FEDERAL CIRCUIT YEAR-IN-REVIEW 2012: GUARDING THE GATES OF GOVERNMENT CONTRACTS LITIGATION

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I. INTRODUCTION

Justice Scalia observed in *Bowen v. Massachusetts* that "[n]othing is more wasteful than litigation about where to litigate. . . ."[1] Judge Plager of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has quoted this observation often regarding litigation involving government contracts, and it rang particularly true in the 2012 review of the Federal Circuit's government contracts decisions.[2] The Federal Circuit's frustration with litigation about where to litigate was most evident in *VanDesande v. United States*, where the panel noted, "[t]o fully detail [this case's] course through the several federal agencies and courts during the numerous years it has been in dispute (nearly a decade and a half) would unduly extend the opinion, and it might be confused with *Jarndyce v. Jarndyce*."[3] The *VanDesande* panel sharply criticized "the Government's attempt to win this case by taking inconsistent positions in two different federal courts."[4]

1. 487 U.S. 879, 930 (1988) (Scalia, J., dissenting). Justice Scalia stated: "Nothing is more wasteful than litigation about where to litigate, particularly when the options are all courts within the same legal system that will apply the same law." *Id.*

2. *E.g.*, Sharp Elecs. Corp. v. McHugh, 707 F.3d 1367, 1376 (Fed. Cir. 2013) (Plager, J., dissenting); VanDesande v. United States, 673 F.3d 1342, 1343 (Fed. Cir. 2012) (Plager, J.); Suburban Mortg. Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116, 1118 (Fed. Cir. 2007) (Plager, J.).

3. *Vandesande*, 673 F.3d at 1344. "*Jarndyce v. Jarndyce* is the Chancery suit around which the plot of Dickens's *Bleak House* (1853) revolves." *Id.* at 1344 n.1.

4. *Id.* at 1347.

By contrast, other 2012 decisions demonstrate that the Government, at least, has a strong incentive to litigate about where to litigate. In *FloorPro, Inc. v. United States*,[5] the Federal Circuit rejected as untimely a contractor's attempt to correct a jurisdictional defect in its previous challenge at the Armed Services Board of Contract Appeals (ASBCA) under the Contract Disputes Act (CDA)[6] by refiling at the U.S. Court of Federal Claims (COFC) under the Tucker Act.[7] The Federal Circuit in *FloorPro* held that the second lawsuit was time-barred because it was commenced outside of the Tucker Act's six-year limitations period.[8] From the Government's perspective, *FloorPro* confirms that protracted litigation concerning the threshold issue of jurisdictional forum can successfully prevent resolution on the merits—indeed, when the ASBCA reached the merits in FloorPro's initial suit (improvidently, according to the Federal Circuit's first opinion), the contractor prevailed on the merits.[9]

Litigating over where to litigate has always been a particularly vexing problem for suits against the Federal Government. For example, the issue in *Bowen* that prompted Justice Scalia's oft-quoted observation was whether the plaintiff could maintain an action against a federal agency under the Administrative Procedure Act in federal district court, or whether the plaintiff's only claim was for breach of contract under the Tucker Act and thus limited to the Court of Federal Claims.[10] Beyond the question of *where* to litigate, however, the Federal Circuit's 2012 decisions confirm that extensive resources are expended litigating about *when* to litigate, *who* can litigate, and *what* can be litigated.[11] Half of the twenty-four precedential opinions in government contracts appeals issued by the Federal Circuit in 2012 turned primarily on a threshold issue of whether the forum below properly heard the case in the first place.[12]

To be sure, several 2012 opinions confirmed the lower tribunal's jurisdiction over a particular matter, resolving once and for all issues that had been raised in numerous cases before the Federal Circuit. For example, *Systems Application & Technologies* confirmed that awardees can challenge an agency's decision to follow the Government Accountability Office's (GAO) recommended corrective action when GAO sustains a protest.[13] The COFC's jurisdiction over such protests had repeatedly been challenged by the Gov-

5. 680 F.3d 1377, 1382 (Fed. Cir. 2012) (*FloorPro III*).
6. Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2011).
7. *FloorPro III*, 680 F.3d at 1382.
8. *Id.* at 1381.
9. *Id.* at 1380.
10. *See* Bowen v. Massachusetts, 487 U.S. 879, 882 (1988).
11. *See, e.g.*, COMINT Sys. Corp. v. United States, 700 F.3d 1377, 1382 (Fed. Cir. 2012) (discussing when to litigate); Digitalis Educ. Solutions, Inc. v. United States, 664 F.3d 1380, 1385 (Fed. Cir. 2012) (discussing who can litigate); Bowers Inv. Co., LLC v. United States, 695 F.3d 1380, 1381–84 (Fed. Cir. 2012) (discussing what can be litigated).
12. *See infra* Appendix (List of 2012 Federal Circuit Government Contracts Decisions).
13. *See* Sys. Application & Techs., Inc. v. United States, 691 F.3d 1374, 1377 (Fed. Cir. 2012), *aff'g* 100 Fed. Cl. 687 (2011).

ernment in other cases.[14] Similarly, the decision in *Arctic Slope Native Association, Ltd. v. Sebelius* elaborated on the grounds under which the CDA's six-year statute of limitations can be equitably tolled.[15] Although tolling will be limited to extreme circumstances, the decision in *Artic Slope* certainly did not result in a further "closing" of the CDA's jurisdictional gates.[16]

Moreover, some of the gatekeeping rules announced in these 2012 opinions should, ostensibly, increase efficiency in government contracts litigation. For example, in *COMINT Systems Corp. v. United States*,[17] the Federal Circuit extended the timeliness rule first articulated in *Blue & Gold Fleet, LP v. United States*[18] to require a pre-award protest in all cases where the protesting party had the opportunity to challenge aspects of a solicitation before the award.[19] Although this holding will undoubtedly generate more timeliness challenges by the Government, the rule should further the policy objective of resolving disputes over the ground rules for a procurement before the Government and offerors have expended time and effort preparing and evaluating proposals.[20] Similarly, in *Digitalis Education Solutions, Inc. v. United States*, the Federal Circuit held that, in order to protest a sole-source award, the protester must have submitted a capabilities statement in response to a sole-source award announcement.[21] A waiver rule in this context could avoid not only protest litigation but improvident noncompetitive contract awards by incentivizing interested parties to make an agency aware of the potential for competition.[22] Furthermore, the court's decisions on claim preclusion and issue preclusion in *Bowers Investment Co., LLC v. United States*[23] and *Laguna Hermosa Corp. v. United States*[24] should foster efficiency by preventing piecemeal litigation of claims based on the same set of facts and

14. *See, e.g.*, Sheridan Corp. v. United States, 95 Fed. Cl. 141, 147–51 (2010); Ceres Gulf, Inc. v. United States, 94 Fed. Cl. 303, 307 (2010); Centech Grp., Inc. v. United States, 78 Fed. Cl. 496, 506–07 (2007).

15. *See* 699 F.3d 1289, 1290, 1295 (Fed. Cir. 2012).

16. *Id.* at 1290 (reversing and remanding because CDA's six-year statute of limitations should have been equitably tolled).

17. 700 F.3d 1377, 1382 (Fed. Cir. 2012).

18. 492 F.3d 1308 (Fed. Cir. 2007). In *Blue & Gold Fleet*, the Federal Circuit held "that a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims." *Id.* at 1313.

19. *See COMINT Sys. Corp.*, 700 F.3d at 1382 ("[W]e think the reasoning of *Blue & Gold* applies to all situations in which the protesting party had the opportunity to challenge a solicitation before the award and failed to do so.").

20. *See Blue & Gold Fleet*, 492 F.3d at 1314 (reasoning that it would be inefficient and costly to entertain such protests after the agency had expended considerable time and effort evaluating proposals and that "a waiver rule thus prevents contractors from taking advantage of the [G]overnment and other bidders, and avoids costly after-the-fact litigation").

21. *See* 664 F.3d 1380, 1385 (Fed. Cir. 2012), *aff'g* 97 Fed. Cl. 89 (2011).

22. *See id.* ("Interested parties are invited to submit statements of capability in order to convince the [G]overnment that it should hold a full competition for the contract rather than sole-source the contract to the proposed contractor.").

23. 695 F.3d 1380, 1381–82 (Fed. Cir. 2012).

24. 671 F.3d 1284, 1287–88 (Fed. Cir. 2012).

disposing of all related matters in a single proceeding to the extent practicable.[25]

On balance, however, and as discussed below, decisions such as *FloorPro*,[26] *VanDesande*,[27] *Parsons Global Services, Inc. v. McHugh*,[28] and *Minesen Co. v. McHugh*[29] collectively demonstrate that Justice Scalia's observation is more often true than not. Government contracts disputes and protests often involve excessive and needless litigation over gatekeeping principles that seldom avoid, and often spawn, further excessive and needless litigation.[30]

This Article will analyze and review the Federal Circuit's 2012 cases in four parts. First, Part II provides a statistical overview of each judge's participation in the Federal Circuit's 2012 government contracts decisions. Next, Parts III–V discuss the key Federal Circuit decisions from 2012 regarding gatekeeping issues. Finally, Part VI summarizes the significant merits and damages decisions from 2012.

II. 2012 BY THE NUMBERS

Government contracts appeals represented approximately four percent of the Federal Circuit's caseload in fiscal year 2012,[31] slightly lower than the five-to-six percent range that has held steady since 2006.[32] Examined from a different perspective, the Federal Circuit's precedential decisions in gov-

25. *See Bowers*, 695 F.3d at 1381–82 ("The present claims are based on the same transactional facts, and could have been and should have been raised and resolved in the prior preceeding."); *Laguna*, 671 F.3d at 1288 ("[T]he doctrine of issue preclusion, or collateral estoppel, protects the finality of judgments by 'preclud[ing] relitigation in a second suit of claims actually litigated and determined in the first suit.'" (quoting *In re* Freeman, 30 F.3d 1459, 1465 (Fed. Cir. 1994))).

26. FloorPro, Inc. v. United States (*FloorPro III*), 680 F.3d 1377, 1378 (Fed. Cir. 2012).

27. VanDesande v. United States, 673 F.3d 1342, 1351–52 (Fed. Cir. 2012).

28. 677 F.3d 1166, 1166 (Fed. Cir. 2012).

29. 671 F.3d 1332, 1332 (Fed. Cir. 2012).

30. *See FloorPro III*, 680 F.3d at 1377; *VanDesande*, 673 F.3d at 1342; *Parsons Global Servs.*, 677 F.3d at 1166; *Minesen Co.*, 671 F.3d at 1332.

31. *See United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category, FY 2012*, CAFC.USCOURTS.GOV, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Caseload_by_category_2012.pdf (last visited June 1, 2013).

32. *See United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category, FY 2011*, CAFC.USCOURTS.GOV, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Caseload_by_category_2011.pdf (six percent, including spent nuclear fuel cases); *United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category, FY 2010*, CAFC.USCOURTS.GOV, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Caseload_by_Category_Appeals_Filed_2010.pdf (six percent, including spent nuclear fuel cases); *United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category, FY 2009*, CAFC.USCOURTS.GOV, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/ChartFilings09.pdf (five percent); *United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category, FY 2008*, CAFC.USCOURTS.GOV, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/ChartFilings08.pdf (six percent, including spent nuclear fuel cases); *United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category, FY 2007*, CAFC.USCOURTS.GOV, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/ChartFilings07.pdf (five percent); *United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category, FY 2006*, CAFC.USCOURTS.GOV, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/ChartFilings06.pdf (five percent). The Federal Circuit previously tracked spent nuclear fuel cases separately from contracts cases, which comprise five percent.

ernment contracts appeals represented little more than nine percent of the precedential opinions issued in 2012, down from eleven percent in 2011.[33]

It is helpful for the reader to look at the number of precedential opinions each Federal Circuit judge participated in this year—an analysis that Professor Steven Schooner performed in his review of the Federal Circuit's 2010 government contracts decisions,[34] and that we extended in our review of the 2011 decisions.[35] Table 1 provides the same information for 2012.

The 2012 data confirm Professor Schooner's observation that "most Federal Circuit judges were not exposed to a large number of [g]overnment contracts cases,"[36] and continue to beg his question of "whether this rather light volume of government contracts decisions permits judges to become specialists."[37] As with 2010 and 2011, every judge participated in fewer than ten government contracts-related appeals that generated a precedential opinion.[38] Active judges participated in an average of six government contracts-related appeals that generated a precedential opinion in 2012, compared to seven in 2011.[39] A majority of active judges participated in at least six government contracts-related precedential appeals, compared with 2010, when Professor Schooner observed that "the vast majority of judges participated in fewer than half a dozen, government contracts related matters."[40]

The Federal Circuit's 2012 government contracts-related workload continues to be spread fairly evenly among the court's judges.[41] Other than

33. Our review identified twenty-four government contracts-related precedential opinions out of 257 total precedential opinions issued by the Federal Circuit in 2012. We identified the total precedential opinions with the following Westlaw search in the CTAF database: "'federal circuit' & da(aft 1/1/2012 & bef 12/31/2012) & ci('f.3d')." Last years' review identified twenty-two government contracts-related precedential opinions, which was approximately eleven percent of the 199 total precedential opinions issued by the Federal Circuit in 2011.

As Professor Schooner observed in his review of the Federal Circuit's 2010 decisions, "case selection methodology is neither entirely scientific nor uniformly consistent." Steven L. Schooner, *A Random Walk: The Federal Circuit's 2010 Government Contracts Decisions*, 60 AM. U. L. REV. 1067, 1071 n.8 (2011). For this Article, we included all precedential opinions involving appeals from the U.S. Court of Federal Claims (COFC) and the Boards of Contract Appeals under the Contract Disputes Act (CDA), 41 U.S.C. § 7107(a) (2006). We also included precedential opinions involving the *Winstar* and "spent nuclear fuel" cases. We included several non-CDA appeals involving contract-based claims from the COFC.

34. Schooner, *supra* note 33, at 1068–69.

35. 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 (2012). As we did last year, 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.

36. Schooner, *supra* note 33, at 1071.

37. *Id.* at 1075.

38. *Id.* at 1071–72; Graham et al., *supra* note 35, at 479.

39. Graham et al., *supra* note 35, at 479–81.

40. Schooner, *supra* note 33, at 1071.

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

Table 1: Government Contracts Activity per Federal Circuit Judge 2012

Judge	Participated	Drafted	Participated Without Writing	Concurring	Dissenting	Total Opinions
Active Judges						
Rader	9	5	4	0	0	5
Lourie	6	0	6	0	0	0
Bryson	8	0	5	0	3	3
Dyk	6	4	1	0	1	5
Prost	8	1	7	0	0	1
Moore	5	2	2	0	0	2
Newman	6	1	0	1	2	4
O'Malley	4	0	4	0	0	0
Reyna	4	2	2	0	0	2
Wallach	5	0	4	0	1	1
Senior Judges & Judges Sitting by Designation						
Clevenger	1	1	0	0	0	1
Linn	4	0	3	0	1	1
Mayer	6	2	3	0	1	3
Plager	4	2	0	0	0	2
Schall	1	1	0	0	0	1
Gajarsa	2	1	0	1	1	3

Judges O'Malley and Reyna, who each participated in four government contracts appeals generating a precedential decision, every active judge participated in at least five appeals, a statistic very similar to 2011.[42] The drafting of opinions, however, was less evenly distributed: only Chief Judge Rader and Judge Dyk wrote the panel or majority opinion in more than two government contracts-related appeals, compared to three in 2011 and one in 2010.[43] When concurring and dissenting opinions are included, Chief Judge Rader and Judge Dyk were the most prolific writers in 2012, each authoring five opinions.[44]

42. Graham et al., *supra* note 35, at 479–81.

43. *Id.* at 481; Schooner, *supra* note 33, at 1071.

