

CONTRACT ADMINISTRATION

Contract Interpretation

COFC Considers Defective Specifications Claim Applying Contract Interpretation Principles

In *Travelers Casualty and Surety of America v. United States*,¹ the Court of Federal Claims (COFC) considered a contract claim filed under the Contract Disputes Act² regarding a contract for the construction of the United States Department of Agriculture's (USDA) Vegetable Laboratory in Charleston, South Carolina. The COFC decision focused on a portion of the contract involving replacing and paving two turn lanes and replacing concrete aprons adjacent to drainage pipes alongside the roadway.³ In applying two constructive change theories, the theory of defective specifications and the theory of contract interpretation, the court denied one part of the contractor's claim and granted another.⁴

The USDA awarded the subject contract on 29 February 1999 to Adams Construction Company.⁵ Subsequently, the USDA terminated its contract with Adams, and then the plaintiff, Traveler's Casualty and Surety of America (Traveler's), assumed responsibility for the contract under the contract's performance bond.⁶ Traveler's then contracted with Alcon Associates, Inc. (Alcon) to complete contract performance.⁷ Next, Alcon contracted with Landscape Pavers Ltd. (LPL) to pave the turn lanes and replace the concrete aprons.⁸ LPL's paving work on two northbound turn lanes and on the concrete aprons was the focus of this contract claim.⁹

With respect to contract interpretation, the interesting part of the case is the work concerning the paving of the northbound turn lanes. After LPL finished paving the northbound turn lanes, Alcon informed LPL that because it had not performed in accordance with the contract terms, LPL would have to remove the pavement and then re-install it.¹⁰ LPL complied with Alcon's orders.¹¹ Specifically, Alcon advised LPL that it had constructed the turn lanes in such a way that the pavement's slope was excessive.¹² Additionally, Alcon stated that because LPL failed to comply with the contract terms, LPL was responsible for any additional costs it incurred to correct its deficiencies.¹³ On 4 April 2002, LPL filed a claim for costs it incurred in repaving the northbound turn lanes.¹⁴ LPL submitted the claim to its contractor, Alcon, which forwarded the claim to Traveler's, which then submitted it to the USDA contracting officer.¹⁵

In its claim, LPL argues that the drawings and specifications related to the slope of the northbound turn lanes were "design specifications" that were defective in that they did not indicate the amount of allowable slope.¹⁶ Thus, LPL asserts that although it closely followed the design specifications, the resulting pavement was unacceptable because the specifications were defective.¹⁷ As a result, LPL argues that the government is responsible for the additional costs it incurred

¹ 74 Fed. Cl. 75 (2006).

² 41 U.S.C. §§ 601-613 (2000).

³ *Traveler's*, 74 Fed. Cl. at 77.

⁴ *Id.* at 105-06.

⁵ *Id.* at 77-78.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 82-83.

¹¹ *Id.*

¹² *Id.* In highway construction, the court stated that the "slope" represented "how quickly the height of the surface [of the pavement] drops as the median or shoulder is approached horizontally." *Id.* at 90.

¹³ *Id.* at 83.

¹⁴ *Id.*

¹⁵ *Id.* at 85.

¹⁶ *Id.* at 87. The court defined "design specifications" as specifications that describe in "precise detail and permit the contractor no discretion." *Id.* at 89. The court stated that the significance of design specifications is risk. The court stated further that if the government requires the contractor to follow defective design specifications, then the government bears the risk that the contractor will incur additional costs during contract performance. *Id.*

¹⁷ *Id.*

in complying with the defective specifications.¹⁸ These additional costs included the removal and re-installation of the pavement.¹⁹

In response to this claim, the government maintained that the contract provisions controlling the paving of the turn lanes were “performance specifications.”²⁰ As such, the contractor was responsible for any failure to perform the contract’s requirements. The government further argued that the cause of the unacceptable pavement was the contractor’s failure to comply with the contract.²¹ The government asserted that while the contract required the contractor to construct the turn lanes with a 2% slope, the pavement’s slopes ranged from 5% to 9%.²² Further, the government stated that contract’s drawings and the South Carolina Department of Transportation (SCDOT) Highway Design Manual, which was widely known by LPL, dictated the slope of the pavement.²³ Because the contracting officer believed that the contract’s relevant provisions were “performance specifications” and that the cause of contract failure was the contractor’s faulty performance, the contracting officer denied the claim.²⁴

The court considered the defective specifications claim by applying the “normal principles of contract interpretation.”²⁵ Generally speaking, in interpreting ambiguities in a contract, courts and boards will first look to the contractual document itself. The court will “interpret a contract in such a way as to give meaning to all the provisions of the contract in light of the parties’ intent at the time they entered the agreement.”²⁶ If a court finds that the meaning of a contract term is clear and unambiguous, then the court will adopt that meaning.²⁷ On the other hand, if the court finds that a contract term is ambiguous, then the court will determine whether the ambiguity is patent or latent.²⁸ If the contract term is a patent ambiguity, then the contractor has a duty to seek clarification from the government prior to submitting its offer; if the contractor fails to seek clarification, then it will be bound by the government’s reasonable interpretation of the patent ambiguity. If the term is a latent ambiguity, then the contractor has no duty to seek clarification. In the latter case, the court will adopt the contractor’s reasonable interpretation of the latent ambiguity.²⁹

After reviewing the contract drawings and the SCDOT manual, the court found that the amount of slope allowed for the turn lanes was unclear.³⁰ In attempting to resolve the ambiguity, the court referenced the language of the contract itself.³¹

The court referenced the contract drawings and found that while many of the drawings indicated that maximum allowable slope for the turn lanes was 2%, the drawings did not directly reference the slope for the northbound turn lanes.³²

¹⁸ *Id.*

¹⁹ *Id.* at 87.

²⁰ *Id.* The court defines “performance specifications” as specifications which “set forth simply an object or standard and leave the means of attaining that end to the contractor.” *Id.* at 89. In contrast to design specifications, if a government requires a contractor to follow performance specifications, then the contractor bears the financial risk of contract failure. *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 90–91. One drawing (CV6.4) indicated a slope of 2% but it stated that it applied to the southbound turn lanes and did not clearly apply to the northbound turn lanes. Another drawing (Detail D of drawing CV6.1) indicated a slope of 2%, but it referred to “asphalt lanes” and did not seem to generally apply to turn lanes as was at issue in this case. Other drawings indicated the allowable slope, but they did not specifically apply to turn lanes. The SCDOT Highway Design Manual (SCDOT manual) stated that the slope should be 2.08%. *Id.*

²⁴ *Id.* at 86.

²⁵ *Id.* at 86–87. The principles of contract interpretation have been disputed. In an unrelated case with the same named plaintiff, the COFC provided a detailed explanation of the two competing views of contract interpretation regarding the appropriateness of referring to extrinsic evidence (evidence other than the contract document itself). *Traveler’s Cas. & Sur. of America v. United States*, 75 Fed. Cl. 696 (2007). In that unrelated case, the COFC compared the majority view which the COFC follows and the minority view which the Court of Appeals for the Federal Circuit (CAFC) follows. *Id.* at 705–11. In interpreting contractual terms, the COFC will admit extrinsic evidence in determining the meaning of the contractual language. *Id.* at 706. In contrast, in interpreting contractual terms, the CAFC will not admit extrinsic evidence where a contract’s terms are clear. *Id.* at 707–08. In the instant *Travelers* case involving paving the turn lanes, the COFC analyzed the facts using the “normal principles of contract interpretation” as the COFC (and the majority of courts) applies them. *Id.*; see also *Travelers*, 74 Fed. Cl. at 87.

²⁶ *Id.* at 87.

²⁷ *Id.* at 88.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 91.

³¹ *Id.*

³² *Id.*

Additionally, while the SCDOT manual referenced the allowable slope for South Carolina highways (stating that they should be 2.08%), the court noted that the contract did not specifically incorporate the manual.³³ So, while the court found that a reasonable interpretation of the contract was that the slope on the turn lanes should be 2%, the court also found that another reasonable interpretation was that the contract did not require any particular slope.³⁴ The court further determined that this was a “patent” ambiguity.³⁵ The court reasoned that where an ambiguity is patent, a contractor has a duty to seek clarification from the government regarding the ambiguity prior to submitting its offer.³⁶ In this case, the LPL failed to seek clarification until after contract performance.³⁷

The court next considered whether the contract provisions referencing the allowable slope in the turn lanes were design specifications or performance specifications.³⁸ As mentioned above, where the government requires a contractor to follow design specifications, the government warrants that the specifications are free from defects and that the contractor can successfully perform the contract.³⁹ Here, the court concluded that the specifications were design specifications because they “set forth in precise detail the materials to be employed and the manner in which the work was to be performed.”⁴⁰ The court further found the design specifications to be defective because they did not clearly explain the allowable slope for the northbound turn lanes.⁴¹ Although normally a contractor would prevail in a case where a court found the government’s design specifications defective, in this case, the contractor did not prevail because it failed to seek clarification regarding the patent ambiguity.⁴²

Since the contractor “failed to satisfy its duty to inquire about [the] patent ambiguity . . . [it] cannot recover damages based on the implied warranty that specifications are free from design defects.”⁴³ Therefore, the court denied the contractor’s claim for its costs to remove and re-install the northbound turn lanes.⁴⁴

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³³ *Id.* at 92.

³⁴ *Id.*

³⁵ *Id.* at 93.

³⁶ *Id.*

³⁷ *Id.* at 94.

³⁸ *Id.*

³⁹ *Id.* at 89.

⁴⁰ *Id.* at 94 (quoting *J.L. Simmons Co., v. United States*, 188 Ct. Cl. 684, 689 (1969)).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 105.

⁴⁴ *Id.* at 105–06.

Contract Changes

Oral Contract Modifications Still Unenforceable

In *Trawick Contractors, Inc. v. United States*,¹ the Armed Services Board of Contract Appeals (ASBCA) considered a contractor's (Trawick) appeal of a Navy contracting officer's final decision denying a claim to remit \$68,394 in liquidated damages. Trawick contended that the contracting officer verbally agreed to remit \$68,394 in liquidated damages.² The government contended that the contracting officer made no such oral agreement with Trawick.³ After examining both parties' arguments, the ASBCA decided in favor of the government.⁴ Even assuming that the contracting officer did orally agree to modify the contract by agreeing to remit a certain amount of liquidated damages, the ASBCA affirmed that oral agreements were unenforceable.⁵

In the instant case, the Navy awarded a firm-fixed price contract to Trawick on 6 February 2002 for the "revitalization" of housing at a Naval base in Millington, Tennessee.⁶ The contract's original completion date was 6 February 2004.⁷ The contract contained a liquidated damages clause providing that if the contractor failed to complete the project on time, then the government would be entitled to damages in the amount of either \$4,351 or \$200 per day (depending up the line item number) for each day of delay.⁸ The contract also contained a clause advising the contractor that only the contracting officer had the contractual authority to make agreements regarding the "contract, modification, [or] change order . . ." ⁹ This contract clause also stated that if the contracting officer modified the contract, then "all such actions must be formalized by a proper contractual document executed by an appointed contracting officer."¹⁰

During contract performance, the contractor failed to complete the project by the completion date.¹¹ Although the parties modified the contract to adjust the contract completion date to 1 July 2004, the contractor did not complete the project until 19 November 2004.¹² Since Trawick completed the project after the completion date, the government assessed liquidated damages by retaining progress payments in the amount of \$98,394.¹³

On 4 April 2005, Trawick contacted the contracting officer stating that the contracting officer had improperly assessed liquidated damages.¹⁴ As such, the contractor stated that it was due the entire contract price.¹⁵ Two months later, Trawick revised its earlier contention by informing the contracting officer that the government owed it a lesser amount of \$68,394 in progress payments and further that Trawick owed the government only \$30,000 in liquidated damages.¹⁶ Trawick based its contention on its allegation that the contracting officer orally agreed that the contractor owed the government only \$68,394 (vice \$98,394) in liquidated damages.¹⁷ On 29 June 2005, Trawick filed a proper claim with the contracting officer for the

¹ ASBCA No. 55097, 07-1 BCA ¶ 33,499.

² *Id.* at 166,025.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 166,021.

⁷ *Id.*

⁸ *Id.* at 166,022.

⁹ *Id.* (citing a clause that the contract termed the "Contracting Officer Authority Clause").

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 166,022-23.

¹³ *Id.* at 166,023.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* Consequently, the government contracting officer issued a unilateral contract modification on 8 July 2005 stating that the contractor owed the government the \$98,394 in liquidated damages; this modification justified the contracting officer's retention of this amount in progress payments. *Id.*

differing amount of \$68,394 that the government was retaining as liquidated damages.¹⁸ The contracting officer denied the claim.¹⁹ The contractor then filed an appeal with the ASBCA.²⁰

The government argued that it properly assessed liquidated damages in the amount of \$98,394.²¹ Further, the government issued a written modification to the contract on 8 July 2005 articulating that the contractor owed this amount in liquidated damages.²² Moreover, the government argued that there was no oral agreement to reduce the amount of liquidated damages and even if there had been such an agreement, oral contract modifications are unenforceable.²³ Finally, the government moved for summary judgment contending that the government should prevail as a matter of law.²⁴

After examining both parties' arguments, the ASBCA was unpersuaded by the contractor's theory.²⁵ The Board found that even if the Navy contracting officer did attempt to orally settle the contract claim by agreeing that the total amount of liquidated damages was \$68,394 (vice \$98,394), such an agreement would constitute an oral contract modification.²⁶ In particular, the Board acknowledged that an oral contract modification "is unenforceable without a written contract modification to decrease the contract price"²⁷ Consequently, the Board granted the government's motion for summary judgment.²⁸

Out-of-Scope Contract Modification Violates Competition Rule . . . But COFC Does Not Order Relief

In *IDEA International, Inc. v. United States*,²⁹ the Court of Federal Claims (COFC) considered a protester's argument that a contract modification was outside the scope of the original contract because the contract, as modified, would have significantly altered the field of competition if the contract, as modified, had been contained in the original solicitation.³⁰ The protester, IDEA International Inc. (IDEA), demanded declaratory and injunctive relief arguing that the Department of Defense Education Activity (DODEA) issued an out-of-scope contract modification "materially altering the contract payment provisions shortly after contract award."³¹ In response, the government contended that the subject modification was within the scope of the original contract.³² After considering arguments from both sides, the court ruled in favor of the protester finding that the contract modification was out-of-scope.³³ Nevertheless, the court did not award the protester declaratory or injunctive relief; the court did, however, award the protester reasonable proposal preparation costs.³⁴

On 18 May 2006, DODEA issued a solicitation for the provision of home-schooling services to dependents of DOD service members and civilian employees assigned to overseas locations.³⁵ The intent of the resulting contract was to support DOD's Remote Location Home School Program which assists parent's kindergarten through twelfth grade students in home schooling where there is no DOD school nearby.³⁶ The DODEA restricted the solicitation to holders of General Services

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 166,024.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ 74 Fed. Cl. 129 (2006).

