

CONTRACT PERFORMANCE

Contract Interpretation/Changes

The Test for Recovery Based on Inaccurate Specifications is Whether Errors Misled the Contractor

In *Turner Construction Co.*,¹²⁴⁵ the CAFC stated that the test for recovery based on inaccurate government specifications is whether the errors misled the contractor. Applying this test, the CAFC held that Turner Construction Co. (Turner) acted as a reasonable and prudent contractor, correctly interpreted the contract specifications and drawings, and was entitled to additional costs.¹²⁴⁶

Boston's Department of Veterans Affairs (VA) hospital awarded Turner a contract to build a new wing to its hospital. A dispute arose concerning exactly what fire-rated electrical feeders and panel boards had to be installed in the operating room. The VA insisted that the contract¹²⁴⁷ and its specifications and drawings and the local¹²⁴⁸ and national¹²⁴⁹ electrical codes required Turner to install certain fire-rated emergency systems in the operating room. Turner disagreed, countering that the explicit contract specifications and electrical drawings did not identify the operating room as part of the hospital's emergency electrical system.¹²⁵⁰ The VA ended the initial disagreement by ordering Turner to install the fire-rated emergency equipment in the operating room. Turner complied and then submitted a claim for additional costs. The VA denied Turner's claim and this litigation followed.¹²⁵¹

Turner appealed to the COFC, arguing the VA materially altered the contract in requiring the work and was thus liable for additional costs resulting from the work.¹²⁵² The COFC did not agree with Turner's interpretation. The COFC found the contract was not ambiguous in requiring the work since the work, as directed by the VA, was necessary in order to conform to state electric code requirements.¹²⁵³

On appeal, a divided CAFC reversed.¹²⁵⁴ The majority observed that the "test for recovery based on inaccurate specifications is whether the contractor was misled by these errors."¹²⁵⁵ For the majority, the specifications and drawings were clear that the additional work was not required. Turner's reading of the contract in conjuncture with the code requirements was, for the majority, "that of a prudent contractor."¹²⁵⁶ Dissenting from the majority, Judge Mayer agreed with the COFC's ruling that the contract fully defined the electrical system to include the work ordered by the VA.¹²⁵⁷

Is Ambiguity Latent or Patent? Look for "Zone of Reasonableness"

In *NVT Technologies, Inc.*,¹²⁵⁸ the CAFC addressed the methodology for determining whether an ambiguity is patent

¹²⁴⁵ 367 F.3d 1319 (Fed. Cir. 2004).

¹²⁴⁶ *Id.* at 1324.

¹²⁴⁷ The contract required Turner to "furnish and install electrical wiring systems, equipment and accessories in accordance with the specifications and drawings" and to comply with applicable electrical codes. *Id.* at 1321.

¹²⁴⁸ The VA argued that even if the contract was not clear, state electrical codes required fire-rated emergency electrical systems and that the operating room constituted an emergency electrical system. The Massachusetts code stated "All portions of the emergency system, such as feeders, . . . shall be enclosed within 2-hour fire rated enclosures." *Id.* at 1322 (quoting the Massachusetts State Electric Code).

¹²⁴⁹ The National Electrical Code for Hospitals states that "hospitals [must] have a separate emergency system for circuits essential to life[,] safety[,] and critical patient care." *Id.* at 1322 (quoting the National Electric Code Article 517-30). The VA argued that this code encompasses operating rooms and that Turner had a duty to clarify this patent ambiguity if it thought that operating rooms were not essential to life, safety, and critical patient care. *Id.* at 1322-23.

¹²⁵⁰ *Id.* at 1321.

¹²⁵¹ *Id.* at 1320-23.

¹²⁵² *Id.* at 1320 (citing *Turner Constr. Co. v. United States*, 54 Fed. Cl. 388 (2002)).

¹²⁵³ *Id.* (citing *Turner Constr. Co.*, 54 Fed. Cl. at 394-95).

¹²⁵⁴ *Id.* at 1324.

¹²⁵⁵ *Id.* (citing *Robins Maint., Inc. v. United States*, 265 F.3d 1254, 1257 (Fed. Cir. 2001)).

¹²⁵⁶ *Id.*

¹²⁵⁷ *Id.* at 1325-26. In an unrelated contract changes and interpretation case, the CAFC held that the government was not liable for an ambiguous lease provision where the government showed that the contractor knew about the government's interpretation of the ambiguous term. For a good discussion on resolving patent ambiguity cases and applying the rule of *contra proferentum*, see *HPI/GSA-3C, LLC v. United States*, 364 F.3d 1327 (2004).

¹²⁵⁸ 370 F.3d 1153 (Fed. Cir. 2004). See also *Patent Ambiguity In Solicitation Must Be Brought To Government's Attention Before Bidding*, *Federal Circuit Holds*, 46 GOV'T CONTRACTOR 24, ¶ 253 (June 23, 2004).

or latent. In sum, the analysis rests on whether the ambiguity falls within the “zone of reasonableness.” That is, does the ambiguity support one interpretation or more?¹²⁵⁹

After participating in a study pursuant to *OMB Circular A-76*, NVT protested the government’s decision to retain the services in-house.¹²⁶⁰ NVT argued that an ambiguity in the solicitation unfairly caused its proposal to be more expensive than the government’s most efficient organization’s (MEO) proposal. More specifically, NVT argued the solicitation did not alert offerors that the pricing methodology for ceramic work differed from the remainder of the contract.¹²⁶¹

The COFC determined that the solicitation was only subject to one interpretation and concluded that the government’s interpretation was the only reasonable one. Alternatively, even if NVT’s interpretation was reasonable, the ambiguity was patent and therefore NVT had a duty to clarify the ambiguity prior to the proposal due date.¹²⁶²

NVT appealed this ruling. The CAFC considered the issues and determined that the government’s and NVT’s interpretations were both within the “zone of reasonableness.”¹²⁶³ The court found NVT’s interpretation reasonable because NVT “applied the same logic to the thirteen disputed line items as applied to the hundreds of other line items present in the schedule,” “the schedule [did not advise] that the data in the ‘Number’ and ‘Frequency’ columns were to be treated differently for the thirteen items in question,” and that “the amount of tile work [NVT projected] was not wholly unreasonable.”¹²⁶⁴

Despite this initial good news for NVT, its glee was short lived. In addition to CAFC’s “zone of reasonableness” finding, the court also ruled that the ambiguity was patent and that NVT could not recover because it failed to clarify the patent ambiguity.¹²⁶⁵ Specifically, the court held “Where, as here, a certain set of line items is expressed in a manner so different from hundreds of other line items, yielding results disproportionate to the remainder of the solicitation, we find the differences to be obvious, gross, [or] glaring, requiring NVT to inquire.”¹²⁶⁶

All Things Being Equal, the Simpler Explanation is Probably True

In *L.W. Matteson, Inc.*,¹²⁶⁷ the COFC provides a solid review of contract interpretation principles. This case arose because the plaintiff, L.W. Matteson (Matteson), an experienced government contractor and hydraulic dredging company, felt the Army COE caused it to incur significant cost overruns. Matteson alleged that the COE failed to notify Matteson of local opposition to the proposed dredging and of pertinent local environmental laws. This failure forced Matteson to change its proposal after contract award, which resulted in an unexpected financial loss.¹²⁶⁸

The court discussed in detail two analytical steps for interpreting contracts. First, the need to construe the contract’s plain language.¹²⁶⁹ More specifically, one must consider the contract as a whole and give a plain meaning to all contract parts without creating any conflict between different parts within the document.¹²⁷⁰ The second analytical step permits extrinsic evidence to resolve any ambiguities within the contract itself.¹²⁷¹ A document is ambiguous only if competing interpretations

¹²⁵⁹ *NVT*, 370 F.3d at 1159.

¹²⁶⁰ *Id.* at 1155. The Navy issued this solicitation for facility maintenance and utility services. *Id.*

¹²⁶¹ NVT’s price was \$3,937,980 higher than the MEO’s estimated cost. NVT asserted the solicitation caused it to overprice the requested ceramic tile work and argued the solicitation was ambiguous because the government, without notice, changed the pricing methodology in one small section of the solicitation. Specifically, NVT multiplied the “number column” by the “frequency column” and determined that there was approximately 76,000 square feet of tile work and approximately 28,600 man-hours. *Id.* at 1158. The Navy, on the other hand, changed its pricing methodology for the ceramic tile work. Instead of using the “frequency column” as a multiplier, the MEO based its proposal on 1354 square feet of tile work and 1354 man-hours. NVT argued that its own interpretation of the solicitation was reasonable. NVT claimed that had it known the solicitation changed the presentation of the pricing data, NVT would have proposed a lower price and therefore would have received this contract award. *Id.*

¹²⁶² *Id.* at 1155 (referencing 54 Fed. Cl. 330 (2002)).

¹²⁶³ *See id.* at 1159 (providing a short review of solicitation/contract interpretation rules).

¹²⁶⁴ *Id.* at 1161.

¹²⁶⁵ *Id.* at 1162.

¹²⁶⁶ *Id.*

¹²⁶⁷ 61 Fed. Cl. 296 (2004).

¹²⁶⁸ *Id.* at 300.

¹²⁶⁹ *Id.* at 307.

¹²⁷⁰ *Id.*

¹²⁷¹ *Id.*

are reasonable and consistent with the contract's language.¹²⁷² In addition, parole evidence should not be used when the terms of the contract are unambiguous.¹²⁷³ Embedded throughout this analysis is the general concept that specific contract clauses trump general clauses.¹²⁷⁴

In *Matteson*, the court sided with the government and held that Matteson assumed the responsibility to comply with all local, state, and federal environmental laws. The court reached this conclusion after reviewing the competing interpretations of the disputed clauses. The court found the following clause persuasive: “[n]otwithstanding the requirements of this section and not withstanding approval by the Contracting Officer of the Contractor’s Environmental Protection Plan, nothing herein shall be construed as relieving the Contractor of all applicable Federal, State and local environmental protection laws and regulations.”¹²⁷⁵ Furthermore, the court noted that the contract obligated the contractor “to obtain all permits and to comply with any federal, state, local laws, codes, and regulations applicable to the performance of work.”¹²⁷⁶ Lastly, the court observed that the contract unequivocally obligated the contractor to ensure any subcontractors complied with all federal, state, and local environmental laws and regulations.¹²⁷⁷ After looking at these clauses, the court noted that the contract clearly and unequivocally assigned Matteson, a sophisticated contractor, the responsibility of complying with local, state, and federal environmental laws.¹²⁷⁸

Major Steven Patoir.

Inspection, Acceptance, and Warranty

Baa Baa, Black Sheep. Have You Any Paratuberculosis?

In *Dodson Livestock Co.*,¹²⁷⁹ the COFC reviewed an allegation that the government violated a health warranty on the sale of a ram purchased at a U.S. Meat Animal Research Center (MARC) auction. The court held that there was no breach of warranty since the government’s representation was a disclosure or disclaimer rather than a contractual warranty.¹²⁸⁰

The MARC held an Annual Surplus Breeding Sheep Sale auction on 14 August 1992.¹²⁸¹ Potential buyers received a catalog which included a statement that, “The MARC flocks harbor some level of Paratuberculosis (Johne’s) and Ovine Progressive Pneumonia (OPP) infections. Based on the availability of reliable tests, or observations, efforts have been made to screen sale animals against these and other maladies.”¹²⁸² An auction supervisor also read this section verbatim prior to the sale beginning.¹²⁸³

Dodson Livestock purchased eighteen purebred Texel sheep. About one year after the MARC auction, Dodson Livestock alleged that one ram was diagnosed with paratuberculosis. Dodson Livestock sold its entire flock for slaughter and filed a claim with the Department of Agriculture for \$57,628,202 in lost profits. After three attempts to submit a properly certified claim, ultimately only the claim related to the one ram, number 806173, reached the court.¹²⁸⁴

On 2 February 2001, the COFC granted the government’s motion for summary judgment on the basis that the more specific statement of warning overruled any general theory of warranty. In addition, the efforts to screen the sale sheep for

¹²⁷² *Id.* at 308.

¹²⁷³ *Id.* at 307.

¹²⁷⁴ *Id.*

¹²⁷⁵ *Id.* at 301.

¹²⁷⁶ *Id.*

¹²⁷⁷ *Id.*

¹²⁷⁸ *Id.*

¹²⁷⁹ 61 Fed. Cl. 480 (2004).

¹²⁸⁰ *Id.* at 494.

¹²⁸¹ *Id.* at 481.

¹²⁸² *Id.* at 482.

