AREA SUMMARIES

THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT: GOVERNMENT CONTRACTS 1990 SUMMARY

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INTRODUCTION

The United States Court of Appeals for the Federal Circuit (Federal Circuit) decided over thirty government contracts or federal procurement law cases in its 1990 term, each of which either affirmed, slightly expanded, or slightly retracted the court's existing precedent. The court's failure to break new or dramatic grounds this term is not surprising, given that most principles of government contract law are well-established. The Federal Circuit did, however, reemphasize and reaffirm several policies and precedents relating to standards of review, contract interpretation, standing, and jurisdiction. Under standards of review, for example, the court continued to read statutory language strictly, according deference and full effect to agency boards' factual conclusions while reviewing legal conclusions de novo. Under standing and jurisdiction, the Federal Circuit restricted its jurisdiction, holding that exclusive jurisdiction over maritime contract disputes lies exclusively with the federal dis-
In each case discussed here, the Federal Circuit relied on its past holdings to fine-tune the legal doctrines involved. The first part of this Article examines the Federal Circuit's jurisdictional decisions, treating those relating to the Boards of Contract Appeals, the Claims Court, and the Federal Circuit separately. The Article then reviews procedural issues addressed by the Federal Circuit, including the standard of review of agency board's decisions. The next two sections contain the court's constitutional analysis of the right to jury trial in government contract cases and issues revolving around bid protests. Finally, this Article concludes with an examination of the substantive issues of contract formation, including contract interpretation and the question of the existence of an implied contract between the government and third-party sureties.

I. Jurisdiction of the Boards of Contract Appeals

A. Jurisdiction of GSBCA over Bid Protests

1. "Interested party" requirement

The Federal Circuit handed down one decision in 1990, Federal Data Corp. v. United States, defining the "interested party" requirement for filing a bid protest with the General Services Administration Board of Contract Appeals (GSBCA). Consistent with its 1989 trend, the court continued to narrow the grounds for standing to bring a bid protest at the GSBCA. In Federal Data Corp., the Federal Circuit held that a bidder who has withdrawn from the bid by refusing to renegotiate is not an "interested party," and is not entitled to file a protest with GSBCA.

Federal Data Corporation and nine other vendors submitted bids on a request for proposals for automatic data processing equipment for the Health Care Financing Administration (HCFA) of the Department of Health and Human Services (HHS). The bid was

7. See infra notes 99-118 and accompanying text (discussing Federal Circuit's analysis that limited its subject matter jurisdiction by deferring to congressional intent).
11. Federal Data Corp., 911 F.2d at 703-05.
12. Id. at 701.
awarded to International Business Machines (IBM) and HCFA notified the unsuccessful bidders of the award. The notification included previously withheld technical information regarding IBM’s proposal.

Wang, another bidder, timely protested the award to IBM and in response, HCFA suspended performance of the contract. HCFA announced that it would reopen the negotiations, advising all previous unsuccessful bidders that HCFA would provide each vendor with technical information similar to the information that had been released to IBM in order to place all prospective vendors on an equal footing. The contracting officer chose to renegotiate rather than to reprocure because of HCFA’s critical need for the ADP equipment.

Federal Data did not agree to the terms set out by the contracting officer and protested twice to the GSBCA. During its second protest, Federal Data stated that it would not enter or participate in the renegotiation. HCFA confirmed by letter that Federal Data’s prices and technical scores would not be released to other bidders due to Federal Data’s decision not to participate in the renegotiation.

Federal Data subsequently amended its second protest, contending that HCFA proposed an improper remedy to correct the errors of the first solicitation. Again, Federal Data stipulated that it would not compete further in the renegotiation process. The GSBCA dismissed or denied each of Federal Data’s protest counts and Federal Data appealed to the Federal Circuit.

13. Id.
14. Id.
15. Id. Wang contended that HCFA disclosed incorrect information regarding its assessment of the initial proposals submitted by each vendor. Id. HHS acknowledged that its investigation revealed that HCFA unintentionally conveyed inaccurate information to all vendors. Id.
16. Id. The information disclosed included the identity of all offerors in the competitive range, the total evaluated prices of all offerors, and the total technical score of all offerors. Id.
17. Id.
18. Id.
19. Id. Federal Data’s first protest, seeking suspension of delegation of procurement authority and reimbursement of proposal costs, protest costs, and attorneys’ fees as relief for errors in the original solicitation, was dismissed without prejudice upon agreement by the parties. Id. In deciding not to renegotiate, Federal Data maintained that it had submitted its best and final offer, and that recompetition would not result in a more favorable evaluation. Id.
20. Id. at 701-02. Each bidder had the option not to participate in the renegotiation, and bidders who chose not to participate did not have any of their bid information released. Id.
21. Id. at 702.
22. Id.
The issue before the Federal Circuit was whether Federal Data had standing to pursue a protest when it did not participate in the renegotiation of the award. The court stated that a protest could only be filed by an "interested party" and that there are two elements to this statutory requirement: (1) the protestor must be an "actual or prospective bidder"; and (2) there must be a "direct economic interest" that would be affected by the award of a contract or the failure to award the contract. In interpreting the requirements, the court held that the GSBCA's "protest authority does not extend to disappointed bidders who have no chance of receiving the contract." Relying on United States v. International Business Machines, the court held that the GSBCA's jurisdiction is limited to protests brought by bidders who are in a position to receive the challenged award. When Federal Data voluntarily removed itself from the renegotiation, it was no longer in a position to receive the contract from HCFA/HHS and, therefore, could not have been a "prospective bidder." The court also stated that Federal Data's expressed intention to compete in a future solicitation, if the GSBCA found the government's conduct unlawful, was not sufficient to grant Federal Data "interested party" status. Relying on MCI Telecommunications Corp. v. United States, the court held that "[a] stated intention to submit a proposal in response to any resolicitation, and its efforts to secure resolicitation by filing a protest, does nothing to create the necessary interested party status." The Federal Circuit wrote that a speculative prospect that a solicitation will be canceled and a new solicitation initiated does not grant "interested party" status to a possible bidder.

The Federal Circuit's holding in Federal Data Corp., in heightening the standing requirement for a GSBCA bid protest, confirms its current approach of narrowly construing the "interested party" requirement.

25. Id. at 703.
26. Id.
27. 892 F.2d 1006 (Fed. Cir. 1989) (holding that only low, responsive, and disappointed bidder had standing).
29. Id.
30. Id. at 704.
31. 878 F.2d 362 (Fed. Cir. 1989) (holding that would-be protestor, who had not submitted proposal but sought resolicitation of agency requirements, was not "interested party").
32. Federal Data Corp., 911 F.2d at 704 (quoting MCI Telecommunications Corp. v. United States, 878 F.2d 362, 365 (Fed. Cir. 1989)).
33. Federal Data Corp., 911 F.2d at 704.
2. Protests involving the Warner Amendment

In Electronic Systems Associates v. United States, the Federal Circuit considered the reach of the Warner Amendment in GSBCA bid protests. The court held that a Reduced Instruction Set Computer Ada Environment (RISCAE) intended to be used in the Strategic Defense Initiative (SDI) systems was a "weapon" for purposes of the Warner Amendment and, as such, deprives the GSBCA of jurisdiction over challenges to awards of weapons contracts. The plaintiff, Electronic Systems, responded to an Air Force solicitation seeking a RISCAE for radiation-hardened microprocessors.

The government chose to procure the system through a small business set-aside to which Electronic Systems protested. The GSBCA held that the RISCAE was a "weapon" or "weapon system" within the rubric of the Warner Amendment and not standard Automatic Data Processing (ADP) equipment. Accordingly, the GSBCA dismissed the protest for lack of jurisdiction.

The central issue on appeal was whether the GSBCA had jurisdiction over the protest under the Brooks Act or whether the Warner Amendment operated to deprive the GSBCA of its jurisdiction. In a unanimous opinion written by Judge Mayer, the Federal Circuit affirmed the GSBCA's dismissal. Relying on exemptions (iv) and (v) of the Warner Amendment, the court agreed with the Board's conclusion that the RISCAE was an "integral part of the weapon or weapons system" and therefore not under the Brooks Act ADP

34. 895 F.2d 1398 (Fed. Cir. 1990).

The Warner Amendment excludes from the coverage of the Brooks Act:

The procurement by the Department of Defense of automatic data processing equipment or services if the function, operation, or use of which -

(i) involves intelligence activities;
(ii) involves cryptologic activities related to national security;
(iii) involves command and control of military forces;
(iv) involves equipment which is an integral part of a weapon or weapons system;
or
(v) 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.


37. Id. at 1399.
38. Id.
39. Id. (finding that ADP equipment is weapon because it is "critical to direct fulfillment of military or intelligence missions").


