FEDERAL CIRCUIT YEAR-IN-REVIEW 2014: WHERE THE RUBBER MEETS THE ROAD

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I. INTRODUCTION

The 2014 government contracts decisions of the U.S. Court of Appeals for the Federal Circuit stand out because of their importance to Contracting Officers (COs) and contract administrators whose countless daily decisions determine the success or failure of a given procurement. Often, those most affected by the Federal Circuit's decisions are the attorneys litigating the disputes and protests before the court and the tribunal decisions that the court reviews. For example, the Federal Circuit's government contracts decisions in 2012 focused on gatekeeping litigation issues, such as jurisdiction, timeliness, and other requirements that determine whether a particular forum is available to resolve a protest or dispute.[1] In contrast, in 2014 the Federal Circuit issued at least six decisions that impact the day-to-day administration of federal government contracts.

Perhaps the most important decisions of 2014 involved two complex cost accounting disputes—*Sikorsky Aircraft Corp. v. United States*[2] and *Raytheon Co.*

1. Daniel P. Graham et al., *Federal Circuit Year-in-Review 2012: Guarding the Gates of Government Contracts Litigation*, 42 PUB. CONT. L.J. 695, 702–30 (2013).
2. Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315 (Fed. Cir. 2014).

v. United States.[3] Both cases resolved significant questions regarding the Cost Accounting Standards (CAS)[4] and the Federal Acquisition Regulation (FAR) Cost Principles.[5] Yet both decisions are far more important for the ancillary rulings that the Federal Circuit made in the course of resolving those appeals.

For example, *Sikorsky* held that the Contract Disputes Act's (CDA) six-year statute of limitations is not jurisdictional, reasoning that over a decade of precedent to the contrary had been effectively overruled by recent Supreme Court decisions.[6] *Sikorsky* undoubtedly impacts litigators; timeliness is now an affirmative defense and need not necessarily be addressed prior to reaching the merits of a claim.[7] But *Sikorsky* will have an even more profound impact on how the government and contractors resolve the enormous backlog of incurred cost audits that has prevented final agreement on reimbursement under many cost-reimbursement contracts.[8] And although *Sikorsky* does not breathe new life into otherwise untimely claims, the decision potentially allows for tolling of the CDA's limitations period by agreement of the parties.[9]

In *Raytheon*, the Federal Circuit seized its first opportunity to endorse the longstanding holdings of the Court of Federal Claims (COFC) and the Armed Services Board of Contract Appeals (ASBCA) ruling that "the [g]overnment bears the burden of proving that a contractor's accounting practices do not comply" with the CAS or the FAR Cost Principles.[10] As with the *Sikorsky* decision, *Raytheon*'s allocation of this burden directly impacts litigators and the order of proof in cost accounting disputes. But as with *Sikorsky*, the greater impact is on accountants and auditors tasked with assuring that incurred costs are accumulated and allocated in accordance with CAS and the FAR Cost Principles. Because those rules in many instances provide for a range of reasonable accounting practices, allocating the burden of establishing non-compliance to the government requires auditors and COs to demonstrate, in the first instance, that the contractor's accounting practice is unreasonable.[11]

3. Raytheon Co. v. United States, 747 F.3d 1341 (Fed. Cir. 2014).

4. FAR 9904.

5. FAR 31.

6. *Sikorsky*, 773 F.3d at 1320–21 (citing Sebelius v. Auburn Regional Med. Ctr., 133 S. Ct. 817 (2013)).

7. *Id.* at 1322.

8. Robin Schulze & Karen L. Manos, The Contract Disputes Act Statute of Limitations: Take Your Time, DOD, Gov't Contract Costs, Pricing & Accounting Rep. 4–6 (2011) [hereinafter Contract Disputes Act Report]. *Accord* Scott Amey, *Billions of Defense Contract Dollars May Go Unaudited*, Huffington Post (Sept. 23, 2013), http://www.huffingtonpost.com/project-on-government-oversight/billions-of-defense-contract_b_3645925.html. Prior cases had rejected the government's argument that the CDA's limitations period does not begin to run until after an audit is completed. *See, e.g.*, Raytheon Co. v. United States, 105 Fed. Cl. 351, 353 (2012) (rejecting the government's argument that "only completion of an audit of plaintiff's claim can provide it sufficient evidence and proof of facts necessary for a trial of the claim" such that the "statute of limitations begins to run then.").

9. *See infra* Part IV.A.

10. *Raytheon*, 747 F.3d at 1352.

11. For example, *Sikorsky* involved the application of CAS 418-50, which governs the allocation of direct and indirect costs. *Sikorsky*, 773 F.3d 1315 (Fed. Cir. 2014); FAR 9904.418-40. Although the Panel in *Sikorsky* questioned whether the contractor's accounting practice satisfied

In a pair of decisions issued early in the year, the Federal Circuit also addressed the implied duty of good faith and fair dealing—the last resort for any contracting party that believes that a particular risk should be borne by the other. In the first, *Bell/Heery, A Joint Venture v. United States*,[12] a divided Panel reaffirmed the standard set forth in *Precision Pine & Timber, Inc. v. United States*[13] and indicated that although the duty is defined on a contract-by-contract basis and is dependent on the terms of the contract at issue, this duty cannot be used to "create" obligations inconsistent with those set forth in the contract.[14] Instead, *Bell/Heery* required the plaintiffs to show that the government "reappropriated benefits promised to [plaintiff] under the contract."[15] One month later, however, the Federal Circuit in *Metcalf Construction Co. v. United States*[16] clarified its decision in *Precision Pine*,[17] holding that a contractor can demonstrate a violation of the duty of good faith even in the absence of "specifically targeted action" or a breach of an express contract provision.[18]

Similarly, the Federal Circuit in 2014 twice confronted the elemental question: "What is a procurement contract?" In *CMS Contract Management Services v. United States*,[19] the COFC concluded that the Department of Housing and Urban Development (HUD) had properly used cooperative agreements rather than procurement contracts to obtain services in support of the agency's Section 8 Housing Program.[20] The Federal Circuit reversed and agreed with an earlier decision of the Government Accountability Office (GAO) that the arrangements were procurement contracts,[21] meaning that an entire federal program twice went to bed one night thinking it was exempt from federal procurement law, but woke up the next day only to find out it was subject to the Competition in Contracting Act (CICA) and the FAR.[22] And in *Crewzers Fire Transport, Inc. v. United States*,[23] the Federal Circuit confirmed that the frequently used agreements known as blanket purchase agreements (BPAs),[24] although often useful for all parties involved, are not actually binding contracts because they do not obligate the government to

CAS 481-50(e)'s proportionality requirement, the Panel found in favor of the contractor on the basis of the allocation of the burden, concluding that "the government has been unwilling or unable to argue that Sikorsky's approach is not appropriate." *Sikorsky*, 773 F.3d at 1326.

12. Bell/Heery, A Joint Venture v. United States, 739 F.3d 1324, 1335 (Fed. Cir. 2014).
13. Precision Pine & Timber, Inc. v. United States, 596 F.3d 817, 826 (Fed. Cir. 2010).
14. *See Bell/Heery*, 739 F.3d at 1335.
15. *Id.*
16. Metcalf Constr. Co. v. United States, 742 F.3d 984 (Fed. Cir. 2014).
17. *Precision Pine*, 596 F.3d at 817.
18. *Metcalf Constr.*, 742 F.3d at 993.
19. CMS Contract Mgmt. Servs. v. Mass. Hous. Fin. Agency, 110 Fed. Cl. 537 (2013).
20. CMS Contract Mgmt. Servs. v. Mass. Hous. Fin. Agency, 745 F.3d 1379, 1385 (Fed. Cir. 2014).
21. *Id.*
22. *See id.*
23. Crewzers Fire Crew Transp., Inc. v. United States, 741 F.3d 1380 (Fed. Cir. 2014).
24. *Id.* at 1381.

purchase anything.[25] Because the BPAs in that case were not contracts, the Federal Circuit concluded that it lacked jurisdiction under the Tucker Act to even hear the merits of the contractor's suit.[26]

Of course, practitioners should review the other decisions issued by the Federal Circuit in 2014, which are summarized below.[27] In the protest arena, the Federal Circuit issued a pair of opinions regarding CICA's Rule of Two, under which acquisitions must be set aside for small business participation when there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and the award will be made at fair market prices.[28] Both opinions affirmed the discretion of procuring officials as to whether and how to conduct the Rule of Two analysis.[29] And in *SRA International v. United States*,[30] the Federal Circuit reinforced that GAO is the only forum available to hear protests related to task or delivery orders.[31]

Finally, *Veridyne Corp. v. United States*[32] stands out among a number of appeals involving performance disputes. In *Veridyne*, the Federal Circuit held that the Special Plea in Fraud statute[33] not only precludes recovery under contract claims tainted by fraud, but also may preclude partial recovery under a quantum meruit.[34] *Veridyne* is particularly notable because evidence indicated that the respective procuring agency knew that the statements at issue were false, but appeared to have actively encouraged them.[35] *Veridyne* involved the Small Business Administration (SBA) Section 8(a) Program, and the Federal Circuit held that the false "inquiry does not end with the [procuring agency's] knowledge."[36] Because the SBA did not know the contractor's statements were false and relied on them to its detriment, the contractor was found liable.[37]

25. *Id.* at 1382–83.
26. *Id.* at 1384–85.
27. This Article does not summarize several other government contracts cases decided in 2014 that did not appear to contribute substantially to the existing body of law. *See*, *e.g.*, Stockton E. Water Dist. v. United States, 761 F.3d 1344 (Fed. Cir. 2014) (applying a broad and plaintiff-friendly interpretation of the government's potential liability for expectancy damages when it breaches a contract); Century Exploration New Orleans, LLC v. United States, 745 F.3d 1168 (Fed. Cir. 2014) (holding in a highly fact-specific case that the government did not breach oil lease agreements by issuing regulations that changed the way lessees were required to calculate worst-case discharge volume—a change that more than quadrupled corresponding bond requirements); Estes Express Lines v. United States, 739 F.3d 689 (Fed. Cir. 2014) (holding that bills of lading between a subcontractor shipper and the government agency were sufficient to establish privity of contract between the subcontractor and the government).
28. *See* Adams & Assocs., Inc. v. United States, 741 F.3d 102, 111 (Fed. Cir. 2014); Kingdomware Techs. v. United States, 754 F.3d 923, 934 (Fed. Cir. 2014); see also *infra* Part IV.A.
29. *Id.*
30. SRA Int'l, Inc. v. United States, 766 F.3d 1409 (Fed. Cir. 2014).
31. *Id.* at 1414.
32. Veridyne Corp. v. United States, 758 F.3d 1371 (Fed. Cir. 2014).
33. 28 U.S.C. § 2514 (2011).
34. *Veridyne Corp.*, 758 F.3d at 1377.
35. *Id.* at 1375.
36. *Id.* at 1379.
37. *Id.* at 1379–80.

II. 2014 BY THE NUMBERS

Government contracts appeals represented approximately five percent of the Federal Circuit's caseload in fiscal year 2014,[38] which is consistent with the range that has held fairly steady since 2006.[39] Notably, however, the Federal Circuit's precedential decisions in government contracts appeals represented approximately 6.5 percent of precedential decisions issued in the calendar year 2014; this is a significant decrease since 2012, when government contracts appeals represented about 9.3 percent of all precedential decisions.[40] A review of the number of precedential opinions that each Federal

38. *See* United States Court of Appeals for the Fed. Circuit, United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category, FY 2014, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/caseload_by_category_appeals_filed_2014.pdf (detailing as a pie graph the types of appeals filed by category in the Federal Circuit in 2014).

39. *See*, *e.g.*, United States Court of Appeals for the Fed. Circuit, United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category, FY 2013, http://www.cafc.uscourts.gov/images/stories/Statistics/fy%2013%20filings%20by%20category.pdf (indicating five percent); United States Court of Appeals for the Fed. Circuit, United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category, FY 2012, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Caseload_by_Category_Appeals_Filed_2012.pdf (indicating four percent); United States Court of Appeals for the Fed. Circuit, United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category, FY 2011, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Caseload_by_category_2011.pdf (indicating six percent, including spent nuclear fuel cases); U.S. Court of Appeals for the Fed. Circuit, United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category FY 2010, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Caseload_by_Category_Appeals_Filed_2010.pdf (indicating six percent, including spent nuclear fuel cases); U.S. Court of Appeals for the Fed. Circuit, United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category FY 2009, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/ChartFilings09.pdf (indicating five percent); U.S. Court of Appeals for the Fed. Circuit, United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category FY 2008, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/ChartFilings08.pdf (indicating six percent, including spent nuclear fuel cases); U.S. Court of Appeals for the Fed. Circuit, United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category FY 2007, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/ChartFilings07.pdf (indicating five percent); U.S. Court of Appeals for the Fed. Circuit, United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category FY 2006, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/ChartFilings06.pdf (indicating five percent). The Federal Circuit previously tracked spent nuclear fuel cases separately from contracts cases. *See generally*, U.S. Court of Appeals for the Fed. Circuit, United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category, FY 2011, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Caseload_by_category_2011.pdf (demonstrating that nuclear fuel cases and government contract cases are tracked separately and comprise one percent of cases whereas government contracts cases made up five percent).

40. These numbers are based on our own calculations and review, which identified eighteen government contracts-related precedential opinions out of 278 total precedential opinions issued by the Federal Circuit in 2014. In 2012, we identified twenty-four government contracts-related precedential opinions out of 257 total precedential opinions. *See Graham*, *supra* note 1, at 700. In 2011, we identified twenty-two government contracts-related precedential opinions, which was approximately 11 percent of the 199 total precedential opinions issued by the Federal Circuit in 2011. Daniel P. Graham et al., *Federal Circuit Year-in-Review 2011: Certainty and Uncertainty in Federal Government Contracts Law*, 41 PUB. CONT. L.J. 473, 477–82 n.26 (2012) [hereinafter *2011 Year-in-Review*]. As in the past, we have included all precedential opinions involving appeals from the COFC and the Boards of Contract Appeals under the Contract Disputes Act. 41 U.S.C. § 7107(a)(2011). We also included precedential opinions

Circuit judge participated in this year continues to demonstrate that most hear only a small number of government contracts appeals in a given year:[41]

Judge	Participated	Drafted	Participated w/o writing	Concurring	Dissenting	Total opinions
Active Judges						
Rader	2	1	1	0	0	1
Lourie	4	0	4	0	0	0
Bryson	1	1	0	0	0	1
Dyk	4	3	1	0	0	3
Prost	5	1	4	0	0	1
Moore	2	0	2	0	0	0
Newman	5	0	5	0	0	0
O'Malley	2	0	2	0	0	0
Reyna	7	5	0	0	2	7
Wallach	4	2	2	0	0	2
Taranto	8	3	5	0	0	3
Hughes	0	0	0	0	0	0
Chen	2	0	2	0	0	0
Senior Judges & Judges Sitting By Designation						
Clevenger	4	1	3	0	0	1
Linn	0	0	0	0	0	0
Mayer	1	0	0	0	1	1
Plager	3	2	1	0	0	2
Schall	0	0	0	0	0	0

involving the *Winstar* and spent nuclear fuel cases. We included several non-CDA appeals involving contract-based claims from the COFC. We identified the total precedential opinions in Westlaw Next by searching the CATF database with the following date restriction: "da(aft 1/1/2014 & bef 12/31/2014)." We then filtered all the decisions that were identified as "reported."

41. Professor Steven Schooner observed that "most Federal Circuit judges were not exposed to a large number of government contracts cases," based on his review of the Federal Circuit's 2010 government contracts decisions. Steven L. Schooner, *A Random Walk: The Federal Circuit's 2010 Government Contracts Decisions*, 60 AM. U. L. REV. 1067, 1068–69, 1071 (2011). We performed a similar analysis in our review of the 2011 and 2012 decisions. *See* Graham, *supra* note 1, at 700–01; *2011 Year-in-Review*, *supra* note 40, at 477–82. As we did for previous years, we excluded nonprecedential opinions from our analysis based on Federal Circuit Rule 32.1(b), which provides that "[a]n opinion or order which is designated as nonprecedential is one determined by the panel issuing it as not adding significantly to the body of law." FED. CIR. R. 32.1(b). To be sure, participation in these appeals provides some degree of experience and background in government contracts law.

As with 2010, 2011, and 2012, every judge participated in fewer than ten government contracts-related appeals that generated a precedential opinion.[42] The active judges participated in an average of three-and-a-half government contracts-related appeals that generated a precedential opinion in 2014, compared to six in 2012,[43] when only three active judges participated in more than six government-contracts related precedential appeals.[44] In 2010, Professor Schooner observed that "the vast majority of judges participated in fewer than half a dozen government contracts related matters."[45]

Unlike the past, the Federal Circuit's 2014 government contracts-related workload does not appear as evenly spread:[46] Judge Reyna drafted five majority opinions,[47] Judges Dyk and Taranto were second in line with three each,[48] and six active judges drafted no majority opinions.[49] Judge Reyna drafted the only two dissents in any government contracts-related precedential appeals.[50] There were no concurring decisions in any government contracts-related precedential appeals.