¹²⁸³ *Id.*

¹²⁸⁴ The COFC granted a motion for dismissal, without prejudice, for all claims other than the claim for ram number 806173. *Dodson Livestock Co. v. United States*, 42 Fed. Cl. 455, 463 (1998). The contracting officer declined to render a final decision on the second and third claims, which were both presented to the government after the dismissal of the first case. Dodson did not amend its complaint prior to the rehearing. *Dodson Livestock Co.*, 61 Fed. Cl. at 484.

disease bolstered the warning theory.¹²⁸⁵ On appeal, the CAFC reversed the grant of summary judgment based on the existence of a question of material fact surrounding the effort to screen the sheep flock through various tests.¹²⁸⁶

On remand, the COFC held an evidentiary hearing but was unconvinced by the plaintiff's conflicting evidence. The court held that the MARC representation was a disclosure, not a warranty; the MARC tested the sheep with reliable methods; and there was a question of fact as to the identity of ram number 806173.¹²⁸⁷

The key to the warranty claim dismissal was that the language neither warranted that the animals would be free of paratuberculosis, nor stated that the independent testing would be foolproof. Instead, the government used a disclosure or disclaimer accompanied by a statement of intent to screen sheep for paratuberculosis prior to sale.¹²⁸⁸

Final Rule on Production Surveillance and Reporting

The DOD issued a final rule amending the DFARS to eliminate requirements to perform production surveillance on "low-urgency contracts."¹²⁸⁹ The rule's goal is to focus more resources on critical and high-risk contracts.¹²⁹⁰ The final rule applies to all contracts classified as "Criticality Designator C." Production surveillance or contract monitoring for these low-urgency contracts is not required unless specifically requested by the contracting officer.¹²⁹¹

Air Force Changes Rules for Quality Assurance

The Air Force changed its policy regarding source inspection to be consistent with DOD policy and the changed DFARS rule. The memorandum states that there is no requirement for government contract quality assurance at source for contracts or delivery orders below \$250,000.¹²⁹² The memorandum lists exceptions for contracts mandated by regulation, required by memoranda of agreement, or determined by the contracting officer to have significant technical requirements, critical product features, or specific acquisition concerns.¹²⁹³

A Game of Chicken

In *Land O'Frost*,¹²⁹⁴ the ASBCA rejected a warranty claim because the U.S. Army Soldier and Biological Chemical Command failed to provide the required notice in accordance with the warranty terms in the contract. The case involved the production of chicken breast filets for the Meals Ready-to-Eat (MRE) program. The specification involved inserting the filet into a polymer pouch, sealing the pouch, and thermoprocessing (or cooking) the entire package.¹²⁹⁵

Although the Army had concerns about the solicitation,¹²⁹⁶ the Army awarded a contract to Land O'Frost for an indefinite quantity of chicken breast filets for a base year and one option year.¹²⁹⁷ The contract contained a non-standard warranty clause drafted by the Defense Personnel Support Center which stated that "(t)he contracting officer shall give

¹²⁸⁵ *Dodson Livestock Co.*, 42 Fed. Cl. at 463.

¹²⁸⁶ *Dodson Livestock Co. v. United States*, 20 Fed. Appx. 989, 933 (Fed. Cir. 2002).

¹²⁸⁷ *Dodson Livestock Co.*, 61 Fed. Cl. at 486.

¹²⁸⁸ *Id.* at 488.

¹²⁸⁹ Defense Federal Acquisition Regulation Supplement; Production Surveillance and Reporting, 69 Fed. Reg. 31,912 (June 8, 2004) (to be codified at 48 C.F.R. pt. 242).

¹²⁹⁰ *Id.*

¹²⁹¹ *Id.*

¹²⁹² Memorandum, Deputy Assistant Secretary (Contracting) & Assistant Secretary (Acquisition), U.S. Air Force, to ALMAJCOM/FOA/DRU (Contracting), subject: Changes in Acquisition Business Rules (19 Nov. 2003).

¹²⁹³ *Id.*

¹²⁹⁴ ASBCA Nos. 55012, 55241, 03-2 BCA ¶ 32,395.

¹²⁹⁵ The contract was the Army's first attempt to use a commercial item description for the food entrée. *Id.* at 160,299.

¹²⁹⁶ A Prenegotiation Briefing Memorandum stated the chicken breast filet was potentially "costly and difficult if not nearly impossible to produce in a commercial business." *Id.* at 160,301.

¹²⁹⁷ The minimum quantity was 1,703,240 and the maximum quantity was 2,129,050. *Id.*

written notice . . . within 7 months . . . from receipt of supplies at destination.”¹²⁹⁸

During the initial production, the Army rejected fourteen out of twenty-two lots based on a warranty inspection at the assembly plants.¹²⁹⁹ After a quality team inspection of the plants and a discussion between Land O’Frost and the Army regarding defect definitions, Land O’Frost stopped work and revamped its production process.¹³⁰⁰ The Army then placed a medical hold on all previously produced lots, and the contracting officer sent written notice to invoke warranty action against the seventeen remaining MRE lots. Because the seven month deadline was approaching, the contracting officer gave the notice without conducting warranty inspections of any of the 329,904 units and without finding any defects with any of the MREs in those lots.¹³⁰¹ The Army demanded payment of \$1,906,206.91 for the rework cost in attempting to reconstitute the production lots in order to conduct the inspection.¹³⁰²

The ASBCA rejected the Army’s warranty claim stating that the attempted warranty invocation failed to meet the requirement of giving Land O’Frost notice of a defect within seven months after receipt of the supplies.¹³⁰³ The Army first conducted inspections in January 1997, nearly two years after initial receipt and at least eighteen months after final receipt.¹³⁰⁴ Since the notice merely referred to the Army’s intent to conduct inspections, rather than notice of a specific defect covered by the warranty, the ASBCA stated that the notice was an attempt to find extra time; strict compliance with the terms of the warranty mandated the conclusion that the government failed to submit a proper claim.¹³⁰⁵

Gross Negligence in Sewage Clean-up Leaves a Bad Taste for the Contractor

In *Bender GmbH*,¹³⁰⁶ the ASBCA upheld a government revocation of final acceptance based on contractor gross negligence tantamount to fraud. The Army had awarded a contract to Bender GmbH (Bender) to clean and close a sewage treatment plant in Babenhausen, Germany.¹³⁰⁷

Through a series of seven modifications, the Army extended the completion date from 18 March 1996¹³⁰⁸ to 7 April 1997¹³⁰⁹ and increased the price on the contract from German deutsche marks (DM) 187,246.57 to DM 486,788.57¹³¹⁰ in part due to weather problems and heavy zinc contamination in a sludge sample.¹³¹¹ After a government attempt to perform a price audit, Bender could only provide weight slips for 229.12 cubic meters of disposed sludge out of a claimed 430 cubic meters.¹³¹²

The contracting officer refused to pay Bender’s final invoice and directed the contractor to repay a claimed overpayment.¹³¹³ The agency discovered that Bender had discharged waste into a canal rather than into a required treatment facility, while charging the government for the latter, more expensive, action.¹³¹⁴ In addition, Bender failed to submit proper invoices for the claimed sludge clean-up, for which the contracting officer demanded repayment.¹³¹⁵

¹²⁹⁸ *Id.* at 160,303.

¹²⁹⁹ *Id.* at 160,307.

¹³⁰⁰ *Id.* at 160,308-09.

¹³⁰¹ *Id.* at 160,310.

¹³⁰² *Id.* at 160,314. Land O’Frost submitted an equitable adjustment, which the ASBCA denied, based on the government’s superior knowledge concerning the difficulty of producing the chicken breast filets and the production delay caused by the dispute. *Id.* at 160,316-17.

¹³⁰³ *Id.* at 160,317-18.

¹³⁰⁴ *Id.* at 160,317.

¹³⁰⁵ *Id.* at 160,319.

¹³⁰⁶ ASBCA No. 52266, 04-1 BCA ¶ 32,474.

¹³⁰⁷ *Id.* at 160,605.

¹³⁰⁸ *Id.* at 160,607.

¹³⁰⁹ *Id.* at 160,608.

¹³¹⁰ *Id.* at 160,605.

¹³¹¹ *Id.* at 160,608.

¹³¹² *Id.* at 160,612.

¹³¹³ *Id.* at 160,613.

¹³¹⁴ *Id.*

¹³¹⁵ *Id.*

The ASBCA found that Bender, in submitting false invoices, acted with “wanton disregard of the facts,” billing the government for 430 cubic meters of sludge while actually only disposing 229.12 cubic meters of sludge.¹³¹⁶ Due to repeated false invoices, the ASBCA approved the Army’s revocation of final acceptance due to Bender’s gross mistakes amounting to fraud.¹³¹⁷

The Splice of Life

The ASBCA reviewed the economic waste principle in *Valenzuela Engineering, Inc.*,¹³¹⁸ denying a claim in which a contractor used spliced rails in contravention of the contract. The claim revolved around an appeal from a contracting officer’s decision demanding liquidated damages of \$184,800.00. The contract, for Navy weapons facility improvements, included construction of a Type C magazine which required blast doors suspended from a track.¹³¹⁹ The specification specifically stated, “Track sections shall not be spliced.”¹³²⁰

Valenzuela’s subcontractor delivered spliced rails. After the Navy complained, Valenzuela assured the Navy it would correct the issue. The subcontractor, despite two letters from Valenzuela, installed the track with alignment splices.¹³²¹ The subcontractor replaced the spliced rails and charged Valenzuela for the additional work; Valenzuela submitted a request for an equitable adjustment which the government denied.¹³²²

On appeal, the ASBCA denied the claim holding that Valenzuela and its subcontractor failed to substantially comply with the contract. The board noted in particular the contractor’s failure to provide expert testimony which would indicate that spliced rails would not interfere with the purpose of containing explosives.¹³²³ Discussing economic waste, the board stated that economic waste does not excuse non-performance, but merely limits excessive damages for the repair of non-conforming work. The rule provides that in the absence of economic waste, the government has the right “to get precisely what it ordered.”¹³²⁴ In this case, doubt over the safety of the spliced rails coupled with the Navy’s right to demand strict compliance with the contract specifications properly resulted in the Navy denying Valenzuela’s claim for additional compensation.

Major Andrew Kantner.

Terminations for Default

Five Default Terminations Survive Tests at the United States Court of Appeals for the Federal Circuit

This past fiscal year, the CAFC affirmed three Board of Contract Appeals decisions and two COFC decisions upholding government default terminations. Despite a variety of challenges from the defaulted contractors/plaintiffs, the government prevailed in each case. Three of these cases are discussed below; two in other sections of the *Year in Review*.¹³²⁵

After Two Years of Bending, the Army Terminates

In *Bender GmbH v. Brownlee*,¹³²⁶ an Army contract required the contractor to replace and repair portions of a

¹³¹⁶ *Id.* at 160,616.

¹³¹⁷ *Id.*

¹³¹⁸ ASBCA Nos. 53608, 53936, 04-1 BCA ¶ 32,517.

¹³¹⁹ *Id.* at 160,849.

¹³²⁰ *Id.*

¹³²¹ *Id.* at 160,850.

¹³²² *Id.* at 160,851.

¹³²³ *Id.* at 160,852.

¹³²⁴ *Id.*

¹³²⁵ Discussed in this section: *Bender GmbH v. Brownlee*, 106 Fed. Appx. 728 (Fed. Cir. 2004) (per curiam); *PCL Construction Serv., Inc., v. United States*, 96 Fed. Appx. 672 (Fed. Cir. 2004); *Brett Arnold, P.C. v. United States*, 98 Fed. Appx. 854 (Fed. Cir. 2004) (per curiam). Discussed elsewhere: *Empire Energy Management Systems, Inc. v. Roche*, 362 F.3d 1343 (Fed. Cir. 2004), *infra* section titled Construction Contracting, and *Copeland v. Veneman*, 350 F.3d 1230 (Fed. Cir. 2003), *supra* section titled Labor Standards.

¹³²⁶ 106 Fed. Appx. 728 (Fed. Cir. 2004) (per curiam).

retaining wall on the Nahe River near Baumholder, Germany.¹³²⁷ A series of events ultimately resulted in execution of Modification Number Four (Modification 4). In Modification 4, the Army agreed to extend the completion date to 9 October 1998 and agreed to accept the contractor's "revised structural analysis" (statical). In exchange, the contractor, waived "any and all claims or requests for equitable adjustment arising from or connected to, alleged differing site conditions"¹³²⁸ After the parties executed Modification 4, the Army warned Bender in a cure notice that "its failure to make adequate progress to ensure completion of the project by the contract deadline may result in termination of the contract."¹³²⁹ The Army terminated the contract on 24 November 1998.¹³³⁰

The circuit court first determined that the government successfully carried its burden to prove it properly terminated Bender for default. Pursuant to FAR section 52.249.10, the government can terminate a contractor, if the contractor "fails to prosecute the work . . . with the diligence that will insure its completion" by the scheduled completion date.¹³³¹ Applying the analogous clause in FAR section 52.249-9, the federal circuit held in 2003, adequate grounds for default exist if the contracting officer has "a reasonable belief . . . that there was 'no reasonable likelihood that the [contractor] could perform the entire contract effort within the time remaining for contract performance.'"¹³³² In the instant case, "repeated delays extending over two years" coupled with Bender's inability to provide evidence it could meet the completion deadline, justified the default termination.¹³³³

Next, the court found Bender's delay was not excusable. First, Bender did not carry its burden to show that but for a partial suspension of work, it could have completed the project in a timely manner.¹³³⁴ Secondly, Bender could not pin delay on the Army for failing to obtain a necessary approval from the local German government, when the contract explicitly required the contractor to "obtain any necessary licenses and permits, and to comply with any . . . laws, codes, and regulations."¹³³⁵ The court affirmed the board's judgment upholding the termination for default.

Indivisible with Termination for All

In *Brett Arnold, P.C. v. United States*,¹³³⁶ Arnold agreed to provide real estate closing services to the HUD.¹³³⁷ A key provision of the contract required Arnold to timely wire sales proceeds to the HUD.¹³³⁸ One of four of Arnold's offices, "on numerous occasions" failed to provide such proceeds to the HUD within the contract's time limits.¹³³⁹ Arnold alleged the contract was "severable and divisible." Citing a 1964 Court of Claims decision, *Murphy v. United States*,¹³⁴⁰ Arnold argued the HUD should have terminated only the non-performing office.¹³⁴¹

According to the CAFC, in *Murphy*, a dam construction contract, the work subject to termination—irrigation work—was "wholly separate from and incidental to," the dam construction. The government had "no concerns" about timely completion of the dam.¹³⁴² Because timely transmitting sales proceeds was a critical function of the contract and not "separate from" or "incidental to" the contract, *Murphy* did not apply and the HUD properly terminated the entire contract.¹³⁴³

¹³²⁷ *Id.* at 729.

