2007 YEAR IN REVIEW: ANALYSIS OF SIGNIFICANT FEDERAL CIRCUIT GOVERNMENT CONTRACTS DECISIONS

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I. INTRODUCTION

As usual, the Federal Circuit's (the court) 2007 decisions reflect the diversity of issues covered by the court, and the procurement (and procurement-related) area is no exception. While there are several important decisions that defy categorization, there are several discernible trends. The court's 2007 decisions reflect a court that continues to establish bright-line rules, especially on procedural and jurisdictional requirements, even where the result might be harsh from an equity standpoint. For example, late is late—whether a contractor is appealing a Contracting Officer's (CO) final decision that it contends was issued without authority, submitting a termination proposal, or protesting a solicitation defect at the Court of Federal Claims (COFC).[1]

The court's bright-line rules make it imperative for contractors to understand the specialized rules for contracting with and litigating against the Federal Government. The common use of commercial practices might make contracting with the Government look and feel much like the commercial marketplace, but in discrete areas, contracting with the Government remains very different and contractors remain ignorant of these differences at their peril.

The court's decision in *Winter v. Cath-dr/Balti Joint Venture*, highlights the first and mother of all rules—the Government is only bound by its officials who act with actual authority.[2] In *Cath-dr/Balti Joint Venture*, the court held that where a contract contains a clause that prohibits anyone other than the CO from issuing changes that "affect price, quality, quantity, delivery, or any other term or condition of the contract,"[3] as the Department of Defense (DoD) clause at issue did, then no individual other than the CO has the authority to issue direction that would constitute a change—even where the contractor is expressly told otherwise in writing during performance.[4] Essentially, such a clause removes any implied authority in any individual other than the CO to change the contract.

This rule might end in a harsh result, but it has the advantage of providing clear guidance and a warning to contractors. This case also underscores the disconnect between a system designed around the exclusive authority of the CO to change the contract and the modern reality of shrinking numbers of well-trained COs. Government individuals with whom the contractor interacts on a daily basis and who may control a majority of contract decisions likely have no authority to direct the contractor in a manner that might constitute a contract change. The gap between actual authority and apparent authority is wider than ever in government procurement, but actual authority remains the only enforceable authority.

The court continued to refine jurisdictional boundaries in a series of decisions. Most significant among these was *Suburban Mortgage Associates*,

1. The court's rigid adherence to the literal requirements of government contracts is not new. In 2004, in *Campbell Plastics Engineering & Manufacturing, Inc. v. Brownlee*, 389 F.3d 1243, 1248 (Fed. Cir. 2004), the court affirmed a decision by the Armed Services Board of Contract Appeals (ASBCA) upholding a decision of a Contracting Officer (CO) to deny a small business title to a patent developed under a contract because the company—although it had actually disclosed the invention within the time required by the Patent Rights Report clause—did not use the U.S. Department of Defense (DoD) form required by the clause to report the invention.

2. 497 F.3d 1339 (Fed. Cir. 2007) (opinion by Moore, J., with Lourie, J.; Proust, J. dissenting in part).

3. DFARS 252.201-7000; FAR 252.201-7000.

4. *Cath-dr/Balti Joint Venture*, 497 F.3d at 1345–46.

Inc. v. U.S. Department of Housing and Urban Development, where the court took aim at attempts to avoid COFC jurisdiction by casting contract claims as actions under the Administrative Procedures Act (APA).[5] The court made it clear that if the essence of the suit involved money owed by the Government, then the action belongs in the COFC if the value exceeds the dollar limits of the Little Tucker Act.[6]

The court also demonstrated that it is not immune from the growing concern that public contracts might be tainted with fraud. The stories of fraudulent practices growing out of contracting in a battle zone in Iraq grace the papers with disturbing frequency. Equally chilling, however, is the specter raised in *Long Island Savings Bank, FSB v. United States* of mundane fraud, where one bad actor acted in secrecy from the rest of the company, rendering the entire contract void *ab initio*.[7] The application of this concept to the undisputed facts in *Long Island Savings* demonstrates that this decision was not driven by egregious facts. In this case, the falsity was a general, overarching certification that the contractor would follow governing laws and regulations. This certification was rendered false by its chief executive officer's (CEO) conduct in earning and individually retaining profits from his law firm, which performed work for his company—a violation of banking regulations requiring "sound management."[8]

Long Island Savings also establishes a new bright-line rule for federal common law—a contractor defending against the imputation of its agent's fraud to itself must show that the agent "ha[d] abandoned his principal's interest and [was] acting to defraud his principal, *entirely* for his own or another's purpose."[9] The court, in overruling the COFC, concluded *as a matter of law* that a CEO who illegally received proceeds from legal work his firm provided to his company was not acting entirely for his own benefit because his company received competent legal services, thus demonstrating that the agent had not entirely abandoned his principal's interest.[10] This application of the court's standard results in near strict liability for the imputation of the agent's fraud to the principal. It will be very interesting to see if the court follows this approach in a traditional government procurement setting.

Decades after the savings and loan crisis of the 1980s and twelve years after the seminal 1996 case, *United States v. Winstar Corp.*,[11] the court continues to refine its analysis of damages available to those thrifts whose contracts were breached as a result of the enactment of the Federal Institutions

5. 480 F.3d 1116, 1126–28 (Fed. Cir. 2007).
6. *Id.*
7. 503 F.3d 1234, 1246 (Fed. Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3539 (U.S. Mar. 27, 2008) (No. 07-1234).
8. *Id.* at 1248.
9. *Id.* at 1249 (quoting Long Island Savs. Bank, FSB v. United States, 54 Fed. Cl. 607, 619 (2002)) (emphasis added).
10. *Id.* at 1249–50.
11. 518 U.S. 839 (1996).

Reform, Recovery, and Enforcement Act of 1989.[12] For the issue of causation, in *Citizens Federal Bank*, *FSB v. United States*, the court departed from its trend of adopting bright-line standards and held that the test for causation may vary at the discretion of the trial court.[13]

In this article, the authors address the 2007 Federal Circuit procurement law opinions by topic. Within each topic, the summaries explain whether the appeal was from a board of contract appeals or a trial court.

II. CONTRACT DISPUTES ACT CASES

A. *Squeeze the* Sharman! *Late Is Late*, *Even If the CO Had No Authority to Render the Final Decision*

In *Renda Marine*, *Inc. v. United States*,[14] the court tackled a significant jurisdictional limitation in litigating at the COFC, namely, "the Contracting Officer (CO) is not authorized to issue a final decision on a claim that is the same as a claim pending before the [COFC]."[15] This rule exists because "once a claim is in litigation, the Department of Justice gains exclusive authority to act in the pending litigation" pursuant to 28 U.S.C. §§ 516–20 (2000), and "[t]hat exclusive authority divests the contracting officer of his authority to issue a final decision on the claim."[16]

Rather than overturn this result first described in *Sharman v. United States*,[17] the court added a new jurisdictional twist—to preserve its right to appeal a final decision regarding the same claim as one in litigation, the contractor must appeal it.[18] Significantly, the court did not overrule the portion of *Sharman* that held that this appeal ultimately must be dismissed for lack of jurisdiction.[19]

Although Renda Marine, Inc. (Renda) had submitted a variety of claims to the CO on its 1999 Army Corps of Engineers dredging contract, only one of these claims was before the Federal Circuit on appeal. Specifically, Renda claimed that a portion of a channel, known as the "Flare Area," contained "stiff clays" where Renda only expected to encounter soft clays, and that the stiff clays caused Renda to expend more time and money to meet contract requirements.[20] The court's denial of Renda's claim was a fairly straightforward application of the test for a Type I differing site condition—"a site condition [that] arises when the conditions encountered differ from what

12. Pub. L. No. 101-73, 103 Stat. 183 (1989).
13. 474 F.3d 1314 (Fed. Cir. 2007).
14. 509 F.3d 1372 (Fed. Cir. 2007) (opinion by Schall, J., with Plager and Moore, JJ.).
15. Rebecca E. Pearson, *Should Congress Squeeze the Sharman*? 28 Pub. Cont. L.J. 597, 597–98 (1999); *see* Sharman Co. v. United States, 2 F.3d 1564 (Fed. Cir. 1993).
16. *Sharman*, 2 F.3d at 1571.
17. *Id*.
18. *Renda Marine*, 509 F.3d at 1380.
19. *Id*.
20. *Id*. at 1376.

was indicated in the contract documents."[21] The court upheld the COFC's finding that Renda's interpretation of the contract was not reasonable because Renda relied on two boring logs that reflected subsurface levels below the area where Renda would be required to do most of its dredging, and ignored other boring logs that provided a more complete picture of the soils to be dredged.[22] It also agreed that the record demonstrated that Renda not only expected to encounter stiff clays in the Flare Area but also considered the existence of stiff clays when preparing its levee construction plans.[23]

The more interesting aspect of the case is one of timeliness and involves claims that were never before the COFC or the Federal Circuit. In November 2002, the CO issued a final decision under the contract on six separate government claims against Renda at the same time that Renda's claim was being litigated at COFC.[24] Renda did nothing to challenge the Government's claims until July 2004 when Renda sought leave to amend its complaint in the ongoing COFC litigation to contest the claims.[25] The COFC denied this motion, as well as a subsequent motion to amend by Renda, on the grounds that the challenge to the CO's final decision was untimely.[26] Renda moved for reconsideration, arguing that the Government's claims were related to the claims already before the COFC in Renda's suit and, therefore, the suit divested the CO of authority to render a final decision on the Government's claims; this motion was likewise denied.[27] Although government contracts scholars[28] and Renda had thought that *Sharman* unequivocally held that a CO's decision issued after a claim goes to litigation is a nullity, the Federal Circuit recast the *Sharman* holding, muddying the rationale and making navigation of jurisdictional issues at the COFC even more problematic.

On appeal, the court distinguished the facts of this case from *Sharman* that were relied upon by Renda. It held that because Renda did not timely appeal the CO's November 2002 final decision and the Government did not put the decision at issue by filing a counterclaim based on that decision, neither the COFC nor the Federal Circuit was in a position to consider the validity of the CO's decision.[29] Essentially, the court found that it did not have jurisdiction to determine that it lacked jurisdiction. Notably, the court did not cite prior precedent to support this unusual outcome.

The court's holding has evoked two distinctly different reactions. On the one hand, the contractor's failure to appeal the CO's final decision on the assumption that it could later demonstrate that the CO lacked authority was

21. *Id.*
22. *Id.* at 1376–77.
23. *Id.* at 1378.
24. *Id.* at 1375.
25. *Id.*
26. *Id.*
27. *Id.*
28. Ralph C. Nash, *Contracting Officer Decisions During Litigation: Are They Valid*? 22 Nash & Cibinic Rep. ¶ 13, Feb. 2008.
29. Renda Marine, Inc. v. United States, 509 F.3d 1372, 1380–81 (Fed. Cir. 2007).

imprudent and a gamble. The court appeared disturbed by what it characterized as the contractor's attempt to "unilaterally" enter into the province of the court to "declare a contracting officer's final decision invalid."[30]

On the other hand, the key to the *Sharman* rule is that the CO is divested of *all* authority to issue a final decision because any authority exists solely with DOJ. Hence, the CO does not have legal authority to perform any act related to a final decision as a CO for that matter; the CO has no more authority than his or her representative (or even the contractor's president!) to issue a final decision. The fact that the individual holding the position of CO lacked the authority to make any decision at all arguably distinguishes the case from other cases where the court takes jurisdiction to determine whether the rationale of the decision was illegal or contrary to an express authority limitation.[31]

From this viewpoint, it appears perplexing and contrary to prior case law to hold that an invalid CO's final decision that does not have legal effect to support an appeal must nonetheless be appealed for a contractor to take the offensive and challenge the decision (presumably, the contractor retains its rights to defend against any future counterclaim or offset raised by the Government based on the unauthorized decision). In its opinion, the court failed to address its prior precedent in *Case*, *Inc. v. United States*,[32] which held:

> an invalid contracting officer's decision may not serve as the basis for a [Contract Disputes Act] action. United States v. Grumman Aerospace Corp., 927 F.2d 575, 579 (Fed. Cir.), *cert. denied*, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991). A contracting officer's final decision is invalid when the contracting officer lacked authority to issue it. *See Ball*, *Ball & Brosamer*, *Inc. v. United States*, 878 F.2d 1426, 1428 (Fed. Cir. 1989) (where submitted claim was not properly certified, there was no valid claim for the contracting officer to decide).[33]

Since an invalid CO's decision does not ripen a claim under the Contract Disputes Act (CDA), it is hard to see how the CDA statute of limitations has any bearing on a challenge to this decision (as opposed to the six-year limitations period for other contract claims before the COFC).[34] The result is that a contractor that is subject to a final decision issued for the same money already at issue in litigation in the COFC must perform a futile act—a challenge pursuant to the CDA—just to get the COFC to recognize the final decision as unauthorized. It must appeal a decision it knows is a nullity so that the appeal may then be rejected for lack of jurisdiction (a ruling that may at least have

30. *Id*. at 1380.

31. In Broad Ave. Laundry & Tailoring v. United States, 681 F.2d 746 (Ct. Cl. 1982), the court recognized three limitations on a Contracting Officer's authority: (1) "[t]he orders must be within the officer's subject matter jurisdiction"; (2) "[t]he order must not be contrary to any express authority limitation"; and (3) "[t]he order must not call on the contractor to do something illegal." *Id*. at 749.

32. 88 F.3d 1004 (Fed. Cir. 1996).

33. *Id*. at 1009. Judges Schall and Plager joined in the decision in *Case*, yet Judge Schall, who authored *Renda*, fails to even reference *Case* in his *Renda* decision.

34. *See* 28 U.S.C. § 2501 (2000).

some preclusive effect if the Government subsequently attempts to collect money under the unauthorized decision).

The original result in *Sharman* put a new claim for the same money at issue in the litigation, potentially under the same facts, into a virtual limbo. *Sharman* is always an issue in deciding which forum a contractor should choose because it limits a party's ability to adjust its legal theories for an amount that is clearly in dispute if the same money demanded is already in litigation. The result of *Sharman* made little practical sense and it appears that the court could have reached a different result without creating a conundrum for the contractor. The statutory authority that underpins *Sharman* merely states that DOJ has the exclusive authority to "conduct [] litigation in which the United States . . . is a party," not that DOJ's authority deprives COs of their statutory roles that form the jurisdictional basis for claims to the same money as involved in the litigation.[35] Because the Government is not bound by the CO's final decision once that decision is appealed, allowing the CO to pursue his statutory function to issue final decisions would not appear to directly conflict with DOJ's right to conduct the ongoing litigation. The COFC has described the *Sharman* result as follows:

> Surely, Congress did not intend that such exhaustive effort would be expended merely to ascertain the court's power to proceed on claims. The end result also fails the litmus test of common sense: In future cases, in order to avoid piecemeal litigation, the Government will be required to issue final decisions asserting setoffs before the date on which the contractor can deem a claim denied—just in case the contractor files suit. The avowed congressional objective in enacting the CDA to foster administrative resolution of claims is a casualty of slavish adherence to a patchwork of statutory, regulatory, and decisional law that now guides the trial court. . . . Only Congress can address the fundamental problem that the CDA has become a jurisdictional maze—atypically hard on the Government in this case and usually a minefield for the contractor. The real loser is the fisc. Heavily litigated jurisdictional requirements just make the cost of contracting with the Government higher.[36]

Rather than remedy the consequences of *Sharman*, the court has only added a new jurisdictional twist and another step for the contractor. Apparently, the best hope of a remedy remains with Congress.[37] Until then, *Sharman* and *Renda* lie in wait for their next victim.

B. *In DoD Contracts, Can Anyone but a CO Have Implied Authority to Issue a Change*

In *Winter v. Cath-dr/Balti Joint Venture*, the court greatly limited the possession of implied authority by anyone other than a CO to issue decisions

35. *Id.* § 516.
36. Volmar Constr., Inc. v. United States, 32 Fed. Cl. 746, 761 (1996).
37. Pearson, *supra* note 15, at 609 (suggesting a potential congressional solution of exempting "any claim that is derivative of or the same as a pending claim, whether in federal court or the boards of contract appeals, from the requirement that the claim be submitted to a CO prior to filing it in court").

resulting in a change to a contract where the contract contains a clause stating that only the CO has the authority to issue changes.[38]

During the preconstruction conference, which the CO did not attend, the Navy directed the contractor to submit all correspondence through the resident officer in charge of contracts (ROICC) and to submit requests for clarification on a written request for information (RFI) directed to the ROICC. The Navy cautioned that "[n]o work is to be performed beyond the contract requirements without written notification from the ROICC."[39] The contractor was also required

> to submit a request for equitable adjustment to the ROICC if it feels a contract modification is required and "[i]f the ROICC sees no entitlement, or the contractor doesn't agree with the entitlement, the contractor has the right to request a Contracting Officer's Final Decision, using the procedures outlined in the Disputes Clause" but that "[t]he contractor must proceed diligently with the work while awaiting the final decision."[40]

Near the beginning of contract performance, the contractor submitted an RFI seeking "documentation of assignment of authority" and the "level of authority" of the ROICC project manager (PM).[41] The Navy responded:

> Project Manager: Serves as the Government Construction Manager on all assigned projects. Responsible for construction management and contract administration on assigned projects while providing quality assurance and technical engineering construction advice. Provides technical and administrative direction to resolve problems encountered during construction. A project manager analyzes and Interprets [sic] contract drawings and specifications to determine the extent of Contractors' responsibility. Prepares and/or coordinates correspondence, submittal reviews, estimates, and contract modifications in support to ensure a satisfactory and timely completion of projects.[42]

Such direction might reasonably be interpreted to indicate that the ROICC PM had the actual authority to construe contract drawings. However, the contract also incorporated by reference DoD Federal Acquisition Regulation Supplement (DFARS) 252.201-7000, which states that "[t]he COR [Contracting Officer Representative] is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract."[43] Two other clauses in the contract also reiterated that "the contracting officer was the only person with the authority to make changes to the contract."[44]

During contract performance, the contractor submitted several RFIs that requested "clarification of the contract requirements" and notified the

38. *See* Winter v. Cath-dr/Balti Joint Venture, 497 F.3d 1339 (Fed. Cir. 2007).
39. *Id*. at 1342.
40. *Id*.
41. *Id*.
42. *Id*. (quoting Navy Response to RFI).
43. *Id*. at 1345 (quoting DFARS 252.201-7000).
44. *Id*.