III. WHERE THE RUBBER MEETS THE ROAD—SEVEN DECISIONS THAT IMPACT THE DAY-TO-DAY ADMINISTRATION OF GOVERNMENT CONTRACTS

A. *The CDA's Statute of Limitations Is Not Jurisdictional*—Sikorsky Aircraft Corp. v. United States

In *Sikorsky*, the Federal Circuit held that the CDA's six-year statute of limitations is not jurisdictional,[51] concluding that over a decade of precedent to the contrary had been effectively overruled by the Supreme Court's 2013 decision in *Sebelius v. Auburn Regional Medical Center*.[52] This ruling comes at a time when "the Defense Contract Audit Agency and the Defense Contract Management Agency are faced with the harsh reality that millions of dollars

42. Graham, *supra* note 1, at 700; *2011 Year-in-Review*, *supra* note 40, at 479; Schooner, *supra* note 41, at 1071–72.

43. Graham, *supra* note 1, at 700.

44. *Id.* at 701.

45. Schooner, *supra* note 41, at 1071.

46. This trend may be influenced by our selection of which precedential decisions fall into the government contracts category.

47. *Raytheon*, 747 F.3d 1341; *Bell/Heery*, 739 F.3d 1324; *Crewzers Fire Transp.*, 741 F.3d 1380; Kellogg Brown & Root Servs., Inc. v. United States, 742 F.3d 967 (Fed. Cir. 2014); *Estes Express Lines*, 739 F.3d 689.

48. *Sikorsky*, 773 F.3d 1315; *Veridyne*, 758 F.3d 1371; *Century Exploration*, 745 F.3d 1168; *Metcalf Constr.*, 742 F.3d 984; Lakeshore Eng'g Servs., Inc. v. United States, 748 F.3d 1341 (Fed. Cir. 2014); SUFI Network Servs., Inc. v. United States, 755 F.3d 1305 (Fed. Cir. 2014).

49. This observation can be seen in the table on page 601.

50. Shell Oil Co. v. United States, 751 F.3d 1282, 1303 (Fed. Cir. 2014) (Reyna, J., dissenting); Kingdomware Tech., Inc. v. United States, 754 F.3d 923, 934 (Fed. Cir. 2014) (Reyna, J., dissenting).

51. Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315, 1320–21 (Fed. Cir. 2014).

52. *See* Sebelius v. Auburn Regional Med. Center, 133 S. Ct. 817 (2013); *see also Sikorsky*, 773 F.3d at 1320–21.

of disputed contract costs may be lost because the agencies failed to act within the six-year statute of limitations specified in the Contracts Disputes Act."[53] Although *Sikorsky* does not breathe new life into otherwise untimely claims, the decision will have a profound effect on how timeliness is addressed at the negotiation stage and, if necessary, litigated for several reasons.

First, because the limitations period is not jurisdictional, it "need not be addressed before deciding the merits."[54] *Sikorsky* illustrates this new rule—the Panel elected not to address whether the claim at issue was timely because it concluded that the claim failed on the merits.[55] This complicates contractors' ability to quickly challenge claims based on incurred cost submissions that have languished for years at the Defense Contract Audit Agency (DCAA). Although contractors can seek summary judgment that such claims are untimely,[56] if the government raises a genuine dispute regarding when it first learned of the facts giving rise to its claim, the Board/Court can defer ruling on the limitations issue until later in the appeal.[57] Ultimately, contractors may expend significant costs litigating untimely claims, and this prospect necessarily increases the government's leverage in settlement discussions.

Second, because the limitations period is not jurisdictional, it can potentially be tolled by the agreement of the parties.[58] This raises the prospect of contracting agencies pressuring contractors to enter into tolling agreements as a matter of course or as an express or implicit precondition to some other contract action (e.g., a modification or action on a request for equitable adjustment). Either way, tolling only exacerbates the problems caused by the government's audit backlog.

Third, *Sikorsky* characterized the limitations issue as an "affirmative defense," and affirmative defenses ordinarily can be waived if not raised in an answer.[59] Given that the contractor normally files the complaint and not

53. CONTRACT DISPUTES ACT REPORT, *supra* note 8, at 1. *See also* Amey, *supra* note 8, at 1. Prior cases had rejected the government's argument that the CDA's limitations period does not begin to run until after an audit is completed. *See*, *e.g.*, Raytheon Co. v. United States, 105 Fed. Cl. 351, 353 (2012) (rejecting the government's argument that "only completion of an audit of plaintiff's claim can provide it sufficient evidence and proof of facts necessary for a trial of the claim" such that the "statute of limitations begins to run then.").

54. *Sikorsky*, 773 F.3d at 1322.

55. *Id.*

56. *Id.* at 1321–22.

57. *See id.* at 1322.

58. *See*, *e.g.*, United States v. Halliburton Energy Servs., Inc., No. H-07-3795, 2009 WL 3260540, at *8 (S.D. Tex. Oct. 9, 2009); Hughes Aircraft Co. v. Nat'l Semiconductor Corp., 850 F. Supp. 828, 830 (N.D. Cal. 1994). The Federal Circuit had previously determined that the CDA's limitations period was subject to equitable tolling, even when the court still regarded the statute as jurisdictional. Arctic Slope Native Ass'n, Ltd. v. Sebelius, 583 F.3d 785, 798 (Fed. Cir. 2009).

59. *See* U.S. CT. FED. CL. R. 8(c)(1). *Accord* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133 (2008) ("[T]he law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and

the answer, this begs the question how, if at all, the limitations period needs to be pled in order to avoid waiver.[60] Although the Federal Circuit did not address this issue, the party raising an affirmative defense typically bears the burden of proving the elements of that defense.[61] The COFC in Sikorsky therefore placed the burden on the contractor to demonstrate that the government's claim had accrued outside of the CDA's six-year limitations period.[62]

The appeal in *Sikorsky* stemmed from a government claim that Sikorsky improperly allocated its material overhead costs between government and non-government contracts from 1999 through 2005.[63] The costs at issue included the costs of purchasing and handling material used to manufacture and assemble aircraft, and Sikorsky allocated these costs using a direct labor base.[64] As the Panel recognized, "Ideally, material overhead costs could be allocated using a base of the direct material costs."[65] However, because Sikorsky used a significant amount of government-furnished material (for which it incurred no direct costs), use of a direct material cost base would result in an over-allocation of material overhead costs to Sikorsky's non-government contracts.[66] The government issued a final decision finding Sikorsky's method noncompliant with CAS 418,[67] which governs to the allocation of direct and indirect costs.[68] Sikorsky appealed this decision to the COFC, challenging both the merits of the government's claim,[69] as well as the timeliness of that claim under the CDA's six-year statute of limitations.[70] The COFC ruled that the government's claim was timely,[71] but that Sikorsky's allocation of material overhead costs was compliant with CAS 418.[72]

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waiver."). The CBCA's and ASBCA's rules do not have a corollary to Court of Federal Claims (COFC) Rule 8(c)(1), but mention affirmative defenses when discussing the government's answer. *See* CIV. BD. CONT. APPEALS R. 6(c); ARMED SERVS. BD. CONT. APPEALS R. 6(b).

60. The Boards have recognized that "there exist situations when the proceedings would be facilitated by the government filing the complaint or initial pleading." Beechcraft Def. Co., ASBCA No. 59173, 14-1 BCA ¶ 35592 (directing respondent to file complaint in appeal from final decision involving government claim).

61. *See* Brunswick Bank & Trust Co. v. United States, 707 F.2d 1355, 1360 (Fed. Cir. 1983) ("This defense is in the nature of an affirmative defense; therefore, the party raising the defense (here the United States) would normally bear the burden of proof."); United States v. Approximately 81,454 Cans of Baby Formula, 560 F.3d 638, 641 (7th Cir. 2009) ("The plaintiff in a tort or contract suit has the burden of proving liability and damages; but if the defendant interposes a defense, for example of . . . assumption of risk, the burden of proving the defense is on him.").

62. Sikorsky Aircraft Corp. v. United States, 110 Fed. Cl. 210, 220 (2013) ("Sikorsky carries the burden of proving the elements of this affirmative defense. . . .").

63. *Sikorsky*, 773 F.3d at 1317.

64. *Id.* at 1318.

65. *Id.*

66. *Id.* at 1318–19.

67. *Id.* at 1319.

68. FAR 9904.418-40.

69. *See Sikorsky*, 773 F.3d at 1319.

70. *Id.*

71. *See Sikorsky*, 110 Fed. Cl. at 230.

72. *Sikorsky*, 773 F.3d at 1320.

The Federal Circuit reviewed both issues on appeal.[73] With respect to the statute of limitations issue, the CDA § 7103 provides that "[e]ach claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer"[74] and further provides that such claims "shall be submitted within [six] years after the accrual of the claim."[75] The Federal Circuit had previously held, as recently as 2011, that the limitations period in § 7103 "is a jurisdictional prerequisite for any subsequent appeal."[76] The COFC in *Sikorsky* characterized the statute of limitations issue as an "affirmative defense," the elements of which Sikorsky had the burden of proving. However, the COFC's opinion did not address prior Federal Circuit precedent holding that limitations period to be jurisdictional.[77]

On appeal, the Panel in *Sikorsky* held that its earlier decisions were "effectively overruled by the Supreme Court's more recent decision" in *Sebelius v. Auburn Regional Medical Center*.[78] *Auburn* "articulated a 'readily administrable bright line' rule, under which the inquiry is 'whether Congress has clearly stated that the rule is jurisdictional; absent such a clear statement, [the Court has] cautioned [that] courts should treat the restriction as non-jurisdictional in character.'"[79] Applying the *Auburn* test, *Sikorsky* concluded that the CDA's limitation period "§ 7103 does not have any special characteristic that would warrant making an exception to the general rule that filing deadlines are not jurisdictional."[80]

The Panel also observed that § 7103 "'does not speak in jurisdictional terms' or refer in any way to the jurisdiction of the Claims Court.'"[81] That much seems clear; however, the Panel also concluded that neither "[§ 7103's] placement within the [CDA]" nor the "context of the statute," suggest that § 7103's limitations period is jurisdictional.[82] Both points are certainly debatable; § 7103 deals with claims generally, mandating that contractor claims "shall be submitted to the contracting officer for a decision" and that government claims "shall be the subject of a written decision by

73. *Id.* at 1320, 1322.
74. 41 U.S.C. § 7103(a)(3)(1978).
75. *Id.* § 7103(a)(4)(A).
76. Sys. Dev. Corp. v. McHugh, 658 F.3d 1341, 1345 (Fed. Cir. 2011) (citing Arctic Slope Native Ass'n v. Sebelius, 583 F.3d 785, 793 (Fed. Cir. 2009)). *Accord* Boeing Co., ASBCA No. 57490, 12-1 B.C.A. ¶ 34916 ("[I]t is clear that an untimely claim is not a valid claim, and under the precedent binding upon us we lack jurisdiction over an appeal where there has been no valid claim.").
77. *Sikorsky*, 110 Fed. Cl. 210, 220 (2013) ("Sikorsky carries the burden of proving the elements of this affirmative defense. . . .").
78. Sebelius v. Auburn Regional Med. Center, 133 S. Ct. 817 (2013); *see also* Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315, 1320-21 (Fed. Cir. 2014).
79. *Sikorsky*, 773 F.3d at 1321 (quoting *Auburn*, 133 S. Ct. at 824 (quoting Arbaugh v. Y&H Corp., 546 U.S. 500, 515–16 (2006))).
80. *Id.* at 1322.
81. *Id.* at 1321 (quoting *Auburn*, 133 S. Ct. at 825 (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982))).
82. *Id.* (alteration in original).

the Contracting Officer."[83] It is axiomatic that the administrative exhaustion requirements of a claim and a CO's final decision are conditions of the CDA's waiver of sovereign immunity, and therefore jurisdictional prerequisites.[84] It seems no great leap to reason that "an untimely claim is not a valid claim" and that a timely claim is therefore a jurisdictional prerequisite as well.[85] Indeed, this was the rationale the Federal Circuit followed in *Arctic Slope* in 2009:

> The six-year presentment period is part of the requirement in section 605(a) that all claims by a contractor against the government be submitted to the contracting officer for a decision. This court has held that the presentment of claims to a contracting officer under section 605(a) is a prerequisite to suit in the Court of Federal Claims or review by a board of contract appeals. . . . Statutory time restrictions on the submission of administrative claims are a part of the requirement that a party must satisfy to properly exhaust administrative remedies. . . . Therefore, subject to any applicable tolling of the statutory time period, the timely submission of a claim to a contracting officer is a necessary predicate to the exercise of jurisdiction by a court or a board of contract appeals over a contract dispute governed by the CDA.[86]

To be sure, a limitations period "does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions."[87] But it is far from clear why § 7103's limitations period should be considered any less jurisdictional than the other requirements for a valid claim, including § 7103(b)'s certification requirement, which has always been considered jurisdictional.[88]

83. 41 U.S.C. § 7103(a)(1), (3).

84. *See* Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc) ("Under the CDA, a final decision by a CO on a 'claim' is a prerequisite for Board jurisdiction."); *see also* Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323, 1328 (Fed. Cir. 2010) (stating that CDA jurisdiction requires both a valid claim and contracting officer's final decision); England v. Swanson Grp., Inc., 353 F.3d 1375, 1379 (Fed. Cir. 2004) (explaining that the Board's CDA jurisdiction is dependent upon the presentation of a claim and issuance of a final decision, which are "strict limits" and "jurisdictional prerequisites"); James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1541–42 (Fed. Cir. 1996) (noting that the CDA's requirements for a claim and final decision are part of the terms of the United States' waiver of sovereign immunity and therefore define jurisdiction). These jurisdictional principles apply equally in appeals involving government claims. *See* Sharman Co. v. United States, 2 F.3d 1564, 1568 (Fed. Cir. 1993) (en banc) ("Under the CDA, a final decision by the contracting officer on a claim, whether asserted by the contractor or the government, is a 'jurisdictional prerequisite' to further legal action thereon."), *overruled in part on other grounds by Reflectone*, 60 F.3d at 1579 n.10; Daff v. United States, 78 F.3d 1566, 1571 (Fed. Cir. 1996) (requiring a valid Contracting Officer's final decision to challenge a government default termination); Joseph Morton Co. v. United States, 757 F.2d 1273, 1279–81 (Fed. Cir. 1985) (noting that government counterclaims on contracts subject to the CDA must be the subject of a Contracting Officer decision before assertion in the Court of Federal Claims).

85. *Boeing Co.*, 12-1 BCA ¶ 34916, at 171, 677.

86. Arctic Slope Native Ass'n v. Sebelius, 583 F.3d 785, 793 (Fed. Cir. 2009) (citations omitted).

87. *Auburn*, 133 S. Ct. at 825. *Accord* Gonzalez v. Thaler, 132 S. Ct. 641, 651–52 (2012).

88. Fischbach & Moore Int'l Corp. v. Christopher, 987 F.2d 759, 762 (Fed. Cir. 1993) (holding that "proper certification of a contractor's claim is a jurisdictional prerequisite for claims over" the statutory threshold); Thoen v. United States, 765 F.2d 1110, 1116 (Fed. Cir. 1985) ("Congress has determined that submission of a certified claim to the Contracting Officer in the first instance is a

Perhaps even more debatable is the Panel's assertion that "[t]his is also not a situation in which longstanding precedent interprets the provision as jurisdictional."[89] The Panel contrasted 28 U.S.C. § 2501, the six–year statute of limitations for filing claims with the COFC, which was subject to "a long line of previous cases describing that particular statute of limitations as jurisdictional."[90] But the *Auburn* test requires consideration of " 'context, including this Court's interpretations of *similar provisions* in many years past,' as probative of whether Congress intended a particular provision to rank as jurisdictional."[91] Although 28 U.S.C. § 2501 and 41 U.S.C. § 7103 are different statutes and the former certainly has a longer pedigree of judicial interpretation,[92] it is far from clear why two identical limitations periods applicable to contract claims against the federal government should be treated differently.

Moreover, it is not clear at all that *Auburn* made any change to the law. The Supreme Court established its "readily administrable bright line" for determining whether a limitations period is jurisdictional in 2006 in *Arbaugh v. Y & H Corp*,[93] which was issued before the Federal Circuit's decisions in *Systems Development*[94] and *Arctic Slope*,[95] both of which treated § 7103 as jurisdictional.[96] Absent a change in the law, the *Sikorsky* panel would have been bound to follow these earlier decisions.[97]

Notably, neither the government nor the COFC below offered any extensive analysis of *Auburn* or whether § 7103's limitations period is jurisdictional. The COFC characterized the statute of limitations issue as an "affirmative defense" but did not cite any prior precedent involving the CDA.[98] On appeal, Sikorsky squarely raised the issue in its opening brief to the Federal Circuit, arguing that, "[b]ecause the statute of limitations is jurisdictional, the government bears the burden of proving its claim accrued within the limitations period."[99] In response, the government's main arguments were: (1) the burden of proof was immaterial because the facts clearly showed

jurisdictional prerequisite to filing a suit in the Claims Court.") (citing W.M. Schlosser Co. v. United States, 705 F.2d 1336 (Fed. Cir. 1983)).

89. *Sikorsky*, 773 F.3d at 1321.

90. *Id.* (citing John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2007)).