41. Electronic Sys. Assoc., 895 F.2d at 1400; see also supra note 35 (stating relevant provisions of Warner Amendment).
42. Id.
equipment jurisdiction.\.43

The Federal Circuit, relying on findings of undisputed facts, found a real and convincing nexus between the contract and the fulfillment of a military mission.\.44 The court concluded that the procurement in question was "critical to the direct fulfillment of military or intelligence missions," and not subject to the Brooks Act.\.45

The court also held that the GSBCA's jurisdiction was limited to the express provisions of the Brooks Act and not to extraneous sources such as treaties or other statutory authorities.\.46 The court rejected Electronic System's argument that, in determining if the GSBCA has jurisdiction under the Brooks Act, it must consider the impact of that determination on other laws or agreements, such as the 1972 Anti-Ballistic Missile Treaty between the United States and the Soviet Union.\.47 Because the Act specifically limits the grant of GSBCA jurisdiction to ADP equipment procurements, which include bid protests over Department of Defense procurements of ADPE crucial to military missions, the Board properly dismissed the appeal.\.48 In addition, the court emphasized statutory construction, reiterating that a court is compelled to give the words of a statute their plain and ordinary meaning unless there is a clear congressional intent to the contrary.\.49 Because neither the Brooks Act nor its legislative history indicates an intent contrary to the plain language of the statute, the Federal Circuit found that the GSBCA's jurisdiction was clearly delineated.\.50

\[\text{43. Id.}\]
\[\text{44. Id. at 1401.}\]
\[\text{45. Id. at 1402.}\]
\[\text{46. Id. at 1400.}\]
\[\text{47. Id. (providing three reasons for rejecting Electronic Systems' reliance on ABM Treaty). First, the ABM Treaty predates the Warner Amendment and the SDI program by at least nine years; second, the ABM Treaty neither uses nor defines the terms "weapon" or "weapons systems"; and third, the Warner Amendment does not refer to the ABM Treaty. Id. As a result, the court concluded that the ABM Treaty is "irrelevant to the jurisdictional analysis." Id.}\]
\[\text{48. Id. at 1402. See PacifiCorporation Capital v. United States, 852 F.2d 549, 551 (Fed. Cir. 1988) (denying GSBCA jurisdiction over Department of Defense ADPE procurements if essential to accomplishing military mission).}\]
\[\text{49. Electronic Sys. Assoc., 895 F.2d at 1400 (quoting Ethicon, Inc. v. Quigg, 849 F.2d 1422, 1426 (Fed. Cir. 1988)); see also Placeway Constr. Corp. v. United States, No. 90-5017 (Fed. Cir. Aug. 7, 1990) (LEXIS, Genfed library, Circuit file) (emphasizing that statutory language will not be construed contrary to plain meaning absent contrary intent in legislative history). The full text of this opinion was originally cited at 910 F.2d 835 (Fed. Cir. 1990), but was withdrawn to correct errors.}\]
\[\text{50. Electronic Sys. Assoc., 895 F.2d at 1400.}\]
II. JURISDICTION OF THE UNITED STATES CLAIMS COURT

A. Jurisdiction over Final Contracting Officer Decisions

The Federal Circuit in *Placeway Construction Corp. v. United States*,51 discussed the jurisdiction of the Claims Court and the issue of finality of board decisions, reinforcing its strict construction of jurisdictional statutes.52

Placeway Construction brought an action under the Contract Disputes Act (CDA)53 to recover amounts withheld by the government, adjustments, and cost performance increases.54 The contracting officer denied Placeway's claims and Placeway brought suit in the United States Claims Court.55 The Claims Court held that the decision of the contracting officer was not final because the contracting officer had not determined the amount of the set-off.56 Upon the government's motion, the Claims Court dismissed the suit and Placeway appealed.57

The Federal Circuit affirmed in part, vacated in part, and remanded the case to the Claims Court.58 Reviewing the Claims Court's jurisdiction over final decisions, the court held that final decisions are those which are adjudicated completely, resolving issues of both liability and damages.59 The Federal Circuit, in an opinion written by Judge Michel, stated that the contracting officer's decision held Placeway liable due to its delayed performance and the officer ruled that damages would be the contract balance, subject to

56. *Id.* at 164-65.
57. *Id.* at 168. Placeway first filed a motion for relief from judgment, pursuant to U.S. Claims Court Rules 59 and 60(b), which were denied by the Claims Court. *Placeway Constr. Corp. v. United States*, 19 Cl. Ct. 484, 485 (1990) (citing CLAIMS CT. R. 59 & 60(b)).
58. *Placeway Constr. Corp.*, No. 90-5017, at 18. The Federal Circuit affirmed the Claims Court's dismissal of plaintiff's request for declaratory judgment, noting that the Claims Court may grant equitable relief only in limited circumstances. *Id.* at 4-5 (citing provision at 28 U.S.C. § 1491(a)(3) (1988) (limiting Claims Court's authority to grant declaratory judgments to cases where contract claim is filed before contract is awarded)).
some possible revision. The court relied on *Teller Environmental Systems v. United States*, which held that a contracting officer’s decision must completely adjudicate all rights, including issues of liability and damages in order to be final. Applying this principle, the Federal Circuit held that the Claims Court possesses jurisdiction to review a contracting officer’s decision in Placeway-type situations.

**B. Jurisdiction over Claims Based on the Prompt Payment Act**

In *New York Guardian Mortgagee Corp. v. United States*, the Federal Circuit considered whether a federal contract must exist before a claim can be submitted under the Prompt Payment Act. New York Guardian acquired seventy-six defaulted mortgages that were guaranteed by the Veterans Administration (VA). New York Guardian conveyed the property to the VA and awaited payment. The VA delayed payment and New York Guardian sued in the United States Claims Court seeking interest on the delayed payments under the Prompt Payment Act. The Claims Court dismissed the suit, holding that a federal contract is required for a party to make a claim.
under the Prompt Payment Act. The court found that, because the government had acquired the property through a purely statutory scheme, no federal contract existed, and, therefore, the Prompt Payment Act did not apply.

In a unanimous opinion written by Senior Judge Cowen, the Federal Circuit affirmed the Claims Court's decision. The Federal Circuit found that there is no provision in the Prompt Payment Act that authorizes the recovery of interest under the Veterans Loan Program and, therefore, the regulations governing the application of the Act control. The court agreed with the Claims Court that the implementing regulations did not define the type of transaction involved in *New York Guardian* as a "federal contract." Moreover, the court held that the regulations show that the Prompt Payment Act applies only to the government's acquisition of goods and services by written contract. The Federal Circuit found that no written contract existed between New York Guardian and the VA and none was required to complete the acquisition because all obligations and transfers were based on purely statutory authority. Therefore, the court concluded that there could be no application of the Act without a federal contract. Absent a specific statutory authorization, the government could not be charged interest unless liability for the interest is "clearly imposed by statute or assumed by contract."

III. JURISDICTION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

A. Jurisdiction over Final Agency Boards' Decisions

Under the Federal Courts Improvement Act, the Federal Circuit hears appeals from the United States Claims Court and the Boards of Contract Appeals. The Federal Circuit's decision in *Teledyne Continental Motors v. United States* clarifies its definition of a board's "fi-
nal” decision for purposes of appealability, without necessarily expanding or narrowing its jurisdiction. Teledyne Continental, a manufacturer of tank and airplane engines for military and industrial applications, was reimbursed by the government under government contracts for pension costs allocable to work performed under those contracts. The general accounting method applied to these allocations was governed by Cost Accounting Standards. During an audit, the administrative contracting officer advised Teledyne Continental that its accounting system did not comply with iterated standards.

Teledyne Continental challenged the decision of the contracting officer. Upon denial of its challenge, Teledyne Continental appealed this decision to the Armed Services Board of Contract Appeals (ASBCA), which denied in part, sustained in part, and remanded the decision to the contracting officer. Teledyne Continental then appealed the ASBCA’s decision to the Federal Circuit.

The narrow issue presented on appeal was whether the ASBCA’s decision was final for purposes of vesting jurisdiction in the Federal Circuit. The court defined a final decision as one which “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” A litigant must raise all issues or claims of error in one appeal following a decision on the merits. Based on this definition, a decision limited to the issue of liability, where the assessment of damages or other relief remains open, is not final.

Applying this concept to the finality of board decisions, a court must examine the scope and extent of the contracting officer’s decision.

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80. The Federal Circuit has jurisdiction only over a final decision of an agency board of contract appeals. 28 U.S.C. § 1295(a)(10) (1988); see supra notes 51-63 and accompanying text (examining issue of finality of board decisions in context of Claims Court jurisdiction).
82. Id. at 1580-81. The applicable Cost Accounting Standards were CAS 403 and CAS 413. Section 403 governs the allocation of home office expenses to segments. 4 C.F.R. § 403 (1990). Section 413 concerns adjustment and allocation of pension cost. 4 C.F.R. § 413 (1990).
83. Teledyne Continental Motors, 906 F.2d at 1580 (noting that Teledyne did not calculate pension costs separately for its divisions).
84. Id. (arguing that “active employee head count” method it used correctly allocated pension costs).
86. Teledyne Continental Motors, 906 F.2d at 1580.
87. Id.
88. Id. (citing Firestone Tire & Rubber v. Risjord, 449 U.S. 368, 373 (1981); Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978)).
89. Teledyne Continental Motors, 906 F.2d at 1581-82.
90. Id. at 1582; see also Liberty Mutual Ins. v. Wetzel, 424 U.S. 737, 744 (1976) (stating that grant of partial summary judgment, without decisions on damages, is interlocutory).
sion.\textsuperscript{91} In \textit{Teledyne Continental}, the contracting officer had decided both the issue of liability and the amount of damage that Teledyne Continental owed the government.\textsuperscript{92} The ASBCA, however, had affirmed the contracting officer's decision of noncompliance with the Cost Accounting Standards but had made no decision regarding whether Teledyne Continental owed money to the government.\textsuperscript{93} Thus, the ASBCA's decision did not dispose of both the issues of liability and damages or other relief. Jurisdiction, therefore, did not vest with the Federal Circuit.\textsuperscript{94}

Teledyne Continental argued that because both parties stipulated the issues on appeal, the court could assert jurisdiction.\textsuperscript{95} The court noted, however, that consent of both parties to a suit cannot cure a defect in jurisdiction.\textsuperscript{96} On all grounds, therefore, the appeal was dismissed for lack of jurisdiction, thereby clarifying the final decision requirement for the purpose of appeals of boards of contract decisions to the Federal Circuit.\textsuperscript{97}

\textbf{B. Jurisdiction over Maritime Contracts}

Although the concepts discussed are not new, \textit{Southwest Marine v. United States}\textsuperscript{98} represents an important jurisdictional decision by the Federal Circuit. The Federal Circuit held that exclusive jurisdiction over maritime contract disputes lies exclusively with the federal district courts and not with the Federal Circuit.\textsuperscript{99} In so holding, the court limited its own subject matter jurisdiction.