44. Chief Judge Rader wrote for the court in the following: Sys. Fuels, Inc. v. United States, 666 F.3d 1306 (Fed. Cir. 2012); Kan. Gas & Elec. Co. v. United States, 685 F.3d 1361 (Fed. Cir. 2012); J.P. Donovan Constr. Inc. v. Mabus, 469 F. App'x 903 (Fed. Cir. 2012); Pac. Gas & Elec. Co. v. United States, 536 F.3d 1282 (Fed. Cir. 2008); and Yankee Atomic Elec. Co. v. United States, 679 F.3d 1354 (Fed. Cir. 2012). Judge Dyk authored a dissenting opinion in *Zoltek*

III. BID PROTEST GATEKEEPING DECISIONS

A. *Extending* Blue & Gold Fleet *to All Pre-award Contexts*—COMINT Systems v. United States

In *Blue & Gold Fleet, LP v. United States*,[45] the Federal Circuit adopted the GAO's rule that, where a party objects to a solicitation or alleges that the solicitation contains patent errors or ambiguities, the party must protest prior to the close of the bidding process or it waives its ability to raise the same objection in a post-award protest.[46] In *COMINT Systems Corp. v. United States*, the Federal Circuit extended *Blue & Gold Fleet* to apply in all cases where the protesting party had the opportunity to challenge aspects of a solicitation before the award but failed to do so.[47]

In *COMINT Systems*, "the agency issued a solicitation seeking offers for a multiple award, indefinite delivery/indefinite quantity contract for information technology services."[48] Offerors were required to submit separate proposals for a Basic Contract as well as for Task Order 1 and Task Order 2.[49] The solicitation stated that the agency would first evaluate the Basic Contract on a best-value basis and offerors would then be evaluated for Task Orders 1 and 2.[50] During its evaluation of bids, the agency decided to limit the initial award to only the Basic Contract.[51] Accordingly, on January 19, 2011, the agency issued Amendment 5 to the solicitation informing offerors that Task Orders 1 and 2 would not be awarded with the Basic Contract.[52] Amendment 5 also stated that the agency would "*NOT* accept any revisions to the proposals."[53] COMINT signed and returned Amendment 5 to the agency on January 20, 2011, confirming that it received the Amendment.[54] An award was made on April 6, 2011.[55]

Following the award, COMINT, a losing offeror, protested the award first to the agency and then at the COFC, arguing that Amendment 5 substantially changed the solicitation, requiring the agency to cancel the solicitation or permit offerors to submit revised proposals.[56] The COFC held that COMINT failed to preserve its challenge to Amendment 5 because it did

Corp. v. United States, 672 F.3d 1309 (Fed. Cir. 2012), and wrote for the court in the following: Vt. Yankee Nuclear Power Corp. v. Entergy Nuclear Vt. Yankee, LLC, 683 F.3d 1330 (Fed. Cir. 2012); Scott Timber Co. v. United States, 692 F.3d 1365 (Fed. Cir. 2012); COMINT Sys. Corp. v. United States, 700 F.3d 1377 (Fed. Cir. 2012); and Consol. Edison Co. v. Entergy, 676 F.3d 1331 (Fed. Cir. 2012).

45. 492 F.3d 1308 (Fed. Cir. 2007).
46. *Id.* at 1314–15.
47. 700 F.3d at 1378.
48. *Id.* at 1379.
49. *Id.*
50. *Id.* at 1380.
51. *Id.*
52. *Id.*
53. *Id.* (emphasis in original).
54. *Id.*
55. *Id.*
56. *Id.* at 1380–81.

not raise the issue before the contract was awarded.[57] COMINT argued that *Blue & Gold* did not explicitly apply to this case.[58] Specifically, COMINT asserted that it did not have an opportunity to challenge the solicitation "prior to the close of the bidding process" because Amendment 5 was adopted after the offerors had submitted their proposals and, moreover, Amendment 5 stated that the agency would not accept revised proposals as a result of the Amendment.[59] The Federal Circuit disagreed, holding that the reasoning in *Blue & Gold* applies in all pre-award situations where the offeror could bring a protest prior to award.[60] Even though proposals had been submitted, the panel noted that there were several months between the issuance of Amendment 5 and the award of the contract during which COMINT potentially could have objected to the amendment.[61] Moreover, although Amendment 5 prohibited revised proposals, it did not prohibit COMINT from protesting the amendment.[62] Finally, the panel noted that the GAO follows "a similar rule, setting various time limits by which protests must be submitted."[63]

Requiring an offeror to protest patent defects or ambiguities in a solicitation or solicitation amendment before award—or else waive the right to do so—rests on the policy that an offeror should not be allowed to "wait and see" if it has received the contract award before challenging terms of the solicitation or amendment.[64] As the Federal Circuit stated in *Blue & Gold*:

> In the absence of a waiver rule, a contractor with knowledge of a solicitation defect could choose to stay silent when submitting its first proposal. If its first proposal loses to another bidder, the contractor could then come forward with the defect to restart the bidding process, perhaps with increased knowledge of its competitors. A waiver rule thus prevents contractors from taking advantage of the government and other bidders, and avoids costly after-the-fact litigation.[65]

The *COMINT Systems* panel reasoned that the policy behind *Blue & Gold* supported its extension to all pre-award situations where the offeror has the time and opportunity to raise its objections.[66]

COMINT Systems provided guidance to offerors, warning that they cannot wait until after award to raise concerns about the propriety of an agency's pre-award actions, including those actions that do not allow offerors to submit revised proposals.[67] Under *COMINT Systems*, if an offeror has the time or the opportunity to challenge any aspect of the ground rules of the com-

57. *Id.* at 1381–82.
58. *Id.* at 1382.
59. *Id.*
60. *Id.*
61. *Id.* at 1382–83.
62. *Id.* at 1383.
63. *Id.* (citing 4 C.F.R § 21.2 (2012)).
64. *Id.*
65. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1314 (Fed. Cir. 2007).
66. *COMINT Sys. Corp.*, 700 F.3d at 1382.
67. *See id.* at 1382–83.

petition, it should consider preserving its rights through a protest filed prior to award of the contract.[68] The Federal Circuit's holding is a logical extension of *Blue and Gold*'s previous holding on the issue of timing for protests and clarified the relevant time period in which such protests must be filed.

B. *Prerequisites for Filing a Protest of a Sole-Source Award*—Digitalis Education Solutions, Inc. v. United States

In *Digitalis*, the Federal Circuit endorsed the rule followed by the GAO and most COFC judges requiring, as a prerequisite to a protest of a sole-source award, that a protester have submitted a capabilities statement in response to a sole-source award announcement.[69] Digitalis protested, before the COFC, the U.S. Department of Defense's (DoD) decision to award a sole-source contract for the provision of fifty digital planetariums for use in schools overseen by the DoD Educational Activity.[70] Prior to finalizing its decision to issue a sole-source award to Science First, the DoD posted its intent to do so on www.fedbizopps.gov (fedbizopps), where federal government contracting opportunities are made publicly available, and sought capability statements from other interested firms.[71] After receiving one such statement from another producer of planetariums, Sky Skan, the DoD slightly modified its Justification and Authorization (J&A) for the procurement and proceeded to award a sole-source contract to Science First.[72] Digitalis never submitted a capabilities statement prior to the deadline set by the DoD.[73]

Digitalis first complained to its congressman regarding the award to Science First and then filed a protest of the award at the COFC on December 6, 2012, over two months after capability statements were due and after the award to Science First was finalized.[74] Both the Government and Science First moved to dismiss Digitalis's protest on standing grounds, arguing that Digitalis could not demonstrate prejudice.[75] The COFC agreed, finding that because Digitalis had failed to review fedbizopps[76] and submit a statement of capability during the prescribed period, it did not have a substantial chance of winning the contract and thus lacked standing to protest the award to Science First.[77]

68. *See id.* at 1383.
69. Digitalis Educ. Solutions, Inc. v. United States, 664 F.3d 1380 (Fed. Cir. 2012), *aff'g* 97 Fed. Cl. 89 (2011).
70. *Id.* at 1382–83.
71. *Id.* at 1383.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 1383–84.
76. Pursuant to the Federal Acquisition Regulation (FAR), FedBizOpps.gov is the government-wide point of entry (GPE). *See* FAR 2.1. The GPE is "the single point where [g]overnment business opportunities greater than $25,000 . . . can be accessed electronically by the public." *Id.*
77. *Digitalis*, 664 F.3d at 1384.

The *Digitalis* panel, after reviewing the standard a protestor must satisfy to establish interested party status, applied *Rex Service Corp. v. United States*[78] to find that because Digitalis did not have a "substantial chance" of winning the contract, it could not demonstrate standing.[79] In *Rex Service*, the Federal Circuit held that the protestor lacked standing because it failed to submit a bid prior to the proposal period ending.[80] Finding "no reason to limit this rule to competitive procurements," the *Digitalis* panel held that "in order to be an actual or prospective bidder, a party must submit a statement of capability during the prescribed period."[81]

The panel, however, did carefully note that its holding should not be read as "foreclosing challenges to the reasonableness of the procurement time period" (i.e., the period in which an agency allows a party to submit a capability statement), even where a party fails to submit a capability statement.[82] However, because "Digitalis did not check fedbizopps or otherwise notice the sole-source award to Science First for more than twenty days," the Federal Circuit did not reach the question of whether five days was a reasonable posting time for purposes of a notice of intent to award a sole-source contract.[83]

In *Digitalis*, the Federal Circuit endorsed the GAO's and the COFC's well-established rule that parties must submit a capability statement, when such statements are requested, in order to have standing to protest a sole-source award.[84] In so doing, the court has cemented the standard that submitting such statements is an absolute prerequisite to protesting sole-source awards.[85] The Federal Circuit's endorsement of this standing requirement will have the effect of requiring parties to announce to agencies their interest in a contract set to be sole-sourced to another company prior the award of that contract.[86] This will, hopefully, result in better pre-award communications between the Government and contractors wishing to compete for contracts and consequently avoid unnecessary litigation post-award.

C. *Confirming COFC Jurisdiction over Corrective Action Protests*—Systems Application & Technologies, Inc. v. United States

In *Systems Application & Technologies*, the Federal Circuit confirmed that awardees can challenge an agency's decision to follow the GAO's recommended corrective action when the GAO sustains a protest.[87] The Army's

78. 448 F.3d 1305, 1307–08 (Fed. Cir. 2006).
79. *Digitalis*, 664 F.3d at 1384–45.
80. *Id.* at 1385.
81. *Id.*
82. *Id.* at 1385–86.
83. *Id.* at 1386.
84. *Id.*
85. *See id.* at 1385–86.
86. *Id.* at 1384–86.
87. Sys. Applications & Techs., Inc. v. United States, 691 F.3d 1374, 1377 (Fed. Cir. 2012), *aff'g* 100 Fed. Cl. 687 (2011).

award to Systems Application & Technology (SA-TECH) of a contract for aerial target flight and maintenance services was protested at the GAO by the predecessor contractor, Kratos Defense & Security Solutions (Kratos).[88] After the GAO notified the parties of its belief that the protest had merit, the Army took corrective action by terminating SA-TECH's contract, amending the solicitation, and requesting revised proposals.[89] SA-TECH's protest at the COFC challenged the Army's decision to take corrective action, alleging that it was arbitrary and capricious because it was based on unreasonable statements by the GAO regarding the merit of Kratos's protest.[90]

Before the COFC, the Government and Kratos moved to dismiss SA-TECH's complaint for lack of subject matter jurisdiction.[91] The COFC denied the motions and instead held that "the Army's decision to take corrective action was arbitrary, capricious, and an abuse of discretion."[92] The Army appealed the questions of jurisdiction and justiciability but did not challenge the decision on the merits.[93]

The Federal Circuit first affirmed the COFC's holding that it had jurisdiction under 28 U.S.C. § 1491(b)(1). The court noted that the Tucker Act's waiver of sovereign immunity in bid protests "covers a broad range of potential disputes arising during the course of the procurement process" and that "a narrow application of section 1491(b)(1) does not comport with the statute's broad grant of jurisdiction over objections to the procurement process."[94] In this case, SA-TECH's challenge to the Army's revision of the solicitation and its allegations that the Army had violated procurement regulations were sufficient to provide jurisdiction under the Act.[95] The court noted that the fact that the Army had not yet implemented the corrective action did not divest the COFC of jurisdiction.[96] Furthermore, the fact that SA-TECH sought an injunction against the termination of its contract did not transform its protest into a claim that could be brought only under the CDA.[97] In this regard, the court held that "[a] request for injunctive relief regarding the government's termination of a contract concerns the scope of the Court of Federal Claims' equitable powers; it is not an issue of Tucker Act jurisdiction."[98]

88. *Id.* at 1379.
89. *Id.*
90. *Id.* at 1380.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 1380–81.
95. *Id.* at 1381.
96. *Id.* "This court has made clear that bid protest jurisdiction arises when an agency decides to take corrective action even when such action is not fully implemented." *Id.* (citing Turner Constr. Co. v. United States, 645 F.3d 1377 (Fed. Cir. 2011)).
97. *Id.* at 1381–82.
98. *Id.* at 1382.

Next, the Federal Circuit found that the COFC properly determined that SA-TECH had standing.[99] The court noted that 28 U.S.C. § 1491(b)(1) requires a protester to be an interested party, meaning it is an "actual or prospective bidder" with a "direct economic interest" in the procurement.[100] Because the Government did not dispute SA-TECH was an actual or prospective bidder, the Federal Circuit's analysis focused on the economic interest prong of the test, holding, "[a]n arbitrary decision to take corrective action without adequate justification forces a winning contractor to participate in the process a second time and constitutes a competitive injury to that contractor."[101] The court also noted that, as the original awardee of the contract, SA-TECH's price had been made public, compounding its injury associated with a re-competition.[102]

Finally, the Federal Circuit affirmed the COFC's determination that SA-TECH's claim was ripe for review.[103] The court analyzed the first factor in determining ripeness when government action is challenged: "whether the challenged conduct constitutes a final agency action."[104] Although the Government argued that the agency action in this case would not be final until the Army re-awarded the contract, the Federal Circuit disagreed.[105] Specifically, the court observed that the GAO dismissed Kratos's protest on the basis of the Army's decision to take corrective action.[106] The court stated that it would not allow the Government to "manipulate the finality doctrine to suit its own current litigation strategies."[107] Regarding the second ripeness factor, hardship to the parties, the court emphasized the competitive hardship SA-TECH would face by being forced to participate in a second competition for the contract.[108]

The Federal Circuit in *Systems Application & Technologies*, as it did in *VanDesande*, harshly rebuked the Government's attempt to use the ripeness doctrine to avoid challenges to agency decisions to take corrective action in response to a protest.[109] *Systems Application & Technologies*, in conjunction with *VanDesande*, should result in more equitable and efficient resolution of disputes against the Government by eliminating frivolous fighting over the COFC's jurisdiction—saving contractors, agencies, and the court's time and money.[110]

99. *Id.*
100. *Id.*
101. *Id.* at 1382–83 (citing United States v. John C. Grimberg Co., 702 F.2d 1362, 1367 (Fed. Cir. 1983)).
102. *Id.* at 1383.
103. *Id.*
104. *Id.* at 1384.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 1385.
109. *See id.*
110. *Id.* at 1381–32.

