

2015 SURVEY OF GOVERNMENT CONTRACT CASES BEFORE THE FEDERAL CIRCUIT

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INTRODUCTION

The U.S. Court of Appeals for the Federal Circuit issued a number of decisions on government contracts law in 2015, including three precedential appeals from the Civilian Board of Contract Appeals (“CBCA”)¹ and twelve precedential appeals from the U.S. Court of Federal Claims.² This Article discusses these fifteen precedential opinions as well as two non-precedential Federal Circuit opinions³ on government contracts matters, including jurisdiction/standing, bid protests, attorney fees, contract/regulatory/statutory interpretation, and contract termination.

Of the fifteen precedential decisions, fourteen affirmed the lower court or board’s decision⁴ while one decision reversed the CBCA’s 2-1

1. See *Yurok Tribe v. Dep’t of the Interior*, 785 F.3d 1405 (Fed. Cir. 2015); *Reliable Contracting Grp., LLC v. Dep’t of Veterans Affairs*, 779 F.3d 1329 (Fed. Cir. 2015); *EM Logging v. Dep’t of Agric.*, 778 F.3d 1026 (Fed. Cir. 2015).

2. See *Normandy Apartments, Ltd. v. United States*, No. 2014-5135, 2015 WL 7423614 (Fed. Cir. Nov. 20, 2015); *Fid. & Guar. Ins. Underwriters, Inc. v. United States*, 805 F.3d 1082 (Fed. Cir. 2015); *Raytheon Co. v. United States*, 809 F.3d 590 (Fed. Cir. 2015); *Tinton Falls Lodging Realty, LLC v. United States*, 800 F.3d 1353 (Fed. Cir. 2015); *Bay Cty. v. United States*, 796 F.3d 1369 (Fed. Cir. 2015); *Colonial Press Int’l, Inc. v. United States*, 788 F.3d 1350 (Fed. Cir. 2015); *SUFI Network Servs., Inc. v. United States*, 785 F.3d 585 (Fed. Cir. 2015); *Palladian Partners, Inc. v. United States*, 783 F.3d 1243 (Fed. Cir. 2015); *Bannum, Inc. v. United States*, 779 F.3d 1376 (Fed. Cir. 2015); *CGI Fed. Inc. v. United States*, 779 F.3d 1346 (Fed. Cir. 2015); *G4S Tech. LLC v. United States*, 779 F.3d 1337 (Fed. Cir. 2015); *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000 (Fed. Cir. 2015).

3. *Allen Eng’g Contractor Inc. v. United States*, 611 F. App’x 701 (Fed. Cir. 2015); *DayDanyon Corp. v. Dep’t of Defense*, 600 F. App’x 739 (Fed. Cir. 2015).

4. See *Normandy Apartments, Ltd.*, 2015 WL 7423614; *Fid. & Guar. Ins. Underwriters, Inc.*, 805 F.3d 1082; *Raytheon Co.*, 809 F.3d 590; *Tinton Falls Lodging Realty, LLC*, 800 F.3d 1353; *Bay Cty.*, 796 F.3d 1369; *Colonial Press Int’l, Inc.*, 788 F.3d 1350; *Yurok Tribe*, 785 F.3d 1405; *SUFI Network Servs., Inc.*, 785 F.3d 585; *Palladian Partners, Inc.*, 783 F.3d 1243; *Reliable Contracting Grp., LLC*, 779 F.3d 1329; *Bannum*,

decision.⁵ Of these fourteen affirming decisions, two affirmed the CBCA on other grounds,⁶ one affirmed the Court of Federal Claims on other grounds,⁷ and one affirmed in part and reversed in part the Court of Federal Claims' decision.⁸

In eleven of the fifteen precedential cases, the Federal Circuit ruled for the United States,⁹ one of which includes a concurrence.¹⁰ In four of the eleven cases ruling for the United States, there was a dissent.¹¹ These five concurrences and dissents were written by one of two judges, Judges Pauline Newman and Jimmie V. Reyna.¹²

This Article discusses these important Federal Circuit opinions from 2015 relating to government contracts law and summarizes the facts, holdings, and significance of each.

I. JURISDICTION/STANDING

A. Fidelity & Guaranty Insurance Underwriters, Inc. v. United States

1. Background

In *Fidelity & Guaranty Insurance Underwriters, Inc. v. United States*,¹³ a general liability insurer brought suit alleging that the U.S. Postal Service (USPS) breached a contract with its insured by failing to indemnify the insured and its agents.¹⁴ In 1984, Gibbs Construction, LLC, formerly known as Gibbs Construction Company ("Gibbs"), entered into a contract with the USPS for renovation of a post office in New Orleans, Louisiana, which required asbestos removal and

Inc., 779 F.3d 1376; *CGI Fed. Inc.*, 779 F.3d 1346; *G4S Tech., LLC*, 779 F.3d 1337; *K-Con Bldg. Sys., Inc.*, 778 F.3d 1000.

5. See *EM Logging*, 778 F.3d at 1028.

6. See *Yurok Tribe*, 785 F.3d at 1407; *Reliable Contracting Grp., LLC*, 779 F.3d at 1330.

7. See *Bannum, Inc.*, 779 F.3d at 1378.

8. See *SUFI Network Serus., Inc.*, 785 F.3d at 588.

9. See *Raytheon Co.*, 809 F.3d at 592; *Tinton Falls*, 800 F.3d at 1355; *Colonial Press Int'l, Inc.*, 788 F.3d at 1352; *Yurok Tribe*, 785 F.3d at 1407; *Palladian Partners*, 783 F.3d at 1246–47; *Reliable Contracting Grp., LLC*, 779 F.3d at 1330; *Bannum, Inc.*, 779 F.3d at 1378; *G4S Tech., LLC*, 779 F.3d at 1338; *K-Con Bldg. Sys., Inc.*, 778 F.3d at 1003.

10. *Normandy Apartments, Ltd. v. United States*, No. 2014-5135, 2015 WL 7423614, at *11–12 (Fed. Cir. Nov. 20, 2015) (Reyna, J., concurring).

11. See *Normandy Apartments, Ltd.*, 2015 WL 7423614, at *9 (Newman, J., dissenting); *Tinton Falls Lodging Realty, LLC*, 800 F.3d at 1363–66 (Reyna, J., dissenting); *Reliable Contracting Grp., LLC*, 779 F.3d at 1335–36 (Newman, J., dissenting); *G4S Tech., LLC*, 779 F.3d at 1344–45 (Newman, J., dissenting).

12. See *supra* note 11.

13. 805 F.3d 1082 (Fed. Cir. 2015).

14. *Id.* at 1083–84.

fireproofing.¹⁵ Gibbs hired a subcontractor, Laughlin-Thyssen, Incorporated, formerly known as Laughlin Development Company (“LTI”), to perform the asbestos removal.¹⁶ LTI purchased general liability insurance, but was unable to renew in 1985.¹⁷ Due to the increased price of general liability insurance, Gibbs contacted USPS for additional compensation.¹⁸ Instead, USPS proposed that the contract be amended to indemnify Gibbs and its agents for liability resulting from asbestos removal, and Gibbs accepted the amendment.¹⁹ The contract amendment stated:

ASBESTOS REMOVAL/REPAIR LIABILITY

The Postal Service shall save harmless and indemnify the contractors and its officers, agents, representatives, and employees from all claims, loss damage, actions, causes of action expense and/or liability resulting from brought for or no [sic] account of any personal injury received or sustained by any person persons [sic] attributable to the asbestos’ [sic] removal work performed under or related to this contract.²⁰

Gibbs purchased additional general liability service from 1985 to 1988 through U.S. Fidelity & Guaranty (“USF&G”).²¹

Louis Wilson, a former USPS employee, brought suit against Gibbs and LTI, alleging that he contracted mesothelioma from asbestos at the post office between 1984 and 1988.²² Gibbs notified USPS and requested that USPS indemnify it pursuant to the Asbestos Removal/Repair Liability Amendment in the contract, but USPS refused.²³ Gibbs, LTI, and USF&G settled with Mr. Wilson without USPS.²⁴ USF&G paid \$1,031,250.00 to settle the claim and incurred an extra \$529,333.34 in legal fees.²⁵ After settlement, Gibbs contacted the USPS and demanded reimbursement for the settlement costs and legal fees.²⁶ The USPS contracting officer denied the claim, and USF&G brought suit against the government

15. *Id.* at 1084.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 1084–85.

