⁸⁰⁰ Wilner sought additional compensation and appealed the contracting officer's decision to the Court of Federal Claims.⁸⁰¹

At trial, Wilner presented critical path evidence that conclusively established that the Government was responsible for only ninety-one days of the delay.⁸⁰² The contracting officer, however, testified regarding the bases for his final decision and confirmed that he was convinced that Wilner had experienced 260 days of compensable

792. *Id.*

793. *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987) (explaining that contracting officer's determination is not equivalent to that of lower tribunal, which is owed special deference on appeal).

794. 41 U.S.C. § 605(a) (1988).

795. See SENATE COMMS. ON GOV'TL AFFAIRS & JUDICIARY, CONTRACT DISPUTES ACT OF 1978, S. REP. NO. 1118, 95th Cong., 2d Sess. 1 (1978), reprinted in 1978 U.S.C.A.N. 5235, 5235 (1978) (noting that purpose of act is to "induce resolution to more contract disputes by negotiation prior to litigation").

796. 994 F.2d 783 (Fed. Cir. 1993).

797. *Wilner v. United States*, 994 F.2d 783, 788 (Fed. Cir. 1993).

798. *Id.* at 784.

799. *Id.*

800. *Id.*

801. *Wilner v. United States*, 26 Cl. Ct. 260 (1992), *aff'd*, 994 F.2d 783 (Fed. Cir. 1993).

802. *Wilner*, 994 F.2d at 785.

delay.⁸⁰³ Although the Court of Federal Claims rejected Wilner's claim for added-delay compensation, it permitted Wilner to recover damages based on 259 days of delay.⁸⁰⁴ The court also denied the Government's claim for reimbursement of delay compensation already paid to Wilner, thus rejecting the Government's contention that Wilner's recovery was precluded by its inadequate critical path analysis.⁸⁰⁵ The Government appealed to the Federal Circuit.

In the Federal Circuit, the Government argued that the trial court failed to conduct a de novo review of the contracting officer's decision.⁸⁰⁶ In pertinent part, the Federal Circuit held that the trial court's reliance on the contracting officer's testimony was not improper for three reasons. First, the court determined that the contracting officer's testimony was not hearsay because it was offered "to explain the basis or foundation of the contracting officer's decision" under Rule 801(c) of the Federal Rules of Evidence.⁸⁰⁷ Second, while recognizing the CDA provision that a contracting officer's decision is not binding in any subsequent proceeding, the court observed that testimony on such decisions may be considered and weighed by the tribunal in the same way as any other evidence.⁸⁰⁸ Third, the court reasoned that the Court of Federal Claims was justified in relying on the contracting officer's testimony because a long line of Court of Federal Claims precedent established that decisions by contracting officers favorable to a contractor constitute evidentiary admissions of government liability.⁸⁰⁹

In August 1993, the Federal Circuit agreed to hear *Wilner* in banc and vacated the panel decision.⁸¹⁰ The panel decision in *Wilner* would undoubtedly have had a chilling effect on the partial allowance of contractor claims by contracting officers. Such a result would prevent the speedy and efficient resolution of claims under the CDA and foster more claim litigation in the boards and the courts. The

803. *Id.*

804. *Id.*

805. *Id.*

806. *Id.* at 786.

807. *Id.* (footnote omitted).

808. *Id.* at 787.

809. *Id.* at 788; *see, e.g.,* Dean Constr. Co. v. United States, 411 F.2d 1238, 1245 (Ct. Cl. 1969) (citing consistent holdings that while contracting officer's findings constitute evidentiary admission, such findings are always subject to rebuttal); Robert E. Lee & Co. v. United States, 164 Ct. Cl. 365, 370 (1964) (stating that although court is not bound to give contracting officer's decision great weight, it may accept it as controlling evidence); Vulcan Rail & Constr. Co. v. United States, 158 Ct. Cl. 234, 241 (1962) (holding that contracting officer's findings are "strong evidence" against Government, but they are rebuttable).

810. *Wilner v. United States*, 1993 U.S. App. LEXIS 20065 (Fed. Cir. Aug. 2, 1993).

full court may well have had these concerns in mind when it decided to rehear *Wilner* in banc.

D. Default Judgment

In *Information Systems & Networks Corp. v. United States*,⁸¹¹ the Federal Circuit addressed the issue of when a default judgment is proper pursuant to RCFC 55.⁸¹² The court concluded that entry of a default judgment is appropriate only when the undisputed facts establish a *willful* disregard for the court's rules and procedures.⁸¹³

In May 1991, a contracting officer issued a final decision terminating Information Systems and Networks Corporation (ISN) for default and asserting a claim for over \$300,000 in damages.⁸¹⁴ Through in-house counsel, ISN subsequently filed a complaint in the Court of Federal Claims alleging that the Government had breached its contract and that the default termination was wrongful.⁸¹⁵ The Government filed an answer to ISN's complaint and subsequently filed an amended answer and counterclaim.⁸¹⁶ ISN failed to file a timely answer to the counterclaim, and the Government requested that the Court of Federal Claims enter a default judgment pursuant to RCFC 55(a).⁸¹⁷ Following the court's entry of the default judgment, ISN retained outside counsel, who filed a motion for relief from the judgment pursuant to RCFC 55(c).⁸¹⁸ ISN's in-house counsel supported the motion with an affidavit stating that he believed the prior joinder motion he had filed suspended the requirement for an answer.⁸¹⁹ Therefore, ISN argued that its failure to answer the counterclaim was excusable neglect.⁸²⁰ The Court of Federal Claims denied ISN's request for relief, reasoning that ISN's failure to file a response to the Government's counterclaim, after receiving notice of the filing, was "culpable" conduct rather than excusable neglect.⁸²¹ ISN appealed this decision to the Federal Circuit.

811. 994 F.2d 792 (Fed. Cir. 1993).

812. RCFC 55.

813. *Information Sys. & Networks Corp. v. United States*, 994 F.2d 792, 796 (Fed. Cir. 1993).

814. *Id.* at 794.

815. *Id.*

816. *Id.*

817. *Id.*; see also RCFC 55(a) (providing that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter such party's default").

818. *Information Sys.*, 994 F.2d at 794; see also RCFC 55(c) (providing that "[f]or good cause shown" default judgment may be set aside).

819. *Information Sys.*, 994 F.2d at 794.