¹³²⁸ *Id.*

¹³²⁹ *Id.*

¹³³⁰ *Id.*

¹³³¹ FAR, *supra* note 20, at 52.249(a).

¹³³² *Bender GmbH v. Brownlee*, 106 Fed. Appx. at 730-31 (citing *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1017 (Fed. Cir. 2003), quoting *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987)).

¹³³³ *Id.* at 731.

¹³³⁴ *Id.*

¹³³⁵ *Id.*

¹³³⁶ 98 Fed. Appx. 854 (Fed. Cir. 2004).

¹³³⁷ *Id.* at 855.

¹³³⁸ *Id.* at 856.

¹³³⁹ *Id.* at 855.

¹³⁴⁰ 164 Ct. Cl. 332 (1964).

¹³⁴¹ *Brett Arnold*, 98 Fed. Appx. at 856.

¹³⁴² *Id.*

¹³⁴³ *Id.*

*OK, So We Made Some Mistakes;
But You Can't Prove We Caused Your Delays and Increased Costs*

In *PCL Construction Services, Inc., v. United States*,¹³⁴⁴ a third per curiam decision from the CAFC, the contractor alleged that the United States Bureau of Reclamation (USBR) breached PCL's fixed-price construction contract to build a parking structure and visitor's center near the Hoover Dam. The breach allegedly arose out of USBR's provision of inaccurate construction drawings.¹³⁴⁵

PCL substantially completed the project on 12 May 1995, approximately fifteen months after the contract deadline. Alleging USBR caused the delays and increased costs, PCL filed a contract breach claim in July 1995. Between July 1995 and November 1996, USBR denied the claim, PCL stopped work, and USBR assessed liquidated damages and terminated the remaining portions of the contract for default.¹³⁴⁶ The COFC found "USBR had not breached the contract" and "it had properly terminated the contract for default."¹³⁴⁷

Both parties agreed USBR had provided flawed drawings, that the contract allowed for some errors, and that USBR provided corrected drawings at government expense.¹³⁴⁸ Therefore, the CAFC determined causation was the pivotal issue: "The question is whether the failure to produce accurate drawings in a timely manner caused disruption or delay for which the USBR was responsible."¹³⁴⁹ PCL alleged USBR was responsible for all the delay costs. The CAFC found "not clearly erroneous," the COFC's finding that PCL failed to prove a "cause and effect relationship" between the contract changes and "PCL's increased costs."¹³⁵⁰ The CAFC appeared swayed by USBR's reasonable position, conceding responsibility for some of the delay and allocating costs between USBR and PCL.¹³⁵¹ Because PCL did not satisfy its burden of proof, the CAFC would not disturb the COFC holding in favor of the government.¹³⁵²

Government Condemned by its Own Documents or Why Didn't we Settle This?

The contractor's victory in *AST Anlagen-Und Sanierungstechnik GmbH*¹³⁵³ left this author wondering, why didn't the government settle this case when it had its chance(s)? The appeal's "long and tortuous history," stretched from 1989 until 2004 and included a dismissal (subject to consummation of an apparent agreement to settle), a separate 2003 opinion regarding whether the case had been settled in 1991,¹³⁵⁴ reinstatement, hearing adjournment, and ultimate decision by the ASBCA.¹³⁵⁵ The case did not involve any novel areas of the law. Further, the board apparently had little trouble sustaining the appeal based almost exclusively on government documents.

AST contracted with the Army to conduct "extensive repair work" on an Army building in Hanau, Germany.¹³⁵⁶ Nearly two years elapsed between contract award and the termination for default.¹³⁵⁷ AST encountered numerous delays and obstacles. Using predominantly Army documents, ASBCA Judge Michael Paul found the government responsible for nearly

¹³⁴⁴ 96 Fed. Appx. 672 (Fed. Cir. 2004) (per curiam).

¹³⁴⁵ *Id.* at 673.

¹³⁴⁶ *Id.* at 674-75. The COFC decision most thoroughly discusses the termination for default. See *PCL Construction Services, Inc., v. United States*, 47 Fed. Cl. 745 (2000).

¹³⁴⁷ *PCL*, 96 Fed. Appx. at 674.

¹³⁴⁸ *Id.* at 675.

¹³⁴⁹ *Id.*

¹³⁵⁰ *Id.* at 675-76.

¹³⁵¹ *Id.* at 676.

¹³⁵² The CAFC decision focused on whether the government breached the contract. By affirming "the decision of the Court of Federal Claims," the CAFC also affirmed the COFC's denial of PCL's challenge to the termination for default. *Id.* at 678.

¹³⁵³ ASBCA Nos. 39576, 50802, 04-1 BCA ¶ 32,558.

¹³⁵⁴ *AST Anlagen-Und Sanierungstechnik GmbH*, ASBCA No. 39576, 03-2 BCA ¶ 32,377.

¹³⁵⁵ The case's procedural history is recounted at *AST Anlagen*, 04-1 BCA ¶ 32,558, at 161,033-34.

¹³⁵⁶ *Id.* at 161,033.

¹³⁵⁷ The contracting officer notified AST of award on 24 September 1987. The contracting officer terminated the contract for default on 5 September 1989. *Id.* at 161,034 and 161,043.

all these problems. Two main circumstances prevented AST from making timely progress. First, U.S. troops continued to occupy the premises after the notice to proceed had been issued.¹³⁵⁸ Secondly, “another renovation contract” was taking place on the roof of the same building AST was hired to repair (and AST’s repair work included replacing “various roof structures”).¹³⁵⁹ Both of these government-caused circumstances delayed AST’s progress and caused problems between AST and its subcontractors.¹³⁶⁰ In addition, design flaws in the specifications for the bathroom walls and interior painting caused additional delays,¹³⁶¹ and Army funding problems delayed payment for certain work.¹³⁶²

Meanwhile, according to the ASBCA opinion, although AST was making “relatively rapid progress” the government issued a cure notice. The Army asserted progress was insufficient and AST was not timely paying its subcontractors.¹³⁶³ The ASBCA found that government-caused delays had hindered progress; insufficient evidence supported the allegation that AST failed to pay its subcontractors; and AST paid its subcontractors “out of its own funds” before receiving even its first progress payment from the Army.¹³⁶⁴

Finally, Modification P00005, drafted to remedy the interior painting specification, left undetermined the contract completion date. The modification provided:

A provisional revised completion date, by which the work described by title and Item # on page 1-2 of this modification and described in detail on the attached specification pages 1-16 MUST BE COMPLETED, is established as being 05 JUNE 1989. A final total contract completion date will be established upon finalization of this Change Order.¹³⁶⁵

The ASBCA found that according to the “plain language” of this modification, a “‘final total contract completion date’ for the project did not exist.”¹³⁶⁶

In general, the ASBCA placed responsibility for all problems on the government. Judge Paul wrote, the “most likely explanation for AST’s purported lack of progress at this time is the host of problems which were left unresolved by the contracting officer’s unilateral issuance of Modification No. P00005 on 5 May 1989” and “the more likely explanation for any perceived difficulties with subcontractors was that, because of the various delays for which the Army was admittedly responsible, the subcontractors were not able to make efficient progress on the job site.”¹³⁶⁷

The Army based its decision to terminate for default on AST’s “failure to diligently perform the work” and on statements by subcontractors that they had stopped work until they received a “written guarantee of payment of future invoices.”¹³⁶⁸ The board found the Army’s own reports belied the conclusions that AST was not diligently performing and that the subcontractors had stopped work. Further, the contracting officer did not conduct a study to determine “how long it would have taken AST to complete the work.”¹³⁶⁹

¹³⁵⁸ *Id.* at 161,035-36.

¹³⁵⁹ *Id.* at 161,035.

¹³⁶⁰ “AST would either have to delay paying its subcontractors for materials already ordered or it would have to pay these expenses out of its own funds.” *Id.*

¹³⁶¹ The government’s initial specifications envisioned masonry and brick bathroom walls with a single steel beam in the basement supporting the walls. Stress analyses indicated a single steel beam could not support brick walls. Instead, the government modified the contract to substitute “prefabricated walls.” The Directorate of Engineering’s memo indicated the change was necessary due to a “design deficiency.” *Id.* at 161,037. Later, the parties discovered that before painting certain walls, they had to be coated with spray-on plaster. Adding the spray-on plaster procedure to the contract was a change that the DEH director stated resulted from “differing site conditions and design deficiencies.” *Id.* at 161,039.

¹³⁶² “As a result of the Army’s funding difficulties, AST was not to be paid for its work on the bathroom walls until the parties reached agreement on a” later negotiated modification. *Id.* at 161,037.

¹³⁶³ *Id.* at 161,038.

¹³⁶⁴ *Id.* at 161,039.

¹³⁶⁵ *Id.*

¹³⁶⁶ *Id.* A later modification provided, “In order to complete the additional work described in the attached specifications the performance completion date is extended until 15 September 1989.” *Id.* at 161,042. The plain language of this provision seems to set a new total completion date. The board found, however, that the new date again “referred only to added work under the ‘attached specifications’” and was “silent regarding a completion date for the remaining basic contractual effort.” *Id.* at 161,045 n.10.

¹³⁶⁷ *Id.* at 161,041.

¹³⁶⁸ *Id.* at 161,043.

¹³⁶⁹ *Id.*

The board found the government did not carry its burden of proving a valid ground to terminate AST for default. First, the bilaterally established completion passed without government action. Modification P00005 left the government without a definitive completion date. Therefore, “the government cannot point to a valid completion date which can serve [as] a basis for default termination.”¹³⁷⁰

Had the Army been able to prove an enforceable deadline existed, the board would have still ruled against the government. The board clearly found the government was responsible for the “array of problems” causing substantial delays. Judge Paul wrote, “AST’s attempts to complete the project were thwarted by a host of government-caused delays which were thoroughly documented by the contracting officer and his fellow government employees.”¹³⁷¹ He concluded, “any failure . . . to make rapid progress: was ‘the fault of the government.’”¹³⁷² The board converted the termination to one for convenience.¹³⁷³

The Government Can “Waive” a Construction Contract Completion Date

Usually, the government is not found to have “waived” a contract deadline in construction cases.¹³⁷⁴ In *B.V. Construction, Inc.*,¹³⁷⁵ however, the lack of a liquidated damages clause coupled with the government’s apparent complete lack of concern over the completion date, caused the ASBCA to find the government elected to waive the right to terminate the contract. Further, the government failed to properly re-establish a contract completion date.¹³⁷⁶

On 7 June 1991, the National Aeronautics and Space Administration (NASA) contracted with B.V. Construction, Inc.(BV), to install a “patio covering known as a ‘space frame.’”¹³⁷⁷ The initial completion date was 31 October 1991.¹³⁷⁸ A bilateral modification, signed by the contractor on 5 December 1991, extended the completion date to 17 January 1992.¹³⁷⁹ Nearly twenty months of differing site conditions, subcontractor problems, and design changes elapsed, with no definitive completion deadline re-established. During the twenty month gap, the parties exchanged letters and phone calls regarding, among other topics, design modifications, pricing of changes, and work schedules.¹³⁸⁰ BV continued work on the project and the contracting officer was aware of BV’s efforts.¹³⁸¹ On 27 September 1993, in an un-priced unilateral modification, the contracting officer required completion by 8 January 1994.¹³⁸² On 22 December 1993, BV submitted a revised schedule showing final completion on 10 April 1994.¹³⁸³ Finally, on 11 February 1994, the contracting officer unilaterally set completion for 24 April 1994.¹³⁸⁴ The contracting officer did not indicate that she considered “BV’s progress or lack thereof” since 22 December 1993—the date BV submitted its proposed schedule.¹³⁸⁵

¹³⁷⁰ *Id.* at 161,044.

¹³⁷¹ *Id.* The Army attempted to discredit the credibility of a key AST witness. However, since the “bulk of the evidence on which the board relied . . . was authored by government representatives,” the witness’ testimony “had little bearing” on the decision. *Id.*

¹³⁷² *Id.*

¹³⁷³ *Id.* at 161,045.

¹³⁷⁴ Absent government manifestation that a performance date is no longer enforceable, the waiver doctrine generally does not apply to construction contracts. *Nisei Constr. Co., Inc.*, ASBCA Nos. 51464, 51466, 51646, 99-2 BCA ¶ 30,448.

¹³⁷⁵ ASBCA Nos. 47766, 49337, 50553, 04-1 BCA ¶ 32,604.

¹³⁷⁶ *Id.* at 161,351-52.

¹³⁷⁷ *Id.* at 161,327.

¹³⁷⁸ “BV’s contract provided that BV had 120 days to complete performance of the space-frame work. NASA issued BV’s notice to proceed with contract work on 3 July 1991. The completion date for BV’s contract accordingly was 31 October 1991.” *Id.* at 161,350.

¹³⁷⁹ *Id.* at 161,333.

¹³⁸⁰ *Id.* at 161,333-38.

¹³⁸¹ As the board wrote:

For 20 months after the completion date passed, from January of 1992 to September of 1993, NASA continued to discuss and negotiate with BV proposed changes to the contract work BV’s activities with respect to its space frame contract were known to NASA’s CO [contracting officer] and constituted substantial reliance on an election having been made to not terminate the contract.

