GOVERNMENT CONTRACTS: 1991
ANALYSIS AND SUMMARY

LYNDA TROUTMAN O’SULLIVAN*
MARTIN P. WILLARD**

TABLE OF CONTENTS

Introduction ................................................ 912
I. Claim Certification ................................... 913
II. Allowability and Allocability ......................... 918
III. Procedure and Jurisdiction ........................ 921
    A. Procedural Requirements Under the CDA ........ 921
    B. Jurisdiction To Issue Declaratory Judgments
       (Default Terminations) .......................... 923
    C. Protest Jurisdiction of the GSBCA Under the
       Brooks Act ...................................... 924
       1. Subcontractor protests ....................... 924
       2. Warner Act exemption ....................... 925
       3. GSBCA authority to direct contract award ... 926
    D. Subject Matter Jurisdiction of the ASBCA .... 927
    E. Maritime Jurisdiction ............................ 929
IV. Sovereign Immunity .................................. 930
V. Substantive Contract Issues and Interpretation .... 931
    A. Anticipatory Breach .............................. 931
    B. Contractual Limits on Overhead Recovery ...... 932
    C. Calculation of Damages and Adjustments to
       Contract Price for Changed Work ............... 933
       1. Total cost method and recoverability of
          interest ....................................... 933
       2. Jury verdict method .......................... 934
    D. Value Engineering Incentive Clause ............ 936
    E. Cargo Preference Clause ........................ 937

* Partner, Perkins Coie, Washington, D.C.; member of the American Bar Association,
  Section of Public Contract Law; Chair, Truth in Negotiations Committee; Vice Chair, Ac-
  counting, Cost and Pricing Committee.

** Associate, Perkins Coie, Washington, D.C.
INTRODUCTION

In 1991, the United States Court of Appeals for the Federal Circuit issued thirty-one published decisions in the government contracts area. These decisions relate to jurisdiction, sovereign immunity, cost allowability and allocability, contract interpretation, statutory interpretation, and indemnification for injuries caused by asbestos, among other issues. One of the most significant developments was in the area of claim certification, with two important decisions affecting the jurisdiction of the Claims Court and boards of contract appeals.

Decisions of lower tribunals (the Armed Services Board of Contract Appeals, the General Services Administration Board of Contract Appeals, and the United States Claims Court) were affirmed by the Federal Circuit in twenty instances and reversed or vacated in eight instances. In two cases lower tribunal decisions were affirmed in part and reversed/vacated in part, and one case was transferred.
to federal district court on jurisdictional grounds, without any decision on the merits. There was no appreciable difference in the rates of affirmance and reversal between the Claims Court and the boards of contract appeals.

There was a significant difference in the odds of affirmance, however, depending on whether the decision below was in the Government's or the contractor's favor. Of nine decisions below in favor of the contractor, five were reversed or vacated on appeal. Only three were affirmed. One was affirmed in part and reversed in part. By contrast, of twenty decisions below in the Government's favor, only three were reversed on appeal. Sixteen were affirmed completely, and one received partial affirmance. In 1991, a contractor who prevailed in a lower tribunal faced odds of sixty-one percent of losing on appeal. If the Government prevailed below, it had an eighty-two percent chance of winning on appeal. The Federal Circuit was not a friendly forum for contractors in 1991.

We begin our review and analysis with the court's decisions on claim certification.

I. Claim Certification

In United States v. Grumman Aerospace Corp., the Government appealed a decision by the Armed Services Board of Contract Appeals (ASBCA) to allow as contract costs Grumman's dividend payments on restricted stock awarded to its employees. The appellate court, however, never reached the allowability issue. Rather, the court disposed of the case on an issue argued by the Government for the first time after the trial on the merits—whether the ASBCA lacked jurisdiction because Grumman's claim had not been properly certified under section 605(c)(1) of the Contract Disputes Act (CDA).

The CDA requires that, for claims of more than $50,000, "the contractor shall 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." Federal Acquisition Regulation (FAR) 33.207(c)(2) provides that "[i]f the contractor is not an individual, the certification shall be executed by (i) [a] senior company official in charge at the contractor's plant or location involved; or (ii) [a]n
The Government argued that Grumman's certification, signed by the treasurer of the contracting corporation, was inadequate because the treasurer satisfied neither subpart of the FAR regulation. In an unpublished opinion dated October 1, 1990, the Federal Circuit vacated the decision of the ASBCA below. The court held that because the contractor's treasurer satisfied neither prong of the FAR requirement, the ASBCA lacked jurisdiction to hear Grumman's claim.

Grumman petitioned for rehearing and requested rehearing in banc. The court granted the petition to the extent of reaffirming its prior decision in a published decision issued on February 27, 1991. Four judges dissented from the court's refusal to rehear the case in banc. The court rejected arguments that the FAR regulation was invalid and held that it constituted a permissible act of gap-filling under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. Quoting its earlier decision in Ball, Ball & Brosamer, Inc. v. United States, the court said "[t]he regulation constitutes a reasonable explication of how the "contractor" shall certify, i.e., it identifies the individuals within the contractor's organization who properly may act for the contractor in certifying." In its analysis of why the contractor's treasurer did not satisfy the

---

5. Grumman, 927 F.2d at 577.
7. Grumman, 927 F.2d at 577.
8. Id.
9. Id. at 581 (Plager, J., dissenting). Judges Newman, Lourie, and Rader joined in the dissent. Id.
10. Id. at 578 (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)). In Chevron, the Supreme Court held that an agency's "legislative regulations" promulgated under an express congressional delegation of authority should be given deference unless "arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 844.
11. 878 F.2d 1426 (Fed. Cir. 1989).
12. Grumman, 927 F.2d at 578-79 (quoting Ball, Ball & Brosamer, Inc. v. United States, 878 F.2d 1426, 1429 (Fed. Cir. 1989)).
regulation, the court first said that Grumman never established that the treasurer was "in charge" at the plant or location involved, or that the treasurer was "physically present" at the plant or location. The court next said that while the treasurer may have had overall responsibility for the contractor's financial affairs, this was not sufficient to show overall responsibility for the contractor's affairs within the meaning of the regulation.

Finally, the court declined to reexamine longstanding precedent holding that claim certification is a jurisdictional prerequisite. The court said that Congress "limited the Board's jurisdiction over contractors' claims to those that are certified. It is in the sense that the Board is given no power to exercise jurisdiction over uncertified claims that the courts have designated certification as 'jurisdictional.'"

A sharp dissent filed by four members of the court took issue with each of the panel's conclusions. First, Judge Plager pointed out that the statutory certification requirement is not ambiguous. Thus, the agency's interpretation of the statute need not be accorded deference where, as here, the interpretation "neither demands expertise nor accords with the thrust of the statute." Moreover, according to the dissent, even if the statute were ambiguous, the regulation improperly alters the meaning of the statute by taking away from the contractor the ability to say who is authorized to bind it. Judge Plager argued that the facts of the case demonstrate the unreasonableness of the regulation or, alternatively, the panel's interpretation of the regulation. Because the claim involved a question of whether stock dividend payments to employees were reimbursable contract costs, the treasurer of the corporation was among the "most knowledgeable and responsible" of the corporation's officials who could assess the claim. The dissent questioned whether Congress could have intended that only the civil engineer who manages the plant or the president of the company is qualified to certify claims. If the panel believes the contractor's treasurer does not

---

13. Id. at 580 (relying on Ball precedent).
14. Id. at 580-81.
15. Id. at 579.
16. Id. at 580.
17. Id. at 582 (Plager, J., dissenting).
18. Id. at 582-83 (Plager, J., dissenting) ("The statute delegates to the contractor the power to designate who speaks for it; it does not grant to OMB the power to intrude itself into the myriad versions of corporate organizational structures." (emphasis in original)).
19. See id. at 583 (Plager, J., dissenting) (discussing fallacy in court's holding that treasurer could not certify claim).
20. Id.
21. Id.
Finally, the dissent agreed with Grumman that the certification requirement is not a jurisdictional prerequisite. The dissent stated that the “failure to properly certify a claim under the CDA does not speak to subject matter jurisdiction—it merely means that the particular claimant has failed to state a claim for which, under the terms of the statute, relief may be granted.” The dissent concluded that there was no reason to prolong this judicially created error, even if it was an error of long standing.

The court’s decision in Grumman has met with widespread criticism, and efforts are underway to amend both the FAR certification requirement and the statute itself. Specifically, these efforts seek to establish the nonjurisdictional nature of the certification requirement and to broaden the class of individuals who may certify contract claims on behalf of contractors. The Federal Circuit itself, in United States v. Newport News Shipbuilding & Dry Dock Co., further refined its views on proper Contract Disputes Act claim certification and appeared to be trying to limit the effect of its Grumman decision.