820. *Id.*

821. *Id.*

Noting the absence of binding precedent establishing criteria for excusable neglect under RCFC 60(b)(1),⁸²² the Federal Circuit looked to the decisions of its "sister circuits" for precedent.⁸²³ The court found that other circuits normally weighed the following factors to determine whether to grant relief from a default judgment: (1) whether the non-defaulting party would be prejudiced; (2) whether the defaulting party has a meritorious defense; and (3) whether the defaulting party's behavior leading to the default was culpable.⁸²⁴

The Federal Circuit held that the Court of Claims incorrectly applied this test by holding that an unfavorable finding with respect to any one of the three factors requires denial of relief.⁸²⁵ Moreover, the Federal Circuit determined that the court below abused its discretion in finding a defaulting party's behavior *per se* culpable if it received actual or constructive notice of the filing of a complaint and failed to answer.⁸²⁶ The Federal Circuit further held that the proper standard for determining culpability is whether the facts show a willful disregard for the court's rules and procedures, not merely negligence.⁸²⁷ As a result of the Court of Federal Claims' finding that ISN had a meritorious defense and that the Government would not be prejudiced if the default judgment was set aside, the Federal Circuit concluded that ISN's motion to set aside should have been granted.⁸²⁸ The Federal Circuit's decision is in accord with the established principle that a decision on the merits is preferable to a default judgment, and that close cases should be resolved in favor of the party seeking relief from a default judgment.⁸²⁹

822. RCFC 60(b)(1) (allowing court to "relieve a party or the party's legal representative from a final judgment" for reasons including "mistake, inadvertence, surprise, or excusable neglect").

823. *Information Sys.*, 994 F.2d at 795.

824. *Id.* (citing *Zawadski de Bueno v. Bueno Castro*, 822 F.2d 416, 419 (3d Cir. 1987) (citations omitted)).

825. *Id.*

826. *Id.* at 796-97.

827. *Id.*

828. *Id.* at 797.

829. *See, e.g., In re Hammer*, 940 F.2d 524, 525 (9th Cir. 1991) (holding that where defendant has meritorious defense, any doubt should be resolved in favor of motion to set aside default judgment); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401-02 (5th Cir. 1981) (concluding that despite important goal of finality, final judgments should be reopened to ensure justice); *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980) (noting strong policies in favor of resolving genuine disputes on their merits).

E. Litigation Authority of the Department of Justice

Pursuant to statute, the Department of Justice has "exclusive control" over the negotiation, compromise, and litigation strategy of the United States in any pending litigation in federal courts.⁸³⁰ Accordingly, although a federal agency attorney represents the Government before the various boards of contract appeals, a Department of Justice lawyer handles the Government's case before the Court of Federal Claims.

Based on this statutory authority, the Department of Justice has consistently argued before the Court of Federal Claims that a claim pending before the court is within the "exclusive control" of the Justice Department and therefore could not be considered by the contracting officer.⁸³¹ Thus, a defective claim could not be cured and resubmitted to the contracting officer while the matter was pending before the court. For example, in a case involving a deficient certification the Justice Department successfully argued that the Court of Federal Claims must dismiss a contractor's complaint before the contractor could resubmit a properly certified claim to the contracting officer.⁸³² Such a dismissal invariably causes unnecessary delays and added expense in resolving claims.⁸³³ Early in its 1993 term, the Federal Circuit appeared poised to abandon this harsh treatment of prematurely filed complaints.

In *Boeing Co. v. United States*,⁸³⁴ the Federal Circuit required a contracting officer to decide a contractor's claim despite the existence of pending litigation.⁸³⁵ In *Boeing*, the contractor challenged the propriety of a default termination in the Court of Federal Claims.⁸³⁶ While the suit was pending, the Federal Circuit issued its decision in *Overall Roofing & Construction, Inc. v. United States*,⁸³⁷ which held that the court lacked jurisdiction over such non-monetary claims.⁸³⁸ In

830. 28 U.S.C. §§ 516-520 (1988).

831. See, e.g., *Sharman Co. v. United States*, 24 Cl. Ct. 763, 769 (1991).

832. *Durable Metal Prods. Inc. v. United States*, 21 Cl. Ct. 41, 46 (1990).

833. In similar instances, the boards of contract appeals would normally retain jurisdiction over the appeal while the contractor resubmitted its claim to the contracting officer.

834. 26 Cl. Ct. 529 (1992), *rev'd in part, vacated in part without op.*, 991 F.2d 811 (Fed. Cir. 1993).

835. *Boeing Co. v. United States*, Nos. 92-5129, 92-5131, 1993 WL 76280, at *2 (Fed. Cir. Mar. 19, 1993). Curiously, the panel chose not to give this decision precedential effect even though this issue was one of first impression for the Federal Circuit and would, in the authors' opinion, have added significantly to the jurisprudence with regard to the authority of the Department of Justice. See FED. CIR. R. 47.6(b).

836. *Boeing*, 1993 WL 76280 at *1.

837. 929 F.2d 687 (Fed. Cir. 1991).

838. *Overall Roofing & Constr., Inc. v. United States*, 929 F.2d 687, 689 (Fed. Cir. 1991).

an attempt to cure its now deficient complaint, Boeing submitted to the contracting officer a certified claim for money damages, a delay and disruption claim, and a termination for convenience claim.⁸³⁹ After the contracting officer failed to issue a decision on these claims within sixty days, Boeing sought to amend its complaint to add these monetary claims on a "deemed denied" basis.⁸⁴⁰ The Court of Federal Claims denied the motion to amend on the grounds that a complaint over which it had no jurisdiction could not be amended.⁸⁴¹ Boeing then filed a second complaint that contained counts identical to the amended complaint.⁸⁴² The Court of Federal Claims dismissed the second complaint for lack of jurisdiction, concluding that because "[t]here was never a time when the contracting officer had certified claims before her which were not also the subject of a pending [Court of Federal Claims] suit," Boeing could not proceed under the "deemed denied" provision of the CDA.⁸⁴³ The Court of Federal Claims reasoned that the contracting officer was precluded from considering monetary claims submitted while the original action was pending because they raised the same issues being litigated by the Justice Department in the court.⁸⁴⁴

In an unpublished decision, the Federal Circuit reversed the Court of Federal Claims, stating:

We do not agree that 28 U.S.C. § 516 precludes the operation of 41 U.S.C. § 605(c)(5). While there may be some instances where pursuing agency action would be essentially duplicative or disruptive of a matter already in court which is being handled by the Attorney General, that is not this case. The Justice Department could neither approve nor disapprove the certified claims submitted to the contracting officer by Boeing; only the contracting officer had that authority. Further, Boeing's action in presenting its claims to the contracting officer is not duplicative but necessary.⁸⁴⁵

In August 1993, the Federal Circuit issued a published decision directly contrary to the non-precedential decision in *Boeing*. In *Sharman Co. v. United States*,⁸⁴⁶ Sharman filed suit in the Court of Federal Claims challenging a contracting officer's final decision to

839. *Boeing*, 1993 WL 76280 at *1.

840. *Id.*; see 41 U.S.C. § 605(c)(5) (1988) (describing that claim is "deemed denied" if contracting officer fails to respond in timely manner to contractor's claim).

841. *Boeing*, 1993 WL 76280 at *1.

842. *Id.* at *2.

843. *Boeing Co. v. United States*, 26 Cl. Ct. 529, 537 (1992).

844. *Id.* at 536.

845. *Boeing*, 1993 WL 76280 at *2.