ROICC PM "of site conditions that may require deviation from the contract specifications with a request for a decision."[45] The ROICC PM signed each response to such RFIs and in some cases highlighted a preprinted statement that the response was a contract requirement.[46] Near the end of construction, the contractor (Cath) submitted a "cumulative request for contract modification and several adjustments" to the ROICC PM.[47] Although the ROICC PM promised a prompt response, Cath submitted its certified claim to the CO after five months without a response.[48] The CO issued a fifteen-page final decision finding Cath entitled to an equitable adjustment of some items and recommending that Cath and the Navy negotiate the value of the meritorious claims.[49] Cath appealed to the Armed Services Board of Contract Appeals (ASBCA or the board) after the Navy refused to negotiate.[50] The board issued a show cause order to the Navy, to which the Navy responded that the July 27, 2001, final decision was not a decision on entitlement.[51] The board ultimately held that the CO's decision "clearly conceded entitlement on these items."[52] The Navy then issued a brief second final decision denying all of Cath's claims.[53] The board's subsequent opinion was the basis of the appeal to the court.[54] The board concluded that the ROICC PM had exercised "express actual authority" binding the Navy, and independently sustained one claim under the contract's differing site conditions clause.[55]

The Navy's appeal of the board's decision to the court contended that the PM did not have the authority to commit the Government to compensable contract changes.[56] The court started with the proposition that every government contractor should learn before contracting with the Government: "Where a party contracts with the government, apparent authority of the government's agent to modify the contract is not sufficient; an agent must have actual authority to bind the government."[57] The court held that the CO delegated only limited authority to the ROICC PM and that, because DFARS 201.602-2 prohibited delegating to a CO's representative the power "to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract," the CO would have been prohibited from delegating power over such changes to the ROICC PM.[58] Thus, it ruled that there was no express authority.[59]

45. *Id.* at 1342.
46. *Id.* at 1343.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 1344.
56. *See id.*
57. *Id.*
58. *Id.* at 1345 (quoting DFARS 201.602-2).
59. *Id.* at 1346.

The court recognized that the issue of implied authority was "a much closer case" because of the Government's directions and representations regarding the scope of the authority of the ROICC PM.[60] Despite this evidence, the court held that there was no implied authority.[61] It explained:

> Here, the ROICC could not have had the *implicit* authority to authorize contract modifications because the contract language and the government regulation it incorporates by reference *explicitly* state that only the contracting officer had the authority to modify the contract. Modifying the contract could not be "considered to be an integral part of [the ROICC project manager's] duties" when the contract explicitly and exclusively assigns this duty to the CO.[62]

Cath argued alternatively that the CO's first final decision ratified its claims.[63] The court explained that "[r]atification requires knowledge of material facts involving the unauthorized act and approval of the activity by one with authority."[64] The court remanded the relevant claims to the board to determine the factual question of whether the CO had full knowledge of the material facts sufficient to ratify the PM's commitments.[65] The court noted that it was not bound by the CO's entitlement decision, but rather it viewed that decision as a possible ratification of the ROICC PM's action.[66] Finally, the court upheld Cath's single claim based upon differing site conditions.

As an initial matter, the facts of the case highlight the danger in relying on a written representation—even by the CO—that is contrary to requirements of a regulation such as DFARS that has the force and effect of law. Based upon the court's reading of DFARS 201.602-2(2), any delegation of authority by a DoD CO to a Contracting Officer Representative (COR), no matter how explicit, is suspect if it deals with the interpretation of or changes to the contract's terms and conditions.

The facts of the case highlight the dilemma caused by the Disputes Clause, which directs contractors to continue performance in the face of disputes[67]—and clauses such as DFARS 252.201-7000, which state that a COR is not authorized to issue changes. The catch is that individuals other than COs, such as the ROICC PM in *Cath-dr/Balti Joint Venture*, have full, express, and actual authority to direct the contractor to perform when this direction is consistent with the contract. When such individuals are right, a contractor risks default or a poor performance evaluation by refusing to perform in accordance with their direction. When their direction is contrary to the contract, they exceed their authority, and a contractor who follows that direction may lose its ability

60. *See id.*
61. *Id.*
62. *Id.* (quoting H. Landau & Co. v. United States, 886 F.2d 322, 324 (Fed. Cir. 1989)).
63. *Id.*
64. *Id.* at 1347.
65. *Id.*
66. *Id.* at 1346 n.5. Judge Prost dissented in part because of the remand, disagreeing that ratification could occur after performance.
67. FAR 52.233-1(i) ("The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.").

to recover any resulting increased costs. This tension is a constant reality under many contracts where CORs handle most of the day-to-day responsibilities and direction from the CO might be difficult to obtain—as this case amply demonstrates.

According to Professor Ralph Nash, a contractor who wants to be able to recover an equitable adjustment for additional work has a clear choice—insist on CO direction:

> [T]he decision serves as a strong warning to contractors that they should not work with a Government agency to achieve effective performance of the contract by resolving routine specification problems with the personnel at the site of the work. Rather, as long as protective clauses are included in their contract, they should only resolve specification problems after they have received written direction from a designated CO.[68]

A contractor who elects to proceed with direction from an individual other than the CO should make sure that the CO knows that the contractor is proceeding based on direction from government personnel and that it believes the direction to be contrary to the contract—even where, as in *Cath-dr/Balti Joint Venture*, the formal process circumvents direct access to the CO. This decision presents a ready justification for copying the CO on any substantive correspondence involving a designated government representative. If the CO remains silent, it improves the contractor's opportunity to later successfully argue that the CO ratified the action. In *Cath-dr/Balti Joint Venture*, the contractor was assisted by the CO's final decision, which the court recognized might constitute express ratification.[69] However, the dissenting opinion, which would not have remanded for ratification despite the facts of this case, also highlights the limitations of reliance on equitable concepts such as ratification.[70]

C. *Contract Interpretation Is a Question of Law*

In *Winter v. Bath Iron Works Corp.*, the court reiterated the fundamental principle that contract interpretation is a question of law that is reviewed by the court de novo.[71] In this case, the court vacated and remanded the ASBCA's decision on entitlement because it found that the board had misapplied explicit language in the contract's insurance clause to the facts.[72]

In 1998, Bath Iron Works Corporation (BIW) began constructing six guided missile destroyers for the Navy.[73] One of the requirements of the contract was to install, inspect, and conduct hydrostatic pressure tests on the destroyers' fuel oil fill and transfer (FOFT) system.[74] The contract required BIW to flush

68. Ralph C. Nash, *CO Authority: A Strict Requirement*, 21 Nash & Cibinic Rep. ¶ 58, Nov. 2007, at 4.

69. Winter v. Cath-dr/Balti Joint Venture, 497 F.3d 1339, 1347–48 (Fed. Cir. 2007).

70. *Id.* at 1349–50 (Prost, J., dissenting).

71. 503 F.3d 1346 (Fed. Cir. 2007) (opinion by Prost, J., with Newman and Rader, JJ.).

72. *Id.* at 1351–52.

73. *Id.* at 1348.

74. *Id.* at 1349.

the FOFT system with fuel after installation to remove any foreign matter.[75] In 2002, a BIW employee flushed the FOFT system on one of the destroyers using water from the Kennebec River in Maine.[76] The brackish river water remained in the FOFT system for approximately eight months and, during that time, numerous holes developed in the FOFT piping due to apparent corrosion.[77]

BIW sought an equitable adjustment for the costs associated with its repairs and replacement of the FOFT piping, but the CO denied the claim.[78] The contract's insurance clause provided, among other things, that the Government would not pay the costs of repairs for "any defects themselves in the vessel(s)" due to defective workmanship.[79] BIW appealed to the board, and the board concluded that the flushing of the FOFT piping with river water was a "defect" under the contract's insurance provision[80] and determined that other unforeseen causes increased the incidence of corrosion.[81] The board declared the unforeseen events a "fortuitous or casualty loss" under the insurance contract, shifting the expense of replacement to the Navy.[82] Initially, the board allowed an equitable adjustment in the amount of $1.13 million to repair and replace the damaged FOFT piping.[83] Upon a motion for reconsideration, however, the board increased the award to $1.17 million and remanded the question of entitlement to interest to the parties for resolution.[84] The Navy appealed the decision with respect to entitlement and quantum and BIW cross-appealed the decision with respect to the interest remand.[85]

On appeal, the court found that the board misapplied the insurance clause's exclusion for defects to the facts.[86] The court emphasized that under the explicit language of the insurance clause, coverage only excludes defects "in the vessel," which means that the flush, itself, cannot be a "defect" under the insurance clause.[87] Instead, the court explained that the "defect" in the vessel was the corroded piping.[88] Thus, the only question remaining was whether this defect was due to the defective workmanship of BIW or its subcontractors.[89] The Federal Circuit noted that the board correctly found that the use of Kennebec River

75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 1348.
80. Bath Iron Works Corp., ASBCA No. 54544, 06-01 BCA ¶ 33,158, slip op. at 19 (Dec. 22, 2005).
81. *Id.* at 14–15.
82. *Id.* at 15.
83. *Id.* at 23.
84. Bath Iron Works Corp., ASBCA No. 54544, 06-01 BCA ¶ 33,272, slip op. at 11 (Apr. 21, 2006).
85. Winter v. Bath Iron Works Corp., 503 F.3d 1346, 1348 (Fed. Cir. 2007).
86. *Id.* at 1351–52.
87. *Id.* at 1351.
88. *Id.*
89. *Id.*

water to flush the FOFT did not conform to the contract's specifications.[90] However, because the board did not determine whether the river water was the actual cause of the corrosion, the Federal Circuit lacked sufficient findings of fact to determine whether BIW's costs were subject to the insurance clause's exclusion for defective and nonconforming workmanship. Therefore, the court vacated and remanded the board's findings with respect to entitlement.[91] As a result, the Navy's appeal of quantum and BIW's appeal of the interest decision were rendered moot.[92]

D. *Late Is Late—Failure to Object to an Economic Price Adjustment Clause Waives Right to Complain*

In *ConocoPhillips, et al. v. United States* and *La Gloria Oil and Gas Company v. United States*, the Federal Circuit affirmed in part and reversed in part consolidated appeals of the COFC's judgment dismissing claims brought by ConocoPhillips, Conoco, Inc., and Phillips Petroleum Company (Conoco) and La Gloria Oil and Gas Company (La Gloria) (collectively, plaintiffs).[93] Plaintiffs had entered into various fuel contracts with the Defense Energy Support Center.[94] Plaintiffs' appeals focused on an economic price adjustment clause that linked fuel prices to data reported in a government publication, the *Petroleum Marketing Monthly* (PMM).[95] Additionally, plaintiffs challenged the COFC's jurisdictional dismissal of their claims that the Government's small business and minority set-aside programs unlawfully reduced the prices of their contracts.[96]

In Conoco's case before the COFC, Conoco argued that the use of the PMM as the basis for price adjustments was contrary to the regulatory framework under the Federal Acquisition Regulation (FAR).[97] The FAR "allow[s] the price of goods in certain contracts to be adjusted 'based on increases or decreases from an agreed-upon level in published or otherwise established prices of specific items or the contract end items.'"[98] "Established prices" as defined by the FAR are

> current prices that (i) are established in the course of ordinary and usual trade between buyers and sellers free to bargain and (ii) can be substantiated by data from sources independent of the manufacturer or vendor.[99]

The COFC rejected Conoco's argument, concluding that the "PMM, as a market publication that compiles the monthly average sales figures reported

90. *Id*.
91. *Id*. at 1352.
92. *Id*.
93. ConocoPhillips v. United States, 501 F.3d 1374, 1376 (Fed. Cir. 2007).
94. *Id*.
95. *Id*.
96. *Id*. at 1377.
97. *Id*.
98. *Id*. (quoting FAR 16.203-1(a)).
99. *Id*. (quoting FAR 15.804-3(c)(2)).

by refiners, qualified as such a source and therefore satisfied the requirements of the FAR provision at issue."[100]

On appeal to the court, the plaintiffs' principal argument was that the PMM was neither designed nor intended to serve as an accurate measure of changes in the market price for the type of fuel sold under their contracts.[101] The plaintiffs argued that using the PMM in the economic price adjustment clause was inappropriate, was due to a mutual or unilateral mistake, and breached the Government's obligation to pay a fair market price.[102]

The PMM calculated average prices of fuel groups rather than the specific military fuels that were the subject of the contracts, and used a methodology in which increased sales volume of one fuel in one of five geographic regions could alter the average price. The court found that neither the design nor intention of the PMM was relevant as the "regulations did not require the use of particular vendors' prices, and they also did not require the use of any particular measure of the market."[103] The court stated that "it is not surprising that the regulations gave the parties some flexibility in choosing how market-based price adjustments would be calculated," and found that it was reasonable to use an index that calculated prices of items that are sufficiently similar to the contract items. The court rejected the argument that use of the PMM denied the plaintiffs a fair market price, explaining that "[i]f the plaintiffs had felt that a different method of adjusting market prices would be more appropriate . . . they could have objected to the use of the PMM [or] declined to enter into the contracts."[104]

The court also rejected the plaintiffs' argument that the parties mistakenly believed that the PMM calculations did not differ from market prices calculated in other publications. On the issue of unilateral or mutual mistake, the court found that the contract clearly linked the price adjustment clause to the PMM; that neither "party could have been mistaken"; and if the "plaintiffs thought that the PMM tracked other market publications more closely than it did, or [was problematic for other reasons] it was incumbent upon the plaintiffs to investigate those issues before entering into the contract."[105] Accordingly, the court affirmed the COFC's judgment on this issue.[106]

On appeal, the plaintiffs also claimed that the Government's small business and minority set-aside programs unlawfully reduced the prices of their contracts.[107] With regard to this issue, the court found that a passing comment in a footnote by Conoco failed to adequately preserve its claim for appeal.[108]

100. *Id*. at 1377–78.
101. *Id*. at 1376.
102. *Id*. at 1376–77.
103. *Id*. at 1378.
104. *Id*. at 1378–79.
105. *Id*. at 1380.
106. *Id*.
107. *Id*. at 1381.
108. *Id*.

However, the court found that La Gloria's "allegations are sufficiently related to the contract to bring the claims within the CDA and the jurisdiction of the [COFC]." Therefore the court reversed the judgment of the COFC on this particular issue and remanded it for further proceedings.[109]

E. *Late Is Late—Even in Terminations for Convenience*

As government contracts practitioners know, failing to comply with timeliness rules can result in somewhat draconian consequences. The court's decision in *Ryste & Ricas* demonstrates that such consequences apply even in the context of terminations for convenience, as late submission of a termination settlement proposal forfeits a contractor's right to any recovery.[110]

On May 29, 2002, the ASBCA converted a termination for default into one for convenience.[111] The board's decision was received by counsel for Ryste & Ricas, Inc. (RRI) on June 8, 2002. Under FAR 52.249-2(e), RRI had one year from the effective date of the termination for convenience—in this case, the date counsel received the board's decision—to submit its termination settlement proposal.[112] Specifically, FAR 52.249-2(e) states:

> After termination, the Contractor shall submit a final termination settlement proposal to the CO in the form and with the certification prescribed by the CO. The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the CO upon written request of the Contractor within this 1-year period.[113]

Another provision, now contained in FAR 2.101, defines the "effective date of termination" as "the date on which the notice of termination requires the contractor to stop performance," but provides that this means "the date the contractor receives the notice" when the notice is received "after the date fixed for termination."[114]

Although there is some disagreement as to precisely when RRI submitted its proposal,[115] neither date was within one year of June 8, 2002.[116] RRI had not requested an extension of the one-year period.[117] RRI's attempt to appeal the deemed denial of its proposal to the board failed as the proposal was not timely filed under FAR 52.249-2(e).[118] RRI argued that the effective date of

109. *Id*. at 1382.
110. Ryste & Ricas, Inc. v. Harvey, 477 F.3d 1337 (Fed. Cir. 2007).
111. Ryste & Ricas, Inc., ASBCA No. 51841, 02-2 BCA ¶ 31,883, at 157,512.
112. *Ryste*, 477 F.3d at 1338.
113. FAR 52.249(e).
114. FAR 2.101.
115. RRI argued that it submitted its termination settlement proposal on July 23, 2003. *Ryste*, 477 F.3d at 1338. When RRI did not receive a response from the Army, it resubmitted its proposal on October 23, 2003. *Id*. The Army maintained that the proposal was submitted on the latter date.
116. *Id*. at 1341.
117. *Id*. at 1340.
118. *Id*. at 1341.

termination should be the day after the expiration of the period under the CDA for seeking an appeal of the board decision converting the termination, citing two unrelated statutes that contain such a tolling provision. The board rejected the argument, relying on Federal Circuit case law that the requirements for submission of termination settlement proposals are separate from the requirements of the CDA. On appeal, the court affirmed the board's decision to grant summary judgment to the Government.[119]

The court's decision focuses on its determination of the effective date of the termination. It relied heavily on its ruling in *England v. Swanson Group, Inc.*[120] to conclude that the effective date of termination was when RRI received the Board's decision.[121] It upheld the board's grant of summary judgment for the Army with little discussion.[122] In *Swanson Group*, the court had ruled "that the Board lacked jurisdiction to entertain Swanson's appeal from the CO's settlement determination because . . . it failed to present to the CO a 'claim' within the meaning of the CDA prior to the CO's settlement determination," even when Swanson had submitted a letter requesting an extension of time to file and where the CO had issued a settlement determination.[123] The court based its decision on the contractor's failure to present a termination settlement proposal within one year of receiving notice from the Board that the termination was converted into one for convenience.[124]

The court described its conclusions in *Ryste* as based on "the plain language of the applicable regulations" and its decision in *Swanson*.[125] However, as Professor Nash has explained, the "plain language" of the governing regulations would also support another conclusion.[126] Specifically, FAR 49.109-7(a) states, "[i]f the contractor and TCO cannot agree on a termination settlement, or if a settlement proposal *is not submitted within the period required by the termination clause*, the TCO *shall* issue a determination of the amount due consistent with the termination clause, including any cost principles incorporated by reference."[127] The "shall" makes it mandatory for a CO to make a determination of costs even for an untimely submitted proposal.[128] However, FAR 52.249-2(j) makes it clear that "if the Contractor failed to submit the termination settlement proposal or request for equitable adjustment within the time provided in paragraph (e) or (l), respectively, and failed to request a time extension, there is no right of appeal." The effect of FAR 52.249-2(j)

119. *Id*. at 1341–42.
120. 353 F.3d 1375 (Fed. Cir. 2004).
121. Ryste & Ricas, Inc. v. Harvey, 477 F.3d 1337, 1342 (Fed. Cir. 2007).
122. *Id*. at 1341 (citing *Swanson*, 353 F.3d at 1375).
123. *Id*. at 1341–42.
124. *Id*. at 1342.
125. *Id*. at 1341–42.
126. Ralph C. Nash, *Postscript II: Late Convenience Termination Settlement Proposals*, 21 Nash & Cibinic Rep. ¶ 13, Apr. 2007, at 35–37.
127. FAR 49.109-7(a) (emphasis added).
128. Nash, *supra* note 126, at 35.

and the court's holding is to preclude a contractor who fails to submit a timely termination proposal from enforcing the requirement for a determination of amounts due the contractor.[129]

Professor Nash forcefully argues that Federal Circuit precedent[130] prohibits enforcement of clauses that deprive a contractor of a right to appeal a claim, even as he recognizes that the holding in *Ryste* is consistent with the Federal Circuit's holding in *Do-Well Machine Shop, Inc. v. United States*,[131] in which the court held that a contractor's termination for convenience claim was barred where the contractor failed to submit its proposal within the one-year period required by the clause.[132] The result of the court's ruling in *Ryste* may be harsh in a fixed-price context where "[t]he penalty is the loss of all costs of performance of a contract that is terminated for the convenience of the Government."[133] This result also appears contrary to the general exhortations in FAR Part 49 that emphasize the need for fairness and flexibility in compensation of the contractor in such a situation.[134]

Under current case law, the consequence of a late termination settlement proposal is the loss of any recovery for contract termination. Although Professor Nash exhorts boards and courts to follow his analysis to reach a fair result,[135] the Federal Circuit's decision is binding precedent on boards and courts and its ruling in *Ryste* is crystal clear and consistent with its precedents in *Swanson* and *Do-Well*. Changing the result in *Ryste* would appear to require action by either Congress or the FAR Council, neither of which is on the horizon.