Southwest Marine bid and received a contract with the United States Navy for ship repair.\textsuperscript{100} During the course of performance, several contract modifications were made for which Southwest Marine requested payment adjustments.\textsuperscript{101} The contracting officer denied Southwest Marine's request, and the contractor appealed to

\begin{itemize}
\item \textsuperscript{91} \textit{Teledyne Continental Motors}, 906 F.2d at 1582.
\item \textsuperscript{92} \textit{Id}.
\item \textsuperscript{93} \textit{Id}.
\item \textsuperscript{94} \textit{Id}.
\item \textsuperscript{95} \textit{Id}.
\item \textsuperscript{96} \textit{Id} (citing Gould v. Control Laser Corp., 866 F.2d 1391, 1393 (Fed. Cir. 1989) (noting that because parties settled, no controversy exists and court was therefore without jurisdiction)).
\item \textsuperscript{97} \textit{Id} at 1583-84.
\item \textsuperscript{98} 896 F.2d 532 (Fed. Cir. 1990).
\item \textsuperscript{99} See \textit{Southwest Marine v. United States}, 896 F.2d 532, 535 (Fed. Cir. 1990) (holding that Congress' formation of Federal Circuit was not intended to change jurisdiction over maritime contract disputes); see also \textit{Matson Navigation Co. v. United States}, 284 U.S. 352, 356 (1932) (vesting district courts with exclusive jurisdiction over maritime contracts).
\item \textsuperscript{100} \textit{Southwest Marine}, 896 F.2d at 532-33.
\item \textsuperscript{101} \textit{Id}.
\end{itemize}
the ASBCA. The ASBCA upheld the contracting officer's decision and Southwest Marine appealed to the Federal Circuit. On appeal, the government sought dismissal due to lack of Federal Circuit jurisdiction over maritime contracts.

Under the Federal Courts Improvement Act, the Federal Circuit has exclusive jurisdiction over appeals taken from the boards of contract appeals. However, Section 603 of the Contract Disputes Act restricts the avenue of review for contracts "arising out of maritime contracts.”

Southwest Marine argued that while the language of Section 603 appears to restrict jurisdiction to federal district courts, such a restriction does not apply to the Federal Courts Improvement Act because no section in that Act refers to such a restriction. The court disagreed. Judge Newman, writing for a unanimous panel, stated that the legislative history of the statutes strongly indicates that maritime contracts were to be excluded from the appellate jurisdiction of the Federal Circuit.

Southwest Marine also argued that subsequent statutes, which contradict earlier statutes, govern. The court noted, however, that even if Southwest Marine were correct, that a later statute implicitly supersedes an earlier inconsistent statute, the intent of Con-

102. Southwest Marine, ASBCA No. 33,404, 89-1 BCA (CCH) ¶ 21,425 (1988).
103. Southwest Marine, 896 F.2d at 533.
104. Id. at 533-34.

(1) The decision of an agency board of contract appeals shall be final, except that -
(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or
(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of title 28, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

106. 41 U.S.C. § 603 (1988). Section 603 provides in pertinent part: "Appeals under paragraph (g) of section 607 of this title and suits under section 609 of this title, arising out of maritime contracts, shall be governed by chapter 20 [the Suites in Admiralty Act] or 22 [Public Vessels Act] of Title 46 as applicable ... .” Jurisdiction vests in the federal district courts when either chapter 20 or 22 is involved. 46 U.S.C. §§ 742, 782 (1988).
107. Southwest Marine, 896 F.2d at 533.
108. Id.
109. Id.
gress must nonetheless be clear that the later statute controls.\textsuperscript{110} Relying on \textit{United States v. United Continental Tuna},\textsuperscript{111} Judge Newman wrote that "a cardinal principle of statutory construction \ldots is that repeals by implication are not favored."\textsuperscript{112} Implicit repeal is looked upon with disfavor, especially when a general statute appears to supersede a more specific statute.\textsuperscript{113} Only in rare circumstances, therefore, will such implicit repeals be upheld.\textsuperscript{114}

The court also noted that jurisdiction over maritime contracts has traditionally vested in the federal district courts.\textsuperscript{115} The Federal Courts Improvement Act did not change that jurisdiction nor did Congress demonstrate an intent to do so.\textsuperscript{116} The court reasoned that because the maritime nature of the existing contract was not at issue, some clear evidence rebutting the presumption that jurisdiction over maritime contracts lies with the federal district courts must exist in order to vest the Federal Circuit with jurisdiction over Southwest Marine's contract.\textsuperscript{117} The court concluded that, without an indication from Congress that the Federal Courts Improvement Act supersedes section 603 of the Contract Disputes Act, jurisdiction lies with the federal district courts and not with the Federal Circuit.\textsuperscript{118}

Judge Newman's opinion represents an extremely lucid account of jurisdictional and statutory construction. It is therefore instructive for its views to the extent that it reaffirms the strict construction of the Federal Circuit's subject matter jurisdiction.

\textbf{IV. PROCEDURAL ISSUES}


The Federal Circuit standard of review of agency board's deci-
sions is statutorily defined by the Contract Disputes Act. In its 1990 decisions, the Federal Circuit continued to interpret the statutory standard strictly, according deference and full effect to agency boards of contract appeal's factual conclusions, while reviewing legal conclusions de novo.

In Halifax Engineering v. United States, the Federal Circuit affirmed a GSBCA decision upholding a contracting officer's termination of a contract. Although the case adds little to existing government contracts theory, it is noteworthy because the court reaffirmed its ruling that questions of contract interpretation are questions of law, and, therefore, a board's decision on the legal interpretation of a contract is not final. Factual findings, however, will not be set aside unless appellants show that they are fraudulent, arbitrary, capricious, grossly erroneous, or not supported by substantial evidence.

Halifax Engineering was awarded a contract to provide security guard services for the Department of State. Prior to beginning actual performance, Halifax was asked to correct deficiencies in its projected performance and was given ten days to do so after which the government terminated the contract. Halifax asserted that the cure notice provided was deficient and that default termination was therefore improper. The Federal Circuit affirmed the termination, stating that the clear language of the contract requires that the government only allow Halifax ten days from receipt of the notice to cure deficiencies. Because the analysis involved a legal in-

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119. 41 U.S.C. § 609(b) (1988). This statute governs the standard of review for the Federal Circuit of both factual and legal conclusions. It provides in pertinent part:

[T]he decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.


120. 915 F.2d 689 (Fed. Cir. 1990).

121. Halifax Eng'g v. United States, 915 F.2d 689, 691 (Fed. Cir. 1990).

122. See id. at 690 (quoting Alvin, Ltd. v. United States Postal Serv., 816 F.2d 1562, 1564 (Fed. Cir. 1987) (reversing Postal Service Board's holding that Postal Service was not obligated to pay certain California taxes under existing lease agreements)).

123. Id.

124. Id. The contract gave the government the option to terminate the contract for default if, after notifying Halifax of deficiencies, and allowing ten days to cure, the government found the deficiencies not cured. Id.

125. Id. The government set a new contract starting date and informed Halifax that failure to perform would result in termination. Id. Termination resulted due to Halifax's failure to be prepared to begin performance on the start date. Id.

126. Id. at 691. Halifax charged that the government's letter was legally inadequate because it failed to specify defects and a cure period. Id.

127. Id. at 690.
terpretation of a contract provision, the Federal Circuit reviewed the GSBCA's interpretation *de novo* and held that the cure request was sufficient notice under the terms of the contract.\(^\text{128}\)

The Federal Circuit's reaffirmation of its standard of review of an agency board's decision occurs consistently throughout the court's opinions.\(^\text{129}\) The standard of review is statutorily mandated under the Contracts Disputes Act.\(^\text{130}\) Therefore, because the language and legislative history are clear, the Federal Circuit has little discretion in interpreting the standard.

**B. Review of Claims: Form over Substance**

The Federal Circuit, in *Placeway Construction Corp. v. United States*,\(^\text{131}\) held clearly that *form* will never define the terms of a claim over the claim's *substance*.\(^\text{132}\) The Federal Circuit held that the claims court erred when it found that Placeway improperly fragmented its request for compensation for additional work into individual items because it originally presented its claim to the contracting officer in one lump sum.\(^\text{133}\) The court noted that the form in which a claim is presented does not determine whether a claim is unitary; rather, the court must conduct a fact finding to determine whether the claims arise from a common set of operative facts.\(^\text{134}\)

The court cited its prior holding in *Contract Cleaning Maintenance v. United States*\(^\text{135}\) which supports this view. The court in *Contract Clean-
ing stated: "[i]t is the claim presented to the contracting officer that is determinative . . . , not the format or fragmentation set forth in the complaint . . . ." The court was consistent in applying its prior precedent and in clarifying its principles.

V. Constitutional Questions

A. Right to Jury Trial

Seaboard Lumber Co. v. United States represents the Federal Circuit's 1990 foray into questions of constitutional law in government contracts. The issue in Seaboard Lumber was whether a government contractor is entitled to an article III court or jury trial for the adjudication of its claims and the government's counterclaims. The case affirms the constitutionality of the Contract Disputes Act's (CDA) adjudication provisions and defines the scope of a government contractor's waiver of its rights.

Several timber companies, known collectively as "Seaboard," which individually entered into timber sales contracts with the government, challenged the contracting officer's decision that they were in breach of their individual contracts with the government. Each contract contained a disputes provision, subjecting disputes resolution to the terms of the CDA. The government counterclaimed for breach of contract. Seaboard claimed the CDA, as incorporated into the government's contract, unconstitutionally deprived them of either their right to a trial before an article III court or before a jury on the counterclaims presented by the government.

136. Id. at 591. The Federal Circuit also stated:

We know of no requirement in the Disputes Act that a "claim" must be submitted in any particular form or use any particular wording. All that is required is . . . a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.

Id.


139. Id. at 1568. See supra note 52 and accompanying text (explaining Contract Disputes Act).

140. Seaboard Lumber Co., 903 F.2d at 1561.

141. Id. The relevant provisions of the CDA provide that a contracting officer's final decision cannot be judicially challenged unless the contractor appeals within 90 days to the appropriate board of contract appeals or files a direct access suit in the Claims Court. 41 U.S.C. §§ 606, 609(a)(3) (1988).