91. *Auburn*, 133 S. Ct. at 824 (quoting Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 168 (2010)) (emphasis added).

92. *See generally* 28 U.S.C. § 2501 (2011).

93. *See* Arbaugh v. Y&H Corp., 546 U.S. 500, 516 (2006).

94. Sys. Dev. Corp. v. McHugh, 658 F.3d 1341, 1345 (Fed. Cir. 2011).

95. Arctic Slope Native Ass'n v. Sebelius, 583 F.3d 785, 800 (Fed. Cir. 2009).

96. *Id.*; *see also Sys. Dev. Corp.*, 658 F.3d at 1345.

97. Preminger v. Sec'y of Veterans Affairs, 517 F.3d 1299, 1309 (Fed. Cir. 2008) ("A prior precedential decision on a point of law by a panel of this court is binding precedent and cannot be overruled or avoided unless or until the court sits en banc."). *Accord* Sacco v. Dep't of Justice, 317 F.3d 1384, 1386 (Fed. Cir. 2003).

98. *Sikorsky*, 110 Fed. Cl. at 220 ("Sikorsky carries the burden of proving the elements of this affirmative defense. . . .").

99. Brief of Plaintiff-Cross Appellant at 28, 62-64, Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315 (Fed. Cir. 2014) (Nos. 2013-5096, -5099).

that the government's claim had accrued within six years of its final decision, and (2) Sikorsky bore the burden of proof because Sikorsky had "invoked" the jurisdiction of the COFC.[100] The government's only mention of *Auburn* was in a footnote observing: "While the requirement to submit a claim remains the bedrock of the CDA exhaustion requirement, three Supreme Court decisions issued in the last three years raise questions about whether the mandatory filing deadline set forth at 41 U.S.C. § 7103(a)(4) should be labeled 'jurisdictional.'"[101]

On the merits, the Federal Circuit reaffirmed *Raytheon*,[102] holding that the government bears the burden of proving a contractor's noncompliance with CAS.[103] The Panel then addressed the parties' disagreement over which of two subsections of CAS 418 applied—CAS 418-50(d),[104] which applies to "an indirect cost pool which *includes* a material amount of the costs of management and supervision of activities involving direct labor or direct material costs,"[105] or 418-50(e), which applies to an indirect pool that *does not include* material amounts of such costs.[106] The government argued that, "contrary to the language of subsections (d) and (e), the applicability of these provisions does not in fact depend on whether the indirect cost pool includes a material amount" of management and supervision costs.[107] Instead, the government relied on "internal government documents concerning the history of the CAS provisions and other materials which were not published" to argue that subsection (d) governed "overhead pools," while subsection (e) governed "service centers."[108] This earned the government a stern rebuke for "rel[ying] on unpublished materials when it serves the government's interests:"[109]

> The CAS standards, like any other regulation, must be interpreted based on public authorities. Interpretation of CAS standards is a legal issue which should "be approached like other legal issues—based on briefing and argument by the affected parties." In *Rumsfeld*, we held that CAS standards were not properly interpreted by considering the "views of . . . self-proclaimed CAS experts," including a former CASB employee . . . as a result, the government prevailed. . . . [T]he government now seeks to disregard the rule from *Rumsfeld* barring reliance on unpublished materials when it serves the government's interests. There is no basis for such an approach. The unpublished history of the rule is not pertinent to its interpretation. Rather we turn to the language of the rule and, where necessary, the history of the rule as published in the Federal Register. The plain language of CAS 418 answers the question here—the materiality test governs.[110]

100. Brief for Defendant-Appellant at 48–56, *Sikorsky*, 773 F.3d 1315 (Fed. Cir. 2014) (Nos. 2013-5096, -5099).
101. *Id.* at 55 n.24.
102. *See* discussion *supra* Part IV.B.
103. *Sikorsky*, 773 F.3d at 1322.
104. *Id.*
105. FAR 9904-418-50(d).
106. *Id.* 9904-418-50(e).
107. *Sikorsky*, 773 F.3d at 1322.
108. *Id.* at 1322–23.
109. *Id.* at 1323.
110. *Id.* (alteration in the original) (citations omitted).

The Panel also refused to consider supplementary material published by the CAS Board in the Federal Register's notice of the final rule for CAS 418, writing, "We decline to rely on ambiguous language from the 'preamble' to contradict the plain language of the rule itself."[111]

Applying CAS 418-50(e),[112] the Panel expressed "some doubt that an allocation based on direct labor satisfies the proportionality requirement simply because of a year-by-year correlation between labor hours and material overhead."[113] Nonetheless, the Panel found in favor of Sikorsky on the basis of the allocation of the burden,[114] concluding that "the government has been unwilling or unable to argue that Sikorsky's approach is not appropriate."[115]

B. *The Government Bears the Burden of Proving a Non-Compliance with CAS and the FAR Cost Principles*—Raytheon Co. v. United States

Like *Sikorsky*, the appeal in *Raytheon* involved a highly technical cost accounting dispute,[116] and like *Sikorsky*, *Raytheon* is far more important for the Federal Circuit's ancillary holdings in that case, as opposed to the Panel's ultimate resolution of the cost accounting question.

In a matter of first impression for the Federal Circuit, *Raytheon* endorsed the established line of decisions by the COFC and the ASBCA that "the Government bears the burden of proving that a contractor's accounting practices do not comply with the CAS."[117] This, of course, could fundamentally affect the procedural posture of every cost accounting dispute involving federal government contracts. The Federal Circuit further ruled that the COFC could not consider the government's request for a downward adjustment of the contractor's cost calculations, reasoning that the government's request was a separate claim under the CDA that first had to be the subject of a CO's final decision.[118] As one commentator has observed, the Federal Circuit in *Raytheon* appeared to "extend[] its decision in

111. *Id.* at 1323–24; Cost Accounting Standard, 45 Fed. Reg. 31929 (May 15, 1980) (to be codified at 4 C.F.R. pt. 418).

112. The Panel interpreted the term "material amount" to refer to a comparison of the amount of the costs of supervision or management in the pool to the total amount of the pool and found that Sikorsky's supervision or management costs were not "material." *Sikorsky*, 773 F.3d at 1324.

113. *Id.* at 1326.

114. *Id.* at 1325–26.

115. *Id.* at 1326. The government also argued that Sikorsky violated CAS 418 because CAS 418-40(b) requires that indirect costs be "accumulated in indirect costs pools which are homogeneous." Sikorsky's pool thus was not homogenous because it included both manufacturing overhead costs and material overhead costs. *Id.* at 1325. But the Federal Circuit found that the government failed to prove this violation, determining that a pool is still homogenous "if 'the allocation of the costs of the activities included in the cost pool result in an allocation to cost objectives which is not materially different from the allocation that would result if the costs of the activities were allocated separately.'" *Id.* (quoting 48 C.F.R. 9904.418-50(e)). The Federal Circuit concluded that the government had failed to establish any material difference. *Id.* at 1326.

116. Raytheon Co. v. United States, 747 F.3d 1341 (Fed. Cir. 2014).

117. *Id.* at 1352; *See also*, *e.g.*, *Sikorsky*, 110 Fed. Cl. at 219; Gen. Dynamics Corp., ASBCA No. 56744, 11–2 BCA ¶ 34,787; Unisys Corp., ASBCA No. 41135, 94–2 BCA ¶ 26,894.

118. *Raytheon*, 747 F.3d at 1353–55.

Maropakis Carpentry . . . to [g]overnment claims asserted as defenses to contractor claims."[119] As a result, COs and contractor contract administrators must appreciate the subtle and relatively undefined distinction between claims, which must go through the CDA's disputes resolution process in order to be preserved,[120] and affirmative defenses, which do not.[121]

Finally, *Raytheon* held that pension segment closing adjustments under CAS 413 are not subject to the timely funding requirement of FAR 31.205-6(j)(2)(i).[122] As a result, contractors need not fully fund a deficit in the year of the segment closing.[123] Given that segment-closing adjustments can often be quite large,[124] the Federal Circuit's ruling has a significant impact on a contractor's ability to restructure or close businesses segments or terminate or curtail pension plans.[125]

Following the sale of several of its business segments, Raytheon calculated segment closing adjustments in accordance with CAS 413[126] and found that three of its closed business segments had pension deficits totaling approximately $69 million.[127] Raytheon submitted certified claims for the deficits,[128] which the CO denied as unallowable because Raytheon had not funded the full amount of the deficits during the same year as the segment closings.[129] The CO believed that FAR 31.205-6(j)'s timely funding requirement applied[130] not only to the assignment of pension costs under CAS 412,[131] but also to pension segment closing adjustments under CAS 413.[132] The CO

119. Elizabeth A. Ferrell et al., *Feature Comment: The Most Important Government Contracts Disputes Decisions of 2014*, 57 GOV'T CONTRACTOR ¶ 83, Mar. 25, 2015, at 7 (citing Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323, 1331 (Fed. Cir. 2010)).

120. *Raytheon*, 747 F.3d at 1354.

121. *Id.*

122. *Id.* at 1349–51.

123. *Id.* at 1351.

124. For example, *Raytheon* involved deficits of approximately $69 million. *Id.* at 1345.

125. *See* FAR 9904.413-50(c)(12).

126. CAS 413 requires contractors, following a segment closing, to "determine the difference between the actuarial accrued liability for the segment and the market value of the assets allocated to the segment[.]" FAR 9904.413–50(c)(12). "The difference between the market value of the assets and the actuarial accrued liability for the closed segment represents an adjustment of previously determined pension costs." *Id.* As the Federal Circuit explained, "the goal of a segment closing adjustment is to determine the present value of the pension plan at the time of the segment's closing and to adjust the plan's value to ensure it is fully-funded to meet the promises made to the plan's participants. The government and the contractor then allocate the resulting surplus or deficit between them." *Raytheon*, 747 F.3d at 1346.

127. *Raytheon*, 747 F.3d at 1345.

128. *Id.*

129. *Id.*

130. *See* FAR 31.205-6(j)(1)(i).

131. *See* FAR 9904.412-50(c).

132. *Raytheon*, 747 F.3d at 1345. FAR 31.205–6(j) requires all pension costs assigned to the current year to be "funded by the time set for filing of the Federal income tax return or any extension thereof." FAR 31.205–6(j)(1)(i). This timely funding requirement is repeated under subparagraph (j)(2), which addresses "defined-benefit pension plans," and provides that "pension costs (*see* FAR 9904.412–40(a)(1)) assigned to the current accounting period, but not funded during it, shall not be allowable in subsequent years[.]" FAR 31.205–6(j)(2)(i)(A).

also claimed that Raytheon's closing adjustment calculations had not complied with CAS 413.[133]

Raytheon filed suit in the COFC, arguing that its segment closing adjustments did indeed comply with CAS 413.[134] The government argued that Raytheon's adjustments failed to comply with the FAR's timely funding requirement or, alternatively, that the government was entitled to a downward equitable adjustment on any deficit recovered by Raytheon to account for a 1995 CAS amendment.[135] The COFC concluded that segment closing adjustments are not "pension costs" for purposes of the FAR's timely reporting requirements,[136] and that the COFC lacked jurisdiction over the government's request for a downward adjustment of Raytheon's recovery.[137] The COFC believed that the government's request for an adjustment was a claim that the COFC lacked jurisdiction to consider because the claim was not the subject of a CO's final decision in accordance with the CDA.[138] Ultimately, the COFC ruled that the government had failed to meet its burden of establishing that Raytheon had violated CAS 413 with respect to two of the three business segments at issue,[139] but that Raytheon had failed to comply with CAS 413 with respect to the third segment.[140]

On appeal to the Federal Circuit, the government argued that: (1) segment closing adjustments were "pension costs" for purposes of the FAR's timely funding requirement, (2) the COFC erred in holding that the burden of proof was on the government to demonstrate a violation of CAS 413; and (3) the trial court did not lack jurisdiction to consider "the Government's request for a downward adjustment" of Raytheon's recovery.[141] With respect to the first issue, the Federal Circuit affirmed the COFC's holding that segment closing adjustments are distinct from "pension costs"[142] and thus are

133. *Raytheon*, 747 F.3d at 1345.

134. *Id.* at 1347.

135. *Id.* Prior to the revision of CAS 413 in 1995, the government or the contractor could recover only the portion of a segment closing surplus or deficit attributable to pension contributions made under cost-type contracts. *Id.* at 1353 (citing Allegheny Teledyne v. United States, 316 F.3d 1366, 1376-77 (Fed. Cir. 2003)). The 1995 revision allowed recovery under both cost-type contracts and fixed-price contracts. *Id.* at 1353–54; FAR 9904.413–50(c)(12)(vii). "Because segment closing adjustments are to be calculated as of the date of the segment's closing, the contractor is required to follow revised CAS 413 for any segment closing that occurred after 1995, even if the segment's contract portfolio includes contracts entered into before 1995." *Raytheon*, 747 F.3d at 1354. "The contractor or the Government therefore may be entitled to an equitable adjustment . . . to the extent the segment closing calculation under revised CAS 413: (i) involves the adjustment of pension contributions made under contracts that did not include the terms of revised CAS 413; and (ii) results in a larger amount owed than under the original provisions of CAS 413." *Id.* at 1353.

136. Raytheon Co. v. United States, 96 Fed. Cl. 548, 552 (2011).

137. Raytheon Co. v. United States, 105 Fed. Cl. 236, 286 (2012).

138. *Id.* at 286–87; 41 U.S.C. § 7103(a)(3).

139. *Raytheon*, 105 Fed. Cl. at 302.

140. *Id.* at 302–03.

141. *Raytheon*, 747 F.3d at 1349. For its part, Raytheon cross-appealed the COFC's rejection of Raytheon's calculations for the third business segment. *Id.*

142. *Id.* at 1351.

not subject to the FAR's timely funding requirement.[143] The Panel cited prior precedent recognizing "the unusual nature of segment closing adjustments,"[144] noting that "segment closing adjustments are treated differently than annual pension costs."[145] Analyzing the language and regulatory history of CAS 412 and 413, the Panel concluded that neither "treat[s] a segment closing adjustment as a 'pension cost' for purposes of the annual timely funding provision,"[146] and that the CAS Board intended for the treatment of pension costs and segment closing adjustments to be different:

> CAS 413 treats segment closing adjustments differently than ordinary "pension costs." The apparent purpose of the FAR's timely funding requirement, which is to ensure that contractors contribute to their pension funds on an annual basis, supports the distinction between "pension costs" and segment closing adjustments, which do not necessarily invoke the same accounting treatment under CAS 413.[147]

Before analyzing the text of FAR 31.205–6(j), the Panel emphasized the "relationship between the CAS and the FAR's cost principles."[148] The Panel recognized that the CAS Board has "exclusive authority" over "the measurement, assignment, and allocation of costs,"[149] including "'defining the *components of costs*, determining the basis for cost measurement, and establishing the criteria for use of alternative cost measurement techniques."[150] By contrast, "the FAR determines whether that cost—as defined by the CAS—is allowable and will be reimbursed by the [g]overnment."[151] With that relationship in mind, the Panel turned to the text of FAR 31.205–6(j), observing that "[t]he timely funding requirement under subparagraph (j)(3) . . . directs the reader to CAS 412 when it uses the term 'pension costs,' [whereas] subparagraph (j)(4), which addresses segment closing adjustments, directs the reader to CAS 413."[152] The Panel therefore held that "segment closing adjustments pursuant to CAS 413 are not subject to the timely funding provisions of FAR 31.205–6(j) and Raytheon was not required to fund its pension deficits within the same year as the segment closings."[153]

As noted above, the burden of proof issue was a matter of first impression for the Federal Circuit. The Panel endorsed the established line of decisions by the COFC and the ASBCA that "the [g]overnment bears the burden of proving that a contractor's accounting practices do not comply with the CAS."[154] Indeed, the government conceded on appeal "'that when [it]

143. *Id.*
144. *Id.* at 1349 (citing Gates v. Raytheon Co., 584 F.3d 1062, 1068 (Fed. Cir. 2009)).
145. *Id.* (citing Allegheny Teledyne Inc. v. United States, 316 F.3d 1366, 1381 (Fed. Cir. 2003)).
146. *Raytheon*, 747 F.3d at 1351.
147. *Id.*
148. *Id.* at 1350.
149. *Id.* (citing 41 U.S.C. § 1502(a)(1)).
150. *Id.* at 1350 (quoting FAR 9903.302–1(a)) (emphasis in original).
151. *Raytheon*, 747 F.3d at 1350.
152. *Id.* at 1351.
153. *Id.*
154. *Id.* at 1352.

alleges contractor CAS noncompliance, the government has the burden of proof[.]'"[155] The Panel rejected the government's argument that this burden shifted to Raytheon because Raytheon had asserted "affirmative claims."[156] The Panel reasoned that Raytheon was not seeking an equitable adjustment for a change in contract terms (if it had been, it would have carried the burden);[157] rather, Raytheon had an "existing contract obligation to perform segment closing adjustments [pursuant to CAS 413]."[158] Thus, the burden properly rested with the government to establish that Raytheon's calculations failed to comply with that obligation.[159]

Finally, the Federal Circuit agreed with the COFC that the government's request for a downward adjustment of Raytheon's segment closing calculations was a claim that should have been the subject of a CO's final decision under the CDA.[160] As noted above, the government's adjustment request was based on 1995 revisions to CAS 413, which allowed recovery of portions of segment closing adjustments attributable to contributions under both fixed-price and cost-type contracts, where previously recovery was permitted only under cost-type contracts.[161] Although the Panel acknowledged that the government might well be entitled to an equitable adjustment based on the 1995 revisions and the CAS clause, FAR 52.230-2,[162] the Panel agreed with the COFC that this was a separate issue than the calculation of segment closing adjustments that Raytheon was required to perform under CAS 413.[163] The Panel reiterated the "bedrock principle of government contract law that contract claims, whether asserted by the contractor or the [g]overnment, must be the subject of a [CO's] final decision"[164] and that "'[a]n action brought before the [COFC] under the [CDA] must be based on the same claim previously presented to and denied by the contracting officer."[165] Because the government's request for a downward adjustment had not been asserted in any CO's final decision, whether the decision denying Raytheon's claim or otherwise, the Federal Circuit concluded that the COFC correctly held that it lacked jurisdiction to consider the claim.[166]

155. *Id.*
156. *Raytheon*, 747 F.3d at 1352.
157. *Id.*
158. *Id.*
159. *Id.* at 1352–53 ("Here, the Government bears the burden of showing that Raytheon did, in fact, fail to follow the terms of its contracts (i.e., that Raytheon's segment closing calculations do not comply with CAS 413)."). The Panel also rejected as "dubious" the Government's assertion that it was Raytheon that was challenging the Government's compliance with CAS in the instant appeal: "To the contrary, Raytheon challenges the contracting officer's final decisions concluding that Raytheon's segment closing calculations 'do[ ] not comply with CAS 413.'" *Id.* at 1352.
160. *Raytheon*, 747 F.3d at 1354–55.
161. *See supra* note 135 and accompanying text.
162. *Raytheon*, 747 F.3d at 1353.
163. *Id.* at 1354.
164. *Id.* (citing 41 U.S.C. § 7103(a)(3)).
165. *Id.* (quoting Scott Timber Co. v. United States, 333 F.3d 1358, 1365 (Fed. Cir. 2003)).
166. *Id.* at 1354–55.