F. *Differing Site Conditions*

In *Ace Constructors, Inc. v. United States*, a case concerning multiple claims under a construction contract with the Army Corps of Engineers, the court upheld a COFC decision that awarded an equitable adjustment to ACE Constructors (ACE) and ordered the return of liquidated delay damages.[136] The COFC had ruled that due to unforeseen conditions and defective specifications incorporated into the contract, ACE was entitled to additional relief beyond

129. In footnote six, the court recognizes that *Swanson* also held that "[i]f the contracting officer were to reject the proposal as untimely or deny the proposal on its merits, Swanson would have the option of appealing the contracting officer's decision as a denial of a claim under the CDA." Ryste & Ricas, Inc. v. Harvey, 477 F.3d 1337, 1342 n.6 (Fed. Cir. 2008) (citing England v. Swanson Group, Inc., 353 F.3d 1375, 1380 (Fed. Cir. 2004)). The court's ruling would appear to overrule this portion of *Swanson*. However, the court's failure to expressly state that this portion of *Swanson* is overruled or distinguish it is noteworthy.

130. *See* Burnside-Ott Aviation Training Ctr. v. Dalton, 107 F.3d 854 (Fed. Cir. 1997).

131. 870 F.2d 637 (Fed. Cir. 1989).

132. *Id*. at 641.

133. Nash, *supra* note 126, at 37.

134. *See, e.g.*, FAR 49.201(a) ("A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. Fair compensation is a matter of judgment and cannot be measured exactly.").

135. Nash, *supra* note 126, at 37 ("Since the FAR Council is unlikely to take this action, it is up to the boards and courts. All they have to do is follow this analysis to get to a fair result.").

136. 499 F.3d 1357 (Fed. Cir. 2007) (opinion by Newman, J., with Michel, CJ. and Dyk, J.).

that which was provided by the CO.[137] In particular, the COFC awarded ACE its additional costs for (1) being required to use a more expensive concrete testing methodology than what was required by the contract;[138] (2) being required to use a more expensive method of concrete paving than what was required by the contract;[139] and (3) a Type I differing site condition that required 129,000 additional cubic yards of fill dirt.[140]

On appeal, the Government argued that the award for concrete testing was erroneous for three reasons. First, it contended that the COFC lacked jurisdiction to review the CO's decision due to ACE's failure to exhaust administrative remedies, arguing that the claim submitted to the CO was not identical to the claim alleged in the complaint. Second, the Government argued that, properly interpreted, the contract required the more expensive testing method. And third, it argued that, even if the specifications were defective, ACE did not demonstrate that its bid was based on the less expensive method of testing.[141]

The court acknowledged that the test for whether claims before the COFC were the same as those before the CO is not whether they are identical, but whether "they arise from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery."[142] The court held that the claims before the CO and the COFC "did not differ significantly" where both claims were "based on the same contract provisions, the same requirements made by the Army Corps of Engineers, the same costs, the same requested relief, and the same legal theories."[143] Consequently, the court upheld the COFC's determination that it had jurisdiction to decide the claim.[144]

Although the COFC had ruled that the Government's insistence on the use of the more expensive method of testing the concrete was a constructive change to the contract,[145] the court upheld this decision on another basis. It determined that the specifications were defective in even suggesting the use of the more expensive testing method, as the other method "was better suited to the required measurements"—a fact that even the Government acknowledged during the course of performance of the contract.[146] The court found no error in the COFC's award of additional costs due to the required use of the more expensive and defective testing method, as the COFC found that ACE reasonably based its bid on the less expensive method of testing.[147]

137. *Id*. at 1360.
138. *Id*. at 1360–63.
139. *Id*. at 1363–64.
140. *Id*. at 1364–65.
141. *Id*. at 1361–63.
142. *Id*. at 1361 (quoting Scott Timber Co. v. United States, 333 F.3d 1358, 1365 (Fed. Cir. 2003)).
143. *Id*.
144. *Id*.
145. *Id*. at 1361–62.
146. *Id*. at 1362–63.
147. *Id*. at 1363.

On the issue of the method of concrete paving required by the contract, the Government again argued that the COFC did not have jurisdiction to entertain the claim.[148] The court upheld the COFC's decision that the same claim was raised in each forum.[149] Concerning the substance of the claim, the Government argued that ACE unreasonably relied on the defective contract specification when it calculated its bid based on the less expensive method of paving.[150] The court upheld the COFC's application of the *Spearin* doctrine,[151] which states that when the Government provides a contractor with defective design specifications, the Government breaches the implied warranty that satisfactory contract performance will result from adherence to the specifications.[152] ACE's reliance on the specifications was reasonable.[153]

On the Type I differing site condition claim, the Government conceded that the specification was defective in indicating that the project was "balanced" and required no fill dirt.[154] But the Government contested the quantum on appeal, arguing that ACE "knew better" concerning the site conditions and thus should have foreseen the need for some fill.[155] The court upheld the COFC's determination that ACE, and the expert consultant it used in the bidding process, reasonably concluded from the plans provided by the Government that significant amounts of additional fill dirt would not be needed.[156] The Government also argued, apparently for the first time in the proceedings, that it should somehow be credited for the (unrealized) savings that ACE anticipated when the contractor bid on the project assuming that no additional fill dirt would be needed.[157] The court dismissed this unusual and belated argument as being "devoid of merit."[158]

G. *Warranty Survives Termination*

In *International Data Products Corp. v. United States*, the court held that an obligation to furnish warranty and upgrade services, which were part of a contract to supply computers to the Air Force, survived a termination for convenience.[159] In 1995, International Data Products Corporation (IDP) was awarded a Small Business Administration (SBA) section 8(a) set-aside[160] indefinite-delivery/indefinite-quantity (ID/IQ) contract to provide computers and support services to the Air Force.[161] Several years later, IDP was acquired

148. *Id.*
149. *Id.*
150. *Id.* at 1362–63.
151. *See* United States v. Spearin, 248 U.S. 132, 136 (1918).
152. ACE Constructors, Inc. v. United States, 499 F.3d 1357, 1363 (Fed. Cir. 2007).
153. *Id.*
154. *Id.* at 1364–65.
155. *Id.* at 1365.
156. *Id.*
157. *Id.*
158. *Id.*
159. 492 F.3d 1317 (Fed. Cir. 2007) (opinion by Rader, J., with Lourie and Prost, JJ.).
160. 15 U.S.C. §§ 631–657f (2000).
161. *Int'l Data Prods.*, 492 F.3d at 1320.

by a large business, thereby disqualifying it from the section 8(a) small disadvantaged business program.[162] Pursuant to 15 U.S.C. § 637(a)(21)(A), the change in ownership obligated the Air Force to terminate the contract,[163] which was subsequently effectuated by an official notice of termination.[164]

Following termination, the Government insisted that IDP honor the warranty and upgrade services provisions of the terminated contract.[165] IDP eventually stopped performing these services due to the growing financial burden and filed suit in the COFC to recover the associated costs.[166] The trial court held that the termination ended IDP's obligation to continue providing these services.[167] The COFC, however, denied IDP's claim for termination costs because approximately $35 million of orders had already been purchased, which is more than the "total contract price" of $100,000.[168] On cross-appeals, IDP challenged the COFC's denial of termination costs and the Government objected to the conclusion that the termination ended IDP's obligation to continue providing warranty and upgrade services.

In evaluating the explicit language of the contract, the court found that the warranty and upgrade obligations had already been paid for in the unit prices of the delivered computers.[169] The termination letter stated that warranties and software upgrade obligations were not affected by contract termination.[170] The court also looked to the language of FAR 49.603-1(b)(7)(v),[171] which provides, among other things, that warranties under a contract survive termination. On this basis, the court held that the contract's termination did not terminate the warranty and upgrade services obligations, and accordingly reversed the COFC on this point.[172] Thus, IDP was required to continue performing these services even though its contract was completely terminated for convenience.

The court affirmed the COFC, however, on the issue of costs. The court rejected several of IDP's arguments that it was entitled to recover termination costs. IDP first argued that it was entitled to expectation damages based on language establishing the "total estimated quantity" to be valued at $100 million, which IDP insisted converted the ID/IQ contract into a requirements contract.[173] The court rejected this argument because the contract language,

162. *Id*. at 1321.

163. The SBA rejected the Air Force's request for a waiver under the statute to allow IDP to continue performing the 8(a) contract.

164. *Int'l Data Prods. Corp*., 492 F.3d at 1321.

165. *Id*.

166. *Id*.

167. Int'l Data Prods. Corp. v. United States, 64 Fed. Cl. 642, 649 (2005).

168. *Id*. at 647. Under a DFARS provision incorporated in the contract, the "total contract price" sets the ceiling on termination costs. *Id*. at 645 (citing DFARS 252.211-7000).

169. Int'l Data Prods. Corp. v. United States, 492 F.3d 1317, 1322 (Fed. Cir. 2007).

170. *Id*.

171. "All rights and liabilities of the parties, arising under the contract or otherwise, and concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the Government by the Contractor under the contract or this agreement [are reserved]." FAR 49.603-1(b)(7)(v).

172. *Int'l Data Prods. Corp*., 492 F.3d at 1323.

173. *Id*. at 1324.

standing alone, was insufficient to convert the contract into a requirements contract.[174] The court explained that the "total estimated quantity" language did not change the fact that the contract had an explicit minimum purchase obligation of only $100,000.[175] Thus, IDP could not have "expected to automatically receive all of those orders."[176]

The court also rejected IDP's arguments that its continued obligation to provide warranty and upgrade services meant that the contract had not been terminated, or represented a new implied-in-fact contract.[177] The court held that the warranty and upgrade services could not be considered an equitable adjustment to the contract because there was no longer a contract to be constructively changed (and, in any event, there were no changes to the services required by the contract).[178] It determined that since the terminated contract was neither invalid nor unenforceable, the grounds for a quantum meruit recovery were absent.[179] As a result, IDP's claim for its costs incurred in providing post-termination warranty and upgrade services was denied.[180]

H. *Cost Recovery: Jury Verdict Is Not Appropriate Where Evidence Is Insufficient to Make a Fair and Reasonable Approximation*

In *Grumman Aerospace Corp. v. Wynne*, a contractor was unable to recover most of its costs on various sustained claims because its evidence was deemed insufficient to establish a reasonable estimate of costs under the jury verdict method.[181] In the 1980s, the Air Force awarded a contract to General Dynamics Corporation (GDC) to modernize the FB-111A fleet (FB-111A procurement).[182] The Air Force subsequently awarded a contract to Grumman Aerospace Corporation (Grumman) to modernize the F-111A/E and the EF-111A models (F-111A/E procurement).[183]

Throughout performance, Grumman and the Air Force had a number of disputes, particularly concerning the operational flight program code and data already under development on the FB-111A procurement, which Grumman relied upon for performance.[184] Both before and after the issuance of the request for proposal (RFP), Grumman and the Air Force discussed the availability of the FB-111A data used by GDC for the F-111A/E.[185] Grumman formally requested the source code data during evaluations.[186] The Air Force

174. *Id*.
175. *Id*. at 1320, 1324.
176. *Id*. at 1324.
177. *Id*. at 1325.
178. *Id*. at 1324.
179. *Id*. at 1325–26.
180. *Id*. at 1326.
181. 497 F.3d 1350 (Fed. Cir. 2007) (opinion by Rader, J., with Dyk, J., and Newman, J., dissenting in part).
182. *Id*. at 1352.
183. *Id*. at 1354.
184. *Id*. at 1355.
185. *Id*. at 1354.
186. *Id*.

informed Grumman that it would provide the requested data to the extent that the data were available.[187] During the post-award system design test phase, the Air Force provided magnetic tape copies of GDC's source codes for the FB-111A procurement and made no warranties as to the data's accuracy, stating that the data were being provided for "familiarization purposes only."[188] In fact, the Air Force specifically warned Grumman that the data contained "numerous known errors."[189] Thereafter, Grumman submitted its computer program development plan for approval, suggesting that the Air Force was obligated to provide the FB-111A data by a specific date.[190] The Air Force denied any obligation on its part to supply the data by certain dates, and again warned Grumman that it would not give "any assurances as to the accuracy of the data."[191]

In 1991, Grumman submitted a request for an equitable adjustment for unanticipated costs resulting from the inadequate FB-111A data.[192] After the Air Force denied the request, Grumman submitted a certified claim for more than $65 million plus interest, consisting of twenty-nine claim items.[193] Grumman calculated its damages based on a total cost method.[194] The CO granted some of the damages but denied use of the total cost method.[195] Grumman appealed to the ASBCA, claiming the Government had superior knowledge of the FB-111A data and requested the use of the jury verdict method to calculate damages. The ASBCA denied fifteen of Grumman's claims and partially denied another six.[196] In particular, the ASBCA rejected Grumman's argument that the Air Force failed to disclose superior knowledge of the FB-111A data[197] and rejected the use of the jury verdict method to calculate damages for lack of sufficient evidence.[198] The board awarded damages in the amount of $387,067 plus interest.[199]

On appeal, the court affirmed the ASBCA's decision.[200] With respect to the superior knowledge claim, the court found that Grumman did not undertake performance without vital knowledge because it had numerous meetings with the Air Force addressing the FB-111A data, even before the RFP was issued.[201] The court also found that Grumman knew about problems in GDC's

187. *Id.*
188. *Id.* at 1355.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 1356.
194. *Id.*
195. *Id.*
196. Grumman Aerospace Corp., ASBCA Nos. 46834, 51526, 48006, 03-1 BCA ¶ 32,203, *aff'd on recon.*, 03-02 BCA ¶ 32,289.
197. Grumman Aerospace Corp. v. Wynne, 497 F.3d 1350, 1357–58 (Fed. Cir. 2007).
198. *Id.* at 1358–59.
199. *Id.*
200. *Id.* at 1359.
201. *Id.* at 1357.

FB-111A contract and received a number of warnings from the Air Force that the data were not warranted.[202] Accordingly, the court found that Grumman entered into the contract "with its eyes open."[203] In rejecting Grumman's argument that the Air Force had an obligation to disclose GDC's contract performance problems, the court explained that the standard does not impose an affirmative duty on the Air Force to disclose such information, especially when it is not specifically requested.[204]

With respect to the jury verdict method, the court explained that this method cannot be used unless "other, more exact methods do not apply."[205] Even though Grumman successfully established that it was injured under a number of its claims, the court agreed with the board that a mere approximation of damages under the jury verdict method was not proper because Grumman did not adequately prove its cost estimates.[206] The court observed that one of the most fatal deficiencies in the evidence presented by Grumman was that it relied entirely on a report subsequently prepared by a third-party accounting firm.[207] This report, in turn, was based on another report containing "acceptable parameters," rather than on Grumman's actual costs.[208] Additional deficiencies included Grumman's premature destruction of important cost documents and its inability to segregate its costs for work performed on the contract from costs for work performed beyond the scope of the contract.[209] Thus, Grumman was unable to recover on valid cost claims because its evidence was so unreliable that even an approximation was not appropriate.