Id. at 161,351.

¹³⁸² *Id.* at 161,342.

¹³⁸³ *Id.* at 161,344.

¹³⁸⁴ *Id.* at 161,345.

¹³⁸⁵ *Id.*

Additional problems ensued, and on 15 April 1994, the contracting officer issued BV two letters. The first denied BV additional time it had requested to complete the contract.¹³⁸⁶ The second, a cure notice, stated, “the Government considers [BV’s] failure to start space frame erection a condition that is endangering performance of the contract’ and, ‘unless this condition is cured within 10 days after receipt of this notice, the Government may terminate for default . . . this contract.’”¹³⁸⁷ On 25 April 1994, BV informed the contracting officer that it required three to four weeks to complete the work.¹³⁸⁸ The termination contracting officer terminated the contract on 26 April 1994.¹³⁸⁹ The notification provided, “the act constituting the default is the failure to commence space frame erection and failure to order necessary materials.”¹³⁹⁰ In addition, the notification stated that “BV’s failure to perform is not excusable and that BV’s response to NASA’s cure notice dated 15 April 1994 ‘did not reflect a satisfactory course of action for progressing with the work and completing the requirement by the required date.’”¹³⁹¹

The board first noted, in familiar language, that a “default termination is a drastic sanction.”¹³⁹² The board further explained that liability for monetary damages “are a species of ‘forfeiture’ and must be strictly construed.”¹³⁹³ The board discussed the issue of waiver, first observing that NASA did not terminate the contract until two and a quarter years after the extended contract completion date of 17 January 1992. Citing *DeVito v. United States*,¹³⁹⁴ the board laid out the two elements required to establish the government elected to waive default: “(1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance of the contract by the contractor with the government’s knowledge and implied or express consent.”¹³⁹⁵

Finding waiver in construction contracts is unusual because construction contracts usually include a liquidated damages clause and a clause entitling the contractor to be paid for work completed. Therefore, detrimental reliance usually can not be found merely from government forbearance and continued contractor performance.¹³⁹⁶ BV’s contract, however, did not contain a liquidated damages clause.¹³⁹⁷ Further, NASA “permitted the original contract completion date to pass without apparent concern.”¹³⁹⁸ While the government may have re-established 17 January 1992 as a valid completion date, by unilaterally establishing the two 1994 completion dates, the government at least “implicitly” conceded it waived the January 1992 deadline. Further, “NASA showed no degree of urgency in resolving” the various design problems that occurred at the contract’s beginning, and the government was aware of BV’s work efforts throughout the period in question.¹³⁹⁹ The board concluded, “based on these unique circumstances,” NASA waived the January 1992 completion date.¹⁴⁰⁰

Once a contract completion date has been waived, the board noted, the government must re-establish a new date to regain the ability to terminate the contract for failure to make progress or to complete. Either the contractor can agree on a new date (a bilateral agreement) or the government’s proposed date must be “reasonable based on the contractor’s performance capabilities” when the government re-established the date.¹⁴⁰¹ On 11 February 1994, NASA unilaterally imposed 24 April 1994 as the contract completion deadline. This date, on its face, was unreasonable in light of BV’s proposed schedule submitted on 22 December 1993.¹⁴⁰² Further, NASA did not “consider BV’s capabilities” as reflected in

¹³⁸⁶ *Id.* at 161,346.

¹³⁸⁷ *Id.* at 161,347.

¹³⁸⁸ *Id.*

¹³⁸⁹ *Id.* at 161,348.

¹³⁹⁰ *Id.*

¹³⁹¹ *Id.*

¹³⁹² *Id.* at 161,350.

¹³⁹³ *Id.*

¹³⁹⁴ 413 F.2d 1147 (Ct. Cl. 1969).

¹³⁹⁵ *B.V. Constr.*, 04-1 BCA ¶ 32,604 at 161,350 (discussing *DeVito v. United States*, 413 F.2d 1147, 1154 (Ct. Cl. 1969)).

¹³⁹⁶ *Id.* (citing John R. Glenn, ASBCA No. 24028, 80-1 BCA ¶ 14,428, at 71,133 and Brent L. Sellick, ASBCA No. 21869, 78-2 BCA ¶ 13510, at 66,195).

¹³⁹⁷ *Id.* at 161,351.

¹³⁹⁸ *Id.*

¹³⁹⁹ *Id.*

¹⁴⁰⁰ *Id.*

¹⁴⁰¹ *Id.*

¹⁴⁰² *Id.* at 161,351-52.

its 22 December schedule. Finally, NASA did not present any evidence demonstrating the new completion date was reasonable.¹⁴⁰³ NASA's "attempt to reestablish a completion date for BV's contract, therefore, was ineffective and did not result in a legally enforceable completion date that could serve as a basis for a default termination. Accordingly, NASA's subsequent termination of BV's contract for default on 26 April 1994 was improper."¹⁴⁰⁴

Rough Waives for the National Oceanic and Atmospheric Administration (NOAA)

This year, the General Services Administration Board of Contract Appeals (GSBCA) also had an opportunity to look at the issue of waiver and re-establishing a completion date.¹⁴⁰⁵ In *Divecon Services, LP v. Dep't of Commerce*,¹⁴⁰⁶ the NOAA contracted for charter of a remotely operated vehicle (ROV), support vessel, captain and crew for an eight-day cruise.¹⁴⁰⁷ Although the parties agreed the cruise would take place from 12 to 20 September 2002, mechanical difficulties delayed the start until 15 September 2002. Additional mechanical problems occurred on 16 September, requiring the ROV to return to port.¹⁴⁰⁸ Communications between the contractor and the NOAA indicated that they had agreed to begin again on 20 September. As of 1600 hours on 20 September, Divecon was mechanically, "ready, willing, and able to complete the contract."¹⁴⁰⁹ Earlier, however, differences concerning which party would pay for delays due to bad weather had arisen.¹⁴¹⁰ The contract was silent as to the financial impact of bad weather,¹⁴¹¹ and the parties did not reach an agreement.¹⁴¹²

Soon after 1100 hours on 20 September 2002, the contracting officer orally terminated the contract. The reasoning for termination was unclear. It occurred, however, soon after the contract administrator noted the NOAA scientist, "would not agree to paying for weather days and decided she would rather lose the data than go back out and finish the survey under those conditions."¹⁴¹³ Further, during the termination conversation, the parties did not discuss the mechanical status of the ROV.¹⁴¹⁴

The contract contained a termination for cause clause providing, in part:

The Government may terminate this contract, or any part hereof [sic], for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance.¹⁴¹⁵

The NOAA asserted the termination was based on Divecon's inability "to make progress so as to endanger performance of the contract."¹⁴¹⁶ To prevail on this termination ground, however, the board noted the government must show the contracting officer had a "reasonable belief that there was no reasonable likelihood the contractor could perform the entire contract effort within the time remaining for contract performance."¹⁴¹⁷ The GSBCA found, however, that NOAA had effectively waived the 20 September 2002 completion date and did not establish a new date.¹⁴¹⁸

Judge Daniels noted that by 16 September it was mathematically impossible to complete the eight-day mission by 20

¹⁴⁰³ *Id.* at 161,352.

¹⁴⁰⁴ *Id.*

¹⁴⁰⁵ The waiver doctrine was raised, but not successful, in the Agriculture Board of Contract Appeals decision. *Kadri Int'l Co.*, AGBCA No. 2000-170-1, 04-2 BCA ¶ 32,646.

¹⁴⁰⁶ GSBCA Nos. 15997, 16057, 04-2 BCA ¶ 32,656.

¹⁴⁰⁷ *Id.* at 161,626.

¹⁴⁰⁸ *Id.* at 161,627-28.

¹⁴⁰⁹ *Id.* at 161,631.

¹⁴¹⁰ *Id.* at 161,630.

¹⁴¹¹ "The parties agree that the contract does not explicitly address, and the parties never discussed prior to award, how costs would be allocated if, on any cruise day or days, the weather was so bad that the ROV could not operate." *Id.* at 161,627.

¹⁴¹² *Id.* at 161,632.

¹⁴¹³ *Id.* at 161,630.

¹⁴¹⁴ *Id.*

¹⁴¹⁵ *Id.* at 161,627.

¹⁴¹⁶ *Id.* at 161,634.

¹⁴¹⁷ *Id.*

¹⁴¹⁸ *Id.*

September. Nonetheless, the government encouraged Divecon to conduct expensive repairs and to keep its personnel on stand-by.¹⁴¹⁹ From 16 to 20 September, the government negotiated with Divecon, knowing that Divecon was hard at work attempting to repair the ROV. Therefore, the government waived the right to terminate the contract on 20 September.¹⁴²⁰

The government also argued that Divecon abandoned performance.¹⁴²¹ Apparently, the government believed that Divecon's refusal to accept financial liability for losses due to bad weather constituted abandonment. The board noted the absurdity of this position. The contract was silent on this issue. The government could not threaten a contractor to accept a change without consideration, that could have a significant negative financial impact on the contractor. "Permitting the government to terminate a contract on this ground would generally be a 'license for abuse of contractors.'"¹⁴²²

Labor Conspiracy, Akin to a Strike, is a Valid Defense to T4D

On 20 November 2001, the Army awarded NTC Group Inc. (NTC) three contracts to operate oil analysis laboratories at Fort Bragg, North Carolina; Fort Drum, New York; and, Hunter Army Airfield (AAF), Georgia.¹⁴²³ NTC was not the incumbent contractor at any of these locations. The contracts each required two "Class A Logistic Support Activity (LOGSA) certified Technician/Evaluators."¹⁴²⁴ The contracts also contained additional training, skills and experience requirements. The ASBCA found there was a limited pool of Army Oil Analysis Program (AOAP) certified employees and that to fulfill the contracts' needs, NTC would have had to "either hire the incumbents or lure certified evaluators from other AOAP laboratories."¹⁴²⁵ The contract required evidence of successful staffing ten days after the government determined the lowest responsive, responsible bidder.¹⁴²⁶

The manager of the Fort Bragg laboratory, in essence, successfully persuaded the Fort Drum and Hunter AAF managers to refuse employment with NTC.¹⁴²⁷ The managers, in turn, persuaded most of the other current employees to refuse to join NTC. These actions were taken with the explicit intent to thwart NTC's successful performance.¹⁴²⁸ In addition, LOGSA refused to provide NTC with a list of names of currently certified evaluators.¹⁴²⁹

NTC could not obtain a sufficient number of certified evaluators at any of the three locations. The respective contracting officers terminated each contract for cause.¹⁴³⁰ The board found that failure to provide an adequate number of qualified personnel was a valid ground for terminating the contracts.¹⁴³¹ The board also found, however, that the particular

¹⁴¹⁹ *Id.*

¹⁴²⁰ *Id.*

¹⁴²¹ *Id.* at 161,635.

¹⁴²² *Id.* at 161,635-36. The board also rejected two other government rationales. First, the government argued that the equipment failure was grounds to terminate. This argument was contrary to Divecon's assertion that it was "ready, willing and able to complete the contract" as of the afternoon of 20 September. *Id.* at 161,635. Next, the government asserted it terminated the contract because Divecon could not guarantee its equipment in seas rougher than "sea state 3." The contract, however, only required the equipment to function in sea states 3 or calmer. *Id.*

¹⁴²³ NTC Group, Inc., ASBCA Nos. 53720, 53721, 53722, 04-2 BCA ¶ 32,706.

¹⁴²⁴ "[T]rained in ferrographic procedures and methodology in accordance with TM 38-301." *Id.* Ferrography is "an analytical method of assessing machine health by quantifying and examining ferrous wear particles suspended in the lubricant or hydraulic fluid." OIL AND LUBRICATION ANALYSIS DICTIONARY, available at <http://www.oilanalysis.com/dictionary/> (last visited Nov. 15, 2004).

¹⁴²⁵ NTC Group, Inc., 04-2 BCA ¶ 32,706 at 161,804.

¹⁴²⁶ *Id.* at 161,804.

¹⁴²⁷ *Id.* at 161,802-03.

¹⁴²⁸ *Id.* at 161,807.

¹⁴²⁹ *Id.* at 161,806. LOGSA denied the information request based on the Privacy Act. The ASBCA did not rule on the appropriateness of this Privacy Act decision. *Id.* at 161,811-12 n.9.

¹⁴³⁰ *Id.* at 161,807-09. The contract included the clause at FAR section 52.212-4, Contract Terms and Condition—Commercial Items (May 1999), which provided, in pertinent part:

(m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

Id. at 161,805-06 (quoting the clause at FAR section 52.212-4).

¹⁴³¹ *Id.* at 161,809.

labor situation NTC faced was beyond NTC's reasonable control and did not result from NTC's fault or negligence.¹⁴³² The board found that a labor situation will only excuse performance "in the most unusual circumstances" or "where abnormal circumstances exist which could not have been anticipated."¹⁴³³ The board viewed the combination of the incumbent chief's conspiracy, the LOGSA requirements, and the LOGSA refusal to share names as just such an abnormal circumstance.¹⁴³⁴

Lieutenant Colonel Michael Benjamin.