21. *Id.* at 1085.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

before the Court of Federal Claims for breach of contract.²⁷ The court held that it lacked jurisdiction over the case because the plaintiff, USF&G, was not in privity with the United States, and thus did not have standing to sue.²⁸ Further, it held that USF&G did not prove that it met one of the exceptions to the privity requirement.²⁹ USF&G appealed to the Federal Circuit.³⁰

2. *The Federal Circuit's decision*

Before the Federal Circuit, USF&G conceded that it was not a signatory to the contract between Gibbs and the USPS, but argued that it was an equitable subrogee of Gibbs.³¹ USF&G cited the Federal Circuit's opinion in *Insurance Co. of the West v. United States*,³² stating, "a subrogee, after stepping into the shoes of a government contractor, may rely on the waiver of sovereign immunity in the Tucker Act and bring suit against the United States."³³ In that case, a Miller Act surety was held to be an equitable subrogee of the prime contractor. The court determined that when, pursuant to performance bonds, the surety was required to complete the prime contractor's work and was entitled to receive payments from the government, then the surety is an equitable subrogee.³⁴

The Federal Circuit rejected USF&G's argument, stating that a general liability insurer, unlike a Miller Act surety, does not step into the shoes of the general contractor, and thus may not rely on the Tucker Act's waiver of sovereign immunity.³⁵ A Miller Act surety guarantees completion of a prime contractor's work by completing the contractor's performance itself or assuming the contractor's liability for failing to complete the project.³⁶ This "creates a third-party relationship, in which the surety becomes liable for the principal's debt or duty to the third party obligee."³⁷ Conversely,

27. *Id.*

28. *Id.* at 1086.

29. *Id.*

30. *Id.* at 1086–87.

31. *Id.* at 1088.

32. 243 F.3d 1367 (Fed. Cir. 2001).

33. *Fid. & Guar. Ins. Underwriters, Inc.*, 805 F.3d at 1091 (quoting *Ins. Co. of the W.*, 243 F.3d at 1374–75).

34. *Id.* at 1087–88 ("[T]he language of both [the Federal Tort Claims Act and the Tucker Act] contains an unequivocal expression waiving sovereign immunity as to claims, *not particular claimants.*" (quoting *Ins. Co. of the W.*, 243 F.3d at 1373–74)).

35. *Id.* at 1091–92.

36. *Id.* at 1091 n.5 (citing *Ins. Co. of the W.*, 243 F.3d at 1370).

37. *Id.* (quoting *Ins. Co. of the W.*, 243 F.3d at 1370).

USF&G never “stepped into the shoes” of Gibbs with regard to Gibbs’ contract claim against the USPS because USF&G did not assume responsibility for Gibbs’ complete performance, nor did it assume any obligations to the USPS.³⁸ Therefore, the Federal Circuit held that general liability insurers may not rely on the Tucker Act’s waiver of sovereign immunity and affirmed the Court of Federal Claims’ decision dismissing USF&G’s complaint for lack of subject matter jurisdiction.³⁹

3. *Significance*

This case clarifies that a party may only rely on the waiver of sovereign immunity under the Tucker Act when “the party standing outside of privity by contractual obligation stand[s] in the shoes of a party within privity.”⁴⁰ A party cannot claim to be an equitable subrogee of a government contractor when it does not assume any obligations under its contract with the government.⁴¹

B. *G4S Technology LLC v. United States*

1. *Background*

In *G4S Technology LLC v. United States*,⁴² a subcontractor on a government contract brought suit against the United States, arguing that it was a third-party beneficiary of the prime contract and that the government was liable for the amount owed the contractor.⁴³ The case arose out of a loan from the Department of Agriculture’s Rural Utilities Service (“RUS”) to Open Range, a contractor, for the construction of broadband networks in 540 markets.⁴⁴ Open Range was also required to secure financing from another entity for the wireless broadband service.⁴⁵

The loan agreement stated that Open Range would keep a pledged deposit account (“PDA”), wherein RUS would deposit funds as needed during the project.⁴⁶ Open Range would request funds by submitting a financial requirement statement, which included the

38. *Id.* at 1092.

39. *Id.*

40. *Id.* (quoting *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999)).

41. *Id.* (citing *Fid. & Guar. Ins. Underwriters v. United States*, 119 Fed. Cl. 195, 201 (2014), *aff’d*, 805 F.3d 1082 (Fed. Cir. 2015)).

42. 779 F.3d 1337 (Fed. Cir. 2015).

43. *Id.* at 1339–40.

44. *Id.* at 1338.

45. *Id.*

46. *Id.*

purpose for the funds and any relevant support.⁴⁷ Subcontractors on the project were paid out of the PDA.⁴⁸

Eighteen months into the project, the Federal Communications Commission suspended the spectrum rights permit that Open Range needed for the construction of broadband networks.⁴⁹ The loan agreement between RUS and Open Range stated that RUS could terminate the loan if Open Range lost spectrum rights.⁵⁰ RUS issued a notice of termination if Open Range could not obtain a replacement spectrum rights permit.⁵¹

Upon issuance of the notice, subcontractors began to worry about Open Range's ability to compensate them.⁵² Soon thereafter, Open Range fell behind on its payments to subcontractors.⁵³

Nevertheless, Open Range was able to secure a temporary permit for spectrum access for 264 of the original 540 communities.⁵⁴ Open Range asked RUS to advance funds because many subcontractors were threatening to leave due to nonpayment.⁵⁵ RUS advanced loan payments and took a number of steps to boost Open Range's credibility.⁵⁶ Through a press release and two public letters, RUS reassured subcontractors that the project would move forward, but the project would be downsizing due to the failure to secure full spectrum rights.⁵⁷ Further, RUS and Open Range also exchanged emails wherein they discussed funding for the G4S subcontract.⁵⁸

RUS and Open Range executed a loan amendment to decrease the scope of work.⁵⁹ RUS also required Open Range to secure another \$40 million in capital from another entity.⁶⁰ In this arrangement, the capital was conditioned upon the revised loan agreement and RUS's advancing funds to Open Range to pay its subcontractors, pursuant to Schedules B-1 and B-2.⁶¹

47. *Id.*

48. *Id.* at 1341.

49. *Id.* at 1338.

50. *Id.*

51. *Id.*

52. *Id.* at 1338–39.