Judge Newman dissented. She stressed that the ASBCA had found injury and that it was undisputed that measurement difficulties existed, and concluded: "It is neither fair nor just to deny compensation simply because it is hard to measure."[210]

I. *The Bad Faith Exception to the Fee-Shifting Rule Does Not Extend to Bad Faith Conduct That Forms the Basis for the Substantive Claim*

In *Centex Corp. v. United States*, the Federal Circuit joined eight other circuit courts of appeal in holding that attorney fees cannot be awarded solely because of the losing party's bad faith in the conduct that formed the basis of the litigated claim.[211] In 1989, the plaintiffs in this consolidated case acquired failing thrifts in exchange for favorable tax treatment.[212] After prevailing on

202. *Id.*
203. *Id.* at 1357–58.
204. *Id.* at 1358.
205. *Id.*
206. *Id.* at 1358–59.
207. *Id.* at 1359.
208. *Id.*
209. *Id.*
210. *Id.* at 1360 (Newman, J., dissenting).
211. 486 F.3d 1369 (Fed. Cir. 2007) (opinion by Bryson, J., with Linn and Robinson, JJ.).
212. *Id.* at 1371.

their breach of contract claim against the Government for the enactment of legislation that retroactively eliminated the tax benefits, the plaintiffs moved for attorney fees.[213] The plaintiffs argued that they were entitled to recover fees because government agents acted in bad faith between 1989 and 1993 by actively encouraging Congress to enact the breaching legislation.[214]

In affirming the decision of the COFC, the court explained that the longstanding common law "American Rule"[215] mandates that a party cannot recover attorney fees from the losing party unless the losing party acted in bad faith.[216] The court held, however, that the bad faith exception to the fee-shifting rule does not extend to bad faith conduct that forms the basis for the substantive claim, or the "primary conduct."[217] The court reasoned that the purpose of the American Rule is to "protect a defendant's right to go to court and argue a non-frivolous defense to a claim, even if the claim arose from the defendant's bad faith conduct."[218]

The court also rejected the plaintiffs' argument that the language and intent of the Equal Access to Justice Act (EAJA)[219] allows fee shifting for bad faith conduct that precedes the accrual of the underlying claim.[220] On this point, the plaintiffs argued that one of the primary purposes of the EAJA was to impose fiscal responsibility on individual agencies.[221] If the bad faith exception to the fee-shifting rule applied only to bad faith conduct *in litigation*, the plaintiffs reasoned, then only Department of Justice attorneys could be held responsible under the statute.[222]

The court explained, however, that other agencies can engage in bad faith during the judicial process,[223] and cited as an example a case in which fees were awarded against an agency because the Secretary of Health and Human Services violated a court order in bad faith.[224] In construing the EAJA, the court concluded that the particular agency that *abuses the judicial process* through bad faith conduct is the proper agency to pay attorney fees.[225] Thus, the DOJ should pay fees if its attorneys act in bad faith, whereas the individual agency should pay fees when its bad faith conduct during litigation warrants the award of fees.[226]

213. *Id.*
214. *Id.*
215. 28 U.S.C. § 2412(b) (2000) provides that the "United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award."
216. *Centex Corp.*, 486 F.3d at 1371.
217. *Id.* at 1372.
218. *Id.*
219. 28 U.S.C. § 2412.
220. Centex Corp. v. United States, 486 F.3d 1369, 1374–75 (Fed. Cir. 2007).
221. *Id.* at 1374.
222. *Id.*
223. *Id.*
224. *See* Am. Hosp. Ass'n v. Sullivan, 938 F.2d 216 (D.C. Cir. 1991).
225. *Centex Corp.*, 486 F.3d at 1374.
226. *Id.*

III. *WINSTAR* DAMAGES

A. *Discretion Is the Better Part of Causation and Foreseeability*

In *Citizens Federal Bank, FSB v. United States*, the Federal Circuit upheld the COFC's discretion to apply a standard for causation based on whether the Government's breach of contract was a substantial factor in causing damages—even though it had recently upheld the use of a different, "but-for" test.[227] *Citizens* is a *Winstar*-related case involving a claim for damages due to the costs of raising capital to replace lost goodwill (including the resulting negative tax consequences) necessitated by the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[228]

During the savings and loan crisis of the 1980s, the Federal Government created a program to encourage healthy savings and loan companies, or thrifts, to acquire financially distressed thrifts. The Government offered potential acquirers various benefits including the ability to treat the excess of the amount paid for the acquired thrift over that entity's value as "regulatory goodwill"—a form of capital that counts toward the capital requirements of the banks.[229] These benefits were memorialized in written agreements between the Government and the acquiring thrifts, referred to as "Assistance Agreements."[230] The enactment of FIRREA, however, made significant changes in the regulatory environment governing these thrifts and eliminated the benefits of these agreements. In *United States v. Winstar Corp.*, various thrifts brought suit against the Government, ultimately resulting in the Supreme Court's determination that the Government was liable for breach of contract.[231]

Citizens Federal Bank (Citizens) acquired two financially troubled savings and loan companies under Assistance Agreements with the Government.[232] After the COFC held that the Government was liable for breach of contract due to FIRREA's effect on the Assistance Agreements, Citizens' suit moved to the damages phase. Citizens sought over $350 million in damages.[233] Three rounds of summary judgment motions saw most of Citizens' theories regarding damages rejected. A trial was held to determine Citizens' entitlement to mitigation damages incurred when replacing the regulatory capital it had lost as a result of FIRREA.[234] Ultimately, the COFC found the Government's breach of contract was a substantial factor in causing Citizens' damages.[235] It also determined that Citizens issued preferred stock for subordinated debt

227. 474 F.3d 1314 (Fed. Cir. 2007).
228. Pub. L. No. 101-73, 103 Stat. 183 (1989).
229. *Citizens Fed. Bank*, 474 F.3d at 1316.
230. *Id.*
231. 518 U.S. 839 (1996).
232. *Citizens Fed. Bank*, 474 F.3d at 1317.
233. *Id.*
234. *Id.*
235. *Id.* at 1317–18.

in part to mitigate the effects of the lost goodwill and capital credit due to FIRREA, and that this was therefore reasonable and recoverable.[236] Citizens was awarded over $18 million in damages to reimburse it for the transaction costs incurred in issuing the preferred stock, the higher cost of capital associated with the preferred stock, and the tax consequences of replacing deductible debt with stock.[237]

The Government appealed both Citizens' entitlement to damages and the calculation of such damages.[238] On appeal, the Government argued: (1) the Assistance Agreements between the Government and Citizens did not promise to allow Citizens to count subordinated debt as regulatory capital, and that the subsequent refinancing of this debt once FIRREA prohibited its inclusion as regulatory capital was not a consequence of the Government's breach of contract; and (2) it was not foreseeable that the Government's breach of contract would result in the adverse tax consequences that Citizens would suffer in replacing interest-deductible debt with preferred stock.[239]

The Government contended that the COFC's use of a "substantial factor" standard for determining whether the actions caused damages was incorrect and that the court should have applied a "but-for" standard.[240] The Government relied heavily on *California Federal Bank v. United States*, in which the Federal Circuit had referenced the "but-for" standard as a "definitively established" standard of causation.[241]

The court reiterated the factors for proving damages as stated in its most recent pronouncement on the subject: "Damages for breach of contract are recoverable where: (1) the damages were reasonably foreseeable by the breaching party at the time of contracting; (2) the breach is a substantial causal factor in the damages; and (3) the damages are shown with reasonable certainty."[242] The Federal Circuit characterized its decision in *California Federal Bank* and other cases applying the "but-for" standard as upholding the discretion of the lower court to determine causation, rather than adopting a particular governing standard.[243] It explained that although it had previously approved the "but-for" standard, such decisions did not create a rule that only the "but-for" theory was appropriate or "prohibit[] the trial court from using the 'substantial factor' test."[244] The court explained that "the selection of an appropriate causation standard depends upon the facts of the particular case and lies largely within the trial court's discretion."[245]

236. *Id.* at 1320–21.
237. *Id.* at 1317.
238. *Id.* at 1316.
239. *Id.* at 1320.
240. *Id.* at 1318.
241. *Id.* at 1319 (citing Cal. Fed. Bank v. United States, 395 F.3d 1263 (Fed. Cir. 2005)).
242. *Id.* (quoting Ind. Mich. Power Co. v. United States, 422 F.3d 1369, 1373 (Fed. Cir. 2005)).
243. *Id.* at 1319.
244. *Id.*
245. *Id.* at 1318.

In *Citizens*, the court found that the COFC "did not abuse its discretion in using the 'substantial factor' theory of causation," and "adequately explained the reasons for its action."[246] The majority in *Citizens* recognized that its embrace of two standards might appear "inconsistent" but described this appearance as superficial.[247] While the court provides a good discussion of its prior opinions upholding both the "substantial factor" and "but-for" tests, it does not offer any factors that would guide lower courts to use one test versus the other.

Judge Rader dissented, explaining that in *California Federal Bank*,[248] the Federal Circuit recognized that the case law had been in conflict over the use of a substantial factor standard for causation of lost profits.[249] He stressed that the court in *California Federal Bank* chose the "but-for" standard over the "substantial factor" standard, and accordingly concluded that the case should be remanded for application of the "but-for" standard.[250]

Regarding the Government's second contention that Citizens had not proved that it was foreseeable that it would incur negative tax consequences, the Federal Circuit held that

> Citizens was not required to also show that it was foreseeable that, in replacing such capital, it would incur negative tax consequences. The foreseeability requirement reflects the principle that a breaching party should not be liable for damages that "it did not at the time of contracting have reason to foresee as a probable result of such a breach."[251]

The majority found the damages foreseeable because "it was foreseeable at the time of the contract that Citizens would have to replace the capital credit and goodwill in order to continue to be a self-sufficient institution" if the Government breached the "regulatory goodwill" provisions of the Assistance Agreements.[252] The court agreed that "[i]f it was foreseeable that the breach would cause the other party to obtain additional capital, there is no requirement that the particular method used to raise that capital or its consequences also be foreseeable."[253] As a result, the court affirmed the COFC's use of the "substantial factor" standard and the award of over $18 million in damages to Citizens.[254]

B. *The Damages Standards of Review*

Bank of America, FSB v. Doumani,[255] brought by successor-in-interest Bank of America and investors in the holding company that had originally acquired the failing Honolulu Federal Savings and Loan (HonFed), implicates a variety

246. *Id.* at 1319.
247. *Id.* at 1318.
248. 395 F.3d 1263 (Fed. Cir. 2005).
249. Citizens Fed. Bank, FSB v. United States, 474 F.3d 1314, 1322 (Fed. Cir. 2007).
250. *Id.*
251. *Id.* at 1321 (quoting Restatement (Second) of Contracts § 351 cmt. a (1981)).
252. *Id.*
253. *Id.*
254. *Id.* at 1322.
255. 495 F.3d 1366 (Fed. Cir. 2007).

of *Winstar* issues concerning when a claim accrues under the CDA, standing, and damages—including the various standards of review that are applicable to different aspects of the damages awards at issue.[256]

The original sale of HonFed was to H.F. Holdings, Inc. (HFH), a holding company created by a group of investors.[257] HFH agreed to purchase 100 percent of HonFed's common stock in exchange for a one-time capital infusion.[258] As part of the transaction, the Government permitted HonFed to count $85 million in supervisory goodwill and $40 million in subordinated debt toward the regulatory capital requirement.[259] Shortly before the passage of FIRREA on August 9, 1989, HonFed entered into negotiations with First Nationwide to purchase the latter's branches in Hawaii and applied for regulatory approval of the acquisition.[260] The Office of Thrift Supervision (OTS) eventually approved the transaction on the condition that HFH infuse additional capital into HonFed sufficient to immediately meet the new capital requirements under FIRREA.[261] HonFed negotiated an extension to complete the deal with First Nationwide and placed $2 million in escrow as consideration.[262] To raise additional capital, HFH sold stock in both HonFed and HFH to the Bishop Estate for a nominal fee in exchange for a $45 million investment.[263] Through the Bishop Estate investment and the retention of earnings generated by favorable real estate sales, HonFed was able to achieve tangible capital compliance—but only after the deadline for the First Nationwide deal had passed and the escrow funds had been forfeited.[264]

In this appeal, the court affirmed each of the COFC's rulings.[265]

1. Claim Accrued When OTS Demanded Changes Consistent with FIRREA, Not upon Enactment of FIRREA

The Government argued that the claims were not filed within the statute of limitations and alleged that they accrued before the enactment of FIRREA, when OTS sent letters to HonFed demanding forbearance from certain mortgage products. The Government contended that these letters put HonFed on notice that supervisory goodwill would be unavailable to meet regulatory capital and set the accrual date.[266] Upon review of the letters, however, the COFC "found the letters invoked by the government did not contain a requirement for HonFed to take specific action contrary to its existing contract."[267]

256. *Id.* at 1371–72.
257. *Id.* at 1370.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 1371.
263. *Id.*
264. *Id.*
265. *Id.* at 1375.
266. *Id.* at 1372.
267. *Id.*

Although the court agreed with the Government's argument that a breach of contract stemming from FIRREA can occur before the effective date of the legislation, the court affirmed the COFC's finding that the breach in this case occurred in October 1989 at the earliest, when "OTS unambiguously demanded changes consistent with FIRREA."[268] Thus, the majority ruled that the suit was timely filed. Judge Mayer dissented, interpreting the *Winstar* decision[269] to suggest that the enactment of FIRREA on August 9, 1989, was sufficient to breach the Government's contracts with the thrifts. Specifically, Judge Mayer relied on the following passage: "*When the law as to capital requirements changed* in the present instance, the Government was unable to perform its promise and, therefore, *became liable for breach*."[270] If the claim had accrued on August 9, 1989, Bank of America's suit would not have been timely filed within the six-year statute of limitations, and COFC would not have jurisdiction to hear the claim.[271]

2. Only the Company and Not Individual Investors Had a Contract with the Government

The court found that the COFC did not err in determining that Doumani and Thrall, although members of the Simon Group that negotiated the purchase of HonFed, were not parties to the contract with the Government and could not pursue damages.[272]

3. Standard of Review for Damages

The court recognized that the standard of review for various damages issues would differ depending upon the particular issue under review.[273] It explained:

> The clear error standard governs a trial court's findings about the general type of damages to be awarded (e.g., lost profits), their appropriateness (e.g., foreseeability), and rates used to calculate them (e.g., discount rate, reasonable royalty). The abuse of discretion standard applies to decisions about methodology for calculating rates and amounts. We review the court's methodology for assessing the cost of replacement capital, including its use of a "safe rate" of return to account for the inherent benefits of the replacement capital, for abuse of discretion.[274]

The court proceeded to review a variety of damages issues, carefully noting the applicable standard of review.

268. *Id.*
269. *See* United States v. Winstar Corp., 518 U.S. 839 (1996).
270. Bank of Am. FSB v. Doumani, 495 F.3d 1366, 1375 (Fed. Cir. 2007) (quoting *Winstar*, 518 U.S. at 870).
271. *Id.* at 1377.
272. *Id.* at 1373.
273. *Id.* at 1372.
274. *Id.* (quoting Home Savs. of Am., FSB v. United States, 399 F.3d 1341, 1347 (Fed. Cir. 2005)) (citation omitted).

4. Retained Earnings and Other Damages

As the retained earnings resulted in a dollar-for-dollar increase in the sale price of HonFed, the court found no error in the COFC's reasoning, or clear error in its findings that HonFed did not suffer any damages from the replacement of regulatory capital with forced retained earnings.[275] The court also held that the COFC "did not abuse its discretion in using the dividend rate to determine the cost of retained earnings" and affirmed the COFC's calculation of HonFed's cost based on the dividends "actually paid out to shareholders."[276]

HFH also was entitled to recover the share of the real estate sale proceeds paid to the Bishop Estate as, absent the Government's breach, HonFed would not have transferred 26 percent of its stock to that entity.[277] The court rejected the Government's argument that HonFed was required to mitigate its damages by paying off its highest-rate debt and instead affirmed the COFC's average cost of funds approach.[278] HonFed was not able to recover the forfeited $2 million deposit, however, because the extension agreement was reached after the passage of FIRREA as well as after the October 1989 breach and the record did not conclusively show that the escrow deposit was part of HonFed's mitigation.[279]

The application of a deferential standard, such as the "clearly erroneous" standard, may result in the Federal Circuit upholding two lower court rulings that reach opposite results. In *Home Savings of America, FSB v. United States*, the Federal Circuit affirmed the COFC's application of a tax "gross up" procedure, where the plaintiff demonstrated that it would be taxed on the COFC's award and would not have been taxed on the monies it lost.[280] In that case, the COFC increased the award to place the contractor in as good a place as it would have been had the Government not breached its contract.[281] In *Bank of America*, the court upheld as "not clearly erroneous" the COFC's refusal to increase or "gross up" HonFed's damages to adjust for taxes because the tax rate was "highly variable" and the taxability of the recovery was "very ambiguous."[282] Therefore, the application of this deferential standard led to a different result.

C. *Void* Ab Initio—*The Dangers of Certifications in an Era of Strict Liability*

Long Island Savings Bank, FSB v. United States, decided September 13, 2007, is a chilling decision wherein the court severely limited contractors' ability to avoid imputation of knowledge, and overturned the COFC's $435.7 million

275. *Id.* at 1373.
276. *Id.*
277. *Id.* at 1374.
278. *Id.*
279. *Id.*
280. Home Savs. of Am., FSB v. United States, 399 F.3d 1341, 1353 (Fed. Cir. 2005).
281. *Id.* at 1356.
282. Bank of Am. FSB v. Doumani, 495 F.3d 1366, 1375 (Fed. Cir. 2007).

breach of contract award by finding fraud in the inducement of the contract at issue.[283] A condition of the contract was the company's certification that it was complying with applicable laws and regulations, but its CEO breached a fiduciary duty and violated laws requiring a financial institution's "safe and sound management." As of this publication, the decision is not yet final as Long Island Savings Bank (LISB) filed a petition for certiorari to the Supreme Court that is still pending.[284]

This case has a fascinating procedural history, as it was the subject of a previous Federal Circuit decision on February 1, 2007, wherein the court held that the banks' claims against the Government were forfeited under 28 U.S.C. § 2514.[285] Section 2514 provides for the forfeiture of claims against the United States where a person uses or attempts to use fraud to obtain payment of that claim, and applies where the fraud is "in regard to the very contract upon which the suit is brought."[286] The banks petitioned for panel rehearing and rehearing en banc, and the en banc court returned the case to the original panel for revision.[287] On rehearing, the Federal Circuit withdrew and vacated its prior decision and held "that the contract is tainted from its inception by fraud and thus void *ab initio*, and that the claims against the government are excused by prior material breach."[288] Thus, the court reached the same disposition as its prior decision, but under a different legal theory that does not encompass the application of 28 U.S.C. § 2514.[289]

The new opinion does not address the reason for the vacation of the original appellate decision. However, because the new opinion carefully avoids using 28 U.S.C. § 2514 as support for its conclusion,[290] the en banc court was presumably uncomfortable with the breadth of the interpretation of 28 U.S.C. § 2514 in the original decision.