Terminations for Convenience

Extraordinary, but not so Extraordinary You Get Profit on a Subcontractor's Efforts in your Cost Plus Fixed Fee Contract

In *Lockheed Martin Corp., Naval Electronics and Surveillance Systems-Surface Systems*,¹⁴³⁵ Lockheed Martin was the "lead contractor" in a contract with the Naval Sea Systems Command (NAVSEA) to qualify Unisys Corp. (Unisys) and Westinghouse Electric Corp. (Westinghouse) as second source producers of key components of the AEGIS Weapon System's AN/SPY-1 Radar System.¹⁴³⁶ The prime contract was a cost plus fixed fee (CPFF) effort between NAVSEA and Lockheed Martin.¹⁴³⁷ Lockheed Martin, in turn, contracted with Unisys for antenna work and with Raytheon for transmitter work.¹⁴³⁸ When NAVSEA terminated the prime contract for the government's convenience, Lockheed sought to include as part of its termination settlement a fee on its subcontractor's efforts.¹⁴³⁹

NAVSEA contracted with Lockheed Martin under the provisions of FAR subpart 17.4, Leader Company Contracting.¹⁴⁴⁰ This subpart authorizes "an extraordinary acquisition technique" to direct a "developer or sole producer of a product or system" to be the "leader company" of one or more designated "follower companies, so that the" follower companies can become "source[s] of supply."¹⁴⁴¹ The prime contract divided the effort into two phases. Each phase included submission of various plans and other data as set forth in a "Contract Data Requirements List" (CDRL).¹⁴⁴² According to Lockheed Martin's subcontracts, the subcontractors had to submit data pursuant to a Subcontractor Data Requirements List (SDRL).¹⁴⁴³

When NAVSEA terminated the prime contract, Phase I had been completed.¹⁴⁴⁴ Phase II was ten to fifteen percent completed,¹⁴⁴⁵ and the required CDRLs and SDRLs had been delivered.¹⁴⁴⁶ In determining a settlement amount, NAVSEA and Lockheed differed in only one main respect: "whether Lockheed Martin [was] entitled to a fee based on subcontractor efforts."¹⁴⁴⁷ Lockheed Martin asserted "'costs incurred for services rendered to the date of termination by the first-tier subcontractors are fee/profit-bearing costs,' and that it was entitled to fee on its costs for services rendered to the date of

¹⁴³² *Id.* at 161,811.

¹⁴³³ *Id.* at 161,810.

¹⁴³⁴ *Id.* at 161,810-11.

¹⁴³⁵ ASBCA Nos. 53032, 54064, 03-2 BCA ¶ 32,408.

¹⁴³⁶ *Id.* at 160,387.

¹⁴³⁷ *Id.* at 160,388-89. NAVSEA and Lockheed actually entered into a letter contract that was never definitized. *Id.* at 160,396.

¹⁴³⁸ *Id.* at 160,392-93 and 160,394-95, respectively. On the antenna side, Unisys thereafter subcontracted with Westinghouse; while on the transmitter side, Raytheon, subcontracted with Unisys. *Id.* at 160,393-94 and 160,395-96. The best, concise, discussion of the contracting and subcontracting structure is found in the reconsideration of this decision, *Lockheed Martin Corp., Naval Electronics and Surveillance Systems-Surface Systems*, ASBCA Nos. 53032, 54064, 04-1 BCA ¶ 32,559, 2004 ASBCA LEXIS 16, at *1-2 (Mar. 10, 2004).

¹⁴³⁹ *Lockheed Martin*, 03-2 BCA ¶ 32,408, at 160,387.

¹⁴⁴⁰ *Id.* at 160,388 (discussing and citing FAR subpart 17.4).

¹⁴⁴¹ *Id.* (citing FAR section 17.401). The decision sets forth the FAR's four prerequisites for use of this contracting technique: (1) The leader company has the necessary production know-how and is able to furnish required assistance to the follower(s); (2) No other source can meet the Government's requirements without the assistance of a leader company; (3) The assistance required of the leader company is limited to that which is essential to enable the follower(s) to produce the items; and (4) Its use is authorized in accordance with agency procedures. *Id.* (citing FAR section 17.402).

¹⁴⁴² *Id.* at 160,390-91.

¹⁴⁴³ *Id.* at 160,393 and 160,395.

¹⁴⁴⁴ Phase I was completed in June 1989. *Id.* at 160,396. NAVSEA terminated the contract on 21 June 1990. *Id.* at 160,397.

¹⁴⁴⁵ *Id.*

¹⁴⁴⁶ *Id.* at 160,398.

¹⁴⁴⁷ *Id.* at 160,410.

termination, including such costs from its first and second tier subcontractors.”¹⁴⁴⁸ The government’s position was the FAR did not entitle a prime contractor to fee or profit on subcontractor work.¹⁴⁴⁹

FAR section 49.305-1(a) applies to cost-reimbursement contracts terminated for convenience.¹⁴⁵⁰ It provides, in pertinent part:

The TCO shall determine the adjusted fee to be paid, if any, in the manner provided by the contract. The determination is generally based on a percentage of completion of the contract or of the terminated portion . . . The contractor’s adjusted fee shall not include an allowance for fee for subcontract effort included in subcontractors’ settlement proposals.¹⁴⁵¹

The relevant contract termination clause, FAR section 52.249-6(g)(4)(i) similarly denies the prime contractor a fee for subcontractor effort.¹⁴⁵² In determining the prime contractors’ fee, FAR section 52.249-6(g)(4)(i) explicitly calls for “excluding subcontract effort included in subcontractors’ termination proposals.”¹⁴⁵³ Apparently, both parties failed to discuss FAR section 52.249-6.¹⁴⁵⁴

Lockheed Martin argued that FAR section 49.305-1(a) did not apply to subpart 17.4 contracts.¹⁴⁵⁵ The board disagreed. Nothing in FAR parts 17 or 49 indicate that Leader Contracts are exempt from FAR section 49.305-1(a).¹⁴⁵⁶ Further, while the parties conducted robust negotiations, there is no evidence the parties intended any interpretation besides the plain meaning of these provisions.¹⁴⁵⁷

Prior ASBCA precedent bolstered this interpretation of the two far clauses. *Kollmorgen Corp., Electro-Optical Division*,¹⁴⁵⁸ involved the interpretation of FAR section 52.249-6’s predecessor clause. Regarding Kollmorgen’s ability to receive a fee on subcontractor effort after termination of its CPFF contract, the board wrote, “The termination clause and the regulations are very clear that the prime contractor . . . may not include a fee on subcontractor cost or effort included in the subcontractor’s termination claim . . . Kollmorgen may not collect a fee on the amount of the settlement with [its subcontractor,] Westinghouse.”¹⁴⁵⁹

Lockheed Martin also argued it should at least recover a profit for the SDRLs actually delivered by the subcontractors to NAVSEA.¹⁴⁶⁰ This ground was also not persuasive in the face of FAR section 49.305-1(a), the FAR clause at section 52.249-6, and *Kollmorgen*. The board concluded, the two FAR clauses mandated that “subcontract effort, delivered SDRLs or otherwise, must be excluded in determining prime contractor fee so long as the prime contract is CPFF.”¹⁴⁶¹

¹⁴⁴⁸ *Id.* at 160,402.

¹⁴⁴⁹ *Id.* at 160,410-11.

¹⁴⁵⁰ See FAR, *supra* note 20, subpt. 49.3, Additional Principles for Cost Reimbursement Contracts Terminated for Convenience, which includes section 49.305-1(a).

¹⁴⁵¹ *Id.* at 49.305-1.

¹⁴⁵² *Lockheed Martin*, 03-2 BCA ¶ 32,408, at 160,411.

¹⁴⁵³ *Id.* (quoting the clause at FAR section 52.249-6(g)(4)(i) (May 1986)).

¹⁴⁵⁴ *Id.*

¹⁴⁵⁵ In fact, Lockheed only wanted to exclude the profit-limiting portion of section 49.305-1. *Id.*

¹⁴⁵⁶ *Id.* at 160,411-12.

¹⁴⁵⁷ *Id.* at 160,412.

¹⁴⁵⁸ ASBCA No. 28480, 86-2 BCA ¶ 18,919.

¹⁴⁵⁹ *Lockheed Martin*, 03-2 BCA ¶ 32,408 at 160,412 (quoting *Kollmorgen Corp.*, ASBCA No. 28480, 86-2 BCA ¶ 18,919, at 95,411).

¹⁴⁶⁰ *Id.* at 160,412-13.

¹⁴⁶¹ *Id.* at 160,413. The board denied reconsideration in *Lockheed Martin Corp., Naval Elec. and Surveillance Systems-Surface Systems*, ASBCA Nos. 53032, 54064, 04-1 BCA ¶ 32,559, 2004 ASBCA LEXIS 16 (Mar. 10, 2004).

The Helicopter that Never Took Off

In late February 2004, the Army announced the cancellation of the Comanche helicopter program.¹⁴⁶² Although the Army had invested over \$6.9 billion in the program, the termination was expected to save approximately \$14 billion.¹⁴⁶³ As of August 2004, reports indicated that the prime contractors, Boeing and Sikorsky, were preparing their termination settlement proposals.¹⁴⁶⁴ Termination settlement estimates run from \$480 million to several billion dollars.¹⁴⁶⁵

Delivery Order Estimates Don't Lock in Government

Maggie's Landscaping, Inc.,¹⁴⁶⁶ had a requirements contract to mow, clip and edge ninety-three areas at Aberdeen Proving Ground.¹⁴⁶⁷ The government issued monthly Delivery Orders (DOs) setting forth the "government's anticipated monthly requirements and clearly identified them as estimated mowing frequencies."¹⁴⁶⁸ Appellant knew the DOs contained estimates.¹⁴⁶⁹ Each week Maggie's would propose areas for mowing. The contracting officer's representative or alternate contracting officer's representative would then approve Maggie's list. Later, Maggie's prepared, and the government paid, monthly invoices based on actual mowing accomplished.¹⁴⁷⁰ The actual work, however, did not always match the monthly estimates.¹⁴⁷¹ In all, actual mowing ordered was less each season than the DO estimates.¹⁴⁷²

Upon completion of the base and four option years, Maggie's submitted a claim, alleging the government's scheduling of less mowing than the DO estimates constituted partial termination for convenience.¹⁴⁷³ Specifically, Maggie's asserted:

the government has no obligation pursuant to a requirements contract to issue delivery orders equal to the government's estimated quantities However, once issued, a contract for the work encompassed by a delivery order is formed, and a subsequent reduction in the scope of the work ordered constitutes a partial termination.¹⁴⁷⁴

The board disagreed for two reasons. First, in most cases, Maggie's had agreed, through bilateral modifications to "adjust the amounts in the DO estimates" to the amounts actually mowed.¹⁴⁷⁵ Second, the contract's terms made clear that the DOs were in fact estimates subject to weekly scheduling and not "unconditional commitment[s]."¹⁴⁷⁶ Thus, the government's failure to order exactly the same amounts as in the DOs did not result in a constructive partial termination for convenience.¹⁴⁷⁷

Lieutenant Colonel Michael Benjamin.

¹⁴⁶² See *DOD Cancels Comanche Helicopter Program*, 46 GOV'T CONTRACTOR 8, ¶ 81 (Feb. 25, 2004).

¹⁴⁶³ *Id.*

¹⁴⁶⁴ *U.S. Army Still Counting Cost of RAH-66*, DEF. NEWS, Aug. 2, 2004 at 20.

¹⁴⁶⁵ Claude M. Bolton, J., the Army's Assistant Secretary for Acquisition, Logistics, and Technology, estimated between \$480 million and \$650 million. An unnamed former Army aviation official was quoted in *Defense News* as saying, "Mark my words, after it's all said and done, it will be at least \$2.5 billion." *Id.*

¹⁴⁶⁶ ASBCA Nos. 52462, 52463, 04-2 BCA ¶ 32,647.

¹⁴⁶⁷ *Id.* at 161,554.

¹⁴⁶⁸ *Id.* at 161,556.

¹⁴⁶⁹ *Id.*

¹⁴⁷⁰ *Id.* at 161,557.

¹⁴⁷¹ *Id.*

¹⁴⁷² *Id.* at 161,558.

¹⁴⁷³ *Id.* at 161,564.

¹⁴⁷⁴ *Id.*

¹⁴⁷⁵ *Id.*

¹⁴⁷⁶ *Id.*

¹⁴⁷⁷ *Id.* at 161,564-65. The board rejected Maggie's other bases for recovery: ordering less than the estimates did not constitute a constructive change, nor a cardinal change; nor did the government act in bad faith. *Id.* at 161,565-66.

Contract Disputes Act (CDA) Litigation

Jurisdiction

If We Could Only Get to the Merits!

This year has given rise to a bumper-crop of court and board decisions involving jurisdictional and procedural issues. Though some may view this abundance as the welcomed result of aggressive lawyering, at least one prominent commentator has bemoaned the inability of the courts and boards to cut through the morass of procedural issues and get to the merits.¹⁴⁷⁸ Be that as it may, several decisions handed down this year warrant examination.