Newport News presented a pure certification issue. The ABSCA granted Newport News’ motion for summary judgment in the case, and the Government appealed solely on the ground that the ASBCA lacked jurisdiction. The Government argued that the ASBCA lacked jurisdiction because the executive vice president of the contractor was not qualified to certify the claim. The Federal Circuit held, however, that summary judgment in favor of the contractor had been properly granted because the Government failed to provide any specific evidence that the executive vice president lacked the
required responsibility—in this case, "overall responsibility for the conduct of the contractor's affairs."^30

Newport News had alleged at the ASBCA that its executive vice president had the requisite "overall" responsibility, but presented no evidence in support of this allegation.^31 In opposing summary judgment, the Government had the burden not only to allege but also to submit evidence that he lacked such responsibility in order to create a genuine issue of material fact.^32 The Federal Circuit observed that, given the jurisdictional nature of claim certification, the Government has the obligation to raise the issue of proper certification as early as possible in a board proceeding, and to do so by proper motion or pleading rather than in a paragraph of its opposition to summary judgment.^33 While the Government did not present evidence that the executive vice president of Newport News lacked overall responsibility, the contractor apparently did not present evidence that he had it.^34 Evidently a contractor is not required to present such evidence in order to prevail on summary judgment, at least where the official's title suggests overall responsibility.^35

The court characterized its own precedent as suggesting that the title "Executive Vice President" is sufficient to show that one is qualified to certify a claim.^36 The court also noted that, although jurisdiction can be challenged at any time and cannot be waived, "the government has still not cited any evidence that [the executive vice president] was not a proper certifying official."^37 Finally, the court stated that "it appears that the certification by a corporate officer, without explanation, necessarily implies that the contractor is representing that he has the requisite 'overall authority,' at least where his title is not inconsistent therewith."^38

Although the court disavowed any intention to alter the burden of proof, the opinion has the effect of shifting at least part of the burden of proof to the Government on the issue of proper certification. The court's reasoning would suggest that in future cases—at

^30. Id. at 1000 (citing FAR, 48 C.F.R. § 33.207(c)(2)(ii) (1990)).
^32. Id.
^33. Newport News, 933 F.2d at 1000 n.4.
^34. Id. at 998.
^35. Id. at 999.
^36. Id. at 999 n.3.
^37. Id. at 998 n.1.
^38. See id. at 998 n.2 (noting that whether contractor is required to plead specifically that company official has "overall responsibility" is not at issue). Interestingly, the court found support for this inference in Grumman. Id.
^39. Id. at 999.
least where the official's title is not inconsistent with the exercise of overall responsibility—the Government cannot successfully challenge jurisdiction without presenting some probative evidence that such responsibility is lacking.

II. ALLOWABILITY AND ALLOCABILITY

General Electric Co. v. United States presented the issue of whether Defense Acquisition Regulation (DAR) 15-205.37(b), stating that foreign selling costs "shall not be allocable to U.S. Government contracts," is an allocation provision in conflict with Cost Accounting Standards (CAS). General Electric (GE) sought to recover costs incurred in 1982 and 1984 in connection with actual and potential sales of defense equipment abroad. When the Government denied reimbursement, GE filed a complaint and motion for summary judgment in the United States Claims Court. The Government filed a cross-motion for summary judgment that was granted.

If DAR 15-205.37(b) was in fact a provision governing the allocation of contract costs and it conflicted with CAS, then it would have to be struck down pursuant to the Federal Circuit's earlier holding in United States v. Boeing Co. In Boeing, the court found that a DAR provision, allowing the costs of a Boeing retirement plan only if they were allocated in a certain manner, constituted an allocation provision in direct conflict with CAS 412 and CAS 413 (the cost accounting standards governing the allocation of pension costs). Because the CAS, not the DAR, are controlling with respect to allocability of costs, the DAR provision at issue in Boeing was held to be invalid.

In General Electric, the Claims Court determined that the DAR provision, which on its face prohibits allocation of foreign selling costs, was intended by its drafters to operate—and did in fact operate—as a prohibition against the allowance of foreign selling costs. Thus,

40. 929 F.2d 679 (Fed. Cir. 1991).
44. General Elec., 929 F.2d at 680 (discussing Claims Court holding and subsequent appeal).
45. 802 F.2d 1390 (Fed. Cir. 1986).
47. Id. at 1395. The court went on to say that to hold otherwise would sanction arbitrary and capricious conduct by the Defense Department in its exercise of procurement authority. Id.; see also General Elec., 21 Cl. Ct. at 75 (concurring with plaintiff's argument that CAS controls in event of conflict).
48. General Elec., 21 Cl. Ct. at 77. A cost may be allocable to contracts under the CAS, yet the Government may determine for policy reasons that it will not allow reimbursement of the
the Claims Court found it unnecessary to determine, if DAR 15-205.37(b) was an allocation provision, whether it would conflict with the CAS. In finding the DAR to be an allowability provision, the Claims Court relied heavily on two factors.

First, the court found that the raison d'être for the rule was grounded in foreign policy—i.e., President Carter’s 1979 decision to discourage sales of arms to foreign governments. Thus, the court said the DAR more closely resembled the Boeing decision’s description of a bona fide allowability provision—a provision making “costs allowable or unallowable per se based upon a rational procurement policy entirely divorced” from principles of cost allocation. Matters of cost allocation, i.e., whether or not a causal link can be established between an expense and a cost objective, are “plainly not” a matter of foreign policy. On the other hand, “[i]t makes perfect sense . . . to dictate matters of allowability through policy determinations.”

Second, the Claims Court found it significant that the contracting officer interpreted DAR 15-205.37(b) as an allowability provision. The court noted that the contracting officer could have required that the costs be allocated elsewhere, but did not. Instead, he accepted GE’s allocation of the costs to U.S. government contracts, but then disallowed the costs.

On appeal, GE urged the Federal Circuit to apply the “plain meaning” rule to the DAR provision. GE noted that the drafters of the regulation had considered and rejected language going to the allowability of foreign selling costs and had instead settled specifically on language prohibiting the allocation of those costs. GE further argued that the term “allocation” and DAR 15-205.37(b) as a whole have a plain meaning, and that plain meaning is binding on the allocable cost. See id. at 76 (observing that DAR may not preclude allocation but may preclude reimbursement).

49. General Elec., 21 Cl. Ct. at 76.
50. Id. at 77-78.
51. Id. at 78.
52. Id.
53. Id. Apparently the Claims Court was not apprised of numerous instances in which policy considerations have resulted in Defense Department rules on allocability. The rule at issue in the Boeing decision, discussed supra notes 45-47 and accompanying text, is a good example.
54. General Elec., 21 Cl. Ct. at 78.
55. Id.
56. Id.
57. General Elec., 929 F.2d at 680.
58. Brief for Appellant at 10, General Elec. Co. v. United States, 929 F.2d 679 (Fed. Cir. 1991) (No. 90-5157) [hereinafter Brief for Appellant]; see also General Elec., 21 Cl. Ct. at 77.
agency and the courts. GE urged the court to follow its recent precedent in *Glaxo Operations UK Ltd. v. Quigg,* in which the Federal Circuit rejected an argument by the Government that Congress "inartfully" and "awkwardly" selected terms in a statute and had, in fact, intended a meaning different from their combined common and ordinary meaning.

In a decision issued March 29, 1991, the Federal Circuit adopted the Claims Court's conclusion that the DAR was in fact an allowability provision. The court premised the holding on the policy reasons for the rule and the rule's categorical prohibition against including any foreign selling costs in the costs of U.S. government contracts. The court viewed the prohibition as inconsistent with a purported allocation determination, remarking that "the statement that a cost can never 'be allocable' is the lexicographic twin of making it unallowable." The court further noted that "the entirety" of title 32, section 15 of the Code of Federal Regulations, of which DAR 15-205.37(b) is a part, "relates to 'allowance of costs.' "

Although the significance of this fact to the court's holding is not clear, section 15 of title 32 in fact addresses both allocability and allowability of costs, and is controlling on the allocation of costs to contracts not covered by CAS. The very provision of DAR 15-205.37(b) at issue in this case follows a sentence which lays down the general rule regarding "allocability" of selling costs. It is thus apparent that the DAR's use of the word "allocable" was not an "unfortunate neologism" as the court termed it, but rather the use of an established word in an established sense.

The court's opinion contains other misapprehensions of fact. For instance, the court states that "[t]he C.A.S. merely requires that FSC

---

60. 894 F.2d 392 (Fed. Cir. 1990).
61. Brief for Appellant, supra note 58, at 28. *Glaxo* involved the question of whether a statutory definition of "product" applied for purposes of a patent extension. *Glaxo Operations UK Ltd. v. Quigg,* 894 F.2d 392, 394 (Fed. Cir. 1990). The court, following the plain meaning rule, stated that when Congress speaks in unambiguous terms, the plain meaning of the statute must be applied, provided that legislative intent to the contrary is nonexistent. *Id.* at 395.
63. *Id.*
64. *Id.*
65. *Id.*
66. See DAR, 32 C.F.R. § 15-201.4 (1984) (defining when cost is allocable to government contract); *Id.* § 15-205.3(b)(2) (addressing allocation of bid and proposal costs where CAS provisions do not apply).
67. *Id.* § 15-205.37(b) (prohibiting allocation of foreign selling costs to U.S. government contracts).
68. *General Elec.*, 929 F.2d at 682; see WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1516 (1981) (defining neologism as a "new word, usage, or expression").
[foreign selling costs] be allocated to General and Administrative Expenses if, and when, such costs are allowable.” The court also states that CAS are applicable to all government contracts. Both statements are made without citation and, in fact, are erroneous.