142. Seaboard Lumber Co., 903 F.2d at 1562.

143. Id. at 1561.
The Claims Court rejected these constitutional arguments. \(^{144}\)

On appeal, the Federal Circuit held that Seaboard waived its rights to an article III jury trial and that the CDA did not unconstitutionally deprive Seaboard of its right to either an article III court or a jury trial. \(^{145}\) Writing for a unanimous court, Chief Judge Nies reviewed the requirements of the seventh amendment and Supreme Court case law. \(^{146}\) The court stated that while the seventh amendment provides that private litigants have a right to a jury trial for controversies exceeding twenty dollars, \(^{147}\) the Supreme Court has recognized a litigant's choice to waive that right as well as the right to an article III court. \(^{148}\) The waiver can be either express or implied, requiring only that the party waiving its right do so voluntarily and knowingly, based on the facts presented in each case. \(^{149}\)

The Federal Circuit noted that waiver of certain enumerated rights has been standard practice in government contracts for many years. \(^{150}\) Government contractors have long been bound by contract clauses vesting dispute resolution in a nonjury, non-article III forum. \(^{151}\) This acceptance of the contract provision that provided for dispute resolution can be construed as a voluntary and knowing

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145. Seaboard Lumber Co., 903 F.2d at 1568.
146. Id. at 1561.
147. Id. at 1563 (quoting seventh amendment).
148. Id. (citing Commodity Futures Trade Comm'n v. Schor, 478 U.S. 833, 848 (1986)). In Schor, the Supreme Court noted that article III, section 1 seeks to protect the role of the independent judiciary and to safeguard a litigant's right to adjudicate claims before judges who are not dominated by the other branches of government. See Schor, 478 U.S. at 848 (citing Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 583 (1985) (stating article III vests federal judicial power in courts whose judges have life tenure and fixed compensation to ensure independent judiciary and impartial adjudication in federal courts)); United States v. Will, 449 U.S. 200, 218 (1980) (noting longstanding Anglo-American tradition of independent judiciary promoted by lifetime tenure and fixed compensation). In Schor, the Court noted that this guarantee protects personal rights and may, therefore, be waived just as many other personal constitutional rights. Schor, 478 U.S. at 848.
149. Seaboard Lumber Co., 903 F.2d at 1563 (quoting Brookhart v. Janis, 384 U.S. 1, 4-5 (1966) (holding petitioner's right to plead not guilty and confront and cross-examine witnesses could not be waived by counsel without his consent)). In Brookhart, the Supreme Court specifically addressed the petitioner's right to waive his sixth amendment right to confront and cross-examine witnesses. Brookhart, 384 U.S. at 2-3. The Court noted that there is a presumption against the waiver of constitutional rights and for a waiver to be effective "it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'" Id. at 4 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (holding waiver of sixth amendment right to assistance of counsel must be intelligent one)).
150. Seaboard Lumber Co., 903 F.2d at 1564 (noting that for many years, government regularly provided in contracts that contracting officer's final decision was not subject to review in any judicial forum).
151. Id. (citing United States v. Moorman, 338 U.S. 657, 660-62 (1950)). In Moorman, the Supreme Court upheld a contractual provision making the decisions of the Secretary of War final. Moorman, 338 U.S. at 463. The Supreme Court observed that the provision was not ambiguous and that parties competent to enter into contracts are also competent to enter agreements containing such provision. Id. at 461, 463.
waiver of a contractor's right to a jury trial.\textsuperscript{152} The court observed that Congress has long approved of this practice and has not modified it with any recent legislation.\textsuperscript{153}

The Federal Circuit additionally noted that Seaboard, in fact, exercised its own statutory forum choice by suing in the United States Claims Court.\textsuperscript{154} Its right to do so was expressly incorporated into the contract provisions referencing the CDA and waiving sovereign immunity on the government's part.\textsuperscript{155} Therefore, the court concluded, Seaboard could not avail itself of one advantageous aspect of the Act or the contract and yet disclaim application of other sections.\textsuperscript{156}

Seaboard further argued that, even if its waiver was knowing, it was not voluntary because government contracts are, by their nature, adhesion contracts.\textsuperscript{157} The Federal Circuit stated, however, that the mere fact that the contracts are of a "take it or leave it" nature is not the controlling issue.\textsuperscript{158} Contractors are not compelled or coerced into making a contract with the government.\textsuperscript{159} The court relied on the Supreme Court's decisions in \textit{Wunderlich v. United States} \textsuperscript{160} in which the Court stated that the contract entered into was a voluntary undertaking and that, as competent parties, they contracted for the bargain obtained.\textsuperscript{161} The Federal Circuit concluded that \textit{Wunderlich} controls the determination of voluntariness in \textit{Seaboard Lumber}.\textsuperscript{162}

The court found that Seaboard agreed to the contract terms outlining dispute resolution procedures which did not include a jury trial or an article III court.\textsuperscript{163} Seaboard did not argue that it was

\textsuperscript{152} \textit{Seaboard Lumber Co.}, 903 F.2d at 1563. The CDA now requires that the provisions of the contract specify that the contractor cannot judicially challenge a contracting officer's final decision unless it files an appeal with the board of contract appeals or the Claims Court within the statutory time frames. \textit{Id.} at 1562, 1565.

\textsuperscript{153} \textit{Id.} at 1565 (noting that Congress passed statutes, providing for limited judicial review of contracting officer's decision and requiring appeal with Board of Contract Appeals or Claims Court).

\textsuperscript{154} \textit{Seaboard Lumber Co.}, 903 F.2d at 1567.

\textsuperscript{155} \textit{Id.} at 1566-67.

\textsuperscript{156} \textit{Id.} at 1567.

\textsuperscript{157} \textit{Id.} at 1564.

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Id.}

\textsuperscript{160} 342 U.S. 98, 99-100 (1951).

\textsuperscript{161} \textit{Wunderlich} v. \textit{United States}, 342 U.S. 98, 100 (1951) (reversing Claims Court holding that set aside dispute resolution by agency head where contractual provision made such resolution final decision). The court reaffirmed that such decisions could only be judicially reviewed where fraud was alleged. \textit{Id.} at 100.

\textsuperscript{162} \textit{Seaboard Lumber Co.}, 903 F.2d at 1565 (noting that, as in \textit{Wunderlich}, Seaboard voluntarily entered its contract with government and also agreed to contract provisions which specifically waived its right to jury trial).

\textsuperscript{163} \textit{Id.}
unaware that it would not have a jury trial for any of its claims.\textsuperscript{164} Under the circumstances, the court concluded, Seaboard was hard pressed to assert a right that it had voluntarily and knowingly waived.\textsuperscript{165} The court held that signing a contract with limited rights of review establishes a prima facie voluntary and knowing waiver of any right to dispute resolution except that specified in the contract.\textsuperscript{166} Having sued under the provisions of the CDA, and having invoked the procedures of the Act as agreed to in the contract, Seaboard waived its rights to alternate resolutions and could no longer retract its knowing and voluntary waiver.\textsuperscript{167}

VI. Bid Protests

A. Mathematical Imbalance

In \textit{SMS Data Products Group v. United States},\textsuperscript{168} the Federal Circuit held that the mathematical imbalance in a successful bidder’s offer must be material before acceptance of the bid can be prevented.\textsuperscript{169} SMS Data Products Group (SMS) and Federal Data Corporation (FDC) responded to solicitations by the Administrative Office of the United States Courts to provide microcomputer hardware, software, and support services to the federal judiciary for up to 108 months.\textsuperscript{170} The government awarded the contract to FDC, and SMS protested to the GSBCA.\textsuperscript{171}

SMS contended that FDC’s offer was mathematically or materially imbalanced such that acceptance of its bid was prohibited by the solicitation and the applicable federal regulations.\textsuperscript{172} The Federal Circuit reviewed SMS’s legal contention that FDC’s offer was so mathematically or materially imbalanced that it could not be ac-

\textsuperscript{164} \textit{Id.} at 1565 n.9.  
\textsuperscript{165} \textit{Id.} at 1565.  
\textsuperscript{166} \textit{Id.}  
\textsuperscript{167} \textit{Id.} at 1568.  
\textsuperscript{168} \textit{900 F.2d 1553 (Fed. Cir. 1990).}  
\textsuperscript{169} \textit{SMS Data Prod. Group v. United States, 900 F.2d 1553, 1557 (Fed. Cir. 1990).}  
\textsuperscript{170} \textit{Id.} at 1554. Each of the offers was evaluated on the basis of four factors: cost, user demonstration, support system capabilities, and corporate and contract management. \textit{Id.}  
\textsuperscript{171} \textit{Id.}  
\textsuperscript{172} \textit{Id.} at 1555; see 41 C.F.R. § 201-32.205-2(g)(3)(d) (1989) (prohibiting fixed price option and requiring contract prices to reasonably represent value of bona fide fiscal year requirements). The Administrative Office of the United States Court’s solicitation provision provides that:

\begin{quote}
[the contract price must] reasonably represent the value of a bona fide fiscal year’s requirements, rather than representing to any extent a portion of any other fiscal year’s requirement . . . . If a determination is made that an offer does not meet these criteria, that offer cannot be accepted for award.
\end{quote}

Solicitation Provision, ¶ m.2.5 (quoted in \textit{SMS Data Prod. Group}, \textit{900 F.2d at 1555}).
The court noted that mathematical imbalance exists if "each bid item fails to carry its share of the cost of the work (or supplies) plus the bidder's profit/overhead or if the bid is based upon nominal prices for some items and enhanced prices for others." SMS contended that a mathematical imbalance alone violates the Administrative Office's solicitation provisions and applicable federal regulations. The court concurred with the actual language of the regulations, but held that not every imbalanced bid need be rejected. The mathematical imbalance must also be material before the bid must be rejected.

The Federal Circuit then reviewed the doctrine of material imbalance. The doctrine, used frequently by the boards of contract appeals, applies when an award fails to "represent the lowest ultimate cost to the Government or the imbalance is such that it will adversely affect the integrity of the competitive bidding system." Applying this concept to the facts at hand, the Federal Circuit deferred to the agency and GSBCA's decision that to award the contract to FDC was in the government's best interest.