53. *Id.* at 1339.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

Even after Open Range disbursed advanced funds to its subcontractors, including G4S, Open Range was unable to pay its subcontractors in full.⁶² Shortly thereafter, Open Range filed for bankruptcy.⁶³

G4S filed suit at the Court of Federal Claims aiming to hold the government liable on G4S's contract claims, despite not being in privity of contract with the government.⁶⁴ The Court of Federal Claims held that it could have jurisdiction over the claim if G4S proved to be a third-party beneficiary under the RUS-Open Range contract.⁶⁵ However, the Court of Federal Claims found that G4S did not prove that it was a third-party beneficiary and thus granted the government's motion for summary judgment.⁶⁶

2. *The Federal Circuit's decision*

The Federal Circuit agreed with the Court of Federal Claims, finding that G4S was not a third-party beneficiary to the RUS-Open Range contract because there was no evidence that RUS intended to be liable to G4S.⁶⁷ The court noted that the standard for proving third-party beneficiary status is a high bar and should be narrowly construed.⁶⁸ Accordingly, the court required the party seeking this status to prove that the contracting parties intended to bestow a benefit upon a nonparty⁶⁹ and that the benefit to the third party was "direct."⁷⁰

The parties agreed that there was no express provision in the contract declaring RUS's intent to be liable to G4S.⁷¹ Case law states:

In the absence of clear guidance from the contract language, the requisite intent on the part of the government can be inferred from the actions of the contracting officer and circumstances

62. *Id.*

63. *Id.*

64. *Id.* at 1339–40.

65. *G4S Tech. LLC v. United States*, 114 Fed. Cl. 662, 669 (2014).

66. *Id.* at 674.

67. *G4S Tech. LLC*, 779 F.3d at 1340–44.

68. *Id.* at 1340 (“[T]he Supreme Court has recognized the exceptional privilege that third-party beneficiary status imparts,’ and we have accordingly cautioned that the privilege of third party beneficiary status ‘should not be granted liberally.’” (quoting *Flexfab, LLC v. United States*, 424 F.3d 1254, 1259 (Fed. Cir. 2005) (alteration in original))).

69. *Id.* (“A nonparty becomes legally entitled to a benefit promised in a contract . . . only if the contracting parties so intend.” (quoting *Astra USA, Inc. v. Santa Clara Cty.*, 563 U.S. 110, 117 (2011))).

70. *Id.* (citing *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001)).

71. *Id.*

providing the contracting officer with appropriate notice that the contract provision at issue was intended to benefit the third party.⁷²

Therefore, the court examined circumstantial evidence of RUS's intent "in the context of the government's responsibilities to safeguard taxpayer funds and advance the public interest."⁷³

G4S argued that RUS's use of a pledged deposit account and RUS's press release and public statements about rebuilding Open Range's credibility showed that RUS intended to guarantee that subcontractors, such as G4S, were paid.⁷⁴ The Federal Circuit disagreed.⁷⁵

The court stated that the PDA was merely a general, standard fund used by RUS and Open Range for payment of all costs under the project.⁷⁶ The fact that the PDA was used to pay the cost of subcontractor work, among other things, did not mean that the government intended to be liable to subcontractors.⁷⁷ Further, the court held that the benefit of the third party was not direct, as the subcontractor was paid by RUS indirectly.⁷⁸

Similarly, the Federal Circuit also rejected G4S's argument that the press release and public letters made by RUS were sufficient to show intent.⁷⁹ While these statements showed RUS's concern about Open Range's credibility with its subcontractors, the court found that the communications were never directed towards G4S.⁸⁰ As such, the Federal Circuit held that RUS was merely supporting Open Range, rather than taking on any liability itself, and its actions did not "deviate[] from the scope of its sovereign responsibilities to safeguard taxpayer funds and advance the public interest."⁸¹ To rule otherwise would mean that any time the government exercised meaningful oversight over a subcontractor, the subcontractor could claim to be a

72. *Id.* (quoting *Flexfab, LLC*, 424 F.3d at 1262–63).

73. *Id.*

74. *Id.* at 1341–44.

75. *Id.*

76. *Id.* at 1341.

77. *Id.*

78. *Id.* at 1341–42 (citing *J.G.B. Enters., Inc. v. United States*, 497 F.3d 1259, 1260, 1261 n.1 (Fed. Cir. 2007); *D & H Distrib. Co. v. United States*, 102 F.3d 542, 546–48 (Fed. Cir. 1996)) (observing that third-party beneficiary status has been found when the government made the prime contractors and subcontractors joint payees and when the government held payments to the prime contractor in escrow for the subcontractor).

79. *Id.* at 1343–44.

80. *Id.* at 1343.

81. *Id.* at 1344.

third-party beneficiary of the contract between the government and the prime contractor.⁸²

3. *Judge Newman's dissent*

Notably, this is one of the only precedential government contracts decisions from the Federal Circuit this year with a dissenting opinion.⁸³ Judge Newman dissented, arguing that the facts plausibly supported RUS's obligation, "in law and/or in equity," to pay for subcontractor services.⁸⁴ Judge Newman explained that RUS's press release and public letters were issued after the subcontractors threatened to stop work and that RUS urged the continuance of performance.⁸⁵ As such, Judge Newman explained that RUS could have been liable for services it solicited and received pursuant to the duty of good faith and fair dealing.⁸⁶

4. *Significance*

This case reinforces the difficulty subcontractors have in arguing third-party beneficiary status in government contracts.⁸⁷ If the contract does not clearly state the government's intent to be obligated to pay the subcontractors, the courts require a strong showing of the government's intent through either a direct payment mechanism or an express statement of liability.⁸⁸

82. *Id.*

83. *See id.* at 1344 (Newman, J., dissenting); *see also* Tinton Falls Lodging Realty, LLC v. United States, 800 F.3d 1353, 1363 (Fed. Cir. 2015) (Reyna, J., dissenting); Reliable Contracting Grp., LLC v. Dep't of Veterans Affairs, 779 F.3d 1329, 1335 (Fed. Cir. 2015) (Newman, J., dissenting).

84. *GAs Tech. LLC*, 779 F.3d at 1345 (Newman, J., dissenting).

85. *Id.* at 1344.

86. *See id.* at 1345 (citing *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014)) (noting that the case should have been remanded for a determination of the Rural Utilities Service's (RUS's) obligations on the specific facts of the case).

87. *See id.* at 1341–44 (outlining the court's reasoning for denying third-party beneficiary status in this case).

88. *See id.* at 1340–43 (finding that the government did not directly pay the subcontractors and that the communications were an insufficient express statement of liability).

C. K-Con Building Systems, Inc. v. United States

1. *Background*

In *K-Con Building Systems, Inc. v. United States*,⁸⁹ K-Con submitted a claim to the contracting officer while litigation was pending on a previous claim on the same project, sparking a jurisdictional discussion at the Federal Circuit.⁹⁰ K-Con's contract was for "cutter support team building" with the U.S. Coast Guard.⁹¹ While the contract completion date was set for November 20, 2004, the project was not substantially completed until May 23, 2005.⁹² Pursuant to the contract, K-Con was required to pay \$589 in liquidated damages for each day the project was delayed.⁹³ Thus, the Coast Guard withheld \$109,554 as liquidated damages for the 186 days of delay.⁹⁴

On July 28, 2005, K-Con submitted a claim to the contracting officer, asking for remission of liquidated damages, arguing that the liquidated damages provision was unenforceable and the Coast Guard failed to issue extensions under the contract after contract changes.⁹⁵ The contracting officer denied the claim, and K-Con brought suit at the Court of Federal Claims under the Contract Disputes Act.⁹⁶ In its complaint, K-Con asserted the two claims outlined in its July 28, 2005 letter to the contracting officer.⁹⁷

During litigation at the Court of Federal Claims, K-Con submitted a second letter to the contracting officer, explaining the contract changes and asking for \$196,126.38 for additional work performed.⁹⁸ K-Con also asked for a 186-day extension of the completion date of the contract.⁹⁹ The contracting officer similarly denied the second claim letter, and K-Con subsequently amended its complaint to

89. 778 F.3d 1000 (Fed. Cir. 2015).