Following the typical *Winstar* pattern, LISB acquired a failing thrift through a 1983 Assistance Agreement (the Agreement) with the Federal Savings and Loan Insurance Corporation (FSLIC) following the FSLIC's national solicitation for potential buyers.[291] As part of the Agreement, LISB explicitly warranted that, except as otherwise disclosed, LISB was "not in violation of any applicable statutes, regulations or orders of, or any restrictions imposed by, the United States of America or state, municipality or other political subdivision or any agency of the foregoing public units, regarding the conduct of its

283. 503 F.3d 1234, 1244 (Fed. Cir. 2007) (opinion by Gajarsa, J., with Linn & Mayer, JJ.), *petition for cert. filed*, 76 U.S.L.W. 3539 (U.S. Mar. 27, 2008) (No. 07-1234).

284. Petition for Writ of Certiorari, *Long Island Savs. Bank*, No. 07-1234 (Mar. 27, 2008).

285. Long Island Savs. Bank, FSB v. United States, 476 F.3d 917, 920 (Fed. Cir.), *vacated on reh'g en banc*, 503 F.3d 1234 (Fed. Cir. 2007).

286. *Id*. at 925 (citing Little v. United States, 152 F. Supp. 84, 87 (Ct. Cl. 1957)).

287. *Long Island Savs. Bank*, 503 F.3d at 1236.

288. *Id*.

289. *See* Ralph C. Nash, *Postscript: Forfeiture of Claims*, 21 Nash & Cibinic Rep. ¶ 55, Nov. 2007, at 2.

290. *Long Island Savs. Bank*, 503 F.3d at 1244.

291. *Id*. at 1237.

business" where such violation could "materially and adversely affect LISB's business, operations or condition, financial or otherwise."[292] The Agreement also included LISB's warranty that none of the information furnished by LISB in connection with the Agreement contained any untrue statements or materially misleading omissions.[293]

At the time LISB certified its compliance, LISB's chairman of its board of trustees and CEO, James Conway Jr., retained a majority interest[294] in his former law firm, Conway & Ryan, and received a substantial portion of the law firm's annual income.[295] Mr. Conway's ongoing receipt of law firm revenues created a conflict of interest because Conway & Ryan was the banks' primary outside counsel, was LISB's sole mortgage closing counsel, and derived at least 70 percent of its revenues from LISB.[296] Although Mr. Conway had received two legal opinions in 1980 that New York law prohibited him from receiving compensation from the law firm for legal services relating to any of the banks' loans, Mr. Conway retained a percentage ownership in and received revenue from the law firm until 1989.[297] Mr. Conway's conflict of interest and violation of New York law were concealed from the FSLIC until 1992.[298] Following the enactment of FIRREA, this conflict of interest came to light and Conway pled guilty to a federal misdemeanor, entered into a consent order banning him from the banking industry, paid a hefty penalty, and was disbarred.

LISB later brought suit against the Government for breach of contract arising from the enactment of FIRREA.[299] The COFC granted summary judgment on the Government's counterclaims and affirmative defenses in favor of LISB and the Long Island Savings Bank of Centereach FSB (Centereach).[300] At trial for the disposition of damages, the COFC rejected the Government's affirmative defense that LISB forfeited its claim under 28 U.S.C. § 2514 and held the Government liable for $435,755,000 in damages.[301]

In its September 2007 decision, the Federal Circuit found that the Assistance Agreement was void *ab initio* because the banks had obtained the contract by knowingly making a false statement and, therefore, the Agreement was unenforceable.[302] Specifically, the court agreed with the Government that LISB falsely certified the representations and warranties in the Assistance Agreements and that the omission concerning Mr. Conway's conduct rendered

292. *Id.* at 1238 (quoting from Assistance Agreement, section 11(b)(5)).
293. *Id.*
294. Although he reduced his actual interest to 9 percent in 1984, he transferred his interest to his daughter and daughter-in-law, and collectively they continued to hold a majority interest. *Id.* at 1239.
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.* at 1253.
299. Long Island Savs. Bank, FSB v. United States, 54 Fed. Cl. 607, 607 (2002).
300. *Id.*
301. Long Island Savs. Bank, FSB v. United States, 67 Fed. Cl. 616 (2005).
302. Long Island Savs. Bank, FSB v. United States, 503 F.3d 1234, 1251 (Fed. Cir. 2007).

LISB's representations misleading.[303] The court noted that the COFC agreed that "'Conway and his firm's impropriety under banking laws is evident.'"[304] The court, however, failed to fully address the COFC's distinction between the illegality and the action for which LISB should be found liable. The COFC characterized the issue as "whether the law prohibited LISB's relationship with Conway and the firm" and found that it did not.[305] The COFC stressed that the illegality was Conway's acceptance of "compensation related to mortgage closing services of LISB's borrowers."[306]

A focal point of LISB's challenge in its petition for certiorari is the court's conclusion that the contract was void *ab initio*, rather than voidable. LISB argued that

> [u]nder the general contract principles that are applied by other courts and should govern here, fraud in the inducement does not render a contract void *ab initio* and therefore wholly unenforceable, and breach of contract is not material unless the contracting party has been denied the benefit of its bargain.[307]

Although it was undisputed that LISB had no actual knowledge that Conway had continued to receive compensation from his law firm relating to services performed for the bank, the court also found that the misrepresentation was "knowing" as Mr. Conway had received two legal opinions stating that he was prohibited from receiving compensation from the law firm for legal services relating to any of the banks' loans.[308]

There are several keys to the court's rejection of the COFC's decision, and they turn on the heart of the wrongful conduct. The COFC defined the wrongful conduct narrowly as Conway's acceptance of payment and not the underlying action of the relationship between the firm and the banks.[309] Thus, the COFC held that "the fraud here was not in entering into the Assistance Agreement, rather the fraud the Government challenges is with regard to Conway's compensation scheme, an arrangement that was neither within the scope of Conway's duties as LISB's CEO and chairman nor approved by LISB."[310] In contrast, the Federal Circuit focused broadly on Conway's violation of banking laws requiring "safe and sound management."[311] The court concluded that Conway's breach of his fiduciary duties for personal profit

303. *Id.* at 1250–51. One commentator disputes whether the certifications were false. Jerry Stouck, *The Federal Circuit Reaffirms Its Hostility to "Fraud," a Term It Applies Broadly, with a New and Completely Revised Opinion in* Long Island Savings Bank v. U.S., 49 Gov't Contractor ¶ 401, Oct. 24, 2007, at 3.

304. *Long Island Savs. Bank*, 503 F.3d at 1247 (quoting Long Island Savs. Bank, FSB v. United States, 54 Fed. Cl. 607, 614 (2002)).

305. *Long Island Savs. Bank*, 54 Fed. Cl. at 614.

306. *Id.*

307. *NDIA Urges Supreme Court to Reverse Decision Voiding Bank's "Tainted" Contract*, 89 Fed. Cont. Rep. (BNA) 551 (May 20, 2008) (quoting LISB's Petition for Certiorari).

308. Long Island Savs. Bank, FSB v. United States, 503 F.3d 1234, 1248 (Fed. Cir. 2007).

309. *Long Island Savs. Bank*, 54 Fed. Cl. at 613–14.

310. *Id.* at 619.

311. *Long Island Savs. Bank*, 503 F.3d at 1248.

"is not safe and sound management."[312] The court characterized Conway's breach as a material fact that was required to be disclosed to make LISB's warranty of safe and sound management not misleading.[313]

This court's broad view of the illegal conduct led the court to reject the COFC's finding that Mr. Conway's knowledge could *not* be imputed to LISB.[314] The court imputed Mr. Conway's knowledge to LISB because "Conway as Chairman and CEO of LISB had the authority to submit the certification and did so," and his "conduct in submitting the certification should be imputed to LISB."[315] The court pointed out that it was undisputed that Mr. Conway had the requisite knowledge of the certification's falsity.[316] Because he was an agent of the banks, the court reasoned that generally his knowledge should have been imputed to the banks, unless he was acting adversely to the banks and "entirely for his own or another's purposes."[317] The COFC had determined that Conway "ha[d] abandoned his principal's interest and [wa]s acting to defraud his principal, *entirely* for his own or another's purpose" because "had the knowledge that the Government seeks to impute to LISB actually been disclosed to LISB, the success of Conway's scheme would have been impaired."[318] The Federal Circuit disagreed, finding that LISB benefited by the arrangement by obtaining "legal services required by LISB for its mortgage closings."[319] Arguably, this legal benefit relates to the relationship of Conway's firm to LISB, which the COFC held was not illegal.[320] The court reasoned that in the absence of evidence that the firm's legal services were deficient, LISB has not shown that "Conway *entirely* abandoned LISB's interests for his own."[321]

The court purported to rely on "legal principles common to both federal and state law."[322] But other than the *Restatement (Second) of Agency*, the only authority cited was New York law, not federal case law, for the test of whether Conway had entirely abandoned LISB's interests for his own—thus, the significant restriction on the adverse interest exception rests on a narrow foundation.[323] The court's application of this standard is even more concerning,

312. *Id.* at 1247.

313. *Id.* at 1248.

314. *Id.* at 1249–50; Long Island Savs. Bank, FSB v. United States, 54 Fed. Cl. 607, 618–19 (2002).

315. Long Island Savs. Bank, FSB v. United States, 503 F.3d 1234, 1246 (Fed. Cir. 2007).

316. *Id.* at 1248.

317. *Id.* at 1249 (quoting Restatement (Second) of Agency § 282 (1958)) (a "principal is not affected by the knowledge of an agent in a transaction in which the agent secretly is acting adversely to the principal and *entirely for his own or another's purposes*").

318. *Long Island Savs. Bank*, 54 Fed. Cl. at 619 (emphasis added).

319. *Long Island Savs. Bank*, 503 F.3d at 1250.

320. Long Island Savs. Bank, FSB v. United States, 54 Fed. Cl. 607, 614 (2002) ("Indeed, had Conway not accepted compensation related to mortgage closing services of LISB's borrowers, but the relationship between LISB and the firm was otherwise the same, no impropriety would exist.").

321. Long Island Savs. Bank, FSB v. United States, 503 F.3d 1234, 1249 (Fed. Cir. 2007).

322. *Id.*

323. *See generally id.*; *see also* Stouck, *supra* note 303, at 6 ("In announcing this 'entirely abandoned' standard, which does not appear in prior Federal Circuit case law, the panel in [*Long Island*

as it is not clear under these facts what would ever constitute an entire abandonment of a principal's interests. One commentator has characterized this ruling as applying strict liability for the conduct that the bad actor actively concealed.[324] The court characterized its imputation to LISB and Centech of Conway's knowledge as "a matter of law."[325] A striking aspect of this case is the length to which the court tries to resolve the issue without a remand for a trial on the merits.

The court accepted the Government's representation—based on an affidavit obtained from the Government in its summary judgment motion—that, absent the omission, LISB would not have been further considered as a bidder for the failing thrifts and would not have been approved for any supervisory acquisition.[326] This issue was not litigated at a trial on the merits.[327] The court concludes without explanation or citation to precedent that "the only reasonable inference is that had the plaintiffs stated the truth about Conway, they would not have received the contract."[328] However, without an evidentiary hearing or citation to precedent, such a conclusion appears ill conceived. The COFC had determined that "LISB's independent efforts to disclose Conway's scheme support the conclusion that, had LISB known of Conway's conflict-of-interest, it is unlikely that LISB would have permitted Conway from misrepresenting his personal compensation scheme."[329] If plaintiffs had known the truth and removed Conway, they might have received the contract.[330] Certainly, the failure of disclosure that the court held was at the heart of the fraud would have been avoided.

Furthermore, the court found that even if the Agreement was not void, the doctrine of prior material breach would preclude the bank's breach of contract claim for damages.[331] The court characterized the false certification as "an uncured material failure of performance."[332] The court does not explain how the false certification constitutes breach of a performance obligation. Rather, it explained that it concluded the breach was material because "our case law holds that any degree of fraud is material as a matter of law."[333] Under this

Savs. Bank, 503 F.3d 1234] relied on two decisions from New York state courts, in both of which the language was dictum.").

324. *Id*. at 7.

325. *Long Island Savs. Bank*, 503 F.3d at 1250.

326. *Id*.

327. *Id*. at 1251.

328. *Id*.

329. Long Island Savs. Bank, FSB v. United States, 54 Fed. Cl. 607, 616 (2002).

330. Stouck, *supra* note 303, at 7.

331. Long Island Savs. Bank, FSB v. United States, 503 F.3d 1234, 1252–53 (Fed. Cir. 2007).

332. *Id*. at 1253.

333. *Id*. (quoting Christopher Vill., L.P. v. United States, 360 F.3d 1319, 1334 (Fed. Cir. 2004)). In its Brief in Opposition to LISB's Petition for a Writ of Certiorari, the United States signals that the quoted portion of the court's decision is overly broad when it characterized it as a "passing statement" that "was unnecessary to the court's disposition of the issue." Brief for the United States in Opposition to Petition for Writ of Certiorari, *Long Island Savs. Bank*, No. 07-1234 (June 2008).

rationale, any false certification of a contractually required certification would make all subsequent work under the contract subject to a prior breach.

The potential implications of the application of the court's decision are troubling and potentially far reaching. In an amicus brief in support of LISB's petition for certiorari, the National Defense Industrial Association (NDIA) warned that the decision could "undermine the stability of the federal contracting process."[334] The decision emboldens the Government to allege fraud in the inducement to evade payment of amounts clearly owed, even when the Government has materially breached the contract. Any fraud by any key actor—no matter how hidden from the rest of a business—that existed at the time of contract award might be used to avoid payment if there is a general certification that the contractor is in compliance with law and regulation. Holding that a contract is void *ab initio* entitles the Government to recovery of all amounts paid the contractor.[335] This opinion underscores the dangers of requirements for contractors to certify that they are in compliance with laws and regulations. The breadth of the certification in this case was magnified by the broad legal standard applied by the relevant regulations, which required "sound management."

Finally, the decision highlights the due diligence that contractors should undertake before pursuing multimillion-dollar claims. For all that one can learn from the case, the unpredictable and inexplicable elements are disconcerting. The court appeared to go to great lengths "as a matter of law," without benefit of a trial on the merits, to find a contract void *ab initio* where the parties did not dispute that the contractor was ignorant of the fraud *on the contractor* perpetrated by its CEO.[336] Fraud is in the air—in Congress, and at the agencies. Apparently, the Federal Circuit is not immune.

D. *Assumption of Risk by Entering into Dividend Agreement*

In *Hughes v. United States*,[337] a *Winstar*-related breach of contract case, the Federal Circuit added to its recent decisions in *Admiral Financial Corp. v. United States*[338] and *Franklin Federal Savings Bank v. United States*[339] in concluding that the plaintiffs assumed the risk of a future regulatory change when acquiring a failing thrift. The Federal Circuit explained that it was bound by its earlier decisions in *Admiral* and *Franklin* because the relevant contractual provisions in those cases were nearly identical to the subject agreements.[340]

334. *NDIA Urges Supreme Court*, *supra* note 307, at 551 (quoting Brief for NDIA as Amicus in Support of Petition for Writ of Certiorari, *Long Island Savs. Bank*, No. 07-1234 (Apr. 30, 2008)).

335. *See* United States v. Miss. Valley Generating Co., 364 U.S. 520, 520 (1961); J.E.T.S., Inc. v. United States, 838 F.2d 1196, 1200 (Fed. Cir.), *cert. denied*, 486 U.S. 1067 (1988); K & R Eng'g Co. v. United States, 616 F.2d 469, 474–75 (Ct. Cl. 1980).

336. *Long Island Savs. Bank*, 503 F.3d at 1250.

337. 498 F.3d 1334, 1335 (Fed. Cir. 2007) (opinion by Moore, J., with Mayer and Rader, JJ.), *cert. denied*, 128 S. Ct. 1859 (2008).

338. 378 F.3d 1336, 1336 (Fed. Cir. 2004).

339. 431 F.3d 1360 (Fed. Cir. 2005).

340. *Hughes*, 498 F.3d at 1338.