³⁰ *Id.* at 141.

³¹ *Id.* at 130.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 143.

³⁵ *Id.* at 131.

³⁶ *Id.*

Administration (GSA) Federal Supply Schedule (FSS) “69 contracts” which covered information technology services.³⁷ The solicitation stated that the contract price would be based upon the total number of enrolled students, estimated to be no more than 700.³⁸ Thus, the government would pay the contractor’s invoices based on the total number of enrolled students. The solicitation did not, however, state how often invoices could be submitted.³⁹

In response to the solicitation, the government received two proposals, one from the protester (IDEA) and one from the awardee, ICATT Consulting, Inc. (ICATT).⁴⁰ While ICATT proposed a price of \$4,800 per student, IDEA proposed a slightly higher price of \$4,900 per student. After evaluating the proposals, the government awarded to ICATT.⁴¹

On 22 August 2006, ICATT submitted an invoice to the government requesting to be paid the entire contract price of \$3,360,000 in one lump sum, without indicating the number of enrolled students.⁴² Four days later, the government and the contractor issued a bi-lateral contract modification changing the method of contract payment.⁴³ Pursuant to the modification, instead of paying the contractor based on the total number of enrolled students, the government would pay the contractor in four increments based on new contract line items (CLINs): (1) initial start up materials (\$764,855), (2) initial program instruction (\$827,453), (3) balance of program materials (\$883,846), and (4) balance of program instruction (\$883,846).⁴⁴ Thus, under the new contract pricing method, the contractor would receive the entire contract price regardless of the total number of enrolled students.

After the government debriefed IDEA of its intent to award the task order to ICATT, IDEA first filed a protest with the Government Accountability Office (GAO) on 28 August 2006.⁴⁵ On 29 August 2006, the agency then issued an opinion stating that it would override a stay of contract performance.⁴⁶ On 14 September 2006, IDEA filed an action in the COFC requesting declaratory and injunctive relief. The COFC exercised jurisdiction to hear the merits of IDEA’s three-part protest. This article focuses solely on the third portion of the protest that “DoDEA unlawfully issued an out-of-scope contract modification materially altering the contract payment provisions shortly after contract award.”⁴⁷

After considering the arguments of the protester and the government, the court concluded that the modification of the task order was out-of-scope.⁴⁸ Specifically, the court stated that the government’s modification to the contract “caused a material change to the Solicitation’s requirements.”⁴⁹ The court explained that proper contract modifications must be within the scope of the original contract.⁵⁰ Specifically, the court stated that contract modifications must not alter the contract to the extent that the modified contract is no longer “the one for which offerors have competed.”⁵¹ Further, the court stressed that these rules apply equally to modifications of task orders, as is the case here.⁵² In this case, had the solicitation contained the contract modification at issue, IDEA may have offered a lower price since the total number of enrolled students would ultimately become irrelevant.⁵³

³⁷ *Id.* at 132.

³⁸ *Id.* at 131–32.

³⁹ *Id.* at 140.

⁴⁰ *Id.* at 133.

⁴¹ *Id.*

⁴² *Id.* at 134.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 130.

⁴⁸ *Id.* at 141 (quoting *Hunt Bldg. Co., Ltd. v. United States*, 61 Fed. Cl. 243, 277 (2004)).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

Remarkably, although the court apparently agreed with the protester that the modification to the task order was out-of-scope, the court did not order relief other than to award the protester protest costs.⁵⁴ The court could have ordered the government to terminate the task order and then re-compete the acquisition including the work as modified.⁵⁵ The court's rationale in not ordering relief was based on its conclusions that (1) the balance of hardships on all parties does not favor the protester and (2) that granting the injunction (to terminate the task order) would not serve the public interest.⁵⁶ First, the court explained that ordering a termination of the task order would constitute a severe hardship on the school age children benefiting from this contract.⁵⁷ Second, terminating the contract and re-soliciting would be so costly as to be contrary to the public interest.⁵⁸ Although the *IDEA* court did not provide relief to the protester, the court certainly could have done so. Practitioners should continue to caution their clients about the pitfalls of out-of-scope contract modifications.

Constructive Change or Differing Site Condition?

In *Beyley Construction Group Corp. v. Dept. of Veterans Affairs*,⁵⁹ the United States Civilian Board of Contract Appeals (CBCA) considered an appeal concerning two issues. First, the CBCA considered whether a limestone hill (called a "mogote") with a significant amount of rock located at a construction site constituted a differing site condition. Second, the CBCA considered whether the government's deletion of the requirement to remove the mogote constituted a constructive change to the contract entitling the contractor to additional compensation.⁶⁰ The CBCA granted the appeal based on the theory of constructive change.⁶¹

This appeal arose from a contract the Department of Veterans Affairs (VA) awarded to the appellant, Beyley Construction Group Corporation (Beyley), for the "development of burial areas at the Puerto Rico National Cemetery" in Puerto Rico.⁶² The contract required the contractor to prepare a tract of the land so that it would be suitable for burials.⁶³ One difficult aspect of contract performance was the requirement to remove a mogote from the construction site.⁶⁴ The "contract documents required [that a] mogote be excavated, backfilled with suitable materials, and graded for burial sites."⁶⁵ During contract performance, Beyley encountered more rock in the mogote than it anticipated.⁶⁶ While the contract drawings and specifications required the contractor to excavate rock in order to complete the project, Beyley contended that the amount of rock in the mogote constituted a differing site condition.⁶⁷ After considering Beyley's position, the contracting officer issued a unilateral contract modification deleting the requirement to excavate the mogote reducing the overall contract price.⁶⁸

Beyley then filed two appeals.⁶⁹ In the first claim, the contractor argued that the mogote was a differing site condition. In the second claim, the contractor argued that the government's deletion of the requirement to remove the mogote constituted a constructive change for which the contractor was entitled additional compensation, not less as the government held.⁷⁰ Beyley argued the deletion of this work was a constructive change because without the requirement to excavate the mogote, the contractor would not have sufficient fill material (that it would have obtained at the worksite) to complete the

⁵⁴ *Id.* at 143.

⁵⁵ *Id.* at 142-43.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ CBCA Nos. 5 and 763, 07-2 BCA ¶ 33,639.

⁶⁰ *Id.*

⁶¹ *Id.* at 166,603.

⁶² *Id.* at 166,589.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 166,590.

⁶⁶ *Id.* at 166,593.

⁶⁷ *Id.* at 166,692.

⁶⁸ *Id.*

⁶⁹ *Id.* at 166,594-95. Both appeals (CBCA Nos. 5 and 763) were consolidated into one appeal. *Id.* at 166,599.

⁷⁰ *Id.* at 166,600.

project. Thus, in this case, the government's deletion of work actually resulted in additional contract costs.⁷¹ Beyley contends that because of the contract change, it would have to purchase fill material at its own expense thus increasing its costs dramatically. Accordingly, the contractor demanded compensation for the alleged constructive change in the amount of \$483,001.32.⁷²

In response, the Government denied the existence of a differing site condition existed and also denied that it had constructively changed the contract.⁷³ Regarding the deleted work, the government asserts that the contractor had no "contractual right to expect that it would be able to use the excavated materials from the mogote as usable fill."⁷⁴ Further, the contract itself states that the contractor could use either excavated material or "borrow" (material brought from another site) as fill and that the costs of obtaining and transporting such borrow would be at no expense to the government.⁷⁵ Therefore, the government posited that Beyley was not entitled to additional compensation⁷⁶

After considering the arguments of both parties, the CBCA granted the two-part appeal, in part, based on the theory of constructive contract change.⁷⁷ The CBCA conveyed that where a contract permits one method of contract performance, the government's later prohibition of that method of performance is a constructive change under the contract's Changes Clause.⁷⁸ The CBCA agreed with the appellant that the government's deletion of the work involving the mogote constituted a constructive change increasing the contractor's cost.⁷⁹ The CBCA also agreed that the appellant had a reasonable expectation that it would use excavated fill from work at the mogote and further that after the government deleted the mogote portion of the contract, the contractor was deprived of that fill material.⁸⁰ As a result, the contractor incurred additional costs in transporting borrow from another location to the worksite.⁸¹ Therefore, the CBCA granted the appeal reasoning that the government had constructively changed the contract requirements by deleting work from the contract.⁸²

It is debatable as to whether the CBCA reached the right result in this case. Whether the deletion of the mogote portion of the contract is a constructive change depends upon whether it was reasonable for the contractor to anticipate that it would have to provide its own fill material.⁸³ Witnesses for both sides testified that in Puerto Rico, mogotes are of varying density and of varying usefulness for fill material.⁸⁴ Further, the contract clearly stated that the contractor would be responsible for providing its own fill material either by utilizing fill from the worksite or by transporting fill from another site.⁸⁵ Interestingly, the contract appears to specifically require the contractor to perform the work that the CBCA held was a contract change. Hence, in this case, the CBCA may have stretched the facts to provide a recovery for the appellant. This case should alert contract law practitioners to remain mindful of the considerable economic powers of the Boards of Contract Appeals.

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⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* The contract stated, "removal of rocks as specified on drawing L-7 is part of the contract and no separate payment will be made." *Id.* Drawing L-7 indicated the tract of land to be converted into a burial area and showed a mogote which the contractor was required to remove. *Id.* at 166,692.

⁷⁴ *Id.* at 166,600.

⁷⁵ *Id.* at 166,692. The contract required the contractor to "use excavated material and borrow [material that the contractor could transport from other locations to the worksite]. . . Borrow will be supplied at no additional cost to [the] Government." *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 166,602-03.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* The CBCA awarded the contractor the amount of \$232,821.48 based upon what it considered to be a reasonable estimate of the contractor's additional costs. *Id.*

⁸³ *Id.* at 166,602.

⁸⁴ *Id.* at 166,596-600.

⁸⁵ *Id.* at 166,692.

Contract Disputes Act (CDA)¹ Litigation

If It Looks Like the Same Claim, It May Be the Same

In order to file a claim at the Court of Federal Claims (COFC), the claim must be the same claim that was submitted to the contracting officer.² The Court of Appeals for the Federal Circuit (CAFC) recently reaffirmed this jurisdictional rule in *Ace Constructors, Inc.*³ Before proceeding with its COFC appeal, Appellant must first exhaust its administrative remedies by submitting the claim to the contracting officer.⁴

In *Ace Constructors, Inc. v. United States*, the Government argued that the claim as presented to the COFC was not the same claim that the appellant submitted to the contracting officer.⁵ The COFC decided that although the Appellant's argument may have been slightly more refined, the operative facts were the same as those described in the requests for equitable adjustment, and addressed the same basic problem that the contracting officer addressed.⁶ The CAFC affirmed, citing *Scott Timber Co. v. United States*.⁷ The CAFC explained the rule in *Scott Timber* as:

[T]he same claim must be presented to the Court of Federal Claims as was decided by the contracting officer, but that that standard “does not require rigid adherence to the exact language or structure of the original administrative CDA claim [when] they arise from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery.”⁸

The CAFC found that the claim was “based on the same contract provisions, the same requirements made by the Army Corps of Engineers, the same costs, the same requested relief, and the same legal theories.”⁹ It was the same claim after all.

More Litigation over Where to Litigate

In *Suburban Mortgage Associates, Inc. v. United States Department of Housing and Urban Development*,¹⁰ the CAFC discussed the jurisdictional boundary between the Tucker Act¹¹ and the Administrative Procedure Act,¹² in the light of the Supreme Court's decision in *Bowen v. Massachusetts*.¹³ Judge Plager framed the issue as forum shopping after the *Bowen* decision:

¹ Contract Disputes Act, 41 U.S.C.S. §§ 601–613 (LexisNexis 2008) [hereinafter CDA].

² See *id.* 41 U.S.C. § 605(a) requires the contractor to submit the claim to a contracting officer, and the contracting officer then issues a final decision concerning that claim. See, e.g., *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004); *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1578 (Fed. Cir. 1994).

³ *Ace Constructors, Inc., v. United States*, 499 F.3d 1357 (Fed. Cir. 2007).

⁴ *Id.* at 1361.

⁵ *Id.*

⁶ *Ace Constructors, Inc. v. United States*, 70 Fed. Cl. 253 (2006). The COFC indicated that is natural for legal arguments to “sharpen” as they develop for trial:

The government seeks to establish a distinction between inapplicability and the lack of a requirement, but any such distinction is too attenuated to be significant; in its claim to the Contracting Officer, ACE manifestly was challenging the need for profilograph testing. In this context, there is no material difference between inapplicability of and the lack of a requirement for such testing. It is hardly unusual for a litigant's arguments to sharpen between the time of the original claim and the time of trial, and the government was given ample notice by ACE's contention that profilograph testing was not applicable.

Id. at 266–67.

⁷ 333 F.3d 1358 (Fed. Cir. 2003)

⁸ *Ace Constructors, Inc.*, 499 F.3d at 1361 (quoting *Scott Timber*, 333 F.3d at 1365).

⁹ *Id.*

¹⁰ 480 F.3d 1116, 1118 (Fed. Cir. 2007) (“Litigation over where to litigate is the unfortunate consequence of the complex of statutes and courts that comprise the federal system.”).

¹¹ 28 U.S.C.S. § 1491 (LexisNexis 2008).

¹² 5 U.S.C.S. §§ 551–559 (LexisNexis 2008).

¹³ *Suburban Mortgage*, 480 F.3d at 1117 (citing *Bowen v. Massachusetts*, 487 U.S. 879 (1988)).