90. *Id.* at 1004.

91. *Id.* at 1003.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1003–04.

96. *Id.* at 1004; *K-Con Bldg. Sys., Inc. v. United States*, 114 Fed. Cl. 595, 597 (2014), *aff'd*, 778 F.3d 1000 (Fed. Cir. 2015).

97. *K-Con Bldg. Sys., Inc.*, 778 F.3d at 1004; Complaint at 2, *K-Con Bldg. Sys., Inc. v. United States*, 114 Fed. Cl. 595 (2014) (No. 05-01054C).

98. *K-Con Bldg. Sys., Inc.*, 778 F.3d at 1004; *K-Con Bldg. Sys., Inc.*, 114 Fed. Cl. at 601.

99. *K-Con Bldg. Sys., Inc.*, 778 F.3d at 1004.

include its request for \$196,126.38 for additional work and for a 186-day extension of the completion date of the contract.¹⁰⁰

The Court of Federal Claims dismissed K-Con's time-extension claim and ruled against it on the merits on the remaining two claims.¹⁰¹ The court held that the liquidated damages clause was enforceable and that K-Con failed to provide adequate written notice of the contract changes.¹⁰² K-Con appealed the three rulings to the Federal Circuit.¹⁰³

2. *The Federal Circuit's decision*

The Federal Circuit affirmed the ruling of the Court of Federal Claims.¹⁰⁴ It began its analysis with jurisdiction, analyzing the three claims separately.¹⁰⁵ The court noted that a claim is not the entire case before a court,¹⁰⁶ but rather it is divisible by statements of an "amount sought and the basis for the request."¹⁰⁷ The Federal Circuit "treat[s] requests as involving separate claims if they *either* request different remedies (whether monetary or non-monetary) *or* assert grounds that are materially different from each other factually or legally."¹⁰⁸ Each claim must be a "clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim."¹⁰⁹ For the court to have jurisdiction over a claim, the contracting officer must issue a final decision on the claim.¹¹⁰

The three claims in K-Con's amended complaint were as follows: (1) the liquidated damages clause was unenforceable, and thus K-Con was entitled to remission of the liquidated damages clause plus interest; (2) K-Con was entitled to time extensions under the contract's changes clause, and thus K-Con was entitled to remission of the liquidated damages clause plus interest; and (3) K-Con was forced to perform extra work due to contract changes by the Coast

100. *Id.*

101. *K-Con Bldg. Sys., Inc.*, 114 Fed. Cl. at 607.

102. *Id.* at 603, 606.

103. *K-Con Bldg. Sys., Inc.*, 778 F.3d at 1004.

104. *Id.* at 1011.

105. *Id.* at 1005.

106. *Id.* ("We have long held that the jurisdictional standard must be applied to each claim, not an entire case; jurisdiction exists over those claims which satisfy the requirements of an adequate statement of the amount sought and an adequate statement of the basis for the request." (citing *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1281 (Fed. Cir. 1985))).

107. *Id.* (citing *Contract Cleaning Maint., Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987)).

108. *Id.*

109. *Id.* (citing *Contract Cleaning Maint., Inc.*, 811 F.2d at 592).

110. *Id.*

Guard, and thus K-Con was entitled to \$196,126.38 “over and above” remission of the liquidated damages clause.¹¹¹

The Federal Circuit held that the Court of Federal Claims had jurisdiction over claims one and three, but did not have jurisdiction over claim two.¹¹²

Claim one was included in K-Con’s first claim letter to the contracting officer on July 28, 2005.¹¹³ In that claim letter, K-Con sought remission of the liquidated damages clause.¹¹⁴ Therefore, it was undisputed that the Court of Federal Claims had jurisdiction over it.¹¹⁵

Claim two was briefly discussed in K-Con’s first claim letter and was presented in K-Con’s original complaint.¹¹⁶ Because it was presented in litigation, K-Con was required to adequately present claim two in its first claim letter.¹¹⁷ However, the Federal Circuit held that the first claim letter did not adequately address claim two and thus did not put the contracting officer on notice of K-Con’s basis for a time extension.¹¹⁸ Therefore, the Federal Circuit held that the Court of Federal Claims did not have jurisdiction over claim two.¹¹⁹

Claim three was included in K-Con’s second claim letter to the contracting officer, which was submitted after K-Con filed a complaint in the instant case.¹²⁰ The Coast Guard argued that the complaint already contained this claim, and thus the contracting officer never issued a final decision for purposes of jurisdiction under the Contract Disputes Act, but the Federal Circuit disagreed.¹²¹ Although the original complaint did include an argument about contract changes, the original complaint only asked for remission of liquidated damages and did not include a request for compensation for additional work performed.¹²² Because the remedies sought in the original complaint and the second claim letter were different, the requests were different claims.¹²³ Thus, the contracting officer’s rejection of the second letter’s claims was sufficient for jurisdiction.¹²⁴

111. *Id.* at 1006.

112. *Id.*

113. *Id.* at 1004; Complaint at 2, *K-Con Bldg. Sys., Inc. v. United States*, 114 Fed. Cl. 595 (2014) (No. 05-01054C).

114. *K-Con Bldg. Sys., Inc.*, 778 F.3d at 1007.

115. *Id.* at 1006.

116. *Id.* at 1007–08.

117. *Id.*

118. *Id.* at 1008.

119. *Id.* at 1007.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

The Federal Circuit addressed claims one and three on the merits.¹²⁵ On claim one, the Federal Circuit noted the “steep climb in [K-Con’s attempt] to establish unenforceability”¹²⁶ of the liquidated damages provision and held that the provision was enforceable.¹²⁷ The court cited case law stating that liquidated damages provisions are enforced unless they were unreasonable at the time they were made.¹²⁸ While K-Con alleged that there may have been some mathematical errors in the rate for delay, the court held that \$589 per day for delay was a reasonable rate, considering the additional costs for travel, inspection, and personnel that the Coast Guard would incur due to the delay in the contract’s completion.¹²⁹

On claim three, the Federal Circuit held that K-Con’s failure to adhere to the notice provision of the changes clause precluded it from recovering under this claim.¹³⁰ The changes clause of the contract stated that any change order had to be in writing, containing the “date, circumstances, and source of the order, and . . . that the Contractor regards the order as a change order.”¹³¹ Further, the clause stated that “no adjustment for any change . . . shall be made for any costs incurred more than [twenty] days before the Contractor gives written notice as required.”¹³²

The court focused on the fact that K-Con never objected to the changes alleged in its amended complaint and even affirmatively suggested that the alleged change orders were consistent with the terms of the contract.¹³³ K-Con never provided written notice of the alleged change orders until it submitted its second claim letter, more than two years after the alleged changes were ordered.¹³⁴ Because two years is well past the twenty day timeframe set forth under the contract’s changes clause and because K-Con did not prove that there were extenuating circumstances justifying its delay in notification, the Federal Circuit held that K-Con was not entitled to recover under claim three.¹³⁵

125. *Id.* at 1008–11.

126. *Id.* at 1008.

127. *Id.*

128. *Id.* (citing *DJ Mfg. Corp. v. United States*, 86 F.3d 1130, 1137 (Fed. Cir. 1996)).

129. *Id.* at 1008–09.

130. *Id.* at 1009.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 1009–10.

135. *Id.* at 1010.