The case was heard on appeal from two related decisions in the COFC, *Hughes I*[341] and *Hughes II*.[342]

During the thrift crisis in the mid-1980s, Alfred D. Hughes entered into a merger agreement with El Paso Federal Savings and Loan Association to create El Paso Association, a wholly owned subsidiary of El Paso Holding Corporation (EPHC).[343] Hughes was the president of EPHC and majority shareholder of El Paso Association's stock.[344] The Federal Home Loan Bank Board (FHLBB) approved the acquisition and granted El Paso Association certain supervisory forbearances.[345] On the same day the FHLBB approved the merger, EPHC and the FSLIC executed a dividend agreement in which EPHC agreed to maintain a level of regulatory capital for El Paso Association in compliance with federal regulation.[346] The dividend agreement provided that references to regulations include any successor regulations that "may increase or decrease the Acquirer's obligation" under the agreement.[347]

Approximately one year after the execution of the dividend agreement, Congress enacted FIRREA,[348] which eliminated El Paso Association's ability to count "supervisory goodwill" toward its regulatory capital requirement, thereby bringing El Paso's regulatory capital below the required level.[349] As a result, the Office of Thrift Supervision placed El Paso Association in receivership and it was subsequently liquidated.[350] In 1990, Hughes and EPHC brought an action in the COFC alleging breach of contract due to the enactment of FIRREA.[351]

In *Hughes I*, the COFC found the Government liable to both plaintiffs.[352] Prior to reaching a decision on damages, however, the Federal Circuit issued decisions in *Admiral* and *Franklin*, finding in those cases that the plaintiffs had assumed the risk of liability by executing a similar dividend agreement.[353] In *Hughes II*, the COFC reversed itself as to the Government's liability to EPHC in light of the Federal Circuit's intervening precedent but found that Hughes personally had not assumed any risk because he was not a party to the dividend agreement.[354] The COFC awarded Hughes $46.5 million in damages.[355]

On appeal, the Federal Circuit affirmed the COFC's determination that the Government is not liable to EPHC.[356] The Federal Circuit explained

341. Hughes v. United States, 58 Fed. Cl. 291 (2003) [hereinafter *Hughes I*].
342. Hughes v. United States, 71 Fed. Cl. 284 (2006) [hereinafter *Hughes II*].
343. Hughes v. United States, 498 F.3d 1334, 1335 (Fed. Cir. 2007).
344. *Id.*
345. *Id.* at 1336.
346. *Id.*
347. *Id.*
348. Pub. L. No. 101-73, 103 Stat. 183.
349. Hughes v. United States, 498 F.3d 1334, 1337 (Fed. Cir. 2007).
350. *Id.*
351. *Id.*
352. *Hughes I*, 58 Fed. Cl. 291, 313 (2003).
353. *See Hughes*, 498 F.3d at 1337.
354. *Hughes II*, 71 Fed. Cl. 284, 292–93 (2006).
355. *Id.*
356. Hughes v. United States, 498 F.3d 1334, 1338 (Fed. Cir. 2007).

that the dividend agreement included, in essence, a risk-shifting provision by announcing that EPHC's obligations with respect to the regulatory capital requirement might change if the regulation is subsequently changed.[357] Relying on *Franklin*, the court rejected EPHC's argument that, if the dividend agreement allowed the Government to eliminate the goodwill forbearance at any time (as the Government maintained), its contract would be illusory.[358] The court explained that *Franklin* already decided that "[u]nder *Winstar*, a promise for a regulatory waiver until regulatory change occurs is plainly sufficient consideration."[359]

Additionally, the Federal Circuit reversed the COFC's finding of the Government's liability with respect to Hughes.[360] The COFC had ruled that because Hughes did not sign the dividend agreement (which contained the apparent risk-shifting provision) in his personal capacity, that agreement should be treated separately from other agreements related to the merger.[361] The Federal Circuit determined, however, that all of the agreements were part of a single overall contract and should not be treated separately.[362] The appellate court explained that because Hughes was a party to the approval letter, he was party to the overall agreement, and, therefore, he "assumed the risk of regulatory change by virtue of the risk-shifting clause" in the dividend agreement.[363]

IV. TUCKER ACT JURISDICTION

A. *Administrative Procedure Act v. Tucker Act Jurisdiction: Claimants Cannot Dress for Success Under the APA Merely by Styling Their Case as One for Nonmonetary Relief*

The Administrative Procedure Act (APA) affords jurisdiction to litigants seeking nonmonetary relief in district court so long as those claims (1) are not for "money damages," (2) have no adequate remedy that exists elsewhere, and (3) do not seek "relief expressly or impliedly forbidden by another statute."[364] In the alternative, litigants seeking monetary relief against the Government would have to file a claim under the Tucker Act in the COFC.[365] In *Suburban Mortgage Associates, Inc. v. U.S. Department of Housing and Urban Development*, the Federal Circuit greatly restricted a plaintiff's ability to create APA jurisdiction by recasting a suit—ostensibly for declaratory or injunctive

357. *Id*.
358. *Id*.
359. *Id*. at 1338 (quoting Franklin Fed. Savs. Bank v. United States, 431 F.3d 1360, 1370 (Fed. Cir. 2005)).
360. *Id*. at 1341.
361. *Hughes II*, 71 Fed. Cl. 284, 321 (2006).
362. Hughes v. United States, 498 F.3d 1334, 1341 (Fed. Cir. 2007).
363. *Id*.
364. 5 U.S.C. §§ 702, 704 (2000); Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116, 1120 (Fed. Cir. 2007) (citing Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev., 2005 WL 3211563, at *6 (D.D.C. Nov. 14, 2005)).
365. *Suburban*, 480 F.3d at 1120.

relief—that ultimately seeks money from the Government.[366] In *Suburban*, the Federal Circuit examined the boundaries of these two acts when it reviewed an interlocutory appeal filed by the U.S. Department of Housing and Urban Development (HUD) to determine which act governs a request for specific performance of contract obligations brought by Suburban Mortgage Associates, Inc. (Suburban) seeking money allegedly due it under an insurance agreement.[367]

In 1998, Suburban made a loan to a nursing home that was secured by a mortgage on the property and was guaranteed by HUD.[368] HUD's guarantee was contained in an insurance agreement, which could be invoked by the lender if the borrower defaults and the lender transfers the interest in the mortgage and the mortgaged property to HUD.[369] In this case, Suburban's borrower (Hillside Nursing Home) defaulted on its loan to Suburban.[370] Suburban attempted to exercise its rights under its agreement with HUD, but HUD refused to accept assignment of the mortgage.[371] HUD claimed it could deny acceptance of the mortgage despite an incontestability clause in the agreement because HUD believed there was sufficient evidence that Suburban had defrauded and made material misrepresentations to the agency.[372]

Following HUD's decision to deny Suburban the insurance payments, Suburban filed a two-count suit for relief in the U.S. District Court for the District of Columbia.[373] The first count sought a declaratory judgment that HUD must comply with its obligation to accept assignment of the loan to the nursing home, and an injunction ordering HUD to reimburse Suburban the outstanding loan balance.[374] Suburban's second count sought specific performance for breach of contract in the form of payment for the insured loan amount.[375] HUD moved to dismiss the suit for lack of subject matter jurisdiction, or, in the alternative, to transfer the matter to the COFC.[376]

The district court reviewed the motion in light of the Supreme Court's decision in *Bowen v. Massachusetts*,[377] which held that "a claim for money is not necessarily a claim for 'money damages' as that term is used in the APA."[378] Applying its understanding of *Bowen*, the district court held that although Suburban would recover money if it obtained the injunctive relief sought, Suburban "was seeking specific relief in the form of money to which it was

366. *Id.*
367. *Id.* at 1117–18.
368. *Id.* at 1118.
369. *Id.*
370. *Id.*
371. *Id.* at 1119.
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.*
377. 487 U.S. 879, 893 (1988).
378. Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116, 1120 (Fed. Cir. 2007).

entitled" rather than simply money damages.[379] As a result, although the district court dismissed the breach of contract count as outside its jurisdiction, it maintained that the count requesting a declaratory judgment was within its jurisdiction.[380] In response, HUD filed an interlocutory appeal.[381]

On appeal, HUD argued that despite Suburban's request for specific performance, "Suburban's claim is in substance a contract-based action asking for monetary relief."[382] Suburban relied on *Bowen* to support its position.[383] The court agreed with HUD's assertion and determined that relief under the Tucker Act would provide Suburban an "adequate remedy," precluding jurisdiction in district court under the APA.[384] As a result, the Federal Circuit reversed the district court's decision and remanded with instructions to either dismiss the count or transfer it to the COFC.[385]

Notably, the Federal Circuit rejected both the district court's and Suburban's reliance on the Supreme Court's decision in *Bowen*.[386] The Federal Circuit reasoned that "*Bowen* turned on the 'complexity of the continuous relationship between the federal and state governments administering the Medicaid program,'" which were not factors present in this case.[387] Thus, *Suburban* relegates the holding in *Bowen* to very narrow facts and circumstances.

The decision evidences the court's antipathy towards the result of *Bowen*. It characterized *Bowen* as "the source of the leak" and said it "has threatened to become a gusher."[388] The Federal Circuit expressed frustration over the ruling in *Bowen*. It stated:

> To thwart such attempted forum shopping, our cases have emphasized that in determining whether a plaintiff's suit is to be heard in district court or the Court of Federal Claims, we must look beyond the form of the pleadings to the substance of the claim. We have cautioned litigants that dressing up a claim for money as one for equitable relief will not remove the claim from Tucker Act jurisdiction and make it an APA case.[389]

To avoid jumping into the analysis of whether a declaratory judgment action involving money is really a claim for money damages, the court clarified that the first analytical step of the jurisdictional test is *not* "whether the claim is for other than 'money damages.'"[390] Rather, it established that the adequacy of an alternative remedy is the first step in determining whether the APA

379. *Id.* at 1120.
380. *Id.* at 1121.
381. *Id.*
382. *Id.* at 1126.
383. *Id.* at 1127.
384. *Id.* at 1126–27.
385. *Id.* at 1128–29.
386. *See id.* at 1127.
387. *Id.* (citing Consol. Edison Co. of N.Y., Inc. v. U.S. Dep't of Energy, 247 F.3d 1378, 1383 (Fed. Cir. 2001)).
388. *Id.* at 1122.
389. *Id.* at 1124.
390. *Id.*

applies. Moving this question to the first step gives it more significant emphasis. Moreover, the court reiterated its prior holdings that monetary damages are "presumptively an 'adequate remedy' for [section] 704 purposes."[391] Therefore, if monetary damages are available, generally, there will be no APA jurisdiction, even if these damages are not (presently) requested.

> Step 1—Adequate Remedy Limitation of Section 704.
>
> 1.1 "[W]hether the cause is one over which the Court of Federal Claims has jurisdiction under the Tucker Act." If the COFC has jurisdiction, proceed to the second issue in step 1. If the COFC does not have jurisdiction, then proceed to step 2.
>
> 1.2 "[C]an the Court of Federal Claims provide an adequate remedy under the Tucker Act for the alleged wrong?" If the answer is yes, then the inquiry ends, as the district court will only have jurisdiction in the absence of an adequate remedy at COFC. If an adequate remedy does not exist at COFC, proceed to step 2.
>
> Step 2—Money Damages Limitation of Section 702. "[W]hether the claim is for other than 'money damages.'"[392]
>
> Step 3—Statute Granting Consent to Suit Expressly or Impliedly Forbids Relief. Does a statute that grants consent "expressly or impliedly forbid[]" relief?[393] If the answer is yes, then there is no jurisdiction under the APA. If the answer is no, then there is jurisdiction.

After this ruling, if a grievance may be remedied by an award of money in the COFC, jurisdiction is probably lacking under the APA—despite the fact that the cause of action is styled as a declaratory judgment—and it should be brought in the COFC under the Tucker Act rather than in district court.

While *Suburban* only involved tension between jurisdiction under the Tucker Act and the APA, the rationale would also appear to apply to cases where the COFC has jurisdiction pursuant to the CDA.[394]

B. *Show COFC the Money! Debt Cancellation Does Not Constitute Monetary Damages for Tucker Act Jurisdiction*

In *Gonzales & Gonzales Bonds and Insurance Agency, Inc., v. Department of Homeland Security*, the Federal Circuit held that judicial relief that would cancel a plaintiff's debt, thereby placing it in a better financial position, did not constitute money damages.[395] In this case, Gonzales & Gonzales Bonds and Insurance Agency, Inc. (Gonzales) appealed the U.S. District Court for the

391. *Id.* at 1126 (quoting Telecare Corp. v. Leavitt, 409 F.3d 1345, 1349 (Fed. Cir. 2005)).

392. *Id.* at 1124.

393. The court acknowledged that the Tucker Act has been argued to fall within this third exception to APA jurisdiction "since the Tucker Act grants consent for suits based on contract." *Id.* at 1128. However, the court declined to address the merit of this argument. *Id.*

394. C. Stanley Dees & Thomas C. Papson, Practitioner's Comment, *Availability of COFC Remedy Precludes APA Review of Dispute over Mortgage Guarantee, Federal Circuit Holds*, 49 Gov't Contractor ¶ 129, Mar. 28, 2007, at 15.

395. Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. Dep't of Homeland Sec., 490 F.3d 940 (Fed. Cir. 2007).

Central District of California's transfer of its claims against the Government to the COFC.[396] The Federal Circuit reviewed the matter *de novo*, first reviewing whether the COFC possessed jurisdiction.[397] Because the Tucker Act only provides jurisdiction for relief in the form of monetary damages (except in limited circumstances that were not applicable), the Federal Circuit focused on whether debt cancellation qualified as monetary damages.[398] The court explained that when determining this issue, it must go "beyond the form of the pleadings to the substance of the claim."[399]

Gonzales, an immigration bond agency, brought suit in the district court seeking the cancellation of debt with the U.S. Department of Homeland Security (DHS).[400] The debt arose from Gonzales's purported breach of various immigration bonds.[401] The Government moved to dismiss the suit for lack of subject matter jurisdiction because many of the bonds at issue were greater than $10,000 and thus exceeded the district court's jurisdiction under the Little Tucker Act.[402] In the alternative, the Government moved to transfer the case to the COFC under the jurisdiction of the Tucker Act.[403] The district court found that it lacked jurisdiction over the claims exceeding $10,000, and therefore transferred all of the claims to the COFC—because the underlying facts and legal issues were common to all of the bonds at issue.[404] In response, Gonzales appealed the district court's decision to the Federal Circuit.[405]

The district court cited *Brazos Electric Power Cooperative v. United States* to support its justification for the transfer to the COFC.[406] In *Brazos*, the plaintiff sought to recover money the Government applied to a prepayment penalty.[407] In that case, the Federal Circuit held that regardless of whether the plaintiff received a monetary payment or credit toward money owed, in substance "Brazos would be receiving monetary damages."[408] The district court believed that there was "no substantive difference between a plaintiff paying money and the government returning it, and the plaintiff never having to pay it in the first place."[409] Consequently, the district court found the plaintiff's action for a determination that it did not owe the Government money to be cognizable

396. *Id*. at 941–42.
397. *Id*. at 943.
398. *Id*. at 945.
399. *Id*. at 944.
400. *Id*. at 942.
401. *Id*.
402. *Id*. at 942–43.
403. *Id*.
404. *Id*. at 943.
405. *Id*.
406. Brazos Elec. Power Coop. v. United States, 144 F.3d 784 (Fed. Cir. 1998).
407. *Id*. at 786.
408. *Id*. at 787.
409. Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. Dep't of Homeland Sec., 490 F.3d 940, 944 (Fed. Cir. 2007) (citations omitted).

under the Tucker Act.[410] The Federal Circuit, however, found the circumstances surrounding *Gonzales* "markedly" different from those presented in *Brazos*.[411]

The Federal Circuit reasoned that Gonzales sought "either specific performance of DHS's contractual obligations . . . or declaratory and injunctive relief determining that DHS breached the bonds."[412] The court reached this conclusion by determining that "[i]f Gonzales prevails on the merits, any purported bond obligations would be cancelled. No monies would be due Gonzales either in the form of cash or credit (such as an offset of other debt)."[413] As a result, the court ruled that Gonzales's claims were not Tucker Act claims for monetary relief and thus the COFC lacked jurisdiction.[414] Accordingly, the Federal Circuit remanded the matter to the district court.[415]

C. *Final Judgments Based on Paragraphs of Settlement Agreements Different from Those at Issue on Appeal Do Not Create Res Judicata*

In *Bianchi v. United States*, the Federal Circuit affirmed in part and reversed in part a decision of the COFC that dismissed a contractor's (Bianchi) suit for lack of subject matter jurisdiction.[416] *Bianchi* is the fourth in a series of cases arising from Bianchi's 1988 settlement with the Government of multiple contract claims brought before the ASBCA. The 1988 settlement agreement, among other things, allowed Bianchi to pursue any additional claims relating to value engineering change proposals (VECP).[417] The board subsequently awarded Bianchi VECP royalties on two occasions, but both times the Government issued payment to Bank of America, Bianchi's contract assignee.[418] Mr. Bianchi filed suit in the COFC alleging that under the terms of the 1988 settlement agreement, he (and not his assignee) was entitled to these VECP royalties.[419] The COFC ruled that even though a settlement agreement is a contract, and even though it has jurisdiction over a contract dispute between a citizen and the Government, it did not have jurisdiction over the matter because Mr. Bianchi was attempting to enforce board awards in the COFC, contrary to the "Election Doctrine."[420] In addition, the COFC ruled that it lacked

410. *Id*. at 945.
411. *Id*.
412. *Id*.
413. *Id*.
414. *Id*.
415. *Id*. at 946.
416. Bianchi v. United States, 475 F.3d 1268, 1270 (Fed. Cir. 2007) (opinion by Prost, J., with Bryson, J. and Saris, District Judge) (rehearing and rehearing en banc denied May 8, 2007).
417. *Id*. at 1270–72. The three prior cases are as follows: Bank of Am. Nat'l Trust & Savs. Ass'n v. United States, 23 F.3d 380, 384 (Fed. Cir. 1994) (*Bianchi I*), denying recoupment of amounts erroneously paid to Bianchi for amounts the Government should have paid the bank as assignee; Bianchi v. Perry, 140 F.3d 1294, 1299 (9th Cir. 1998) (*Bianchi II*), denying the Government's attempt to recoup its funds from Bianchi's Equal Access to Justice Act award; and Bianchi v. Walker, 163 F.3d 564, 570 (9th Cir. 1998) (*Bianchi III*), holding that the Bank, as assignee, was entitled to VECP royalties for one of the contracts.
418. *Bianchi*, 475 F.3d at 1272.
419. *Id*.
420. Bianchi v. United States, 68 Fed. Cl. 442, 450–52 (2005).

jurisdiction over the earlier of Bianchi's two VECP claims because it was time-barred.[421] Finally, the COFC stated that even if it had jurisdiction over the claims, the Government would be entitled to summary judgment.[422]

Bianchi appealed and the Federal Circuit ruled that his pleadings alleged that the Government breached the parties' settlement agreement by refusing to pay Bianchi the VECP royalties and that the COFC therefore had jurisdiction over these breach claims.[423] The court rejected the Government's argument that Bianchi's complaint did not sufficiently plead breaches of contract.[424] In reaching this conclusion, the court emphasized that "[a]ll that Rule 8(a)(2) [R. Ct. Fed. Cl.] . . . requires 'is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'"[425] Bianchi's complaint met this standard where its complaint set forth the language of the settlement agreement and alleged "that his claims for payment of the VECP awards 'arise under' that agreement."[426]

The court, however, rejected Bianchi's contention that his claims did not arise until the Government paid royalties to the bank.[427] It held instead that the Government's liability for the earlier claim was fixed once the Board awarded VECP royalties in 1993, and that is when Bianchi's first VECP claim accrued.[428] Thus, the six-year statute of limitations had run on this claim before Bianchi filed suit in the COFC in 2004.[429]

Regarding the latter VECP claim that was not time barred, Bianchi argued that the Federal Circuit's holding in *Bianchi I* and the Ninth Circuit's holding in *Bianchi II* were res judicata and "conclusively established that the 1988 settlement agreement required the Government to pay any VECP awards obtained under the original contracts to Bianchi personally."[430] The court rejected this argument because, in the instant case, Bianchi sought to determine his entitlement to VECP awards, which were reserved in the settlement agreement.[431] Moreover, in this case, the Government paid the proper party—the bank as assignee.[432] In contrast, the prior cases on which Mr. Bianchi relied for his res judicata argument addressed the Government's right to recoupment for various payments made on portions of the settlement agreement that were settled and paid directly to Bianchi. *Bianchi I* dealt with the first paragraph of the settlement agreement, which stated "Mr. Maurice Bianchi . . . is entitled to recover $617,500.00 [plus interest] on his claims" and held that the Government could