IV. CLAIMS AND BREACH OF CONTRACT GATEKEEPING DECISIONS

A. *Preventing "Jurisdictional Ping-Pong":* Gladys S. VanDesande v. United States

In *VanDesande*, the Federal Circuit reversed the COFC's dismissal of Ms. VanDesande's complaint for lack of subject matter jurisdiction.[111] As the Federal Circuit noted, "[t]o fully detail [this case's] course through the several federal agencies and courts during the numerous years it has been in dispute (nearly a decade and a half) would unduly extend the opinion, and it might be confused with *Jarndyce v. Jarndyce*."[112] In 1998 and 1999, Ms. VanDesande "filed a series of complaints with the [U.S. Postal Service (USPS)], her employer, and subsequently with the [Equal Employment Opportunity Commission (EEOC)], alleging that the USPS had violated the Pregnancy Discrimination Act."[113] After the EEOC found that Ms. VanDesande had been discriminated and retaliated against, the parties entered into a "Stipulation Agreement" in order to settle the issue of damages.[114]

In 2003, Ms. VanDesande notified the USPS that she believed the Stipulation Agreement had been breached.[115] After both the USPS and EEOC found that the Stipulation Agreement had not been breached, the EEOC informed Ms. VanDesande of her right to file an action "in an appropriate United States District Court."[116] Ms. VanDesande did so and the Government moved to dismiss the case, arguing that "because Ms. VanDesande's claim for monetary damages exceeded $10,000, '[t]he United States Court of Federal Claims has exclusive jurisdiction over Plaintiff's monetary claims for breach of the Stipulation Agreement . . . against the Postal Service.'"[117] The parties eventually agreed to voluntarily dismiss this case in 2007.[118] Roughly a month after the initial case was voluntarily dismissed, the USPS fired Ms. VanDesande—coincidentally, the Federal Circuit noted, "the Stipulation Agreement had included a lump sum payment to her in exchange for her resignation."[119] Believing her termination was wrong, Ms. VanDesande again filed complaints before the USPS and EEOC that were again rejected.[120] Ms. VanDesande then returned to the district court, where the Government succeeded in having her case dismissed as untimely.[121]

111. VanDesande v. United States, 673 F.3d 1342, 1343–44 (Fed. Cir. 2012), *rev'g* 94 Fed. Cl. 624 (2010).
112. *Id.* at 1344. *See supra* note 3.
113. *VanDesande*, 673 F.3d at 1344.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* (citing Defendant's Motion for Summary Judgment and Memorandum of Law at 6, VanDesande v. Potter, No. 06-61263 (S.D. Fla. Mar. 28, 2007)).
118. *Id.* at 1344–45.
119. *Id.* at 1345.
120. *Id.*
121. *Id.*

Following the dismissal of her case in the District Court for the Southern District of Florida, "Ms. VanDesande, adopting the Government's position in her first District Court suit that the agreement is a contract and can be enforced only in the Court of Federal Claims, then filed on April 24, 2009, a complaint for breach of contract in the Court of Federal Claims."[122] However, the Government inverted its original position before the district court and argued before the Court of Federal Claims that "the Stipulation Agreement is not a contract but a consent decree, enforcement of which is not within the jurisdiction of the Court of Federal Claims under the Tucker Act."[123] The COFC agreed and dismissed Ms. VanDesande's case.[124]

On appeal, the Federal Circuit addressed a matter of first impression for the court:

> [I]f the claim against the Government is based not on a settlement agreement per se, but on a settlement agreement that has been incorporated into a judicial or administrative order, in the form, for example, of a consent decree[,] [d]oes the nonbreaching party have the option to pursue a remedy in the Court of Federal Claims under the Tucker Act, or does jurisdiction for enforcing such an agreement rest solely in the hands of the tribunal that issued the order?[125]

After first putting aside "the possible consequences of the Government's attempt to win this case by taking inconsistent positions in two different federal courts," the court, after reviewing conflicting precedent, first held that "consent decrees and settlement agreements are not necessarily mutually exclusive."[126] The Federal Circuit then reversed the COFC's holding that "the Stipulation Agreement in this case is not a contract within the jurisdiction of the Court of Federal Claims."[127]

The court then returned to the potential consequences that could arise if the Government were permitted to take inconsistent positions in two different federal courts.[128] The court's opinion concluded with a harsh rebuke of the U.S. Department of Justice (DoJ): "Finally, we take note of the Government's attempt to win this case by taking entirely irreconcilable positions regarding the jurisdiction of the federal courts to hear Ms. VanDesande's case."[129] The court did recognize that the position initially taken in the district court was under the U.S. attorney for that district, whereas the position later taken before it was determined by the DoJ's civil division attorneys in Washington, D.C.[130] Nevertheless, both groups are part of the DoJ, and it was the latter office that reversed the argument.[131]

122. *Id.*
123. *Id.* (emphasis removed).
124. *Id.*
125. *Id.* at 1346.
126. *Id.* at 1347, 1350.
127. *Id.* at 1350.
128. *Id.* at 1351.
129. *Id.*
130. *Id.*
131. *Id.*

The VanDesande court also noted that the DoJ, regardless of which office speaks last, is responsible to ensure that justice is more than a name.[132] Quoting Abraham Lincoln, the court admonished the Government's conduct as unacceptable: "It is as much the duty of the Government to render prompt justice against itself, in favor of citizens, as it is to administer the same, between private individuals."[133] The court continued, "[t]he Government's shifting positions have led to an unnecessary waste of money and judicial resources, and are manifestly unfair to the litigant."[134] The court further noted that the DoJ was a repeat offender:

> Regrettably, this is not the first case in which the Government urged a district court to dismiss a case on the ground that jurisdiction belonged in the Court of Federal Claims and then, after suit was brought in the Court of Federal Claims, again urged dismissal on the ground that the Court of Federal Claims lacked jurisdiction.[135]

The court concluded with expectations that these "jurisdictional ping-pong games" would diminish in the future.[136] Furthermore, the court emphasized that the Government "would be well advised to avoid taking positions in future litigations that open it up to the criticism that it has used its overwhelming resources to whipsaw a citizen into submission."[137]

Hopefully, the Federal Circuit's admonition will have the effect of ending the DoJ's practice of employing a "ping-pong" jurisdictional strategy when litigating against government contractors and government employees' claims.[138] This decision should result in more equitable results for litigants suing the Government either before the COFC or in district courts nationwide and will greatly reduce the waste of time and money that litigants were forced to incur fighting DoJ's jurisdictional "ping-pong" tactic.

B. *One Party's Waste Is Another Party's Savings*—FloorPro, Inc. v. United States

In its second panel opinion concerning this long-running dispute, the Federal Circuit rejected FloorPro's attempt to correct a jurisdictional defect in its previous suit at the ASBCA under the CDA by refiling at the COFC under the Tucker Act.[139] The panel in *FloorPro* held that the second suit was time-barred because it was commenced outside of the six-year limita-

132. *Id.*

133. *Id.* (quoting President Abraham Lincoln, Annual Message to Congress 1861 (quoted in CONG. GLOBE, 37th Cong., 2d Sess., pt. IV, app. at 2 (1962), and engraved in the façade of the Federal Circuit's building)).

134. *Id.*

135. *Id.* (citing Phillips v. United States, 77 Fed. Cl. 513 (2007); Drury v. United States, 52 Fed. Cl. 402 (2002); Clark v. United States, 229 Ct. Cl. 570 (1981)).

136. *Id.* (citing Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988)).

137. *Id.*

138. *See id.* at 1351–52 ("At a minimum, the Government should consider an authoritative position on jurisdiction in cases such as this binding on the Government.").

139. FloorPro, Inc. v. United States (*FloorPro III*), 680 F.3d 1377, 1377–78 (Fed. Cir. 2012).

tions period applicable to suits under the Tucker Act, 28 U.S.C. § 2501.[140] Although FloorPro effectively sued the same defendant (the Department of the Navy instead of the United States), alleging the same cause of action (breach of contract), the court found itself without a cause of action because the plaintiff's initial suit involved the wrong jurisdictional statute (the CDA versus the Tucker Act) and because the Tucker Act's limitations period ran before this error could be rectified.[141] From the contractor's perspective, years of litigation costs appear to have been wasted with no resolution on the merits of what appears to have been a relatively straightforward question of entitlement (on which the contractor had prevailed before the Board).[142] From the Government's perspective, these same costs may have been well-spent, as the Government successfully avoided resolution on the merits.[143]

The plaintiff in *FloorPro* was a subcontractor on a prime contract issued by the Navy.[144] After the prime contractor failed to pay FloorPro for work that had been completed, the Navy negotiated a contract modification (Modification P00001) to the prime contract providing that the Government would issue a hard-copy, two-party check payable to the prime contractor and FloorPro for the work performed by FloorPro.[145] Modification P00001 also stated that the Navy would mail the check directly to FloorPro.[146] Notwithstanding Modification P00001, the Government paid the remaining amounts due under the contract directly to the prime contractor.[147] When FloorPro complained that Modification P00001 had been ignored, the Navy responded by letter dated August 9, 2002, asserting that "the Government does not possess privity of contract with FloorPro," that payment to the prime contractor "fulfill[ed] the extent of the Government's obligations under the contract," and that FloorPro's only recourse was to seek payment from the prime contractor "through the civil court system."[148]

The first panel decision concerning the dispute stemmed from FloorPro's attempt to submit a certified claim under the CDA.[149] The Contracting Officer (CO) denied the claim, and FloorPro successfully appealed to the ASBCA, where it obtained a judgment for the amounts due under the subcontract.[150] The Federal Circuit reversed that judgment, holding that "the ASBCA has no jurisdiction" under the CDA "over a claim brought by a subcontractor who is a third-party beneficiary of a contract between the govern-

140. *Id.* at 1379.
141. *See id.* at 1379–80 ; Contract Disputes Act, 41 U.S.C. §§ 7101–7109 (2011); 28 U.S.C. § 1491(a)(1) (2011).
142. *FloorPro III*, 680 F.3d at 1379–80.
143. *Id.* at 1379–80, 1382.
144. *Id.* at 1379.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* (internal quotations omitted).
149. *Id.* at 1379–80.
150. *Id.*

ment and the prime contractor."[151] The panel in *FloorPro I* observed, however, "that the grant of jurisdiction to the [COFC] under the Tucker Act . . . 'is broader' than the jurisdiction of the ASBCA under the CDA, and can potentially extend to an intended third-party beneficiary of a government contract."[152]

As a result, FloorPro filed a complaint in the COFC on October 2, 2009.[153] The Government moved for summary judgment, arguing that the plaintiff's claim was untimely "because it was filed more than six years after it first accrued."[154] The COFC denied the Government's motion, agreeing with FloorPro that the underlying claim did not accrue until October 5, 2004, "at which time the Navy filed a brief at the [ASBCA] contending that FloorPro had no enforceable rights under [Modification P00001]."[155] The COFC further held that "FloorPro did not sleep on its rights, but instead had diligently pursued its claim by filing suit at the ASBCA," and that barring FloorPro's claim as untimely would "lead to an unjust result."[156]

In the most recent panel opinion, the Federal Circuit again reversed.[157] Citing the Supreme Court's decision in *John R. Sand & Gravel Co. v. United States*, the panel observed that the Tucker Act's six-year limitations period is jurisdictional and may not be waived or tolled.[158] The panel further observed that a cause of action against the Government generally accrues "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action."[159] Applying this standard, the panel concluded that "FloorPro's cause of action accrued when the Government breached Modification P00001 by making payment directly to GM & W, rather than sending a two-party check to FloorPro as the modification required."[160] The panel ruled that FloorPro became aware of the breach well before the Government's ASBCA brief, and no later than August 9, 2002, when the Navy informed FloorPro by letter that "(1) it had paid GM & W directly for the floor-coating work; (2) it believed that it had fulfilled the extent of its contract obligations; and (3) Floor-Pro's only recourse was to seek payment from GM & W through the civil court system."[161] FloorPro's failure to file its complaint in the COFC before the six-year

151. *Id.* at 1380 (citing Winter v. FloorPro, Inc. (*FloorPro I*), 570 F.3d 1367, 1370–73 (Fed. Cir. 2009)).
152. *Id.* (citing *FloorPro I*, 570 F.3d at 1372).
153. FloorPro, Inc. v. United States (*FloorPro II*), 94 Fed. Cl. 775, 777, 779 (2010), *rev'd*, 680 F.3d 1377 (Fed. Cir. 2012).
154. *FloorPro III*, 680 F.3d at 1375–76.
155. *Id.* at 1378–79 (citing *FloorPro II*, 94 Fed. Cl. at 778).
156. *Id.* (citing *FloorPro II*, 94 Fed. Cl. at 779).
157. *Id.* at 1382.
158. *Id.* at 1380–81 (citing John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 136–39 (2008)).
159. *Id.* at 1381 (quoting Goodrich v. United States, 434 F.3d 1329, 1333 (Fed. Cir. 2006)).
160. *Id.*
161. *Id.* (internal quotations omitted).

accrual deadline forced the panel to rule that FloorPro's action was time-barred.[162]

The panel also rejected FloorPro's contention that equitable tolling should defer the running of the limitations.[163] According to the panel, the Supreme Court's decision in *Sand & Gravel*[164] makes clear that the Tucker Act sets an "absolute time limit" for COFC filings.[165] Because this time limit is jurisdictional, the court cannot extend the six-year period even if justice so requires.[166]

C. *Waiver of CDA Jurisdiction*—The Minesen Co. v. McHugh

In *Minesen*, the Federal Circuit held that a contractor can waive its statutory right to an appeal before the Federal Circuit under the CDA.[167] In that case, the Minesen Company (Minesen) appealed an ASBCA decision to dismiss a portion of Minesen's breach of contract action against the U.S. Army's Morale, Welfare, and Recreation Fund (Fund).[168] However, because the contract stated that "[d]ecisions of the [ASBCA] are final and are not subject to further appeal,"[169] the Federal Circuit ruled "that Minesen knowingly and voluntarily waived its right to appeal" a Board decision to the Federal Circuit, and dismissed Minesen's claim.[170]

The appeal in *Minesen* stemmed from two actions filed before the ASBCA. In the initial action, the Board determined that the Fund breached the contract, and therefore remanded the case to the CO for a damages determination.[171] In the second complaint, Minesen alleged that the Fund did not cure its ongoing breach.[172] The ASBCA dismissed Minesen's second complaint as duplicative of the first breach of contract action.[173] Minesen appealed that dismissal to the Federal Circuit.[174]

The Fund moved to dismiss the appeal on two grounds.[175] First, the Fund argued that the Federal Circuit lacked statutory jurisdiction over Minesen's appeal because the Fund was a nonappropriated fund instrumentality (NAFI) and the ASBCA's decision was therefore not rendered under the CDA.[176] Second, the Fund argued that Minesen waived any right to appeal

162. *Id.*
163. *Id.* at 1382.
164. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 135 (2008).
165. *FloorPro III*, 680 F.3d at 1382 (internal quotations omitted).
166. *Id.*
167. Minesen Co. v. McHugh, 671 F.3d 1332, 1333 (Fed. Cir. 2012).
168. Minesen had contracted with the Fund—a nonappropriated fund instrumentality (NAFI)—to build and operate a hotel facility at a military base on Oahu Island, Hawaii. *Id.* at 1333–34.
169. *Id.* at 1343.
170. *Id.*
171. *Id.* at 1335.
172. *Id.*
173. *Id.*
174. *Id.* at 1336.
175. *Id.*
176. *Id.*

to the Federal Circuit under the disputes clause of the contract, which stated that ASBCA decisions were final and "not subject to further appeal."[177]

The majority declined to decide the first question and assumed jurisdiction only to dispose of the case on the second question.[178] In so doing, the majority recognized that, although it is "generally obligated to resolve jurisdictional challenges first, Supreme Court precedent only requires federal courts to answer questions concerning their Article III jurisdiction—not necessarily their statutory jurisdiction—before reaching other dispositive issues."[179] With regard to the second question, the court identified a conflict between precedents—finding that the Federal Circuit lacks jurisdiction under the CDA to hear contract claims against NAFIs[180] conflicted with the Federal Circuit's en banc decision in *Slattery v. United States*, which held that the Tucker Act provides jurisdiction over claims against NAFIs.[181] Because the jurisdictional question both was "complex" and "ha[d] a statutory provenance," the majority assumed jurisdiction and proceeded to address the Fund's waiver argument.[182]

With respect to the question of waiver, Minesen argued that "it could not legally consent to waive its statutory right under [the CDA] to an appeal before the Federal Circuit."[183] The majority rejected Minesen's argument and held that waiving appeal before the Federal Circuit is not contrary to the CDA; the court reasoned that nothing in the statute's text or legislative history states or implies that Congress intended to preclude such a waiver.[184] On the contrary, the majority reasoned that agreeing to the finality of ASBCA decisions furthers the CDA's objective of "induc[ing] resolution of more contract disputes by negotiation prior to litigation,"[185] by "encourag[ing] the informal, quick resolution of disputes before they can develop into expensive and time-consuming administrative tangles or litigation."[186] The majority further held that allowing a party to waive Federal Circuit appeal does not violate public policy, citing Supreme Court and Federal Circuit precedent that the Government, if not otherwise prohibited by statute, can enforce a voluntary contractual waiver with the same force as a private party, notwithstanding its superior bargaining power.[187] The majority concluded that "public policy is not *per se* offended when a sophisticated con-