3. *Significance*

The Federal Circuit's decision in *K-Con* clarifies that parties must be careful as to the breadth and scope of their claims within their complaint.¹³⁶ The Court of Federal Claims does not have jurisdiction under the Contract Disputes Act over claims that were raised in the original complaint but never raised to a contracting officer.¹³⁷ However, the court does have CDA jurisdiction over new claims raised to a contracting officer on projects already the subject of litigation.¹³⁸ This case highlights the importance of crafting comprehensive claim letters to contracting officers to preserve the record for appeal.

D. *Normandy Apartments, Ltd. v. United States*

1. *Background*

In *Normandy Apartments, Ltd. v. United States*,¹³⁹ an apartment owner with a Section 8 housing contract with the Oklahoma Housing Finance Authority (OHFA) brought a breach of contract claim and a takings claim against the U.S. Department of Housing and Urban Development (HUD) for terminating assistance payments and interfering in its sale of its apartment complex.¹⁴⁰ Normandy owned Normandy Apartments, a Section 8 housing project in Tulsa, Oklahoma, which permits tenants to pay rent according to their ability to pay, with HUD subsidizing the remainder of the unit's rent.¹⁴¹

In 1992, Normandy and HUD executed a Section 8 rental subsidy agreement ("Original Contract"), whereby HUD agreed to pay the remainder of each unit's allowable rent and Normandy agreed to "maintain and operate the contract units and related facilities so as to provide decent, safe, and sanitary housing as defined by HUD[;]' to clean and 'make repairs with reasonable promptness[;]' to 'respond promptly to HUD's Physical Inspection Reports[;]' and to implement corrective actions within a reasonable time."¹⁴² Under

136. *See id.* at 1007 (differentiating between the claims raised in the original complaint and a letter to contracting officer based on relief requested).

137. *See id.* (finding that the Court of Federal Claims had jurisdiction over claims raised in the letter to the contracting officer).

138. *Id.* at 1006 (explaining that precluding matters developed in litigation would impose too rigid a standard and would be too disruptive).

139. No. 2014-5135, 2015 WL 7423614 (Fed. Cir. Nov. 20, 2015).

140. *Id.* at *1.

141. *Id.*

142. *Id.*

the contract, HUD had authority to inspect, audit, and even withhold assistance payments.¹⁴³

In 1997, the Original Contract expired so Normandy and HUD renewed the contract annually until 2004.¹⁴⁴ In 2000, Normandy and HUD entered into a “Use Agreement,” in which Normandy would pre-pay its HUD-backed mortgage and continue housing low-income tenants until June 1, 2009.¹⁴⁵ The 2000 Use Agreement required Normandy to restrict housing to low-income tenants, prohibited Normandy from evicting existing tenants based on income, and mandated that Normandy maintain its housing complex “in a condition that is decent, safe, and in good repair, as well as in compliance with all applicable state and local building and health codes.”¹⁴⁶

In 2004, Normandy entered into a renewal contract (“2004 Renewal Contract”), which renewed the existing terms of the contract between Normandy and HUD, but designated the OHFA as the contract administrator, rather than HUD.¹⁴⁷ Despite not being a party to the 2004 Renewal Contract, HUD maintained its authority to inspect the premises.¹⁴⁸

In November 2004, HUD inspected Normandy Apartments and issued it a failing score.¹⁴⁹ After Normandy corrected the issues, OHFA reinspected in February 2005 and noted that all issues had been addressed.¹⁵⁰ Therefore, in February 2006, HUD stated that it would close the November 2004 inspection.¹⁵¹

On August 23, 2006, HUD performed its second inspection of the complex and issued it another failing score.¹⁵² Normandy requested that HUD revise its score because the complex was undergoing repairs, but HUD denied the request for failure to meet the appeal deadline.¹⁵³ In March 2007, Normandy was unable to certify that its property met all inspection requirements and instead wrote a letter stating the anticipated window replacement completion date.¹⁵⁴ On June 20, 2007, HUD sent a letter to Normandy that it would cease

143. *Id.*

144. *Id.*

145. *Id.* at *2.

146. *Id.*

147. *Id.* at *1.

148. *Id.*

149. *Id.* at *2.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

making housing assistance payments to Normandy Apartments due to its repeated inspection violations.¹⁵⁵

In October 2007, Normandy attempted to sell the housing complex to Summit Assets Management, LLC for \$8 million.¹⁵⁶ Pursuant to the 2000 Use Agreement, Normandy requested approval from HUD for the sale.¹⁵⁷ However, HUD did not approve the sale and Summit withdrew its offer.¹⁵⁸ The apartments allegedly decreased in value to \$5.25 million by 2009.¹⁵⁹ Thereafter, Normandy filed a complaint in the U.S. District Court for the Western District of Oklahoma.¹⁶⁰

On October 18, 2007, Normandy sought a preliminary injunction in the Western District of Oklahoma, enjoining HUD from ceasing its housing assistance payments.¹⁶¹ The Western District of Oklahoma held that it lacked jurisdiction,¹⁶² finding that the Tucker Act governed the claim because the requested relief exceeded the ten thousand dollar threshold applied to Tucker Act cases and, therefore, the Court of Federal Claims had exclusive jurisdiction.¹⁶³ Normandy appealed to the U.S. Court of Appeals for the Tenth Circuit.¹⁶⁴

The Tenth Circuit stated that the Western District of Oklahoma had jurisdiction to hear an Administrative Procedure Act claim by Normandy for nonmonetary relief.¹⁶⁵ However, Normandy elected to bring a Tucker Act claim before the Court of Federal Claims.¹⁶⁶ The Court of Federal Claims dismissed Normandy's contract claim

155. *Id.*

156. *Id.* at *3.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Normandy Apartments, Ltd. v. U.S. Dep't of Hous. & Urban Dev.*, No. Civ-07-1161-R, 2007 WL 3232610, at *2-3 (W.D. Okla. Nov. 1, 2007), *rev'd*, 554 F.3d 1290 (10th Cir. 2009).

163. Tucker Act, 28 U.S.C. § 1491 (2012) (permitting contractual claims against the government and granting the Court of Federal Claims exclusive jurisdiction over Tucker Act claims in excess of ten thousand dollars); *Normandy Apartments, Ltd.*, 2007 WL 3232610, at *2 (calculating Normandy's requested monetary relief to be \$109,575 per month in U.S. Department of Housing and Urban Development (HUD) funds).

164. 554 F.3d at 1293.

165. *Id.* at 1300.

166. *Normandy Apartments, Ltd. v. United States*, 100 Fed. Cl. 247, 254-58 (2011), *aff'd*, 2015 WL 7423614, at *1 (Fed. Cir. Nov. 20, 2015).

holding that because there was no privity of contract between Normandy and the United States, it did not have jurisdiction.¹⁶⁷

2. *The Federal Circuit's decision*

On appeal to the Federal Circuit, Normandy argued: (1) that the United States was a party in privity to the 2004 Housing Assistance Payments (HAP) Contract, (2) the United States breached its responsibilities under the 2000 Use Agreement, and (3) that the United States' conduct constituted a regulatory taking.¹⁶⁸

Judge Wallach's majority decision responded to the first claim by finding that Normandy could not bring a Tucker Act claim against the United States because it lacked privity with HUD.¹⁶⁹ The court held that the parties to the 2004 Renewal Contract were Normandy and the OHFA, as evidenced by the contract language, which stated that "[t]he Renewal Contract is a housing assistance payments contract . . . between the Contract Administrator[, OHFA,] and the Owner of the Project[, Normandy]."¹⁷⁰ HUD was not a signatory and was not designated as a party to the 2004 Renewal Contract.¹⁷¹

The court addressed Normandy's argument that HUD was a party to the 2004 Renewal Contract because the 2004 Renewal Contract renewed the exact terms of the Original Contract between Normandy and HUD.¹⁷² The Federal Circuit rejected this, finding that the 2004 Renewal Contract was modified when OHFA was designated as the contract administrator, replacing HUD.¹⁷³

The court also addressed Normandy's argument that it had privity with HUD despite HUD's not being a party to the 2004 Renewal Contract because HUD provided funding, oversight, and enforcement of the 2004 Renewal Contract.¹⁷⁴ Again, the Federal Circuit rejected this argument, stating that "a grant of benefits and subsequent oversight by HUD is insufficient to establish a contractual obligation between [a property developer] and the

167. *Id.* at 254–59.