C. *Duty of Good Faith and Fair Dealing*

1. *Bell/Heery, A Joint Venture v. United States*

In *Bell/Heery, A Joint Venture v. United* States,[167] a divided panel of the Federal Circuit affirmed the COFC's dismissal of the plaintiff's complaint for failure to state a claim.[168] Reviewing each of plaintiff's arguments in turn, the majority agreed with the lower court that appellant Bell/Heery had failed to state a viable claim for breach of contract, breach of the implied covenant of good faith and fair dealing, or constructive or cardinal change.[169] Notably, in its discussion regarding the implied duty of good faith and fair dealing, the majority reaffirmed the standard it set forth in *Precision Pine & Timber, Inc. v. United States*,[170] indicating that, although the duty is defined on a contract-by-contract basis and is dependent on the terms of the contract at issue, this duty cannot be used to "create" obligations inconsistent with those set forth in the contract.[171] Instead, the Federal Circuit once again required plaintiff to show that the government "reappropriated benefits promised to [plaintiff] under the contract."[172] Put another way, the Federal Circuit imposed on the plaintiff the burden of showing that the government took away something it previously, expressly promised.

This case involved a contract between Bell/Heery and the Federal Bureau of Prisons to construct a federal correctional institution in New Hampshire.[173] The project involved a "cut-to-fill" site, meaning that Bell/Heery was required to excavate materials from one area of the site and use that excavated material to fill-in lower areas of the site.[174] The contract required Bell/Heery to perform this excavation work "in compliance with the rules and regulations of the New Hampshire Department of Environmental Sciences (NHDES),"[175] "includ[ing] obtaining and complying with an alteration of terrain permit."[176] As pertaining to the permits, the Bureau's request for proposal (RFP) advised bidders that the contract incorporated the FAR's Permits and Responsibilities Clause,[177] which allocated all costs associated with obtaining permits to the winning contractor "without additional expense to the Government."[178] In its bid, Bell/Heery proposed completing

167. 739 F.3d 1324 (Fed. Cir. 2014).
168. *Id.* at 1336.
169. *See id.* at 1332–36.
170. *Precision Pine*, 596 F.3d at 826.
171. *Bell/Heery*, 739 F.3d at 1335. Judge Mayer, in dissent, did not address the standard for the duty of good faith and fair dealing in his opinion. *See id.* at 1336–38 (Mayer, J., dissenting).
172. *Id.* at 1335.
173. *Id.* at 1326.
174. *Id.*
175. *Id.*
176. *Bell/Heery*, 739 F.3d at 1326–27.
177. FAR 52.236-7.
178. *Bell/Heery*, 739 F.3d at 1327 ("The requirements for permits on projects are regulated by FAR clause 52.236-7: The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any

the cut-to-fill operations in a single-step,[179] which Bell/Heery indicated was the most efficient excavation process.[180] Based on prior experience, Bell/Heery anticipated that NHDES would approve a permit for this one-step process.[181]

After winning the contract, Bell/Heery then applied to NHDES for the permit in accordance with its proposed construction plan.[182] NHDES denied the application and indicated that it would approve a permit only for excavation of a substantially smaller area.[183] Bell/Heery amended its application and NHDES granted the permit to proceed.[184] Concurrently, Bell/Heery advised the Bureau of the restrictions and the ramifications such restrictions would have on Bell/Heery's construction costs and deadlines,[185] but it did not request the Bureau's intervention with NHDES nor did it refuse to proceed.[186] Subsequently, NHDES imposed at least ten additional limitations on the excavation activities, which greatly added to Bell/Heery's construction costs and delayed the construction schedule.[187] Throughout this process, Bell/Heery repeatedly informed the Bureau of NHDES's restrictions and the detrimental impact these restrictions were having on the construction.[188] Upon completion of the excavation operations, Bell/Heery submitted a request for equitable adjustment (REA) for the excess construction costs because Bell/Heery believed that NHDES's restrictions were both beyond the standard alteration of terrain (AOT) permit requirements and "contrary to generally accepted industry practice."[189] The CO rejected the REA.[190]

Bell/Heery appealed the CO's denial to the COFC, alleging several theories of relief, including breach of contract, breach of the implied covenant of good faith and fair dealing, and relief under the doctrines of constructive or cardinal change.[191] The government moved to dismiss Bell/Heery's complaint for failure to state a claim upon which it could recover, and the COFC granted the government's motion.[192] As a result of the denial, Bell/Heery

Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work. . . .") (emphasis original) (internal quotations omitted).

179. *Id.* at 1328.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Bell/Heery*, 739 F.3d at 1328.
184. *Id.*
185. *Id.*
186. *Id.* at 1328–29.
187. *Id.* at 1329.
188. *Bell/Heery*, 739 F.3d at 1329.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 1329–30. The COFC found that the Permits and Responsibilities clause unambiguously placed the financial risks involved in obtaining and complying with state and local construction permits on Bell/Heery "without additional expense to the Government." Bell/Heery v. United States, 106 Fed. Cl. 300, 312 (2012), *aff'd*, 739 F.3d 1324 (Fed. Cir. 2014). Further, the

appealed the COFC decision to the Federal Circuit.[193] A divided panel at the Federal Circuit affirmed.[194]

Beginning first with Bell/Heery's breach of contract theory, the majority examined Bell/Heery's three arguments that the Permits and Responsibilities Clause did not create an absolute bar to an equitable adjustment.[195] Although the majority acknowledged that the broad Permits and Responsibilities Clause could be constrained by other contract provisions,[196] such was not the case here.[197] The majority determined that despite several clauses requiring the Bureau to work "in conjunction with" Bell/Heery,[198] there was no contractual duty to intervene with NHDES on Bell/Heery's behalf during the "construction" phase,[199] nor was the Bureau obligated to assist Bell/Heery by virtue of an RFP clause cited by Bell/Heery.[200] The majority then rejected Bell/Heery's additional breach arguments[201] and concluded that Bell/Heery had not pled a viable breach of contract claim.[202]

Turning next to Bell/Heery's claim that the Bureau had breached the implied duty of good faith and fair dealing, the majority restated the standard for this cause of action that such a duty was implied in every contract.[203] In elaborating on the scope of this duty, the majority then referenced the Federal Circuit's decision in *Precision Pine*,[204] noting that this covenant "guarantees that the government will not eliminate or rescind contractual benefits through action that is specifically designed to reappropriate the benefits and thereby abrogate the government's obligations under the contract."[205] But, the majority noted that this implied covenant "cannot 'create duties inconsistent with the contract's provisions.'"[206] Because of this limitation, a breach of this implied duty depends upon the specific terms of the contract.[207]

COFC determined that the government had no obligation to engage NHDES on Bell/Heery's behalf. *Id.* at 313. The COFC similarly rejected Bell/Heery's theories under a breach of the implied duty of good faith and fair dealing and constructive and cardinal change. *Id.* at 313.

193. *Bell/Heery*, 739 F.3d at 1330.

194. *Id.* at 1336.

195. *Id.* at 1330–34.

196. *Id.* at 1331.

197. *Id.* (citing Hills Materials Co. v. Rice, 982 F.2d 514, 516–17 (Fed. Cir. 1992)).

198. *Bell/Heery*, 739 F.3d at 1332.

199. *Id.*

200. *Id.* at 1333.

201. Regarding Bell/Heery's argument that the Bureau had breached the Changes Clause, the majority found that Bell/Heery's complaint "fails to allege that the Contracting Officer ever ordered BH to perform any specific work in conjunction with the cut-to-fill operations" and that the Contracting Officer's silence in response to Bell/Heery's complaints could not alone support a ratification theory. *Id.* at 1334.

202. *Id.*

203. *Bell/Heery*, 739 F.3d at 1334–35 ("Implied in every contract is a duty of good faith and fair dealing that requires a party to refrain from interfering with another party's performance or from acting to destroy another party's reasonable expectations regarding the fruits of the contract.").

204. *Precision Pine*, 596 F.3d at 829.

205. *Bell/Heery*, 739 F.3d at 1335 (citing *Precision Pine*, 596 F.3d at 829).

206. *Id.* (citing *Precision Pine*, 596 F.3d at 831).

207. *Id.* (citing *Precision Pine*, 596 F.3d at 830).

In this case, although Bureau personnel had advised Bell/Heery that it would be "treated fairly with respect to extra work caused by NHDES's administration of the AOT permit,"[208] the majority found that Bell/Heery had not alleged that "the [g]overnment engaged in conduct that reappropriated benefits promised to BH under the contract."[209] Noting that Bell/Heery had failed to allege facts sufficient to form a breach of contract claim,[210] the majority found that the implied covenant by itself could not "form the basis for wholly new contract terms, particularly terms which would be inconsistent with the express terms of the agreement.'"[211] Again emphasizing that the complained-of conduct here was that of NHDES and not the Bureau,[212] the majority concluded that Bell/Heery had not pled "a viable claim for breach of the implied covenant of good faith and fair dealing."[213] The majority then rejected Bell/Heery's argument that it was entitled to relief under the doctrines of constructive or cardinal change.[214] Having rejected all of Bell/Heery's theories of entitlement, the majority affirmed the COFC's dismissal.[215]

Judge Mayer, however, dissented from the majority opinion, arguing that the majority had applied too stringent a standard when evaluating Bell/Heery's claims.[216] Judge Mayer found that Bell/Heery alleged that the Bureau had breached two express provisions of the contract[217] and, while neither contract provision was "a model of clarity regarding the scope of the government's obligations,"[218] Judge Mayer found that both provisions could "plausibly be read to require the Bureau to confer with local permitting authorities and to approve or not any recommendations made by them" at least for purposes of determining the viability of Bell/Heery's claims.[219] Similarly, he also found that Bell/Heery had pled facts sufficient to "provide[] an ample predicate for a breach of contract claim."[220] Judge Mayer found that the majority had been too quick to dismiss Bell/Heery's arguments that other contractual provisions

208. *Id.*
209. *Bell/Heery*, 739 F.3d at 1335.
210. *Id.*
211. *Id.* (quoting Jarvis v. United States, 43 Fed. Cl. 529, 534 (1999)).
212. *Id.*
213. *Id.*
214. After restating the standards for these doctrines the majority stated that Bell/Heery's complaint alleged that NHDES had increased Bell/Heery's workload, not the government. *Bell/Heery*, 739 F.3d at 1335. As a result, "[t]here are no allegations that the Government demanded [Bell/Heery] to engage in any work that went beyond what [Bell/Heery] was required to perform under the contract." *Id.* The majority thus concluded that Bell/Heery had not stated a claim under either of these theories because the government "did not itself effect an alteration in the work to be performed." *Id.*
215. *Id.* at 1336.
216. *Bell/Heery*, 739 F.3d at 1336. ("The court improperly tests the complaint filed by Bell/Heery . . . 'in a crucible hotter than the plausibility standard demands.'") (quoting Rodriguez-Reyes v. Molina-Rodriguez, 711 F.3d 49, 53 (1st Cir. 2013)).
217. *Id.* (Mayer, J., dissenting).
218. *Id.*
219. *Id.* at 1336–37.
220. *Id.* at 1337. Judge Mayer also chided the majority for placing "undue weight" on the Permits and Responsibilities clause, citing Federal Circuit case law where the court previously had

provided a sufficient predicate for its claims and had effectively ruled on the merits of the dispute rather than whether Bell/Heery had claims under which it potentially could recover.[221]

2. *Metcalf Construction Company, Inc. v. United States*

Just one month after deciding *Bell/Heery*, the Federal Circuit again waded into the duty of good faith and fair dealing in *Metcalf Construction Company, Inc. v. United States*.[222] In *Metcalf*, the Federal Circuit addressed in detail the standard contractors must meet in order to prevail under a claim that the government breached the implied duty of good faith.[223] In doing so, the Federal Circuit clarified the trial court's standard of review in light of the Federal Circuit's decision in *Precision Pine*.[224] Contrary to the COFC's interpretation,[225] the Federal Circuit expressly found that a contractor could prevail under such a claim even in the absence of "specifically targeted action" or a breach of an express contract provision.[226]

Metcalf Construction Company was awarded a U.S. Navy contract to design and build housing units at a Marine Corps facility in Hawaii.[227] However, after construction began, the project ran into several problems due in substantial part to soil conditions at the construction site.[228] Although the Navy had represented that the soil at the building site had on "slight expansion potential," Metcalf's more detailed survey of the conditions revealed that the soil was highly expansive.[229] As a result, construction was significantly delayed, and, because of the soil conditions and several other factors, Metcalf's construction costs far exceeded the amount paid by the Navy under the contract.[230] Metcalf alleged that the final construction cost was approximately $76 million; the Navy paid Metcalf less than $50 million.[231] As a result, Metcalf filed a certified claim with the CO for the increased costs caused by differing soil conditions, which had necessitated additional excavation, more expensive building materials, and unforeseen environmental remediation work.[232]

After the CO denied the certified claim,[233] Metcalf appealed to the COFC and argued that the Navy breached the contract and its implied

recognized that the scope of a contractor's liability under this clause was "not unbounded, but can instead be constrained by other contractual provisions." *Bell/Heery*, 739 F.3d at 1337–38.

221. *Id.* at 1338.
222. Metcalf Constr. Co. v. United States, 742 F.3d 984, 987 (Fed. Cir. 2014).
223. *Id.* at 993.
224. 596 F.3d at 826.
225. *Metcalf*, 742 F.3d at 993.
226. *Id.* at 993–94.
227. *Id.* at 987.
228. *Id.* at 987–88.
229. *Id.*
230. *Metcalf*, 742 F.3d at 988.
231. *Id.* at 989.
232. *Id.*
233. *Id.*

duty of good faith and fair dealing.[234] The Navy counter-claimed for liquidated damages caused by Metcalf's delayed delivery of all of the contracted-for buildings.[235] After trial on the issues, the COFC rejected Metcalf's claim and sided with the Navy, holding that the Navy did not breach its duty of good faith and fair dealing and granting the its request for liquidated damages.[236] In making this determination, the COFC relied heavily on the Federal Circuit's prior ruling in *Precision Pine* to hold that a failure to cooperate does not violate the duty of good faith and fair dealing unless the government takes "specifically targeted" action to reappropriate the benefit of the contract or hamper contract performance.[237] Metcalf appealed this decision to the Federal Circuit.[238]

On appeal, the Federal Circuit vacated the COFC's decision, finding in part that the COFC relied upon "an unduly narrow view of the duty of good faith and fair dealing."[239] The Federal Circuit first proceeded to lay out the standard for a breach of the covenant of good faith and fair dealing[240] and explained the importance between the interplay of this cause of action and the express terms of the contract at issue.[241] The Federal Circuit noted that

> [although in one sense any "implied" duty "expands" the "express" duties, our formulation means simply that an act will not be found to violate the duty (which is implicit in the contract) if such a finding would be at odds with the terms of the original bargain. . . ."[242]

The Federal Circuit then explained how this standard was applied in *Precision Pine*.[243] Importantly, the court concluded that "an essential basis of *Precision Pine* was that the challenged conduct was not contrary to the contract bargain."[244] The Federal Circuit even referred back to its decision in *Bell/*

234. *Id.*
235. *Id.*
236. *Id.* at 989–90.
237. *Id.* at 992–93.
238. *Id.*
239. *Id.* at 992.
240. *Metcalf*, 742 F.3d at 990–91.
241. *See id.* at 991 ("The covenant of good faith and fair dealing . . . imposes obligations on both contracting parties that include the duty not to interfere with the other party's *performance* and not to act so as to destroy the *reasonable expectations* of the other party regarding the *fruits of the contract*.") (quoting Centex Corp. v. United States, 395 F.3d 1283, 1304 (Fed. Cir. 2005)) (emphasis original); *see also id.* ("We have expressed this principle when we have said that the 'implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions.'") (quoting *Precision Pine*, 596 F.3d at 831).
242. *Id.* at 991.
243. *Id.* at 991–92 ("We held that there was no breach because of two grounds combined: the challenged delays 'were (1) not specifically targeted [at the contracts,] and (2) did not reappropriate any benefit guaranteed by the contracts, since the contracts contained no guarantee that . . . performance would proceed uninterrupted.'") (quoting *Precision Pine*, 596 F.3d at 829) (alteration in original) (internal quotation marks omitted).
244. *Metcalf*, 742 F.3d at 992.