B. Dismissal of Frivolous Claims

The Federal Circuit's holding in ViON Corp. v. United States provides a clearer definition of when a protest is deemed frivolous. The
United States Army solicited offers for the provision of central processing units for the Information System Selection and Acquisitioning Agency. ViON was not awarded the contract and filed a protest with the GSBCA. The GSBCA examined the issues presented by ViON and dismissed the protest as frivolous. ViON, challenging the dismissal, appealed to the Federal Circuit.

The Federal Circuit began its analysis by examining the statutory definitions and requirements for establishing whether an appeal is frivolous. Under the Competition in Contracting Act of 1984, the GSBCA may dismiss a protest which is "frivolous or which, on its face, does not state a valid basis for protest." The GSBCA interpreted this provision as allowing the Board to dismiss complaints based on claims that are not substantiated or that, for some reason, "consciously interfere with or delay the Board’s management of protest proceedings." The GSBCA relied on the legislative history of the Competition in Contracting Act of 1984, which provided the Board with the authority to avoid disruptions of legitimate procurements and to "especially ... prevent protest actions taken in bad faith...." The GSBCA dismissed ViON's protest as frivolous, stating that its protest was not prosecuted in a fair fashion and that ViON's motives in bringing the protest were not genuine.

The Federal Circuit agreed with the GSBCA's determination that the statute allows the board to handle protest proceedings expeditiously so as to satisfy the goals of economic and efficient procurements. In reviewing the GSBCA's decision, the court focused on the issue of whether protester motivations are appropriate grounds for dismissing a protest as frivolous. Neither the legislative his-

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182. ViON Corp. v. United States, 906 F.2d 1564, 1564-65 (Fed. Cir. 1990).
183. Id.
185. ViON Corp., 906 F.2d at 1565.
186. Id.
188. 40 U.S.C. § 759(f)(4)(C) (providing that "[t]he board may dismiss a protest the board determines is frivolous, or which, on its face, does not state a valid basis for protest").
191. ViON Corp., 906 F.2d at 1566.
192. Id.
193. Id.
tory nor the plain language of the statute defines the term "frivo-
luous." The court noted that the legislative history is devoid of any
evidence of intent by Congress to define "frivolous" in any manner
other than its established meaning in other legal contexts. After
analyzing several Federal Circuit and Supreme Court opinions and
treatises, the Federal Circuit held that a protest is frivolous when the
claims or appeals involve "legal points not arguable on their merits,
or those whose disposition is obvious." The court then reviewed the reasons for the GSBCA's dismissal of ViON's protest. Because the GSBCA found ViON's motivations, rather than the merits of its protest, questionable, the Federal Circuit held that the GSBCA improperly dismissed ViON's protest. Furthermore, the Federal Circuit concluded that "[a] protest cannot be dismissed as 'frivolous' unless the protest lacks an arguable basis in fact or law." In eliminating improper motivation as a definition of a frivolous protest, the Federal Circuit has moved closer to drawing a bright line distinction in the law in order to clarify the scope and authority of both the agency boards' and its own jurisdiction. This opinion appears to reflect a trend in the court's government contract decisions toward defining issues and terms more precisely.

VII. CONTRACT FORMATION

A. Between the Government and Third-Party Sureties

In Ransom v. United States, the Federal Circuit found that neither an express contract nor an implied-in-fact contract existed between the government and Ransom, the surety, which could have been breached by the government, and that, therefore, the government owed no obligation to Ransom that it could have breached.

194. Id.
195. Id. (citing Galloway Farms v. United States, 834 F.2d 998, 1000-01 (Fed. Cir. 1987)). Galloway Farms involved a claim for damages against the United States by farmers affected by the grain embargo against the Soviet Union. Galloway Farms, 834 F.2d at 999. The Federal Circuit held that the plaintiffs' substantive claims were frivolous. Id. at 1001; see also Greenberg v. Salas, 822 F.2d 882, 885 (9th Cir. 1987) (stating that nonfrivolous complaint cannot be filed for improper purpose).
196. ViON Corp., 906 F.2d at 1566 (finding that GSBCA improperly dismissed ViON's protest because subjective motive is irrelevant to merits of issues presented). The court reversed and remanded the case with instructions to the Board to reinstate the protest. Id. at 1568.
197. Id. at 1568 (cautioning in footnote 4, however, that GSBCA's conclusion does not mean that refusal to respond promptly and adequately to proper discovery requests might not give rise to inference that protestor's case lacks merit because it does not have facts required for arguable case).
198. 900 F.2d 242 (Fed. Cir. 1990).
William Ransom and Robert Nesen, acting as sureties, provided a bid bond and payment and performance bonds to the A. Marvin Company, the lowest bidder on a contract with the United States Air Force. The contractor, A. Marvin Company, defaulted during the performance of its construction contract with the government and Ransom executed a takeover agreement to complete performance. Ransom, asserting that its surety relationship with Marvin automatically gave rise to a contract between it and the government, submitted a claim for money damages for its costs in completing the contract. After the government's contracting officer denied its claim, Ransom brought a Tucker Act claim against the government in the United States Claims Court. The Claims Court granted the government's motion for summary judgment. Ransom appealed, contending that either an express or implied contract existed between it and the government.

A unanimous panel, in an opinion written by Judge Michel, af-

200. Id.
201. Id. The contractor's bid was $1.7 million lower than the government's estimate of performance cost plus profit. Id. After the government sought confirmation of the bid price, and discovered that the contractor's miscalculation was a bona fide error, it gave the contractor an opportunity to withdraw its bid but not to amend it. Id. A. Marvin Company responded that it would perform the contract for the originally submitted bid price, but it subsequently defaulted. Id. Ransom did not receive any correspondence concerning the bid error. Id.
202. Id. Ransom claimed that the breach occurred when the government failed to notify it of Marvin's option to withdraw its bid.
firmed the Claims Court's summary judgment in favor of the government.\textsuperscript{207} After examining the record below, the court concluded that no authorized representative of the government ever said or did anything that could be construed as intending to obligate the government to Ransom.\textsuperscript{208} Neither were any bonds or other documents ever signed by the government nor did any language within the bonds themselves remotely indicate that the government was bound to Ransom.\textsuperscript{209} On that basis, the Federal Circuit found that no express contract existed between Ransom and the government.\textsuperscript{210}

In the alternative, Ransom argued that an implied-in-fact contract was inferred from the parties' conduct.\textsuperscript{211} The court concluded, however, that Ransom failed to satisfy the standards for establishing implied-in-fact contracts.\textsuperscript{212} The most that could be implied from the fact that the government requires contractors to provide bonds is a duty between the contractor and the government. This duty, however, does not extend to the surety.\textsuperscript{213}

Ransom cited \textit{Balboa Insurance Co. v. United States}\textsuperscript{214} to support its claim that because the government contract required a bond, the contract creates a third-party contract in which the government, the contractor, and the surety have rights and obligations.\textsuperscript{215} The court, however, noted that the court in \textit{Balboa} merely held that the government becomes a "stakeholder" for remaining contract proceeds when the surety notifies the government that the surety's interest is in jeopardy due to the contractor's default.\textsuperscript{216} \textit{Balboa}'s holding was based on the rationale that once the surety notified the

\textsuperscript{207} Ransom, 900 F.2d at 245; see Balboa Ins. Co. v. United States, 775 F.2d 1158, 1163 (Fed. Cir. 1985) (discussing standard for summary judgment and stating that after moving party has clearly established case, duty to go forward shifts to party opposing motion to produce evidence that places material facts in dispute and that if opposing party fails, summary judgment must be granted to moving party).
\textsuperscript{208} Ransom, 900 F.2d at 244.
\textsuperscript{209} Id.
\textsuperscript{210} See id. (stating that express contract does not exist and none was intended).
\textsuperscript{211} Id. Ransom argued that because the government required A. Marvin Company to obtain bonds, a reciprocal contract between the government and Ransom should be implied. \textit{Id.} (citing Baltimore & Ohio R.R. v. United States, 261 U.S. 592, 597 (1923) (holding that implied-in-fact contract is inferred from parties' conduct, and that legal consequences of express contract and implied-in-fact contract are similar)).
\textsuperscript{212} Ransom, 900 F.2d at 245; see Baltimore & Ohio R.R. v. United States, 261 U.S. 592, 597 (1923) (stating that implied-in-fact agreement is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding").
\textsuperscript{213} Ransom, 900 F.2d at 245.
\textsuperscript{214} 775 F.2d 1158 (Fed. Cir. 1985).
\textsuperscript{215} Ransom, 900 F.2d at 245.
\textsuperscript{216} \textit{Id.} (citing Balboa Ins. Co. v. United States, 775 F.2d 1158, 1160-63 (Fed. Cir. 1985)).
government of the contractor's default, the surety could assert the equitable doctrine of subrogation. The Federal Circuit did not, however, consider the subrogation issue, because Ransom did not assert this doctrine as a basis for its cause of action.

The Federal Circuit also noted that Ransom misfocused on Balboa's language relating to the government's rights to sue on the surety's bonds if the surety fails to perform. The Balboa court carefully qualified its statement in regard to a surety's rights in government contracts, stating that "under certain circumstances, a surety could assert rights against the government" based on contract theory. The Federal Circuit, in Ransom, defined the "certain circumstances" under which the government could be contractually bound to a surety: the government may be bound "if it manifested such an intent." The Federal Circuit held that neither an express nor an implied contract existed between the government and Ransom and that, therefore, the government did not intend to be bound to the surety.

The Federal Circuit was faced with some of these same issues in Fireman's Fund Insurance Co. v. United States. In Fireman's Fund, the Federal Circuit also held that the surety did not have an express or an implied-in-fact contract with the government because the surety was neither the direct beneficiary nor the intended third-party beneficiary of any promise by the government. The Federal Circuit also held that although generally a surety is discharged from its obligations when an obligee departs from or alters the contractual provisions relating to payments or security of retained funds, the government did not depart from the terms of the bonded contract by releasing the full amount of retainage funds to the contractor before the work was substantially complete.