846. 2 F.3d 1564 (Fed. Cir. 1993).

terminate for default Sharman's contract with the Marine Corps.⁸⁴⁷ In the complaint, Sharman sought to convert the default termination into one for convenience and asked for remuneration of all unpaid progress payments for the work performed.⁸⁴⁸ The Court of Federal Claims granted in part and denied in part the Government's motion to dismiss for lack of subject matter jurisdiction.⁸⁴⁹ The court dismissed Sharman's claim for convenience termination costs because the claim had never been submitted to the contracting officer for a final decision.⁸⁵⁰ The court, however, decided that it had jurisdiction over Sharman's challenge to the default termination as it related to the contracting officer's determination that Sharman owed the Government \$1,391,240.29 in unliquidated progress payments.⁸⁵¹

In response to the court's order, Sharman amended its complaint to challenge the Government's entitlement to the unliquidated progress payments.⁸⁵² The Government counterclaimed, seeking payment of the unliquidated progress payments.⁸⁵³ The court ruled from the bench on June 11, 1992, granting the Government's counterclaim.⁸⁵⁴ Sharman appealed this decision to the Federal Circuit.

On appeal, the Federal Circuit found that the Court of Federal Claims lacked jurisdiction to entertain Sharman's claim.⁸⁵⁵ The Federal Circuit held that the jurisdictional prerequisite for both a contractor claim and a government claim is a final decision by the contracting officer prior to the claim becoming part of the lawsuit.⁸⁵⁶ Absent such a decision, the court lacked authority to hear petitioner's complaint.⁸⁵⁷

The Federal Circuit held that an October 18, 1990 "final decision" letter from the contracting officer did not change this result, despite the fact that Sharman amended its complaint after that date. The court explained:

847. *Sharman Co. v. United States*, 2 F.3d 1564, 1566 (Fed. Cir. 1993).

848. *Id.* at 1567.

849. *Id.*

850. *Id.*

851. *Id.* The contracting officer informed Sharman that it owed this amount on October 18, 1990. The letter also stated that it was a "notice of the Contracting Officer's final decision."
Id.

852. *Id.* at 1567-68.

853. *Id.* at 1568.

854. *Id.*

855. *Id.* at 1569-70.

856. *Id.*

857. *Id.*

Once a claim is in litigation, the Department of Justice gains exclusive authority to act in the pending litigation. That exclusive authority divests the contracting officer of his authority to issue a final decision on the claim. Because the progress payment claim was the subject of litigation at the outset, the contracting officer had no authority to issue a final decision on the claim after the complaint was filed. Therefore, the October 1990 final decision letter was issued without authority and consequently is a nullity. . . . As a result, it provides no jurisdictional basis for the government's counterclaim for progress payments.⁸⁵⁸

This issue remains the subject of vigorous debate. Judge Schall filed a dissent to the majority opinion, arguing that the Court of Federal Claims had jurisdiction over Sharman's claim because of the Federal Courts Administration Act (FCAA) Amendments to the Tucker Act.⁸⁵⁹ Judge Schall insisted that the Court of Federal Claims had jurisdiction over Sharman's original complaint from the time it was filed, and that the lower court's jurisdiction extended to the Government's counterclaim against Sharman as well.⁸⁶⁰ Judge Schall also concluded, as did the panel in *Boeing*, that 28 U.S.C. § 516 did not divest the contracting officer of the authority to issue a final decision on Sharman's claim.⁸⁶¹

Whether the Federal Circuit will abandon its prior precedent to follow *Boeing* remains to be seen.⁸⁶² The Federal Circuit generally has refrained from considering government contract cases in banc, so it is unlikely that the court will revisit *Sharman*. Meanwhile, it appears that contractors who file suit on a claim absent a contracting officer's final decision run the risk of being caught between a "rock and a hard place." Once litigation begins, the lack of a final decision cannot be cured at the Court of Federal Claims without outright dismissal of the case. As the *Sharman* and *Boeing* decisions reveal, even the most sophisticated government contractors can become entangled in this procedural trap.

858. *Id.* at 1571-72 (citations omitted).

859. *Id.* at 1576 (Schall, J., dissenting); see 28 U.S.C. § 1491(a)(2) (Supp. IV 1992) (explaining that Federal Courts Administration amended statute governing Court of Federal Claims to give it jurisdiction over nonmonetary suits brought under Disputes Act of 1978).

860. *Sharman*, 2 F.3d at 1573, 1577 (Schall, J., dissenting).

861. *Id.* at 1575 (citing 28 U.S.C. § 516 (1988)).

862. Technically, the *Boeing* and *Sharman* decisions do not create a conflict necessitating *in banc* consideration because *Sharman*, as the precedential decision, is controlling. See FED. CIR. R. 47.6.

VIII. DAMAGES

A. *Eichleay Formula*

The Eichleay formula is a method of calculating a contractor's extended overhead in instances where the Government causes the contractor to "stand by" during contract performance and the contractor is unable to take on any additional work during the period of delay.⁸⁶³ The Federal Circuit considered the application of the Eichleay formula in three cases in 1993.⁸⁶⁴

In *Community Heating & Plumbing Co. v. Kelso*,⁸⁶⁵ the Federal Circuit considered a contractor's claim to recover home office costs under the Eichleay formula for an extended performance period. Community claimed that it was entitled to compensation for home office overhead under the Eichleay formula for an eight-month contract extension as a result of government-ordered changes.⁸⁶⁶ The ASBCA rejected Community's appeal from the denial of its extended overhead claim by the contracting officer.⁸⁶⁷ The ASBCA reasoned that there was no suspension in contract performance because of the additional work.⁸⁶⁸ Community appealed to the Federal Circuit.⁸⁶⁹

The Federal Circuit rejected Community's claim to recover home office costs under the Eichleay formula because Community's claim arose out of changed work, not suspension of work or a hiatus in performance.⁸⁷⁰ The court affirmed the general rule that the Eichleay method is appropriate only where contract changes result in suspension of performance.⁸⁷¹

The Federal Circuit also considered the application of the Eichleay formula in *Daly Construction, Inc. v. Garrett*.⁸⁷² In *Daly*, the contractor

863. The formula is named after the first ASBCA case in which it was applied, *Eichleay Corp.*, ASBCA No. 5183, 60-2 B.C.A. (CCH) ¶ 2688 (1960), *aff'd on reconsideration*, 61-1 B.C.A. (CCH) ¶ 2894 (1961).

864. See *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575 (Fed. Cir. 1993); *Daly Constr., Inc. v. Garrett*, 5 F.3d 520 (Fed. Cir. 1993); *Interstate Gen. Gov't Contractors, Inc. v. West*, 12 F.3d 1053 (Fed. Cir. 1993).

865. 987 F.2d 1575 (Fed. Cir. 1993).

866. *Community Heating*, 987 F.2d at 1581.

867. See *Community Heating & Plumbing Co., Inc.*, ASBCA Nos. 37981, 38166, 38167, 38168, 38467, 40151, 92-2 B.C.A. (CCH) ¶ 24,870, at 124,071-73 (1992).

868. *Id.*

869. *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575 (Fed. Cir. 1993).

870. *Id.* at 1582.