Finally, the court’s opinion makes no mention of GE’s arguments concerning application of the “plain meaning” rule. This is especially unfortunate since the court was asked to construe a pronouncement by regulators who were familiar with the concepts of both allowability and allocability, a fact demonstrated within section 15 itself, and who deliberately chose to use the word “allocable” in place of the word “allowable.” A proper application of the “plain meaning” rule would have required the court to acknowledge the plain meaning of the DAR provision and then to explain why that plain meaning should not apply. The court chose instead to “reform” the language of the DAR provision based on its perception of the policy underlying the rule and its mistaken belief that prohibiting allocation of a cost is the “lexicographic twin” of making a cost unallowable. This result is clearly contrary to the court’s own precedent in Glaxo Operations.

III. Procedure and Jurisdiction

A number of the Federal Circuit’s decisions in 1991 concerned the procedure and jurisdiction of the Claims Court and boards of contract appeals.

A. Procedural Requirements Under the CDA

Borough of Alpine v. United States concerned the question of when the twelve-month deadline for filing appeals under the CDA begins running. The case involved a joint project between Alpine and the United States Postal Service (USPS) for the construction of a new

69. See id. at 682 (concluding that DAR and CAS provisions do not conflict). In fact, the CAS require that all costs, whether allowable or unallowable, be allocated to final cost objectives on the basis of a beneficial or causal relationship. See Cost Accounting Standards (CAS), 4 C.F.R. § 405.20(a) (1991).

70. General Elec., 929 F.2d at 682.

71. All contracts with civilian agencies and defense contracts below a certain threshold value were, at all times relevant to the GE case, exempt from CAS coverage. See generally 4 C.F.R. § 331.30 (1991).

72. See supra note 66 and accompanying text (discussing allocability provisions in DAR).

73. See supra note 58 and accompanying text (discussing drafters’ decision to reject allowability language in favor of allocability term).

74. See supra note 61 and accompanying text (discussing precedent of Glaxo Operations UK Ltd. v. Quigg).

75. 923 F.2d 170 (Fed. Cir. 1991).
USPS agreed to pay a portion of the construction costs for part of the building to house the new post office. Upon completion, a dispute arose regarding the construction costs associated with the new post office, and Alpine filed a claim requesting $28,800. Although an express mail return receipt showed that the contractor received the contracting officer's final decision on the claim on September 30, 1988, it was not opened and distributed until November 4, 1988. Alpine filed a complaint in the Claims Court on October 31, 1989.

Title 41 U.S.C. § 609(a)(3) states that actions shall be brought in the Claims Court “within twelve months from the date of the receipt by the contractor of the decision of the contracting officer . . . .” In upholding the Claims Court's decision rejecting plaintiff's claim, the Federal Circuit said the plaintiff “confuses receipt and notice. The statute requires only the former.”

In an odd footnote, the court echoed its discussion of subject matter jurisdiction in Grumman. Noting that the Claims Court dismissed the case for lack of subject matter jurisdiction, the court went on to say that “[t]he Claims Court has and will continue to have jurisdiction over the subject matter of Contract Disputes Act cases. In this case, however, because of its failure to file a timely appeal, Alpine was not entitled to have the Claims Court exercise its subject matter jurisdiction.”

In Neal & Co. v. United States, the Federal Circuit addressed the issue of the jurisdiction of the Claims Court when a claim was addressed to the Government’s Resident Officer in Charge of Construction (ROICC) rather than the contracting officer. The Government argued that the Claims Court lacked jurisdiction because submission to the ROICC failed to satisfy the requirement of the Contract Disputes Act, 41 U.S.C. § 605(a), that claims “shall be submitted to the contracting officer . . . .” The Federal Circuit held, however, that no basis exists for finding that the claim was not submitted to the contracting officer as required under section

---

77. Id.
78. Id.
79. Id.
80. Id.
82. Alpine, 923 F.2d at 172.
83. Id. at 171 n.1. The distinction between not having subject matter jurisdiction and not being able to exercise it is left unexplained by the court.
84. 945 F.2d 385 (Fed. Cir. 1991).
86. Id. at 388 (quoting 41 U.S.C. § 605(a) (1988)).
where the contractor "sends a proper claim to its primary contact with a request for a final decision of the contracting officer and a reasonable expectation that such a request will be honored, and the primary contact in fact timely delivers the claim to the contracting officer . . . ." 87

B. Jurisdiction To Issue Declaratory Judgments (Default Terminations)

An important case discussing the jurisdiction of the Claims Court in the context of default terminations is *Overall Roofing & Construction Inc. v. United States.* 88 The Government awarded Overall a roof repair contract at the Naval Air Station in Key West, Florida. 89 The Government demanded reconstruction of part of the roof. When the contractor refused, the Government terminated the contract for default. 90 The contractor then asked the Claims Court to review the propriety of the default termination but did not make a specific claim for monetary relief. 91 The Claims Court dismissed the complaint on the grounds that the court lacked jurisdiction. 92

Reviewing the Claims Court's decision, the Federal Circuit observed that in a 1969 case, *United States v. King,* 93 the Supreme Court held that the Declaratory Judgment Act 94 did not grant the old Court of Claims authority to enter declaratory judgments. Overall Roofing argued that legislative changes since King rendered the Declaratory Judgment Act applicable to the Claims Court. 95 The Federal Circuit disagreed. 96

First, the court found that an extension of jurisdiction to "any claim" by or against the contractor contained in the Federal Courts Improvement Act of 1982 "carries with it the historical limitation that it must assert a right to presently due money." 97 Second, Overall Roofing's reading of the statute renders meaningless the Act's granting of jurisdiction to issue declaratory judgments in the pre-award bid protest area. 98 The court also rejected the proposition that section 609(a)(1) of the Contract Disputes Act, which permits contractors to bring actions on claims before the Claims Court, af-

---

87. *Id.* at 388-89.
88. 929 F.2d 687 (Fed. Cir. 1991).
90. *Id.*
91. *Id.*
92. *Id.*
95. *Overall Roofing,* 929 F.2d at 688.
96. *Id.*
97. *Id.* at 689 (relying on United States v. King, 395 U.S. 1, 3 (1969)).
98. *Id.*
fected the Claims Court’s jurisdiction.\textsuperscript{99} Citing its decision in \textit{Malone v. United States},\textsuperscript{100} the Federal Circuit held that, under the CDA, the jurisdiction of the boards of contract appeals to hear nonmonetary claims must be distinguished from that of the Claims Court.\textsuperscript{101}

\section*{C. Protest Jurisdiction of the GSBCA Under the Brooks Act}

\subsection*{1. Subcontractor protests}

Jurisdiction of the General Services Administration Board of Contract Appeals (GSBCA) under the Brooks Act was an issue in \textit{US West Communications Services, Inc. v. United States}.\textsuperscript{102} In \textit{US West}, Westinghouse, the management and operating (M&O) contractor at the Hanford nuclear facility, was given responsibility for procuring a communications system for the facility.\textsuperscript{103} A disappointed bidder protested the award of the contract to \textit{US West}, alleging that a former Department of Energy (DOE) employee improperly leaked information about the award to \textit{US West}.\textsuperscript{104} DOE, Westinghouse, and \textit{US West} moved to dismiss the GSBCA proceeding for lack of jurisdiction, arguing that the Brooks Act\textsuperscript{105} “applies only to \textit{federal agency} purchases of automated data processing equipment” (ADPE).\textsuperscript{106} The Board denied the motions on the ground that procurement contracts with Westinghouse, as M&O of the facility, constitute contracts “with a Federal agency.”\textsuperscript{107} After a trial on the merits, the GSBCA sustained the bid protest and directed DOE and

\begin{itemize}
\item \textsuperscript{99} \textit{Id.} (emphasizing requirement that contractor advance actual claim).
\item \textsuperscript{100} 849 F.2d 1441 (Fed. Cir. 1988).
\item \textsuperscript{101} \textit{See Overall Roofing}, 929 F.2d at 689 (noting that jurisdiction of boards of contract appeals is not circumscribed by Tucker Act as is Claims Court jurisdiction). The court also drew a distinction between jurisdiction to review decisions and jurisdiction to review claims. \textit{Id.} The court concluded that the CDA contemplates that the board would review decisions and that the Claims Court would review suits demanding “money presently due and owing.” \textit{Id.} As a result of this decision, legislation has been proposed to give the Claims Court jurisdiction over appeals of default terminations co-extensive with that of the boards of contract appeals. \textit{See Jurisdiction, Draft Bill, supra note 25, at 618. In the meantime, the ASBCA has ruled that contracting officer final decisions on default terminations are without legal effect if they mislead contractors into thinking that they can appeal such decisions to the Claims Court. Power Ten, Inc., ASBCA No. 43026, 91-3 B.C.A. (CCH) ¶ 24,279, 1991 WL 204274, at *3 (Aug. 7, 1991). These rulings by the ASBCA assure that contractors will not be deprived of a remedy simply because they were improperly advised by the contracting officer that review may be sought in the Claims Court.} \textsuperscript{102} 940 F.2d 622 (Fed. Cir. 1991).
\item \textsuperscript{103} \textit{US West Communications Servs., Inc. v. United States}, 940 F.2d 622, 624 (Fed. Cir. 1991).
\item \textsuperscript{104} \textit{Id.} at 624-25.
\item \textsuperscript{105} \textit{See 40 U.S.C. § 759} (1988) (setting out provisions for procurement, maintenance, operations, and utilization of automated data processing equipment). Subsection (a) authorizes the administrator to coordinate purchases, leases, and maintenance by federal agencies. \textit{Id.} § 759(a).
\item \textsuperscript{106} \textit{US West}, 940 F.2d at 625 (emphasis in original).
\item \textsuperscript{107} \textit{Id.}
Westinghouse to award the contract to the complaining bidder.\textsuperscript{108}