177. *Id.* at 1337.
178. *Id.*
179. *Id.*
180. *Id.*
181. 635 F.3d 1298, 1301 (Fed. Cir. 2011) (en banc).
182. *Minesen*, 671 F.3d at 1337.
183. *Id.*
184. *Id.* at 1338.
185. *Id.* (quoting S. REP. NO. 95-1118, at 1 (1978), 1978 U.S.C.C.A.N. 5235, 5235).
186. *Id.* (quoting 124 CONG. REC. 31,645 (1978)).
187. *Id.* at 1338–39 (citing Pathman Constr. Co. v. United States, 817 F.2d 1573, 1578 (Fed. Cir. 1987) ("A major purpose of the [CDA] was to induce resolution of contract disputes with the government by negotiation rather than litigation."); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) ("Having made the bargain, . . . the party

tractor knowingly and voluntarily agrees to an appellate waiver provision denying Federal Circuit review."[188]

Finally, the panel majority distinguished the Federal Circuit's decision in *Burnside-Ott Aviation Training Center v. Dalton*,[189] which held that the parties to a government contract cannot waive review of CO decisions before the Boards of Contract Appeals.[190] The *Minesen* majority explained that "under the CDA at least one impartial review of CO decisions was necessitated by the statute's goal of 'equaliz[ing] the bargaining power of the parties when a dispute exists.'"[191] Because "the CO is unquestionably biased," permitting a waiver of Board review would allow the Government to "commandeer the final decision on all disputes of fact arising under the contract."[192] The majority reasoned that further appeal to the Federal Circuit was not necessary to address these concerns.[193]

Judge Bryson dissented on the grounds that the waiver provision in the contract's disputes clause was unenforceable because it conflicts with the CDA.[194] Judge Bryson reasoned that the CDA provides a right to judicial review of Board decisions, and it prescribes particular standards of review that this court must adhere to "[n]otwithstanding any contract provision . . . to the contrary."[195] Because the contract's disputes clause was a "contract provision to the contrary," Judge Bryson concluded that the clause was unenforceable.[196]

The majority disagreed, reasoning that the CDA's standard of review provision is irrelevant to the issue of contractual waiver.[197] The majority explained that, "[b]y its terms, § 7107(b) merely defines this court's standard of review in CDA cases. Thus, while parties can waive Federal Circuit appeals available under § 7107(a), if they elect not to waive, § 7107(b) merely sets out the review standard that must be followed."[198]

D. Reflectone *Revisited*—Parsons Global Services, Inc. v. McHugh

In *Parsons Global Services, Inc. v. McHugh*,[199] the Federal Circuit revisited the distinction between routine and nonroutine requests for payment that has guided the determination of what constitutes a "claim" under the

should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.")).

188. *Id.* at 1340 (emphasis in original).
189. 107 F.3d 854, 854 (Fed. Cir. 1997).
190. *Minesen*, 671 F.3d at 1340.
191. *Id.*
192. *Id.*
193. *Id.* at 1341.
194. *Id.* at 1343 (Bryson, J., dissenting).
195. *Id.* at 1346 (citing 41 U.S.C. § 7107(a)(1)(A), (b) (2006)).
196. *Id.*
197. *Id.* at 1342 (majority opinion).
198. *Id.*
199. 677 F.3d 1166, 1166 (Fed. Cir. 2012).

CDA since the *en banc* decision in *Reflectone, Inc. v. Dalton*.[200] The *Reflectone* court held that a nonroutine request for payment can constitute a "claim" under the CDA, even if the request is not in dispute at the time the request is submitted.[201] Conversely, a "routine request for payment" must be in dispute at the time the claim is submitted in order to constitute a claim.[202] In so holding, the Federal Circuit overruled an earlier three-judge-panel decision in *Dawco Construction, Inc. v. United States*,[203] which held that any request for payment—whether routine or nonroutine—must be in dispute prior to submission to qualify as a claim.[204]

The *Reflectone* court did not attempt to precisely demarcate the boundary between routine and nonroutine requests for payment—the request in that case was a request for an equitable adjustment (REA) due to the Government's failure to timely deliver government-furnished property.[205] The court in *Reflectone* held that the REA at issue was "anything but a 'routine request for payment,'" observing that it was instead a request for a "remedy payable only when unforeseen or unintended circumstances . . . cause an increase in contract performance costs."[206]

The decision in *Parsons* appears to have elevated *Reflectone*'s characterization of the REA in that case—a request based on "unforeseen or unintended circumstances"—to a jurisdictional prerequisite.[207] Under *Parsons*, absent "the presence of some unexpected or unforeseen action on the government's part that ties to the demanded payment," the request is routine and must be in dispute before submission in order to qualify as a claim.[208]

Parsons involved a sponsored claim that Parsons, the prime contractor, filed on behalf of its subcontractor, Odell International, Inc. (Odell), under an indefinite-delivery/indefinite-quantity (ID/IQ) contract with the Army for design-build work in Iraq.[209] The task orders relevant to the appeal were later terminated for convenience by the Army.[210] Subsequently, Odell invoiced Parsons for $2.4 million, representing general and administrative costs, overhead, and other indirect costs that Odell mistakenly failed to include on its earlier invoices.[211] With the prime contract having already been terminated, Parsons requested payment of this amount from the

200. *See id.* at 1168; Reflectone, Inc., v. Dalton, 60 F.3d 1572, 1575–76 (Fed. Cir. 1995) (en banc).
201. *Reflectone*, 60 F.3d at 1575–76.
202. *Id.* at 1578.
203. *See id.* (citing Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991)).
204. *Id.* at 1578–83.
205. *See id.* at 1573.
206. *Id.* at 1577.
207. *See* Parsons Global Servs., Inc. v. McHugh, 677 F.3d 1166, 1170–71 (Fed. Cir. 2012).
208. *Id.* at 1171.
209. *Id.* at 1168.
210. *Id.*
211. *Id.* at 1168–69.

Army by submitting a sponsored certified claim under the CDA.[212] The Army denied the claim and Parsons appealed.[213]

Both before the Board and on appeal to the Federal Circuit, the Government did not deny that it was obligated to pay the amount sought by Parsons on behalf of Odell.[214] Indeed, a Defense Contract Audit Agency (DCAA) audit report appeared to recognize that these costs were reimbursable.[215] Instead, the Government argued that Parsons' sponsored claim was not a claim at all but rather a routine request for payment submitted without any preexisting dispute.[216]

The Board and the panel majority agreed with the Government, holding that Parsons had not filed a valid claim.[217] As the majority explained, contractor demands for payment "can be classified into two categories: 'routine' and 'non-routine.'"[218] When the request is nonroutine, it does not need to be in dispute in order to constitute a claim under the CDA.[219] However, "[i]f the request for payment is 'routine,' a pre-existing dispute is necessary for it to constitute a claim under the CDA."[220] The court explained that a nonroutine request involves "the presence of some unexpected or unforeseen action on the government's part that ties it to the demanded costs."[221]

The court went on to hold that such factors were not present in Parsons' request, which "originate[d] from scheduled contract work Odell performed on Parsons's behalf," none of which was "additional or unforeseen work at the government's behest."[222] The panel found dispositive the fact that the costs requested "would have been accounted for in the invoices submitted during the contract's duration if not for Odell's own billing error and both Parsons's and Odell's failure to enforce the agreed-upon terms of their 2004 subcontract."[223] The court also noted that "the contract's termination did not divest Parsons of mechanisms for requesting payment of Odell's costs."[224] Therefore, the request did not become nonroutine due to the intervening termination for convenience.[225] Because the request was routine, and because there was no preexisting dispute over the request, the court held that Parsons had not submitted a valid claim:

> The government affirmed that invoicing is still a viable option. Alternatively, Parsons could settle with Odell and submit the subcontractor settlement to the

212. *Id.* at 1169.
213. *Id.*
214. *Id.* at 1173 (Newman, J., dissenting).
215. *Id.* at 1169 (majority opinion).
216. *Id.*
217. *Id.* at 1172–73.
218. *Id.* at 1170.
219. *Id.*
220. *Id.*
221. *Id.* at 1171.
222. *Id.*
223. *Id.*
224. *Id.* at 1172.
225. *Id.*

> TCO or, in the absence of any evidence on the record that its settlement is final, amend its settlement agreement with the government to account for Odell's costs. What Parsons cannot do is classify its request as non-routine so it can submit it directly to the PCO as a claim without first pursuing the proper avenues under the prime contract.[226]

Judge Newman dissented, stating that "[t]his is a simple situation, in which the government determined, through its own audit, that certain payments are owed to the subcontractor."[227] Indeed, after a request for payment, two COs declined to make the payments; therefore, "the obligation was not, and is not, denied."[228] She rejected the Government's "plethora of creative excuses, none of which were raised by the contracting officers, [and] none of which affects the government's conceded obligation."[229] Judge Newman explained, "a simple correction of a billing error has morphed into a nearly four-year litigation, with no end in sight."[230] Judge Newman disagreed that the claim was routine, observing that "[m]ajor billing errors are neither foreseen nor intended."[231] She concluded that the "lengthy litigation of a conceded governmental obligation is an embarrassment."[232]

It may be true that most nonroutine requests for payment do involve "some unexpected or unforeseen action on the government's part that ties to the demanded payment."[233] What is far from clear is whether every other request is "routine" and whether requiring a preexisting dispute as a predicate to litigation serves the underlying CDA policy of "providing for the efficient and fair resolution of contract claims."[234] On the one hand, ensuring that the Government has an opportunity to pay undisputed routine payment requests relieves COs of the obligation of making a "CDA final decision" on the vouchers that the Government must pay "under the express terms of the contract."[235] But in *Parsons*, the Government clearly "disputed" payment of the sums requested by Parsons—it incurred the costs of litigating jurisdiction rather than simply paying the amount requested by Parsons.[236] The court's entertainment of the Government's request to dismiss, at that point,[237] serves no purpose other than to encourage more dismissal requests as a tactic to delay the resolution of disputes.

226. *Id.*
227. *Id.* at 1173 (Newman, J., dissenting).
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 1174.
232. *Id.*
233. *Id.* at 1171 (majority opinion).
234. Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1580 (Fed. Cir. 1995) (en banc) (citing REP. OF THE S. GOVERNMENTAL AFFAIRS COMM. & THE S. JUDICIARY COMM. ON THE CONTRACT DISPUTES ACT OF 1978, S. REP. NO. 1118, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5238).
235. *Id.* at 1576 n.6.
236. *See Parsons*, 677 F.3d at 1169, 1171–73.
237. *Id.* at 1172–73.

E. *Equitable Tolling Under the CDA*—Arctic Slope Native Association, Ltd. v. Sebelius

In the Federal Circuit's 2009 decision *Arctic Slope Native Association, Ltd. v. Sebelius*, the court held that the CDA's six-year limitations period is subject to equitable tolling and remanded the claim to the Civilian Board of Contract Appeals (CBCA) to determine whether the equitable tolling doctrine had been satisfied.[238] Arctic Slope Native Association, Ltd.'s (ASNA) appeal to the Federal Circuit provided the court the first opportunity to expand on its earlier decision and address the circumstances under which the CDA's limitations can be equitably tolled.[239]

ASNA, an intertribal consortium of seven federally recognized tribes situated across the North Slope of Alaska, had contracted with the U.S. Department of Health and Human Services, Indian Health Service (IHS) to operate a hospital pursuant to the Indian Self-Determination and Education Assistance Act (ISDA).[240] Under the ISDA, the Government is required to reimburse tribal contractors for "support costs," which are "costs that a federal agency would not have incurred but which the tribes reasonably incurred in managing the programs."[241] After the Government refused to pay the full contract support costs sought by the various tribes, numerous litigations ensued in various forums, though none under the CDA.[242]

Finally, on September 30, 2005, ASNA presented its CDA claims to the IHS CO.[243] After these claims were rejected, ASNA filed a complaint with the CBCA on August 21, 2006, alleging breach of contract for IHS's failure to pay the full contract support costs and to calculate the costs correctly.[244] The Federal Circuit noted that "[i]t is undisputed that, absent equitable tolling," the claim would be time-barred.[245] ASNA contended, however, that the CDA's statute of limitations was tolled as of the date it filed its complaint in an earlier class action litigation.[246] ASNA argued that tolling should apply because it did not sleep on its rights and it reasonably relied on that litigation in determining whether to present a claim under the CDA.[247]

The CBCA disagreed and held that the claim was time-barred.[248] Among the various reasons for its holding, the Board focused on ASNA's participation in the earlier class action litigation.[249] In that litigation, ASNA expected to be considered a member of the class but never took the steps necessary to

238. 583 F.3d 785, 788 (Fed. Cir. 2009).
239. *See* Arctic Slope Native Ass'n, Ltd. v. Sebelius, 699 F.3d 1289, 1294 (Fed. Cir. 2012).
240. *Id.* at 1290–91.
241. *Id.* at 1291.
242. *See id.*
243. *Id.* at 1293.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.* at 1295–96.
248. *Id.* at 1294.
249. *See id.*

actually become a member of the class.[250] Because ASNA "did not take the actions required to be considered a purported member of this class action," the Board held that ASNA could not rely upon the complaint for purposes of tolling "in a case in which it could not have participated as a class member."[251] For this and other reasons, the Board rejected ASNA's tolling argument and held that its claim was time-barred.[252]

The Federal Circuit reversed and agreed with ASNA.[253] Specifically, it found that equitable tolling should apply to its claims, holding that there was "no dispute" that ASNA relied on the prior litigation in deciding that it was not required to present its claims to the CO within the CDA's statute of limitations.[254] Rejecting the Board's analysis, the court held that "the critical questions are whether ASNA pursued its rights diligently and whether its reliance on the then-existing legal landscape constituted an 'extraordinary circumstance' sufficient to warrant equitable tolling of the filing deadline."[255] In finding that equitable tolling should apply, the court relied on, among other things, ASNA's participation in the prior litigations, "swift and diligent" presentment of its CDA claims after a stay in the earlier litigation was lifted, and the "precautionary" step of filing a complaint with the Board.[256] Based on these actions, the court held that, "given the existence of the unambiguous court order that specifically addressed the exhaustion of remedies issue and the fact that ASNA diligently pursued its rights by monitoring the relevant legal landscape, ASNA took reasonable, diligent, and appropriate action as the legal landscape evolved."[257] The court further noted that the result was not fundamentally unfair to the Government because the complaint filed in the class action "put IHS on notice of the exact nature and scope of ASNA's claims."[258] The finding of equitable tolling was also appropriate given that "[t]he Supreme Court and Congress have repeatedly recognized the special relationship between the government and Indian tribes."[259]

The court's analysis in this decision demonstrates its focus on the "critical questions" of whether a litigant pursued its rights diligently and whether its reliance constituted extraordinary circumstances sufficient to warrant equitable tolling, rather than a myopic analysis of the litigant's prior actions in separate litigations.[260] This focus opens opportunities for equitable tolling arguments, but, concurrently, the decision leaves open questions regarding

250. *See id.*
251. *Id.*
252. *Id.* at 1293.
253. *Id.* at 1296.
254. *See id.*
255. *See id.*
256. *See id.* at 1297.
257. *Id.*
258. *Id.*
259. *Id.*
260. *See id.* at 1296.

what constitutes "extraordinary circumstances."[261] As a case decided at least partially on the "special relationship" between Indian tribes and the Government, the wide-ranging impact of this decision is perhaps of limited value.[262]

V. OTHER GATEKEEPING DECISIONS

A. *Section 1498(a) Waives Sovereign Immunity for Any Direct Infringement by a Government Contractor*—Zoltek Corporation v. United States

In *Zoltek Corporation v. United States*, a case spanning almost two decades and generating multiple opinions, the Federal Circuit spontaneously convened an *en banc* panel to revisit and correct an earlier opinion (in the same line of *Zoltek* cases) regarding the interpretation and application of 28 U.S.C. § 1498(a) (2006), which governs causes of action for direct patent infringement by the Government or its contractors.[263] In particular, the opinion holds that 28 U.S.C. § 1498(a) creates an independent cause of action for direct infringement by the Government or its contractors *independent of* 35 U.S.C. § 271(a) (2006).[264]

In 1996, Zoltek brought an infringement action against the United States under 28 U.S.C. § 1498(a) based on Lockheed Martin's alleged infringement of a Zoltek patent under its government contract for the design and manufacturing of the F-22 fighter jet.[265] Specifically, Zoltek alleged that Lockheed used Zoltek's patented methods in Japan before importing the resulting products into the United States and thereby violated 35 U.S.C. § 271(g), which provides liability where an entity uses a patented process and imports or uses the product in the United States.[266]

The United States moved for partial summary judgment arguing that because part of the process claim was practiced in a foreign country, 28 U.S.C. § 1498(c) excluded recovery under § 1498(a) for "claim[s] arising in a foreign country."[267] The Court of Federal Claims held that the Government could not be held liable under § 1498(a), reasoning that § 1498 does not apply so as to waive sovereign immunity for "all forms of direct infringement as currently defined in 35 U.S.C. § 271."[268]

261. *See id.* at 1296–97.
262. *See id.* at 1297.
263. 672 F.3d 1309 (Fed. Cir. 2012) (en banc), *vacating* Zoltek Corp. v. United States, 442 F.3d 1345 (Fed. Cir. 2006) (per curiam).
264. *Id.* at 1321.
265. *Id.* at 1312. Zoltek is the assignee of U.S. Reissue Patent No. 34,162 (the RE '162 Patent), entitled "Controlled Surface Electrical Resistance Carbon Fiber Sheet Product." Claims 1–22 and 33–38 related to methods of manufacturing carbon fiber sheets and claims 39–40 were product-by-process claims for partially carbonized fiber sheets. *Id.*
266. *Id.*
267. Zoltek Corp. v. United States (*Zoltek I*), 51 Fed. Cl. 829, 830–31 (2002).
268. *Id.* at 837.