One consequence of the Bowen case has been to create a sort of cottage industry among lawyers attempting to craft suits, ultimately seeking money from the Government, as suits for declaratory or injunctive relief without mentioning the money. If successful, a plaintiff could have the case heard under the [Administrative Procedure Act] APA in one or another district court, with appeal to a regional circuit, rather than in the Court of Federal Claims, where money claims against the Government are routinely heard and decided, with appeal in the Federal Circuit.¹⁴

In the instant case, the contractor wanted to exercise its contractual right to assign a defaulted mortgage to the U.S. Department of Housing and Urban Development (HUD).¹⁵ But HUD declined to accept the assignment, believing that Suburban had committed fraud or made material misrepresentations.¹⁶ Suburban then sued in the District Court for the District of Columbia, under 28 U.S.C. § 1331,¹⁷ the Administrative Procedure Act (APA),¹⁸ the Declaratory Judgment Act,¹⁹ and the Fifth Amendment of the Constitution.²⁰

Suburban first alleged that the Government acted arbitrarily, capriciously, and in violation of Suburban's due process rights under the Fifth Amendment, and second "asked the court for 'specific relief in the form of payment of the insured loan amount' and reimbursement of certain taxes and fees as losses."²¹ The Government moved to dismiss for lack of subject matter jurisdiction arguing that the suit was essentially a contract action, properly before the COFC under the Tucker Act, 28 U.S.C. § 1491(a)(1).²²

The District Court analyzed subject matter jurisdiction and concluded that the APA provided a waiver of sovereign immunity for challenges to agency action, subject to three exceptions found in 5 U.S.C. §§ 702 and 704.²³ The court stated, "the APA excludes from its waiver of sovereign immunity (1) claims for money damages, (2) claims for which an adequate remedy is available elsewhere, and (3) claims seeking relief expressly or impliedly forbidden by another statute."²⁴

The CAFC rejected Suburban's characterization of the case as an action for specific performance and declaratory judgment.²⁵ The CAFC instead stated that what Suburban wanted was a declaratory judgment that HUD's action was improper and specific performance in the form of payment.²⁶ The court stated, "[t]he thrust of Suburban's claim [was] that HUD breached the insurance contract when it refused to accept assignment of the mortgage and pay Suburban the insurance proceeds."²⁷ The court then concluded that the COFC could provide an adequate remedy, and was therefore the proper forum.²⁸ In a final note, the CAFC stated that since the Tucker Act specifically allows for contract actions against the

¹⁴ *Id.* at 1124.

¹⁵ *Id.* at 1119.

¹⁶ *Id.*

¹⁷ 28 U.S.C.S. § 1331. This statute states, "the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

¹⁸ 5 U.S.C.S. §§ 701–06.

¹⁹ 28 U.S.C.S. §§ 2201–02.

²⁰ *Suburban Mortgage*, 480 F.3d at 1119.

²¹ *Id.*

²² *Id.* As an alternative to dismissal, the Government requested that the district court transfer the case to the COFC pursuant to 28 U.S.C. § 1631. *Id.*

²³ *Id.*

²⁴ *Id.* at 1119 (quoting *Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 2005 WL 3211563, at *6 (D.D.C. 2005)).

²⁵ *Id.* at 1117. Judge Plager writes:

The suit was cast in part as an action for specific performance of the contract and in part as a declaratory judgment action. The relief sought was to require the Government to perform its contract obligations so that Suburban Mortgage could get the money allegedly due it under the insurance agreement.

Id.

²⁶ *Id.* at 1117–18, 1126.

²⁷ *Id.* at 1127.

²⁸ *Id.* With regard to other relief sought, the CAFC stated:

Nor are Suburban's concerns about possible bankruptcy, loss of reputation, and lost future profits a basis for saying that there is not an adequate remedy in the Court of Federal Claims. Those concerns can be alleged by any claimant seeking money from the

government, other courts have decided that the Tucker Act precludes APA contract claims of any kind, either for damages or specific performance.²⁹ The CAFC decided not to rule on that issue, and instead based its decision on the limitations of the APA.³⁰ That argument would not have helped Suburban in any event.

Which Act Has Jurisdiction When the Government Sells Services?

In *North Star Steel Co. v. United States*, the CAFC reversed a COFC decision that jurisdiction was under the CDA, where the plaintiff was a third party beneficiary to a contract in which the government was selling services.³¹ Nevertheless, the CAFC concluded that the COFC did have jurisdiction to hear the case under the Tucker Act.³²

The Department of Energy's Western Area Power Administration (WAPA), is one of four power marketing administrations within the U.S. Department of Energy, marketing and delivering hydroelectric power and related services within a fifteen-state region of the central and western United States.³³ North Star was a steel manufacturer with an agreement for power from Arizona Electric Power Cooperative, Inc. (AEPCO), a generation and transmission cooperative organized under the Department of Agriculture's Rural Utility Service Administration.³⁴ Under what was known as the Consolidated Arrangements Contract (CAC) between WAPA and AEPCO for the benefit of North Star, WAPA agreed to provide both non-firm transmission service and regulating services for North Star's power requirement.³⁵ North Star brought suit in the COFC for breach of the CAC.³⁶

The COFC held that it had jurisdiction over North Star's suit under 28 U.S.C. § 1491(a)(2) because the suit involved a claim arising under section 10(a)(1) of the CDA.³⁷ At the CAFC, both parties argued that the CDA did not apply to a contract involving the provision of services by the government, but applied only when the government is the acquiring party.³⁸ The CAFC agreed and stated "The CDA applies to contracts entered into by an executive agency for: (1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or (4) the disposal of personal property."³⁹

Although the CDA did not apply to the CAC because it was a contract for the provision of services by the government, the CAFC found jurisdiction with the COFC under the Tucker Act.⁴⁰ The CAFC concluded that North Star's claim arose out of an express contract with the government, and therefore the Tucker Act gave the COFC jurisdiction.⁴¹ Consequently, COFC had jurisdiction either way.

Government for an allegedly wrongful failure to pay a claim; to the extent they have merit in a given case, money usually can assuage the wrong.

Id. (citing *Bowen v. Massachusetts*, 487 U.S. 879, 925 (Scalia, J., dissenting)).

²⁹ *Id.* at 1128.

³⁰ *Id.*

³¹ *N. Star Steel Co. v. United States*, 477 F.3d 1324 (Fed. Cir. 2007).

³² *Id.* at 1332; 28 U.S.C.A. § 1491(a)(1) (LexisNexis 2008).

³³ *N. Star Steel Co.*, 477 F.3d at 1326.

³⁴ *Id.* at 1327.

³⁵ *Id.*

³⁶ *Id.* at 1329–30.

³⁷ *Id.* at 1330 (citing *N. Star Steel*, 68 Fed. Cl. 696 (Fed. Cl. 2005)).

³⁸ *Id.* at 1331.

³⁹ *Id.* at 1331–32 (citing 41 U.S.C. § 602(a)).

⁴⁰ *Id.* at 1332 (quoting 28 U.S.C. § 1491(a)(1)). The Tucker Act states in relevant part:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C.A. § 1491(a)(1) (LexisNexis 2008).

⁴¹ *N. Star Steel Co.*, 477 F.3d at 1332.

Is It the Same Claim? Even with Different Theory, Claim is Barred by Res Judicata

A COFC issue can be precluded when the Armed Services Board of Contract Appeals (ASBCA) has already made a decision on the same set of transactional facts. This is true even if the legal theory was not presented or considered at the board, such as in the recent case of *Phillips/May Corp. v. United States*.⁴²

The case arose from a contract for construction at the Religious Ministry Facility at the Naval Air Station-Joint Reserve Base in Fort Worth, Texas.⁴³ From July to November 2003, the plaintiff submitted nine claims related to its work under the contract.⁴⁴ In November 2003, the plaintiff submitted a claim for “delay, mal-administration of the contract, over-zealous inspection and impossibility.”⁴⁵ The contracting officer did not act on any of the claims.⁴⁶ The plaintiff appealed each of the first nine claims to the ASBCA.⁴⁷

Although the plaintiff raised a claim of over-zealous inspection during one of the ASBCA hearings, the ASBCA did not rule on that claim.⁴⁸ The ASBCA did not address over-zealous inspection in any of the other appeals.⁴⁹ As for mal-administration or impossibility of performance, the plaintiff did not raise the issue, nor did the ASBCA make a decision on those grounds.⁵⁰ As of January 2006, the contracting officer still had not issued a final decision on plaintiff’s November claim, and the plaintiff filed a COFC appeal of that claim.⁵¹

The government moved to dismiss on the basis of res judicata.⁵² The court agreed with the plaintiff in that the specific claims it raised before COFC differ from the claims it raised in its ASBCA appeals, but the court recognized that the claims were all “based on the same, or nearly the same, factual allegations, that is, that the Government’s failure to timely act and its penchant for changing the design led to delays for which plaintiff contends it is entitled to be compensated.”⁵³ The court goes on to state that because the plaintiff’s COFC claims were based on the same transactional facts as its nine appeals to the ASBCA, the claim preclusion aspect of res judicata barred the action.⁵⁴ The case was dismissed.⁵⁵

Equal Access to Paralegals at Cost, Not at Market Rate

In *Richlin Security Service Company v. Chertoff*,⁵⁶ the CAFC decided that paralegal services could be reimbursed under the Equal Access to Justice Act (EAJA) at actual cost to the attorney and not at prevailing market rates.⁵⁷ The main focus of the case was whether to call the paralegal services and “expense” or a “fee.”⁵⁸ If paralegal services are to be considered part of attorney’s fees, they could be billed at market rates, however, as expenses, they could only be billed at cost. The court

⁴² 76 Fed. Cl. 671 (2007).

⁴³ *Id.* at 672.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 673.

⁵⁰ *Id.*

⁵¹ *Id.* at 672.

⁵² *Id.* at 673–74. “Although plaintiff chose not to raise its claims of over-zealous inspection, mal-administration of the Contract, and impossibility before the ASBCA, defendant argues that it could have, and thus *res judicata* precludes litigation of those claims, as well as the claims actually litigated before the ASBCA.” *Id.*

⁵³ *Id.* at 675–76.

⁵⁴ *Id.* at 676 (citing *Pactiv Corp. v. Dow Chem. Co.*, 449 F.3d 1227, 1230 (Fed. Cir. 2006) (“[T]he defense of claim preclusion will generally be available where the asserted claim was, or could have been, raised in a prior action between the parties which has been adjudicated on the merits.”)).

⁵⁵ *Id.*

⁵⁶ 472 F.3d. 1370 (Fed. Cir. 2006) (rehearing denied).

⁵⁷ *Id.* at 1381.

⁵⁸ *Id.* at 1374.

recognized that EAJA “fees and expenses” included the reasonable expenses of expert witnesses and reasonable attorney or agent fees.⁵⁹ Although the wording of the EAJA statute could be read to include other types of fees, the court concluded that “the statutory text compels a conclusion that EAJA permits only reimbursement of expert, agent, and attorney’s fees.”⁶⁰ In fact, Richlin argued that paralegal services should be reimbursed under the specific category of “attorney’s fees.”⁶¹ Accordingly, the court considered whether paralegal services could fall within the definition of attorney’s fees.⁶²

The CAFC distinguished the previous Supreme Court’s treatment of paralegal services under section 1988 of the Civil Rights Attorney’s Fees Awards Act (Civil Rights Act)⁶³ by stating that where there are “differences in the surrounding language, structure and purpose of the statute, the Supreme Court has interpreted identical language in different statutes differently.”⁶⁴ The CAFC noted that the under the Civil Rights Act § 1988 the effect of denying “fee” recovery for paralegal services would be to deny recovery completely, whereas EAJA allows for recovery of “expenses.”⁶⁵ The CAFC then discusses how allowing paralegal services to be billed as “fees” subject only to the cap on attorney fees would create a “perverse incentive” to shift legal work from attorneys onto paralegals and “distort the normal allocation of work,” creating “less efficient legal services.”⁶⁶

The court then discussed the Senate report accompanying EAJA bill of 1984.⁶⁷ The court concluded that Congress did not intend to include paralegal expenses in “attorney’s fees,” but rather intended that paralegal services be billed as expenses limited to the attorney’s cost.⁶⁸ Ultimately, the interests of legal efficiency triumph over the creation of perverse incentives.

Attorney’s Fees Have to Be Reasonable?

In addition to paralegal services, the CAFC also looks at EAJA fees for attorneys in *Hubbard v. United States*,⁶⁹ where an award of \$400 in damages resulted in an award of \$110,000 in attorney’s fees. At the COFC, Hubbard originally sought damages of \$627,000, mostly in lost profits.⁷⁰ The COFC rejected the lost profits claim and awarded damages of only \$400 for repaving a damaged concrete slab.⁷¹ The government argued that the COFC’s award of \$400 represented only nominal damages and that Hubbard should not receive any attorney fees,⁷² or in the alternative, that Hubbard failed to prove the lost profits (the majority of its claim), and therefore was not entitled to EAJA attorney’s fees.⁷³

⁵⁹ *Id.* (citing 5 U.S.C. § 504(b)(1)(A) (2000)).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1375.

⁶³ 42 U.S.C. § 1988 (LexisNexis 2008).

⁶⁴ *Richlin Sec.*, 472 F.3d. at 1378.

⁶⁵ *Id.* at 1378–79.

⁶⁶ *Id.* at 1379–81.

⁶⁷ *Id.* at 1381 (citing S. REP. NO. 98-586, 98th Cong., at 15 (1984)).

⁶⁸ The court’s analysis of the Senate report was as follows:

When Congress acted to make EAJA permanent in 1984, the Senate report accompanying the bill clarified the meaning of “fees and expenses.” S. Rep. No. 98-586, 98th Cong., 2d Sess., at 15 (Aug. 8, 1984). The Senate report stated that “though no language change takes place, clarification of the term [fees and expenses] is necessary” because there was a dispute about whether “fees and expenses,” as listed in the statute, is exclusive or whether it included other reasonable expenses. *Id.* The Senate report clarified that the term “fees and expenses” is inclusive and permits the reimbursement of all “reasonable expenses.” The report then stated that “[e]xamples of the type of expenses that should ordinarily be compensable include paralegal time (billed at cost).”

Id.

⁶⁹ 480 F.3d 1327 (Fed. Cir. 2007).

⁷⁰ *Id.* at 1330.

⁷¹ *Id.*

⁷² *Id.* at 1331. The government cited the Supreme Court in *Farrar v. Hobby*, 506 U.S. 103, 115 (1992), “[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all.”