Prior to beginning performance of a contract to build a pressure recovery system for a high energy laser test facility of the United

217. See Balboa Ins. Co. v. United States, 775 F.2d 1158, 1161 (Fed. Cir. 1985) (stating that traditional means of asserting surety's claim is under equitable doctrine of subrogation entitling surety to succeed to contractual rights of contractor against government).
218. Ransom, 900 F.2d at 245 (dismissing subrogation issue because surety did not give notice of contractor's default to government).
219. Id; see Balboa Ins. Co., 775 F.2d at 1160 (stating that if surety fails to perform, government can sue under bond).
221. Ransom, 900 F.2d at 245.
222. Id; see Fireman's Fund Ins. Co. v. United States, 909 F.2d 495, 500 (Fed. Cir. 1990) (relying on Ransom and holding that government's requirement of payment and performance bonds on contracts does not imply contract between government and surety).
223. 909 F.2d 495 (Fed. Cir. 1990).
225. Id. at 497-98.
States Department of the Army, the contractor, Westech Corporation, obtained both performance and payment bonds from Fireman’s Fund Insurance Company.226 The construction contract provided that the government was to make periodic progress payments to Westech, but the government was to retain ten percent of each payment.227 If the contractor made satisfactory progress during a payment period, however, the government’s contracting officer could authorize payment in full.228 When Westech experienced cash flow problems due to overtime expenditures, it submitted a request for the release of retainage funds.229 The contracting officer agreed and released the funds.230

Fireman’s Fund, in refusing to assume the contract after Westech defaulted, challenged the release, arguing that such an action was a departure from the terms of the contract.231 The Claims Court agreed with Fireman’s Fund and held that the surety was discharged from its obligations under the pro tanto discharge rule.232

The government appealed to the Federal Circuit, raising three issues: (1) whether the pro tanto discharge rule applies to government contracts; (2) whether the government owes a surety an equitable duty when the surety has failed to notify the government that the contractor has defaulted under the bond; and (3) whether the government owes the surety a contractual duty not to release the retainage until after the contract is substantially complete.233 The Federal Circuit declined to address the first issue, stating that even if the pro tanto discharge rule did apply, it would not relieve Fireman’s Fund of liability in this case.234

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226. Id. at 496.
227. Id.
228. Id. Westech performed satisfactorily through the first 14 pay periods, during which time the government retained 10% of Westech’s monthly payments. Id.
229. Id.
230. Id. At the time the request to release the retainage funds was made, the project was approximately 85% complete, and there was no indication that Westech would be unable to complete the contract. Id.
231. Id. at 496-97 (observing that Fireman’s Fund had fulfilled its obligations under bond by satisfying over $2 million in subcontractor and supplier claims against Westech). Fireman’s Fund, however, defaulted on its performance bond by declining to assume the contract, alleging that the government’s premature release of the retainage breached the bonded contract and prejudiced its interests. Id.
232. Fireman’s Fund Ins. Co. v. United States, 15 Cl. Ct. 225 (1988), rev’d, 909 F.2d 495 (Fed. Cir. 1990). The pro tanto discharge rule states that “if the obligee departed from or altered the contractual provisions relating to payments and/or security or retained funds, a surety is discharged to the extent it can show injury, loss, or prejudice.” Fireman’s Fund Ins. Co., 909 F.2d at 498-99. The Claims Court noted its unprecedented use of the pro tanto discharge rule as it relates to government contracts. Id.
234. Id. at 497. In Fireman’s Fund, the Federal Circuit focused more heavily on the contractual or equitable obligations of the government, relying on other circuit case law rather
With respect to the second and third issues, the Federal Circuit held that, assuming the *pro tanto* discharge rule applies, a surety is discharged from its obligations when an obligee departs from or alters the contractual provisions relating to payments or the security of retained funds. The Federal Circuit, however, disagreed with the Claims Court's evidentiary interpretations.

The Claims Court determined that the government had, in fact, departed from the terms of the contract by releasing the funds early, thereby discharging Fireman's Fund from its obligations. The Federal Circuit, couching the issue in terms of a legal conclusion, noted that the contract made no statement regarding what the contracting officer could do with the retainage after he accumulated it but before the contract was substantially completed. Therefore, the court stated that under the terms of the contract, an early release of retainage funds was within the contracting officer's rights.

The Federal Circuit also held that the government does not owe an equitable duty to a surety unless the surety notifies the government that the principal has defaulted under the bond. Notice, the court emphasized, is the minimum requirement the surety owes the government to establish a duty owed by the government. Because Fireman's Fund did not notify the government of its principal’s failure to pay its subcontractors, the government did not have a duty to withhold disbursements of any retainage. Moreover, the court noted that a surety cannot rely on subcontractors to pro-
tect its interest.243 Thus, a subcontractor's notification to the government of a contractor's failure to pay its subcontractors does not trigger a duty on the part of the government to retain the funds.244

Finally, the Federal Circuit rejected Fireman's Fund argument that an implied-in-fact contract existed between it and the government.245 Relying on Ransom v. United States,246 the court held that the requirement for payment and performance bonds on contracts does not imply a contract between the government and the surety.247 Furthermore, even if a contract, implied or otherwise, could be fashioned, Fireman's Fund still could not prevail because a release of the funds was not a departure from the contract.248 The opinion belies the Federal Circuit's opening statements that it would not decide the issue of the pro tanto discharge rule's application to government contracts because the court decided the case on the assumption that the pro tanto discharge rule applied. The court's conclusion seems to extend the pro tanto discharge rule to government contracts regardless of its earlier statements.

VIII. CONTRACT INTERPRETATION

A. Termination for Convenience Clause

In Salsbury Industries v. United States,249 the Federal Circuit held that the government validly terminated its contract with a supplier based on its determination that to do so was in the government's best interest.250

Salsbury Industries bid on a contract with the United States Postal Service for the provision of aluminum lockboxes.251 During the bid period, the contracting officer disqualified another bidder, Doninger Metal Products Corporation, because it was not a responsible

243. Id.
244. See id. (stating that although some subcontractors and suppliers informed government of Westech's payment deficiencies, surety is not relieved of notice obligation and government's equitable duty toward surety is not triggered).
245. Id. at 500.
246. 900 F.2d 242 (Fed. Cir. 1990); see supra notes 198-222 and accompanying text (discussing Ransom v. United States).
247. Fireman's Fund Ins. Co., 909 F.2d at 500 (stating that Fireman's Fund was neither intended third-party, nor direct beneficiary of any promise by government within bonded contract, and as such, government did not undertake any obligation to Fireman's Fund).
248. Fireman's Fund Ins. Co., 909 F.2d at 500; see supra notes 238-39 and accompanying text (noting that under terms of contract, contracting officer was within his rights to release retainage funds early).
251. Id. at 1519.
The Postal Service awarded the contract to Salsbury and four other companies. After Salsbury began performance on the contract, Doninger sued in the District Court for the District of Columbia, seeking an injunction barring the continuation of performance based on the Postal Service's improper disqualification of Doninger as a bidder. The district court issued an injunction and notified the contracting officer and parties to the suit. Upon notification, the contracting officer issued a stop work order and terminated for convenience the contract with Salsbury because of the injunction and the officer's view that termination was in the government's best interests.

Salsbury appealed the contracting officer's action to the United States Claims Court. The Claims Court granted the Postal Service's motion for summary judgment holding that the government's termination was proper and in the government's best interests. Salsbury then appealed this decision to the Federal Circuit.

On appeal, Salsbury argued: (1) that the termination for convenience was improper because the contracting officer never made the requisite finding that termination was in the government's best interest; and (2) that the termination by the Postal Service was improper because the Service acted illegally under the standards announced in Tornello v. United States. The court, in a unanimous opinion written by Judge Mayer, agreed with the Claims Court that the actions of the contracting officer were in the best interests of the government, since failure to terminate the contract would result in criminal contempt sanctions. The Federal Circuit stated that it will not disturb a contracting officer's decision to terminate a con-
tract absent "bad faith or clear abuse of discretion." Because neither bad faith nor abuse of discretion was apparent from the record, the court declined to question the decision to terminate the contract.

Addressing Salsbury's second argument, the court held that Torncello did not apply under the circumstances of this case. In Torncello, the Claims Court held that the government cannot hide behind the termination for convenience clause in a contract when it obligates itself to a party knowing that it cannot honor the contract. In Salsbury Industries, however, the Federal Circuit noted that the government unquestionably intended to honor its contract with Salsbury. The improper disqualification of another bidder was found to be irrelevant to the government's intention or ability to honor its contract with Salsbury. In addition, the court stated that the Postal Service honored its contract with Salsbury for more than one year by paying over five million dollars for services before the injunction issued. The court added that the government's intention to honor its contractual obligations was made clear through these actions, and therefore, under these circumstances, Torncello did not apply. The Federal Circuit, based on its affirmation that it was in the government's best interest, concluded that the government validly terminated its contract with Salsbury.