In 2006, the Federal Circuit held that Zoltek did not have a valid claim for patent infringement but did not cite § 1498(c) in reaching that conclusion.[269] Instead, the Federal Circuit held that "direct infringement under section 271(a) is a necessary predicate for government liability under section 1498" and "a process cannot be used 'within' the United States as required by section 271(a) unless each of the steps is performed within this country."[270] The Federal Circuit determined that Lockheed had practiced at least some of Zoltek's claimed methods in Japan and, therefore, there could be no infringement under § 271(a).[271] The Government could not, in turn, be found liable under 28 U.S.C. § 1498(a).[272]

On remand, Zoltek moved to amend its complaint to add a claim against Lockheed for infringement under 35 U.S.C. § 271(g) and to transfer the claim to the Northern District of Georgia under 28 U.S.C. § 1631.[273] The COFC held that § 1498(a) is nullified whenever § 1498(c) applies.[274] The court granted Zoltek's motion to amend its complaint, noting that Zoltek would otherwise be without a remedy: § 1498(c) prevented Zoltek from suing the Government and § 1498(a) prevented Zoltek from being able to recover from Lockheed.[275] Zoltek amended its complaint, and the COFC certified for interlocutory appeal the issue whether 28 U.S.C. § 1498(c) must be interpreted to nullify any government contractor immunity provided for in § 1498(a) when a patent infringement claim arises in a foreign country.[276]

Thus, the issue in this particular appeal was whether the COFC erred in allowing "Zoltek to amend its complaint and transfer its claim for infringement under 35 U.S.C. § 271(g) against Lockheed Martin . . . to the United States District Court for the Northern District of Georgia."[277] As a threshold matter, the Federal Circuit held that the trial court's determination that the requirements of the transfer statute, 28 U.S.C. § 1631, had been met was clear legal error.[278] More substantively, the *en banc* panel overruled the Federal Circuit's earlier opinion in *Zoltek III*.[279] Specifically, the Federal Circuit held that "under § 1498(a) the Government has waived its sovereign immunity for direct infringement, which extends not only to acts previously recognized as being defined by § 271(a) but also acts covered under § 271(g) due to

269. Zoltek Corp. v. United States (*Zoltek III*), 442 F.3d 1345, 1355 (Fed. Cir. 2006).
270. *Id.* at 1350 (citing NTP, Inc. v. Research in Motion, Ltd., 418 F.3d 1282, 1316 (Fed. Cir. 2005)).
271. *See id.*
272. *Id.*
273. Zoltek Corp. v. United States (*Zoltek IV*), 85 Fed. Cl. 409, 410 (2009).
274. *Id.* at 418 ("[S]ection § 1498(a) only insulates government contractors from suit when the Government can be found liable.").
275. *Id.* at 421 (noting that justice favors a transfer of case because Zoltek was the first plaintiff to encounter a legislative gap between § 1498(a) and (c)).
276. *See* Zoltek Corp. v. United States, Misc. No. 903 (Fed. Cir. Sept. 30, 2009) (unpublished).
277. Zoltek Corp. v. United States, 672 F.3d 1309, 1311 (Fed. Cir. 2012).
278. *Id.*
279. *Id.* at 1317.

unlawful use or manufacture."[280] Thus, the Federal Circuit held that the Government has waived sovereign immunity for any direct infringement by a government contractor.[281]

The Federal Circuit first examined the plain language of § 1498 to determine the scope of the Government's waiver of sovereign immunity.[282] The panel held that the statute

> waives the Government's sovereign immunity from suit when (1) an invention claimed in a United States patent; (2) is "used or manufactured by or for the United States," meaning each limitation is present in the accused product or process; and (3) the United States has no license or would be liable for direct infringement of the patent right for such use or manufacture if the United States was a private party.[283]

The Federal Circuit observed that the panel in *Zoltek III* had relied on dicta and "a fundamental misreading of the statute" in holding that infringement under § 271(a) was a prerequisite for finding government liability under § 1498.[284] Additionally, the panel determined that the prior reading would render § 1498(c)—which bars government liability for claims arising in a foreign country—"inoperative."[285]

Having vacated the *Zoltek III* decision, the panel held that Lockheed's actions did create liability under § 1498(a):

> If a private party had used Zoltek's patented process to create the resulting product, there would be liability for infringing Zoltek's patent right under [35 U.S.C.] § 154(a)(1) and § 271(g). We hold that the Government is subject to the same liability in this case, and that precedent and legislative intent dictate that result.[286]

The Federal Circuit remanded the case for further proceedings.[287]

Of particular note to the government contracting community, in overturning its previous decision, the Federal Circuit examined the effect of its ruling on government contractors, recognizing its prior ruling had at least three unintended or negative results.[288] First, Lockheed would have been liable for conduct immunized by § 1498(a) and, second, the Federal Circuit's prior ruling left open the "possibility that procurement of U.S. military materiel could be interrupted via infringement actions against government

280. *Id.* at 1327.
281. *Id.*
282. *Id.* at 1318.
283. *Id.* at 1319.
284. *Id.*
285. *Id.* at 1317. The Federal Circuit further determined that the earlier holding would render inoperative 19 U.S.C. § 1337(l), which prevents International Trade Commission exclusion orders from applying to articles "imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization and consent of the Government." Section 1377(l) provides instead that a patentee is entitled to a remedy under 28 U.S.C. § 1498 (2006). *Id.* at 1321–22.
286. *Id.* at 1323.
287. *Id.* at 1327.
288. *Id.* at 1315.

contractors."[289] Finally, the Federal Circuit's prior ruling was inconsistent with congressional intent, as stated in 35 U.S.C. §§ 154(a)(1), 271(g) (2006); 19 U.S.C. § 1337 (2006); and 28 U.S.C. § 1498 (2006).[290]

B. *Claims Preclusion*—Bowers Investment Co., LLC v. United States

In *Bowers Investment Co., LLC v. United States*, the Federal Circuit affirmed the COFC's dismissal of Bowers Investment Company LLC's (Bowers) claims against the Government for nonpayment and underpayment of rent on the ground that they could have been and should have been brought during a prior proceeding at the CBCA and were, accordingly, barred.[291] The court held that the claims were precluded by Bowers' earlier claims at the CBCA because the new claims were based on the same transactional facts that were already settled by the CBCA.[292] In holding, the court reiterated the rule first articulated in *Phillips/May Corp. v. United States* that all related CDA claims arising from the same contract must be brought simultaneously.[293]

The case arose under a lease agreement between the Federal Aviation Administration (FAA) and Bowers in which the FAA was to rent office and warehouse space from Bowers in South Fairbanks, Alaska.[294] The monthly rent payments would be made in arrears by the FAA, beginning in January 1994.[295] Rent was to be paid "on the first workday of each month" and would cover the previous month's occupation of the office and warehouse space.[296] After the completion of the lease, Bowers brought a claim against the FAA for the last month's rent.[297] In its claim, Bowers asserted that the last payment made by the Government in September 2006 covered the occupation of the space for August 2006 since rent was "paid in arrears."[298] Thus, Bowers claimed that the rent for the FAA's September occupation was still owed by the FAA.[299] The CO denied Bower's claim for rent and Bowers appealed to the CBCA.[300]

As part of its evidence used at the CBCA, the FAA produced various records of its historical payments to Bowers beginning with a rent payment in May 1994.[301] The FAA did not produce evidence of rent payments made

289. *Id.*
290. *Id.*
291. 695 F.3d 1380, 1381–82 (Fed. Cir. 2012).
292. *Id.*
293. The *Phillips/May* panel explained that "[t]he presumption that claims arising out of the same contract constitute the same claim for res judicata purposes may be overcome by showing that the claims are unrelated." *Id.* at 1384 (quoting Phillips/May Corp. v. United States, 524 F.3d 1264, 1271–72 (Fed. Cir. 2008)).
294. *Id.* at 1382.
295. *Id.*
296. *See id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*

from January through March 1994, even though the FAA during this period was required to pay rent under the lease agreement.[302] Given this lack of evidence, Bowers sought to amend its claim to include rent payments for January through March.[303] The CBCA, however, denied Bowers' request stating that Bowers never complained in writing or otherwise to FAA about the nonpayment for these months and was thus not allowed to bring the claims into the case.[304] Following the completion of the case without the additional rent payment claims, Bowers signed a certificate of finality accepting the CBCA's award as the "full and final satisfaction of its case."[305] Bowers did not appeal.[306]

Following the conclusion of its case at the CBCA, Bowers submitted two additional claims to the CO.[307] The first claim was for $56,640.78, plus interest, for unpaid rent for the months of January, February, and March 1994.[308] The second claim stated that the FAA had underpaid its rent "by $664 every month from October 1, 1998 to October 1, 2006. . . ."[309] The CO denied the claims, and Bowers appealed to the COFC rather than to the CBCA.[310] The FAA moved to dismiss, and both the COFC and the Federal Circuit agreed that the additional claims for rent brought by Bowers were barred by the doctrine of claims preclusion.[311] In affirming the COFC's decision, the Federal Circuit stated that claim preclusion requires

> (1) an identity of parties or their privies, (2) a final judgment on the merits of the first suit, and (3) the later claim to be based on the same set of transactional facts as the first claim such that the later claim should have been litigated in the prior case.[312]

Parts 1 and 2 of the test are satisfied because the parties are the same, and Bowers signed a final judgment, so the remaining issue decided by the court was whether the claims were based on the same set of transactional facts.[313] The CAFC upheld the COFC's holding that the second rent payment claims "ar[o]se from the same set of transactional facts" as the one previously brought because they arose under the same contract.[314] The court found claims under the same contract "could have been and should have been" raised previously at the CBCA. Thus, the claims were now precluded and the case was dismissed.[315]

302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.* (stating that Bowers proceeded instead in the present matter).
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.* at 1382–83.
312. *Id.* at 1384.
313. *Id.*
314. *Id.* at 1383–84.
315. *Id.* at 1384–85.

The court in *Bowers* offered guidance to contractors in observing that a contractor generally must bring all related claims arising under the same contract during one proceeding.[316] Although another venue may have jurisdiction under the Election Doctrine if the claims are "separate and distinct" from those previously brought, the claims are precluded if they "arise from the same set of transactional facts" and could and should have been brought in the earlier proceeding.[317]

C. *Issue Preclusion*—Laguna Hermosa Corp. v. United States

The Federal Circuit in *Laguna* applied the related gatekeeping doctrine of issue preclusion, disagreeing with the COFC's application of that doctrine to dismiss a complaint under Rules of the Court of Federal Claims Rule 12(b)(6).[318] Laguna Hermosa served as a concessionaire at the Lake Berryessa recreation area in California for several decades under an agreement with the Bureau of Reclamation of the U.S. Department of the Interior (Bureau).[319] During that time, Laguna Hermosa operated a recreational facility and made a number of improvements to the land, such as the creation of "boat launch ramps, drainage structures, access roads, a sewage system, and a water purification plant."[320] Prior to expiration of the concessionaire agreement, Laguna Hermosa and three other concessionaires brought suit under the Tucker Act challenging the Bureau's plan for soliciting new concessionaire bids.[321] In that case, the plaintiffs argued that the Bureau was obligated to require new concessionaires to compensate the original concessionaires for the facilities built on the lakefront.[322] In an opinion affirmed by the Federal Circuit, the COFC held that the applicable statute, Public Law 96-375, stated that the concessionaires would receive compensation for only those facilities that the United States required the concessionaires to leave behind.[323] The concessionaires were obligated to remove or abandon the remaining facilities.[324]

When its agreement expired, Laguna Hermosa left the facilities it had built on the lakeside.[325] The Bureau had since entered into an agreement with a different concessionaire covering the area previously operated by Laguna Hermosa.[326] Laguna Hermosa filed a complaint against the United States in the COFC seeking compensation for the facilities it left behind.[327]

316. *Id.* at 1384.
317. *Id.* at 1383–85.
318. Laguna Hermosa Corp. v. United States, 671 F.3d 1284, 1289, 1291 (Fed. Cir. 2012).
319. *Id.* at 1286.
320. *Id.*
321. *Id.*
322. *Id.* at 1286–87 (citing Frazier v. United States, 79 Fed. Cl. 148, 161 (2007), *aff'd*, 301 F. App'x 974 (Fed. Cir. 2008)).
323. *Id.* at 1287 (citing *Frazier*, 79 Fed. Cl. at 161).
324. *Id.* (citing *Frazier*, 79 Fed. Cl. at 161).
325. *Id.*
326. *Id.*
327. *Id.*

While Laguna Hermosa did not allege that the United States instructed it to leave the facilities, it argued that the Government "should be found to have 'retroactively' required their retention under Public Law 96-375."[328] On a motion filed by the United States, the COFC dismissed the complaint for two reasons: (1) Laguna Hermosa's claims were foreclosed by issue preclusion and (2) Laguna Hermosa had no right to compensation under Public Law 96-375.[329]

On appeal, the Federal Circuit agreed with Laguna Hermosa that the COFC's analysis of issue preclusion was in error.[330] While the COFC determined that the issues were identical to those raised in the earlier Tucker Act case, the Federal Circuit held that interpretation of the word "require" in the context of the statute at issue had not been necessary in the earlier case.[331] Because the prior action "did not decide whether retention and use of permanent facilities after expiration of the lease was sufficient action to trigger the compensation provision of Public Law 96-375," issue preclusion did not apply.[332]

However, the Federal Circuit affirmed the second basis for dismissal by the COFC.[333] The court noted that Public Law 96-375 states that "the United States may require that the permanent facilities mentioned herein not be removed from the concession areas, and instead, pay fair value" for those facilities.[334] Laguna Hermosa argued that the United States should be deemed to have required the retention of facilities when the Government retained and used those facilities.[335] The court disagreed, stating, "[t]he plain language of the statute indicates that there must be some affirmative action by the government before the duty to compensate is triggered."[336] The court noted that, even if the statute's language were ambiguous, the legislative history supported an interpretation requiring affirmative action by the Government to trigger the duty to compensate.[337] Because Laguna Hermosa had not alleged such action by the United States, its complaint failed to state a claim on which relief could be granted.[338]

D. *The Scope of Remand*—Pacific Gas & Electric Co. v. United States

In *Pacific Gas & Electric Co. v. United States*, a spent nuclear fuel (SNF) case, the court examined the scope and limitations of its mandate to the lower court after previously remanding the case to the COFC to recalculate