421. *Id*. at 452.
422. *Id*. at 464.
423. Bianchi v. United States, 475 F.3d 1268, 1273 (Fed. Cir. 2007).
424. *Id*.
425. *Id*. (quoting Gould v. United States, 935 F.2d 1271, 1276 (Fed. Cir. 1991)).
426. *Id*. (citing Bianchi's complaint).
427. *Id*. at 1274.
428. *Id*.
429. *Id*.
430. *Id*. at 1275 (characterizing Bianchi's argument).
431. *Id*. at 1276.
432. *Id*.

not recoup money it had paid under that paragraph.[433] *Bianchi II* held that "the government could not use its mistaken payment to Bianchi as a setoff against Bianchi's EAJA legal fees."[434]

The Federal Circuit ruled that the Government had paid Bianchi's designated contract assignee and that the terms of the settlement agreement did not also require the Government to pay Bianchi in his personal capacity.[435] The Federal Circuit remanded with instructions that the COFC enter judgment in favor of the Government with respect to this latter VECP claim.[436]

D. *Claims Against a State Agency Are Not Claims Against the United States*

In *Souders v. South Carolina Public Service Authority*, the court affirmed a ruling of the U.S. District Court for the District of South Carolina denying a motion by the United States to intervene in and transfer three lawsuits to the COFC.[437] These suits were brought by several property owners and complained that operations of the South Carolina Public Service Authority (SCPSA) flooded their lands. The court summarized the claims of the three lawsuits as involving tort claims, other state law claims, a claim that the SCPSA was in violation of its Federal Energy Regulatory Commission (FERC) license, and takings claims under the U.S. Constitution. The SCPSA operated a series of hydroelectric power plants as well as the Cooper River Rediversion Project (under a contract with the Army Corps of Engineers). After the SCPSA obtained an ASBCA decision requiring the Federal Government to indemnify it for damages and costs awarded in the lawsuits, the Federal Government moved under terms of the Army's contract to intervene in the three lawsuits—which it then argued were properly within the jurisdiction of the COFC, not the district court.[438]

The Federal Circuit ruled that the tort claims, other state law claims, and the claim that the SCPSA was in violation of its FERC license were clearly outside the scope of the limited jurisdiction of the COFC.[439] In addition, the Federal Circuit held that the COFC does not have subject matter jurisdiction over takings claims against a state agency under the Fourteenth Amendment as these claims are not "against the United States" within the meaning of the Tucker Act.[440]

SCPSA argued that all the claims were actually against the United States because of its contract with the Army Corps of Engineers, which, according to SCPSA, was intended to immunize SCPSA from any and all liability arising from its operation of the Cooper River Rediversion Project. The Federal Circuit described SCPSA's arguments as "irrelevant" because "[w]hile the

433. *Id.* at 1275.
434. *Id.*
435. *Id.* at 1276.
436. *Id.*
437. 497 F.3d 1303, 1309 (Fed. Cir. 2007) (opinion by Michel, CJ., with Mayer and Dyk, JJ.).
438. *Id.* at 1306.
439. *Id.* at 1307.
440. *Id.* at 1308.

facts may or may not support a Fifth Amendment takings claim by plaintiffs against the United States, no such claim was pursued by the plaintiffs in the cases now before us."[441] In addition, the court held that any agreement by the United States to indemnify and assume liability for the SCPSA's activities "does not transform plaintiffs' Fourteenth Amendment takings claims into Fifth Amendment claims against the United States."[442]

V. LITTLE TUCKER ACT JURISDICTION—A TREATY IS NOT AN EXPRESS CONTRACT

In *De Archibold v. United States*,[443] the Federal Circuit explained that the Little Tucker Act[444] does not grant district courts jurisdiction over claims against the United States arising under foreign treaties for the simple reason that a treaty (and related executive agreements) is not a contract as contemplated by the statute. In this case, a number of former employees of the Army Air Force Exchange Service (AAFES) in the Republic of Panama brought employment-related claims against the United States based on a certain provision of an executive agreement implementing the Panama Canal Treaty (the treaty)—which requires the United States to follow Panamanian labor law when employing nationals in Panama.

The plaintiffs originally brought an action in the COFC, but the court concluded that it did not have jurisdiction under 28 U.S.C. § 1491(a)(1).[445] The COFC found that because the plaintiffs' claims were dependent on the treaty, its claims were subject to the jurisdictional bar of 28 U.S.C. § 1502—which expressly denies COFC jurisdiction over claims against the United States growing out of or dependent upon any treaty with foreign nations.[446] The COFC transferred the case to the U.S. District Court for the Northern District of Texas, however, because the plaintiffs also asserted federal question jurisdiction under 28 U.S.C. § 1331—which provides that the district courts shall have original jurisdiction over all civil actions arising under treaties of the United States.[447]

In the district court, the plaintiffs asserted jurisdiction under the Little Tucker Act, arguing that the executive agreement was an express contract between the plaintiffs and AAFES. The district court disagreed, however, and dismissed the case, finding no jurisdiction under either 28 U.S.C. § 1346(a)(2) or 28 U.S.C. § 1331.[448]

441. *Id.*
442. *Id.* at 1309.
443. 499 F.3d 1310 (Fed. Cir. 2007) (opinion by Moore, J., with Rader and Bryson, JJ.).
444. 28 U.S.C. § 1346(a)(2) (2000).
445. De Archibold v. United States, 57 Fed. Cl. 29, 34 (2003).
446. *Id.* at 32.
447. *Id.* at 34.
448. De Archibold v. United States, No. 03-1871, 2006 WL 763059, at *2–3, 5–6 (N.D. Tex. Mar. 24, 2006).

On appeal, the Federal Circuit affirmed, ruling that treaties and international executive agreements between sovereign nations do not qualify as express contracts under the Little Tucker Act.[449] In so ruling, the court explained that because the Little Tucker Act is a waiver of sovereign immunity, it must be "strictly interpreted" and the court will not "resort to legislative history to find a waiver not otherwise unequivocally expressed in the statute."[450] As a result, the court concluded that if Congress intended to waive sovereign immunity for claims arising under foreign treaties, it would have clearly stated so in the statute.[451] The court explained that even though treaties are in nature "contracts" between nations, they are not "express contracts" as contemplated by the Little Tucker Act.[452]

The Federal Circuit also rejected the plaintiffs' alternative theory of jurisdiction—federal question jurisdiction under 28 U.S.C. § 1331.[453] The court explained that although § 1331 establishes jurisdiction over civil actions arising under treaties of the United States, the statute does not waive sovereign immunity for such claims.[454] In order to invoke § 1331 jurisdiction, the plaintiffs needed to identify an independent and express waiver of sovereign immunity.[455] In determining that no such waiver exists, the court also rejected the argument that the executive agreement itself contained the necessary waiver.

VI. SUBROGATION RIGHTS OF A PAYMENT BOND SURETY

In a case discussing the subrogation rights of a payment bond surety, the court, in *National American Insurance Co. v. United States*, upheld a COFC ruling granting summary judgment to National American Insurance Company (NAICO).[456] The COFC had ruled that the Government had violated its duty as a stakeholder in a Miller Act payment bond case by making final payment to a government contractor after being notified by the payment bond surety that it was asserting a right to the funds after having fully discharged the debt of the contractor.[457]

On appeal, the Government argued that NAICO could "only stand in the shoes of the subcontractor whom it paid, and since the subcontractor has no privity with the United States, there can be no Tucker Act waiver of sovereign immunity."[458] The Federal Circuit, after reviewing prior decisions on

449. De Archibold v. United States, 499 F.3d 1310, 1315 (Fed. Cir. 2007).
450. *Id.* at 1313.
451. *Id.* at 1315.
452. *Id.*
453. 28 U.S.C. § 1331 provides that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."
454. *De Archibold*, 499 F.3d at 1316.
455. *Id.*
456. Nat'l Am. Ins. Co. v. United States, 498 F.3d 1301, 1307 (Fed. Cir. 2007) (opinion by Prost, J., with Linn and Clevenger, JJ.).
457. *Id.* at 1303.
458. *Id.* at 1304.

this issue, ruled that "it has been well-established that a payment bond surety that discharges a contractor's obligation to pay a subcontractor is equitably subrogated to the rights of both the contractor and subcontractor."[459] The court then held that the COFC had correctly rejected as dicta language to the contrary that had been included in a prior performance bond decision, and distinguished other cases that the Government sought to rely upon.[460] The court concluded: "Simply put, [these cases] did not change the established precedent that a payment bond surety that discharges a contractor's obligation to pay a subcontractor may be equitably subrogated to the rights of the contractor."[461]

VII. ECONOMIC DURESS

In *North Star Steel Co. v. United States*, the Federal Circuit addressed "agreements to agree" and the elements of economic duress and reversed a decision of the COFC awarding $1,521,626 to third-party beneficiary North Star Steel Inc. (North Star).[462] The plaintiff alleged the breach of a contract between Arizona Electrical Power Cooperative Inc. (AEPCO) and the Department of Energy's Western Area Power Administration (WAPA). The contract at issue involved the transmission and regulation of electrical power for North Star's use in operating electric arc furnaces at a steel mill.[463] WAPA owned the only power lines in the area of North Star's mill that could support the voltage required by the mill.[464] The contract provided for in-kind energy payments to be made to WAPA in exchange for WAPA regulatory services.[465] The contract also provided that these in-kind energy payments could be revisited by the parties and adjusted at a later date.[466] The COFC ruled that WAPA breached the contract by not utilizing a specific methodology for calculating the in-kind energy payments and, in addition, ruled that North Star (through AEPCO) had entered into a contract amendment under duress.[467]

The United States appealed the decision and North Star cross-appealed on the issue of computation of damages.[468] On appeal, the Federal Circuit reversed the COFC's decision that it had jurisdiction under the CDA.[469] Because WAPA was not acquiring services, but rather selling them, jurisdiction was proper under the Tucker Act, not the CDA.[470] The court also reversed the

459. *Id.* at 1306.
460. *Id.*
461. *Id.* at 1307.
462. 477 F.3d 1324, 1335 (Fed. Cir. 2007) (opinion by Schall, J., with Linn and Dyk, JJ.).
463. *Id.* at 1327.
464. *Id.* at 1326–27.
465. *Id.* at 1327–28.
466. *Id.* at 1328.
467. *Id.* at 1330–31.
468. *Id.* at 1332.
469. *Id.*
470. *Id.*

COFC's ruling that WAPA had breached the contract.[471] The court ruled that a contract provision relating to in-kind energy payments was an "agreement to agree" requiring that both parties negotiate in good faith, but it did not require WAPA to utilize any specific methodology for calculating the in-kind energy payment.[472] Because there was no finding of a lack of good faith (the court phrased it as "bad faith") on the part of WAPA, there was no breach of contract.[473]

The Federal Circuit also overturned the COFC's ruling that North Star had entered into a contract amendment under duress.[474] "To render a contract unenforceable for duress, a party must establish that (1) it involuntarily accepted the other party's terms, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of the other party's coercive acts."[475] The court cited with approval other COFC holdings that "coercion requires a showing that the Government's action was wrongful, i.e., '(1) illegal, (2) a breach of an express provision of the contract without a good-faith belief that the action was permissible under the contract, or (3) a breach of the implied covenant of good faith and fair dealing.'"[476] Because the court previously held that WAPA did not breach the contract, and there was no showing that WAPA's actions were illegal or in bad faith, there was no coercion demonstrated and thus the test for duress was not satisfied.[477] The Federal Circuit remanded the case to the COFC with instructions to enter judgment in favor of the United States and to dismiss North Star's Second Amended Complaint.[478]

VIII. OFFSETS

In *J.G.B. Enterprises, Inc. v. United States*, J.G.B. Enterprises, Inc. (JGB), a subcontractor, argued that the Government could not offset a payment owed to a third-party beneficiary to collect debt owed by a different entity (in this case, the prime contractor).[479]

Capital City Pipes (CCP) entered into multiple contracts with the Defense Supply Center Columbus (DSCC) for various military supplies.[480] On one particular contract for hose assemblies, CCP engaged JGB as its subcontractor.[481] Under their contract, JGB would manufacture the hose assemblies and ship them directly to DSCC, yet DSCC would pay CCP—which would in turn

471. *Id.*
472. *Id.*
473. *Id.* at 1332–33.
474. *Id.* at 1334.
475. *Id.*
476. *Id.* (citing North Star Steel Co. v. United States, 68 Fed. Cl. 672, 722 (2005)).
477. *Id.*
478. *Id.* at 1335.
479. 497 F.3d 1259, 1260 (Fed. Cir. 2007).
480. *Id.*
481. *Id.*

pay JGB.[482] Due to CCP's failure to pay JGB money owed under several contracts, JGB informed the Government that it would cease future shipments until these nonpayment issues were resolved.[483] Ultimately, JGB, CCP, and DSCC reached an agreement whereby DSCC would pay JGB directly.[484] When DSCC made payment on the contract, however, the payment was less than what JGB had expected because DSCC withheld part of the payment in order to recoup debt owed to it by CCP.[485] JGB filed suit in the COFC seeking the full payment.[486] The COFC found in favor of JGB and the Government appealed the decision to the Federal Circuit.[487]

In addressing whether DSCC could offset the payment owed to JGB to collect debt owed to it by the prime contractor, the Federal Circuit explained that typically a subcontractor lacks privity of contract to seek relief directly against the Government. In this matter, however, JGB was not a typical subcontractor because JGB was a third-party beneficiary to the contract.[488] As a third-party beneficiary, JGB's claims were not derivative, but rather direct.[489]

As a result, the Federal Circuit held that "the government here must have a claim against JGB, not CCP, in order to setoff its payment due JGB because JGB's claim is a claim for the benefits due it directly and not a derivative claim for money owed to CCP."[490] Since it was CCP and not JGB that owed the Government this other debt, JGB was entitled to full payment. The court added that the Government "may separately pursue a claim against CCP for the monies owed by CCP." Accordingly, the Federal Circuit affirmed the COFC's judgment.[491]

IX. ATTORNEY FEES

In *Hubbard v. United States*, the Federal Circuit considered the Government's challenge to an award of attorney fees, and a cross-appeal arguing that the plaintiff had proven his lost profits.[492]

In 1984, Bill Hubbard (Hubbard) entered into a contract to build and operate a storage facility for the Navy.[493] In return, the Navy agreed to staff the facility and operate a rental center on the premises.[494] In 1993, the new commander of the naval base moved the rental center to a different location on the

482. *Id.*
483. *Id.*
484. *Id.*
485. *Id.* at 1260–61.
486. *Id.* at 1261.
487. *Id.*
488. *Id.*
489. *Id.*
490. *Id.* at 1262.
491. *Id.*
492. 480 F.3d 1327, 1329 (Fed. Cir. 2007).
493. *Id.*
494. *Id.*

base and took several other actions in bad faith, adversely affecting Hubbard's business.[495] In 1995, Hubbard brought suit for $627,000 in damages he allegedly suffered as a result of the Government's breach of contract.[496]

The COFC found that the commander had breached the implied duty to make reasonable decisions and the implied covenant of good faith and fair dealing.[497] The COFC also found that Hubbard had not proven that these breaches resulted in the lost profits claimed in his complaint, and instead awarded Hubbard $400 to cover the cost of a concrete slab that had been damaged by one of the commander's actions.[498] The COFC found, however, that under the Equal Access to Justice Act (EAJA),[499] Hubbard was a prevailing party. Since the Government's prelitigation conduct amounted to bad faith, the COFC awarded Hubbard over $110,000 in attorney fees and over $14,000 in costs.[500]

On appeal to the Federal Circuit, the Government challenged the attorney fees award while Hubbard disputed the COFC's finding that he had not proven his lost profits.[501] The court rejected Hubbard's argument that the COFC's finding on lost profits was unsupported.[502] Regarding the Government's attorney fee challenge, the court likened the EAJA's fee-shifting arrangement to that of the Civil Rights Attorney's Fees Awards Act of 1976 (Civil Rights Act).[503] Applying Civil Rights Act precedent, the court found that the COFC's $400 damages award was not a "nominal" award, and thus an attorney fee award was not precluded.[504] The court, however, rejected the Government's argument that its position was "substantially justified" under the EAJA since this requirement covers not only the Government's conduct of litigation, but also the Government's actions—in this case taken in "bad faith"—that gave rise to the lawsuit.[505]

With regard to the COFC's calculation of the amount of Hubbard's attorney fees award, the court rejected the Government's argument for a strict mathematical formula based on the ratio between the COFC's damages awarded and the damages initially sought.[506] Rather, the court stated that under the EAJA, a court should calculate attorney fees by multiplying the total number of hours reasonably spent on the litigation by a reasonable rate, and then consider a number of other factors in determining whether this total should be increased or decreased—chief of which is the degree of success

495. *Id.*
496. *Id.* at 1329–30.
497. *Id.* at 1330.
498. *Id.*
499. 28 U.S.C. § 2412.
500. Hubbard v. United States, 480 F.3d 1327, 1330, 1333 (Fed. Cir. 2007).
501. *Id.* at 1330–31.
502. *Id.* at 1331.
503. *Id.* (citing 42 U.S.C § 1988).
504. *Id.* at 1331–32.
505. *Id.* at 1332.
506. *Id.* 1333–34.

obtained.[507] The court noted that the COFC did not consider the degree of success achieved, which was rather minimal considering Hubbard sought damages over $600,000.[508]

The court also rejected the COFC's adjustment of the statutory fee rates for the cost of living.[509] The EAJA allows an increase in the hourly rate awarded to account for inflation suffered since the statute was last amended.[510] Since most of the fees were incurred in 1996, the COFC's adjustment—which was based solely on the 2003 Consumer Price Index—was beyond the trial court's discretion.[511] As a result of these problems, the Federal Circuit vacated the COFC's award of attorney fees and costs and remanded for proceedings consistent with the opinion.[512]

X. SOVEREIGN ACTS

A. *Even If the Sovereign Acts Defense Applies, an Agency Is Obligated to Provide Reasonable Substitute Performance to Substantially Fulfill the Contract Requirements*