Heery v. United States for the proposition that the terms of the contract at issue are central to a determination of whether there was a breach of the covenant of good faith and fair dealing.[245]

The Federal Circuit then found that the COFC misread the standard stated in *Precision Pine* to require that "a breach of the duty of good faith and fair dealing claim against the government can *only* be established by a showing that [the government action was] 'specifically designed to reappropriate the benefits [that] the other party expected to obtain from the transaction. . . .'"[246] The Federal Circuit expressly stated that *Precision Pine* "does not purport to define the scope of good-faith-and-fair-dealing claims for all cases, let alone alter earlier standards."[247] The court then clarified that establishing a "specific-targeting" action is not a necessary prerequisite in every case to establishing a breach of the duty of good faith and fair dealing.[248] The court thus ruled "the government 'may be liable'—not that it is liable only—when a subsequent government action is 'specifically designed to reappropriate the benefits the other party expected to obtain from the transaction.'"[249]

Having found that the COFC applied an incorrect standard for determining whether the Navy breached the duty of good faith and fair dealing, the Federal Circuit remanded for reconsideration using the broader standard established in prior case law,[250] such as in *Centex Corp. v. United States*.[251] Further, the court disagreed with the government's additional attempts to defend the COFC's ruling,[252] holding that although the covenant of good faith and fair dealing cannot "expand" a party's contractual duties or "create" new ones,[253] a "breach of the *implied* duty of good faith and fair dealing does not require a violation of an *express* provision of the contract."[254] As a result, the Federal Circuit vacated the COFC's decision and remanded with instructions to reconsider the matter using the broader standard.[255]

245. *Id.* at 992 (citing *Bell/Heery*, 739 F.3d 1324).
246. *Id.* (emphasis in original).
247. *Id.* at 993.
248. *Id.*
249. *Metcalf*, 742 F.3d at 993.
250. *Id.* at 994.
251. 395 F.3d 1283, 1304 (Fed. Cir. 2005) (holding that the parties have a general "duty not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.").
252. *Metcalf*, 742 F.3d at 993.
253. *Id.* at 994.
254. *Id.* (emphasis original)
255. *Id.* at 994 ("Whether the government breached the duty of good faith and fair dealing—as to the expanded soil problem, the chlordane problem, or any other properly preserved matter—requires reconsideration under the familiar broader standards reflected in the passages from *Centex* and *Malone* quoted above.").

D. *What Is a Contract/Procurement?*

1. *CMS Contract Management Services v. United States*

In *CMS Contract Management Services v. United States*,[256] the Federal Circuit tackled the question of whether an agency needed to comply with basic statutory and regulatory requirements such as CICA and the FAR. This case forced the Federal Circuit to examine whether an agency had properly classified a group of solicitations as cooperative agreements instead of procurement contracts.[257] Because the agency had classified the solicitations as cooperative agreements, the agency believed it was excused from complying with both CICA and the FAR.[258] Although the COFC had accepted the agency's arguments,[259] the Federal Circuit rejected HUD's classification and ruled that the solicitations were, in fact, procurement contracts.[260] Because HUD admitted that it had not adhered to either CICA or the FAR in drafting the solicitations, the Federal Circuit reversed the COFC's ruling.[261]

HUD initially entered into these Housing Assistance Program (HAP) contracts with the project owners directly;[262] however, pursuant to a 1974 statutory amendment, HUD began entering into annual contributions contracts (ACCs) with public housing agencies (PHAs),[263] which "would then enter into the HAP contracts with project owners."[264] PHAs were classified as "[s]tate, county, municipality, or other governmental entity or public bod[ies] . . . authorized to engage in or assist in the development or operation of public housing."[265] After Congress amended the program in 1997, HUD began outsourcing contract administration services.[266] To effectuate this outsourcing, HUD conducted a "nationwide competition to award an ACC to a PHA in all 50 states."[267] HUD chose to make these new ACCs performance-based annual contribution contracts (PBACCs); thus, "PHAs could earn 'incentive' fees" by entering into more HAP contracts than were specified in the PBACC in addition to the base administrative fee.[268] As a result, the PHAs became known as performance-based contract administrators (PBCAs).[269] Although HUD stated in the RFPs that

256. 745 F.3d 1379, 1381 (Fed. Cir. 2014).
257. *Id.* at 1385.
258. *See id.* at 1383.
259. *Id.* at 1385.
260. *Id.*
261. *Id.* at 1386.
262. *Id.* at 1381–82.
263. *Id.* at 1382.
264. *Id.*
265. *Id.* (quoting 42 U.S.C. § 1437a(b)(6)(A)).
266. *Id.* at 1382.
267. *Id.*
268. *Id.* at 1382–83.
269. *Id.* at 1383.

these were not formal procurements, HUD also stated that it would follow many of the formal procurement principles.[270]

In February 2011, despite strong resistance from the PBCAs, HUD decided to recompete the PBACCs in an attempt to capture additional cost savings.[271] HUD announced awards for every U.S. jurisdiction in July 2011, but faced a total of sixty-six post-award protests.[272] Among other arguments, the protestors argued "the PBACCs were procurement contracts and HUD had not complied with federal procurement laws."[273] HUD announced that it would withdraw the awards to reevaluate the competitive process.[274] But in March 2012, it reissued the solicitations, expressly characterizing the PBACCs as cooperative agreements and styling the solicitation as a notice of funding availability (NOFA) and thus not subject to the federal procurement laws.[275] The appellants in the instant case responded by filing a pre-award protest at GAO.[276] GAO agreed with the appellants that the PBACCs were "procurement contracts under which HUD was procuring the services of the PBCAs."[277] GAO recommended that "HUD cancel the NOFAs and properly re-solicit" proposals for the PBACCs.[278] HUD, however, disregarded GAO's recommendation and announced that it was proceeding with its initial NOFAs,[279] and the "appellants filed a pre-award protest in the COFC" asking the court to "enjoin HUD from proceeding with the NOFA."[280] The COFC ruled in favor of HUD, rejecting the appellants' arguments that the PBACCs were procurement contracts.[281] Consequently, the appellants appealed the decision to the Federal Circuit.[282]

In resolving this issue, the Federal Circuit looked to the Federal Grant and Cooperative Agreement Act (FGCAA),[283] which delineates when an agency must use each type of legal agreement.[284] Under the FGCAA, "[a]n executive agency shall use a procurement contract as the legal instrument . . . when . . . the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States government."[285] By contrast,

270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.* at 1384.
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.* at 1385.
281. *Id.*
282. *Id.*
283. *Id.* at 1381 (citing 31 U.S.C. § 6301).
284. *Id.*
285. *Id.* (citing 31 U.S.C. § 6303).

> an agency shall use a cooperative agreement as the legal instrument . . . when . . . the principal purpose of the relationship is to transfer a thing of value to the [recipient] to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring . . . property or services.[286]

This distinction is significant because an agency must adhere to both CICA and the FAR when using a procurement contract.[287] In contrast, an agency does not need to comply with these procurement laws when using a cooperative agreement.[288]

The Federal Circuit, like GAO, agreed with the appellants that HUD's PBACCs were procurement contracts.[289] The court determined that the primary purpose of the PBACCs was to "procure the services of the PBCAs to support HUD [staff]" by providing oversight and monitoring of Section 8 housing assistance.[290] Citing to the Administrative Record,[291] the court noted that HUD itself had acknowledged its intention "'to *procure* the services of contract administrators . . . in order to release HUD staff for those duties that only government can perform.'"[292] The Federal Circuit also rejected HUD's argument that the housing assistance payments made to the PBCAs were a "thing of value,"[293] finding instead that HUD's legal obligation was to provide these payments to project owners.[294] Because the PBCAs "have no rights to, or control over, those funds . . . HUD was not conferring anything of value on the PBCAs."[295] Similarly, the court was unconvinced that the administrative fee paid to the PBCAs constituted a benefit, considering that the fee "appears only to cover the operating expenses of administering HAP contracts on behalf of HUD."[296]

The Federal Circuit found that, at most, HUD was creating an "intermediary relationship with the PBCAs."[297] Citing to a Senate Report,[298] the Federal Circuit endorsed the position that the PBCAs are "not receiving assistance from the federal agency but [are] merely used to provide a service to another entity which is eligible for assistance."[299] Because "[t]he fact that the product or service produced by the intermediary may benefit another party is irrelevant,"[300] the court ruled that, in the case of an intermediary relationship, the agency should use a procurement contract.[301] Thus, the Federal

286. *Id.* at 1385.
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.* (emphasis in original).
293. *Id.* at 1384.
294. *Id.* at 1386.
295. *Id.* at 1384–86.
296. *Id.* at 1386.
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*

Circuit reversed the COFC's decision and remanded the case back to the lower court for disposition.[302]

2. *Crewzers Fire Transport, Inc. v. United States*

In *Crewzers Fire Transport, Inc. v. United States*,[303] the Federal Circuit confirmed that blanket purchase agreements (BPAs), although often useful for all parties involved, are not actually binding contracts because they do not obligate the government to purchase anything.[304] Because the BPAs underlying the dispute in this case were not contracts, the Federal Circuit concluded that it lacked jurisdiction under the Tucker Act even to hear the merits of the contractor's suit.[305]

Crewzers was an appeal from two COFC decisions in which Crewzers Fire Crew Transport, Inc. sued the U.S. Forest Service under the Tucker Act for breaching two related BPAs.[306] Under the first BPA, Crewzers agreed to sell heavy-duty buses to the Forest Service that would be used to "transport fire crews to wildfires."[307] Under the second, Crewzers agreed to provide flame retardant tents.[308] The Forest Service envisioned using these BPAs to order the necessary resources whenever emergencies arose.[309]

The Forest Service subsequently purchased a few resources from Crewzers, but then terminated the BPAs for cause.[310] For the crew-carrier buses BPA, the Forest Service alleged that Crewzers provided unauthorized vehicles and overcharged for them.[311] For the tent BPA, the Forest Service alleged that the tents were delivered late and did not meet the specifications set forth in the BPA.[312] Crewzers filed separate suits in the COFC, challenging each of these terminations.[313] In both, "Crewzers sought a declaratory judgment that it was entitled to breach of contract damages or, alternatively, to reinstatement of the BPAs."[314] The COFC dismissed both cases for lack of jurisdiction, and Crewzers appealed both decisions to the Federal Circuit.[315] The Federal Circuit affirmed both decisions.[316]

In affirming the COFC's rulings, the Federal Circuit looked to the language of the BPA.[317] Under the BPA, if the government were to place an

302. *Id.*
303. 741 F.3d 1380 (Fed. Cir. 2014).
304. *Id.* at 1382–83.
305. *Id.* at 1385.
306. *Id.* at 1381.
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.* at 1382.
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.* at 1381–82.
316. *Id.* at 1385.
317. *See id.* at 1382–83.

order, Crewzers would be obligated to deliver only if Crewzers was "willing and able."[318] Similarly, the court found that the government did not have any obligations to place a minimum number of orders or otherwise procure the necessary products through Crewzers or the other BPA holders.[319] As a result, the Federal Circuit found that any promises were illusory and no obligations had been placed on either party.[320] Citing to a previous decision in which the Federal Circuit had found that a similar Forest Service agreement was not a valid contract, the court concluded, "It is axiomatic that a valid contract cannot be based upon the illusory promise of one party, much less illusory promises of both parties."[321] Finding that there was no contract, the Federal Circuit held that it lacked jurisdiction under the Tucker Act.[322]

III. KEY PROTEST APPEALS

A. *Clarifying the Rule of Two and When an Agency Must Determine a Small Business's Responsibility*—Adams & Associates, Inc. v. United States

In *Adams & Associates, Inc. v. United States*,[323] the Federal Circuit clarified that COs conducting market research to determine whether a procurement should be set aside for small business, do not, as part of that market research, need to definitively determine whether the prospective small business offerors are responsible.[324] This decision, in practice, should act to lessen the burden on agencies conducting market research prior to determining whether to set aside a contract for small businesses. It will also likely result in more contracts actually being set aside for small businesses.

In *Adams*, the Federal Circuit addressed the Department of Labor's (DOL) ability to set aside a Workforce Investment Act (WIA)[325] procurement for competition among small businesses.[326] The Panel ultimately sided with DOL, although the appellant raised numerous arguments challenging each DOL action in the procurement process, including DOL's interpretation of the WIA, its authority to issue procurement rules, and its application of those rules.[327] After addressing each of the appellant's arguments, the Federal Circuit affirmed the COFC judgments on the administrative record,[328] finding that DOL properly issued rules that subjected

318. *Id.* at 1383.
319. *Id.* at 1382–83.
320. *Id.*
321. *Id.* at 1382 (citing Ridge Runner Forestry v. Veneman, 979 F.2d 200 (Fed. Cir. 1992)).
322. *Id.* at 1385.
323. 741 F.3d 102 (Fed. Cir. 2014).
324. *Id.* at 111.
325. Workforce Investment Act of 1998, Pub. L. No. 105-220, 112 Stat. 936 (codified at 29 U.S.C. § 2887).
326. *Adams*, 741 F.3d at 106.
327. *Id.* at 108–09.
328. *Id.* at 106–111.

WIA procurements to the CICA Rule of Two test.[329] The court then upheld the DOL's application of the Rule of Two.[330]

Adams & Associates was the incumbent contractor for two separate contracts to operate Job Corps centers pursuant to the WIA.[331] In 2011, the DOL "declined to exercise its option to extend Adam's contract" for operating the first of the two centers and instead issued a request for information (RFI) to evaluate how many other firms potentially could operate the center.[332] Based on the responses to the RFI, the DOL determined that it could reasonably expect to receive offers from at least two responsible small businesses capable of operating the center.[333] As a result, DOL set aside the procurement, rendering Adams ineligible to compete.[334] Adams filed a pre-award protest, which led the DOL to cancel the solicitation and conduct further market research.[335] After the second round of RFI responses, the DOL again set aside the procurement for small businesses.[336] In 2012, the DOL issued a similar RFI for another Job Corps center that Adams had been operating, called the Shriver Center.[337] Based on the responses to this RFI, the DOL chose to set aside this procurement as well.[338]

Out of the myriad arguments raised by Adams on appeal, the most important for agencies and contractors going forward was its claim that the DOL improperly applied the Rule of Two framework by failing to conduct a responsibility determination under FAR 9.104-1.[339] As noted above, the Rule of Two requires the CO to set aside a procurement for competition among small businesses when "there is a reasonable expectation that . . . [o]ffers will be obtained from at least two responsible small business concerns . . . at fair market prices."[340] The court interpreted this provision to mean that rather than conducting a full responsibility determination at this point—which DOL was separately required to perform under FAR 9.103 prior to award—DOL needed only a "reasonable expectation

329. The Rule of Two states that the "Contracting Officer shall set aside any acquisition over $150,000 for small business participation when there is a reasonable expectation that: (1) Offers will be obtained from at least two responsible small business concerns . . . and (2) Award will be made at fair market prices." *Id.* at 111 (citing FAR 19.502–2(b)).

330. *Adams*, 741 F.3d at 111 ("The DOL was not required to impose the requirements of the contractor-selection process onto the small business set-aside determination, and it properly applied the Rule of Two. Because its decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, it will not be disturbed.").

331. *Id.* at 104.

332. *Id.*

333. *Id.* at 104–05.

334. *Id.* (noting that "if the contract for the operation of Gadsden were to be set aside for small businesses, any business with more than $35.5 million in annual receipts, including Adams, would not qualify.").

335. *Adams*, 741 F.3d at 104.

336. *Id.* at 105.

337. *Id.*

338. *Id.*

339. *Id.* at 111.