B. Ambiguity

The Federal Circuit decided three cases dealing with the recurring problem of ambiguous contracts. In Fruin-Conlon Corp. v. United States, the Federal Circuit held that a contractor must rely on its own or on a subcontractor's interpretation of ambiguous contract provisions at the time of bidding, rather than at the time of

262. Id. at 1521 (citing John Reiner & Co. v. United States, 325 F.2d 438, 442 (Ct. Cl. 1963)).
263. Salsbury Indus., 905 F.2d at 1521.
264. Id.
266. Salsbury Indus., 905 F.2d at 1521.
267. Id.
268. Id.
269. Id.
270. Id. at 1522.
271. See infra notes 272-341 and accompanying text (discussing ambiguity cases). For a definition of an ambiguous contract, see Edward R. Marden Corp. v. United States, 803 F.2d 701, 705 (Fed. Cir. 1986) (defining ambiguity as contract reasonably susceptible of more than one interpretation).
272. 912 F.2d 1426 (Fed. Cir. 1990).
performance, to receive an equitable adjustment based on the interpretation of that provision.\textsuperscript{273} Fruin-Conlon bid and entered into a contract with the United States Army Corps of Engineers to construct an addition to an existing government building.\textsuperscript{274} The bid included a subcontract to provide electrical work according to contract specifications.\textsuperscript{275}

The contractor submitted drawings, prepared by the subcontractor, to the government indicating the plan for the installation of wiring.\textsuperscript{276} The subcontractor had begun installation of the wiring when the government notified Fruin-Conlon that the proposed installation was unacceptable.\textsuperscript{277} The government required Fruin-Conlon to remove and reinstall the wiring in accordance with the precise language of the contract.\textsuperscript{278}

The contractor complied with the government’s request and then submitted a claim for an equitable adjustment to cover the costs of reinstallation.\textsuperscript{279} The contracting officer denied the claim and Fruin-Conlon appealed to the ASBCA.\textsuperscript{280} The ASBCA denied Fruin-Conlon’s protest, but noted that “both parties’ interpretations of the contract were reasonable and that the contract was thus ambiguous.”\textsuperscript{281} Fruin-Conlon appealed the Board’s decision to the Federal Circuit.\textsuperscript{282}

The Federal Circuit declined to review the ASBCA’s finding that the contract terms were ambiguous because it constituted a finding of fact.\textsuperscript{283} The court, however, did analyze Fruin-Conlon’s contention that the ASBCA’s holding, stating that it failed to rely on its subcontractor’s interpretation at the time of the bid, was clearly er-

\textsuperscript{273} Fruin-Conlon Corp. v. United States, 912 F.2d 1426, 1429-30 (Fed. Cir. 1990).
\textsuperscript{274} Id. at 1427.
\textsuperscript{275} Id. at 1427-28.
\textsuperscript{276} Id. at 1428.
\textsuperscript{277} Id. The subcontractor’s drawings differed from provisions of the National Electric Code regarding the method of installation of wiring. Id. Three days after the subcontractor began installation, the government orally informed Fruin-Conlon that the manner of installation was unacceptable. Id. Five days later, the government notified Fruin-Conlon of its disapproval in writing. Id. Despite notification, Fruin-Conlon continued with the incorrect method of installation for one month before it complied with the government’s request. Id.
\textsuperscript{278} Id. at 1427. The government rejected Fruin-Conlon’s contention that the National Electric Code definition only applies to safety considerations. Id.
\textsuperscript{279} Id. at 1428. Fruin-Conlon sought an equitable adjustment of $186,349.21 to cover the additional work involved in removing and replacing installed conduit wiring to comply with the government’s request. Id.
\textsuperscript{280} Fruin-Conlon Corp., ASBCA No. 30,702, 89-3 BCA (CCH) ¶ 22,005, 22,009 (1989), aff’d, 912 F.2d 1426 (Fed. Cir. 1990).
\textsuperscript{281} Id. at 22,010 (1989).
\textsuperscript{282} Fruin-Conlon Corp., 912 F.2d at 1428.
\textsuperscript{283} Id. at 1429; see supra notes 119-28 and accompanying text (explaining Federal Circuit standard of review of agency boards’ decisions).
The court held that reliance by a contractor or a subcontractor on an interpretation of an ambiguous contract must be shown not during the course of performing a contract but at the time of the bid. The contractor bears the burden of proving this reliance and, the court observed, Fruin-Conlon failed to provide any evidence to the ASBCA that it relied on its subcontractor’s interpretation of the ambiguous contract provisions at the time of its bid.

The Federal Circuit further stated that Fruin-Conlon’s reliance on Froeschle Sons, Inc. v. United States as authority for reliance during contract performance was erroneous. The court observed that although Froeschle held that an equitable adjustment could be granted if the contractor proved that it reasonably relied on the drawings or interpretations of its subcontractor, the reliance must occur at the time of the bid. In Froeschle, the contractor incorporated the subcontractor’s bid into its own bid to the government and relied on the subcontractor’s interpretation for pricing at the time of bidding. The court held that Fruin-Conlon did not present any evidence indicating that it similarly relied on its electrical subcontractor’s interpretation or information at the time of bidding.

The Federal Circuit also distinguished WPC Enterprises, Inc. v. United States, a Court of Claims case that held that reliance during performance of a contract may be sufficient to establish the right to

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284. Fruin-Conlon Corp., 912 F.2d at 1429. Fruin-Conlon argued that showing reliance on an ambiguous contract provision during performance is sufficient to enable it to recover equitable adjustment. Id.
285. Id.
286. Id. at 1430 (quoting Lear Siegler Management Serv. Corp. v. United States, 867 F.2d 600, 603 (Fed. Cir. 1989) (holding that contractor must prove reliance not merely in preparing bid, but in interpretation of ambiguous term)).
287. Fruin-Conlon Corp., 912 F.2d at 1430.
288. Id.
289. 891 F.2d 270 (Fed. Cir. 1989); see Younger, supra note 10, at 1061-62 (discussing Froeschle Sons, Inc.). In Froeschle Sons, Inc., one drawing called for one-inch and three-inch piping passing through certain valves, while a schedule to that drawing, as well as another drawing, incompatibly called for four-inch piping. Froeschle Sons, Inc. v. United States, 891 F.2d 270, 271 (Fed. Cir. 1989). After award of the contract, when it had already ordered the one-inch and three-inch piping, Froeschle raised the issue with the government, and was advised that four-inch piping should be used throughout. Id. The Federal Circuit held that the record showed that the subcontractor relied upon the presently claimed interpretation and that the ASBCA erred in requiring the contractor to prove that it specifically included the subcontractor’s bid in making its estimate. Id. at 272.
290. Fruin-Conlon, 912 F.2d at 1430.
291. Id.
292. Froeschle Sons, Inc., 891 F.2d at 272-73.
293. Fruin-Conlon, 912 F.2d at 1430, 1432 (stating that Fruin-Conlon became aware of ambiguous and disputed term during performance of contract).
294. 323 F.2d 874 (Cl. Ct. 1963).
relief. The Federal Circuit noted that *WPC Enterprises* required a contractor to prove reliance at the time of the bid unless the parties' intentions under the contract were "otherwise affirmatively stated." In *Fruin-Conlon*, the government clearly and unambiguously rejected Fruin-Conlon's drawings and interpretations of the installation of the wiring, yet the subcontractor continued to install the wiring pursuant to its interpretation.

In *Fruin-Conlon*, the Federal Circuit focused on the importance of presenting sufficient evidence of reliance on an interpretation of an ambiguous contract at the board review level in order to establish a case for an equitable adjustment. Fruin-Conlon's appeal, therefore, was rejected not only because of defective legal reasoning, but also because of insufficient provision of evidence.

The Federal Circuit, in *R.B. Wright Construction Co. v. United States*, split in its decision and discussion of burdens and policies behind federal government contracts. Writing for the two-to-one majority, Senior Judge Friedman held that the standard omissions and misdescriptions clause used in government contracts does not allow the contractor to do less than the contract requires on the grounds that such lesser work is customary in the trade. The Federal Circuit found that the sole issue in the case was whether the contractual requirement that three coats of paint be applied to certain surfaces contained an implied exception that only two coats are

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295. *Fruin-Conlon*, 912 F.2d at 1430. In *WPC Enters., Inc. v. United States*, 323 F.2d 874 (Cl. Ct. 1963), the government and contractor disagreed over whether the contract for the production of generators required certain parts to be manufactured by specific named companies. *Id.* at 875-77. The Court of Claims found the government-drawn contract ambiguous and the contractor's interpretation reasonable. *Id.* at 880. The court held that the government was required to affirmatively reveal its intention or be held to the contractor's reasonable interpretation. *Id.*

296. *Fruin-Conlon*, 912 F.2d at 1430; see *WPC Enters., Inc. v. United States*, 323 F.2d 874 (Cl. Ct. 1963) (determining that before awarding contract, government did present its interpretation of disputed term, but when contractor demurred, government did not sufficiently insist on its announced requirement).

297. *Fruin-Conlon*, 912 F.2d at 1428. The Federal Circuit noted that even under the most favorable view toward Fruin-Conlon, an adjustment could be made possibly for the three days between Fruin-Conlon's submission of the drawings incorporating its interpretation of the contract and notification by the government that such an interpretation was wrong. *Id.* at 1431. Such a recovery, however, cannot be permitted without sufficient evidence provided by the contractor. *Id.*

298. *Id.* at 1429-30.

299. *Id.* at 1432.

300. No. 90-1188 (Fed. Cir. Nov. 20, 1990) (LEXIS, Genfed library, Circuit file). This opinion will be published at 919 F.2d 1569, but is not yet in print. It was previously published and withdrawn.


302. *Id.* at 6.
required when the surface had already been painted. The court held that there was no implied exception because the contract was unambiguous in requiring three coats of paint. Judge Plager, in a pointed dissent, discussed the nature of poorly drafted government contracts and stated that the government should have the burden of paying for any ambiguities or inarticulateness in its contract drafting.

R.B. Wright entered into three contracts with the government to perform miscellaneous repairs and painting on approximately 200 World War II-era barracks and office buildings. Each of R.B. Wright’s contracts contained drawings specifying the areas to be painted and detailing surface preparation, type of paint, and numbers of coats. R.B. Wright reviewed the drawings and began work, through its subcontractor, Rembrant, on the facilities. During the course of performance, the government discovered that the subcontractor was applying only one coat of paint to the specified surfaces. Based on its interpretation of the contract, the government ordered R.B. Wright to apply three coats of paint to the already painted surfaces or to give the government credit for any work not performed. Pursuant to R.B. Wright’s request, Rembrant performed the work as directed and subsequently submitted claims for extra cost to the contractor. R.B. Wright forwarded the claims, with its own additional costs for overhead and profit, to the contracting officer, who denied the claims.

R.B. Wright timely appealed the contracting officer’s decision to the ASBCA, arguing that the painting schedule applied only to previously unpainted surfaces. The ASBCA, in a four-to-one decision, denied the appeal, finding that the painting schedule applied unambiguously to all surfaces, whether painted or unpainted.