In *England v. Swanson Group (Swanson)*¹⁴⁷⁹ the CAFC held it lacked jurisdiction over a contractor's appeal because the contractor's request for an extension for filing a settlement proposal was not a "claim" under the Contract Disputes Act (CDA).¹⁴⁸⁰ In *Swanson*, the Navy awarded Swanson a guard services contract in 1991. In 1992, the Navy ordered Swanson to cure what the Navy perceived as Swanson's failure to comply with the contract terms.¹⁴⁸¹ Shortly thereafter, the Navy terminated the contract for default. Swanson filed a timely appeal of the default to the ASBCA, whereupon the board ordered the Navy to convert the termination for default to a termination for convenience.¹⁴⁸²

In accordance with the clause at FAR section 52.249-2(e),¹⁴⁸³ when the government terminates a contract for convenience, a contractor has one year to submit a termination for convenience settlement proposal. If a contractor fails to submit a proposal within that time, the contracting officer "may determine, on the basis of the information available, the amount, if any, due the Contractor."¹⁴⁸⁴ In the present case, Swanson did not submit a termination settlement within the one-year period, but prior to the expiration of the period, requested a one-year extension with the Navy. The Navy denied this request, and shortly after the end of the one-year period, unilaterally determined Swanson was entitled to \$12,294.21 in termination settlement costs. Swanson appealed the Navy's decision, whereupon the ASBCA awarded Swanson \$249,840.38 in costs over and above the \$12,294.21 paid by the Navy.¹⁴⁸⁵

On appeal to the CAFC, the Navy, for the first time, argued the board lacked jurisdiction to entertain the quantum appeal because Swanson failed to submit a claim, or alternatively, a settlement proposal that could ripen into a claim, prior to the contracting officer's settlement determination.¹⁴⁸⁶ The court agreed with the Navy's argument. Specifically, the court observed that while the board addressed whether Swanson had complied with the requirements of FAR section 52.249-2(e), it did not address the jurisdictional prerequisites of the CDA itself. Because Swanson submitted neither a claim, nor a termination settlement proposal that could have ripened into a claim, prior to the contracting officer's settlement determination, Swanson could not appeal the contracting officer's settlement determination. To the court, "Swanson's appeal was not authorized by the CDA because it was not an appeal from a contracting officer's final decision on a claim that Swanson had submitted."¹⁴⁸⁷ Accordingly, the court vacated the board's decision and remanded the case to the board with instruction that the case be dismissed.¹⁴⁸⁸

¹⁴⁷⁸ See Ralph C. Nash & John Cibinic, *Postscript: Late Convenience Termination Settlement Proposals*, 18 NASH & CIBINIC REP. 4 ¶ 13 (2004).

¹⁴⁷⁹ 353 F.3d 1375 (Fed. Cir. 2004).

¹⁴⁸⁰ 41 U.S.C.S. §§ 601-613 (LEXIS 2004).

¹⁴⁸¹ *Swanson*, 353 F.3d at 1376-77. The underlying dispute involved the number of qualified guards Swanson posted at required facilities. *Id.*

¹⁴⁸² See *The Swanson Group, Inc.*, ASBCA No. 44664, 98-2 ¶ 29,896.

¹⁴⁸³ FAR, *supra* note 20, at 52.249-2(e).

¹⁴⁸⁴ *Id.*

¹⁴⁸⁵ See *The Swanson Group, Inc.*, ASBCA No. 52109, 02-1 BCA ¶ 31,836. Swanson requested reconsideration based on math errors in the board's decision, whereupon the board increased the amount by \$15,941.66. See *The Swanson Group, Inc.*, ASBCA No. 52109, 02-2 BCA ¶ 31,906.

¹⁴⁸⁶ *Swanson*, 353 F.3d at 1377-78.

¹⁴⁸⁷ *Id.* at 1379.

¹⁴⁸⁸ *Id.* at 1380. If it is any consolation to Swanson, the CAFC left the appellant some hope. To the court, the fact that the board lacked jurisdiction over Swanson's previous appeal did not bar Swanson from submitting a termination settlement proposal to the contracting officer. "If Swanson submits such a proposal now, the contracting officer will be in a position either to reject it on the ground that it is untimely or to consider it on the merits. If the contracting officer rules the proposal untimely, Swanson will have the option of appealing that decision as a denial of a claim under the CDA." *Id.* See also *C.J. Machine Inc.*, ASBCA No. 54249, 04-1 BCA ¶ P32,515 (holding that the government's silence in response to contractor's termination for convenience settlement proposal, coupled with contractor's request for a final decision, was sufficient evidence that an impasse existed concerning the proposal).

Pursuant to the CDA, a party has 120 days to appeal an adverse board decision to the CAFC.¹⁴⁸⁹ In a case of first impression, the CAFC recently held that it has jurisdiction to entertain issues involving both entitlement and quantum in a timely appeal of a board's quantum ruling, even when the entitlement decision was issued well outside the 120 day period.

In *Brownlee v. DynCorp*,¹⁴⁹⁰ the Army awarded DynCorp a cost-plus-award-fee contract for base support services at Fort Irwin, California, in 1991.¹⁴⁹¹ In 1992, the Army Criminal Investigation Division (CID) began investigating allegations of criminal activity by DynCorp and its employees relating to DynCorp's performance of the contract.¹⁴⁹² Upon completion of the investigation, the government declined to prosecute the contractor, but charged a DynCorp employee in a single-count information.¹⁴⁹³ The employee subsequently entered into a plea agreement with the government, pleading guilty to a charge of unauthorized access to a government computer.¹⁴⁹⁴ The government filed no criminal or civil actions against DynCorp as a result of the investigations.¹⁴⁹⁵

In 1996, DynCorp submitted a certified claim to the Army seeking reimbursement for costs it incurred in connection with the criminal investigation.¹⁴⁹⁶ The Army denied the claim, and shortly thereafter DynCorp appealed the decision to the ASBCA.¹⁴⁹⁷ On 21 June 2000, the ASBCA rendered an entitlement decision, holding that DynCorp could recover a portion of its defense costs.¹⁴⁹⁸ Between 2000 and 2002, the parties could not arrive at an acceptable quantum settlement, so on 15 May 2002, the ASBCA issued a final judgment against the Army for \$585,650.¹⁴⁹⁹ The Army then filed a notice of appeal with the CAFC on 11 September 2002, within 120 days of the quantum decision, but more than two years after the entitlement decision.¹⁵⁰⁰

On appeal, the government argued that its decision not to appeal the earlier board decision did not render the present appeal of entitlement issues as time barred.¹⁵⁰¹ Upon examination, the court agreed with the government. To the court, allowing an aggrieved party to wait for a truly final judgment before appealing the case furthers both the CDA's purpose, as well as the doctrine of finality.¹⁵⁰² "A contrary rule would force the government or the contractor to appeal each and every Board entitlement decision that was appealable . . . or lose the right to appeal those issues Requiring appeals under such circumstances would compel premature appeals that might in fact be mooted if the parties awaited a judgment concerning quantum, thus wasting the parties' and this court's resources."¹⁵⁰³ As such, the court concluded the appeal was not time barred and proceeded directly to the merits.¹⁵⁰⁴

The CAFC wasted little time in applying *DynCorp* as precedent, this time in favor of the appellant. In *J.C.*

¹⁴⁸⁹ 41 U.S.C.S. § 607(g)(1)(A) (LEXIS 2004).

¹⁴⁹⁰ 349 F.3d 1343 (Fed. Cir. 2003).

¹⁴⁹¹ *Id.* at 1345.

¹⁴⁹² *Id.* at 1345-46.

¹⁴⁹³ *Id.* at 1346. The information alleged that Mr. Marcum inputted into a government accounting system "estimated hours, which represented the average time among all work centers using [the government accounting system] for performing a particular scheduled service," rather than the actual work hours his employees had expended. *Id.*

¹⁴⁹⁴ See 18 U.S.C. § 1030(a)(3) (2000).

¹⁴⁹⁵ *DynCorp*, 348 F.3d at 1346.

¹⁴⁹⁶ *Id.* DynCorp excluded from its claim the fees charged by the lawyers for the employee's defense. *Id.*

¹⁴⁹⁷ *Id.* at 1346-47.

¹⁴⁹⁸ See *DynCorp*, ASBCA No. 49714, 00-2 BCA ¶ 30,986, at 152,930. The board accepted the government's argument that FAR section 31.205-47(b) barred recovery of defense costs for a proceeding in which only the contractor's agent or employee, not the contractor itself, was convicted. However, the board also found that the FAR provision was "inconsistent" with 10 U.S.C.S. § 2324 and 41 U.S.C.S. § 256. Accordingly, the ASBCA held the provision was an unenforceable "mere nullity." *Id.*

¹⁴⁹⁹ *DynCorp*, ASBCA No. 53098, 2002 ASBCA LEXIS 60, at *5.

¹⁵⁰⁰ *DynCorp*, 348 F.3d at 1346.

¹⁵⁰¹ *Id.* at 1347.

¹⁵⁰² *Id.*

¹⁵⁰³ *Id.* at 1347-48.

¹⁵⁰⁴ *Id.* at 1349. Once the court established it had jurisdiction over the entitlement portion of the appeal, the court examined the issue of whether FAR section 31.205-47(b) barred recovery of defense costs for a proceeding in which only the contractor's employee, not the contractor itself, was convicted. Reversing the board, the court concluded the costs were not allowable. *Id.* at 1356. For a discussion of the fraud aspects of this case, see *infra* section titled Procurement Fraud.

Equipment Corporation v. England (J.C.),¹⁵⁰⁵ appellant J.C. timely appealed an adverse ASBCA quantum decision to the CAFC.¹⁵⁰⁶ Once before the CAFC, J.C. launched an attack on both the ASBCA's quantum decision, as well as entitlement issues that had been the subject of a much earlier ASBCA decision.¹⁵⁰⁷ In response to a government motion to limit the scope of J.C.'s appeal to only quantum, the court cited *DynCorp* as dispositive and proceeded to an examination of both entitlement and quantum.¹⁵⁰⁸

NAFIs: Something Old, Something New

In 2002 the CAFC created something of a stir with *Pacrim Pizza Co. v. Secretary of the Navy*,¹⁵⁰⁹ when the court held it lacked jurisdiction to entertain a claim brought by a non-appropriated fund instrumentality (NAFI) not affiliated with a post exchange because the Tucker Act only confers jurisdiction over cases where the judgment is to be paid from appropriated funds.¹⁵¹⁰ Last year, the CAFC reaffirmed it lacked jurisdiction over claims involving NAFI funds in a case involving a Federal Prison Industries contract.¹⁵¹¹ This year, the CAFC has once again informed a contractor it lacks jurisdiction over a claim involving NAFI funds. In *AINS Inc. v. United States*,¹⁵¹² the CAFC affirmed the COFC's dismissal of appellant's claim against the U.S. Mint for lack of jurisdiction.¹⁵¹³ In doing so, the CAFC established a four-part test for determining whether a government instrumentality is a NAFI.

In CAFC's eyes, a government instrumentality is a NAFI if: (1) it does not receive its monies by congressional appropriation; (2) it derives its funding primarily from its own activities, services, and product sales; (3) absent a statutory amendment, there is no situation in which appropriated funds could be used to fund the federal entity; and, (4) there is a clear expression by Congress that the agency was to be separated from general federal revenues.¹⁵¹⁴ Looking to the present action, the CAFC observed that the U.S. Mint met all four factors. Thus AINS was without remedy before the CAFC.¹⁵¹⁵

Although the NAFI doctrine may work hardships for contractors seeking redress from NAFIs, a recent ASBCA decision demonstrates that contractors are not entirely without redress. In *SUFI Network Services Inc.*¹⁵¹⁶ appellant SUFI entered into a contract with the U.S. Air Force Services Agency (a NAFI not affiliated with the Army and Air Force Exchange System) to install and operate a lodging facility telecommunication system at designated Air Force lodgings facilities in Europe for fifteen years.¹⁵¹⁷ Pursuant to the contract, SUFI dug trenches, laid telephone cable, and performed other work at no expense to the Air Force. Upon completion of this work, SUFI was to be paid by guests who placed local or long distance phone calls from the lodging facilities.¹⁵¹⁸

During the course of performance, a dispute arose concerning the extent to which SUFI could take measures to block guests' access to toll-free cards and take other measures to ensure guests did not bypass SUFI's services.¹⁵¹⁹ In November, 2003, SUFI requested a final decision from the Air Force concerning the Air Force's interpretation of the

¹⁵⁰⁵ 360 F.3d 1311 (Fed. Cir. 2004).

¹⁵⁰⁶ *Id.* at 1312.

¹⁵⁰⁷ *Id.* at 1314.

¹⁵⁰⁸ *Id.* Unfortunately for appellant, upon examination of the merits the court agreed with the government on all points and affirmed the ASBCA's decisions. *Id.* at 1319.

¹⁵⁰⁹ 304 F.3d 1291 (Fed. Cir. 2002).

¹⁵¹⁰ *Id.* See also 2002 Year in Review, *supra* note 300, at 209.

¹⁵¹¹ See Core Concepts of Florida, Inc. v. United States, 327 F.3d 1331 (Fed. Cir. 2003). See also 2003 Year in Review, *supra* note 29, at 106.

¹⁵¹² 365 F.3d 1333 (Fed. Cir. 2004).

¹⁵¹³ AINS, Inc. v. United States, 56 Fed. Cl. 522 (2003).

¹⁵¹⁴ AINS, 365 F.3d at 1342.

¹⁵¹⁵ *Id.* at 1344-45. The CAFC was not entirely without sympathy for appellant, noting that "in reaching this legally correct conclusion, the Court of Federal Claims lamented that 'the extension of the NAFI doctrine [may] ultimately increase the price of government goods and services by denying the efficiency of the market place to institutions, such as private enterprise funds, ironically established to mimic the market place.' The Court of Federal Claims also reminded us of Abraham Lincoln's observation in his 1861 message to Congress: 'It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.'" *Id.* at 1344.

¹⁵¹⁶ ASBCA No. 54503, 04-1 BCA ¶ 32,606.

¹⁵¹⁷ *Id.* at 161,364.

¹⁵¹⁸ *Id.* at 161,364-65.