871. *Id.* at 1581-82 (citing *C.B.C. Enters., Inc. v. United States*, 978 F.2d 669, 675 (Fed. Cir. 1992) (holding that use of Eichleay method is "specifically limited to contracts affected by government caused suspension, disruptions, and delays of work")).

872. 5 F.3d 520 (Fed. Cir. 1993).

incurred delays as a result of the Government's defective specifications.⁸⁷³ Through a series of negotiations, Daly's claim for extended overhead was denied by the contracting officer.⁸⁷⁴ Daly appealed to the ASBCA, which held that Daly had not produced sufficient evidence to demonstrate that the contractor was reasonably required to stand by, without staff reduction, during the delay or that it was impractical for Daly to take on additional work during the delay period.⁸⁷⁵ On appeal, the Federal Circuit affirmed the board's decision, concluding that Daly made no showing that it reasonably incurred extended overhead costs attributable to the delay.⁸⁷⁶

The Federal Circuit again explored the prerequisite to receiving compensation under the Eichleay formula in *Interstate General Government Contractors, Inc. v. West*.⁸⁷⁷ In *Interstate General*, the contractor did not receive notice to proceed under a contract for repair or replacement of a heating, ventilating, and air conditioning system on the anticipated date because of a pending bid protest.⁸⁷⁸ Because the contract award exhausted Interstate General's bonding capacity, it could not take on additional work during this period of inactivity.⁸⁷⁹ Moreover, under the contract, Interstate General was required to start work within ten days of receiving the notice.⁸⁸⁰ Consequently, Interstate General either dismissed or reassigned the workers who would have performed the contract work.⁸⁸¹ After the bid protest was resolved, Interstate General received notice to proceed and completed performance within the originally contemplated performance period.⁸⁸²

Interstate General subsequently filed a claim for unabsorbed home office overhead incurred during the delay in issuance of the notice.⁸⁸³ The contracting officer denied the claim and Interstate

873. *Daly Constr., Inc. v. Garrett*, 5 F.3d 520, 520 (Fed. Cir. 1993) (noting that Government's specifications for transformers were defective).

874. *Id.* at 521.

875. *Daly Constr., Inc.*, ASBCA No. 34322, 92-1 B.C.A. (CCH) ¶ 24,469, at 122,045 (1991) (stating that Daly was "able to bid other work during the suspension period, and suffered no financial impact as a result of: (a) compromised bonding capacity, or (b) any requirement to stand-by"), *aff'd*, 5 F.3d 520 (Fed. Cir. 1993).

876. *Daly Constr.*, 5 F.3d at 522.

877. 12 F.3d 1053 (Fed. Cir. 1993) (previously issued as nonprecedential opinion on June 11, 1993).

878. *Interstate Gen. Gov't Contractors, Inc. v. West*, 12 F.3d 1053, 1055 (Fed. Cir. 1993).

879. *Id.* at 1055-56.

880. *Id.* at 1055.

881. *Id.* at 1056.

882. *Id.* at 1055.

883. *Id.* at 1055-56.

General appealed to the ASBCA.⁸⁸⁴ The board found that Interstate General did not adequately show that it was forced to "stand by" during the delay period and that Interstate General had not established that it had incurred unabsorbed overhead during the delay period.⁸⁸⁵ Accordingly, the appeal was denied.

On appeal, the Federal Circuit affirmed the decision of the ASBCA even though it disagreed with the board's legal conclusion that the contractor was not required to stand by.⁸⁸⁶ The ASBCA had found that because the employees who were to work on the contract were either dismissed or reassigned, Interstate General was not required to stand by.⁸⁸⁷ The Federal Circuit noted that the board had focused improperly on the employees assigned to the site; the correct inquiry was whether the home office personnel were required to stand by.⁸⁸⁸ Under this standard, the court concluded that Interstate General was in fact required to stand by.⁸⁸⁹ Nevertheless, the court determined that Interstate General was not entitled to recovery under the Eichleay formula because it failed to establish that it incurred unabsorbed overhead under the contract.⁸⁹⁰

The Federal Circuit found that "where a contractor is able to meet the original contract deadline or, as here, to finish early despite a government-caused delay, the originally bargained for time period for absorbing home office overhead through contract performance payments has not been extended."⁸⁹¹ The court concluded that in order to establish recovery under the Eichleay formula, the contractor was required to show that it: "(1) intended to complete the contract early; (2) had the capability to do so; and (3) actually would have completed early, but for the government's actions."⁸⁹² The court held that Interstate General did not produce sufficient evidence under any prong of the test, and thus it was not entitled to recover unabsorbed overhead costs.⁸⁹³ In effect, the Federal Circuit found

884. *Interstate Gen. Gov't Contractors, Inc.*, ASBCA No. 43369, 92-2 B.C.A. (CCH) ¶ 24,956, at 124,363 (1992).

885. *Id.* at 124,367.

886. *Interstate Gen. Gov't Contractors, Inc. v. West*, 12 F.3d 1053, 1055 (Fed. Cir. 1993).

887. *Interstate Gen.*, 92-2 B.C.A. (CCH) at 124,367.

888. *Interstate Gen.*, 12 F.3d at 1057-58.

889. *Id.* at 1058.

890. *Id.* at 1058-60.

891. *Id.* at 1058.

892. *Id.* at 1058-59 (citing *Elrich Contracting, Inc.*, GSBCA No. 10936, 93-1 B.C.A. (CCH) ¶ 25,316, at 126,142 (1992); *Fraizer-Fleming Co.*, ASBCA No. 34537, 91-1 B.C.A. (CCH) ¶ 23,378, at 117,287-88 (1990)).

893. *Id.* at 1058-60.

that Interstate General was already compensated through its direct payments for all home office overhead allocable to this contract.

An important aspect of this opinion is the Federal Circuit's adoption of the above mentioned three-prong test. The test sets forth the standards by which to evaluate whether recovery of unabsorbed overhead should be allowed where the contractor completes performance within the initial performance period, despite a government-caused delay.⁸⁹⁴ Previously, this standard had only been applied by the boards of contract appeals.⁸⁹⁵

In denying Community's, Daly's, and Interstate General's attempts to utilize the Eichleay formula for recovery of unabsorbed overhead, the Federal Circuit did not make new law. The Federal Circuit merely applied the accepted standard that the contractor must show some cessation in contract performance during which it was unable to take on extra work, and that it actually incurred uncompensated overhead expenses in order to recover unabsorbed overhead under the Eichleay formula. Notably, *Community*, *Daly*, and *Interstate General* all relied heavily on the Federal Circuit's 1992 opinion in *C.B.C. Enterprises, Inc. v. United States*.⁸⁹⁶ To date, *C.B.C. Enterprises* contains the most comprehensive discussion by the Federal Circuit of the application of the Eichleay formula and the recovery of unabsorbed overhead.