340. *See supra* note 329 and accompanying text; *see also Adams*, 741 F.3d at 111.

that [the] likely small business offerors will survive a future responsibility determination."[341]

B. *The Rule of Two as Applied to the Department of Veterans Affairs*—Kingdomware Technologies, Inc. v. United States

In *Kingdomware Technologies v. United States*,[342] the Federal Circuit held that the Department of Veterans Affairs (VA) has discretion to decide whether to conduct a Rule of Two analysis to determine whether the procurement should be set-aside for veteran-owned small businesses.[343] In a two-to-one decision, the Federal Circuit settled a two-year dispute over the proper interpretation of the Veterans Benefits, Health Care, and Information Technology Act of 2006 (Veterans Benefits Act or VBA),[344] which provides that the VA "shall award contracts" on the basis of restricted competition if the Rule of Two is satisfied.[345] Unlike the Federal Circuit's decision in *Adams*, discussed above,[346] this decision is likely to result in fewer contracts being set aside for veteran-owned small businesses, at least by the VA.

The Small Business Act requires federal agencies to award at least three percent of their contracts to service-disabled veteran-owned small businesses (SDVOSB).[347] For years, the VA failed to satisfy this goal.[348] In response, Congress passed the Veterans Benefits Act (VBA), which requires the VA to increase small business participation in its contracts.[349] The VBA also requires the VA to establish annual goals for veteran-owned small businesses (VOSB) and SDVOSB and provides contracting mechanisms (such as non-competitive procedures) for achieving those goals.[350] The VBA also requires the VA to increase its use of the Rule of Two and small-business set-asides:

> Use of restricted competition.–Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers the award can be made at a fair and reasonable price that offers best value to the United States.[351]

341. *Adams*, 741 F.3d at 111.
342. 754 F.3d 923 (Fed. Cir. 2014).
343. *Id.* at 931–33.
344. Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403 (codified at 38 U.S.C. § 8127 (2010)).
345. *Id.* § 502.
346. *See* discussion *supra* Part IV.A.
347. *See Kingdomware*, 754 F.3d at 926–27.
348. *Id.* at 926.
349. *See* 38 U.S.C. § 8127 (2010).
350. *Id.*
351. *Id.* § 8127(d).

The dispute over the VBA's Rule-of-Two provision began in 2012, when the VA opted to award several contracts through the Federal Supply Schedule without first conducting a Rule of Two analysis.[352] Several SDVOSB contractors, including Kingdomware, protested before the GAO, which sustained the protests and held that the VBA requires the VA to conduct a Rule of Two analysis before turning to the Federal Supply Schedule.[353] The VA refused to follow GAO's recommendation.[354] As a result, Kingdomware brought its protest to the COFC, which sided with the VA and held that the VA could in fact order from the Federal Supply Schedule without first conducting a Rule of Two analysis.[355]

On appeal, the Federal Circuit affirmed the decision of the COFC and held that the Rule of Two provision in the VBA is not mandatory.[356] The court noted that the Act requires the VA to award contracts on the basis of restricted competition only "for purposes of meeting the goals under subsection (a)[.]"[357] Thus, the court reasoned that the VA "need not perform a VOSB Rule of Two analysis for every contract, as long as the goals set under subsection (a) are met."[358] The court further noted that the VA has "consistently met" its small business set-aside goals since the Act's passage and has therefore "complied with [its] statutory mandate to both set goals and meet them[.]"[359]

Judge Reyna issued a forceful dissent, asserting that the majority's decision "guts the Rule of Two of its full force and effect" and argued that "an agency cannot refuse to set aside an acquisition solely because small businesses already receive a fair proportion of the agency's contracts."[360] According to Judge Reyna, the majority's rationale gives too much weight to the provision's prefatory language and ignores the relationship "between a Rule of Two analysis and agency-wide goals."[361] Judge Reyna also called out the majority's "unusual step" of collecting statistics on small business participation in VA's contracts, claiming that the majority's "use of this extrinsic evidence is post hoc rationalization constructed to shore up an otherwise unsound construction of the statute."[362]

352. *See Kingdomware*, 754 F.3d at 928.
353. *See* Aldevra, B-406205, 2012 CPD ¶ 112 at 7 (Comp. Gen. Mar. 14, 2012).
354. *See Kingdomware*, 754 F.3d at 929.
355. *Id.* at 930.
356. *Id.* at 934.
357. 38 U.S.C. § 8127(d) (2010).
358. *Kingdomware*, 754 F.3d at 934.
359. *Id.*
360. *Id.* at 935.
361. *Id.* at 939.
362. *Id.* at 937.

C. *Closing the Door on Task Order Protests at the Court of Federal Claims*—SRA International, Inc. v. United States

In *SRA International v. United States*,[363] the Federal Circuit further defined the limits Congress imposed on the COFC's jurisdiction to hear protests of task or delivery orders.[364] The court dismissed a protest for lack of jurisdiction, relying on the plain, unambiguous language of the Federal Acquisitions Streamlining Act of 1994 (FASA).[365] The FASA vests the Comptroller General with exclusive jurisdiction to hear protests in connection with task or delivery orders.[366] By dismissing the case, the court reminded contractors and agencies that the only forum available to hear protests related to task or delivery orders is the GAO.[367] In practice, this decision will leave agencies with great discretion to avoid potentially meritorious protests by providing agencies with the unilateral power to remove such protests from the jurisdiction of both the GAO and every other forum.

Since 2009, plaintiff SRA International, Inc. "provided network infrastructure support" for the Federal Deposit Insurance Commission (FDIC).[368] During this time, another company, Blue Canopy Group, LLC, was responsible for security audits for the FDIC.[369] In 2012, the General Services Administration (GSA) issued a task order request under a government-wide acquisition contract for a follow-on contract for network infrastructure support services for the FDIC.[370] After an initial award, GAO protest, and subsequent corrective action,[371] the GSA again awarded the task order to Computer Sciences Corporation (CSC), which proposed using Blue Canopy as a subcontractor.[372] SRA again protested the award at the GAO.[373]

At the GAO, SRA argued CSC's relationship with Blue Canopy created both an "impaired objectivity" and an "unequal access to information" organizational conflict of interest,[374] the latter of which was not resolved even when CSC agreed not to use Blue Canopy as a subcontractor.[375] The GSA, deeming an actual conflict "exceedingly remote and unsubstantiated," nonetheless waived any potential conflict for CSC.[376] After the waiver, the

363. 766 F.3d 1409 (Fed. Cir. 2014).
364. *Id.* at 1410.
365. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified at 41 U.S.C. § 4106(f)(1)-(2) (2011)); *SRA Int'l*, 766 F.3d at 1413–14.
366. 41 U.S.C. § 4106(f)(2) (2011).
367. *SRA Int'l*, 766 F.3d at 1413.
368. *Id.* at 1410.
369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.*
373. *Id.* at 1410–11.
374. *Id.* at 1411.
375. *Id.*
376. *Id.*

GAO dismissed the protest as "academic," and SRA took its protest—now adding a challenge to the waiver—to the COFC.

Most importantly, the COFC held that it did have jurisdiction to rule on the validity of the waiver.[377] The waiver, the court said, was not subject to the FASA bar, primarily for three primary reasons.[378] First, the court deemed "in connection with" a task order issuance to be different than simply "related to" the same.[379] While the court agreed the waiver was related to the issuance, it did not agree that it was made *in connection with* the issuance.[380] Second, the waiver was not executed until 102 days after the issuance of the task order, making the waiver too far removed temporally to be connected with the task order.[381] Finally, the waiver was a discretionary act by the agency, a fact the court found salient in deeming the waiver distinct from the task order and exempt from the FASA bar.[382] The court dismissed the case as moot.[383]

The only question the Federal Circuit addressed was whether the challenged waiver was executed in connection with the issuance of the task order.[384] If so, the FASA bar applied.[385] The Federal Circuit found that it did,[386] giving the court "no room to exercise jurisdiction;" thus, the COFC erred in exercising jurisdiction.[387] The remedies that SRA sought targeted the underlying award were significant to the court,[388] indicating the protest was in fact connected to the task order.[389] The court also relied on FASA's legislative history, which supported the conclusion that Congress had no intention of vesting federal courts with jurisdiction over these protests.[390] Since 2008, Congress twice amended FASA to extend sunset provisions vesting GAO with exclusive jurisdiction of claims like SRA's.[391] In

377. *Id.* at 1412.
378. SRA Int'l, Inc. v. United States, 114 Fed. Cl. 247, 254 (2014).
379. *Id.*
380. *Id.* at 255.
381. *Id.*
382. *Id.*
383. *Id.* at 255.
384. *SRA Int'l*, 766 F.3d at 1412 ("The issue here is whether SRA's protest of the GSA's act of issuing the OCI waiver falls under the FASA bar. For purposes of the present case, we simply accept the parties' characterization of this issue as jurisdictional.").
385. *Id.*
386. *Id.* at 1413.
387. *Id.*
388. *Id.* at 1414.
389. *Id.*
390. *Id.* ("Additionally, we note that Congress has enacted multiple amendments to FASA that indicate Congress's reaffirmed intent to bar protests on the issuance of task orders. In 2008, Congress amended FASA to give the GAO exclusive jurisdiction for protests to the issuance of task orders exceeding $10 million, which would expire in 2011. In 2011, Congress amended this sunset provision for GAO jurisdiction to extend through 2016. In each instance, Congress left the general ban on protesting the issuance of task orders undisturbed.") (citing National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181, § 843, 122 Stat. 3, 239 (2007) and National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112–81, § 813, 125 Stat. 1298, 1491 (2011)).
391. *Id.* at 1414.

neither instance did it alter the general ban on protesting task orders, and so the Federal Circuit found that the COFC lacked jurisdiction over SRA's claims.[392]

IV. KEY DISPUTES APPEALS

A. *The Government's Remedies for Fraud*—Veridyne Corporation v. United States

In *Veridyne Corp. v. United States*,[393] the Federal Circuit emphasized the extent to which fraud, even fraud known by and facilitated by a government agency, may preclude the contractor from recovering from the government, even under equitable principles.[394] Specifically, in *Veridyne* the court reversed in part and affirmed in part a COFC ruling allowing Veridyne Corporation to recover in quantum meruit for services performed under a logistics contract issued under the SBA's 8(a) program with the U.S. Department of Transportation's Maritime Administration (MARAD).[395] Since Veridyne falsely certified its pricing estimate to induce the SBA to enter into the contract extension, Veridyne forfeited its contract claims to the government under the Forfeiture of Fraudulent Claims Act (also known as the Special Plea in Fraud) and thus was not entitled to recover any monies under the contract.[396] But the Federal Circuit affirmed the COFC's award to the government of $1.9 million in penalties under both the False Claims Act (FCA) and the fraud provision of the CDA.[397]

In March 1995, Veridyne, a certified participant in the SBA's 8(a) program for disadvantaged small businesses,[398] won an indefinite delivery, indefinite quantity contract from the MARAD (via the SBA) to perform logistics services.[399] In early 1998, shortly before its graduation from the 8(a) program, Veridyne contacted the MARAD about extending its contract.[400] The MARAD preferred to continue working with Veridyne rather than in lieu of transitioning to a new 8(a) contractor,[401] but, under SBA rules,

392. Analyzing the remainder of the COFC's reasoning, the Panel stated that the waiver's timing was irrelevant to the jurisdictional question in this case. *Id.* Nor did the court find any support in FASA's plain language to compel exempting discretionary acts from the general bar—in part because many aspects of a task order are naturally subject to agency discretion. *Id.* Although the court noted the statute was unusual in that it effectively foreclosed judicial review for certain protests, FASA is also unambiguous in doing precisely that. *Id.* Finding an exception for the waiver claim would only allow protesters to circumvent the will of Congress, particularly where, as here, the remedy sought is a rescission of the underlying award. *See generally id.* at 1413–14.

393. 758 F.3d 1371 (Fed. Cir. 2014).

394. *See id.* at 1373.

395. *Id.* at 1373–74.

396. *Id.* at 1378–80.

397. *Id.* at 1382.

398. *Id.* at 1374.

399. *Id.*

400. *Id.*

401. *Id.*

agencies can only sole-source a contract to a particular vendor if the contract is valued at less than $3 million.[402] As a result, Veridyne submitted a proposal to the MARAD with a cost estimate of $2,999,949,[403] certifying that this estimate was "accurate, complete, and current."[404] Although both the MARAD and Veridyne knew that the $3 million estimate was unrealistically low, the MARAD accepted Veridyne's proposal and recommended that SBA issue a modification to extend the term of Veridyne's contract.[405]

Five years after MARAD and Veridyne entered into the contract extension, the Department of Transportation (DOT) Inspector General (IG) initiated an investigation into the contract because of tremendous cost overruns.[406] The DOT IG concluded that the contract extension was obtained through fraud and ordered the MARAD to cancel Veridyne's contract.[407] However, MARAD did not notify Veridyne of this finding until December 2004, when it issued a stop-work order and claimed that contract extension was void *ab initio*.[408]

At the time the stop-work order was issued, Veridyne had five unpaid invoices, and it submitted three more invoices after receiving the stop-work order.[409] When the MARAD refused to pay, Veridyne converted the invoices into certified claims.[410] Following the MARAD's "deemed denial" of the claims, Veridyne brought suit in the COFC.[411] The government asserted an affirmative defense under the Special Plea in Frauds Statute and counterclaimed under the FCA.[412] The COFC first found that Veridyne forfeited its affirmative contract claim under the Special Plea in Fraud Statute,[413] but the court then awarded Veridyne $1 million in quantum meruit for certain unpaid contract costs incurred because Veridyne had conferred a benefit on the government.[414] The COFC next held that, because of its falsified pricing estimate, Veridyne was liable under the FCA and imposed the maximum penalty on Veridyne for each invoice submitted under the contract.[415] Finally, the COFC concluded that the three invoices Veridyne

402. *Id. See* 15 U.S.C. § 637(a)(1)(D)(i)(II) ("A contract opportunity offered for award pursuant to this subsection shall be awarded on the basis of competition restricted to eligible Program Participants if . . . the anticipated award price of the contract (including options) will exceed $5,000,000 in the case of a contract opportunity assigned a standard industrial classification code for manufacturing and $3,000,000 (including options) in the case of all other contract opportunities.").
403. *Veridyne*, 758 F.3d at 1374.
404. *Id.*
405. *Id.* at 1374–75.
406. *Id.* at 1375.
407. *Id.*
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.* at 1375–76.
412. *Id.* at 1376.
413. *Id.*; *see also* Veridyne Corp. v. United States, 105 Fed. Cl. 769, 806, 807 (2012).
414. *Veridyne Corp.*, 105 Fed. Cl. at 807–08.
415. *Id.* at 814–15.

submitted subsequent to receiving the stop-work order were knowingly unsupported,[416] thus requiring the imposition of CDA penalties as well.[417] Both parties appealed, but Veridyne did not appeal the COFC's forfeiture holding.[418]

The Federal Circuit first addressed the government's appeal of the COFC's decision to award Veridyne $1 million in quantum meruit.[419] The Panel agreed with the government's position, noting "it was improper for the Claims Court to allow Veridyne to recover in quantum meruit when its claims have been forfeited under the Special Plea in Fraud Statute."[420] Relying on both the Court of Claims's decision in *Mervin Contracting Corp. v. United States*[421] and the legislative history of the Special Plea in Fraud Statute,[422] the court found that a contractor could not recover under a quantum meruit theory where, as here, it had forfeited its contract claim and both claims "'were for the same services, and the claims for those services were forfeited, regardless of the theory or form in which the claims were asserted.'"[423] The Federal Circuit emphasized the legislative intent behind the Special Plea in Fraud Statute that "any attempt at fraud upon [a claimant's] part shall so taint their claim, *no matter whether there be equity in it or not*, as to forever forfeit it to the Government."[424]

The Federal Circuit next rejected Veridyne's challenge to the COFC's imposition of penalties under both the FCA and CDA.[425] Veridyne argued that it should not be liable under the FCA for submitting invoices under the contract extension because its proposal was merely an estimate and because MARAD knew the estimate contained false statements.[426] Veridyne further argued that it was not liable under the FCA's statutory penalty for every invoice submitted under the contract extension because none of the invoices themselves contained false statements.[427] The Federal Circuit rejected both arguments.[428] According to the court, it was immaterial that the MARAD knew Veridyne had submitted a falsified proposal because Veridyne's contract was with the SBA, not MARAD: "Even if Veridyne believed that [the] MARAD officials were not misled by its proposal, it is clear that these false statements, certified as true by Veridyne, misled the SBA to

416. *Id.* at 814.
417. *Id.* at 815–16.
418. *Veridyne Corp.*, 758 F.3d at 1373.
419. *Id.* at 1376.
420. *Id.* at 1377.
421. Mervin Contracting Corp. v. United States, 94 Ct. Cl. 81 (1941).
422. *Veridyne Corp.*, 758 F.3d at 1377.
423. *Id.*
424. *Id.* (emphasis original). As noted by the court, the Special Plea in Fraud statute was enacted in 1863 as part of the Court of Claims Act. Court of Claims Act, ch. 91-92, §§ 1-4, 12 Stat. 765 (1863) (codified as amended at 28 U.S.C. § 2514).
425. *Veridyne Corp.*, 758 F.3d at 1378.
426. *Id.* at 1378–79.
427. *Id.* at 1379.
428. *Id.* at 1378–80.

enter the contract with Veridyne. Veridyne intended that the SBA rely on the false statements."[429] The court thus affirmed the COFC ruling, concluding that "[the contract extension] was infected with fraud."[430]