The Federal Circuit reversed.\textsuperscript{109} First, the court said that the plain meaning of the Brooks Act, which refers both to purchases and solicitations by "federal agencies," fails to support "the board's holding that its jurisdiction covers subcontract procurement by a prime government contractor."\textsuperscript{110} The court further observed that "[w]hat is being protested in this case is not the decision of a contracting officer, but the decision of Westinghouse's procurement personnel. It is also not a procurement by a federal agency, but by Westinghouse."\textsuperscript{111} The court held that Congress limited the coverage of the Brooks Act to "in-house government procurement of ADPE" and made this clear by changing the legislation from "by, or at the expense of, federal agencies" to "by federal agencies."\textsuperscript{112} The Brooks Act was never intended to extend to subcontractors.\textsuperscript{113}

The court also rejected the GSBCA's alternative holding that jurisdiction existed because M&O contractors act as agents for the United States.\textsuperscript{114} Following its decision on subcontractor privity in \textit{United States v. Johnson Controls, Inc.},\textsuperscript{115} the court held that Westinghouse could not be an agent for the United States because the Westinghouse subcontract did not bind the Government.\textsuperscript{116}

2. \textit{Warner Act exemption}

In \textit{Information Systems \& Networks Corp. v. United States},\textsuperscript{117} the court had occasion to construe the Warner Act exemption to the GSBCA's Brooks Act jurisdiction over protests of automatic data processing (ADP) procurements. The Warner Act exemption applies to Defense Department procurements of ADP equipment and services, if

\begin{itemize}
\item \textsuperscript{108} Id.
\item \textsuperscript{109} Id. at 624.
\item \textsuperscript{110} See id. at 626 (reasoning that statutory language requires that protest involve potential contract directly with federal agency).
\item \textsuperscript{111} Id. at 627.
\item \textsuperscript{112} See id. (refuting Board's argument that legislative history supports broader reading of jurisdictional authority).
\item \textsuperscript{113} Id. at 627-29.
\item \textsuperscript{114} Id. at 629-30. The court also refused the Government's request to find jurisdiction based on the "unique relationship" between DOE and its M&O contractors. Id. at 630.
\item \textsuperscript{115} 713 F.2d 1541 (Fed. Cir. 1983).
\item \textsuperscript{116} US West, 940 F.2d at 629-30. For an agency relationship to exist between the Government and its prime contractor, three elements must be present. Id. at 629. The prime contractor must act as a purchasing agent, the relationship must be established by clear contractual consent, and the contract must explicitly provide that the Government is directly liable for the purchase price. Id. The contract between Westinghouse and DOE not only failed to bind the Government, it explicitly provided that subcontracts did not bind the Government. Id. Furthermore, the contract did not indicate that Westinghouse acted as the Government's agent. Id.
\item \textsuperscript{117} 946 F.2d 876 (Fed. Cir. 1991).
\end{itemize}
the function, operation, or use is "critical to the direct fulfillment of military or intelligence missions, provided that this exclusion shall not include automatic data processing equipment used for routine administrative and business applications such as payroll, finance, logistics and personnel management."\(^{118}\)

The procurement at issue was a Navy contract for a sophisticated intrusion detection system at four overseas air stations.\(^{119}\) The purpose of the system was to detect and prevent terrorist attacks. It included computers, card readers, central displays, cameras, fiber optic networks, and infrared detectors.\(^{120}\) The GSBCA found that the intrusion detection system was "critical to the direct fulfillment of a military mission" and that the equipment did not serve a routine business or administrative purpose.\(^{121}\) The Federal Circuit agreed.\(^{122}\)

3. GSBCA authority to direct contract award

In *SMS Data Products Group, Inc. v. Austin*,\(^ {123}\) the second-lowest bidder on a Treasury Department computer solicitation appealed decisions of the GSBCA refusing to direct to it an award of the contract.\(^ {124}\) In an earlier protest, the GSBCA had determined that the awardee's proposal did not satisfy certain "mandatory" technical requirements outlined by the Treasury Department.\(^ {125}\) Rather than directing that the contract be awarded to the lowest bidder in compliance, SMS, the GSBCA ordered Treasury to reexamine its needs.\(^ {126}\) After so doing, Treasury decided its needs had changed and ordered a new round of best and final offers (BAFOs).\(^ {127}\) SMS protested this decision. It argued that it should have been awarded the contract as the lowest responsive bidder and that Treasury's new solicitation was "illusory."\(^ {128}\)

The Federal Circuit rejected both contentions. First, the court found nothing in the Brooks Act that gives the GSBCA authority to
direct an award to a successful protestor.\textsuperscript{129} Even if the GSBCA had such authority, the court reasoned, it was not clear that a directed award to SMS would have been proper.\textsuperscript{130} Finally, the court held that there was nothing inappropriate or illusory about Treasury's reopening of discussions after it decided that its needs had changed.\textsuperscript{131}

\textbf{D. Subject Matter Jurisdiction of the ASBCA}

The court addressed the jurisdiction of the Armed Services Board of Contract Appeals in \textit{Emerald Maintenance, Inc. v. United States}.\textsuperscript{132} In \textit{Emerald}, a roofing contractor filed a claim with the contracting officer after the Government withheld monies and paid them to Emerald's workers pursuant to a Department of Labor determination to apply a higher wage rate than that included in the contract.\textsuperscript{133} The contract contained a clause requiring the contractor to pay its workers no less than the wage determined by the Secretary of Labor.\textsuperscript{134} Emerald submitted a claim to the contracting officer, with four counts: (1) the lower wage determination included in the contract amounted to a defective specification; (2) the Government misrepresented the wage rate for laborers performing roofing work; (3) the Government had superior knowledge regarding the proper classification of workers; and (4) there was a mutual mistake with respect to the existence of the local custom of paying laborers at the same rate as roofers.\textsuperscript{135}

The ASBCA dismissed counts one and two for lack of subject matter jurisdiction and determined that both parties abandoned count three. Finally, the Board concluded that a mutual mistake did not exist.\textsuperscript{136}

The Board determined that counts one and two were attacks on the contents of the wage determination.\textsuperscript{137} Because the wage determination was prepared by the Department of Labor, the contracting officer was not responsible for its content.\textsuperscript{138} Furthermore, the dis-
putes provision of the contracts provided that disputes arising out
of the labor standards provision were to be resolved by the Depart-
ment of Labor and were not within the jurisdiction of the
ASBCA.139

The Federal Circuit agreed. Following Collins International Service
Co. v. United States,140 the court said that “[h]owever Emerald
chooses to style its complaint ... the essence of its complaint relates
to the wage rate it had to pay all workers doing roofing work, and
the listing of job categories and wage rates in the contracts is surely
one of the labor standards provisions.”141 Even though the Con-
tract Disputes Act gives the Board jurisdiction to decide any appeal
from a decision of the contracting officer relating to the contract,
the contracts in this case specifically provided that “disputes over
labor standards are not subject to the general disputes clause.”142

Finally, the court rejected Emerald’s assertion of mutual mistake,
even though the parties stipulated that neither the Government nor
the contractor was aware of the area practice of paying all roofing
laborers at the roofer rate.143 According to the court, the contractor
assumed the risk of failing to investigate local conditions affecting
the work and its cost because specific language in the contract
placed this burden on Emerald.144

In dissent, Judge Newman contended that the Board “erred in
holding that Emerald must bear the cost of the government’s post-
contract determination” that all laborers must be paid as roofers.145
The contracts were bid, accepted, entered into, and performed on
the basis of a false assumption (by both parties) about the wage
rate.146 Judge Newman argued that the dispute about liability for the
increased cost was subject to the disputes clause, even if the wage
rate determination itself was not.147 Thus, Judge Newman believed
that the ASBCA had jurisdiction over counts one and two.148 She
also contended that the burden of the mistake should be placed on
the Government because the Government failed to make the proper
wage rate determination and because the contract clause relied on
by the majority applied only to differing site conditions.149

139. Id.
140. 744 F.2d 812 (Fed. Cir. 1984).
141. Emerald, 925 F.2d at 1429.
142. Id. (emphasis in original) (noting that labor law also requires this result).
143. Id. at 1429-30.
144. Id. at 1430.
145. Id. (Newman, J., dissenting).
146. Id.
147. Id. at 1431 (Newman, J., dissenting).
148. Id. at 1431-32 (Newman, J., dissenting).
149. Id. at 1432-34 (Newman, J., dissenting).
Finally, one decision of the 1991 docket concerned the jurisdiction of the Federal Circuit to hear an appeal from a maritime decision of the ASBCA. In Umpqua Marine Ways, Inc. v. United States, the ASBCA sustained the termination for default of Umpqua's contract. The contract was for the conversion of a workboat into a diving boat and the fabrication of a diving system module to be used to support divers working on the hulls of Navy ships. Umpqua was awarded a single contract for both projects.