B. Duty to Mitigate

The Federal Circuit addressed the issue of whether the Government is entitled to damages under a contract when the Government has incurred no loss under the contract in *Madigan v. Hobin Lumber Co.*⁸⁹⁷ In *Hobin*, the Federal Circuit held that the contract terms relieved the Government of its duty to demonstrate harm or loss caused by the contractor's breach as a condition precedent to the recovery of damages.⁸⁹⁸ The Federal Circuit also narrowly construed a Court of Claims decision "on all fours" with *Hobin* in order to reach this result.⁸⁹⁹

894. *Id.* at 1058-59.

895. *See, e.g., Elrich Contracting*, 93-1 B.C.A. (CCH) at 126,142; *Fraizer-Fleming*, 91-1 B.C.A. (CCH) at 117,287-88.

896. *C.B.C. Enters., Inc. v. United States*, 987 F.2d 669, 675 (Fed. Cir. 1992) (limiting recovery under and application of Eichleay formula to cases involving "government-caused suspensions, disruptions and delays of work").

897. 986 F.2d 1401 (Fed. Cir. 1993).

898. *Madigan v. Hobin Lumber Co.*, 986 F.2d 1401, 1402 (Fed. Cir. 1993).

899. *Id.* at 1404-05 (citing *Louisiana-Pacific Corp. v. United States*, 227 Ct. Cl. 756 (1981)).

Hobin and the Forest Service entered into a contract for the sale of timber that required Hobin to cut the timber by the termination date of the contract.⁹⁰⁰ The contract provided that if Hobin failed to cut the timber by that date, the Forest Service would be entitled to damages equal to either the difference between Hobin's contract price and the resale value or, if there was no resale, the difference between the contract price and the appraised price.⁹⁰¹ Hobin did not cut the timber prior to the termination date. The Forest Service, however, chose not to resell the timber, but to preserve the trees as a habitat for the northern spotted owl.⁹⁰² The Government demanded damages based on the difference between Hobin's contract price and the appraised price at contract termination.⁹⁰³

Hobin appealed the adverse contracting officer decision to the Agriculture Board of Contract Appeals.⁹⁰⁴ Both Hobin and the Government moved for summary judgment. Relying on its reading of *Louisiana-Pacific Corp. v. United States*,⁹⁰⁵ which involved a damages clause virtually identical to the clause at issue, the board ruled in favor of Hobin.⁹⁰⁶ In *Louisiana-Pacific*, the Government unsuccessfully attempted to negotiate a contract modification designed to reduce the amount of timber the contractor was required to harvest.⁹⁰⁷ The contractor failed to cut all of the timber as specified in the contract prior to the termination date. The Court of Claims held that the Government's recovery under the damages clause was limited to the contract amount less the amount of timber the Government attempted to exclude from the contract.⁹⁰⁸ Applying *Louisiana-Pacific*, to Hobin's situation, the board granted summary judgment for Hobin.⁹⁰⁹ The board concluded that the Government had not suffered any damages as a result of the contractor's failure to cut the timber because the Government intended to keep the timber uncut.⁹¹⁰

900. *Id.* at 1402.

901. *Id.* (describing "Failure to Cut" provision of contract).

902. *Id.* at 1402-03.

903. *Id.*

904. Hobin Lumber Co., AGBCA No. 87-170-1, 91-3 B.C.A. (CCH) ¶ 24,213, at 121, 117 (1991), *rev'd*, 986 F.2d 1401 (Fed. Cir. 1993).

905. 227 Ct. Cl. 756 (1981).

906. *Hobin Lumber*, 91-3 B.C.A. (CCH) at 121,117.

907. *Louisiana-Pacific Corp. v. United States*, 227 Ct. Cl. 756, 757-58 (1981).

908. *Id.* at 758.

909. *Hobin Lumber*, 91-3 B.C.A. (CCH) at 121,117.

910. *Id.*

On appeal, the Federal Circuit reversed the board's finding and granted summary judgment for the Government.⁹¹¹ In so doing, the Federal Circuit limited *Louisiana-Pacific* to its facts, finding that the case applies only when the Government attempts to negotiate a reduction in the timber to be cut prior to the termination date.⁹¹² In *Hobin*, the Government did not attempt to renegotiate the amount of timber prior to the termination date. As a result, the court stated that *Louisiana-Pacific* was inapposite.⁹¹³ In response to Hobin's argument that the Government did not mitigate damages by attempting a resale, the court ruled that the contract clause specifically contemplated damages without a resale. The Government thus had no obligation to resell the timber.⁹¹⁴

In *Hobin*, the Federal Circuit never expressly overruled *Louisiana-Pacific*, nor could such a result ensue absent in banc consideration of the case by the full court.⁹¹⁵ The panel's attempt to distinguish these two cases on their facts, however, is strained at best. Both cases concerned contracts with the same operative damages clause. Furthermore, the Government suffered no "out of pocket" loss due to the contractor's failure to salvage timber. By granting recovery without proof of actual damages, the Federal Circuit in *Hobin* provided the Government with a windfall. As the Court of Claims correctly held in *Louisiana-Pacific*, such a recovery is improper, counter-intuitive, and contrary to the reasonable expectations of the parties.⁹¹⁶ In essence, the Federal Circuit panel in *Hobin* overruled *sub silentio* the more reasoned and equitable decision of the Court of Claims in *Louisiana-Pacific*.

C. Debt Collection

The Federal Circuit in *Cecile Industries, Inc. v. Cheney*⁹¹⁷ addressed the interaction of the Debt Collection Act (DCA)⁹¹⁸ and the common law right to offset contract debt to the United States against contract payments due the debtor.⁹¹⁹ In *Cecile*, the Federal Circuit

911. *Madigan v. Hobin Lumber Co.*, 986 F.2d 1401, 1406 (Fed. Cir. 1993).

912. *Id.* at 1405 n.3 (noting that in *Louisiana-Pacific*, fact that Government attempted to modify contract during period of performance provided justification for court to estop Government from fully recovering).

913. *Id.* at 1405.

914. *Id.*

915. See FED. CIR. R. 35(a) (stating that "only the court *in banc* may overrule a binding precedent").

916. *Louisiana-Pacific Corp. v. United States*, 227 Ct. Cl. 756, 758 (1981).

917. 995 F.2d 1052 (Fed. Cir. 1993).

918. 31 U.S.C. § 3716 (1988 & Supp. IV 1992).