¹⁵¹⁹ *Id.* at 161,365.

contract. The Air Force responded with a decision that was significantly at odds with SUFI's contract interpretation. SUFI then appealed the Air Force's final decision to the ASBCA. The appeal did not seek monetary relief, but rather was a request for the ASBCA's interpretation of the contract.¹⁵²⁰

Once before the board, the Air Force sought to dismiss the appeal for lack of jurisdiction.¹⁵²¹ The board quickly distinguished the case from *Pacrim Pizza*,¹⁵²² observing that appellant did not seek monetary damages, but rather non-monetary relief.¹⁵²³ The board observed that in *Alliant Techsystems, Inc. v. United States (Alliant)*¹⁵²⁴ the CAFC held that the Tucker Act,¹⁵²⁵ as amended in 1992, defined the COFC's jurisdiction to render judgments in CDA disputes to include certain specific kinds of non-monetary disputes, "and other non-monetary disputes on which a decision of the [contracting officer] has been issued under . . . the [CDA]."¹⁵²⁶ Thus, under *Alliant* the COFC (as well as the ASBCA) had jurisdiction to issue a declaratory judgment.¹⁵²⁷ The board reasoned that its conclusion that it had jurisdiction to issue a declaratory relief "was consistent with the decisions of most of the boards of contract appeals, which have held that they have authority under the CDA, as they did under pre-CDA law, to grant declaratory relief when appropriate."¹⁵²⁸

Counting the Days Away

A recent COFC case stands for the proposition that it is a good idea to regularly check your mailbox. In *Riley & Ephriam Construction Co. Inc. v. United States*¹⁵²⁹ the government awarded plaintiff a contract requiring demolition and other construction services. During the course of performance, plaintiff encountered several unanticipated problems, and filed an equitable adjustment claim with the contracting officer.¹⁵³⁰ The contracting officer issued a final decision denying the claim, which was delivered via certified mail to a post office box address that the contractor provided as its business address when it submitted its claim.¹⁵³¹ Upon arrival of the letter, the post office placed a notice in plaintiff's post office box stating the letter had arrived. Plaintiff failed to pick up the letter, and twenty-nine days later, the post office returned the letter to the contracting officer.¹⁵³² Upon receipt of the returned letter, the contracting officer faxed a copy of the final decision to the plaintiff's attorney, who later claimed he never saw the fax.¹⁵³³

Ultimately, plaintiff brought suit before the COFC, seeking damages associated with the claim for equitable adjustment.¹⁵³⁴ At the time plaintiff filed the suit, more than one year had passed from the date the final decision was received in the post office box, but less than one year had passed from the date the contracting officer faxed the final decision to plaintiff's counsel.¹⁵³⁵

Once before the court, the government challenged the court's jurisdiction to entertain the case.¹⁵³⁶ The issue before the court was whether plaintiff had "received" the contracting officer's final decision when the decision was accepted by the post office where plaintiff held a post office box. Looking to the plain wording of the CDA, the court observed the CDA requires that: "[t]he contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the

¹⁵²⁰ *Id.* at 161,365-66.

¹⁵²¹ *Id.* at 161,366.

¹⁵²² 304 F.3d 1291 (Fed. Cir. 2002).

¹⁵²³ *SUFI*, 04-1 BCA ¶ 32,606, at 161,366.

¹⁵²⁴ 178 F.3d 1260, *reh'g denied*, 186 F.3d 1379 (Fed. Cir. 1999).

¹⁵²⁵ 28 U.S.C.S. § 1491(a)(2) (LEXIS 2004).

¹⁵²⁶ *Id.*

¹⁵²⁷ *SUFI*, 04-1 BCA ¶ 32,606, at 161,366.

¹⁵²⁸ *Id.* (citing *Garrett v. Gen. Elec. Co.*, 987 F.3d 747, 750-51 (Fed. Cir. 1993)).

¹⁵²⁹ 61 Fed. Cl. 405 (2004).

¹⁵³⁰ *Id.* at 407.

¹⁵³¹ *Id.*

¹⁵³² *Id.*

¹⁵³³ *Id.* at 408.

¹⁵³⁴ *Id.*

¹⁵³⁵ *Id.*

¹⁵³⁶ *Id.*

decision to the contractor.”¹⁵³⁷ Further, under the act, the contractor may bring an action before the COFC only where the action is “filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim.”¹⁵³⁸ Applying this standard, the court concluded that “receipt” took place upon arrival of the final decision at plaintiff’s post office box. The court observed that plaintiff implicitly consented to allow the U.S. Postal Service to handle and accept mail on plaintiff’s behalf. Further, in accepting the letter, the Postal employees “were acting within the scope of their employment . . . and in accordance with the obligations arising from Plaintiff’s rental of the post office box.”¹⁵³⁹ As such, the Postal Service was “authorized, and expected, to accept mail directed to the Plaintiff.”¹⁵⁴⁰

In another case involving the triggering of the appeal period, the ASBCA held where a contracting officer both hand-delivered and mailed a copy of a final decision to a contractor, the contractor’s receipt of the mailed copy triggered the ninety-day appeal period under the CDA.¹⁵⁴¹ In *AST Anlagen-und Sanierungstechnik GmbH*¹⁵⁴² appellant AST submitted a delay and acceleration cost claim to the Army contracting officer on 30 June 1996.¹⁵⁴³ On 5 August 1998, the contracting officer mailed a copy of the final decision directly to AST, and also hand delivered a copy to a colleague of AST’s attorney. AST received the mailed copy of the final decision on 8 August 1998, and on 4 November 1998, appellant’s attorney filed a notice of appeal to the ASBCA.¹⁵⁴⁴ Needless to say, the notice of appeal was within the ninety-day appeal period from the date AST received mailed delivery, but outside the ninety-day window if delivery were deemed to have taken place on 5 August 1998,¹⁵⁴⁵ the date the government hand delivered the final decision to appellant.

Upon examination of the government’s motion to dismiss, the board observed that the contracting officer failed to inform appellant as to which version of the final decision was legally effective. Accordingly, the board held that AST was entitled to rely on the mailed copy as triggering the 90-day appeal period.¹⁵⁴⁶

Other Cases in the Spotlight

Several other recent cases involving jurisdiction warrant mention. In *Roxco Ltd. v. United States (Roxco)*,¹⁵⁴⁷ the COFC held that appellant’s equitable adjustment claim was timely under the CDA, even though over one year had passed between the Air Force’s termination of appellant’s contract for default and appellant’s filing before the COFC. In *Roxco*, appellant abandoned performance on an Air Force construction contract, whereupon the Air Force terminated the contract for default on 21 December 1998, and entered into a takeover agreement with Roxco’s surety.¹⁵⁴⁸ On 30 March 2001, appellant submitted a claim for equitable adjustment with the Air Force. On 9 November 2001, the contracting officer returned the claim to appellant, determining the claim was an untimely challenge to the earlier termination for default.¹⁵⁴⁹ On 7 March 2002, Roxco filed a complaint before the COFC. The government responded with a motion to dismiss, arguing appellant’s appeal was untimely.¹⁵⁵⁰ The court dismissed the government’s motion, holding, inter alia, that Roxco was not challenging the earlier termination for default decision, but rather, the contracting officer’s rejection of its claim for equitable adjustment.¹⁵⁵¹

In *Floor Pro Inc. (Floor Pro)*,¹⁵⁵² the ASBCA addressed whether under the CDA a subcontractor was authorized to

¹⁵³⁷ 41 U.S.C.S. § 609 (a)(3) (LEXIS 2004).

¹⁵³⁸ 41 U.S.C.S. § 605(a).

¹⁵³⁹ *Riley & Ephriam*, 61 Fed. Cl. 405 at 410.

¹⁵⁴⁰ *Id.*

¹⁵⁴¹ Under the CDA, a board lacks jurisdiction over a case if the appeal is filed more than ninety days after the contractor’s receipt of a contracting officer’s valid final decision. 41 U.S.C.S. § 606.

¹⁵⁴² ASBCA No. 51854, 2004 ASBCA LEXIS 83 (Aug. 11, 2004).

¹⁵⁴³ *Id.* at *2.

¹⁵⁴⁴ *Id.*

¹⁵⁴⁵ *Id.* at *2-3.

¹⁵⁴⁶ *Id.* at *4-5.

¹⁵⁴⁷ 60 Fed. Cl. 39 (2004).

¹⁵⁴⁸ *Id.* at 40-41.

¹⁵⁴⁹ *Id.* at 41.

¹⁵⁵⁰ *Id.*

¹⁵⁵¹ *Id.* at 46.

¹⁵⁵² ASBCA No. 54143, 04-1 BCA ¶ 32,571.

bring an appeal where the government promised the subcontractor it would issue it a two-party check for work the subcontractor performed on a government contract. In *Floor Pro*, appellant subcontracted with the prime contractor, G.M. & W. Construction Corp., to install a floor coating at a Marine Corps warehouse in Albany, Georgia.¹⁵⁵³ When it appeared the prime contractor was not going to pay Floor Pro for the work it performed, Floor Pro complained to the government contracting officer. In response, the contracting officer issued a modification to the contract which provided Floor Pro would be issued a two-party check for work it performed.¹⁵⁵⁴ Unfortunately for Floor Pro, the Defense Financing and Accounting Service (DFAS) did not honor the modification, and paid the prime contractor the disputed amount.¹⁵⁵⁵ Upon appeal to the board, the board characterized this as a “rare, exceptional case” where appellant was a direct beneficiary of the contract, and as such entitled to third-party beneficiary status.¹⁵⁵⁶ Accordingly, the ASBCA held it had jurisdiction to hear the subcontractor’s appeal.¹⁵⁵⁷

Finally, in *Tiger Natural Gas, Inc. v. United States*,¹⁵⁵⁸ the COFC examined whether a contractor’s suit was rendered moot where the government refused to concede to a contractor’s interpretation of a contract, but nevertheless returned funds the government offset as a result of the dispute. In *Tiger*, the GSA awarded Tiger a contract to install a propane backup system at a federal building in Fort Worth, Texas.¹⁵⁵⁹ After installing the system, the GSA paid Tiger the amount due under the contract. However, the GSA asserted that Tiger guaranteed the government would realize a certain level of savings from the system, which the government never realized.¹⁵⁶⁰ The GSA proceeded to setoff payments due Tiger under other contracts, whereupon Tiger filed a complaint before the COFC contesting GSA’s claim and the subsequent setoff.¹⁵⁶¹

About six months after Tiger filed its complaint, the GSA had a change of heart and paid Tiger the money that had been setoff, but refused to concede that Tiger’s contract interpretation was correct. Tiger continued the action before the COFC, and the GSA moved to have the case dismissed as moot.¹⁵⁶² Upon examination, the court concluded the complaint was not moot because the GSA maintained its interpretation of the contract concerning the alleged performance guarantee, which the parties still disputed. Accordingly, the court held there was a genuine issue regarding whether the GSA would pursue this claim in the future.¹⁵⁶³ Further, the court observed that Tiger could potentially be entitled to interest from the GSA under the CDA if the court found the government’s claim and subsequent offset were improper.¹⁵⁶⁴ Accordingly, the COFC denied the government’s motion, finding there was a “live dispute” between the government and Tiger concerning the government’s claim over the alleged savings guarantee and the issue of Tiger’s potential entitlement to interest.¹⁵⁶⁵

Remedies

Supreme Court: Failure to Allege Government’s Position Not “Substantially Justified” is Not a Bar to Recovery Under EAJA

The Supreme Court recently addressed whether a federal court should bar petitioner from recovery under the Equal Access to Justice Act (EAJA)¹⁵⁶⁶ where the applicant failed to include the standard language in his request that “the position

¹⁵⁵³ *Id.* at 161,177.

¹⁵⁵⁴ *Id.* (stating that the contracting officer and the president of G.M. & W. agreed that the government would issue a two-party check payable to both appellant and G.M. & W., rather than following the electronic payment method as provided in the contract).

¹⁵⁵⁵ *Id.* 161,181.

¹⁵⁵⁶ *Id.*

¹⁵⁵⁷ *Id.* at 161,184.

¹⁵⁵⁸ 61 Fed. Cl. 287 (2004).

¹⁵⁵⁹ *Id.* at 288.

¹⁵⁶⁰ *Id.* at 289-90.

¹⁵⁶¹ *Id.* at 290.

¹⁵⁶² *Id.* at 293-94.

¹⁵⁶³ *Id.* at 294.

¹⁵⁶⁴ *Id.* at 294-95; see 41 U.S.C.S. § 611 (LEXIS 2004), providing “interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim . . . from the contractor until payment thereof.”

¹⁵⁶⁵ *Tiger*, 61 Fed. Cl. at 296.