328. *Id.*
329. *Id.*
330. *Id.* at 1288.
331. *Id.*
332. *Id.*
333. *Id.* at 1289, 1291.
334. *Id.* at 1289.
335. *Id.*
336. *Id.*
337. *Id.* at 1290.
338. *Id.*

damages arising from the Government's breach of the Standard Contract.[339] On remand, the COFC, in addition to recalculating damages, also reexamined its earlier causation analysis with respect to two categories of damages claimed by Pacific Gas, ultimately reversing its earlier decision that these damages were too speculative.[340] The Government appealed the COFC's decision on the assertion that the Federal Circuit's "earlier mandate barred the trial court's award of damages" for these two categories of damages.[341] In affirming the lower court's award of damages, the Federal Circuit noted that, within the framework of its earlier mandate, "the trial court enjoyed considerable discretion to perform a new causation analysis."[342]

Pacific Gas & Electric Company (Pacific Gas) owns and operates two nuclear power generation stations in California: Humboldt Bay and Diablo Canyon.[343] Pacific Gas entered into a Standard Contract with the U.S. Department of Energy (DoE), like other nuclear utilities, to have DoE dispose of Pacific Gas's SNF.[344] As part of this contract, DoE was required to issue annual capacity reports (ACR), beginning in 1987, that set forth the agency's projected annual capacity for receiving and disposing of SNF, which were used by both DoE and the nuclear utilities for planning purposes.[345] When DoE failed to begin accepting fuel by January 31, 1998, per the contract, Pacific Gas sued the Government for damages arising from the breach.[346]

In the court's earlier decision on this case, the Federal Circuit examined the COFC's damages calculation and held that the lower court should have relied on an earlier ACR.[347] According to the court, the lower court improperly relied on DoE's 1991 ACR to determine what DoE's expected performance would have been without the breach because, at this point in time, "[DoE's] timely performance of its full contractual obligations had . . . already become a distant possibility."[348] The court remanded the case to the COFC to conduct a new damages calculation based on the 1987 ACR, at which point "both the [DoE] and the nuclear utilities realistically expected that [DoE] would accept SNF . . . on schedule."[349]

339. 668 F.3d 1346 (Fed. Cir. 2012) (*Pacific Gas II*).
340. *Id.* at 1347, 1349–50.
341. *Id.* at 1350.
342. *Id.* at 1351. The court later affirmed the COFC's discretion on remand. Yankee Atomic Elec. Co. v. United States, 679 F.3d 1354, 1362 (Fed. Cir. 2012) (noting that on remand COFC "was free to revisit and reconsider issues raised at trial, particularly as its application of this court's mandate changed the factual predicate for its prior decision to deny Yankee Atomic's costs").
343. Pac. Gas & Elec. Co. v. United States, 536 F.3d 1282, 1284 (Fed. Cir. 2008).
344. *Id.*
345. *Id.* at 1288.
346. *Id.* at 1284.
347. *See id.* at 1291.
348. *Id.*
349. *Id.*

Using the 1987 ACR as its new frame of reference, the COFC proceeded to conduct a new damages calculation.[350] The COFC also reexamined two categories of damages claimed by Pacific Gas that it had previously dismissed as being too speculative: (1) costs incurred for maintaining its Humboldt Bay power plant in a "safe storage" status and (2) costs incurred in evaluating potential off-site private fuel storage options.[351] Given the new timeframe for evaluating damages, the COFC reexamined its causation analysis and concluded that the Humboldt Bay storage and off-site storage evaluation costs were, in fact, a foreseeable consequence of the Government's breach.[352] The COFC thus awarded Pacific Gas additional damages based on these costs.[353]

The Government appealed the COFC's decision, alleging that the trial court had no discretion under the terms of the Federal Circuit's earlier mandate to reexamine Pacific Gas's claims for these costs.[354] The court rejected the Government's argument, holding that "the mandate of this court required the trial court to reconsider the damages presented during the initial trial in view of the 1987 ACR" and that, "[w]ithin this framework, the trial court enjoyed considerable discretion to perform anew a causation analysis."[355] The court noted that, although a mandate is generally controlling "as to matters within its compass," the COFC was free on remand to reconsider other issues properly before the court.[356] Given the spirit of the court's earlier mandate, refusing to allow the trial court to conduct a new causation analysis "would run the risk of not properly allowing for reconsideration of the mitigation damages sought, and deemed proven by the trial court[.]"[357]

This case demonstrates the court's broad interpretation of its mandates on remand and affirms the COFC's broad discretion to reconsider issues that may be outside the scope of such a mandate.[358] In such situations, the COFC continues to be free to consider new evidence and testimony as necessary to resolve the issues properly before the court.[359] Indeed, "[a]bsent contrary instructions, a remand for reconsideration leaves the precise manner of reconsideration—whether on the existing record or with additional testimony or other evidence—to the sound discretion of the trial court."[360]

350. Pac. Gas & Elec. Co. v. United States (*Pacific Gas II*), 668 F.3d 1346, 1349 (Fed. Cir. 2012).

351. *Id.* at 1349–50.

352. *Id.* at 1352 ("[T]he trial court determined that, in a non-breach world, [Pacific Gas] would not have explored [off-site storage] in 1987 when the parties still expected the Government to perform.").

353. *Id.* at 1350.

354. *Id.* at 1351.

355. *Id.*

356. *Id.* (quoting Engel Indus., Inc. v. Lockformer Co., 166 F.3d 1379, 1382 (Fed. Cir. 1999)).

357. *Id.* at 1352.

358. *Id.* at 1350–52.

359. *Id.* at 1351, 1354.

360. *Id.* at 1354 (quoting State Indus., Inc. v. Mor-Flo Indus., Inc., 948 F.2d 1573, 1577 (Fed. Cir. 1991)). Several months later, the court again affirmed its broad interpretation of mandates when remanding cases. In *Yankee Atomic Electric Co.*, the court held that the COFC's

VI. SIGNIFICANT MERITS AND DAMAGES DECISIONS

A. Tip Top Construction, Inc. v. Donahoe

In this appeal of a contractor's claim for consultant costs and legal fees incurred during price negotiations related to a contract modification, the Federal Circuit again addressed the distinction between contract administration costs incurred due to a change order and costs incidental to the prosecution of a claim.[361] The question before the Federal Circuit was whether the contractor's consultant costs and legal fees were recoverable as contract administration costs.[362] According to Federal Acquisition Regulation (FAR) 31.205-33, contract administration costs arising from change orders may be allowable, while costs incidental to the prosecution of a claim are unallowable.[363]

In *Tip Top*, the U.S. Postal Service awarded a work order under an indefinite-quantity job order contract to Tip Top to replace the air-conditioning system in one of its post offices in the Virgin Islands.[364] During contract performance, the Postal Service changed the type of coolant to be used and issued the appropriate change order.[365] During price negotiations for the contract modification, Tip Top hired a consultant and outside counsel to help prepare its cost estimate.[366] After negotiations between Tip Top and the Postal Service were terminated, Tip Top submitted an REA under the CDA.[367] In addition to seeking costs for the changed work, Tip Top's REA sought reimbursement for the costs of the consultant that helped prepare Tip Top's change proposal and the legal fees arising from work performed by outside counsel during price negotiations.[368]

The CO granted an equitable adjustment for the costs of the changed work but denied the remainder of Tip Top's REA.[369] In denying these requests, the CO reasoned that (1) these costs were barred by a contract clause that prohibited recovery of costs related to the development of a work order and (2) in any event, Tip Top's costs to prepare the change order, $6,704.66, were disproportionately high relative to the change order value, $22,133.77.[370] Tip Top appealed the CO's denial of the consultant costs and legal fees to the Postal Service Board of Contract Appeals (PSBCA).[371]

interpretation of the remand was too narrow and that on remand the COFC "was free to 'revisit and reconsider' issues raised at trial, particularly as its application of this court's mandate changed the factual predicate for its prior decision to deny Yankee Atomic's costs." Yankee Atomic Elec. Co. v. United States, 679 F.3d 1354, 1362 (Fed. Cir. 2012).

361. *See* Tip Top Constr., Inc. v. Donahoe, 695 F.3d 1276 (Fed. Cir. 2012).

362. *See id.* at 1280.

363. *Id.* at 1283–84 (citing Bill Strong Enters., Inc. v. Shannon, 49 F.3d 1541, 1549–50 (Fed. Cir. 1995)).

364. *Id.* at 1278.

365. *Id.*

366. *Id.* at 1279.

367. *Id.*

368. *Id.*

369. *Id.* at 1279–80.

370. *Id.*

371. *Id.* at 1280.

The PSBCA held that the contract's Changes Clause governed the change order and not the contract clause prohibiting recovery of work order preparation costs.[372] Therefore, some of Tip Top's costs were compensable as an increase in the direct cost of performance.[373] The Board, however, rejected Tip Top's claim for recovery of the consultant costs and legal fees surrounding the price negotiations.[374] The PSBCA held that the price negotiations "had nothing to do with performance of the changed work or genuine contract administration and were solely directed at . . . maximizing [Tip Top's] monetary recovery."[375]

The Federal Circuit reversed the PSBCA's decision and held that the costs incurred in negotiating the price of the changed work were allowable as contract administration costs.[376] Relying on its earlier decision in *Bill Strong Enterprises, Inc. v. Shannon*,[377] the Federal Circuit stated that, "[i]n classifying a particular cost as either a contract administration cost or a cost incidental to the prosecution of a claim, contracting officers, the Board, and courts should examine the objective reason why the contractor incurred the cost."[378] The Federal Circuit held that costs incurred in order to materially further the negotiation process should normally be contract administration costs allowable under FAR 31.205-33:

> This negotiation process often involves requests for information by the CO or the Government auditors or both, and, inevitably, this exchange of information involves costs for the contractor. These costs are contract administration costs, which should be allowable since this negotiation process benefits the Government, regardless of whether a settlement is finally reached or whether litigation eventually occurs because the availability of the process increases the likelihood of settlement without litigation.[379]

Even though the Federal Circuit recognized that the FAR does not apply to the Postal Service, the court still found that *Bill Strong* provided the correct standard when evaluating how to classify costs arising from Tip Top's price negotiations with the Postal Service.[380] Applying this standard, the court found that the consultant costs and legal fees incurred by Tip Top during the price negotiations were allowable contract administration costs because they were incurred "for the genuine purpose of materially furthering the negotiation process."[381] The Federal Circuit noted that the CO, in approving the changed work, "expressly left open for further negotiation the issue of price," and the parties continued to negotiate the price of the

372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.* at 1284–85.
377. *Id.* at 1283 (citing Bill Strong Enters., Inc. v. Shannon, 49 F.3d 1541 (Fed. Cir. 1995)).
378. *Id.* (quoting *Bill Strong Enters.*, 49 F.3d at 1549–50).
379. *Id.*
380. *Id.* at 1283–84.
381. *Id.* at 1284.

changed work "in order to avoid litigation."[382] The Federal Circuit also noted that "[s]imply because the negotiations related to the price of the change does not serve to remove the associated costs from the realm of negotiation and genuine contract administration costs."[383] The court also notes, "[c]onsideration of price is a legitimate part of the change order process."[384] The Federal Circuit's opinion in *Tip Top* thus reaffirms the standard announced in the court's earlier decision in *Bill Strong* as the proper standard for distinguishing allowable contract administration costs from costs incidental to the prosecution of a claim, which are unallowable.[385]

B. *Clarifying the Test for Breach of the Duty of Good Faith and Fair Dealing*—Scott Timber Co. v. United States

The court in *Scott Timber* addressed again the standard applied to alleged breaches of the duty of good faith and fair dealing.[386] Breaches of the duty of good faith and fair dealing have long been analyzed under the "reasonableness" standard, in which the court or board determines whether the alleged offending action was reasonable in light of the circumstances.[387] Since its application of the "targeted benefit" standard in *Precision Pine & Timber, Inc. v. United States*,[388] however, contractors have been required to show that the Government engaged in action "specifically targeted" at the contractor in an attempt to "reappropriate a benefit" guaranteed by the contract.[389] Of course, these differing standards have an immense impact on the ability to prevail under a breach of the duty of good faith and fair dealing claim,[390] and *Scott Timber* appears to have reset the standard or at least to have clarified when the various standards are applicable.[391]

In this appeal of a contractor's claim for damages relating to the Government's breach of three timber-harvesting contracts, the Federal Circuit reversed the COFC's finding that the Government breached its duty of good faith and fair dealing.[392] The question before the court was whether the Government's actions in completing required wildlife surveys and continuing the suspension of the contract constituted unreasonable delay in violation of this duty.[393]

382. *Id.*
383. *Id.*
384. *Id.*
385. *Id.* at 1283–84.
386. Scott Timber Co. v. United States, 692 F.3d 1365, 1365 (Fed. Cir. 2012).
387. Daniel P. Graham, Tara L. Ward & Craig Smith, *Fed. Cir. Resets Standard for Breach of the Duty to Cooperate and Not Hinder*, 52 GOV'T CONTRACTOR ¶ 97, Mar. 17, 2010, at 5 [hereinafter *Fed. Cir. Resets Standard for Breach*].
388. *See Scott Timber Co.*, 692 F.3d at 1374 (citing Precision Pine & Timber, Inc. v. United States, 596 F.3d 817, 829 (Fed Cir. 2010)).
389. *See id.* (citing *Precision Pine*, 596 F.3d at 829).
390. *See id.* at 1375 (citing *Precision Pine*, 596 F.3d at 829); *Fed. Cir. Resets Standard for Breach*, *supra* note 387, at 6.
391. *See Scott Timber Co.*, 692 F.3d at 1375 (citing *Precision Pine*, 596 F.3d at 829).
392. *Id.* at 1368, 1379.
393. *See id.* at 1371–72, 1374–75.

In *Scott Timber*, the Government awarded three timber-harvesting contracts to Scott Timber Co. (Scott) for the "Pigout," "Jigsaw," and "Whitebird" cutting units.[394] Because of the risk of environmental litigation and resultant delays, the Government included contract provisions that authorized the suspension of the contracts in order for the Forest Service to first comply with a court order.[395] The contract provided for a term adjustment but specifically prohibited the award of "lost profits, attorney's fees, replacement cost of timber, or any other anticipatory loss suffered" as a result of an authorized suspension.[396]

At the time of award, the Oregon Natural Resources Council Action (Oregon Natural) had filed suit against the Government claiming that the Forest Service violated the Northwest Forest Plan for failing to conduct wildlife surveys for certain species before authorizing timber sales.[397] During this litigation, the contracts for the cutting units were suspended.[398] In November 1999, the Forest Service settled with Oregon Natural and agreed to continue the suspension of timber-harvesting contracts while the Forest Service completed the required wildlife surveys.[399] The Forest Service suspensions remained in place even though wildlife surveys had been completed.[400] Another plaintiff filed suit in connection with the wildlife surveys, but no injunction was issued in the second case.[401]

Scott brought suit against the Government based on the extra costs it had incurred due to the numerous litigation delays.[402] The COFC found that the Government breached the implied duty of good faith and fair dealing by unreasonably delaying required surveys and, in turn, improperly continuing suspension of the relevant contracts.[403] The COFC found the Government liable for breaching its implied duty of good faith and fair dealing by failing to inform Scott of the risks posed by the Oregon Natural litigation.[404] In turn, the COFC also found that the Government unreasonably delayed the completion of the wildlife surveys, which led to "unduly lengthened" contract suspension periods.[405] The COFC further found that the Government unreasonably continued suspensions after wildlife surveys had been completed because an injunction was never issued in a second litigation.[406]

394. *Id.* at 1368.
395. *Id.*
396. *Id.* at 1369.
397. *Id.*
398. *Id.* at 1370.
399. *Id.*
400. *Id.*
401. *Id.*
402. *See id.*
403. *See id.* at 1370–72.
404. *Id.* at 1370–71.
405. *Id.* at 1371.
406. *Id.*

The COFC awarded Scott $28,742 in lost profits and $129,599 in replacement costs, offset by $62,638 to account for actual profits.[407]