919. *Cecile Indus., Inc. v. Cheney*, 995 F.2d 1052, 1052 (Fed. Cir. 1993).

held that the Government possesses a common law right to collect contractor debt to the Government, regardless of whether the debt was incurred in the same contract or different contracts.⁹²⁰ Moreover, the court held that this right was not affected by the passage of the DCA.⁹²¹

Cecile was awarded three contracts to produce sleeping bags for the Defense Logistics Agency (DLA).⁹²² Contract one required the sleeping bags to contain at least eighty percent goose down. Cecile submitted a value engineering change proposal, for a cost-saving suggestion in connection with the production of these sleeping bags.⁹²³ This was accepted on contract one.⁹²⁴ Both contracts two and three required the use of government-furnished material (GFM), the cost of which was to be deducted from the contract price.⁹²⁵ Cecile did not use all of the government-furnished material that it was provided and returned the excess material to the Government for a refund.⁹²⁶ Cecile was also entitled to payment of royalties as a result of its value engineering change proposal under contract one.⁹²⁷

After Cecile delivered the sleeping bags and received the full contract payment under contract one, the DLA discovered that the sleeping bags did not contain eighty percent goose down. The DLA terminated contract one for default and reduced the contract price by the amount required to correct the defect.⁹²⁸ The DLA offset the payments owed to Cecile under the value engineering provision of contract one and for the returned GFM under contracts two and three against the amount necessary to cure the defect.⁹²⁹ The DLA did not use the DCA procedures in executing this offset.⁹³⁰

When the contracting officer failed to act on Cecile's claim for payment, Cecile appealed to the ASBCA.⁹³¹ The ASBCA held that the DCA did not apply to the intracontract offset of debts under contract one.⁹³² The ASBCA did hold, however, that the DCA procedures must be used for the intercontract offset that occurred

920. *Id.* at 1056.

921. *Id.*

922. *Id.* at 1053.

923. *Id.*

924. *Id.*

925. *Id.*

926. *Id.*

927. *Id.*

928. *Id.*

929. *Id.*

930. *Id.*

931. Cecile Indus., Inc., ASBCA Nos. 40813, 40814, 40815, 91-3 B.C.A. (CCH) ¶ 24,099, at 120,625 (1991), *aff'd*, 995 F.2d 1052 (Fed. Cir. 1993).

932. *Id.* at 120,626.

under contracts two and three.⁹³³ The board then remanded the intercontract offsets to the contracting officer for compliance with the procedures of the DCA.⁹³⁴ The Government appealed the ASBCA decision to the Federal Circuit.⁹³⁵

The Federal Circuit affirmed the ASBCA's decision concerning the intracontract offsets.⁹³⁶ The Federal Circuit ruled that the DCA was intended to provide an additional means for the Government to collect a debt.⁹³⁷ The court determined that passage of the DCA did not repeal any of the common-law rights of offset that the Government previously enjoyed.⁹³⁸ On this point the court further stated that the Government has "long enjoyed the right to offset contract debts to the United States against contract payments due to the debtor."⁹³⁹ The Federal Circuit therefore held that the board had incorrectly ruled that the DCA applied to the offset of intercontractual debts.⁹⁴⁰ The ASBCA's remand to the contracting officer for procedural compliance, however, rendered this error harmless.⁹⁴¹ Although the Government does possess the right to offset debts between contracts, no further corrective action was necessary in this instance.⁹⁴²

D. Equitable Subrogation

When a surety completes performance of a government contract, the doctrine of equitable subrogation generally operates to confer to the surety all of the rights and remedies that the Government may

933. *Id.*

934. *Id.* at 120,629.

935. *Cecile Indus., Inc. v. Cheney*, 995 F.2d 1052 (Fed. Cir. 1993).

936. *Id.* at 1056.

937. *Id.*

938. *Id.*

939. *Id.* at 1064.

940. *Id.* at 1056. In *Cecile*, the ASBCA followed *DMJM/Norman Engineering Co.*, ASBCA No. 28154, 84-1 B.C.A. (CCH) ¶ 17,226, at 85,761 (1984), in holding that the Debt Collection Act does apply to intercontract debts. *Cecile Indus., Inc.* ASBCA Nos. 40813, 40814, 40815, 91-3 B.C.A. (CCH) ¶ 24,099, at 120,626 (1991). *DMJM* interpreted the Act to be applicable except where it was specifically stated to be inapplicable. See *DMJM*, 84-1 B.C.A. (CCH) at 85,774-79 (examining legislative intent and history of Debt Collection Act). This conclusion is inconsistent with the Federal Circuit's determination that the Act merely augmented the Government's common law rights without extinguishing any pre-existing rights. See 35 GOV'T CONTRACTOR ¶ 410 (1993) (citing *Cecile* and noting that Federal Circuit has ruled "that Debt Collection Act does not abrogate Government's common law rights of offset").

941. *Cecile*, 995 F.2d at 1056.

942. *Id.* In another 1993 case, the Federal Circuit upheld an agency's invocation of the alter ego doctrine in rendering administrative offsets under the Debt Collection Act. See *McCall Stock Farms, Inc. v. United States*, 14 F.3d 1562, 1565-67 (Fed. Cir. 1993) (noting "longstanding existence of the alter ego doctrine as a means to achieve fundamental fairness in particular fact circumstances"). Although *McCall* is not a government contracts case, it will undoubtedly have an impact on Debt Collection Act procedures in government contracting.

have had against a defaulting contractor.⁹⁴³ Under this doctrine, the surety is usually held to be entitled to the monies retained by the Government only under the contract on which the surety completed performance.⁹⁴⁴ In *Transamerica Insurance Co. v. United States*,⁹⁴⁵ however, the Federal Circuit held that the doctrine of equitable subrogation permits a surety to recover monies held by the Government, notwithstanding the fact that those monies are held under a different contract from the contract that generated the surety's claim.⁹⁴⁶ The Federal Circuit reasoned that the surety should be entitled to recover funds held under a different contract when the defaulting contractor is the sole competing claimant for such funds.⁹⁴⁷

In this case, Transamerica was the performance bond surety on two government construction contracts, the second of which was defaulted on by the contractor.⁹⁴⁸ Pursuant to its obligations under the bond, Transamerica completed the second contract and claimed to have sustained losses in excess of one million dollars.⁹⁴⁹ The contractor completed the first contract and filed a claim for an equitable adjustment in an amount exceeding \$500,000.⁹⁵⁰ Transamerica claimed to have submitted written notice to the Government seeking, under the doctrine of equitable subrogation, the funds owed by the Government to the contractor pursuant to the settlement of the contractor's claim under the first contract.⁹⁵¹ The Government, however, disbursed the funds to the contractor.⁹⁵²

Transamerica brought suit in the Court of Federal Claims, contending that it was entitled to money damages because of the Government's disregard of Transamerica's right to equitable subrogation.⁹⁵³ The court rejected Transamerica's claim, reasoning that prevailing precedent provided that a surety's rights and remedies

943. See *Security Ins. Co. v. United States*, 428 F.2d 838, 842 (Ct. Cl. 1970) (explaining that upon completion of contract performance, "[t]he surety is not only a subrogee of the contractor and therefore a creditor, but also a subrogee of the government and entitled to any rights the government has to the retained funds").

944. See *Dependable Ins. Co. v. United States*, 846 F.2d 65, 66 (Fed. Cir. 1988) (stating that surety's recovery is limited to funds held by Government pursuant to underlying construction contract).

945. 989 F.2d 1188 (Fed. Cir. 1993).

946. *Transamerica Ins. Co. v. United States*, 989 F.2d 1188, 1194-95 (Fed. Cir. 1993).

947. *Id.*

948. *Id.* at 1189.