Lastly, the court turned to the COFC's ruling on the government's CDA counter-claim.[431] After satisfying itself that the COFC had not erred in its findings that the MARAD's last three invoices were unsupported, the Federal Circuit reiterated that it is now well-established that a "single claim *can be* the source of liability under both the FCA and the CDA" and affirmed the COFC's imposition of CDA penalties.[432]

B. *Cost-Reasonableness on the Battlefield*—Kellogg Brown & Root Services, Inc. v. United States

In the second of two appeals related to Kellogg Brown & Root Services, Inc.'s (KBR) work in Iraq under the LOGCAP program (*KBR II*),[433] the Federal Circuit reaffirmed its earlier decision that cost reasonableness is a question of fact; thus, "[t]he standard for assessing reasonableness is flexible, allowing the Court of Federal Claims to consider many fact-intensive and context-specific factors."[434] *KBR II* reaffirmed that the test for reasonableness is not limited to whether the costs "arise out of willful misconduct, gross negligence, or gross disregard of contractual obligations."[435]

In the first *KBR* decision in 2013 (*KBR I*), the court rejected KBR's argument that, under a cost-reimbursement contract, "costs are payable absent gross misconduct or absent arbitrary action or a clear abuse of discretion."[436] The court reasoned that

> the words "arbitrary," "gross negligence," and "willful misconduct" do not appear in the text [of FAR 31.203-3]. . . . Although evidence of willful misconduct, gross negligence, or arbitrary conduct could well provide a basis for a contracting officer or court to disallow costs under the regulation, such evidence is not required.[437]

In doing so, *KBR I* brushed aside as "non-binding" precedent decades of Board of Contract Appeals decisions emphasizing that "[t]he contractor is entitled to exercise its discretion and sound judgment in incurring costs without the substitution of judgment by the contracting officer disallowing the costs."[438] Instead, *KBR I* stood FAR 31.201-3 on its head and emphasized

429. *Id.* at 1379.
430. *Id.*
431. *Id.* at 1380.
432. *Id.* at 1382 (emphasis added).
433. *See* Kellogg Brown & Root Servs., Inc. v. United States (*KBR II*), 742 F.3d 967 (Fed. Cir. 2014); Kellogg Brown & Root Servs., Inc. v. United States (*KBR I*), 728 F.3d 1348 (Fed. Cir. 2013).
434. *Kellogg Brown & Root Servs.*, 742 F.3d 967, 970 (quoting *Kellogg Brown & Root Servs.*, 728 F.3d 1348, 1360).
435. *Id.* at 971.
436. *Kellogg Brown & Root Servs.*, 728 F.3d at 1359.
437. *Id.*
438. Boeing Aerospace Operations, Inc., ASBCA Nos. 46274, 46275, 94-2 BCA ¶ 26,802, at 133,283, *aff'd on recons.*, 94-3 BCA ¶ 27,281; *see also*, *e.g.*, Delco Elecs. Corp. v. United States, 17

the discretion afforded to the government and the reviewing court, stating that FAR 31.201-3 "affords the [reviewing officer or court] considerable discretion in determining whether a cost is reasonable and therefore allowable."[439]

Similarly, *KBR II* involved costs incurred by KBR under its LOGCAP contract during Operation Iraqi Freedom and subsequently disallowed by the government as unreasonable pursuant to FAR 31.203-1.[440] In August 2003, the Army issued a task order directing KBR to "provide, install, operate, and maintain dining facility services near Mosul, Iraq."[441] That task order and a subsequent task order that extended KBR's period of performance for the Mosul facility were cost-plus-award-fee contracts.[442]

KBR entered into a subcontract with ABC International Group to construct the dining facility and provide the dining services.[443] In June 2004, however, the Army directed KBR to stop construction on the prefabricated facility and begin construction of a facility made of reinforced concrete.[444] In addition, the Army increased the estimated troop headcount to approximately 6,200.[445] Rather than resolicit bids for the increased workload, KBR asked ABC to provide an updated proposal.[446] Although the new troop count was only approximately double the initial troop count, ABC's proposal tripled the monthly cost of its services.[447] A KBR subcontract administrator prepared a price negotiation memorandum to analyze ABC's updated proposal, but made an error in the calculation of a reasonableness benchmark.[448] This error, which quadrupled KBR's estimated cost of performance, made ABC's price seem reasonable by comparison.[449] KBR management relied on the price negotiation memorandum and approved ABC's proposal as reasonable.[450]

DCAA subsequently suspended payment of certain costs by KBR to ABC, and KBR filed suit in the COFC seeking to recover those costs.[451] After a

Cl. Ct. 302, 321 (1989), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990) ("The duty of the court then, is to determine what a reasonably prudent contractor would have done under the circumstances that confronted [the contractor]."); Lockheed-Georgia Co., ASBCA No. 27,660, 90-3 BCA ¶ 22,957, at 115,276 (referring to this test as "[t]he business judgment rule" and stating, "the contracting officer should determine that the cost is allowable and approve it for reimbursement even if in his own judgment he would not have incurred such a cost for reasons that appear plausible to him.") (quoting Telecomputing Servs., Inc., ASBCA No. 10655, 68-1 BCA ¶ 7023, at 32,466); Ensign-Bickford Co., ASBCA No. 6214, 60-2 BCA ¶ 2817, at 14,561.

439. *Kellogg Brown & Root Servs.*, 728 F.3d at 1363.
440. *Kellogg Brown & Root Servs.*, 742 F.3d at 968, 971.
441. *Id.* at 968.
442. *Id.*
443. *Id.*
444. *Id.* at 969.
445. *Id.*
446. *See id.*
447. *Id.*
448. *Id.*
449. *Id.*
450. *Id.*
451. *Id.* at 970.

trial, the COFC determined that KBR had failed to prove that all of the costs it incurred were reasonable, concluding that KBR had failed to demonstrate "that it employed sound business practices and acted as a reasonably prudent business person in accepting ABC's proposed prices."[452]

On appeal to the Federal Circuit, the court rejected each of KBR's arguments that the COFC had erred.[453] As it had in *KBR I*, the court rejected KBR's argument that "all costs associated with performance of a cost-reimbursement contract are reasonable unless they arise out of willful misconduct, gross negligence, or gross disregard of contractual obligations."[454] Although the court agreed that *KBR I* had not addressed whether costs incurred as a result of negligent mistakes meet the standard for reasonableness, it quickly noted that it need not decide that question in this case because the COFC reasonably had found that KBR had been grossly negligent in accepting ABC's proposal.[455] The Federal Circuit then found that, contrary to KBR's assertions, the COFC had considered extenuating circumstances affecting KBR's decision making,[456] such as the urgency of the Army's request and the war zone environment, and, even given these exigencies, KBR still had not acted reasonably.[457]

Finally, the Federal Circuit dismissed KBR's argument that the concept of reasonableness should not apply to the battlefield because of the often extraordinary contracting situation.[458] In doing so, however, the court emphasized the discretion afforded to contractors (as opposed to the government).[459] Although the court held that FAR 31.203-1 applies to cost-reimbursement contracts regardless of whether they are performed in a theater of war,[460] the court stated that "the reasonableness standard is flexible and affords the *contractor* discretion based on the circumstances surrounding performance."[461] As a result, "[t]he reasonableness of a contractor's business judgment must be examined under the circumstances that existed at the time the cost was incurred, but such business judgment must still be exercised in a rational manner, even in wartime."[462] Because the COFC properly considered the circumstances surrounding KBR's acceptance of ABC's proposal and determined that they were insufficient to justify the reasonableness of the increased costs, the Federal Circuit affirmed the COFC's ruling.[463]

452. *Id.* (quoting Kellogg Brown & Root Servs., Inc. v. United States, 107 Fed. Cl. 16, 41 (2012)).
453. *Id.* at 968.
454. *Id.* at 971 (citing *Kellogg Brown & Root Servs.*, 728 F.3d at 1359).
455. *Id.* at 971.
456. *Id.* at 972.
457. *Id.* at 971–72.
458. *Id.* at 971.
459. *Id.*
460. *Id.*
461. *Id.*
462. *Id.*
463. *Id.*

C. *Risk Allocation in Fixed-Price Contracts*—Lakeshore Engineering Services, Inc. v. United States

In *Lakeshore Engineering Services, Inc. v. United States*,[464] the Federal Circuit issued a reminder to contractors that they accept the full risk of price and cost fluctuations when performing under a fixed-price contract, even if the government is aware that the contractor is performing at a loss.[465] Here, the Federal Circuit held that the COFC properly granted summary judgment to the government on plaintiff Lakeshore Engineering Services, Inc.'s contract-based claims.[466] Emphasizing an assumption-of-risk theme inherent in fixed-price contracts, the Federal Circuit agreed with the COFC that Lakeshore was not entitled to an equitable adjustment based on increased costs incurred in the performance of fixed-price task orders issued under an indefinite delivery/indefinite quantity (ID/IQ) contract.[467]

In December 2006, the U.S. Army Contracting agency issued a solicitation for a contract for repair, maintenance, and construction services at Fort Rucker.[468] The contract would be an ID/IQ contract under which the government would issue firm-fixed-price task orders.[469] The amount of each task order would be based on unit prices found in the Universal Unit Price Book (UUPB) created for Fort Rucker, which would then be multiplied by a particular coefficient proposed by the winning offeror in its bid.[470] In the solicitation, each bidder was instructed to devise its coefficients to represent costs "not considered to be included in the [UUPB] prices."[471] The coefficients were required to "contain all costs other than the pre-priced unit prices, as no allowance [would] be made after award."[472] The solicitation then listed several factors that each offeror should consider in setting its coefficients, including "[o]ther risks of doing business (i.e., risk of a lower than expected contract dollar value; risk of poor subcontractor performance and re-performance)."[473]

Lakeshore responded to the solicitation, indicating in its bid that it had "thoroughly reviewed the [U]UPB and compared major line items with [its] actual cost experience on past projects."[474] According to its bid, Lakeshore performed a two-step analysis of the UUPB prices, both reviewing its own costs on similar projects and seeking input from the incumbent contractor.[475] Based on this analysis, "Lakeshore concluded that the UUPB prices were too

464. 748 F.3d 1341 (Fed. Cir. 2014).
465. *Id.* at 1347, 1350.
466. *See id.* at 1350.
467. *Id.* at 1348.
468. *Id.* at 1343.
469. *Id.*
470. *Id.*
471. *Id.*
472. *Id.*
473. *Id.*
474. *Id.* at 1344.
475. *Id.*

low" and proposed "coefficients that were six percent higher than its ordinary pricing coefficients" in order to make each task order profitable.[476] Lakeshore was awarded the contract and began performance in 2007.[477]

In 2008, the U.S. Army exercised its option to extend the contract[478] and increased its payments to Lakeshore under the contract based on the contract's price-adjustment clause,[479] which tied the pricing increases to a Building Cost Index for the construction industry.[480] But, despite this increase, Lakeshore determined that the task order payments were not covering its performance costs.[481] After both its request for equitable adjustment and its certified claim were denied,[482] Lakeshore filed suit in the COFC, alleging breach of contract, breach of implied warranty, breach of the covenant of good faith, and mutual mistake.[483] The COFC granted the government's motion for summary judgment on all of Lakeshore's claims, and Lakeshore appealed to the Federal Circuit.[484]

The Federal Circuit reviewed the COFC's decision de novo and affirmed the COFC's judgment.[485] Beginning with Lakeshore's breach of contract claims, the Federal Circuit agreed that Lakeshore had not provided enough evidence to create a genuine issue of material fact under its two breach theories: that "the government breached the contract (1) by paying Lakeshore based on unit prices that . . . did not accurately reflect the then-prevailing local prices and (2) by not allowing for equitable adjustments for the inflation of costs that occurred after [the contract had been awarded]."[486] The Federal Circuit concluded "the only reasonable conclusion on the evidence here is that any risk that the prices in the UUPB were inaccurate at the time of contracting was borne by Lakeshore."[487]

Next, the Federal Circuit found that the solicitation reinforced this allocation of risk by indicating that each bidder should propose a coefficient to take into account potential inaccuracies in the UUPB, including "all costs other than the pre-priced unit prices" and "[o]ther risks of doing business."[488] Based on this language, the Federal Circuit concluded that each

476. *See id.*
477. *Id.*
478. *Id.* at 1344–45.
479. *Id.*
480. *See id.* at 1345.
481. *Id.*
482. *Id.*
483. *Id.* at 1345.
484. *Id.* at 1345–46.
485. *See id.* at 1346–50.
486. *See id.* at 1346–48.
487. *Id.* at 1347. The Federal Circuit cited three reasons for this conclusion. First, citing to the solicitation's edict that "no allowance will be made after award," the court found that "the contract does not promise that the UUPB prices were accurate" nor did it "place on the government the risk that they will turn out to be inaccurate." *Id.* Further, the Federal Circuit emphasized that the task orders would be firm fixed price, concluding "the essence of a firm fixed-price contract is that the contractor, not the government, assumes the risk of unexpected costs." *See id.*
488. *Id.*

offeror was on notice[489] that it was the offeror's "responsibility to set [its] proposed coefficients at a level that would protect [its] interest in making the contract profitable."[490] Finally, the Federal Circuit found that Lakeshore itself had understood this risk allocation and set its coefficients accordingly.[491] The court concluded that, because Lakeshore had, in fact, proposed coefficients that were higher than its normal coefficients as a result of its analysis of the UUPB pricing guide, it understood that the UUPB prices were too low at the time it submitted its proposal.[492]

The Federal Circuit then summarily affirmed the COFC's decision on Lakeshore's other three causes of action.[493] Notably, the Federal Circuit found that the government had not breached its duty of good faith and fair dealing.[494] The court found that a claim for breach of the covenant of good faith and fair dealing based on the premise that the government's failure to increase the prices under a fixed-price contract, after learning that the original prices were too low, could not succeed "without overriding the fundamental decision in this fixed-price contract that the contractor, not the government, [bears] the risk of any inaccuracy in the pre-contract prices used for bidding . . . and of post-contract changes in market prices."[495] The court concluded that because Lakeshore received what it bargained for under the contract, i.e., "payment based on unit prices set forth in the UUPB multiplied by its bid coefficients," the government's subsequent refusal to pay Lakeshore additional amounts did not destroy its "reasonable expectations under the contract."[496]

Finding that Lakeshore's contract providing for fixed-price task orders did not provide it protection from the resulting injury, i.e., increased costs of performance,[497] the Federal Circuit concluded "no contract-law doctrine applies here to allow Lakeshore to prevail on its claims."[498] Thus, the

489. *Id.*
490. *Id.*
491. *Id.*
492. *See id.* at 1347–48. The court also rejected Lakeshore's second breach theory. *Id.* at 1348. The Panel rejected Lakeshore's argument that the inclusion of a DoD FAR Supplement provision governing the procedures for requests for equitable adjustment necessarily supported the argument that the government was required to compensate Lakeshore for cost increases beyond the terms of the contract. *Id.* The Federal Circuit stated that such an interpretation would "erase the careful limits on the adjustments the government actually agreed to make." *Id.* Further, the court found that Lakeshore had not demonstrated a breach of the actual adjustment provisions that were included in the contract—Lakeshore had not argued that the government misapplied the methodology set forth in the contract for option year pricing increases. *Id.* As a result, the court concluded, "having agreed to the limited adjustment clauses in this fixed-price contract, Lakeshore cannot now rewrite the clauses to provide it protection the government did not agree to." *Id.*
493. *Id.* at 1350.
494. *Id.* at 1349.
495. *Id.*
496. *Id.*
497. *Id.* at 1350.
498. *Id.*

Federal Circuit affirmed the COFC's decision to grant summary judgment in favor of the government.[499]

D. *Causation and Damages*—Nycal Offshore Development Corp. v. United States

In *Nycal Offshore Development Corp. v. United States*,[500] the Federal Circuit confirmed that a plaintiff electing to seek lost profits rather than restitution bears the burden of proving causation.[501] At issue in this case were damages resulting from the government's breach of contracts with various oil companies.[502] Previously, oil and gas leaseholders sued the government for breach of contract when a federal district court ruled that the government's extension of the oil and gas leases violated the law.[503] The COFC agreed with the leaseholders that the government had breached its contracts and held that they were entitled to restitution awards totaling approximately $1 billion.[504] The Federal Circuit affirmed.[505] With the exception of Nycal Offshore Development Corp., all of the plaintiffs accepted the restitution remedy.[506] Nycal, however, waived its right to restitution and returned to the COFC seeking a larger recovery under a claim for lost profits.[507]

After ruling that Nycal could seek lost profits damages,[508] the COFC conducted a trial on its claim.[509] The COFC ultimately ruled that Nycal had failed to prove its case for lost profits,[510] noting that when seeking lost profits, the plaintiff must prove that the damages were foreseeable at the time of contract formation, were actually caused by the breach, and are reasonably certain.[511] Although the COFC found that the damages sought by Nycal were foreseeable to the government,[512] the court concluded that Nycal had failed to prove that the government's breach was the proximate cause of its damages and, in any event, that Nycal's damages were