In 1990, the court held that the admiralty public contract jurisdiction statute requires that contract decisions in admiralty be appealed exclusively to United States district courts. In Umpqua, the Government argued that the case should be transferred to the federal district court because all aspects of the contract were maritime. Umpqua argued that the matter was not within traditional admiralty jurisdiction. Both parties relied on the equitable doctrine of pendent jurisdiction—Umpqua arguing that the boat conversion project should be treated as pendent to the nonmaritime module construction and the Government arguing that the module construction, if nonmaritime, should be pendent to the boat conversion.

The court found that under traditional principles of admiralty a contract for the conversion of a ship is governed by the law of admiralty. The court then addressed the issue of whether the contract for the construction of the diving system module lay within admiralty jurisdiction. Umpqua argued that because the system could be operated from a land-based pier, it did not fall within admiralty. The Government said that because the Navy intended the module to be placed on a vessel specially customized to receive it, the contract was maritime in nature. Moreover, the Government argued that the diving module should be viewed as a necessary "supply" for the
Navy diving boat.\textsuperscript{161}

The court found the intent of the design to be dispositive, holding that the diving system module was designed to be used to support purely maritime activities, whether it was actually placed aboard a naval vessel or upon land.\textsuperscript{162} Because, in the court's view, the system contracted was significantly related to a traditional maritime activity, and because its main function was to serve in sea operations, the court concluded that the contract was wholly maritime.\textsuperscript{163} Therefore, under \textit{Southwest Marine}, the court lacked jurisdiction to hear the claim and the case was transferred to federal district court.

IV. SOVEREIGN IMMUNITY

In one 1991 case the Federal Circuit decided an issue relating to the Government's sovereign immunity. \textit{McDonald's Corp. v. United States}\textsuperscript{164} involved the interpretation of a Tucker Act amendment that allows claims against certain "nonappropriated fund instrumentalities" (e.g., post exchanges).\textsuperscript{165} McDonald's had been awarded a contract by the Navy Resale and Services Support Office (NAVRESSO) to construct and operate between 40 and 300 fast-food facilities at Navy exchanges. After a controversy over beef supplies, McDonald's discontinued operations and claimed breach of contract. The Claims Court held that the waiver of immunity did not extend to NAVRESSO, even though that office directed system-wide procurement for Navy exchanges.\textsuperscript{166} The Claims Court dismissed McDonald's suit for breach of contract.\textsuperscript{167}

The Federal Circuit reversed on the ground that the Tucker Act amendment at issue was intended to waive the immunity of entities such as NAVRESSO.\textsuperscript{168} The court engaged in a lengthy review of the legislative history of the Nonappropriated Fund Activities Act.\textsuperscript{169} Because the Senate version of the bill contained general language waiving sovereign immunity of nonappropriated fund activities, the Departments of Defense and Agriculture expressed concern

\begin{itemize}
  \item \textsuperscript{161} Id. (summarizing Government's position that if diving modules fell within category of "supply" for Navy diving boat then entire contract would necessarily be maritime).
  \item \textsuperscript{162} Id. at 414.
  \item \textsuperscript{163} Id.
  \item \textsuperscript{164} 926 F.2d 1126 (Fed. Cir. 1991).
  \item \textsuperscript{165} McDonald's Corp. v. United States, 926 F.2d 1126, 1126-27 (Fed. Cir. 1991).
  \item \textsuperscript{166} Id. at 1127.
  \item \textsuperscript{167} Id. at 1126-27.
  \item \textsuperscript{168} Id. at 1133.
\end{itemize}
that such a waiver might encompass groups beyond the control of the Government.\textsuperscript{170} For this reason, the legislation as enacted listed the specific exchanges of each branch of the military included.\textsuperscript{171}

The Federal Circuit had no difficulty concluding that Congress intended the waiver to encompass more than just the named exchanges. The court pointed out that the statute identified entities by function, not simply by title.\textsuperscript{172} Moreover, a holding that NAVRESSO is immune could create incentives for the military branches to reorganize their post exchanges under entities that are not specifically named in the statute.\textsuperscript{173} Thus, congressional intent is furthered by treating NAVRESSO as subject to suit under the Tucker Act amendment.\textsuperscript{174}

V. Substantive Contract Issues and Interpretation

The Federal Circuit decided a number of cases in 1991 involving substantive questions of contract law and interpretation.

A. Anticipatory Breach

In \textit{United States v. DeKonty Corp.},\textsuperscript{175} the ASBCA found the Government liable for anticipatory breach of contract for expressing an intent to withhold scheduled progress payments from the contractor.\textsuperscript{176} On July 5, 1985, the Navy recommended default termination of a contract for the construction of a child care facility. The contractor stopped working on the site on July 16. On July 19, an internal Navy memorandum recommended that progress payments should be processed but not issued until the payments were cleared by the termination contracting officer.\textsuperscript{177} Six days later, the contractor called to check on the status of the progress payment due August 8 and was told the payment was "on hold."\textsuperscript{178} On July 22, the contracting officer told the contractor to keep working, but on August 1 the contractor abandoned the job, asserting that the Government breached the contract by failing to make scheduled progress payments.\textsuperscript{179}
The contractor argued that the Government breached the contract before the contractor abandoned performance. The ASBCA agreed that the Government was liable for anticipatory breach of contract. The Federal Circuit reversed, holding that neither the July 19 internal memorandum nor the July 25 conversation rose to the level of anticipatory breach. The Navy's actions fell short of "positive, definite, unconditional and unequivocal" evidence of intent, without which anticipatory breach cannot occur.

B. Contractual Limits on Overhead Recovery

In *Reliance Insurance Co. v. United States*, L.G. Leffler, Inc. contracted with the Veterans Administration for the construction of a hospital wing. The contract was for $11.3 million and was to take 950 days. During construction, the VA issued 200 change orders which extended the project 498 days. Approximately two years after the contract award, Leffler defaulted and Reliance assumed its obligations as the performance surety. Reliance subsequently submitted six equitable adjustment claims totalling $1.3 million. Four claims for extended home and field office overhead went beyond the delay overhead permitted under the changes clause.

The Government moved for partial summary judgment on the four overhead claims. The Claims Court granted the motion, and Reliance appealed. The Federal Circuit affirmed.

Clause G-10 of Reliance's contract, which supplemented the changes clause of the contract, set a ceiling on the amount of overhead recoverable under the standard changes clause. For changes exceeding $50,000, a 5% limit was set for delay overhead. Reliance argued that this provision conflicted with the standard changes clause, but the court, relying on *Santa Fe Engineers, Inc. v. United States*, disagreed. The court distinguished *Morrison-Knudsen Co.*
in which a clause prohibiting price adjustments unless the adjustment exceeded 25% of the total contract price was held to be overridden by the changes clause. The court distinguished Morrison-Knudsen on two grounds. First, the G-10 clause did not eliminate the standard changes clause. Second, the G-10 clause did not shift to the contractor the entire cost of correcting specification defects. In addition, the court noted that Reliance had full knowledge of the contract clause, and as surety the clause applied to it.

C. Calculation of Damages and Adjustments to Contract Price for Changed Work

1. Total cost method and recoverability of interest

In Servidone Construction Corp. v. United States, the plaintiff received a contract from the United States Army Corps of Engineers to build an embankment, spillway, outlet works, and several roads on an earlier constructed dam. After incurring costs beyond its bid price, Servidone filed a certified claim for equitable adjustment and subsequently filed suit in the Claims Court under the Contract Disputes Act.

Servidone alleged both "Type I" and "Type II" differing site condition claims. The Type I claim was that the Army Corps breached an implied duty to provide adequate information, and the Type II claim was that Servidone encountered unusual soil conditions covered by the differing site condition clause. Servidone also complained that the Corps caused delays by excessive quality assurance testing.

Using the "total cost method," which compares original bid with actual cost, the Claims Court found the Government liable for Servidone's increased costs due to the Type II differing site conditions. The court, however, adjusted its award downward based on its finding that Servidone's original bid was unreasonably low.