949. *Id.*

950. *Id.*

951. *Id.*

952. *Id.*

953. *Id.*

are limited to the recovery of retained funds from the contract generating the claim.⁹⁵⁴ Transamerica, therefore, could not offset its losses against the funds owed to the contractor under a different contract.⁹⁵⁵ Accordingly, the court dismissed the action for failure to state a claim.⁹⁵⁶

The Federal Circuit, however, determined on review that cogent precedent supported the proposition that where the only claimants to monies held by a contracting agency are the surety and a defaulting contractor, the surety that has performed under a performance bond agreement is subrogated to all of the rights and remedies, including the government common law right to set-off, which the Government might have had against the principal had the Government been forced to complete the project itself.⁹⁵⁷ Moreover, the Federal Circuit found that the equities of the case clearly supported Transamerica's position, because, had the Government chosen to complete the work and incurred losses in so doing, the Government would have had the option to set off its claim against the monies owed the contractor on the second contract.⁹⁵⁸ Moreover, the court observed that it could see no reason to allow the contractor to profit, at Transamerica's expense, from the Government's choice to have Transamerica complete the work.⁹⁵⁹

The court denied the Government's request for rehearing in banc.⁹⁶⁰ Two judges forcefully dissented from the decision.⁹⁶¹ The dissenting judges stated that because Transamerica did not assert that it had been subrogated to the contractor's rights under the defaulted contract, Transamerica could recover only if it acquired subrogation rights from the Government.⁹⁶² They further maintained that the Government did not step in and perform the defaulted contract, which would have entitled the Government to the right of set-off.⁹⁶³ Even if the Government had performed the contract, the dissenters argued, it need not exercise its right of set-off for the benefit of the surety.⁹⁶⁴ The dissenting judges further

954. *Id.* at 1189-90.

955. *Id.* at 1190.

956. *Id.*

957. *Id.* at 1191-94 (discussing surety law precedents in favor of decision to allow equitable subrogation where Government has no competing interest in retained funds).

958. *Id.* at 1194-95.

959. *Id.*

960. *Transamerica Ins. Co. v. United States*, 998 F.2d 972 (Fed. Cir. 1993).

961. *Id.* at 972-74 (Nies, C.J., dissenting).

962. *Id.* at 973.

963. *Id.*

964. *Id.* (citing STEARNS & ELDER, *THE LAW OF SURETYSHIP* § 6.51, at 191-92 (1972)).

asserted that previous case law held that the surety is only subrogated to the rights of the Government on the contract on which it completes performance.⁹⁶⁵ According to the dissenting judges, *Transamerica* was incorrectly decided because it effectively permitted the surety to suspend performance of an undefaulted contract merely by providing notice to the Government that it seeks money due on an unrelated contract.⁹⁶⁶

In the authors' opinion, the dissenting judges advance the better argument. In such instances, the Government is not a stakeholder for the surety, and, as such, a surety has no right in either commercial or government contract law to obtain monies due under an unrelated contract. The *Transamerica* decision will place an excessive administrative burden on the contracting officer in weighing the competing interests of the contractor and its surety. Further, an improper withholding could authorize the contractor to cease performance of the contract. In any event the surety has adequate recourse in the courts to redress its claims against the contractor.

IX. ATTORNEY'S FEES

A. *Equal Access to Justice Act*

The Equal Access to Justice Act (EAJA)⁹⁶⁷ provides a statutory basis for certain parties to recover attorney's fees and litigation costs in lawsuits against the Federal Government.⁹⁶⁸ To recover under the EAJA, a party must "prevail" in the litigation and be a small business or an individual with a net worth under the statutory limit.⁹⁶⁹ A business is considered small if it has less than five hundred employees or a net worth of not more than seven million dollars at the time the action is commenced.⁹⁷⁰ If the party is an individual, its net worth cannot exceed two million dollars at the time that the proceeding is initiated.⁹⁷¹ In addition, before a party or individual may recover under the EAJA, the Government's litigation

965. *Id.* (noting that "a completing surety does not become subrogated to 'all of the government's rights,' only the rights of the government on the contract of which it completes performance") (citing *Dependable Ins. Co. v. United States*, 846 F.2d 65, 67-68 (Fed. Cir. 1988); *Security Ins. Co. v. United States*, 428 F.2d 838, 841 (Ct. Cl. 1970)).

966. *Id.* at 974.

967. 5 U.S.C. § 504 (1988 & Supp. IV 1992) (pertaining to administrative proceedings); 28 U.S.C. § 2412 (pertaining to court proceedings).

968. 5 U.S.C. § 504; 28 U.S.C. § 2412; see Donald A. Tobin & George W. Stiffler, *Recovering Legal Fees Under EAJA/Edition II*, BRIEFING PAPERS, June 1991, at 1-10 (explaining provisions and means of recovery under EAJA).

969. 5 U.S.C. § 504(a)(1), (b)(1)(B); 28 U.S.C. § 2412(a), (d)(2)(B)(ii).

970. 5 U.S.C. § 504(b)(1)(B)(ii); 28 U.S.C. § 2412(d)(2)(B)(ii).

971. 5 U.S.C. § 504(b)(1)(B)(i); 28 U.S.C. § 2412(d)(2)(B)(i).

position must be found not to be "substantially justified."⁹⁷² Whether a party is "prevailing" and whether the Government's position was "substantially justified" are questions that are addressed by a substantial amount of case law.⁹⁷³

In *TGS International, Inc. v. United States*,⁹⁷⁴ the Federal Circuit considered the appropriate award of attorney's fees where the prevailing party has entered into a contingent fee arrangement with counsel.⁹⁷⁵ The court determined that such a party may recover only the actual attorney's fees incurred under the contingency arrangement.⁹⁷⁶

TGS International (TGS) was the prevailing party in an earlier Federal Circuit decision on the merits of its claim.⁹⁷⁷ For its successful appeal, TGS had retained new counsel on a contingency fee basis.⁹⁷⁸ TGS sought to recover the fees it incurred in pursuing its successful appeal concerning the Government of Kuwait's liability for delays in accepting and activating an electrical substation.⁹⁷⁹ The United States argued that TGS was not yet a prevailing party because on remand, TGS was required to establish that it was entitled to compensation for the delay.⁹⁸⁰ The Government also argued that TGS was not entitled to attorney fees under EAJA because the Government's litigation position was substantially justified.⁹⁸¹

The Federal Circuit rejected both of the Government's arguments. First, the court clarified that it had decided on appeal that the Government was liable for the delay and that the only issue to be addressed on remand was the measure of damages to TGS.⁹⁸² Second, after examining the totality of the record, including the

972. 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A).