499. *Id.*
500. 743 F.3d 837 (Fed. Cir. 2014).
501. *Id.* at 843.
502. *Id.* at 840.
503. 106 Fed. Cl. 222, 224, 226 (2012). Specifically, in June 2001, the U.S. District Court for the Northern District of California held that the government violated the Coastal Zone Management Act (CZMA) by not certifying that the lease suspensions were consistent with California's Coastal Management Program. *See* California v. Norton, 150 F. Supp. 2d 1046, 1057–58 (N.D. Cal. 2001).
504. *Nycal Offshore Dev. Corp.*, 106 Fed. Cl. at 253.
505. *See* Amber Res. Co. v. United States, 538 F.3d 1358 (Fed. Cir. 2008).
506. *Nycal Offshore Dev. Corp.*, 743 F.3d at 839–40.
507. *Id.* at 840.
508. Nycal Offshore Dev. Corp. v. United States, 92 Fed. Cl. 209, 213 (2010).
509. *See Nycal Offshore Dev. Corp.*, 106 Fed. Cl. 222.
510. *Id.* at 254.
511. *Id.* at 253, 256 (citing Cal. Fed. Bank v. United States, 395 F.3d 1263, 1267 (Fed. Cir. 2005)).
512. *Id.* at 229 (noting that "[t]he lessor's repudiation of an oil and gas lease clearly would cause plaintiff to lose precisely the benefit it bargained for, namely, profits it might have earned had the lease been developed.").

uncertain.[513] Nycal appealed the decision to the Federal Circuit, which affirmed the COFC's decision.[514]

On appeal, Nycal first argued that the COFC improperly imposed on Nycal the burden of proving that the leaseholders would have been able to obtain the appropriate emissions credits and "access to an onshore production facility."[515] The Federal Circuit disagreed, noting that "[t]he basic principles that apply to proof of causation in a lost-profits case are well settled," concluding that the plaintiff carries the burden of proving that the alleged loss was "the proximate result of the breach."[516] Undeterred, Nycal argued that this standard was inapplicable to cases involving "intervening" causes.[517] The Federal Circuit rejected this argument,[518] holding that the plaintiff carries the burden of proof in a lost-profits case as to all relevant factors, regardless of the nature of the impediment the plaintiff would have had to overcome to make a profit.[519] The court noted that there is "no ready way to distinguish, in a lost-profits case, between proof of causation in general and . . . 'intervening causes.'"[520] Thus, the Federal Circuit concluded that "for burden-of-proof purposes, the use of ['intervening'] does not justify treating certain factors bearing on causation differently from others."[521] In the alternative, Nycal argued that even if it did bear the burden of proving causation, it had carried its burden.[522] The Federal Circuit disagreed.[523]

Nycal's final argument challenged the COFC's finding that its claim would fail regardless of the COFC's causation findings because its damages would be uncertain.[524] Relying on previous Federal Circuit decisions holding that imprecise damages in a lost profits calculation are not a bar to recovery,[525] Nycal argued that any profits from the oil and gas produced from the properties would have rendered the costs incurred in obtaining the necessary permits and onshore profits inconsequential.[526] Although the Federal Circuit found that the COFC's reasoning appeared persuasive,[527] the court declined to rule on this alternative issue.[528] Because the court upheld the

513. *Id.* at 253.
514. *See Nycal Offshore Dev. Corp.*, 743 F.3d at 843, 849.
515. *Id.* at 843.
516. *Id.* (citing Yankee Atomic Elec. Co. v. United States, 536 F.3d 1268, 1273 (Fed. Cir. 2008)); Energy Capital Corp. v. United States, 302 F.3d 1314, 1324–25 (Fed. Cir. 2002)).
517. *Nycal Offshore Dev. Corp.*, 743 F.3d at 843–44.
518. *Id.* at 844.
519. *Id.*
520. *Id.*
521. *Id.*
522. *Id.* at 846.
523. *Id.* at 845–46.
524. *Id.* at 848–49.
525. *Id.* at 849.
526. *Id.*
527. *Id.* at 849.
528. *Id.*

COFC's ruling that Nycal had failed to meeting its causation burden, it was unnecessary to reach the issue of certainty of damages.[529]

E. *Allocating the Risk Fifty Years Later*—Shell Oil Co. v. United States

In a particularly unusual case, the Federal Circuit analyzed a fifty-year-old government contract to determine how the parties allocated certain risks that were largely unthought-of at the time the contract was entered.[530] In *Shell Oil Co. v. United States*,[531] the Federal Circuit determined whether the terms of a World War II contract required the government to indemnify various oil companies (including Shell Oil) for environmental remediation costs assessed fifty years later under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[532] After reviewing the plain language of the contract,[533] the historical context,[534] evidence regarding a possible release,[535] and competing interpretations of the Anti-Deficiency Act,[536] a majority of the Federal Circuit panel reversed the decision below and held the government liable for these costs.[537]

In 1942, the United States, acting through the Defense Supplies Corporation (DSC), entered into contracts with several oil companies to purchase high-octane aviation fuel for military aircraft.[538] These contracts required the oil companies to "undertake extraordinary modes of operation which were often uneconomical and unanticipated at the time. . . ."[539] To incentivize the oil companies, the government agreed to three-year contracts with cost allocation measures that limited their risk.[540] Among those cost allocation provisions was a clause that required DSC to reimburse the oil companies for

> any new or additional taxes, fees, or charges . . . which [the [o]il [c]ompanies] may be required by any municipal, state, or federal law in the United States or any foreign country to collect or pay by reason of the production, manufacture, sale or delivery of the [aviation gas].[541]

The production of this aviation gas resulted in various waste products, including spent alkylation acid and "acid sludge," which the oil companies partially disposed of at a location known as the McColl site.[542] The oil companies did obtain the necessary permits for disposing the waste.[543] But roughly

529. *Id.*
530. *See* Shell Oil Co. v. United States, 751 F.3d 1282 (Fed. Cir. 2014).
531. *Id.*
532. *Id.* at 1284–85.
533. *Id.* at 1290.
534. *Id.* at 1285.
535. *Id.* at 1296.
536. *Id.* at 1299.
537. *Id.* at 1303.
538. *Id.* at 1285.
539. *Id.* at 1287.
540. *Id.*
541. *Id.* (alteration in original).
542. *Id.* at 1288, 1296.
543. *Id.*

fifty years after the contract was performed, California and the federal government obtained compensation under CERCLA for the environmental damage caused by the disposal of these waste byproducts.[544]

After apportioning the environmental remediation costs to Shell under CERCLA, the district court transferred the case to the COFC.[545] The COFC found in favor of the government and denied the oil companies' motion for summary judgment for reimbursement of these costs, listing three independent rationales.[546] First, the COFC held that CERCLA costs were not "charges" within the meaning of the cost allocation provision in the contract.[547] Second, the parties released these claims when the contracts were terminated and, according to the parties' stipulations, "all other issues were settled in the mid-to-late 1940s."[548] Third, the Anti-Deficiency Act (ADA) barred the type of indemnification sought here.[549] The COFC also found that there were genuine factual disputes that precluded summary judgment on another portion of the government's allocation of costs for one of the chemicals.[550] On appeal, a majority of the Federal Circuit reversed the decision on each of these independent grounds.[551]

The Federal Circuit first addressed whether these CERCLA costs were "charges" under the cost allocation provision.[552] The oil companies argued the term "charges" was part of a broad indemnification provision that covered all "[g]overnment-imposed 'expenses' or 'costs.'"[553] As support, the oil companies pointed to Black's Law Dictionary, which defined "charges" as "price, cost, or expense."[554] The government argued that "'charge' plainly connotes an amount paid to receive a privilege, product, or service."[555] The Federal Circuit found that the government's proposed definition accords with the meaning that "charges" means "costs."[556] It then held that the term "charges" and, thus, the contract, assigned liability for these CERCLA costs to the government.[557]

Next, the Federal Circuit addressed whether the parties had entered into a release covering these claims when they terminated the contract.[558] The actual close-out documentation was not provided,[559] and the parties instead

544. *Id.* at 1288–89.
545. *Id.* at 1289.
546. *Id.* at 1288.
547. *Id.*
548. *Id.*
549. *Id.*
550. *Id.* at 1290.
551. *Id.* at 1303.
552. *Id.* at 1290.
553. *Id.*
554. *Id.* at 1291 (citing BLACK'S LAW DICTIONARY 265 (9th ed. 2009)).
555. *Id.* at 1292.
556. *Id.*
557. *Id.* at 1292–93.
558. *Id.* at 1296–97.
559. *Id.* at 1297.

relied on a joint stipulation representing that the parties settled "all other issues" at the time of the contract termination.[560] The oil companies argued that because the stipulation said nothing about whether there was a valid "release (general or otherwise) as part of the settlement," the burden was on the government to prove the existence and validity of a release.[561] The government argued that because the settlement superseded the contract, the settlement did not contain the cost allocation provision that assigned liability for these costs to the government.[562] The Federal Circuit sided with the oil companies, holding that the stipulation did not establish a general release; therefore, the government had failed to carry its burden and prove that a valid release had been executed.[563]

Finally, the Federal Circuit addressed whether the ADA invalidated the cost allocation provision discussed above as an unappropriated, open-ended indemnity provision.[564] The oil companies, along with their *amici*,[565] argued that DSC was not "subject to the ADA in the first place,"[566] but the Federal Circuit found they had waived this argument by failing to raise it before the COFC.[567] The oil companies further argued that this contract was exempt from the ADA because it was entered into under the president's authority in the First War Powers Act.[568] The government agreed with the general proposition that the First War Powers Act permitted agencies to "enter into contracts that would otherwise violate the ADA,"[569] but argued instead that the president had not delegated that authority to DSC.[570] The Federal Circuit sided with the oil companies, finding that the president had delegated this authority to the War Powers Board (WPB) chairman in Executive Order 9024.[571] The majority then found that the WPB delegated the authority to the Office of Petroleum Coordinator for National Defense (OPC) by letter when it delegated the authority "to determine . . . the price at which [aviation gas] is to be purchased, the capacity of the particular refiner to perform and the technical details of the particular contract."[572] Finally, the majority found that the OPC delegated the authority to DSC when it granted DSC the authority to "determine . . . the other terms and the form of such [aviation gas]

560. *Id.*
561. *Id.*
562. *Id.*
563. *Id.*
564. *Id.* at 1299.
565. *Id.* at 1299–1300.
566. *Id.*
567. *Id.* at 1300.
568. *Id.*
569. *Id.*
570. *Id.*
571. *Id.* at 1301.
572. *Id.* at 1300–01.

contracts."[573] As a result, the Federal Circuit held that this provision would not violate the ADA.[574]

Judge Reyna filed a dissenting opinion disagreeing with the majority's holding on the first two issues.[575] Judge Reyna argued that the majority should have read the term "charge" as limited to tax-related costs because the cost allocation provision relied upon was listed under the heading entitled "Taxes."[576] Judge Reyna then argued that these costs were also barred under the precedent established in *E.I. Du Pont de Nemours & Co. v. United States*,[577] which held that a pre-CERCLA liability clause could only cover CERCLA costs if it was either "(1) specific enough to include CERCLA liability or (2) general enough to include any and all environmental liability. . . . "[578] Finally, Judge Reyna concluded that the parties were silent on who bears these costs[579] and, had the oil companies intended to shift these costs to the government, they "'surely would know how to [negotiate and] draft broad hold harmless indemnification clauses extending in perpetuity if that were their intent,' even during wartime."[580]

F. *Review of Contract Claims Under the Wunderlich Act*—SUFI Network Services, Inc. v. United States

In *SUFI Network Services, Inc. v. United States*,[581] the Federal Circuit addressed a unique appeal brought under the now-defunct Wunderlich Act, which gave the COFC jurisdiction to review decisions of the Boards of Contract Appeals.[582] The Federal Circuit overturned a $118.7 million judgment in favor of SUFI Network Services, holding that the COFC should have remanded the case to the Armed Services Board of Contract Appeals (ASBCA) instead of making its own factual findings in violation of the Wunderlich Act standard.[583] The court's decision thus continues a decades-old dispute[584] that highlights the procedural inefficiencies of the Wunderlich Act and leaves open the possibility for additional proceedings before the ASBCA, the COFC, and the Federal Circuit.

SUFI Network Services was awarded a telephone services contract in 1996 with the Air Force Non-Appropriated Funds Purchasing Office,[585]

573. *Id.* at 1301.
574. *Id.*
575. *Id.* at 1303.
576. *Id.* at 1304–05 (Reyna, J., dissenting).
577. *Id.* at 1306 (citing 365 F.3d 1367 (Fed. Cir. 2004)).
578. *Id.*
579. *Id.* at 1307.
580. *Id.* (quoting Shell Oil Co. v. United States, 108 Fed. Cl. 422, 425 (2013)).
581. 755 F.3d 1305 (Fed. Cir. 2014).
582. *Id.* at 1311 (citing 41 U.S.C. §§ 321–322 (2006)). The Wunderlich Act applies to this case because SUFI initiated proceedings at the Armed Services Board of Contract Appeals. *See id.*
583. *Id.* at 1309.
584. *See id.* at 1312.
585. *Id.* at 1309.

an entity not covered by the CDA.[586] The contract required SUFI to install and operate telephone systems at Air Force housing facilities in Europe at no charge.[587] In return, SUFI earned fees for every local and long-distance call made on its network.[588] SUFI later discovered that guests were circumventing its network by using calling cards and other tactics.[589] SUFI claimed the Air Force breached the contract by allowing this activity,[590] which deprived SUFI of its only means of revenue under the contract.[591] SUFI appealed to the ASBCA after the Air Force disputed its interpretation of the contract; the ASBCA held that the Air Force was in material breach and that SUFI was entitled to stop performance.[592] SUFI then submitted a total of twenty-eight monetary claims valued at $130.3 million for damages arising out of the Air Force's breach.[593] The ASBCA, however, awarded only $7.4 million plus interest.[594]

Dissatisfied with the ASBCA's decision, SUFI appealed to the COFC.[595] At the time, the Wunderlich Act allowed the COFC to review Board decisions on claims not covered by the CDA.[596] The COFC had authority to overturn a Board decision only if it was "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or . . . not supported by substantial evidence[.]"[597] In SUFI's case, the court found much of the ASBCA's damages decision to be arbitrary and capricious.[598] The court also held that remand to the ASBCA for further fact finding was unnecessary and awarded SUFI $118.7 million in damages.[599]

On appeal, the Federal Circuit vacated much of the COFC's decision.[600] The Federal Circuit found that several of SUFI's claims for damages required additional factual finding by the Board and faulted the Court of Federal Claims for making its own factual findings.[601] The court noted that, in general, "a court reviewing a Wunderlich Act case is limited to the administrative record and may not take new evidence."[602] This case thus highlights the limited nature of Wunderlich review and the inefficiencies created by

586. *See* 41 U.S.C. § 7102(a) (2006). The Air Force Non-Appropriated Funds Purchasing Office is not one of the non-appropriated fund activities listed in 28 U.S.C. §§ 1348, 1491. *See generally* 28 U.S.C. § 1348 (2006); 28 U.S.C. § 1491 (2006).
587. *SUFI Network Servs.*, 755 F.3d at 1309.
588. *Id.*
589. *Id.* at 1309–10.
590. *Id.* at 1310.
591. *Id.* at 1309.
592. *Id.* at 1310.
593. *Id.* at 1311.
594. *Id.*
595. *Id.*
596. *Id.* at 1311–12.
597. *Id.* (quoting 41 U.S.C. § 321 (2006)).
598. *Id.* at 1312.
599. *See id.* at 1311.
600. *See id.* at 1312.
601. *See id.*
602. *Id.*

allowing claims to be kicked back and forth among three different forums. Fortunately, the Wunderlich Act has since been repealed,[603] and the vast majority of contract claims are subject to the more-streamlined procedures of the CDA.[604]

V. CONCLUSION

The decisions of the Federal Circuit addressed above are likely to have a lasting impact on the day-to-day administration of federal government contracts. Indeed, decisions like *Sikorsky* and *Raytheon*, which cemented the status of the CDA's six-year statute of limitations as non-jurisdictional and clarified the government's burden of proof with respect to CAS non-compliance, have already affected the work of on-the-ground contract professionals, COs, and cost auditors. The Federal Circuit's revival of the "reasonableness" standard for the duty of good faith and fair dealing in *Metcalf* is likely to have similar ramifications for contracting parties seeking to protect their rights under the contract. Additionally, the Federal Circuit's expansive interpretation of the Special Plea in Fraud statute in *Veridyne* serves to remind contractors that fraudulent activity has the potential to taint all claims under the contract. The other decisions discussed above are no less influential.

Above all, the Federal Circuit's 2014 government contracts decisions confirm that the court remains an impactful player in the government contracts arena. Although the numbers show that the court continues to maintain a relatively small docket of government contracts cases,[605] each one of the court's decisions could have profound implications on the formation and administration of federal government contracts. Indeed, 2014 has shown that the court's decisions have the potential to affect major areas of contract administration, which, after all, is where the rubber meets the road.

603. *Id.* at 1311.
604. *Id.*
605. *See* U.S. Court of Appeals for the Federal Circuit, Appeals Filed, by Category, FY 2014, *supra* note 38.