¹⁵⁶⁶ 28 U.S.C.S. § 2412. The EAJA authorizes the payment of attorney’s fees to a prevailing party in an action against the United States, absent a showing by the government that its position in the underlying litigation “was substantially justified.” *Id.* § 2412 (d)(1)(A). Section 2412 (d)(1)(B) of the act sets a deadline of thirty days after final judgment for the filing of a fee application, and directs that the application include: (1) a showing that the applicant is a “prevailing party”; (2) a showing that the applicant is “eligible to receive an award”; and (3) a statement of “the amount sought, including an itemized statement from any attorney . . . stating the actual time expended and the rate” charged. *Id.* § 2412 (d)(1)(B). Section 2412(d)(1)(B) further requires the applicant to “allege that the position of the United States was not substantially justified.” *Id.*

of the United States was not substantially justified.”¹⁵⁶⁷ In siding with petitioner, the majority held the “substantially justified” language is not a jurisdictional prerequisite, but simply an allegation or pleading requirement. Thus, petitioner’s failure to allege the required language in the EAJA application did not bar recovery under the act.¹⁵⁶⁸

In *Scarborough v. Principi*, petitioner Scarborough prevailed before the Court of Appeals for Veterans Claims (CAVC) in an action for disability benefits.¹⁵⁶⁹ Scarborough’s counsel filed a timely application for attorney’s fees and costs pursuant to the EAJA. The application stated Scarborough was the prevailing party in the underlying litigation and was eligible to receive an award. Scarborough’s counsel also stated the total amount sought, and itemized the hours and rates of work. However, the application failed to allege that “the position of the United States was not substantially justified.”¹⁵⁷⁰ The government moved to dismiss the application on the grounds that Scarborough’s counsel had failed to make the required “no substantial justification” allegation. Scarborough’s counsel then filed an amended application adding the language to his application. However, in the interim, the thirty-day fee application filing period expired. As a result, the CAVC granted the government’s motion to dismiss Scarborough’s fee application.¹⁵⁷¹

On appeal, the CAFC affirmed the CAVC’s decision.¹⁵⁷² The CAFC reasoned that the EAJA effects a partial waiver of sovereign immunity. Thus, the courts must strictly construe the act’s requirements in the government’s favor. To the CAFC, the statute’s “plain and unambiguous” language requires that a requesting party enumerate all required allegations within the thirty-day time period.¹⁵⁷³

On appeal, the Court’s majority rejected the CAFC’s reasoning. Writing for the majority, Justice Ginsburg concluded the “not substantially justified” allegation imposes no proof burden on the applicant, but is simply an allegation or pleading requirement.¹⁵⁷⁴ So understood, “the allegation does not serve an essential notice-giving function; the government is fully aware, from the moment a fee application is filed, that to defeat the application on the merits, it will have to prove its position ‘was substantially justified.’”¹⁵⁷⁵ To the majority, a failure to make the allegation should not be fatal where no doubt exists as to who is applying for the fees, from what judgment, and to which court.¹⁵⁷⁶

The majority’s opinion generated a dissent from Justices Thomas and Scalia.¹⁵⁷⁷ Writing for the dissent, Justice Thomas reasoned “the EAJA requirement for filing a timely fee application with the statutorily prescribed content is a condition on the United States’ waiver of sovereign immunity As such, the scope of the waiver must be carefully construed.”¹⁵⁷⁸

Post-Judgment Interest? As Clear as Mud

In *Marathon Oil Company and Mobil Oil Exploration & Producing Southeast, Inc. v. United States*,¹⁵⁷⁹ the CAFC

¹⁵⁶⁷ *Scarborough v. Principi*, 124 S. Ct. 1856 (2004).

¹⁵⁶⁸ *Id.* at 1865-66.

¹⁵⁶⁹ *Id.* at 1860.

¹⁵⁷⁰ *Id.*

¹⁵⁷¹ *Id.*

¹⁵⁷² *Scarborough v. Principi*, 273 F.3d 1087 (Fed. Cir. 2001).

¹⁵⁷³ *Id.* at 1090-91. Shortly after the CAFC issued its decision, Scarborough petitioned the Supreme Court for a writ of certiorari. The Court granted Scarborough’s writ, vacated the CAFC’s judgment, and remanded the case in light of the Court’s recent decision in *Edelman v. Lynchburg College (Edelman)*, 535 U.S. 106 (2002). *Edelman* concerned an Equal Employment Opportunity Commission (EEOC) regulation that allowed applicants of employment discrimination complaints timely filed with the EEOC to add, after the filing deadline had passed, the required, but initially absent, verification. The Court upheld this regulation, citing “a long history of practice.” *Id.* at 116. On remand of Scarborough’s case to the same CAFC panel, two of the three judges adhered to the panel’s unanimous earlier decision and distinguished *Edelman*. *Scarborough v. Principi*, 319 F.3d 1346 (2003). Unlike the civil rights statute in *Edelman*, the court of appeals majority held, as a “remedial scheme” in which laypersons often initiate the process, the EAJA is directed to attorneys, who do not need “paternalistic protection.” *Id.* at 1353. Chief Judge Mayer dissented. In light of EAJA’s purpose “to eliminate the financial disincentive for those who would defend against unjustified governmental action and thereby deter it,” Chief Judge Mayer concluded, “it is apparent that Congress did not intend the EAJA application process to be an additional deterrent to the vindication of rights because of a missing averment.” *Id.* at 1356. In 2003, the Court again granted certiorari. *Scarborough v. Principi*, 539 U.S. 986 (2003).

¹⁵⁷⁴ *Scarborough*, 124 S. Ct. at 1865.

¹⁵⁷⁵ *Id.* at 1867.

¹⁵⁷⁶ *Id.*

¹⁵⁷⁷ *Id.* at 1871.

¹⁵⁷⁸ *Id.* at 1872.

¹⁵⁷⁹ 374 F.3d 1123 (Fed. Cir. 2004).

denied appellants' claim for post judgment interest from an earlier CAFC judgment. The case merits examination, if only due to the extent to which the majority and dissent disagreed on the applicability of 28 U.S.C. section 1961(c)(2)¹⁵⁸⁰ to the facts of this case.

From start to finish, the case followed a long and tortuous path. In 1981, appellants (collectively "the Oil Companies") purchased interests in oil and gas leases from the federal government. In 1990, new federal legislation impacted the Oil Companies' rights under the lease contracts. The Oil Companies sued for breach of contract in the COFC and won, receiving judgments in an amount of over \$78 million each.¹⁵⁸¹ On appeal, the CAFC reversed the COFC.¹⁵⁸² The Supreme Court then granted certiorari, and reversed the CAFC, holding that the government had breached its contracts with the Oil Companies.¹⁵⁸³ On 28 December 2000, the CAFC rejected an argument by the government on remand that the damages award should be reduced, and affirmed the initial judgments of the COFC. The government did not seek further review before the Supreme Court, and on 28 February 2001, the CAFC reinstated its initial judgments in favor of the Oil Companies.¹⁵⁸⁴

On 1 May 2001, the government paid the amounts specified in the judgments to the Oil Companies, but refused to pay interest on the judgment. In response, the Oil Companies brought suit in the COFC, seeking post-judgment interest from 28 December 2000—the date of the Federal Circuit's contract judgment on remand from the Supreme Court—through 1 May 2001—the date on which the government paid the contract judgment.¹⁵⁸⁵

Before the COFC, the Oil Companies argued that 28 U.S.C. section 1961(c)(2) waives the government's sovereign immunity from post-judgment interest on the contract judgment because the statute requires the government pay post-judgment interest on "all final judgments against the United States in the United States Court of Appeals for the Federal Circuit."¹⁵⁸⁶ The COFC disagreed and dismissed the complaint.¹⁵⁸⁷ The court stated two reasons why section 1961(c)(2) did not waive sovereign immunity for post-judgment interest on the Oil Companies' contract judgment. First, the COFC held "the plaintiffs received their awards . . . pursuant to final judgments of the Court of Federal Claims, not the U.S. Court of Appeals for the Federal Circuit."¹⁵⁸⁸ Therefore, the "'judgment' of the Federal Circuit on December 28, 2000 was not a 'final judgment' within the contemplation of 28 U.S.C. § 1961(c)(2) . . ."¹⁵⁸⁹ Second, the COFC held that, even assuming the Federal Circuit judgment was the "final judgment" for the purposes of section 1961(c)(2), the waiver of sovereign immunity for post-judgment interest on some CAFC judgments that is embodied in section 1961(c)(2) did not unambiguously encompass interest on the Oil Companies' contract judgment.¹⁵⁹⁰

¹⁵⁸⁰ In relevant part, the statute provides:

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court Such interest shall be calculated from the date of the entry of the judgment

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

(c) . . .

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit, at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Court of Federal Claims only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

28 U.S.C.S. § 1961(c)(2) (LEXIS 2004).

¹⁵⁸¹ *Conoco, Inc. v. United States*, 35 Fed. Cl. 309 (1996).

¹⁵⁸² *Marathon Oil Co. v. United States*, 177 F.3d 1331 (Fed. Cir. 1999).

¹⁵⁸³ *Marathon Oil Co. v. United States*, 528 U.S. 1002 (1999).

¹⁵⁸⁴ *Marathon Oil Co. v. United States*, 236 F.3d 1313, 1315-16 (2000).

¹⁵⁸⁵ *Marathon Oil Co. v. United States*, 56 Fed. Cl. 768, 769 (2003).

¹⁵⁸⁶ *Id.* at 776.

¹⁵⁸⁷ *Id.*

¹⁵⁸⁸ *Id.* at 773.

¹⁵⁸⁹ *Id.*

¹⁵⁹⁰ *Id.* at 774-75.

Writing for the majority, Judge Clevenger summarily rejected the COFC determination that the 28 December 2000 judgment was a not a final judgment under section 1961(c)(2).¹⁵⁹¹ For Judge Clevenger, the key issue before the court was whether section 1961(c)(2) unambiguously waived sovereign immunity for post-judgment interest on “all” judgments of the Federal Circuit. After an exhaustive analysis of the doctrine of sovereign immunity and the reach of section 1961(c)(2), Judge Clevenger concluded the section did not unambiguously waive sovereign immunity in this case. Central to Judge Clevenger’s conclusion was the fact the express language of section 1961(c)(2) cross-referenced four distinct statutory provisions.¹⁵⁹² After attempting to untangle the interaction of the various statutes referenced by section 1961(c)(2), Judge Clevenger concluded section 1961(c)(2) was “subject to plausible readings under which Congress has not waived sovereign immunity for post-judgment interest on judgments of the Federal Circuit against the United States that the United States does not seek to have reviewed in the Supreme Court.”¹⁵⁹³

Judge Prost respectfully dissented from the majority’s opinion. To Judge Prost, “there is only one plausible reading of the statutory language at issue. It is the reading that maintains that ‘interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit, at the rate provided in [§ 1961(a)] and as provided in [§ 1961(b)].”¹⁵⁹⁴

ASBCA: Conversion of T4D to T4C Entitles Contractor To EAJA Fees

The ASBCA determined that a contractor who prevailed in converting a termination for default into a termination for convenience is entitled to collect Equal Access to Justice Act (EAJA)¹⁵⁹⁵ fees. In *American Service & Supply, Inc.*,¹⁵⁹⁶ the Air Force awarded a contract to American Services to replace two air compressors and their gas engines. During performance, the government required American Services test the engine skids separately. American Services, believing that this requirement was not a contractual requirement, agreed to do so but requested an extra five months to complete contract performance. The agency, believing that the contract required skid testing, refused to extend the performance period.¹⁵⁹⁷

The agency terminated the contract for default after both parties agreed that American Services would not be able to complete the skid testing and the remainder of the contract on time.¹⁵⁹⁸

American Services contested the termination for default and prevailed. The ASBCA converted the termination for default to a termination for convenience. After this ruling, American Services requested EAJA fees. It argued that it was a prevailing party in the termination litigation and the government’s position was not substantially justified.¹⁵⁹⁹

The Air Force countered that its decision to terminate American’s contract for default was substantially justified and therefore American Services was not entitled to collect EAJA fees. In other words, the Air Force argued that its decision is “substantially justified [because] a reasonable person could think it correct [and the decision] has a reasonable basis in law and fact.”¹⁶⁰⁰

¹⁵⁹¹ *Marathon Oil Co. and Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 374 F.3d 1123, 1127 (Fed. Cir. 2004).

¹⁵⁹² Specifically, section 1961(c)(2) provides that “interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit . . . as provided in subsection (b).” 28 U.S.C.S. § 1961(c)(2) (LEXIS 2004). Section 1961(b) states that “interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.” *Id.* § 1961(b). Section 2516(b), in turn, provides that: “interest on a judgment against the United States affirmed by the Supreme Court after review on petition of the United States is paid at” the same rate specified in 28 U.S.C. § 1961(a). *Id.* § 2516(b). Finally, 31 U.S.C. § 1304 provides, in relevant part, “[i]nterest may be paid from the appropriation made by this section—on a judgment of a district court, only when the judgment becomes final after review on appeal or petition by the United States Government . . . [or] on a judgment of the Court of Appeals for the Federal Circuit or the United States Court of Federal Claims under section 2516(b) of title 28” 31 U.S.C.S. § 1304.

¹⁵⁹³ *Marathon*, 374 F.3d at 1132.

¹⁵⁹⁴ *Id.* at 1141 (citing 28 U.S.C. § 1961(c)(2)). See also *England v. Contel Advanced Sys.*, 2004 U.S. App. LEXIS 20844 (reversing the ASBCA, finding that appellant’s claimed damages was interest that was barred by the no-interest rule).

¹⁵⁹⁵ 28 U.S.C. § 2412 (2000).

¹⁵⁹⁶ ASBCA No. 49309, 50606, 04-2 BCA ¶ 32,675, 2004 ASBCA Lexis 74, July 15, 2004. See also *Board Finds Agency Actions Not Substantially Justified, Awards EAJA Fees*, 46 GOV’T CONTRACTOR 30, ¶ 316 (Aug. 11, 2004).

¹⁵⁹⁷ The government argued that the following contract language required separate testing of the skid: “the compressor and engine shall be rated for continuous duty . . . all components shall be mounted on a structural base [the skid]. The units shall be factory assembled and test run prior to shipping.” *Am. Svs. & Supply*, 04-2 BCA ¶ 32,675, at 161,722.

¹⁵⁹⁸ *Id.*

¹⁵⁹⁹ *Id.*

¹⁶⁰⁰ *Id.*