973. See, e.g., *Cotton & Co.*, EBCA No. 441-2-90(E), 91-1 B.C.A. (CCH) ¶ 23,507, at 117,864 (1990) (noting that "substantially justified" has been interpreted to mean "justified in substance or in the main," or "justified to a degree that could satisfy a reasonable person," or "justified if it has a reasonable basis both in law and in fact"); *Crown Laundry & Dry Cleaners, Inc.*, ASBCA Nos. 28889, 31900, 87-3 B.C.A. (CCH) ¶ 20,034, at 101,422 (1987) (concluding that EAJA does not require "total victory to satisfy the requirement of prevailing," as victory in entitlement phase of litigation was sufficient); *Yamas Constr. Co.*, ASBCA No. 27366, 87-2 B.C.A. (CCH) ¶ 19,695, at 99,724-26 (1987) (denying attorney's fees to Yamas as "prevailing party" because Government's position was more than reasonable and therefore "substantially justified" under EAJA).

974. 983 F.2d 229 (Fed. Cir. 1993).

975. *TGS Int'l, Inc. v. United States*, 983 F.2d 229, 229 (Fed. Cir. 1993).

976. *Id.* at 230.

977. See *TGS Int'l, Ltd. v. United States*, No. 90-1440, 1991 U.S. App. LEXIS 23621 (Fed. Cir. Oct. 8, 1991).

978. *TGS, Int'l*, 983 F.2d at 229.

979. *Id.*

980. *Id.*

981. *Id.* at 229-30.

982. *Id.* at 230.

underlying agency action, the Federal Circuit concluded that the Government position was not substantially justified.⁹⁸³

Finally, the Federal Circuit held that when the court remands for a determination of quantum, recovery of attorney's fees for the appeal normally need not await completion of the proceedings.⁹⁸⁴ Rather, the prevailing party may recover the amount of fees actually incurred in pursuing the appeal.⁹⁸⁵ In this regard, the court noted that TGS had a contingency fee arrangement with its counsel. Therefore, even though it had submitted a petition for fees based on an allocation of attorney's fees to the prevailing issue,⁹⁸⁶ the actual fees TGS incurred was some percentage of the quantum of the damages. Because the quantum of damages had been settled by the time the Federal Circuit issued its decision, the court held that TGS was entitled to file a petition to recover the attorney's fees incurred under the contingency agreement.⁹⁸⁷ Accordingly, a prevailing party under the EAJA will only be permitted to recover funds actually expended on attorney's fees, regardless of whether that sum is equivalent to that attorney's normal billing rate for the number of hours expended in the litigation.⁹⁸⁸

B. Attorney's Fees for Government Breach of Contract

As previously stated, a prevailing party must meet EAJA size requirements in order to recover attorney's fees.⁹⁸⁹ In *Texas Instruments, Inc. v. United States*,⁹⁹⁰ the Federal Circuit considered whether a contractor could recover attorney's fees for a government breach of contract even though the contractor does not meet the size requirements of the EAJA.⁹⁹¹ The Federal Circuit rejected the contractor's request, holding that such a recovery would effectively nullify the EAJA.⁹⁹²

The case involved a consolidation of two appeals brought by Texas Instruments (TI) before the ASBCA.⁹⁹³ In each case, the contracting officer determined that TI had defectively priced two separate Department of the Army contracts and had adjusted downward the

983. *Id.*

984. *Id.*

985. *Id.*

986. *Id.*

987. *Id.*

988. *Id.*

989. See *supra* notes 967-71 and accompanying text.

990. 991 F.2d 760 (Fed. Cir. 1993).

991. *Texas Instruments, Inc. v. United States*, 991 F.2d 760, 763-65 (Fed. Cir. 1993).

992. *Id.* at 768.

993. *Id.* at 760-61.

prices of the contracts.⁹⁹⁴ TI appealed both contracting officer decisions to the board.⁹⁹⁵ The board eventually sustained both appeals and determined that the Army had improperly reduced TI's contract price.⁹⁹⁶ Subsequently, TI filed claims to recover the costs of litigating the defective pricing claims.⁹⁹⁷ Both contracting officers issued final decisions denying the claims.⁹⁹⁸ TI appealed these decisions to the Court of Federal Claims, arguing that the Government had breached the disputes clause of its contract by pursuing "negligent, arbitrary, [and] capricious" claims against TI.⁹⁹⁹

The Court of Federal Claims consolidated the two actions and dismissed TI's claims for failure to state a claim upon which relief could be granted.¹⁰⁰⁰ The court determined that the company's claims were really tort claims against the Government over which it had no jurisdiction.¹⁰⁰¹ The court also determined that even if the Government had breached its contract against TI, the court would have no authority to award attorney fees against the Government.¹⁰⁰²

On appeal, the Federal Circuit noted that TI's argument that the Government breached the disputes clause of its contract was nothing more than an attempt to circumvent the requirements of the EAJA.¹⁰⁰³ According to the court, the EAJA permits the award of attorney's fees in adjudicative proceedings before the boards of contract appeals and the Court of Federal Claims, but only for entities with net assets less than seven million dollars.¹⁰⁰⁴ Because TI had assets considerably above this amount, it was ineligible for an award of attorney's fees against the Government.¹⁰⁰⁵

CONCLUSION

In all, the Federal Circuit performed a competent review of government contract appeals in 1993. While the Federal Circuit generally continued to follow established precedent in many areas of government contracting, it did so in some cases by foregoing valuable

994. *Id.* at 761.

995. *Id.* at 761-62.

996. *Id.* at 762.

997. *Id.*

998. *Id.*

999. *Id.* at 762-63.

1000. *Id.* at 763.

1001. *Id.*

1002. *Id.*

1003. *Id.* at 764.

1004. *Id.* at 767.

1005. *Id.* at 766-67.

opportunities to revisit unworkable decisions. In such cases, the court chose instead to apply rigidly precedent that contravenes fundamental principles of government contracting and, in some instances, the dictates of common sense. Nowhere has this been more evident than in the area of CDA jurisdiction, where the court steadfastly refused to abandon unworkable statutory interpretations despite clear congressional intent to the contrary.

Moreover, while the Federal Circuit appears to be gaining a greater familiarity with government contracts law, the court as an institution still appears reluctant or unwilling to recognize that, as in the area of patent law, it is essentially the court of last resort for government contractors. Given its important role in the contract disputes process, it is unfortunate that on some occasions the court has not been more willing to look beyond legal principles and weigh the equities of each government contracts case and more vigorous in rehearing cases in banc when necessary to resolve troublesome issues. Commendably, the court has agreed in 1993 to consider two government contract cases in banc.¹⁰⁰⁶ To the authors' knowledge, however, this marks only the second time in the court's twelve-year history that the full court has agreed to rehear a government contracts case. As many practitioners have suggested, the court's reluctance in this area may be attributable to the lack of active judges on the court with significant government contracts backgrounds. The infusion of such experience would undoubtedly prove invaluable in the court's review of cases involving more complex and specialized government contracts issues, and would render the Federal Circuit well-equipped like its predecessor, the United States Court of Claims, to perform its role as the final arbiter of government contract disputes.

1006. *Winstar Corp. v. United States*, 994 F.2d 797 (Fed. Cir. 1993), *vacated and reh'g in banc granted*, Aug. 18, 1993; *Wilner v. United States*, 994 F.2d 783 (Fed. Cir. 1993).