168. *Normandy Apartments, Ltd. v. United States*, No. 2014–5135, 2015 WL 7423614, at *4–9 (Fed. Cir. Nov. 20, 2015).

169. *Id.* at *4 (finding that no contractual relationship existed between Normandy and the United States because the United States was not a party to the 2004 HAP contract).

170. *Id.*

171. *Id.*

172. *Id.* at *5.

173. *Id.*

174. *Id.* at *6.

government,”¹⁷⁵ even when the local agency’s only role is to channel HUD funding.¹⁷⁶ Moreover, the court found that there was no implied-in-fact contract between Normandy and HUD because an express contract, such as the 2004 Renewal Contract and the 2000 Use Agreement, precluded the existence of an implied-in-fact contract regarding the same terms and requirements.¹⁷⁷

The court then addressed Normandy’s claim that HUD breached the 2000 Use Agreement between Normandy and HUD.¹⁷⁸ The agreement specifically referenced section 221(d)(3) of the National Housing Act, requiring HUD to provide subsidy payments to property owners, like Normandy, that house low-income tenants, and thus incorporated HAP contract provisions into the 2000 Use Agreement, making HUD in privity of contract.¹⁷⁹ The Federal Circuit declined to find that section 221(d)(3) of the National Housing Act was incorporated into the 2000 Use Agreement and held that, even if it had been, it did not expressly incorporate the 2004 Renewal Contract, as required for incorporation by reference.¹⁸⁰

Finally, the Federal Circuit addressed Normandy’s final claim that HUD’s conduct was a taking because Normandy’s right to receive housing assistance payments pursuant to the 2004 Renewal Contract was conditioned on HUD’s inspections and Normandy’s right to sell the housing complex, which was conditioned on HUD’s written approval.¹⁸¹ The court found that because Normandy had contracted away its rights to receive housing assistance payments and sell the housing complex without HUD’s involvement, HUD’s actions were not takings.¹⁸²

Judge Wallach quickly addressed Judge Newman’s argument in dissent that the government is estopped from arguing that it is not a contractual party because it argued one position in front of the Western District of Oklahoma and the Tenth Circuit, and then argued the contrary position before the Court of Federal Claims.¹⁸³ Judge Wallach explained that HUD’s arguments were not inconsistent.¹⁸⁴ Before the Western District of Oklahoma and the

175. *Id.* (quoting *Katz v. Cisneros*, 16 F.3d 1204, 1210 (Fed. Cir. 1994)).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at *7.

181. *Id.*

182. *Id.* at *7–9.

183. *Id.* at *9–10; *id.* at *13 (Newman, J., dissenting).

184. *Id.* at *10 (majority opinion).

Tenth Circuit, HUD argued that the court did not have jurisdiction,¹⁸⁵ but before the Court of Federal Claims, HUD did not contest jurisdiction, but merely addressed the merits.¹⁸⁶ Therefore, the majority found that HUD did not make inconsistent statements.¹⁸⁷

3. *Judge Reyna's concurrence with Judge Wallach joining*

Judge Reyna penned a concurrence to “explain why our opinion raises troubling concern.”¹⁸⁸ While Judge Reyna agreed that all of Normandy’s attempts to recover from HUD should fail, he found it troubling that HUD was able to insulate itself from Tucker Act jurisdiction by creating a separate contract between Normandy and OHFA.¹⁸⁹ While Judge Reyna noted that HUD’s insulation from liability would discourage property owners from participating in HUD’s Section 8 housing program, he noted that these problems are “outside this court’s authority to remedy and are best left for another branch of government to address.”¹⁹⁰

4. *Judge Newman's dissent*

Judge Newman based her dissent on the doctrine of judicial estoppel, finding that the government should not have been able to successfully argue that Normandy was in the wrong court at the Western District of Oklahoma and the Tenth Circuit and then argue the contrary position before the Court of Federal Claims.¹⁹¹ Judge Newman took issue with HUD shifting its position on the proper jurisdiction of Normandy’s claim and argued that this tactic allowed HUD to avoid litigation on the merits for eight years.¹⁹² In a sharp dissent, she stated, “This is not the process envisioned by President Lincoln, his words carved at the entrance to this courthouse: ‘It is as much the duty of government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals.’”¹⁹³

185. *Id.* (arguing that Tucker Act jurisdiction was appropriate in the Court of Federal Claims).

186. *Id.* at *10–11.

187. *Id.* at *11.

188. *Id.* (Reyna, J., concurring).

189. *Id.*

190. *Id.* at *12.

191. *Id.* at *13 (Newman, J., dissenting).

192. *Id.* at *13.

193. *Id.* at *17.

5. *Significance*

Like the Federal Circuit's opinion two weeks prior in *Fidelity & Guaranty Insurance Underwriters, Inc. v. United States*, the Federal Circuit declined to find a waiver of sovereign immunity under the Tucker Act due to lack of privity of contract and declined to apply one of the limited exceptions to privity of contract.¹⁹⁴ Despite the Tucker Act being a statute that provides "the widest and most unequivocal waiver of federal immunity from suit,"¹⁹⁵ the Federal Circuit continues to insulate the government from suits, even if it has rights and obligations under the contract.¹⁹⁶

E. *Yurok Tribe v. Department of the Interior*

1. *Background*

In *Yurok Tribe v. Department of the Interior*,¹⁹⁷ the Yurok Tribe filed suit against the U.S. Department of the Interior for failing to make payments under an Indian Self-Determination and Education Assistance Act (ISDA) proposal that the Yurok Tribe contended had been approved.¹⁹⁸ The ISDA states that the Department of the Interior shall enter into self-determination contracts, or Title I contracts, with Indian tribes to fund programs that the Secretary is authorized to administer.¹⁹⁹ Under the ISDA, a tribe that wants to enter into a self-determination contract submits a proposal to the Secretary of the Interior.²⁰⁰ Ninety days after receipt of a proposal, the Secretary must either approve the proposal and issue the contract or provide written notification to the tribe that the proposal has been rejected.²⁰¹ If the Secretary fails to respond to the proposal within ninety days, the proposal is automatically approved and the Secretary must award the contract.²⁰²

194. *Id.* at *4–6 (majority opinion); *see also* *Fid. & Guar. Ins. Underwriters, Inc. v. United States*, 805 F.3d 1082, 1092 (Fed. Cir. 2015).

195. *Normandy Apartments, Ltd.*, 2015 WL 7423614, at *12 (Reyna, J., concurring) (quoting *United States v. Mitchell*, 463 U.S. 206, 215 (1983)).

196. *See id.* at *4–9 (finding the fact that HUD was not a named party to the contract to be controlling on the question of jurisdiction even though HUD had rights and obligations under the contract).