On appeal, the Federal Circuit noted that, although questions of contract interpretation are questions of law and therefore reviewable de novo by the Federal Circuit, the ASBCA’s expertise on ques-

303. Id.
304. Id. at 6-7.
305. Id. at 17 (Plager, J., dissenting).
306. Id. at 2.
307. Id. at 2-3 (setting forth example of detailed painting schedule contained in contract).
308. Id. at 4.
309. Id.
310. Id.
311. Id.
312. Id.
313. Id. at 5.
tions of government contracts requires the grant of "some weight to the Board's interpretation of particular contractual language." Applying this standard of review and examining the ASBCA's interpretation of the contract, the majority held that the contract was unambiguous.

According to the court, the contractor bore the burden of clarifying any questions relating to the contract prior to executing the contract. The record, Judge Friedman noted, did not indicate that the contractor or the subcontractor questioned the government on any ambiguity. Furthermore, the Federal Circuit imposed the burden on the subcontractor and the prime contractor to bid on the contract as written, not as interpreted or construed by a contractor and not according to contrary customary trade practice. The court concluded that contractors' or subcontractors' interpretations or customary trade practices cannot change unambiguous provisions of a contract.

Judge Plager's dissent, however, indicated that the problem was not one of legal interpretation, but "of common sense." The dissent argued that rather than adhering blindly to the perceived terms of the contract, the contracting officer should have examined the situation more closely. Moreover, Judge Plager stated, the government should not be able to avail itself of the contract's omissions clause protection without allowing the contractor some similar protection.

The Federal Circuit in *Carl Garris & Son, Inc. v. United States*, an

315. *R.B. Wright Constr.*, No. 90-1188, at 6; *see supra* notes 119-30 and accompanying text (explaining Federal Circuit standard of review of agency boards' decisions).


317. *Id.* at 8.

318. *Id.*

319. *Id.* at 9-10.

320. *Id.* at 10 (citing Northwestern Indus. Piping, Inc. v. United States, 467 F.2d 1308, 1314 (Cl. Ct. 1972) (holding that trade practice will not override clear and unambiguous contract specifications)). The Federal Circuit also quoted the ASBCA's opinion that the government is "entitled to receive what it has paid for, even if it exceeds what is absolutely needed for a satisfactory result." *R.B. Wright Constr. Co.*, No. 90-1188, at 11.


322. *Id.* at 15 (Plager, J., dissenting).

323. *Id.* at 16. Judge Plager also stated:

By its approval of the Appeals Board's mechanical reading of the contract, the majority creates a negative incentive for the Government to invest resources in getting its contracts right in the first instance, and diverts resources into contract performance which even the Government does not want, or which at best produces marginal benefits compared to the costs incurred. I would hold enforcement of the literal terms of this contract under these circumstances unconscionable and reverse the decision for the Government. *If the Government wants to do foolish things, it should pay for its foolishness.*

unpublished decision, discussed the concept of patent contract ambiguity thoroughly, applying it to reverse a decision of the ASBCA. This case is important because most government contracts are very long and complex, and therefore, the possibility of finding an ambiguity, whether latent or patent, is very real.

Carl Garris challenged the contracting officer's denial of its claim for extra roofing work it performed under a contract with the Navy. Under the terms of the contract, the contractor was required to repair and re-roof housing at designated naval weapons stations. The contractor disputed the government's interpretation that the contract required total re-roofing. On appeal from the contracting officer's denial, the ASBCA concluded that both parties' interpretation of the contract was reasonable and, therefore, the contract was patently ambiguous. In addition, the Board placed the burden on the contractor to recognize the patent ambiguity. Carl Garris appealed to the Federal Circuit which held that the contract was not patently ambiguous and remanded the case to the ASBCA for resolution of payment and claims issues.

Judge Clevenger, writing for an unanimous court, asserted that the question of contract ambiguity was reviewable de novo as a question of law. The court disagreed with the ASBCA's conclusion, stating that patent ambiguity occurs where the internal inconsistency is blatant and significant, not subtle, hidden, or minor. Patient ambiguity, the court observed, cannot be generally defined but must be assessed on an ad hoc basis looking to "what a reasonable man would find to be patent and glaring." The Federal Circuit then examined the record below, pointing out extensive and conflicting testimony indicating that government representatives did not know whether the contract was ambiguous.

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326. Id. at 1.
327. Id.
328. Id. at 2.
329. Id. at 2-3.
330. Id. at 3.
331. Id. at 1-2.
332. Id. at 3; see supra notes 119-30 and accompanying text (examining Federal Circuit's standard of review of agency boards' decisions).
333. Carl Garris & Son, Inc., No. 90-1215, at 3-4 (quoting S.O.G. of Arkansas v. United States, 546 F.2d 367, 370 (Ct. Cl. 1976) (holding that government diagram was ambiguous and requiring contractor to resolve ambiguity before submitting bid)).
334. Id. at 4 (quoting Max Drill, Inc. v. United States, 427 F.2d 1233, 1244 (Ct. Cl. 1970) (finding contractor's interpretation of ambiguous contract reasonable and requiring government to compensate contractor for additional work it imposed on contractor)).
or confusing.335 Under the circumstances, the court stated, no patent ambiguity existed and the ASBCA erred as a matter of law.336

Of additional interest was Judge Clevenger’s discussion of the theory of contra proferentem.337 When the court finds no patent ambiguity, the reasonableness of the contractor’s interpretation of the contract is critical to determining whether the contra proferentem rule applies.338 The court reviewed the contract language and determined that Carl Garris’ interpretation fell within the requisite “zone of reasonableness” and therefore Garris’ interpretation should be adopted.339 Judge Clevenger stated that the contractor’s interpretation need not necessarily be preferable to the government’s, it need only be reasonable.340 Therefore, the Federal Circuit remanded the case to the ASBCA to review Garris’ case consistent with its order.341

Thus, in Fruin-Conlon, R.B. Wright Construction, and Carl Garris & Son, the Federal Circuit strictly construed the concept of ambiguity against contractors. In Fruin-Conlon, the court held that reliance on an ambiguous contract must be shown not during the course of performance, but at the time of the bid. In R.B. Wright Construction, the court held that contractors must bid according to the contract as written and not as interpreted or construed by a contractor and not according to customary trade practice. Finally, in Carl Garris & Son, the court held that patent ambiguity occurs when the internal inconsistency is blatant and significant, not when it is subtle, hidden, or minor.

CONCLUSION

The 1990 court year in federal procurement law did not provide startling or unexpected changes in the field. Once again, the Federal Circuit moved toward a strict definition of its subject matter jurisdiction and clarified two critical concepts—“frivolousness” and “final decisions.” The court held that a protest is “frivolous” if the claim or appeal involves legal points that cannot be argued on their

335. Id. at 4-7.
336. Id. at 7.
337. Id. at 7-8 (quoting Fort Vancouver Plywood Co. v. United States, 860 F.2d 409, 414 (Fed. Cir. 1988) (stating contra proferentem rule means that contract is construed against its drafter if interpretation advanced by non-drafter is reasonable)).
338. Id. at 7-8 (quoting Newsom v. United States, 676 F.2d 647, 650 n.11 (Ct. Cl. 1982) (finding portions of contract patently ambiguous and requiring contractor to inquire about ambiguity in order to recover for work done beyond that required under contractor’s interpretation of contract)).
339. Id. at 9.
340. Id.
341. Id. at 10.
merits or whose disposition is obvious.\textsuperscript{342} The court defined a final decision as one that adjudicates all claims and which determines damages.\textsuperscript{343}

The Federal Circuit also continued to read statutory language strictly, stating that it will not be construed contrary to its plain meaning absent a clear and contrary intent in the legislative history.\textsuperscript{344} Similarly, in 1990, the court continued to accord full effect to factual determinations of agency Boards of Contract Appeal, while reviewing legal decisions on a \textit{de novo} basis.\textsuperscript{345} The certainty provided by these definitions and interpretations demonstrates the Federal Circuit’s continued penchant for bright line tests.\textsuperscript{346} This trend will most likely continue through 1991.

\begin{itemize}
\item \textsuperscript{342} \textit{See supra} note 195 and accompanying text (defining “frivolous” claim).
\item \textsuperscript{343} \textit{See supra} notes 59 & 88-89 and accompanying text (defining “final” decision).
\item \textsuperscript{344} \textit{See supra} notes 49-50 & 109-14 and accompanying text (deferring to intent of Congress).
\item \textsuperscript{345} \textit{See supra} notes 119-30 and accompanying text (discussing Federal Circuit’s standard of review of agency boards’ decisions).
\item \textsuperscript{346} While this Article was in production, the Federal Circuit decided \textit{Texas Instruments v. United States}, 922 F.2d 810 (Fed. Cir. 1990) (finding that government could not reopen negotiations with contractor because final binding agreement was reached). The issue in \textit{Texas Instruments} was whether the Administrative Contracting Officer’s (ACO) approval of a price negotiation memorandum was a final binding decision. \textit{Id.} at 814. The court held that formal execution is not essential to a consummation of a contract. \textit{Id.} (concluding that absence of Standard Form 30 does not exclude possibility of final binding agreement having been reached). The court held that the “law presumes that when an ACO acquainted with the underlying facts signs an internal document . . . that she has decided to express a definite opinion on the merits of the claim . . . .” \textit{Id}. The Federal Circuit found that the ACO’s signature on a price negotiation memorandum constitutes an authorized decision to approve the negotiated price even though the Department of Defense has issued an internal directive that limits the ACO’s authority to reach agreements. \textit{Id.} at 15. \textit{See General Elec. Co. v. United States}, 412 F.2d 1215, 1221 (Ct. Cl. 1969) (holding that government could be bound by contracting officer’s notations of concurrence on legal opinion rendered by staff). The court then reviewed the facts and concluded that a final binding agreement was reached between the government and \textit{Texas Instruments} and that the agreement could not be revoked on the basis of unsupported and unverified allegations concerning the design of the equipment. \textit{Id.} at 815.
\end{itemize}