⁷³ *Id.* at 1332.

The CAFC affirmed the COFC's determination as to the award of fees, but questioned the amount of the fee and the way it was determined.⁷⁴ The court referred to the Supreme Court's rule on the fee shifting provision of the Civil Rights Act established in *Hensley v. Eckerhart*⁷⁵ and noted that the degree of success is the most critical factor in determining the reasonableness of a fee award.⁷⁶ Although those cases involved the Civil Rights Act, the CAFC applied the same logic to the fee shifting provision of EAJA.⁷⁷

The CAFC concluded that the COFC had correctly taken the first step of the *Hensley* analysis by multiplying the hours spent by the hourly rate; however, the COFC failed to determine "whether there were circumstances that required a reduction in the fee thus calculated—particularly whether such fee would be excessive in light of the results achieved."⁷⁸ The court vacated the award of attorney fees and remanded the case for COFC for reconsideration.⁷⁹ Maybe the award will be more reasonable next time.

CDA and Prompt Payment Act Interest: You Might Have It Both Ways

After recovering CDA interest, why not ask for Prompt Payment Act (PPA) Interest as well?⁸⁰ That is what the Plaintiff attempted in *Laurelwood Homes LLC v. United States*.⁸¹ The Plaintiff asserted a claim for PPA interest after the Navy had already paid CDA interest on damages due to vandalism at residential military housing.⁸²

Plaintiff Laurelwood and the Navy entered into a lease agreement for residential real property located within a Naval station.⁸³ Laurelwood had been submitting invoices to the Navy for vandalism repairs to the housing, and the Navy had consistently paid those claims.⁸⁴ In August 2006, the contracting officer notified Laurelwood that the Navy would no longer pay invoices for vandalism repairs.⁸⁵ Laurelwood then submitted a formal CDA claim for the vandalism repairs.⁸⁶ In October 2006, another contracting officer issued a final decision denying the claim and also determining that previous payments were "erroneous."⁸⁷

Laurelwood filed suit in the COFC requesting damages plus interest, for vandalism to its property and a denial of the Navy's claim for the erroneous payments.⁸⁸ In March 2007, the contracting officer revoked her previous demand for repayment and notified Laurelwood of the Navy's payment of damages plus CDA interest, for the vandalism damages sought in its claim.⁸⁹ In April 2007, Laurelwood amended its complaint to seek PPA interest.⁹⁰

⁷⁴ *Id.*

⁷⁵ *Id.* (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983), *Farrar*, 506 U.S. 103; *Marek v. Chesny*, 473 U.S. 1 (1985)).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 1333. The CAFC continued to describe the problem in more detail:

Although at trial Hubbard sought damages of \$627,000, he recovered only \$400— less than 1/10th of 1% of the amount sought. The \$110,000 attorney's fee awarded was 275 times the amount of the recovery. The trial court made no attempt to explain why that fee—which on its face seems grossly excessive in light of the small recovery—could be deemed a reasonable one in the light of "the degree of success obtained."

Id. (quoting *Farrar*, 506 U.S. at 114).

⁷⁹ *Id.* at 1335.

⁸⁰ Prompt Payment Act, 31 U.S.C. §§ 3901–3907 (2000).

⁸¹ 78 Fed. Cl. 290 (2007).

⁸² *Id.* at 292.

⁸³ *Id.* at 291.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 291–92.

⁸⁸ *Id.* at 292.

⁸⁹ *Id.*

⁹⁰ *Id.*

Citing the PPA and case law, the COFC explained that the PPA only required interest for untimely payments, but not for payments that are under dispute.⁹¹ Laurelwood contended that there was no “objectively discernable dispute,” and since the contracting officer reversed her decision and paid the invoices in full, the government had essentially conceded there was no actual dispute.⁹² The court disagreed, and held that the claim was in a legitimate dispute at the time the Defendant was initially denied payment.⁹³

Laurelwood offered by way of comparison, the case of *North Star Alaska Housing Corporation (North Star)*⁹⁴ which involved a similar agreement between an Alaska corporation and the Army Corps of Engineers to lease property located on an Army installation.⁹⁵ In that case, the government was held liable for vandalism damages that occurred while the government occupied the property.⁹⁶ The court distinguished the *North Star* case due to different lease provisions.⁹⁷ Since there was a legitimate dispute in the *Laurelwood* situation, PPA interest did not apply.⁹⁸

When the Fax Confirmation Doesn't Confirm Receipt

As it turns out, that fax confirmation sheet that agencies often save as proof of receipt, does not prove much, at least by itself. In the case of *Brickwood Contractors, Inc. v. United States*,⁹⁹ the government offered a fax confirmation sheet as proof that the contractor received a termination notice.¹⁰⁰ The plaintiff denied receiving the fax, and filed its appeal within one year of receiving notice by certified mail.¹⁰¹

The government moved to dismiss for lack of jurisdiction because the complaint was filed more than twelve months after the fax was received, so the statute of limitations period had expired.¹⁰² The government argued that the fax confirmation sheet together with a declaration by the contracting officer stating that the fax was successfully transmitted, proved contractor receipt of the final decision of the contracting officer.¹⁰³

Citing a CAFC case, the COFC held that a fax confirmation sheet by itself, without a confirming phone call, did not constitute adequate notice for CDA purposes.¹⁰⁴ The COFC noted that there was “understandable confusion” since the government failed to communicate which receipt date was to start the clock for the statutory period, nor did the government reference the earlier faxed copy in its certified copy.¹⁰⁵ The COFC followed the rule according to the ASBCA, that the

⁹¹ *Id.* The court quoted the PPA:

Except as provided in section 3904 of this title, this chapter does not require an interest penalty on payment that is not made because of a dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract. A claim related to the dispute, and interest payable for the period during which the dispute is being resolved, is subject to the Contract Disputes Act of 1978. 31 U.S.C. § 3907(c) (2000).

Id.

⁹² *Id.* at 293. The phrase “objectively discernable dispute” was mentioned in *Arkansas Best Freight Sys., Inc. v. United States*, 20 Cl. Ct. 776, 779 (1990).

⁹³ *Id.* at 294.

⁹⁴ *Id.* at 293 (citing *N. Star Alaska Hous. Corp. v. United States*, 30 Fed. Cl. 259 (1993)).

⁹⁵ *Id.* (citing *N. Star Alaska*, 30 Fed. Cl. at 265).

⁹⁶ *Id.* at 293.

⁹⁷ *Id.* In the *North Star* case, the Government was liable for any damage beyond normal wear and tear. The evidence showed that the Army left an area of base open and unguarded. In the *Laurelwood* case, the lease agreement put the burden on the contractor for “malicious damage (other than Government-caused).” *Id.*

⁹⁸ *Id.* at 294.

⁹⁹ 77 Fed. Cl. 624 (2007).

¹⁰⁰ *Id.* at 625.

¹⁰¹ *Id.* at 625, 627.

¹⁰² *Id.* at 627.

¹⁰³ *Id.* at 625. The government also asserts that contractor’s subsequent evasive behavior after the date the fax was transmitted served as additional evidence that Plaintiff did, in fact, receive the default termination notice.

¹⁰⁴ *Id.* at 632 (citing *Riley & Ephriam Constr. Co. v. United States*, 408 F.3d 1369 (Fed. Cir. 2005)). Another court stated, “All the government has to do is make a simple telephone call to the contractor or its authorized representative to affirm actual receipt of the fax. This simple step would give the government assurance of actual receipt that the regulation requires it to have.” *Riley*, 408 F.3d at 1373.

¹⁰⁵ 77 Fed. Cl. at 633 (2007).

contractor is entitled to compute the statutory period from the latter date of receipt of the final decision. The COFC stated, “in this case, the date that the final decision was received via certified mail.”¹⁰⁶ The government’s motion to dismiss was denied.¹⁰⁷ The fax confirmation sheet alone did not meet the standard.

New Interim Rules of Procedure Similar But Different

The Civilian Board of Contract Appeals (CBCA) published interim rules of procedure which became effective on 5 July 2007.¹⁰⁸ The public comment period ended on 28 September 2007.¹⁰⁹ The CBCA incorporated many of the rules of its predecessor boards into the new rules.¹¹⁰ Chairman of the CBCA, Judge Stephen Daniels, told *The Government Contractor*, “For practitioners who understood the procedure before, things should remain pretty much the same”¹¹¹ The Board expects to issue final rules of procedure some time in the first half of 2008.¹¹² In addition to hearing and deciding contract disputes, the new CBCA has inherited many other types of proceedings as required by statutes and regulation, such as: grants and contracts under the Indian Self-Determination and Education Assistance Act, Federal Crop Insurance cases, Federal Employee travel claims, etc.¹¹³ Also of note, Judge Daniels indicates in his introduction that the CBCA does not have the legal authority to enforce subpoenas against a federal agency.¹¹⁴ This comment will likely draw many further comments.¹¹⁵

One Contractor Sues to Enforce the Contracting Officer’s Decision

In *Lavezzo v. United States*,¹¹⁶ a contractor sued to enforce a contracting officer’s final decision in its favor, which the government disclaimed for lack of authority.¹¹⁷ Due to “considerable agency discord,”¹¹⁸ the plaintiff’s claim was handed over to a contracting officer from another agency, resulting in a second “final decision.”¹¹⁹ The court described the government’s handling of plaintiff’s claims as being “at odds with the requirement of the Contract Disputes Act that contracting officers act independently when adjudicating disputes.”¹²⁰ Citing the CDA¹²¹ and case law,¹²² the court outlined

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Rules of Procedure of the Civilian Board of Contract Appeals, 72 Fed. Reg. 36,793 (July 5, 2007) (to be codified at 48 C.F.R. pts. 6101, 6102).

¹⁰⁹ *Id.* at 36,794.

¹¹⁰ *Id.* at 36,795.

¹¹¹ *Civilian Board of Contract Appeals Releases Interim Rules of Procedure*, 49 GOV’T CONT. ¶ 264 (2007).

¹¹² *Id.*

¹¹³ 72 Fed. Reg. 36,794.

¹¹⁴ *Id.* at 36,795.

¹¹⁵ See, e.g., David M. Nadler & Joseph R. Berger, *Subpoena Power at the Civilian Board of Contract Appeals—GSA Should Reconsider Its Position and Reverse Course*, 49 GOV’T CONT. ¶ 349 (2007).

¹¹⁶ 74 Fed. Cl. 502 (2006).

¹¹⁷ *Id.* at 503.

¹¹⁸ The contracting officer’s supervisor was not a contracting officer, but gave direct orders not to process the claim, then later reassigned the claim processing by paying an outside agency to handle the claim for a fee. *Id.*

¹¹⁹ *Id.* The opinion stated that, “The record reflects considerable agency discord in the handling of Plaintiff’s claims, and Plaintiff’s understandable confusion upon receiving two conflicting contracting officer final decisions addressing the same claims.” *Id.*

¹²⁰ *Id.* at 509. The court describes the situation from the plaintiff’s point of view:

From [Plaintiff’s] vantage, in its first Government contracting foray, it received two conflicting contracting officer final decisions within a month addressing the same claims. One of these decisions was an 18-page document filled with personal attacks on an agency supervisor, and the other was a set of rubber-stamp claim denials from the Department of Treasury. With even a rudimentary knowledge of the federal procurement process, [the plaintiff] may have rightly wondered why an agency supervisor tried to prevent the assigned contracting officer from deciding its claims, and why it was necessary to go outside the agency to another contracting officer.

Id.

¹²¹ *Id.* The Contract Disputes Act gives contracting officers “final and conclusive authority” to decide claims, and their decisions are “not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced” 41 U.S.C. § 605(b) (2000).

the rule that, “[w]hile contracting officers are encouraged to seek advice from legal counsel and other agency experts, their decisions must be ‘personal [and] independent,’ and ‘even the appearance of coercion [must] be avoided.’”¹²³ The case was remanded to the agency for yet another final decision by an impartial contracting officer.¹²⁴ In agencies with contracting officers who work with inexperienced supervisors, it is “remarkable” that this type of situation does not occur more frequently.¹²⁵ One may hope that the next final decision will be better.

Major Michael Wong

¹²² *Id.* at 509 (citing *Pacific Architects & Eng’rs, Inc. v. United States*, 491 F.2d 734, 744 (1974); *New York Shipbuilding Corp. v. United States*, 385 F.2d 427, 435 (1967)) (“Ultimately, the contracting officer must “put his own mind to the problems and render his own decisions.”).

¹²³ *Id.* (quoting *Edmund Leising Bldg. Contr., Inc.*, VABCA No. 1428, 81-1 BCA 14,925).

¹²⁴ *Id.*

¹²⁵ 21 NASH & CIBINIC REP. ¶ 20 (2007).

Terminations for Default

You Can't Play Games With Contract Claims

In *Moreland Corp. v. United States*,¹ the Department of Veterans Affairs (VA) had contracted with Moreland to build a medical clinic which the VA would then lease from Moreland for a term of fifteen years. After five years of occupancy, latent defects became apparent which posed no danger to the occupants and which the court found to be “largely cosmetic and easily could have been repaired if the VA had permitted Moreland to do so.”² The VA, however, prevented Moreland from timely making the repairs by prohibiting any repair work until Moreland submitted a “comprehensive remediation plan,” which was not required by the contract, and by making other “extra-contractual” demands that prevented Moreland from making the repairs.³ Just days after giving Moreland authorization to begin work but before the weekend on which work was to begin, the VA’s engineering consultant alleged that the building was “unsafe for continued occupancy.”⁴ Three days later, the VA notified Moreland the lease was terminated for default because of Moreland’s alleged failure to make satisfactory progress to repair the defects.⁵ As the owner of the building, Moreland made the repairs notwithstanding the termination, while the VA continued to occupy the building. Several months later, the VA moved out of the building and stopped making lease payments.