The Federal Circuit reversed the COFC's holding.[408] First, the court held that the Government could not have breached the implied duty of good faith and fair dealing because the covenant exists once the contract is signed, not during the pre-award period.[409] An underlying contractual relationship must exist at the time of the Government's actions in question, which in this case occurred prior to award.[410] The court also held that the Government explicitly put Scott on notice of the potential for suspension in its pre-award notice, thus satisfying any duty it might have had in this pre-award period.[411] Applying the "targeted-benefit" test previously applied by the court in *Precision Pine*, a breach of the duty to cooperate case involving similar timber contracts, the court found that the Government's delay was not unreasonable because the Forest Service was required to comply with a court order and that there was "no evidence that any delays . . . were incurred 'for the purpose of delaying or hampering [Scott's] contracts.'"[412] Third, the court found that Scott failed to establish that it suffered any damages and was thus precluded from recovering damages, lost profits, and replacement costs on a theory of material breach.[413]

Importantly, although the court applied the "targeted-benefit" standard, the court appeared to limit the standard to those situations where suspensions of performance are caused by matters outside the four corners of the contract, specifically to those matters caused by court orders.[414] In the majority decision, the court stated that the "targeted-benefit" test was "applicable only in the period governed by the [court] order, not in the period after the [court] order expired."[415] Therefore, according to the court's instruction, the targeted-benefit standard applies to the analysis of a breach of the duty of good faith and fair dealing to the extent the alleged breach occurs in the context of a court order.[416] In any other context, the court left open the availability of the traditional "reasonableness" standard in reviewing alleged breaches of the duty of good faith and fair dealing.[417]

For contractors seeking to recover under a breach of the duty of good faith and fair dealing, the Federal Circuit's apparent retreat from the "targeted-benefit" standard is correct.[418] By potentially limiting the applicability

407. *Id.*
408. *Id.* at 1379.
409. *Id.* at 1372.
410. *Id.*
411. *See id.* at 1373–74.
412. *Id.* at 1374–75.
413. *See id.* at 1376.
414. *See id.* at 1376–77.
415. *Id.* at 1375 n.4.
416. *See id.* at 1375.
417. *See id.*
418. *See id.*

of the "targeted-benefit" standard, the ability to recover under a breach of the duty of good faith and fair dealing is substantially broadened.[419]

C. The DIRECTV Group, Inc. v. United States

In this per curiam opinion, the Federal Circuit affirmed the COFC's award of summary judgment in favor of DIRECTV.[420] DIRECTV brought suit against the Government challenging two CO Final Decisions and Demands for Payment relating to segment closing adjustments resulting from DIRECTV's sale of segments to Raytheon Company (Raytheon) and The Boeing Company (Boeing).[421] Segment closing adjustments occur when a defined benefit pension plan is transferred with the sale of a segment of a company and the Government and contractor allocate between them any surplus or deficiency in the outstanding pension obligations.[422] Both of the segment transfers at issue involved surplus pension assets.[423] The Government asserted its Demands for Payment after determining that the transactions were not in compliance with the Cost Accounting Standards (CAS).[424]

Before the COFC, DIRECTV alleged that no segment closing adjustments were required because the pension plan assets and liabilities were transferred to Raytheon and Boeing as part of the sales.[425] The COFC agreed, granting DIRECTV's motion for summary judgment and holding that DIRECTV's segment closing adjustment obligations could be satisfied through cost reductions on the contracts held by Raytheon and Boeing.[426]

The Government made two arguments on appeal.[427] First, the Government argued that the segment closing adjustments must be calculated based on the assets and liabilities retained by DIRECTV, as opposed to the pension assets and liabilities of the entire segment.[428] The court disagreed, holding that the applicable CAS provision "requires a segment closing adjustment based on the applicable assets and liabilities of the entire segment at issue."[429] The court noted that its interpretation of the provision was supported by subsequent changes to the CAS, which now specifically require that the adjustment be based on the assets and liabilities remaining with the contractor.[430]

Second, the Government argued that the FAR required DIRECTV "to pay any amount due as a segment closing adjustment, and that cost reductions

419. *See id.*
420. DIRECTV Grp., Inc. v. United States, 670 F.3d 1370, 1372 (Fed. Cir. 2012).
421. *Id.* at 1373.
422. *Id.*
423. *Id.*
424. *Id.*
425. *Id.*
426. *See id.* at 1374.
427. *Id.* at 1375.
428. *Id.*
429. *Id.*
430. *See id.* at 1376.

provided by successor contractors [were] not an acceptable form of payment."[431] The court disagreed, holding that the FAR's language allowing for repayment by a cost reduction permitted "payment by way of cost reductions that occur due to the transfer of pension assets to a successor contractor."[432]

The court further noted that the Government's view would allow it to "collect the segment closing adjustment for a second time simply because these cost reductions occurred as part of a successor contract," which would provide "a prohibited windfall to the Government."[433]

In his dissent, Judge Gajarsa disagreed with the court's analysis of the Government's second argument regarding whether payment was required from DIRECTV itself, and not through cost reductions provided by a successor contractor.[434] Judge Gajarsa argued the court's opinion erred in three respects: (1) in failing to consider 41 U.S.C. § 422, requiring that contract price adjustments "be made, where applicable, on relevant contracts between the United States and the contractor"; (2) in misreading regulations that require the Government and the contractor to agree on the manner of recognizing cost impacts; and (3) in ignoring the language in FAR 31.205-6(j)(4) stating that "the contractor shall make a refund or give a credit to the Government for its equitable share" of any pension assets received by the contractor.[435]

D. *Significant Trends in Spent Nuclear Fuel Damages*

The Federal Circuit continued to address a litany of SNF cases in 2012. Because for the most part, entitlement to damages in SNF cases has been developed in prior cases, the court dedicated the majority of its SNF decisions in 2012 to dealing with damages.[436] Given the highly factual nature of SNF cases, it is often difficult to extrapolate general legal rules from the court's SNF opinions that would likely have a significant impact in other cases, let alone other, non-SNF cases. That said, three specific damage-related issues did receive particular attention from the court in 2012: (1) the no-interest rule on mitigation costs, (2) damage calculations based on GAAP/FERC compliant accounting, and (3) the issue of foreseeability.[437]

1. The No-Interest Rule on Mitigation Costs

The first case to address the no-interest rule in 2012 was *System Fuels, Inc. v. United States*,[438] where the Federal Circuit considered appeals brought by

431. *Id.* at 1375.
432. *See id.* at 1378.
433. *Id.*
434. *See id.* at 1379–80 (Gajarsa, J., dissenting in part) (emphasis removed).
435. *Id.* at 1379–80, 1385 (emphasis removed).
436. *See* Sys. Fuels, Inc. v. United States, 666 F.3d 1306, 1310–11 (Fed. Cir. 2012); Consol. Edison Co. v. United States, 676 F.3d 1331, 1340 (Fed. Cir. 2012); Vt. Yankee Nuclear Power Corp. v. Entergy Nuclear Vt. Yankee, LLC, 683 F.3d 1330, 1335–36 (Fed. Cir. 2012).
437. *See Sys. Fuels, Inc.*, 666 F.3d at 1310–11; *Consol. Edison Co.*, 676 F.3d at 1340; *Vt. Yankee Nuclear Power Corp.*, 683 F.3d at 1335–36.
438. 666 F.3d at 1306, 1310.

System Fuels, Inc. and two other companies (collectively the Plaintiffs) challenging the COFC's damages calculations.[439] The lower court, after finding the Government in breach for failing to take possession of the SNF as required by the contract, denied the Plaintiffs' request for damages related to the cost of funds borrowed to finance the construction of dry fuel storage and for damages related to their overhead.[440] The Government also cross-appealed, arguing that the COFC had failed to engage in a proper causation analysis.[441] The Federal Circuit affirmed the COFC's finding regarding the costs related to the borrowed funds and its causation analysis but reversed the COFC's denial of overhead costs.[442]

In *System Fuels*, one way the Plaintiffs attempted to mitigate DoE's breach of the Standard Contract was, beginning in 2002, to prepare to construct an Independent Spent Fuel Storage Installation (ISFSI) that could hold additional dry storage containers of SNF pending DoE complying with its duties under the Standard Contract.[443] This action was deemed necessary by the Plaintiffs given that the core of the reactor at their nuclear plant would reach capacity in 2007.[444] By the Plaintiffs' estimate, however, the Government would not begin to comply with its contractual duty to remove waste until 2022.[445]

Following an eight-day trial on damages, and after the COFC revisited its initial causation analysis in light of numerous SNF decisions issued by the Federal Circuit in 2008, the COFC awarded the Plaintiffs mitigation damages based on their capital work operations on the ISFSI but found that the Plaintiffs were not entitled to the cost of borrowed funds or overhead costs.[446] The Plaintiffs appealed this ruling, and the Government cross-appealed, asserting that the COFC's causation analysis was tainted by a failure to compare breach and nonbreach worlds under the Standard Contract.[447]

First, the Federal Circuit addressed the issue related to the approximately $1.6 million sought by the Plaintiffs for the costs of borrowed funds to construct the ISFSI.[448] The COFC had relied on the "no-interest rule" derived from the Judicial Procedure Rules of Decision Act—which states that "interest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof"—to deny the Plaintiffs' claim.[449] The Federal Circuit affirmed, finding that its decisions in *England v.*

439. *Id.* at 1310.
440. *Id.* at 1308–09.
441. *Id.* at 1310.
442. *Id.* at 1311–13.
443. *Id.* at 1309.
444. *See id.*
445. *Id.*
446. *Id.* at 1310.
447. *See supra* notes 439 and 441 and accompanying text.
448. *Sys. Fuels, Inc.*, 666 F.3d at 1310.
449. *Id.*

Contel Advanced Systems, Inc.[450] and *Energy Northwest v. United* States,[451] which reiterated the Court of Claims' holding that the no-interest rule denies claims for interest and "interest costs incurred on money borrowed as a result of the [G]overnment's breach or delay in payment," controlled and had been correctly applied by the COFC.[452]

Second, the court addressed the additional overhead costs incurred by the Plaintiffs in managing the construction projects associated with their mitigation efforts.[453] Despite that the Plaintiffs' cost accounting practices relating to these efforts conformed to Federal Energy Regulatory Commission (FERC) regulations, the COFC offset the Plaintiffs' damages for certain costs it found were not proven with "reasonable certainty."[454] After reviewing the standard for when a party may recover damages for a breach of contract, the court found that the COFC had erred in offsetting these costs as the Plaintiffs had presented evidence that they had kept reasonable records related to these overhead costs, which complied with the accounting procedures "as mandated by FERC" and were "consistent with Generally Accepted Accounting Principles."[455] Accordingly, the Federal Circuit reversed the COFC's holding regarding the overhead costs sought by the Plaintiffs.[456]

Finally, the court denied the Government's appeal and found that the COFC had properly considered the question of causation when determining the Government's liability.[457] The court noted that while in some aspects the COFC's analysis may have been in error by improperly placing the burden of proof on the Government—errors caused by the COFC deciding the case "without the benefit of [the court's] most recent cases"—any such errors were nonprejudicial.[458] Accordingly, the court affirmed the COFC's causation and offset analysis.[459]

Judge Newman concurred with the court's findings regarding overhead costs and causation but vigorously dissented from the court's finding that the "no-interest rule" barred the recovery of the funds the Plaintiffs bor-

450. 384 F.3d 1372, 1374 (Fed. Cir. 2004).

451. 641 F.3d 1300, 1313 (Fed. Cir. 2011).

452. *Sys. Fuels, Inc.*, 666 F.3d at 1310–11. The court has since applied this interpretation of the "no-interest rule" several times in subsequent cases, relying in part on its decision in *System Fuels*. *See* Consol. Edison Co., Inc. v. Entergy Nuclear Indian Point 2, LLC, 676 F.3d 1331, 1340 (Fed. Cir. 2012) (denying contractor's claim for recovery of interest on money borrowed in order to mitigate damages resulting from the Government's breach of the Standard Contract); Kan. Gas & Elec. Co. v. United States, 685 F.3d 1361, 1371 (Fed. Cir. 2012).

453. *Sys. Fuels, Inc.*, 666 F.3d at 1312.

454. *Id.* at 1311.

455. *Id.* at 1312.

456. *Id.* The Federal Circuit, in two subsequent decisions, affirmed its holding in *System Fuels* and allowed contractors to recover "reasonably foreseeable" overhead costs incurred due to the Government's breach of the Standard Contract. *See Consol. Edison Co., Inc.*, 676 F.3d at 1340; *Kan. Gas & Elec. Co.*, 685 F.3d at 1369–70.

457. *Sys. Fuels, Inc.*, 666 F.3d at 1313.

458. *Id.* at 1312.

459. *Id.* at 1314.

rowed in order to build the ISFSI.[460] Finding the rule "inapplicable," Judge Newman argued that the majority had improperly "blurr[ed] the distinction between the cost of money expended to mitigate a breach and interest awarded on a judgment for damages"—finding the "non-interest" statute applicable to the latter but not the former.[461] Analogizing the Plaintiffs' case to FIRREA (i.e., *Winstar*) cases, and seemingly ignoring the court's prior decisions in *England* and *Energy Northwest*, Judge Newman argued the monies borrowed by the Plaintiffs fell under the category of "damages [that] include the cost of the money expended in mitigation" and thus should have been recoverable.[462] Judge Newman concluded by saying: "As stated in *Indian Towing Co.* . . . the court is not a 'self-constituted guardian of the Treasury.' My colleagues err in holding that the cost of mitigation of governmental breach of contract cannot include the cost of the money expended in mitigation."[463]

The court went on to address the no-interest rule in at least two other SNF cases. In *Consolidated Edison Company of New York, Inc. v. Entergy Nuclear Indian Point 2*, an appeal from the COFC, the Federal Circuit reversed in part and affirmed in part the COFC's award of different types of damages to Entergy Nuclear Indian Point 2, LLC (ENIP).[464] While it was undisputed that the Government breached its duties under the Standard Contract by failing to dispose of the SNF, both ENIP and the Government appealed various aspects of the COFC's damages award.[465] The Government appealed the "award of two categories of damages: (1) ENIP's Unit 1 wet storage costs for the continued operation of its Unit 1 spent fuel pool; and (2) regulatory fees paid to the United States Nuclear Regulatory Commission ('NRC')," while ENIP cross-appealed the COFC's "denial of damages for: (1) ENIP's indirect overhead costs associated with its mitigation activities; and (2) ENIP's cost of financing its mitigation activities" (i.e., capital costs).[466] The court reversed the COFC on three of the four grounds before it—affirming only the denial of ENIP's cost of capital.[467]

After providing the usual summary of the history of SNF cases, the court described ENIP's actions following the Government's breach:

> ENIP constructed an on-site dry-storage facility, otherwise known as an Independent Spent Fuel Storage Installation ("ISFSI") in the period leading up to 2008, to provide for the long-term storage of SNF from Unit 1 and Unit 2. ENIP filed an action in the Claims Court for damages caused by [DoE]'s failure to collect and dispose of SNF generated at Indian Point, including the costs incurred in connection with ENIP's mitigation activities.[468]

460. *Id.* (Newman, J., concurring in part, dissenting in part).
461. *See id.*
462. *Id.* at 1315.
463. *Id.*
464. 676 F.3d 1331, 1340 (Fed. Cir. 2012).
465. *Id.* at 1331, 1334, 1340.
466. *Id.* at 1333.
467. *Id.*
468. *Id.* at 1334.