In *Carabetta Enterprises, Inc. v. United States*, a complicated case involving multiple statutory changes and the sovereign acts doctrine, the Federal Circuit upheld a COFC ruling that the Department of Housing and Urban Development (HUD) breached its contract with owners of low-income housing.[513] Carabetta Enterprises (Carabetta) and a group of associated companies were owners and managers of low-income rental housing under several programs sponsored by HUD.[514] Carabetta acquired these properties using mortgages insured by the Federal Government under the National Housing Act.[515] Deeds insured under this program allowed the owners to pay off the mortgages early, provided that twenty years had passed since the mortgage was issued.[516] As this mortgage program neared its twentieth anniversary, Congress passed two statutes revising the program by eliminating the ability of the owners to prepay the mortgages without HUD's prior approval.[517] Instead, the statutes authorized HUD to guarantee private loans ("section 241(f) equity loans") on the properties in amounts up to 90 percent of the equity in the properties, plus the amount of any approved rehabilitation costs.[518] In exchange, property owners were required to ensure that the properties

507. *Id.*
508. *Id.* at 1333.
509. *Id.* at 1334.
510. 28 U.S.C. § 2412(d)(2)(A).
511. Hubbard v. United States, 480 F.3d 1327, 1334 (Fed. Cir. 2007).
512. *Id.* at 1335.
513. 482 F.3d 1360, 1370 (Fed. Cir. 2007) (opinion by Bryson, J., with Lourie and Rader, JJ.).
514. *Id.* at 1362.
515. *Id.*
516. *Id.*
517. *Id.* at 1363.
518. *Id.*

continued to operate as low-income housing and that they remained in compliance with HUD regulations.[519]

Carabetta applied for several section 241(f) equity loans, but HUD refused to process the necessary paperwork because Carabetta was not in compliance with certain HUD regulations.[520] This impasse was resolved when HUD and Carabetta executed a repayment agreement through which HUD agreed to insure some loans and Carabetta agreed to utilize some of the loan proceeds to bring itself into compliance with HUD regulations.[521] The repayment agreement also provided that once Carabetta was in compliance with the HUD regulations, HUD would then insure loans on an additional twenty-six properties.[522] A twenty-seventh property, Southford Park, also was mentioned in the repayment agreement, but its status was disputed by HUD.[523]

While Carabetta was waiting for HUD to process the paperwork for the section 241(f) equity loans for the additional twenty-six properties, Congress passed an appropriations act that prohibited HUD from insuring any more section 241(f) equity loans.[524] Instead, the statute authorized HUD to issue $75 million in interest-free capital loans directly to low-income properties in three identified categories, one of which included Carabetta's properties.[525] Under this scheme, the amount of each loan was limited to 65 percent of the equity in the property plus any approved rehabilitation costs.[526] HUD issued $25 million in direct loans to seven of Carabetta's properties.[527]

Carabetta sued for breach of contract after HUD failed to provide loans for the other properties identified in the repayment agreement.[528] On cross-motions for summary judgment, the COFC granted summary judgment for Carabetta on liability and the case proceeded to trial on damages.[529] The Government appealed the COFC's ruling on liability and Carabetta cross-appealed on the amount of damages awarded.[530]

On appeal, the Federal Circuit ruled that summary judgment on liability was appropriate even if the Sovereign Acts Doctrine applied.[531] The court held that this doctrine was, in turn, subject to the doctrine of partial impossibility or partial impracticability.[532] Thus, HUD was obligated to provide any reasonable substitute performance that would substantially fulfill the

519. *Id.*
520. *Id.*
521. *Id.*
522. *Id.*
523. *Id.*
524. *Id.*
525. *Id.* at 1363–64.
526. *Id.* at 1364.
527. *Id.*
528. *Id.*
529. *Id.*
530. *Id.*
531. *Id.* at 1365.
532. *Id.*

contract requirements, despite the statutory change.[533] Here, HUD had discretion to issue up to $75 million in capital loans to Carabetta, but it failed to do so.[534] The Federal Circuit also upheld the COFC's ruling on damages, holding that (1) Carabetta was not eligible for a "tax gross-up" because it was not being compensated for the loss of untaxable funds; (2) Carabetta was not entitled to damages corresponding to the capital loans it would have received to rehabilitate the properties because Carabetta failed to introduce sufficient evidence to support this theory; and (3) the Southford Park property was not entitled to damages under the repayment agreement because Carabetta failed to show that HUD's denial of loan benefits for that property was unreasonable.[535]

B. *The Sovereign Acts Defense Is Not Available for the Low Income Housing Preservation and Resident Homeownership Act Where the Government Intends Legislation to Abrogate Agreements*

In *City Line Joint Venture v. United States*, the court held that the Government could not employ the sovereign acts or impossibility defenses to defeat a breach of contract claim when the sovereign's act in question was legislation that was intended to relieve the Government of contractual obligations.[536] In the late 1960s, City Line Joint Venture (City Line) developed a rental housing project in Maryland using a low-interest forty-year loan from Riggs Bank (Riggs).[537] HUD provided mortgage insurance to Riggs and other banks under a scheme that required property owners to agree to be subjected to certain restrictions in terms of investment, use, and sale of the low-income housing projects.[538] The mortgage note between City Line and Riggs prohibited the prepayment of the mortgage within the first twenty years after HUD endorsed the note.[539] The contractual right to prepayment after twenty years was important because it would allow City Line to exit the housing program and free itself of the various restrictions in effect.

HUD endorsed the note on August 30, 1971.[540] At the same time, Riggs sold the mortgage to the Government National Mortgage Association (GNMA).[541] Shortly thereafter, City Line encountered financial difficulties and defaulted on its loan.[542] As a result, GNMA assigned its rights to the mortgage insurer, HUD, thereby bringing City Line and HUD in privity.[543]

533. *Id.* at 1365–66.
534. *Id.*
535. *Id.* at 1366–70.
536. City Line Joint Venture v. United States, 503 F.3d 1319, 1322 (Fed. Cir. 2007) (opinion by Moore, J., with Friedman and Rader, JJ.).
537. *Id.* at 1320–21.
538. *Id.* at 1321.
539. *Id.*
540. *Id.*
541. *Id.*
542. *Id.*
543. *Id.*

City Line eventually recovered from its financial difficulties and was no longer in default.[544]

Beginning in 1988, Congress passed several laws relating to the low-income multifamily housing that had been built with HUD-insured loans.[545] One of these statutes, the Low Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA),[546] required prior HUD approval before a property owner could prepay the forty-year mortgages (even after twenty years), as well as imposing other restrictions. HUD subsequently denied City Line's request to prepay its loan after the twenty-year period, based on the new authority of LIHPRHA.[547] As a result, City Line was unable to exit the program and was forced to maintain reduced rent prices.[548]

In 1996, City Line brought a breach of contract action and takings claim in the COFC, arguing, among other things, that Congress deprived City Line of its contractual right to prepay its mortgage by enacting LIHPRHA.[549] In 2001, the COFC held on summary judgment that the Government's enactment of LIHPRHA was a "public and general act" and, therefore, the sovereign acts doctrine was an appropriate defense for the alleged breach of contract.[550] The COFC also explained that the change in the governing law under LIHPRHA rendered HUD's obligation under its mortgage agreement with City Line impossible to perform and, as a result, HUD's duty was discharged.[551]

On appeal, however, the Federal Circuit reversed, explaining that the sovereign acts and impossibility defenses were not available to the Government in these circumstances.[552] The court first noted that, unlike other recent cases where the court found no breach of contract, HUD and City Line were in privity at the time LIHPRHA was enacted by virtue of GNMA's assignment of the mortgage agreement to HUD.[553] The court reiterated the rule that a "finding of privity of contract is to find a waiver of sovereign immunity."[554]

The Federal Circuit then explained that it had issued an opinion—after the COFC had entered judgment on the breach of contract claim—that analyzed the effect of LIHPRHA on the owners of low-income housing, in the context of a takings claim.[555] In *Cienega Gardens v. United States*, the court applied the sovereign acts doctrine as it was discussed in the Supreme Court's *Winstar* opinion.[556] The court had found that LIHPRHA was not a general law that

544. *Id.*
545. *Id.*
546. Pub. L. No. 101-625, 104 Stat. 4249.
547. City Line Joint Venture v. United States, 503 F.3d 1319, 1322 (Fed. Cir. 2007).
548. *Id.*
549. *Id.*
550. *Id.*
551. *Id.*
552. *Id.* at 1322–23.
553. *Id.* at 1322.
554. *Id.* (citing Cienega Gardens v. United States, 194 F.3d 1231, 1243 (Fed. Cir. 2003)).
555. *Id.* at 1322–23.
556. Cienega Gardens v. United States, 331 F.3d 1319, 1332–33 (Fed. Cir. 2003) (citing United States v. Winstar Corp., 518 U.S. 839 (1996)).

incidentally affected contract rights, but rather was "aimed at the contract rights themselves in order to nullify them," and that, therefore, LIHPRHA was the type of statute referred to in *Winstar* as "tainted by a governmental object of self-relief."[557]

Following *Cienega Gardens*, the court in *City Line* held that LIHPRHA would not excuse the Government's failure to perform its obligations under the original mortgage agreement—namely, the obligations to allow City Line to prepay the mortgage and free itself from the rent and other restrictions under the program.[558] Although *Cienega Gardens* involved a takings claim, the court determined that the reasoning and understanding of the impact of LIHPRHA on property owners under the Takings Clause were equally relevant in the application of the sovereign acts defense to breach of contract claims.[559] The court thus concluded that the Government "cannot avail itself of the impossibility defense to save it from this breach of contract claim."[560]

In short, the Federal Circuit held that LIHPRHA was a direct and intentional abrogation of City Line's mortgage prepayment clause. Because HUD was in privity with City Line, the legislation breached City Line's contract with HUD and City Line was accordingly entitled to an appropriate remedy.

XI. PROTESTS

A. *COFC*

1. First Impressions Are Often the Fairest

In an important bid protest of first impression, the Federal Circuit adopted a rule that requires protestors to object to patent errors in a solicitation prior to the close of bidding.[561] In *Blue & Gold Fleet, L.P. v. United States*,[562] the court upheld the COFC's denial of a bid protest concerning a contract to provide ferry transportation, sell concessions, and provide related services at Alcatraz Island.[563]

Prior to award, but after Hornblower Yachts, Inc. (Hornblower) had been announced as the winning bidder, Blue & Gold Fleet, L.P. (Blue & Gold) filed a protest and sought an injunction—alleging that the National Park Service had erred in its evaluation of Hornblower's proposal.[564] Specifically, Blue & Gold argued that because Hornblower's proposal "did not include the wages and benefits for its employees required by the Service Contract Act,"

557. *Id.* at 1334 n.27.
558. City Line Joint Venture v. United States, 503 F.3d 1319, 1323 (Fed. Cir. 2007).
559. *Id.*
560. *Id.*
561. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1315 (Fed. Cir. 2007) (opinion by Gajarsa, J., with Bryson and Dyk, JJ.).
562. *Id.* at 1314–15.
563. *Id.* at 1311.
564. *Id.* at 1312.

it should not be awarded the contract.[565] The COFC ruled that because Blue & Gold was attempting to protest the terms of the solicitation, it had "missed its chance to protest" the service contract issue by waiting to protest until after the submission of proposals.[566]

On appeal, Blue & Gold argued that its protest challenged the evaluation of Hornblower, not the terms of the solicitation.[567] The Federal Circuit, however, ruled that the solicitation on its face did not require bidders to consider the Service Contract Act, and thus, the National Park Service would not have been able to evaluate proposals for compliance with the Act.[568] "[A] party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the [COFC]."[569]

Although the jurisdictional statute does not impose a time limit requiring a solicitation to be challenged before the close of bidding, the statute does reference "the need for expeditious resolution of the action."[570] The *Blue & Gold* decision marked the first time that the Federal Circuit had considered this issue in the bid protest context, but the court explained that the rule it adopted reflects the same fairness issues it has addressed in the doctrine of patent ambiguity under the CDA. This doctrine holds that "where a government solicitation contains a patent ambiguity, the government contractor has 'a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation' in a subsequent action against the government."[571] Specifically, this rule

> [w]as established to prevent contractors from taking advantage of the government, protect other bidders by assuring that all bidders bid on the same specifications, and materially aid the administration of government contracts by requiring that ambiguities be raised before the contract is bid, thus avoiding costly litigation after the fact.[572]

The court found that these reasons "apply with equal force in the bid protest context."[573] In addition, the analogous COFC doctrines of laches and equitable estoppel in the patent context and the Government Accountability Office bid protest regulations further support the adoption of a waiver rule.[574]

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565. *Id.*
566. *Id.* (quoting Blue & Gold Fleet, L.P. v. United States, 70 Fed. Cl. 487, 513–14 (2006)).
567. *Id.* at 1313.
568. *Id.*
569. *Id.*
570. 28 U.S.C. § 1491(b)(3) (2000).
571. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313–14 (Fed. Cir. 2007) (quoting Stratos Mobile Networks USA, LLC v. United States, 213 F.3d 1375, 1381 (Fed. Cir. 2000)).
572. *Id.* at 1313–14 (quoting Cmty. Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1580 (Fed. Cir. 1993)).
573. *Id.* at 1314.
574. *Id.* at 1314–15.

The Federal Circuit, noting that the COFC found that Blue & Gold had been aware of the National Park Service's longstanding policy of not applying the Service Contract Act to its concession contracts, then held that the COFC correctly applied the waiver rule.[575] In addition, the Federal Circuit also dismissed Blue & Gold's other argument that Hornblower failed to propose the correct number of round trips to Alcatraz Island.[576] The court held that this, too, was an issue of interpretation of the solicitation provisions and, as a patent ambiguity, Blue & Gold was required to seek clarification from the Government prior to the close of the bidding process.[577] Finally, the court found the COFC did not err in determining that alleged misrepresentations by Hornblower were not material and were not relied on by the National Park Service.[578]

The adoption and application of this waiver rule is a wise choice for the reasons of fairness and judicial economy discussed by the court.[579] The adoption of this rule also results in greater consistency between the protest rules of the COFC and the Government Accountability Office. This resulting consistency, however, should not be viewed as justifying a wholesale adoption of the GAO timeliness rules.

2. Correction—Availability of EAJA Fees Is Not an Appropriate Consideration for a Court in Determining How to Dispose of a Case

The U.S. Department of Housing and Urban Development's 2003 solicitation of management and marketing services for single-family housing owned by HUD has been the subject of a number of protests. In *Chapman Law Firm Co. v. Greenleaf Construction Co.*, the court held that the COFC's refusal to dismiss a bid protest case after the agency took corrective action when the only opposition related to recovery of attorney fees "was not only unnecessary, it was improper."[580]

In September 2005, Chapman Law Firm Company (Chapman) had been awarded a small business contract to provide management and marketing services—but by April 19, 2006, HUD had decided to terminate Chapman's contract for convenience and issue a new competitive solicitation.[581] Chapman filed a protest of this decision in the COFC.[582] Greenleaf Construction Company (Greenleaf), a competing contractor, and Michaelson, Connor & Boul, the incumbent, intervened.[583]

575. *Id.* at 1315.
576. *Id.* at 1316.
577. *Id.*
578. *Id.* at 1317.
579. *See* Ralph C. Nash, *Protesting the Terms of a Solicitation in Court*, 21 Nash & Cibinic Rep. ¶ 47, Sept. 2007.
580. 490 F.3d 934, 939 (Fed. Cir. 2007) (opinion by Prost, J., with Lourie, J.; Newman, J. concurring in part and dissenting in part).
581. *Id.* at 936.
582. *Id.*
583. *Id.* at 937.

In response to Chapman's protest, the Government proposed to voluntarily implement corrective action, which included reinstatement of Chapman's contract with no other offerors in the small business tier and amendment of the 2003 solicitation.[584] After it proposed this corrective action, the Government moved to dismiss the protest.[585] The COFC, however, found that the proposed corrective action lacked a rational basis—in part because it did not include Greenleaf in the small business tier even though the SBA had issued an intervening determination that Greenleaf qualified.[586] Consequently, the COFC denied the Government's motion to dismiss.[587] In response, the Government revised its proposed corrective action to include consideration of Greenleaf in the small business tier of the solicitation and renewed its motion to dismiss. Rather than dismiss the protest, the COFC entered judgment in favor of Chapman and Greenleaf, noting that they were "instrumental in achieving the final outcome" and that granting a motion to dismiss might limit Chapman's and Greenleaf's abilities to apply for attorney fees under the EAJA.[588]

Chapman appealed the COFC's denial of the Government's original motion to dismiss.[589] Although the proceedings were unusual, Chapman's appeal of this issue suggests that Chapman preferred the first proposal of corrective action—which included only Chapman in consideration for award at the small business tier—to the revised corrective action that included Greenleaf in the small business tier. The Government cross-appealed the same issue as well as the entry of judgment for Chapman and Greenleaf.[590] The Federal Circuit rejected the arguments put forth by both Chapman and the Government regarding the denial of the first dismissal.[591] Specifically, the Federal Circuit held that the SBA's determination that Greenleaf was a small business applied to this procurement even though the determination was issued after the contract award to Chapman "because there had not been a binding final award"; accordingly, the COFC properly determined that the proposed corrective action was not reasonable.[592]

Regarding the entry of judgment in favor of the two contractors, because the COFC "had already determined that the revised corrective action was reasonable, and was required to assume that the Government would carry out the corrective action in good faith," the court held that the COFC should have dismissed the case.[593] The Federal Circuit found that the availability of

584. *Id.*
585. *Id.*
586. *Id.*
587. *Id.*
588. *Id.* at 937.
589. *Id.*
590. *Id.*
591. *Id.* at 938.
592. *Id.*
593. *Id.* at 940. Judge Newman dissented in this part of the ruling without explanation. *Id.*

EAJA fees is not an appropriate consideration for a court in determining how to dispose of a case and remanded the case to the lower court for dismissal.[594]

Moreover, the court explained that for a party to be considered prevailing and thus entitled to recover fees under the EAJA, there must be "an actual, court-ordered alteration in the legal relationship in the parties in the form of an entry of judgment or a consent decree."[595] The court recognized that in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,[596] the Supreme Court had rejected awarding attorney fees where a party was merely a catalyst and achieved its desired result through a voluntary change in the defendant's conduct.[597] The court's ruling effectively prevents a party from being able to obtain attorney fees in a protest when an agency takes corrective action and the COFC finds that the corrective action adequately addresses the effects of the challenged practice or decision.

594. *Id.* at 939–40.
595. *Id.* at 939.
596. 532 U.S. 598 (2001).
597. Chapman Law Firm Co. v. Greenleaf Constr. Co., 490 F.3d 934, 939 (Fed. Cir. 2007).