The court held that Moreland was not in default, finding that the VA’s actions had prevented the repairs prior to termination.⁶ The clauses of the lease did not provide the VA with the right of termination for default anyway, instead providing other remedies governing defective work such as having the repairs performed at Moreland’s expense.⁷ The repairs could have been completed within thirty days with work performed only during non-duty hours.⁸ The VA was required by the lease to allow Moreland access to the building to make the repairs, but breached the lease by preventing Moreland from making the repairs until after the termination.⁹ The VA also failed to show constructive eviction, since the VA’s occupancy and use of the building was never impacted in any way by the defects and the VA continued to occupy the building for nine months after the default termination.¹⁰

Whenever the government has a right to terminate for default, the contracting officer must still exercise “reasoned discretion” in making the decision to terminate for default.¹¹ The court found that this contracting officer abused his discretion in that regard.¹² In view of the fact that the defects did not hinder the clinic’s operation, the building was safe for continued occupancy, and that necessary repairs could be quickly made without interrupting the clinic’s operation, the decision to terminate the lease for default and move nine months later to another facility costing \$4,000,000 per year more “was an irrational decision by any measure, and one that cannot have resulted from the exercise of reasoned discretion.”¹³

¹ 76 Fed. Cl. 268 (2007).

² *Id.* at 270.

³ *Id.* at 289. The VA later required a more detailed remediation plan, denied Moreland’s initial request to inspect the facility defects during non-duty hours, and gave belated approval for Moreland to proceed with the work, conditioned upon Moreland executing an Indemnification and Remediation agreement which was also not required by the contract. *Id.* at 278–79, 289–90.

⁴ *Id.* at 279–80. The court found that assertion by the VA’s consultant to be “incorrect and unreliable.” *Id.* at 286. In fact, both before that letter, and after termination, the VA’s consultant indicated that the building was safe for occupancy. *Id.* at 287. The court suspected that “some of his professionalism may have been compromised to satisfy the desires of his client,” and noted that he had a conflict of interest. *Id.* at 283. The court placed greater weight in the testimony of Moreland’s structural expert, who convincingly showed that the defects never posed any threat to continued safe occupancy of the building. *Id.* at 287.

⁵ *Id.* at 279.

⁶ *Id.*

⁷ *Id.* at 285–86.

⁸ *Id.* at 289.

⁹ *Id.* at 290.

¹⁰ *Id.* at 286. The standard for establishing a constructive eviction is a two-part test: “(1) Whether the landlord’s acts or omissions ‘substantially interfered with the beneficial use or enjoyment of the premises’ by the tenant; and (2) if so, whether the tenant abandoned the premises within a reasonable time.” *Id.* at 287 (quoting *Richardson v. United States*, 17 Cl. Ct. 355, 357 (1989)).

¹¹ *Id.* at 290 (citing GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 49.402-3 (July 2007) [hereinafter FAR]).

¹² *Id.*

¹³ *Id.* Moreland offered evidence showing that “the VA’s real motive was to move eventually to a new facility better able to accommodate the rapid population growth in the Las Vegas area.” *Id.* The court found it unnecessary to make findings on that issue, but noted that “it may be that Plaintiff’s

What makes this case more interesting is the conduct of the government that the court held to be a breach of the covenant of good faith and fair dealing.¹⁴ Prior to the discovery of the latent defects, Moreland had submitted two claims relating to the construction of building that the contracting officer determined to be meritorious and was prepared to pay.¹⁵ The contracting officer nonetheless denied the valid claims on advice of counsel, as a tactic in negotiating a settlement on other claims.¹⁶ The court noted that contractors are legally required to submit claims in good faith, certifying that the claim “accurately reflects the contract adjustment for which the contractor believes the government is liable,”¹⁷ and that this requirement of good faith with regard to claims runs both ways. The contracting officer’s treatment of claims “is not intended to be a negotiating game where the agency may deny meritorious claims to gain leverage over the contractor.”¹⁸ Thus, claims must be both submitted and decided in good faith, and neither party may stray from that standard in order to gain some tactical advantage over the other.¹⁹

The court found that this and other conduct by the VA constituted bad faith,²⁰ under either the “clear and convincing evidence” standard “or some lesser measure.”²¹ The court rejected the government’s argument that the standard Termination clauses²² incorporated by reference into the lease prevented Moreland from recovering future lost rent under the lease, finding that the government’s right to terminate for the convenience of the government was applicable only during the construction of the building but had been specifically deleted by the parties with respect to the lease agreement.²³ The court therefore awarded Moreland the unpaid rent that it would have received over the remainder of the fifteen-year lease.²⁴

A Small Change Is a Cardinal Change If It Is Not Permitted under the Changes Clause

The Court of Federal Claims recently overturned a termination for default resulting from a contractor’s refusal to perform a unilateral change that, while small, was not permitted by the Changes clause. In *Keeter Trading Co., Inc. v. United States*,²⁵ the United States Postal Service (USPS) had a contract with a company owned and operated by Mr. Edward Keeter, for the delivery of mail to 250 rural residences in Arkansas. Over a year into the successful contract performance, the USPS contracting officer issued a unilateral change instructing Keeter to service an additional fifty-two mailboxes located along

assessment of the VA’s motive is correct. Certainly, the court can see no other explanation from the record, except perhaps bureaucratic ineptitude, to account for such a senseless decision.” *Id.* at 290–91.

¹⁴ *Id.*

¹⁵ *Id.* at 291.

¹⁶ *Id.* at 291–92.

¹⁷ *Id.* at 292 (quoting 41 U.S.C. § 605(c)(1) (2000)).

¹⁸ *Id.*

¹⁹ The court concluded: “The Contracting Officer’s outright denial of meritorious claims to gain some advantage over the contractor will not be condoned by this Court.” *Id.*

²⁰ *Id.* at 293. The court also found bad faith on the part of the VA in its attempt to create a justification to require Moreland to perform a comprehensive structural study at Moreland’s expense—an expense for which the VA would otherwise be responsible to determine whether the VA could install a heating ventilation and air conditioning system on the roof of the building. *Id.* at 292–93.

²¹ *Id.* at 291. The court cited the “clear and convincing evidence” standard set forth in *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239–40 (Fed. Cir. 2002), which suggested that courts and boards require “clear and convincing evidence” (formerly described as “well-nigh irrefragable proof”) of malice or “designedly oppressive conduct” to overcome the presumption that public officials act in good faith in the exercise of their responsibilities. *Id.* However, the court also cited as a “but see,” without any discussion, *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 771 (2005), in which the COFC had suggested that the presumption of good faith has limited applicability, and that where it does apply, the heightened standard of proof to overcome the presumption is limited only to cases in which government officials are accused of fraud or quasi-criminal conducts in performing their duties. *Id.* The court also noted:

A breach of the covenant of good faith occurs when there has been “sharp dealing,” such as taking “deliberate advantage of an oversight by your contract partner concerning his rights under the contract.” *Mkt. St. Assocs. L.P. v. Frey*, 941 F.2d 588, 594 (7th Cir. 1991). See also *North Star Alaska Housing Corp. v. United States*, 76 Fed. Cl. 158, 2007 U.S. Claims LEXIS 108, 2007 WL 1041442 (Fed. Cl. Apr. 2, 2007).

Id. The court did not specifically identify the applicable standard in this case, finding that the VA’s conduct “was deplorable by any measure, be it ‘clear and convincing’ or some lesser standard.” *Id.*

²² FAR, *supra* note 11, at pts. 52.249-2, 52.249-8.

²³ *Moreland*, 76 Fed. Cl. at 291.

²⁴ *Id.* at 295.

²⁵ 79 Fed. Cl. 243 (2007).

Keeter's existing route and increasing annual compensation by \$1,087.56.²⁶ Keeter refused to perform the additional work, believing that the price adjustment was undervalued.²⁷ Ultimately, the USPS agreed and further increased the annual compensation by \$1,602.72, for a total of \$2,690.28.²⁸ Nevertheless, the contract's Changes clause permitted the contracting officer to make unilateral changes that would increase compensation by no more than \$2,500—any changes in excess of that amount could be made only by mutual agreement.²⁹ When Keeter refused to perform the additional work on the ground that the unilateral change was not permitted by the Changes clause, the USPS procured that work from another source and deducted the cost of that “reprocured” work from payments due Keeter.³⁰ In response, Keeter ceased all work under the contract, resulting in the termination for default.³¹

While repudiation by a contractor constitutes a valid ground for the government to terminate a contract for default, the court noted that a contractor's refusal to perform is not a repudiation if it was in response to a material breach of the contract by the government.³² The court therefore considered whether the contracting officer's unilateral change in violation of the Changes clause was a cardinal change which constituted a breach of the contract and entitled Keeter to stop performance.³³

In its Motion for Summary Judgment, the Government relied upon *Becho, Inc. v. United States*,³⁴ in which the COFC had stated that,

while there is no precise calculus for determining whether a cardinal change has occurred, the courts have considered, *inter alia*, the following factors: (i) whether there is a significant change in the magnitude of work to be performed; (ii) whether the change is designed to procure a totally different item or drastically alter the quality, character, nature or type of work contemplated by the original contract; and (iii) whether the cost of the work ordered greatly exceeds the original contract cost.³⁵

Applying these factors, the government argued that the change of adding mailboxes within Keeter's delivery route was minor in magnitude of the work to be performed, was the identical type of work required by the contract, and was only a slight increase in the original cost, and therefore could not be deemed a “cardinal change” of the contract.³⁶

The court noted that “[t]hose factors are especially helpful in cases in which a challenged contract includes a standard changes clause which provides little specific guidance regarding changes,”³⁷ and agreed with the government that the increase in the workload and compensation occasioned by the change in this case did not appear to be a substantial alteration of the contract.³⁸ Yet, those factors cannot “override the specific contractual terms of the parties' narrowly drafted Changes clause, as those terms represent the essence of the agreement to contract.”³⁹ The court held that because the unilateral change in this case violated the express terms of the Changes clause, “[i]t follows that the modification was, in fact, a cardinal change which entitled [Keeter] to cease performance.”⁴⁰ Accordingly, the USPS had failed to show that the decision to terminate the contract for default was proper.⁴¹

²⁶ *Id.* at 246.

²⁷ *Id.* The contract contained a precise formula for valuing the additional work caused by adding mailboxes to the route which, when applied to these facts, resulted in an increase of more than \$2,500 to the annual contract price. *Id.* at 255.

²⁸ *Id.* at 246.

²⁹ *Id.* at 254.

³⁰ *Id.* at 247.

³¹ *Id.*

³² *Id.* at 253 (citing *Murdoch Mach. & Eng'g Co. v. United States*, 873 F.2d 1410, 1413 (Fed. Cir. 1989)).

³³ *Id.*

³⁴ 47 Fed. Cl. 595 (2000).

³⁵ *Id.* at 601.

³⁶ *Keeter Trading Co.*, 79 Fed. Cl., at 260.

³⁷ *Id.*

³⁸ *Id.* at 261.

³⁹ *Id.*

⁴⁰ *Id.* (citing *PCL Constr. Servs., Inc. v. United States*, 47 Fed. Cl. 745, 804 (2000)).

⁴¹ *Id.*

Having concluded that the USPS breached the contract by making a unilateral change that was not permitted under the Changes clause, the court needed to address Keeter's request for breach damages. The court noted that "in government contract cases in which a termination for default is found to be improper, it will be converted to a termination for the convenience of the government, and damages calculated accordingly,"⁴² and that the contract's Termination for Default clause specifically provided for that same result.⁴³ However, if the contractor can show that the termination was made in bad faith, then he can be entitled to traditional breach damages, including expectation damages, rather than the lesser damages resulting from a termination for convenience.⁴⁴

The court recited some allegations made by Keeter in his attempt to show that the government had acted in bad faith in terminating the contract for default.⁴⁵ Although opining that "[t]here can be no real dispute that [Keeter's] allegations, even when coupled with the documentation contained in the record, do not meet the standard of 'well-nigh irrefragable proof' required to establish bad faith on the part of the government,"⁴⁶ the court noted that the issue of bad faith in this case was an "intensely factual question" for which more information was needed and which was inappropriate for summary judgment.⁴⁷ The court therefore stayed the issue of quantum pending the development of further facts needed to resolve the issue.

Anticipatory Repudiation Clearly Not Clear

What is the difference between saying that you will not perform unless certain conditions are met, and saying that you intend to perform once certain issues are resolved? The Civilian Board of Contract Appeals (CBCA) this year found that there was a "big difference."⁴⁸ In *David/Randall Associates*, the National Park Service (NPS) suspended performance of a roofing contract. Fifteen months later, the NPS forwarded to the contractor a copy of a report alleging deficiencies in the work and asked the contractor about its intentions in fulfilling its obligations under the contract.⁴⁹ After examining the report, the contractor disputed some of the issues in the report and ultimately replied that "[i]t is David/Randall's intention, upon satisfactory resolution of a number of outstanding issues, to complete performance of this suspended project," identifying issues that required resolution including the scope of the remaining work, structural issues, performance schedule, and payment issues.⁵⁰ Within hours of that response, the contracting officer terminated the contract for default, explaining that the contractor's response indicated that the contractor will not complete performance unless certain conditions are met, and that "such preconditions constitute an anticipatory breach of the contract."⁵¹

⁴² *Id.* at 262 (citing *Best Foam Fabricators, Inc. v. United States*, 35 Fed. Cl. 627, 638 (1997)).

⁴³ *Id.* The relevant portion of the Termination for Default clause used in the contract was nearly verbatim with the corresponding paragraph of the clause at FAR 52.249-8 Default (Fixed-Price Supply and Service), which states:

If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

FAR, *supra* note 11, at pt. 52.249-8(g).

⁴⁴ *Keeter Trading Co.*, 79 Fed. Cl. at 263

⁴⁵ *Id.* at 264–65. These included Keeter's detailed allegations of personal bias against him by the Postmaster, who he alleged was the driving force behind the decision to change his duties and the decision to terminate the contract, and that the amount that USPS deducted from his pay to cover the cost of procuring alternative delivery services for the extra mailboxes "were based on a much larger number of work hours than [USPS] had proposed to pay [Keeter]" for the work. *Id.* at 265. The court also noted that the government's attempt to make the change using two unilateral change orders, each under the \$2,500, rather than with one change order over \$2,500, "raises the question of whether the agency had a specific intent to deprive [Keeter] of [his] contractual rights." *Id.* (citing *Libertatia Assocs., Inc. v. United States*, 46 Fed. Cl. 702, 707 (2000)).