Before the COFC, the Government conceded that ENIP was entitled to over $89 million in costs based upon its construction of the dry-storage facility to store the SNF the Government had failed to collect.[469] As to the four categories of damages on appeal, the Government argued that ENIP was entitled to none of them because the damages would have been incurred even if the Government had begun collecting SNF in 1998 or were otherwise not related to the Government's breach.[470]

Of relevance here, the Federal Circuit addressed ENIP's appeal of the COFC's finding that it was not entitled to over $20 million in cost-of-capital damages (i.e., damages related to the costs incurred to finance ENIP's mitigation activities).[471] The Federal Circuit quickly affirmed the COFC's denial of these damages, relying on its recent line of SNF damages cases[472] where the court held that "the no-interest rule barred parties to the Standard Contract from recovering the costs of financing mitigation projects" and that "the 'commercial enterprise exception' to the no-interest rule did not apply in the context of the NWPA."[473]

The court also addressed the no-interest rule in *Vermont Yankee v. United States*.[474] Of "interest" here, is the court's holding in Parts III and IV of its decision, relating to overhead costs and cost of capital, where the court found that its decision was dictated by its other recent holdings in *Energy Northwest v. United States*[475] and *Boston Edison Co. v. United States*.[476] The court relied on *Energy Northwest* and *Boston Edison* in finding that the no-interest rule barred parties from recovering the costs of mitigation projects and that the rule did not apply in SNF cases.[477]

Finally, the court also addressed, and confirmed, its prior holdings related to the no-interest rule, in *Kansas Gas & Electric Co. v. United States*.[478] In this case, the Kansas Companies had appealed the COFC's denial of damages for the costs of capital to fund mitigation activities.[479] The court held that the COFC's decision was consistent with the court's precedent on the issue, which states that "the no-interest rule barred parties to the Standard Contract from recovering the costs of financing mitigation projects."[480]

469. *Id.*
470. *Id.*
471. *Id.* at 1340.
472. Boston Edison Co. v. United States, 658 F.3d 1361, 1363 (Fed. Cir. 2011); Energy Nw. v. United States, 641 F.3d 1300, 1300 (Fed. Cir. 2011).
473. *Consol. Edison Co.*, 676 F.3d at 1340.
474. *Id.*; Vt. Yankee Nuclear Power Corp. v. Entergy Nuclear Vt. Yankee, LLC, 683 F.3d 1330, 1330 (Fed. Cir. 2012).
475. *Consol. Edison Co.*, 676 F.3d at 1340; *Energy Nw.*, 641 F.3d at 1313.
476. *Consol. Edison Co.*, 676 F.3d at 1340; *Boston Edison Co.*, 658 F.3d at 1370, 1372.
477. *Consol. Edison Co.*, 676 F.3d at 1340.
478. 685 F.3d 1361, 1371 (Fed. Cir. 2012).
479. *Id.* at 1366.
480. *Id.* at 1371.

2. Damage Calculations Based on GAAP/FERC Compliant Accounting

In the aforementioned decision in *Consolidated Edison*, the court also addressed the COFC's denial of $6.8 million in overhead costs sought by ENIP based on its mitigation efforts.[481] The COFC had denied ENIP any overhead damages because it found the method ENIP used to charge and allocate overhead time and expenses too imprecise even though, as ENIP pointed out, the accounting practices it had used were "compliant with the Federal Energy Regulatory Commission's (FERC) regulations and are also in accordance with Generally Accepted Accounting Principles (GAAP)."[482] Following the COFC's ruling, the Federal Circuit issued its decision in *Systems Fuels*, where it found that as long as "reasonable particularity" was achieved via the use of GAAP, damages for overhead costs were recoverable.[483] Accordingly, the court reversed the COFC's denial of these damages.[484]

The court reached a similar finding in *Kansas Gas*.[485] In that case, the Federal Circuit affirmed-in-part and reversed-in-part the COFC's calculation of damages.[486] The litigation stemmed from the Government's breach of the Standard Contract it had entered into with Kansas Gas and Electric Company, Kansas City Power & Light Company, and Kansas Electric Power Cooperative, Inc. (collectively "the Kansas Companies").[487] The COFC awarded the Kansas Companies $10.6 million as compensation for the Government's partial breach of the contract.[488] On appeal, the Kansas Companies raised several arguments as to why the award should have been higher.[489]

The Kansas Companies appealed the COFC's analysis of their construction overhead costs.[490] In calculating these costs for purposes of the damages award, the COFC determined that the total-cost allocation method employed by the Kansas Companies was imprecise.[491] The court also determined that the construction overhead amounts were inflated.[492] The court reversed the COFC on this point, stating that

> [o]nce a company has proved that certain work was undertaken because of the breach, it may proceed to prove the amount of the associated cost (including both direct and indirect costs) by any available and reasonable technique. . . . These reasonable techniques need not prove damages with Cartesian certainty.[493]

481. *Consol. Edison Co.*, 676 F.3d at 1340.
482. *Id.*
483. *Id.*
484. *Id.*
485. 685 F.3d at 1370.
486. *Id.* at 1363.
487. *Id.* at 1364.
488. *Id.* at 1366.
489. *Id.*
490. *Id.*
491. *Id.* at 1370.
492. *Id.*
493. *Id.* at 1369.

The court went on to note that the Kansas Companies had an "internal accounting system which coded costs to specific projects, the allocation rates were re-examined on a regular basis in order to reflect actual capital project costs, and the total-cost allocation method complied with required FERC accounting regulations."[494] Under these circumstances, the court held that the COFC's denial of damages was inconsistent "with precedent and the record."[495]

Judge Linn dissented with the court's determination that the COFC erred in denying damages for overhead costs calculated using a total-cost allocation method.[496] According to Judge Linn, "the fact that a regulatory-compliant accounting practice is followed should not prevent a trial court from considering other record evidence showing that the amount claimed as damages based on such accounting practice is grossly disproportionate to the actual damages incurred."[497] Judge Linn believed that the COFC reasonably determined that the total-cost allocation method "reflected an overhead amount that was a demonstrably inaccurate reflection of the damages incurred" and that the COFC should have been affirmed, additionally, on this issue.[498]

3. Foreseeability

Finally, the court addressed the issue of foreseeability in its decision in *Vermont Yankee Nuclear Power Corporation*.[499] In 2003, Entergy Nuclear Vermont Yankee, LLC (ENVY) brought suit at the COFC for damages caused by DoE's breach of the Standard Contract.[500] The COFC consolidated ENVY's action with a separate action brought by Vermont Yankee asserting claims arising out of its presale ownership and operation of the Vermont Yankee Nuclear Power Station (VYNPS).[501] The COFC awarded $34.89 million in undisputed damages to ENVY, mostly based on the construction of dry cask storage necessitated by DoE's breach.[502] The COFC awarded $9.6 million in damages for the costs spent to obtain state approval of a dry cask storage facility.[503] The COFC also found that Vermont Yankee had assigned its claims for presale mitigation efforts to ENVY, meaning Vermont Yankee, in this case, was not entitled to pursue its claims against the Government.[504] Finally, the COFC addressed the damages sought by

494. *Id.* at 1370.
495. *Id.*
496. *Id.* at 1371–72 (Linn, J., dissenting in part).
497. *Id.* at 1372.
498. *Id.*
499. Vt. Yankee Nuclear Power Corp. v. Entergy Nuclear Vt. Yankee, LLC, 683 F.3d 1330, 1335–36 (Fed. Cir. 2012).
500. *Id.* at 1337.
501. *Id.*
502. *Id.* at 1337–38.
503. *Id.* at 1343.
504. *Id.* at 1338.

ENVY, awarding some and denying others.[505] All parties subsequently appealed to the Federal Circuit.[506]

In its lengthy majority opinion, the court upheld much of the COFC's decision but found that the COFC had improperly awarded ENVY many of the costs it had paid to win approval from the State of Vermont for construction of a dry cask storage facility—including the $5.62 million that Entergy paid into Vermont's Clean Energy Development Fund.[507] Summarizing its holding, the court stated:

> We hold that legal and lobbying fees incurred by ENVY to secure approval from the State of Vermont for a dry storage facility were foreseeable. We hold, however, that other state-imposed requirements were not foreseeable, and hence not recoverable, including payments into Vermont's Clean Energy Development Fund, performance of a flood analysis, and construction of a visual barrier. . . .[508]

Relying upon a 1977 Vermont statute requiring the Vermont legislature to approve the construction of any SNF storage facility, the court found that, in 1983, the lobbying fees incurred by ENVY to get approval from Vermont for the dry cask storage were foreseeable.[509] However, the court found that the Government could not have foreseen that ENVY would be forced to pay over $5 million in fees into Vermont's Clean Energy Development Fund given that the fund was established in 2005 by the Dry Storage Act.[510] The court categorized these payments as "a form of blackmail for the state approval of the construction" of the dry casks.[511] The court then found that, given that no other similar "blackmail" provisions were put in place by any other states in 1983, these costs could not be reasonably deemed foreseeable.[512] The court also relied heavily on its finding that Vermont's requirement that ENVY make payments into the Fund, conduct a flood analysis, and build a visual barrier were all likely unconstitutional as preempted by federal law.[513] Thus, ENVY should have refused to incur these costs in the first place, and the Government could not have foreseen that ENVY would refuse to challenge unconstitutional fees that it was being forced to pay.[514]

Judge Bryson concurred with the court's opinion, except that ENVY's payments to the Vermont Clean Energy Development Fund and the costs incurred putting up a visual barrier at the power plant were unforeseeable and thus unrecoverable.[515] Judge Bryson argued that, in 1983, "[t]he costs

505. *Id.*
506. *Id.*
507. *Id.* at 1344.
508. *Id.* at 1335.
509. *Id.* at 1345–46.
510. *See id.* at 1346.
511. *Id.*
512. *Id.*
513. *Id.* at 1347.
514. *Id.* at 1348–49.
515. *Id.* at 1353 (Bryson, J., concurring in part, dissenting in part).

of dealing with state regulatory efforts were clearly foreseeable" and that because foreseeability was a question of fact, reviewed for clear error, it was incorrect to reverse the COFC's finding that the Government should reimburse ENVY for the costs of its payments into the Fund.[516] He also found that it was foreseeable, based on the Government's breach and the need to find a quick solution for storage of SNF, that a company like ENVY would not engage in expensive litigation with a state in order to determine the validity of the payments it was being required to provide.[517] Lastly, Judge Bryson concluded that the same arguments he articulated as to why the Fund payments were foreseeable applied "with perhaps even greater force to the costs for constructing the visual barrier" because "a visual barrier cannot be said to relate to radiological safety concerns" and thus likely falls outside any possible issue related to federal preemption.[518]

In each of the holdings of this case, the Federal Circuit provides further guidance to litigants of SNF cases. The most significant holding of the case is that which denied ENVY damages for payments for state-imposed requirements—most notably the payment it made to the Vermont Clean Energy Development Fund.[519] The court found these damages to be unforeseeable and unrecoverable.[520] While the court upheld the foreseeability of damages relating to the construction of necessary dry cask storage, it also found that state-imposed fees could not have been foreseen by the Government.[521] The case added to existing precedent relating to the foreseeability of various types of damages that commonly arise out of the Government's breach in SNF cases.[522]

VII. CONCLUSION

The Federal Circuit's twenty-four precedential opinions in 2012 in the field of government contracts continue to demonstrate that, notwithstanding a relatively slight caseload compared with the Federal Circuit's other jurisdictional areas,[523] the Federal Circuit is generally fulfilling its duty to provide "a prompt, definitive answer to legal questions" in this important area of law and policy.[524] The answers provided in 2012, however, suggest that all too often, litigants are focused heavily on threshold jurisdictional and gatekeeping questions, rather than the underlying merits of the protest or dispute. Certainly, the answers to some of these gatekeeping questions can

516. *Id.*
517. *Id.* at 1354.
518. *Id.* at 1355.
519. *Id.* at 1330, 1344 (majority opinion).
520. *Id.*
521. *Id.* at 1344.
522. *Id.* at 1330, 1344.
523. *See supra* Part II.A, note 33 and sources cited therein.
524. S. REP. NO. 97-275, at 1 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 12; S. REP. NO. 96-304, at 1 (1979).

serve to increase judicial efficiency: the decision in *COMINT*[525] with respect to bid protest timeliness and waiver should facilitate the resolution of disputes regarding the ground rules for a procurement before the Government and offerors have expended time and effort preparing and evaluating proposals.[526] And the court's decisions on claim preclusion and issue preclusion in *Bowers*[527] and *Laguna*[528] should prevent piecemeal litigation of claims and ensure that all related matters are disposed of in a single proceeding.

On balance, however, this Article submits that the Federal Circuit's 2012 government contracts decisions confirm Justice Scalia's observation that "[n]othing is more wasteful than litigation about where to litigate"[529] is true more often than not. Decisions such as *FloorPro*,[530] *VanDesande*,[531] *Parsons*,[532] and *Minesen*[533] confirm that government contracts disputes and protests often involve excessive and needless litigation over gatekeeping principles that seldom avoid, and often spawn, further excessive and needless litigation over gatekeeping principles.

525. COMINT Sys. Corp. v. United States, 700 F.3d 1377 (Fed. Cir. 2012).

526. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1314 (Fed. Cir. 2007) (reasoning that it would be inefficient and costly to entertain such protests after the agency had expended considerable time and effort evaluating proposals and that "[a] waiver rule thus prevents contractors from taking advantage of the [G]overnment and other bidders, and avoids costly after-the-fact litigation").

527. *See supra* note 23 and accompanying text.

528. *See supra* note 24 and accompanying text.

529. Bowen v. Massachusetts, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting).

530. FloorPro, Inc. v. United States, 680 F.3d 1377, 1382 (Fed. Cir. 2012).

531. VanDesande v. United States, 673 F.3d 1342 (Fed. Cir. 2012).

532. Parsons Global Servs., Inc. v. McHugh, 677 F.3d 1166 (Fed. Cir. 2012).

533. Minesen Co. v. McHugh, 671 F.3d 1332 (Fed. Cir. 2012).

APPENDIX

Case	Date	Precedential?	Significant?
The DIRECTV Group, Inc. v. United States, No. 2010-5031	1/26	Yes	Yes
The Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States, No. 2010-5150	1/9	Yes	No
Digitalis Education Solutions, Inc. v. United States, No. 2011-5079	1/4	Yes	Yes
System Fuels, Inc. v. United States, Nos. 2010-5116, -5117	1/19	Yes	Yes
Crewzers Fire Crew Transport, Inc. v. United States, No. 2011-5069	1/25	No	No
Laguna Hermosa Corp. v. United States, No. 2011-5062	2/6	Yes	Yes
Benjamin Gal-Or v. United States, No. 2011-5122	2/9	No	No
Pacific Gas & Electric Company v. United States, No. 2010-5123	2/21	Yes	No
Gladys S. VanDesande v. United States, No. 2011-5012	3/23	Yes	Yes
The Minesen Co. v. Mchugh, No. 2010-1453	3/2	Yes	Yes
Zoltek Corporation v. United States v. Lockheed Martin Corporation, No. 2009-5135	3/14	Yes	Yes
Consolidated Edison Company of New York, Inc. v. United States, No. 2010-5155	4/16	Yes	Yes
James Richard Sr. (Personal Representative of the Estate of Calonnie D. Randall, Deceased) and Jon Whirlwind Horse (Personal Representative of the Estate of Robert J. Whirlwind Horse, Deceased) v. United States, No. 2011-5083	4/13	Yes	No
Parsons Global Services Inc. v. Mchugh, No. 2011-1201	4/20	Yes	Yes
Englewood Terrace Limited Partnership v. United States, Nos. 2011-5072, -5073	5/2	No	No
Frank Gaylord v. United States, No. 2011-5097	5/14	Yes	No

Continued

Case	Date	Precedential?	Significant?
Yankee Atomic Electric Co. v. United States, Nos. 2011-5020, -5021, -5027, -5028, -5029	5/18	Yes	Yes
Floorpro, Inc. v. United States, No. 2011–5116	5/31	Yes	Yes
Vermont Yankee Nuclear Corp. v. Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc. v. United States, Nos. 2011-5033, -5034, -5042	6/13	Yes	Yes
Kansas Gas & Electric Co. v. United States, Nos. 2011-5044, -5045	7/12	Yes	Yes
Systems Application & Technologies, Inc. v. United States, No. 2012-5004	8/24	Yes	Yes
DGR Associates, Inc. v. United States, No. 2011-5080	8/2	Yes	No
Tip Top Construction, Inc. v. Donahoe, No. 2011-1509	9/19	Yes	Yes
Scott Timber Co. v. United States, No. 2011-5092	9/5	Yes	Yes
Bowers Investment Company, LLC v. United States, No. 2011-5102	10/15	Yes	No
Peter C. Nwogu, Doing Business as Environmental Safety Consultants, Inc. v. United States, No. 2011-5015	10/31	No	No
Arctic Slope Native Association, Ltd. v. Sebelius, No. 2011-1485	11/9	Yes	Yes
COMINT Systems Corp. v. United States, CAFC No. 2012-5039	12/7	Yes	Yes
Evelyn Burney, Doing Business as Plott Bakery Products v. United States, No. 2012-5088	12/11	No	No