197. 785 F.3d 1405 (Fed. Cir. 2015).

198. *Id.* at 1407–08.

199. *Id.* (citing 25 U.S.C. § 450f(a)(1) (2012)).

200. *Id.* (citing § 450f(a)(2)).

201. *Id.* at 1408 (citing § 450f(a)(2)).

202. *Id.*

The Yurok Tribe submitted a “letter of interest” to the Bureau of Indian Affairs’ Office of Self Governance, requesting funding for the Tribe’s Department of Public Safety and the Tribe’s Tribal Court.²⁰³ Attached to the letter was a Tribal Resolution authorizing the request.²⁰⁴ The Office of Self Governance responded that the correct office for ISDA proposals was the Bureau’s Office of Justice Services and forwarded Yurok Tribe’s proposal to the correct office.²⁰⁵ The Yurok Tribe then wrote a number of emails following up on its “Title I request.”²⁰⁶

Ninety days after the Yurok Tribe submitted its letter, it wrote a second letter, stating that due to the Secretary’s lack of response, its proposal was deemed approved.²⁰⁷ However, the Secretary refused to award a contract to the Yurok Tribe.²⁰⁸

After the Secretary denied the Yurok Tribe’s claim, the Yurok Tribe filed an appeal with the CBCA as well as a parallel appeal with the Interior Board of Indian Appeals (IBIA).²⁰⁹ The Yurok Tribe requested a stay of the IBIA case pending resolution of the case before the CBCA.²¹⁰

The CBCA dismissed the Yurok Tribe’s claim for failure to state a claim upon which relief can be granted, finding that the Yurok Tribe’s letter was not a proposal and that, even if it were a proposal, Yurok Tribe requested funding for programs that the Bureau was not currently performing.²¹¹ The Yurok Tribe appealed directly to the Federal Circuit.²¹²

2. *The Federal Circuit’s decision*

The Federal Circuit affirmed the CBCA’s decision to dismiss the case for failure to state a claim on different grounds.²¹³ The Federal Circuit disagreed with the CBCA’s holding that the Yurok Tribe’s letter was not a proposal.²¹⁴ The court found that the letter detailed

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 1409.

209. *Id.*

210. *Id.*

211. *Yurok Tribe v. Dep’t of the Interior*, CBCA 3519-ISDA, 14-1 BCA ¶ 35,528.

212. *Yurok Tribe*, 785 F.3d at 1408-09.

213. *Id.* at 1410-14.

214. *Id.* at 1410-11.

the request for and necessity of the funding.²¹⁵ The letter was appropriately titled “Yurok Tribe Title I Request for the Yurok Department of Public Safety and the Yurok Tribal Court,” and the email was appropriately titled “Yurok Tribe—Title I Request and Council Tribal Resolution.”²¹⁶ Further, pursuant to the Bureau regulations, the Bureau is required to notify a tribe of any inadequacies in their proposals.²¹⁷ However, the Bureau never did so.²¹⁸

The Federal Circuit also disagreed with the CBCA’s holding that a contract could not have been formed because the Yurok Tribe requested funding for programs that the Bureau was not currently providing.²¹⁹ The Federal Circuit cited 25 U.S.C. § 450f(a)(1), stating that self-determination contracts could be awarded for all programs that “the Secretary is *authorized to administer*.”²²⁰ The court held that this definition did not exclude programs that the Bureau was not currently providing.²²¹ Therefore, Yurok Tribe’s proposal was not insufficient for including programs not currently provided by the Bureau.²²²

However, the Federal Circuit nevertheless affirmed the CBCA’s dismissal of Yurok Tribe’s claim for failure to state a claim because, as the Secretary had never awarded a contract to the Yurok Tribe, the case was a pre-award dispute outside the jurisdiction of the CBCA.²²³ Even if the proposal had been deemed approved, the Secretary still had not taken the second step, pursuant to the Bureau regulations, to award the contract.²²⁴ The Federal Circuit refused to find that a contract arose as a matter of law and stated that the Yurok Tribe still had recourse before the IBIA.²²⁵

3. *Significance*

The Federal Circuit’s opinion explains that an ISDA proposal does not become a contract as a matter of law after it is deemed approved and that ISDA contracts are also not awarded automatically.²²⁶

215. *Id.* at 1410.

216. *Id.*

217. *Id.* at 1411.

218. *Id.*

219. *Id.* at 1411–12.

220. *Id.* at 1411 (emphasis added) (citing 25 U.S.C. § 450f(a)(1)(B) (2012)).

221. *Id.* at 1411–13.

222. *Id.* at 1413.

223. *Id.*

224. *Id.*

225. *Id.* at 1414.

226. *Id.*

Further, it reiterates that a tribe's only recourse after submitting a proposal and before being awarded a contract is with the IBIA.²²⁷

II. BID PROTESTS

A. *Bannum, Inc. v. United States*

1. *Background*

In *Bannum, Inc. v. United States*,²²⁸ Bannum protested the Bureau of Prison's (BOP's) award of two contracts to other entities after Bannum objected to an amendment in the solicitation.²²⁹ The first solicitation was for a fixed-price requirements contract for the operation of a facility in Mississippi.²³⁰ Bannum and one other entity submitted offers.²³¹ After fifteen months, the BOP altered the solicitation and added an amendment requiring facilities to comply with the Prison Rape Elimination Act of 2003 (PREA).²³² While the other bidder signed the amendment and submitted a revised offer, Bannum wrote a letter labeled "Final Proposal Revision #3 and AGENCY PROTEST," restating its initial proposal and objecting to the compliance amendment.²³³ Bannum's letter stated that its prices "do not, and cannot, reflect any consideration for the effects of [the PREA compliance] Amendment."²³⁴ Bannum objected again when the Bureau of Prisons requested final offers.²³⁵ After an evaluation, the Bureau awarded the contract to the other entity.²³⁶

The second solicitation was for a similar contract in South Carolina, which was also subsequently amended to add the PREA compliance requirement.²³⁷ Bannum refused to price PREA compliance into its bid and stated that it "reserve[d] all rights to [requests for equitable adjustments], Claims, and Protests."²³⁸ After an evaluation, the Bureau awarded the contract to another entity.²³⁹

227. *Id.*

228. 779 F.3d 1376 (Fed. Cir. 2015).

229. *Id.* at 1378.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 1379.

238. *Id.*

239. *Id.*

Bannum filed two separate protests with the Government Accountability Office (GAO), arguing that the Bureau improperly evaluated the proposals on each contract, but the GAO denied both protests.²⁴⁰

Bannum filed two separate suits in the Court of Federal Claims on the same grounds, but with the new allegation that the PREA compliance requirement and lack of pricing guidance rendered the solicitation “materially defective.”²⁴¹ Bannum argued the solicitations were defective because they were amended to require defective PREA compliance, and the bids were improperly evaluated based on that requirement.²⁴² The Court of Federal Claims dismissed both cases, finding that Bannum was not an “interested party” in either suit because its bids were not in compliance with the solicitations.²⁴³

2. *The Federal Circuit’s decision*

The Federal Circuit consolidated the two claims and addressed Bannum’s two arguments, defective solicitation and improper evaluation, separately.²⁴⁴ On Bannum’s claim that the solicitation was defective, the Federal Circuit held that Bannum had waived its solicitation challenges by failing to object to the solicitation terms before the close of bidding.²⁴⁵ While Bannum objected to both PREA compliance amendments when submitting its final offers, the court held that “mere notice of dissatisfaction or objection is insufficient to preserve Bannum’s defective-solicitation challenge.”²⁴⁶ Bannum had the option, before the award of both contracts, to follow formal routes for protest, both outlined in the solicitations, either at the

240. *Id.* at 1378–79.