⁴⁶ *Id.* at 265. In articulating the standard the contractor must meet to show bad faith, the court had earlier also made reference to the "clear and convincing evidence" standard enunciated in *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002):

It cannot be disputed that, in attempting to make such a showing, a contractor "must meet a high burden because this Court assumes that the Government acts in good faith." This requires "well-nigh irrefragable proof" that the government acted in bad faith. Stated more plainly, a plaintiff is required to raise "clear and convincing" evidence of improper motive on the part of the government. This standard, while somewhat daunting, "is not intended to be impenetrable," and it "does not insulate government action from *any* review by courts." Instead the relevant question is whether the plaintiff has presented evidence that the government had a specific intent to injure it, or was motivated by animus toward the plaintiff. Indeed, the concept of "bad faith" has traditionally been equated with "actions motivated by malice or the specific intent to injure."

Keeter Trading Co., 79 Fed. Cl. at 263–64 (emphasis in original) (citations omitted).

⁴⁷ *Id.* at 265.

⁴⁸ *David/Randall Assocs., Inc., v. Dep't of the Interior*, CBCA Nos. 162, 243, 07-2 BCA ¶ 33,598.

⁴⁹ *Id.* at 166,414.

⁵⁰ *Id.* at 166,415.

⁵¹ *Id.*

The CBCA found that the contractor's response was "clearly" not an anticipatory repudiation of the contract.⁵² Citing long-standing precedent,⁵³ the Board stated that anticipatory repudiation required a "distinct and unequivocal absolute refusal to perform the promise."⁵⁴ Contrary to the NPS's characterization of the contractor's response, the contractor did *not* refuse to perform, but was instead "stating its willingness to perform and at the same time trying to get to a situation where it could reasonably begin performance under a considerable suspension period."⁵⁵ The Board stated that "[t]here is a big difference between an absolute refusal to perform unless certain conditions are met, and a statement of intent to perform upon the 'resolution' of certain issues."⁵⁶ The Board recognized that after a long suspension period, it is not clear whether the "performance was sufficiently defined to enable [the contractor] to proceed," and that the contractor's response was simply an attempt to get such matters resolved so that it could proceed with performance.⁵⁷ This, the Board concluded, does not constitute the absolute refusal to perform required for anticipatory repudiation.⁵⁸

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⁵² *Id.* at 166,416.

⁵³ The Board stated that the standards for anticipatory repudiation were set forth in *United States v. DeKonty Corp.*, 922 F.2d 826 (Fed. Cir. 1991), which relied on *Dingley v. Oler*, 117 U.S. 490 (1886), in which the U.S. Supreme Court stated: "When one party to [a] . . . contract absolutely refuses to perform his contract, and before the time arrives for performance distinctly and unqualifiedly communicates that refusal to the other party, that other party can, if he choose, treat that refusal as a breach . . ." *David/Randall Assocs.*, CBCA Nos. 162, 243, 07-2 BCA ¶ 33,598, at 166,415 (quoting *Dingley*, 117 U.S. at 499–500).

⁵⁴ *David/Randall Assocs.*, CBCA Nos. 162, 243, 07-2 BCA ¶ 33,598, at 166,416 (quoting *Dingley*, 117 U.S. at 503).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

Terminations for Convenience

Warranty and Upgrade Obligations Survive Contract Termination

Reversing a Court of Federal Claims (COFC) decision from two years ago,¹ this year the U.S. Court of Appeals for the Federal Circuit held that the termination of a contract for convenience does *not* terminate the contractor's obligation to continue providing warranty and upgrade services for the goods purchased under the contract prior to termination. In *International Data Products Corp. v. United States*,² the contractor provided computer systems and related services to the Air Force under an indefinite-delivery indefinite quantity (ID/IQ) contract awarded under section 8(a) of the Small Business Act.³ The Air Force was ultimately compelled to terminate the contract for convenience when the contractor corporation was purchased by a non-section 8(a) concern.⁴ At that time, the Air Force had already purchased over \$35 million in goods and services under the contract, far in excess of the contract's \$100,000 minimum quantity.⁵ Upon termination, the Air Force insisted that the contractor continue to fulfill its contract obligations for warranty services and software upgrades that accompanied the products purchased prior to the contract termination.⁶ The contractor objected, but continued to provide the warranty services under threat of default and debarment.⁷

At the COFC, the contractor sought approximately \$1.7 million in termination costs, which included \$440,990 for providing the warranty services and software upgrades after the contract had been terminated.⁸ The COFC granted summary judgment for the government on the issue of termination settlement costs, holding that once the government had met its obligation to purchase the guaranteed minimum quantity under the ID/IQ contract, it had no further obligation to pay contractor settlement costs.⁹ But the court also held that the contractor was not required to continue to perform the warranty and upgrade services after the contract was terminated, finding that the statute which required the government to terminate the contract for convenience in these circumstances does not permit a "partial termination of the contract."¹⁰ The court recognized that this holding would result in the Air Force's loss of the warranty and upgrade services for which it had already paid, but noted such losses were contemplated by Congress when it enacted the statute.¹¹ Still, in the subsequent trial on quantum,¹² the court held that there was no theory under which the contractor could recover for the post-termination warranty services it provided. The court found that the post-termination services were not provided under the terms of either an express or implied contract, because no such contract existed after the termination.¹³ And because the COFC lacked jurisdiction over contracts implied in law, the contractor also could not recover in quantum meruit.¹⁴

¹ *Int'l Data Prods. Corp. v. United States*, 64 Fed. Cl. 642 (2005).

² 492 F.3d 1317 (Fed. Cir. 2007).

³ 15 U.S.C.S. § 637(a) (LexisNexis 2008).

⁴ *Int'l Data Prods.*, 492 F.3d at 1321. The Small Business Act required the government to terminate the contract under those circumstances:

Subject to the provisions of subparagraph (B), a contract (including options) awarded pursuant to this subsection shall be performed by the concern that initially received such contract. Notwithstanding the provisions of the preceding sentence, if the owner or owners upon whom eligibility was based relinquish ownership or control of such concern, or enter into any agreement to relinquish such ownership or control, such contract or option shall be terminated for the convenience of the Government, except that no repurchase costs or other damages may be assessed against such concerns due solely to the provisions of this subparagraph.

15 U.S.C.S. § 637(a)(21)(A).

⁵ *Int'l Data Prods.*, 492 F.3d at 1321.

⁶ *Id.*

⁷ *Id.*

⁸ *Int'l Data Prods. Corp. v. United States*, 70 Fed. Cl. 386, 393 (2006).

⁹ *Int'l Data Prods. Corp. v. United States*, 64 Fed. Cl. 642, 647.

¹⁰ *Id.* at 650 (citing 15 U.S.C. § 637(a)(21)(A)) (LexisNexis 20087).

¹¹ *Id.* at 651. The court explained:

Congress weighed the inconvenience and expense of termination to the Government against the goals of the 8(a) program and concluded that the exceptions to termination should be made only when the agency's objectives would be "severely impaired." Congress determined that not every loss or inconvenience to the agency would prevent termination of the contract. It is not up to the Court or the contracting officer to strike a different balance from that set forth in the statute.

Id.

¹² *Int'l Data Prods.* 70 Fed. Cl. at 386.

¹³ *Id.* at 399. In a footnote, the court also noted that even if the services had been provided pursuant to the contract, the cost of the services were included as part of the unit prices of the products purchased and already paid for by the government. The contractor argued that it still hadn't been "fully" compensated for the services because it had based its pricing on an expectation that all four of the contract's option periods would be exercised. The court rejected this

The Federal Circuit, however, held that the statute did not terminate the contractor's obligation to continue performing the warranty and upgrade services after the termination for convenience.¹⁵ The court first found that the Air Force had already paid for the warranty services, because the warranty accompanied, and was included in the cost of, the equipment that the Air Force had purchased.¹⁶ The court also observed that the COFC's holding was inconsistent with the Federal Acquisition Regulation (FAR), which specifies that termination does not affect the parties' rights and liabilities "concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the Government by the Contractor under the contract," which survive termination.¹⁷ The regulation, the contract, and Air Force's termination notice which tracked the language in the regulation, all supported the court's conclusion.¹⁸ While the court reversed the COFC as to whether the contractor's warranty and upgrade services obligation survives termination for convenience, the court affirmed the COFC's determination that the contractor was not entitled to any termination costs,¹⁹ finding each of the contractor's theories of recovery to be without merit.²⁰

A Contractor Being a Pain in the Butt Is a Good Enough Reason to T4C Contract

The government's right to terminate a contract for the convenience of the government is, of course, a very broad right. In a case more notable for its entertainment value than for legal developments, a decision by the Civilian Board of Contract Appeals this year further illustrates the breadth of this right. In *Greenlee Construction, Inc. v. General Services Administration*,²¹ a job order contract for construction work was terminated for the convenience of the government after the contractor failed to provide a price proposal for a payment bond required as a result of the contracting officer's unilateral change and for which the government agreed to pay. The contractor, who at the time of termination had not yet performed any work or apparently incurred any costs, appealed the contracting officer's deemed denial of the contractor's claim for \$2,282,822 and the contracting officer's final decision denying a \$165,000 claim for termination settlement charges, alleging that the termination was unreasonable and in bad faith.²²

The Board noted that a failure to provide a required bond was a valid ground even for a termination for default, so it was certainly an adequate justification for terminating the contract for convenience.²³ However, the Board noted that even if that justification had not sufficed, "the contracting officer had another, ample reason for issuing the termination: Greenlee was a consistently uncooperative contractor, and it is unquestionably in the Government's interest to be free from such a party."²⁴ Among the contractor's several other failures to endear himself to the General Services Administration (GSA) were the contractor's demand, two days after award, that GSA not issue any orders for work under certain contract line items because those tasks would net little profit, informing the GSA that if it were given only the guaranteed minimum instead of the

argument, noting that the government had no obligation to exercise any options, and if the warranty services had been priced "based upon the assumption that all four option periods would be exercised, it did so at its own risk." *Id.* at 399 n.11.

¹⁴ *Id.* at 404.

¹⁵ *Int'l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1320 (Fed Cir. 2007) (LEXIS 2008).

¹⁶ *Id.* at 1322–23.

¹⁷ *Id.* at 1323 (quoting U.S. GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 49.603-1(b)(7)(v) [hereinafter FAR]).

¹⁸ *Id.* While not specifically noted by the court, the statute that compelled termination in this case merely directed that the contract "shall be terminated for the convenience of the Government," giving no indication that the effect of termination under these circumstances would be different from any other termination for convenience. 15 U.S.C.S. § 637(a)(21)(A) (LexisNexis 2008). This point by itself seemingly supports the court's holding that the warranty obligations survive the termination for convenience.

¹⁹ *Int'l Data Prods.*, 492 F.3d at 1320.

²⁰ *Id.* at 1323–27. The contractor's theories of recovery included "expectation damages, warranty services under an express contract, warranty services under an implied in fact contract, warranty work under a theory of constructive change or equitable adjustment or cardinal change, and quantum meruit based on an implied in fact contract." *Id.* at 1323. Except for the theory of implied in fact contract, over which the COFC lacked jurisdiction, the Federal Circuit rejected each of these theories for essentially the same reasons as had the COFC.

²¹ CBCA Nos. 415, 448, 07-2 BCA ¶ 33,619.

²² *Id.* at 166,509. The claims for these amounts are as interesting as the contractor's conduct before termination, and included such things as anticipated overhead and profits during the base year, both unexercised option years, and two additional years that the contractor alleged would be granted to "favored contractors"; the wages that the contractor's president would allegedly have received over those five years; attorney fees; and an amount the contractor erroneously alleged to be the contract's guaranteed minimum for both the base year as well as for each of the contract's unexercised option years. *Id.*

²³ *Id.* at 166,511.

²⁴ *Id.*

contract maximum “then we will have more problems.” The contractor sought to have the contract prices increased, complaining that the contract provided the contractor with too little profit. The contractor asked for a different start date, different line items, two additional option years, and a payment of \$73,400. Lastly, the contractor demanded that GSA not issue any orders under the contract unless GSA amended the contract to increase the percentage adjustment to the same percentage that another contractor was allegedly receiving under a different contract in a different geographical area.²⁵ “It does not take much imagination,” the Board stated, “to see how a contracting officer would find it advantageous to end legal entanglements with a contractor who behaved in this fashion.”²⁶

Finding that the termination was not motivated by bad faith, the Board denied the breach of contract claim. Because the contractor failed to show any incurred costs, and finding the claim “misguided in several ways,”²⁷ the Board also denied the claim for termination settlement charges.

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²⁵ *Id.* at 166,511–12.

²⁶ *Id.* at 166,512.

²⁷ *Id.*

Government Property

Electronically Accounting for DOD Property

On 13 September 2007, the Department of Defense (DOD) published an interim rule through Defense Federal Acquisition Regulation Supplement (DFARS) Case 2005-D015 requiring contractors to provide Item Unique Identification (IUID) data electronically in the IUID registry for all DOD personal property in the possession of the contractor (PIPC).¹ In the past, contractors were able to report PIPC annually using Department of Defense (DD) Form 1662 pursuant to DFARS 245.505-14 and DFARS 252.245-7001.² On 1 October 2005, DOD began to phase out the DD Form 1662 manual reporting process and started to migrate towards electronic reporting.³ Under the interim rule, the DFARS sections authorizing the use of DD Form 1662 have been removed and replaced by new DFARS provisions that require use of the IUID registry.⁴ This registry is accessible via the internet.⁵ Through its use, DoD hopes to achieve more efficient and accurate PIPC reporting.⁶ In accordance with Federal Acquisition Regulation (FAR) 1.108(d)(1), the interim rule applies to all contracts resulting from solicitations issued on or after its 13 September 2007 effective date.⁷ The public comment period for this interim rule will expire on 13 November 2007.⁸

A New Government Property Regime Begins: Are Contracting Professionals Prepared?

In the late 1990s, DOD initiated a complete rewrite of Federal Acquisition Regulation (FAR) Part 45,⁹ the Government Property section, and its associated clauses.¹⁰ The proposed amendments sought to encourage efficiency, flexibility, and innovation by adopting a life-cycle, performance-based approach to property management that allowed DOD to take advantage of commercial business practices.¹¹ More than a decade in the making, the efforts of the DOD finally came to fruition on 14 June 2007 when a final rule proposed by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) became effective.¹² In evaluating the changes, one of the goals of the Councils was to simplify procedures, clarify language, and eliminate obsolete requirements,¹³ and to this end, the success of the drafters is readily apparent from even a cursory review of the new regulations. First, the drafters reorganized FAR Part 45 making it

¹ Defense Federal Acquisition Regulation Supplement; Reports of Government Property (DFARS Case 2005-D015), 72 Fed. Reg. 52,293 (Sept. 13, 2007) [hereinafter DFARS Interim Rule].