193. 397 F.2d 826 (Ct. Cl. 1968).
194. Morrison-Knudsen Co. v. United States, 397 F.2d 826, 829 (Ct. Cl. 1968). The dispute in Morrison-Knudsen was based on a contract for the grading and drainage required to improve a 45-mile segment of roadway in Alaska. Id. at 830.
195. Reliance, 931 F.2d at 866.
196. Id. at 866-67.
197. 931 F.2d 860 (Fed. Cir. 1991).
199. Id.
200. Id.
201. Id.
202. Id.
203. Id.
Finally, the Claims Court awarded interest on the certified claim, but denied a request for $13 million in interest on Servidone's borrowings to cover the additional costs. The Federal Circuit affirmed. Although the court noted that the total cost method should be used with caution and only as a last resort, it stated that the Claims Court's use of the method in this case was not clearly erroneous. The Federal Circuit stated that the Claims Court "carefully found facts and correctly applied the law in a rare case justifying the total cost method." Furthermore, the court found that the Claims Court properly awarded interest from the date of the claim even though Servidone had yet to incur the total costs it later recovered. Citing Fidelity Construction Co. v. United States, the court found that the CDA sets the date from which interest runs without regard to when the contractor incurred the costs.

Finally, noting that Servidone's contract barred recovery of interest on borrowed funds and that no statute authorizes such recovery, the Federal Circuit affirmed the lower court's denial of any additional interest. The court's opinion does not discuss whether the cost of borrowings might be recoverable as an element of damages for breach of contract, as distinct from including interest costs in a request for equitable adjustment pursuant to the contract. While the latter is clearly prohibited by standard contract terms, the former is not. At least two commentators have posited that contract cost principles do not apply to a suit for damages.

2. 

Jury verdict method

In Dawco Construction, Inc. v. United States, the Navy awarded Dawco a contract to refurbish a Navy housing project near San Diego. Dawco subcontracted the part of the contract that required Dawco to landscape the housing area grounds. Before performance

204. Id.
205. Id. at 863.
206. Id. at 862 ("[T]his court's predecessor condoned the total cost method in those extraordinary circumstances where no other way to compute damages was feasible and where the trial court employed proper safeguards.").
207. Id.
208. Id.
210. Servidone, 931 F.2d at 862.
211. Id. at 863.
213. 930 F.2d 872 (Fed. Cir. 1991).
commenced, the Government decided to reduce the areas to be landscaped by forty-four percent.215

During the landscaping process, the subcontractor encountered differing site conditions which it attributed to deterioration during a delay caused by the Government.216 Dawco sought $325,063 as an equitable adjustment for the differing site condition.217 The contracting officer did not issue a decision on the request for equitable adjustment, primarily because of Dawco’s failure to identify the difference between the cost to perform the work as specified in the contract and the actual cost to perform under the differing conditions.218 Dawco then filed suit in the Claims Court for $529,935.219

The Claims Court initially ruled that the contractor was entitled to $529,935, less the original subcontract price, for a total of $69,935.220 The Claims Court then issued an order stating that the contractor was entitled to $529,935.221 Finally, the court rejected the Government’s request that the payment be reduced by $273,472, representing the amounts already paid to the contractor.222

The Federal Circuit found that the Claims Court applied the “jury verdict” method to what was in essence a total cost claim.223 Citing WRB Corp. v. United States,224 the court held that the jury verdict method is to be used only when there exists clear proof of injury, there is no more reliable method for computing damages, and the evidence is sufficient for the court to make a fair and reasonable approximation of damages.225 Furthermore, the party must be unable to substantiate the injury with direct and specific proof.226 In concluding that the jury verdict was improper, the court determined that the contractor could neither prove it was injured nor prove a justified inability to substantiate its injury.227 Consequently, the court remanded the case to the Claims Court for a determination of the equitable adjustment due Dawco by the “actual cost

215. Id.
216. Id. at 874-75.
217. Id. at 875. The court discussed the issue of whether a proper claim had been submitted. That issue is not addressed in this Article.
218. Id.
219. Id. at 875-76.
221. Id.
222. Id.
223. Dawco, 930 F.2d at 880.
225. Dawco, 930 F.2d at 880.
226. Id. at 881.
227. Id. at 881-82.
D. Value Engineering Incentive Clause

ICSD Corp. v. United States involved an Army contract to supply night vision gun sights. The contract contained a “value engineering incentive” clause, which provided the contractor with a portion of any savings achieved by the Government due to acceptance of the contractor’s value engineering change proposals. The benefit to the contractor depended on the nature of the proposal. If the Government used the change proposal on future contracts for essentially the same item (contract savings), the contractor shared in 50% of the savings. By contrast, the contractor would receive 20% of any collateral savings on maintenance, operation, support, or government-furnished property.

The contractor in ICSD suggested the use of standard alkaline batteries rather than mercury batteries to operate the sights. Although the batteries were a “major component” of the sights, they were not a deliverable item under the contract. The ASBCA ruled that the savings were merely collateral, and the contractor appealed. The Federal Circuit affirmed.

The court said the savings were either a reduced cost of operation or a reduced cost of government-furnished property. In either case, they were not subject to the 50% savings clause because the batteries were not “essentially the same item” as that to be acquired under the contract. The contractor also argued that the Government did not calculate the collateral savings properly because it did not take into account the safety and logistic advantages of the new batteries. The court upheld the Board’s finding that such savings were not ascertainable. Finally, the court upheld the Government’s decision to split the value engineering award between two contractors.

228. Id. at 882. The court preferred the “actual cost method” because it provides the court with documentation of the underlying expenses and ensures that the final amounts of the equitable adjustment will not be a windfall for either of the contracting parties. Id.
229. 934 F.2d 313 (Fed. Cir. 1991).
231. Id.
232. Id.
234. ICSD, 934 F.2d at 317.
235. Id. at 316.
236. Id. at 315-16.
237. Id. at 316-17.
238. Id. at 317.
239. See id. (finding that both proposals were under consideration at same time and decision to split award was not arbitrary or capricious).
E. Cargo Preference Clause

In *Craft Machine Works, Inc. v. United States*,\(^{240}\) the court interpreted the Cargo Preference Clause in a contract for the sale of shipbuilding portal cranes.\(^{241}\) Federal Acquisition Regulation Clause 52.247-64, Alternate 1, which was incorporated into the contract, required the contractor to use privately owned U.S.-flag commercial vessels to transport any supplies furnished under the contract.\(^{242}\) The contractor believed the clause did not require the shipment of crane parts on U.S.-flag carriers, and therefore entered into a contract for the delivery of the parts by a foreign carrier.\(^{243}\) Subsequently, the Navy directed the contractor to use U.S.-flag carriers for transportation of the parts.\(^{244}\) The contractor canceled its original contract and filed a claim for equitable adjustment for the increased costs of using a U.S.-flag carrier.\(^{245}\) The Claims Court read the clause to require the use of U.S.-flag carriers and denied the claim.\(^{246}\) The Federal Circuit reversed.\(^{247}\)

The court looked to the contract itself, which specified the delivery of complete cranes. Therefore, the court reasoned, the "supplies" to be furnished under the contract were complete cranes. Contrary to the assertion of the Claims Court, "supplies" in this context cannot refer to parts of cranes.\(^{248}\) Moreover, the court noted that it had been the longstanding practice of the Department of Defense to apply the clause in question to end items only.\(^{249}\)

F. Construction of Option Pricing Provisions; Requirement for Certainty in Contract Terms; Unenforceability of Contract Modifications Not Supported by Consideration

In *Aviation Contractor Employees, Inc. v. United States*,\(^{250}\) the Federal Circuit reviewed issues related to the pricing of contracts once an
option to renew has been executed. The contract at issue was for flight training for student pilots at Fort Rucker, Alabama. The contract required that this service be provided in 1983 and contained an option clause for renewal of the contract for up to five years. Disagreements arose over the pricing of the option years soon after the Government exercised its first option. The contract contained no explicit provisions for pricing for any year other than 1983. It did, however, provide for adjustment of the contract price in the event of changes in the scope of work or changes in the cost of wages and benefits paid to employees covered by a collective bargaining agreement.

The contractor, Aviation Contractor Employees, Inc. (ACE), argued that all of its increased costs for fiscal year (FY) 1984 ought to be the subject of negotiation. ACE pointed out that this was not expressly prohibited, and that the Government had evaded a direct answer to pre-bid conference questions about the pricing of the option years. The Government contended that, due to the course of dealing between the parties on a prior contract, ACE's president was well aware of the Government's intent to price the options by allowing only the two specified types of adjustments to contract price.

The ASBCA found that the Government's answers to the pre-bid questions, while "somewhat evasive," put bidders on notice that the Government did not intend to negotiate the option years on a total cost basis. It also found that ACE's president was aware of how the Government intended to price subsequent options. The Federal Circuit declined to upset these factual findings and relied particularly on the finding regarding ACE's "awareness" to affirm the Board with respect to FY 1984.