² U.S. DEP'T OF DEFENSE, ITEM UNIQUE IDENTIFICATION OF GOVERNMENT PROPERTY GUIDEBOOK: REPORTING GOVERNMENT PROPERTY IN THE POSSESSION OF THE CONTRACTOR (PIPC), at 3 (Sept. 21, 2007) [hereinafter 2007 GUIDEBOOK] (version 1.0), available at <http://www.acq.osd.mil/dpap/pdi/uid/guides.html> (then follow "Item Unique Identification of Government Property Guidebook (September 21, 2007)" hyperlink).

³ *Id.*

⁴ DFARS Interim Rule, *supra* note 1, at 52,297–52,299. The new regulations may be found in the following DFARS sections: 211.274-4, 211.274-5, 252.211-7003, and 252.211-7007. *Id.*

⁵ 2007 GUIDEBOOK, *supra* note 2, at 10. The IUID registry may be accessed through the Government's Business Partner Network (<https://www.bpn.gov/iuid>). After accessing the registry, the information is then available in Wide Area Workflow (WAWF). *Id.* WAWF is a "secure real-time web-based DoD enterprise system for electronic invoice submission, receipt, acceptance, processing, and reporting." U.S. DEP'T OF DEFENSE, DEFENSE ACQUISITION TRANSFORMATION: REPORT TO CONGRESS 43–44 (July 2007).

⁶ DFARS Interim Rule, *supra* note 1, at 52,293.

⁷ GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 1.108(d)(1) (July 2007) [hereinafter FAR].

⁸ DFARS Interim Rule, *supra* note 1, at 52,293.

⁹ Federal Acquisition Regulation; Government Property, 70 Fed. Reg. 180, 54,878 (Sept. 19, 2005) [hereinafter FAR Change].

¹⁰ See Douglas N. Goetz, *The Rewrite of FAR Part 45: Government Property and Its Associated Clauses*, CONTRACT MANAGEMENT 31 (July 2006) (summarizing the "long and arduous process" of rewriting FAR Part 45).

¹¹ FAR Change, *supra* note 9, at 54,879.

¹² Federal Acquisition Regulation; Final Rule, 72 Fed. Reg. 27,363 (May 15, 2007) [hereinafter Final FAR Rule].

¹³ *Id.*

more user-friendly¹⁴ and tailored its language so that it now only applies to the Government.¹⁵ Another obvious and dramatic change was the drafters' reduction of the number of FAR property clauses from nineteen to just three overarching clauses.¹⁶

In light of this improved organization and clause reduction, contracting professionals may be inclined to breathe a sigh of relief by concluding that under the new Government property regime, they will have easier roles to play. Such a conclusion, however, would be inaccurate. While the new regulation has simplified certain aspects of handling Government property, it has also placed a considerable burden on contracting officers, property administrators, and other personnel involved in the awarding and administering of Government property because these personnel are now being asked to be aware of and to understand voluntary consensus standards (VCS)¹⁷ and industry-leading practices (ILP)¹⁸ applicable to the management of that property.¹⁹ In the discussion that follows, this article will briefly explore the scope, the genesis, and the implications of the new Government property regime's VCS and ILP knowledge requirement. This analysis will raise the question of whether the Government's acquisition personnel are adequately prepared to effectively execute their additional duties under the new rules.

The concept of incorporating VCS and ILP into the Government sector is not new. In fact, the incorporation VCS is required by statute,²⁰ policy,²¹ and regulation,²² and the use of VCS is prevalent within DOD.²³ The use of ILP within the Government is also routinely encouraged.²⁴ The Government's goals in using VCS, which can also be attributed to ILP, are:

¹⁴ Goetz, *supra* note 10, at 31.

¹⁵ *Id.* According to Goetz, the purpose of this change was to bring FAR Part 45 in concert with FAR protocol calling for all requirements contractually imposed upon the contractor to be in a clause. *Id.*

¹⁶ See FAR, *supra* note 7, pts. 52.245-1, 52.245-2, 52.245-9. First, FAR 52.245-1, Government Property, is the default property clause and, as described in FAR 45.107(a) (Contract Clauses), it is required in almost every contract. Second, FAR 52.245-2, Government Property Installation Operation for Services, was written in response to exponential growth in Government service contracts and the Office of Management and Budget A-76 process. Goetz, *supra* note 10, at 37. This clause applies to installation service contracts where the Government provides the property "as-is" for the purpose of initial provisioning only and bears no responsibility for its repair or replacement. FAR, *supra* note 7, at 45.107(b). Lastly, FAR 52.245-9, Use and Changes, was carried-over virtually unchanged from the old Part 45 clauses. It is now required whenever FAR 52.245-1 is used in a contract. *Id.* at 45.107(c).

¹⁷ As a part of the Government property rewrite, the drafters added a definition of VCS to FAR Part 2.101. Final FAR Rule, *supra* note 12, at 27,383. This definition reads:

[C]ommon and repeated use of rules, conditions, guidelines or characteristics for products, or related processes and production methods and related management systems. Voluntary Consensus Standards are developed or adopted by domestic and international voluntary consensus standard making bodies (*e.g.*, International Organization for Standardization (ISO) and ASTM-International).

Id.

¹⁸ The Councils did not define ILP in the FAR. In an unpublished version of the DOD MANUAL FOR THE PERFORMANCE OF CONTRACT PROPERTY ADMINISTRATION (DOD 4161.2-M), however, one can find a proposed definition:

Industry leading practices (ILP) are generally accepted processes, including best practices, that have been proven throughout related businesses, to be managerially and economically effective, efficient, and successful at meeting particular objectives of a contractor's management system, and where specified, in compliance with the required Government Outcomes. The ILP should be based on empirical research, evidence and literature pertaining to that business practice, product or system as a "leading" practice. In order for a process to become an ILP, it should be widely used. Generally, there should be supporting historical data from an accepted source, *e.g.*, trade publications, literature, etc., to support that process as being repeatable, efficient, measurable, and verifiable.

Douglas N. Goetz, *Applications of Voluntary Consensus Standards and Industry Leading Practices within the Federal Acquisition Regulation Government Property Clause-52.245.1*, 10-11 (quoting the unpublished version of DOD 4161.2-M), available at <https://acc.dau.mil/GetAttachment.aspx?id=172702&name=file&lang=en-US&aid=30927> (last visited Feb. 24, 2008).

¹⁹ FAR Change, *supra* note 9, at 54,879.

²⁰ National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775 (codified as amended in scattered sections of 15 U.S.C.). With limited exceptions, Section 12(d) of this Act directs that Federal agencies and departments "shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments." *Id.*

²¹ FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES (Feb. 10, 1998) [hereinafter OMB CIR. A-119].

²² See FAR, *supra* note 7, pt. 11.101(c). This provision states:

In accordance with OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," agencies must use voluntary consensus standards, when they exist, in lieu of Government-unique standards, except where inconsistent with law or otherwise impractical. The private sector manages and administers voluntary consensus standards. Such standards are not mandated by law (*e.g.*, industry standards such as ISO 9000).

Id.

²³ In Fiscal Year 2006, DOD participated in 110 VCS bodies and began to use 9,204 VCS. ADDENDUM TO THE TENTH ANNUAL REPORT ON FEDERAL AGENCY USE OF VOLUNTARY CONSENSUS STANDARDS AND CONFORMITY ASSESSMENT D-33, D-34 (2006).

a) Eliminate the cost to the Government of developing its own standards and decrease the cost of goods procured and the burden of complying with agency regulation; b) Provide incentives and opportunities to establish standards that serve national needs; c) Encourage long-term growth for U.S. enterprises and promote efficiency and economic competition through harmonization of standards; and d) Further the policy of reliance upon the private sector to supply Government needs for goods and services.²⁵

The application of VCS and ILP to Government property in order to achieve those goals is a sound decision that will likely lead to significant rewards in the long term. In the short term, however, the mandatory use of these standards and practices entails a certain amount of risk because Government contracting officers and property administrators are not familiar with these standards and practices. Further, applying VCS and ILP is not simple. Numerous VCS bodies exist,²⁶ and if a VCS body promulgates standards applicable to Government property, those standards may also be numerous.²⁷ With regard to ILP, one of the qualities that makes ILP appealing is their dynamic nature. Unfortunately, this dynamism also makes it difficult to readily understand them because ILP is constantly changing. Because ILPs frequently change, one author proposes that Government personnel faced with these practices should research professional property manuals and commercial literature to determine what these materials say about the practices.²⁸ This proposal is certainly valid, but it still constitutes a daunting task for an understaffed contracting office that is struggling to comply with the new Government property requirements.

Delving into these requirements, the genesis for the use of VCS and ILP in Government property management originates from the new primary property clause, which mandates:

[T]he Contractor *shall* initiate and maintain the processes, systems, procedures, records, and methodologies necessary for effective control of Government property, *consistent with voluntary consensus standards and/or industry-leading practices* and standards for Government property management except where inconsistent with law or regulation.²⁹

As a result of contractors being required to use VCS and ILP, Government personnel responsible for awarding and administering those contracts must also understand VCS and ILP in order to effectively execute their duties and to protect the Government from abuse.³⁰ That supposition is explicitly and implicitly reaffirmed throughout the new FAR Part 45, but it is especially important in three distinct areas: (1) Acquisition planning, (2) Evaluation of contractor proposals, and (3) Monitoring of contractor performance.

²⁴ See, e.g., U.S. GEN. ACCOUNTABILITY OFF., REP. NO. GAO-02-447G, EXECUTIVE GUIDE: BEST PRACTICES IN ACHIEVING CONSISTENT, ACCURATE PHYSICAL COUNTS OF INVENTORY AND RELATED PROPERTY (Mar. 2002).

²⁵ OMB CIR. A-119, *supra* note 21, at sec. 2.

²⁶ In Fiscal Year 2006, federal agencies participated in 413 VCS bodies, which is only a segment of the community of VCS bodies. FY 2006 VOLUNTARY CONSENSUS STANDARDS BODIES IN WHICH FEDERAL AGENCIES PARTICIPATED (n.d.). It is uncertain how many VCS bodies might publish standards that would be applicable to Government property management. Goetz, *supra* note 18, at 8–9.

²⁷ When gauging the scope of this problem, consider that a recent article on this subject identified fifteen different Property Management VCS published by just one VCS body. Goetz, *supra* note 18, at 7–8. For illustrative purposes, these fifteen VCS's are listed below:

E2132-01 Standard Practice for Physical Inventory of Durable, Moveable Property; E2221-02 Standard Practice for Administrative Control of Property; E2279-03 Standard Practice for Establishing the Guiding Principles of Property Management; E2497-06 Standard Practice for Calculation of Equipment Movement Velocity; E2499-06 Standard Practice for Classification of Equipment Physical Location Information; E2219-02 Standard Practice for Valuation and Management of Moveable, Durable Property; E2220-02 Standard Practice for Establishing the Full Valuation of the Loss/Overage Population Identified During the Inventory of Moveable, Durable Property; E2378-05 Standard Practice for the Recognition of Impaired or Retired Personal Property; E2453-05 Standard Practice for Determining the Life-Cycle Cost of Ownership of Personal Property; E2131-01 Standard Practice for Assessing Loss, Damage, or Destruction of Property; E2306-03 Standard Practice for Utilization and Disposal of Personal Property; E2379-04 Standard Practice for Property Management for Career Development and Training; E2452-05e1 Standard Practice for Equipment Management Process Maturity Model; E2495-07 Standard Practice for Prioritizing Asset Resources in Acquisition, Utilization, and Disposition; E2135-06 Standard Terminology for Property and Asset Management.

Id. at 8.

²⁸ *Id.* at 16.

²⁹ See FAR, *supra* note 7, pt. 52.245-1(b)(1) (emphasis added).

³⁰ When private entities are involved in the setting of contractual standards, even by proposing VCS, Government agencies must close the knowledge gap to be effective because “[w]hen the transaction takes place under conditions of uncertainty, the private actor may be able to exploit an information advantage to take actions that are in its self-interest, but not in the agency’s self-interest.” Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 405 (2003).

In the area of acquisition planning, the new Government property rules require contracting officers to specifically discuss government-furnished property issues in acquisition plans.³¹ These rules also require contracting officers to provide property to contractors only when the contracting officer determines that four criteria are met.³² These criteria include a finding that providing property is in the Government's best interest and that the overall benefit of furnishing the property significantly outweighs the increased cost of administration.³³ In order to responsibly execute these requirements and make reasoned findings about matters like acquisition strategy and administration costs, a contracting officer is going to have to possess at least a general understanding of the VCS and/or ILP that a contractor might employ to manage the property in question.

In the area of proposal evaluation, the new Government property rules mandate that contracting officers require all offerors to submit with their offers information on the "voluntary consensus standard or industry leading practices and standards to be used in the management of Government property, or existing property management plans, methods, practices, or procedures for accounting for property."³⁴ Obviously, in order to understand and evaluate these "property management plans," contracting officers and Government personnel involved in the acquisition process must first understand VCS and ILP.

Finally, in the area of monitoring contract performance, if a contractor is utilizing a property management system rooted in VCS and/or ILP, then to properly administer the contract the Government personnel will have to understand what the standards and practices require and how they should operate in practical application. Specifically, this knowledge would be necessary to conduct the analysis of the contractor's property management policies, procedures, practices, and systems, which the new regulations require.³⁵ Under the new rules, contracting officers may revoke the Government's assumption of risk "when the property administrator determines that the contractor's property management practices are inadequate and/or present an undue risk to the Government."³⁶ Without a substantial understanding of VCS and ILP, however, contracting professionals will be unable to protect the Government from contractors, whose property management systems are not in compliance with the contractual requirements.³⁷

As the three scenarios discussed above demonstrate, contracting professionals will need to understand VCS and ILP in order to function responsibly under the new Government property regime. This reality raises the question of whether these personnel are adequately prepared. During the public comment period for the new rules, one respondent raised this very issue, by inquiring, "How are contracting officers to be aware of industry leading practices? Will the council direct the creation of new Defense Acquisition University (DAU) courses specifically for this purpose?"³⁸ The response to this question was, "The Councils believe that contracting officers are professionals in their fields of acquisition and are capable of assessing the necessary information from various sources applicable in their respective fields. The Councils will work with DAU to determine if and to what extent course revisions or new courses are required."³⁹ While all contracting officers should be professionals in their fields of acquisition and capable of assessing the necessary information to effectively execute the new Government property rules, the public forum is unfortunately full of reports bemoaning the health and capabilities of an exceedingly taxed Federal acquisition corps.⁴⁰ Fortunately, DOD officials also recognized the need for training early in the process and developed a four-phase training plan to meet those needs,⁴¹ which DAU is currently implementing.⁴² The

³¹ See FAR, *supra* note 7, 7.105(b)(14).

³² *Id.* at pt. 45.102(b).

³³ *Id.*

³⁴ *Id.* at pt. 45.201(c)(4).

³⁵ *Id.* at pt. 45.105(a).

³⁶ *Id.* at pt. 45.104(b).

³⁷ *Id.* at pt. 45.105(b).

³⁸ Final FAR Rule, *supra* note 12, at 27,369.

³⁹ *Id.*

⁴⁰ See, e.g., REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS ch. 5 The Federal Acquisition Workforce (Jan. 2007), available at <http://www.acqnet.gov/comp/aap/documents/Chapter5.pdf>. In this report, the Panel found that "[t]he federal government does not have the capacity in its current acquisition workforce necessary to meet the demands that have been placed on it." *Id.* at 361. It also found that "[t]he pace of acquisition reform initiatives has outstripped the ability of the federal acquisition workforce to assimilate and master their requirements so as to implement these initiatives in an optimal fashion." *Id.* at 369; see also THE PROFESSIONAL SERVICE COUNCIL PROCUREMENT POLICY SURVEY, TROUBLING TRENDS IN FEDERAL PROCUREMENT (2006).

⁴¹ Thomas Ruckdaschel, Presentation at the National Property Management Association, National Education Seminar: The Property Code Parts 45 & 52 (Sept. 2005) (unpublished PowerPoint Presentation available at <http://www.knownet.hhs.gov/log/propmanDR/PPMPdf/nes.ppt>).

billion dollar question, however, remains. In short, will enough Government personnel receive the in-depth training they need in time to effectively implement the new regime in a manner that can mitigate its risks and realize its potential?

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⁴² Charles Waszczak, Presentation at the Defense Acquisition University 2007 St. Louis Acquisition Insight Day: FAR Part 45—Government Property Requirements for Program Managers and Contracting Officers, (May 23, 2007) (PowerPoint Briefing Slides *available at* <http://www.dau.mil/regions/Midwest/docs/2007%20STL%20Acq%20Ins%20Day%20--%20FAR%2045a.ppt>).

Non-Appropriated Fund Contracting

CAFC and COFC Consider Jurisdiction Applying “NAFI Doctrine”—Reaching Different Results

In the following two cases, both the Court of Federal Claims (COFC) and the Court of Appeals for the Federal Circuit (CAFC) consider whether the COFC can properly exercise jurisdiction over a contract award or over a bid protest involving a non-appropriated fund instrumentality (NAFI). While the COFC decision determines that the exercise of jurisdiction is proper,¹ the CAFC decision determines that the exercise of jurisdiction is improper.² Practitioners may be puzzled by these two cases which reach different results but which have marked similarities.

In *Southern Food, Inc. v. United States*, the COFC considered a post-award protest requesting declaratory and injunctive relief from the United States, acting through the United States Army Community and Family Support Center (USACFSC).³ In this protest, Southern Foods requested a declaratory judgment that USACFSC’s decision to award a food service contract to United States Foodservice, Inc. (USF) was “arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.”⁴ The protester also requested that the COFC order USACFSC to set aside the award to USF and re-solicit the requirement. While the United States moved to dismiss the protest on jurisdictional grounds, the COFC denied the motion to dismiss and considered the protest on the merits.⁵ This article will focus primarily on the jurisdictional issues raised in this case.

In *Southern*, USACFSC awarded a food service contract on 24 February 2006 as part of the Joint Services Prime Vendor Program (JSPV Program).⁶ The JSPV Program is a group of separate contracts between commercial vendors and the Army which supply all of the food requirements for the Army’s Morale, Welfare, and Recreation (MWR) activities. The JSPV Program is regulated by Army non-appropriated fund (NAF) regulations. The particular contract at issue affected food services at Fort Knox, Kentucky and Fort Campbell, Kentucky. The solicitation stated that only NAFs would be obligated for this contract.⁷

The government argued that the entity which awarded the food service contract, USACFSC, is a NAFI and as such, the COFC has no jurisdiction over the protest.⁸ Conversely, while the COFC agreed that USACFSC is a NAFI, the court nevertheless found that the court does have jurisdiction over this protest involving a NAFI contract.⁹

The *Southern* court meticulously explained the circumstances under which the COFC has jurisdiction over NAFI contracts.¹⁰ The COFC’s jurisdiction over actions against the United States over government contracts originates from the Tucker Act.¹¹ The Tucker Act is a specific waiver of sovereign immunity and grants jurisdiction to the COFC to hear contract claims filed against the United States; the act states in pertinent part:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department or upon any express or implied contract with the United States¹²

The Alternative Dispute Resolution Act (ADRA)¹³ amends the Tucker Act by specifically granting the COFC jurisdiction over protests. The ADRA states that the COFC has jurisdiction to:

¹ *S. Foods, Inc. v. United States*, 76 Fed. Cl. 769, 771 (2007).

² *Smith v. United States*, (*Smith II*) No. 2007-5008, 2007 U.S. App. LEXIS 5686 (Mar. 8, 2007).

³ *S. Foods, Inc.*, 76 Fed. Cl. at 770.

⁴ *Id.*

⁵ *Id.* at 771.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 774. The court stated that, “non-appropriated fund instrumentalities (NAFIs) are federal government entities whose ‘monies do not come from congressional appropriation but rather primarily from their own activities, services, and product sales.’” *Id.* (citing *El-Sheikh v. United States*, 177 F.3d 1321, 1322 (Fed. Cir. 1999)).

⁹ *Id.* at 776.

¹⁰ *Id.* at 775–76.

¹¹ 28 U.S.C.S. § 1491(a)(1) (LexisNexis 2008).

¹² *Id.*

¹³ *Id.* § 1491(b).

render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with procurement or a proposed procurement.¹⁴

The so-called “NAFI Doctrine” is a limit on the COFC’s jurisdiction under the Tucker Act and the ADRA. This doctrine originated in *United States v. Hopkins*¹⁵ in which the United States Supreme Court case defined a NAFI as a federal entity that “does not receive its monies by congressional appropriation.”¹⁶ The *Hopkins* Court stated that because the Tucker Act does not waive sovereign immunity with respect to NAFIs (with the exception of military exchanges), the COFC has no jurisdiction in these cases. Hence, if the NAFI Doctrine applies then the COFC has no jurisdiction over the matter.

In *AINS v. United States*,¹⁷ the CAFC relied upon earlier decisions concerning the NAFI Doctrine in crafting the following four-part test for determining whether a court could exercise jurisdiction under the Tucker Act:

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.”¹⁸

Consequently, if all four of the above factors are met, then a government entity is a NAFI and thus, the COFC does not have Tucker Act jurisdiction. Conversely, if an entity cannot meet all four factors, then it is not a NAFI under the test and so, COFC does have jurisdiction.¹⁹ The court indicated that it would strictly construe its jurisdiction over protests and claims in light of this four-part test.²⁰

In applying the *AINS* test to the instant case, the COFC found that because USACFSC did not meet all four prongs, the COFC could not exercise jurisdiction over the case.²¹ Specifically, the court reasoned that USACFSC did not meet the first prong of the test. In reaching its conclusion, the COFC references Army Regulation (AR) 215-1 which states that all Army NAFIs receive some appropriated funds.²² Therefore, because USACFSC does receive appropriated funds, its funding source precludes it from being considered a NAFI under the NAFI Doctrine and thus, the COFC may exercise jurisdiction.²³

Interestingly, in a separate unpublished decision, *Smith v. United States*,²⁴ the CAFC applied the NAFI Doctrine and summarily decided that the doctrine precluded the COFC from exercising Tucker Act jurisdiction. The CAFC considered *Smith* on appeal of an earlier unpublished COFC decision²⁵ dismissing a contractor’s claim for lack of jurisdiction.²⁶ Unlike the CAFC’s rigorous application of the *AINS* test in the case by that name²⁷ and also unlike the COFC’s application of the

¹⁴ *Id.* § 1491(b)(1).

¹⁵ 427 U.S. 123 (1976).

¹⁶ *Id.* at 125 n.2.

¹⁷ *AINS, Inc. v. United States*, 365 F.3d 1333, 1342 (Fed. Cir. 2004). In this case, the CAFC determined that the United States Mint did, in fact, meet all four of the above factors and so, the COFC did not have jurisdiction over a claim filed against the Mint. *Id.*

¹⁸ *Id.* (citations omitted).

¹⁹ *Id.*

²⁰ *S. Foods, Inc. v. United States*, 76 Fed. Cl. 769, 775 (2007). The jurisdictional key is whether a government entity is a NAFI under the NAFI Doctrine’s four-part test and not merely whether the government considers the entity to be a NAFI. *Id.* So, if an entity is a NAFI under the NAFI Doctrine, then the COFC may not exercise Tucker Act jurisdiction. *Id.*

²¹ *Id.*

²² U.S. DEP’T OF ARMY, REG. 215-1, MILITARY MORALE, WELFARE, AND RECREATION PROGRAMS AND NONAPPROPRIATED FUND INSTRUMENTALITIES paras. 3–7, 3–8, 3–9 (31 July 2007).

²³ *S. Foods, Inc.*, 76 Fed. Cl. at 775.

²⁴ *Smith II*, No. 2007-5008, 2007 U.S. App. LEXIS 5686, at *9 (Mar. 8, 2007).

²⁵ *Smith v. United States (Smith I)*, No. 05-1246C, slip. op. (Ct. Fed. Cl. Aug. 22, 2006). The CAFC reviews jurisdictional issues de novo. *Smith II*, 2007 U.S. App. LEXIS 5686.

²⁶ *Id.*

²⁷ *AINS, Inc. v. United States*, 365 F.3d 1333, 1342 (Fed. Cir. 2004).

test in *Southern*,²⁸ in *Smith*, the CAFC did not appear to apply the test at all.²⁹ In its brief analysis, the CAFC determined that the COFC did not have jurisdiction to hear a breach of contract claim filed against an Air Force NAFI.³⁰

On 4 November 1998, on behalf of the Air Force's MWR Office, an Air Force contracting officer awarded a concession contract to Rodgers Travel Service (Rodgers), a company owned by Mr. Rodger Smith.³¹ The purpose of the contract was to "serve the recreational needs of Air Force servicemen through the MWR."³² The contract required the contractor to pay a concession fee that was based on the total sales of travel services.³³ In July of 2005, Rodgers filed a claim with the Air Force contracting officer seeking reimbursement of concession fees that he had paid on international airline tickets in the amount of \$3,116.³⁴ About four months later, prior to the contracting officer's issuance of a decision on the claim, Rodgers filed an appeal at the COFC under the Contract Disputes Act³⁵ seeking reimbursement of the concession fees and also its other expenses totaling \$82,635.97.³⁶ The COFC dismissed the appeal for lack of jurisdiction because the appeal concerned a contract between a Rodgers and a NAFI, which is not an entity subject to the Tucker Act.³⁷

Rodgers appealed the COFC's decision to the CAFC which affirmed the lower court's decision.³⁸ The CAFC purportedly based its decision on the NAFI Doctrine stating that the CAFC "lacks jurisdiction over an action against the United States in which congressionally appropriated funds cannot be used to pay the resulting judgment."³⁹ Nevertheless, the court did not apply the *AINS* test to the facts of this case.⁴⁰

Although *Smith II* is an unpublished decision without precedential value, it is intriguing that the CAFC did not analyze this case using the *AINS* test, a test the CAFC created in 2004 for the purpose of applying the NAFI Doctrine.⁴¹ If the *Smith II* court had applied the *AINS* test, it seems probable that it would have exercised jurisdiction because Air Force NAFIs generally do receive some appropriated funds, thus failing the first prong of the test.⁴² Whether the *Smith II* decision signals a move by the CAFC away from a strict application of the *AINS* test remains a topic for future editions of the *Year in Review*.

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²⁸ *S. Foods, Inc.*, 76 Fed. Cl. at 775.

²⁹ *Smith II*, 2007 U.S. App. LEXIS 5686, at *4-*5.

³⁰ *Id.*

³¹ *Id.* at *2.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ 28 U.S.C. § 1491(a)(1) (LexisNexis 2008). The court stated that enough time had elapsed after Rodgers filed its claim with the contracting officer such that the contracting officer's failure to issue a decision could be considered a deemed denial under the Contract Disputes Act. See *Smith II*, 2007 U.S. App. LEXIS 5686, at *4 n.3; see also 41 U.S.C.S. § 605(c)(5) (LexisNexis 2008).

³⁶ *Smith II*, 2007 U.S. App. LEXIS 5686, at *2-*3.

³⁷ *Id.* at *3.

³⁸ *Id.* at *9.

³⁹ *Id.* at *4.

⁴⁰ *Id.* at *4-*6. In affirming the lower court's decision, it appears that the CAFC rather summarily agreed with the Air Force's characterization of the entity as a NAFI. After determining that the entity was a NAFI, the CAFC then concluded that the COFC could not exercise jurisdiction under the NAFI Doctrine. *Id.*

⁴¹ *Id.* In *AINS*, before articulating the "*AINS* test," the CAFC declared, "the NAFI Doctrine has evolved slowly since the Supreme Court first recognized the existence of NAFIs . . . [we] distill[s] from case law an analytic four-factor test." *AINS, Inc. v. United States*, 365 F.3d 1333, 1342 (Fed. Cir. 2004).

⁴² U.S. DEP'T OF THE AIR FORCE, INSTR. 65-106, APPROPRIATED FUND SUPPORT OF MORALE, WELFARE, AND RECREATION (MWR) AND NONAPPROPRIATED FUND INSTRUMENTALITIES (NAFIs) 9-10 (11 Apr. 2006).