Disposition of the issues in pricing FY 1985 hinged on a bilateral modification to the contract executed by ACE and the Government. The ASBCA found that the parties intended to negotiate the price for FY 1985 without regard to FY 1984 pricing. The ASBCA con-

252. Id.
253. Id. at 1570.
254. Id. at 1569.
255. Id.
256. Id. at 1570.
257. Id.
258. Id. at 1571.
259. Id. at 1571-72.
260. Id. at 1572.
261. Id.
cluded, however, that the modification was simply an agreement to negotiate a price without establishing what cost factors would be considered and was, therefore, unenforceable due to uncertainty. The Federal Circuit disagreed, noting that the “emerging view” is that “an agreement which specifies that certain terms will be agreed on by future negotiation is sufficiently definite, because it impliedly places an obligation on the parties to negotiate in good faith.” Noting that there was evidence that the Government had not negotiated in good faith, the Federal Circuit concluded that the parties intended to negotiate a contract price for FY 1985 taking all of ACE’s costs into account, and that a trial court or board should be able to determine a reasonable price.

This conclusion led the court to consider an issue the ASBCA did not consider, namely, whether the modification was unenforceable because the Government had received no consideration for its agreement to consider additional costs in the negotiation. The court noted that there would be a lack of consideration if all the Government received in return for the modification was performance of a pre-existing duty that is “neither doubtful nor the subject of honest dispute.” There was some evidence that ACE agreed to forego further litigation of pricing issues in connection with the modification, and there may have existed at the time an honest dispute concerning the costs to be used in calculating the contract price. Therefore, settlement of the dispute could constitute adequate consideration. Since no such findings were made, however, the case was remanded to the ASBCA for specific findings on the issue of ACE’s good faith in disputing the Government’s position.

G. Construction of Economic Price Adjustment Clause

The contract at issue in Brunswick Corp. v. United States was for the delivery of a supply of camouflage systems to the Army over a three-year period. It contained an economic price adjustment (EPA) clause which assumed that offerors included in their bid

262. Id.
263. Id. (emphasis in original).
264. Id. at 1573.
265. Id.
266. Id. at 1574 (quoting JOHNS CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 189 (2d ed. 1986)).
267. Id.
268. Id.
269. Id.
270. 951 F.2d 334 (Fed. Cir. 1991).
prices for each of the contract years an amount for anticipated economic fluctuations. The clause provided that contract price would be adjusted only for unanticipated economic fluctuations that exceeded anticipated fluctuations by more than two percent. Anticipated fluctuations were established by escalation factors included in Table I of the EPA clause.\(^{272}\)

The Army delayed awarding the contract until five months after the specified date of commencement in the EPA clause, and the award was made without any change in the Table I factors.\(^{279}\) When Brunswick submitted its request for equitable adjustment at the end of each contract year, it recalculated the Table I factors to reflect the award delay. The total contract price adjustment requested was $952,090.\(^{274}\) The Government took the position that Brunswick was bound by the unchanged Table I factors and was only entitled to $338,279.\(^{275}\) The ASBCA agreed with the Government, and the Federal Circuit affirmed.\(^{276}\) Vital to the court’s holding was its construction of the contract provisions which, although far from being a model of clarity, provided for calculation of actual, unanticipated fluctuations, but not for recalculation of anticipated fluctuations.\(^{277}\)

VI. Asbestos Indemnification

In GAF Corp. v. United States,\(^{278}\) GAF sought indemnification from the Government for liability resulting from its predecessor’s insulation of Navy ships.\(^{279}\) Shipyard workers employed by Ruberoid, GAF’s predecessor, contracted asbestosis because of their exposure to asbestos products during the performance of Navy contracts to insulate ships.\(^{280}\) In the Claims Court, GAF contended that the Navy knew of the potential health risks in the 1940s but deliberately withheld information from Ruberoid.\(^{281}\) The Claims Court dismissed GAF’s claim on summary judgment, ruling that the Navy had no contractual duty to warn an asbestos producer of the hazards in its product.\(^{282}\) The Federal Circuit affirmed.\(^{283}\)

\(^{272}\) Id.
\(^{273}\) Id.
\(^{274}\) Id. at 336.
\(^{275}\) Id.
\(^{276}\) Id. at 337.
\(^{277}\) Id.
\(^{280}\) Id.
\(^{281}\) Id.
\(^{282}\) Id.
\(^{283}\) Id.
GAF first contended that the Claims Court improperly denied a trial on the issue of whether the Government had a duty to disclose its “superior knowledge” of asbestos hazards. Following *Lopez v. A.C. & S. Inc.*, the court held that GAF could not show that the Government was aware that Ruberoid lacked knowledge of asbestos hazards and had no reason to obtain such information. Therefore, the Federal Circuit agreed with the Claims Court that GAF presented no triable issue.

Second, GAF contended it was entitled to a trial on whether the Government breached an implied warranty of specifications for the insulation. The Government provisionally conceded that the contracts contained design specifications. The specifications did not cause GAF’s losses, however. GAF incurred losses because of its predecessor Ruberoid’s failure to place warnings on its products. For this reason no triable issue was presented.

Finally, the court agreed with the Claims Court that the fact that the Government originally sold the asbestos fiber to Ruberoid fails to alter the result because UCC implied warranties do not apply to government contracts.

Judge Newman dissented, principally on the ground that *Lopez* is distinguishable because GAF presented evidence, absent in *Lopez*, that the Government actively suppressed knowledge superior to Ruberoid’s. According to Judge Newman, GAF presented sufficient evidence of a discrepancy in knowledge significantly different from that before the court in *Lopez*, and for that reason, the case should not be dismissed. Judge Newman objected to the court’s
apparent treatment of *Lopez* as a rule of law for all asbestos cases.\(^{294}\)

VII. **Statutory Construction**

**A. Recovery of Costs Under the Brooks Act**

In *United States v. Compusearch Software Systems*,\(^ {295}\) the issue was whether section 759(f)(5)(C) of the Brooks Act entitles a prevailing "interested party" to recover costs from the Government, including attorney's fees attributable to discovery against an opposing intervenor.\(^ {296}\) The GSBCA held that such costs were recoverable,\(^ {297}\) and the Federal Circuit affirmed.\(^ {298}\)

Compusearch filed a protest against the United States Corps of Engineers alleging that a modification of a software contract unlawfully restricted competition.\(^ {299}\) The awardee, CACI, Inc., intervened, and both parties engaged in extensive discovery.\(^ {300}\) In the settlement of the case, Compusearch was deemed to be the prevailing party entitled to the costs of pursuing the protest.\(^ {301}\) The Corps agreed to challenge only the reasonableness of Compusearch's fees, not its entitlement to those fees.\(^ {302}\) When Compusearch filed a motion for protest costs, the Corps responded by objecting to paying for Compusearch's litigation against CACI.\(^ {303}\) The Board found that because the intervenor was squarely on the side of the Government and because Compusearch had no choice but to litigate against both the Government and the intervenor, Compusearch was entitled to all costs, even those caused by litigation with another private party.\(^ {304}\)

The Federal Circuit agreed.\(^ {305}\) According to the court, the statute unambiguously states that an interested party may be awarded the costs of pursuing a protest.\(^ {306}\)

---

\(^{294}\) See id. (stating that *Lopez* did not purport to decide universal principle of law and that *Lopez* holding should not be read to require summary disposition of this case).

\(^{295}\) 936 F.2d 564 (Fed. Cir. 1991).


\(^{298}\) Compusearch, 936 F.2d at 564.

\(^{299}\) Id.

\(^{300}\) Id.

\(^{301}\) Id. at 565.

\(^{302}\) Id.

\(^{303}\) Id.


\(^{305}\) Compusearch, 936 F.2d at 566.

\(^{306}\) Id.; see 40 U.S.C. § 759(f)(5)(C) (1988) (stating that interested party is entitled to costs of "(f) filing and pursuing the protest, including reasonable attorney's fees, and (ii) bid and proposal preparation").
templates that intervenors will participate in bid protests filed under the Brooks Act.\textsuperscript{307} Therefore, the court reasoned, Congress "intended that costs of pursuing a protest included costs incurred as a result of the actions of an intervenor."\textsuperscript{308} The court rejected the Government's suggestion that the principle of strict construction of waivers of sovereign immunity dictates a contrary result.\textsuperscript{309}

### B. Recoverability Under EAJA of Consultants' Fees Incurred Prior to Appeal of Contracting Officer's Final Decision

In \textit{Levernier Construction, Inc. v. United States},\textsuperscript{310} the Federal Circuit reversed a Claims Court award of contract claim consultant fees incurred by the contractor in presenting its claim for equitable adjustment to the contracting officer.\textsuperscript{311} The Claims Court awarded the consultant fees pursuant to the Equal Access to Justice Act (EAJA),\textsuperscript{312} finding that they were necessary for the preparation of the contractor's case.\textsuperscript{313} The Federal Circuit held it was error for the Claims Court to fail to inquire first whether the contractor incurred the consultant's fees in a "civil action" as that term is used in the EAJA.\textsuperscript{314} As a waiver of sovereign immunity, the court found that the EAJA must be strictly construed and the term "civil action" must be given its ordinary, and most restrictive, meaning to include only judicial proceedings.\textsuperscript{315} Since the consultant's fees were incurred prior to the contracting officer's decision, the contractor did not incur them in a "civil action" under the EAJA.\textsuperscript{316} The court in \textit{Levernier} further held that EAJA cost-of-living adjustments may not be applied to paralegal fees, nor to enhance attorney fees not normally billed in excess of $75 per hour.\textsuperscript{317}

### C. Applicability of the Debt Collection Act to Withheld Progress Payments

In \textit{Allied Signal, Inc. v. United States},\textsuperscript{318} the court considered a con-
tractor's attempt to apply the Debt Collection Act of 1982\(^{319}\) to the Government's withholding of progress payments.\(^{320}\) Pursuant to an economic price adjustment clause, the contracting officer reduced the price of a multi-year contract for the development and production of airplane engines.\(^{321}\) Because the contractor had already received payment in excess of the new, reduced price, the contracting officer refused to pay two of the contractor's requests for progress payments.\(^{322}\) The contractor filed certified claims regarding both the withheld payments and the price adjustment and, upon denial of the claims by the contracting officer, appealed to the ASBCA.\(^{323}\) The contractor argued that the procedural safeguards of the Debt Collection Act had not been followed, but the Board held that withholding of contract payments is contract administration, not debt collection.\(^{324}\) The contractor appealed and the Federal Circuit affirmed.\(^{325}\)

The court held that "debt," as used in the Debt Collection Act, contemplates an existing liability running from the contractor to the Government, not the denial of further liability by the Government within an ongoing contract.\(^{326}\) Thus, in the present case, there was no "debt" to trigger the Act's application.\(^{327}\)

VIII. MISCELLANEOUS CASES

A. SDB Preference Requirement

In Commercial Energies, Inc. v. United States,\(^{328}\) the issue was whether a solicitation complied with the small disadvantaged business (SDB) preference contained in 10 U.S.C. § 2301 and 48 C.F.R. § 219.7001.\(^{329}\) The regulation states that 10% will be added to offers from non-SDB firms prior to evaluation of price.\(^{330}\) The solicitation at issue involved the supply of natural gas to the Air Force.\(^{331}\) The Air Force attempted to comply with the SDB requirements by instructing offerors that award would be based on the sum of two line items only, with ten percent added to the non-SDB offers with

\(^{320}\) Allied Signal, Inc. v. United States, 941 F.2d 1194, 1195 (Fed. Cir. 1991).
\(^{321}\) Id. at 1194-95.
\(^{322}\) Id. at 1195.
\(^{323}\) Id.
\(^{324}\) Id.
\(^{325}\) Id. at 1198-99.
\(^{326}\) Id. at 1198.
\(^{327}\) Id.
\(^{328}\) 929 F.2d 682 (Fed. Cir. 1991).
\(^{331}\) Commercial, 929 F.2d at 683.
respect to those two items. 332

The Claims Court held that basing award on two line items, and applying the 10% differential only to those items, complied with the SDB requirement. 333 The Federal Circuit affirmed, concluding that the Air Force’s approach provided a rational procedure for meeting the statutory goal. 334

B. Record Retention Requirements—Forfeiture of Payments

In JANA, Inc. v. United States, 335 the Government alleged that the contractor overcharged it on a time and materials contract and demanded substantiation of the time charges. 336 The Claims Court ruled against the Government based on its interpretation of the contract’s record retention requirements. 337 The issue before the Federal Circuit was whether the contractor was required to maintain the records that would have been necessary to support its charges for two, three, or four years. 338 After reviewing various regulatory requirements to determine which one applied to the records at issue, the court concluded that the requirement applicable in this case was three years. 339 Thus, the Federal Circuit reversed the Claims Court and held that the contractor was required to produce the records or concede the Government’s claim. 340 Furthermore, the court held that the contractor had not met the necessary requirements to assert laches or estoppel against the Government. 341

Given the fact that the Claims Court agreed with JANA that the records supporting its invoices need only have been retained for two years, the Federal Circuit’s imposition of a forfeiture of all payments, based on its interpretation of the clause as requiring retention for three years, seems somewhat draconian. Because the absence of the records prevented conclusive proof of overpayment and because in fact there may have been no overpayment, equity would seem to require that the contractor be allowed to retain part,
if not all, of the disputed payments. This result could be reached on a theory of quantum meruit, among other possible approaches.

C. Causes of Action

In Gould, Inc. v. United States, the Federal Circuit vacated a Claims Court decision dismissing Gould's complaint for failure to state a claim upon which relief could be granted. The Navy awarded Gould a five-year contract to build tactical radios at a fixed price. Gould submitted a number of claims for relief based on alleged violations of the contract by the Navy. Gould also submitted a claim requesting equitable reformation and upward adjustment of the contract price based on the Navy's failure to disclose relevant information about the design of the radio being procured. After Gould failed to meet delivery schedules, the parties terminated the contract and settled all contract claims except for the claim for equitable reformation of the contract and upward adjustment of the price.

The Federal Circuit vacated the Claims Court decision on two grounds. First, the Claims Court erred in assuming that the parties had limited Gould's remedy to reformation of the contract. The court found instead that the parties intended to permit Gould to seek monetary damages. Second, the Claims Court erred in dismissing Gould's three counts: (1) that the contract was invalid because the Navy failed to provide a stable design for a multiyear award, (2) that the Government withheld necessary information, and (3) that the parties made a mutual mistake. The Claims Court's dismissal of the first count was improper because it construed the facts against Gould. Its dismissal of the second count was improper because Gould satisfied the requirements of notice pleading. Finally, the court concluded that mutual mistake was properly pled.
D. Liability of Surety for Prejudgment Interest

In Insurance Co. of North America v. United States, the court reviewed a Claims Court holding that a surety was liable for payment of prejudgment interest accruing after the Government demanded payment on a performance bond. The Insurance Company of North America (INA) issued a bond in the amount of $129,000 to guarantee the performance of a timber contractor. One year after the contractor's default, the Government demanded payment. The timber contractor contested the default determination in the Claims Court, which found for the Government and ordered INA to pay prejudgment interest in addition to the full bond amount. In affirming, the Federal Circuit held that the assessment of prejudgment interest on a surety bond is not meant to penalize the surety beyond the bond limit but does ensure that the creditor is fully compensated for the use of the money beyond its due date.

E. Use and Possession Distinguished from Final Acceptance

In M.C. & D. Capital Corp. v. United States, the contractor contested the propriety of its termination for default on a roofing contract. The contractor first argued that because the Government took possession of the work as substantially complete prior to the termination, final acceptance had occurred. The court rejected this argument, noting that the contract and the FAR explicitly provided that possession and use shall not be deemed to constitute final acceptance. M.C. & D.'s second argument was that termination was improper because it had substantially performed the contract. This argument was also rejected by the court, which held that the numerous uncorrected deficiencies in the contractor's work precluded a finding of substantial performance.

352. 951 F.2d 1244 (Fed. Cir. 1991).
354. Id.
355. Id.
356. Id.
357. See id. at 1246 ("This interest returns the parties to the financial position they would have occupied had the surety paid its obligation when due.").
358. 948 F.2d 1251 (Fed. Cir. 1991).
360. Id. at 1254-55.
361. Id. at 1255.
362. Id. at 1256.
363. Id.
F. Sanctions

In Romala Corp. v. United States, the contractor argued that in terminating for nonperformance, the Government breached the contract. The Claims Court dismissed the action, finding that Romala failed to submit design plans as required under the contract and, consequently, the termination for default was not a breach. The Federal Circuit affirmed, finding that the Claims Court's interpretation of the contract and resulting outcome were correct.

In addition, the Federal Circuit determined that Romala's appeal was frivolous. The court found that "Romala's post-filing conduct, consisting of irrelevant and illogical arguments based on factual misrepresentations and false premises, is the sort of appellate litigation behavior that makes an appeal frivolous as argued, and thus eligible for sanctions."

G. Captions

Boeing Petroleum Services, Inc. v. Watkins concerned the proper caption on appeal. Boeing argued that the GSBCA, not the United States, should have been identified as the appellee pursuant to Federal Rule of Appellate Procedure 15(a). The Federal Circuit, however, concluded that because both the CDA and the Brooks Act designate the agency head, not the Board or the United States, as the party entitled to appeal, the agency head is also the proper respondent on appeal.

CONCLUSION

The 1991 government contract decisions of the Federal Circuit illustrate the court's need for judges who have more background and experience in this sometimes highly technical field. While the court on the whole was able to dispose adequately and fairly of those cases that presented more or less traditional and straightforward issues of contract interpretation and statutory construction, a number of the court's decisions regarding more complex and spe-
cialized government contract issues have tended to confuse rather than clarify the applicable law.