241. *Id.* at 1379; *see also* Bannum, Inc. v. United States, No. 14-40C, 2014 WL 1373739, at *1 (Fed. Cl. Apr. 8, 2014), *aff’d*, 779 F.3d 1376 (Fed. Cir. 2015); Bannum, Inc. v. United States, 115 Fed. Cl. 148, 150 (2014), *aff’d*, 779 F.3d 1376 (Fed. Cir. 2015).

242. *Bannum, Inc.*, 779 F.3d at 1378–79.

243. *See Bannum, Inc.*, 2014 WL 1373739, at *3–5; *Bannum, Inc.*, 115 Fed. Cl. at 150, 155–56.

244. *Bannum, Inc.*, 779 F.3d at 1378–80.

245. *Id.* at 1381; *see also* COMINT Sys. Corp. v. United States, 700 F.3d 1377, 1382 (Fed. Cir. 2012) (explaining that disappointed bidders must bring a challenge to a flawed solicitation before the contract is awarded); Blue & Gold Fleet, LP v. United States, 492 F.3d 1308, 1315 (Fed. Cir. 2007) (explaining that a party that does not object to a government solicitation before bidding is closed cannot later raise the same objection).

246. *Bannum, Inc.*, 779 F.3d at 1380.

agency level or with GAO.²⁴⁷ Further, Bannum did not challenge these options as “not practicable.”²⁴⁸ Therefore, because Bannum did not avail itself of pre-award remedies, the Federal Circuit held that it waived its ability to raise the same objection before the Court of Federal Claims.²⁴⁹ As such, the Federal Circuit did not reach the issue of whether Bannum was an “interested party” for purposes of standing.²⁵⁰

As to Bannum’s second argument, that the Bureau of Prisons’ evaluation of the proposals was improper, the Federal Circuit found that Bannum had failed to preserve those challenges on appeal.²⁵¹ Indeed, Bannum’s sole argument as to standing rested on its challenge to the Bureau’s solicitations.²⁵² Bannum argued that had the challenge to the solicitations been successful, the Bureau would have been required to rebid, and Bannum could have participated in solicitations.²⁵³ However, because Bannum did not argue against the Court of Federal Claims’ denial of standing on its improper evaluation argument, the Federal Circuit deemed the standing argument waived.²⁵⁴

3. Significance

This Federal Circuit decision reinforces the holding in *Blue & Gold Fleet, LP v. United States*²⁵⁵ that any challenges to the terms of a solicitation must be made before award of the contract.²⁵⁶ The challenge or objection should be a formal agency-level or GAO protest, rather than an oral or written objection, to best preserve the rights of the protester.²⁵⁷

247. *Id.* at 1380–81 (citing 4 C.F.R. § 21.2 (2015); *COMINT Sys. Corp.*, 700 F.3d at 1382–83).

248. *Id.* at 1381 (citing *COMINT Sys. Corp.*, 700 F.3d at 1382).

249. *Id.*; see also *Blue & Gold Fleet, LP*, 492 F.3d at 1315 (finding that a party that fails to object to a government solicitation before bidding is closed cannot later raise the same objection in the Court of Federal Claims).

250. *Bannum, Inc.*, 779 F.3d at 1381.

251. *Id.*

252. *Id.*

253. *Id.* at 1381–82.

254. *Id.* at 1382 (citing *Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1383 (Fed. Cir. 1999); *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990)).

255. 492 F.3d 1308, 1315 (Fed. Cir. 2007).

256. *Bannum, Inc.*, 779 F.3d at 1380 (citing *Blue & Gold Fleet, LP*, 492 F.3d at 1315).

257. *Id.* (citing *COMINT Sys. Corp. v. United States*, 700 F.3d 1377, 1382–83 (Fed. Cir. 2012)).

B. CGI Federal Inc. v. United States

1. Background

In *CGI Federal Inc. v. United States*,²⁵⁸ the protester filed a bid protest with GAO over payment terms in a request for quotations (RFQ) issued by the U.S. Department of Health and Human Services' Centers for Medicare and Medicaid Services ("CMS") without bidding on the Federal Supply Schedule ("FSS") contract.²⁵⁹ The FSS contract was for contractors to review Medicare claims for overpayment.²⁶⁰ If the contractor found an overpayment, CMS would pay the contractor a contingency fee upon collection.²⁶¹ In 2014, CMS issued an RFQ for these services, but included additional payment terms, stating that instead of being paid upon collection, contractors would be paid after a provider's challenge passed the second level of a five-level appeal.²⁶²

CGI did not bid on the contract.²⁶³ However, before the end of the bidding process, CGI filed a timely pre-award protest with GAO, challenging these new payment terms.²⁶⁴ Before GAO's decision, the bidding process closed.²⁶⁵ GAO subsequently denied CGI's protest.²⁶⁶ Three days later, CGI filed suit at the Court of Federal Claims on the same grounds.²⁶⁷

The Court of Federal Claims found that CGI had standing, but held that the new payment terms did not violate any statute or regulation or unduly restrict competition.²⁶⁸

2. The Federal Circuit's decision

The Federal Circuit agreed with the Court of Federal Claims on the issue of standing, finding that CGI met the definition of "interested

258. 779 F.3d 1346 (Fed. Cir. 2015).

259. *Id.* at 1347–48, 1352.

260. *Id.* at 1348.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *CGI Fed. Inc. v. United States*, 118 Fed. Cl. 337, 340, 356–57 (2014), *rev'd*, 779 F.3d 1346 (Fed. Cir. 2015).

party” pursuant to 28 U.S.C. § 1491(b)(1) when it filed its protest.²⁶⁹ Because § 1491(b)(1) does not contain a definition of “interested party,” the court relied on the definition of “interested party” in the Competition in Contracting Act (CICA).²⁷⁰

CICA states that an interested party is “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.”²⁷¹ To determine CGI’s status, the court considered four prior cases in which it had analyzed the meaning of the term “prospective bidder.”²⁷² In *MCI Telecommunications Corp. v. United States*,²⁷³ the court held that a party that has not submitted a bid must protest an outstanding solicitation in order to be a prospective bidder.²⁷⁴ Similarly, in *Federal Data Corp. v. United States*,²⁷⁵ the court ruled a party that withdraws from a bid prior to filing a protest is not a prospective bidder.²⁷⁶ Additionally, in *Rex Service Corp. v. United States*,²⁷⁷ the court further held that a party that chooses not to bid a solicitation nor timely protest an award is not a prospective bidder.²⁷⁸ Finally, in *Digitalis Education Solutions v. United States*,²⁷⁹ the court held that “the opportunity to become a prospective bidder ends when the proposal period ends.”²⁸⁰

As CGI never bid on the contract, the court found that it was not an actual bidder.²⁸¹ The parties did not dispute that CGI was a prospective bidder at the time it filed its GAO protest.²⁸² The court held that it was clear that CGI kept its prospective bidder status during the GAO protest because it was pursuing its challenge to the solicitation.²⁸³ Further, the court concluded that CGI did not lose its prospective bidder status in the three days between the denial of its

269. *CGI Fed., Inc.*, 779 F.3d at 1348, 1352 (citing 28 U.S.C. § 1491(b)(1) (2012)).

270. *Id.* at 1348 (citing 31 U.S.C. §§ 3551–56 (2012)); *see* 28 U.S.C. § 1491(b)(1) (granting jurisdiction to review claims of “interested part[ies]” without defining the term).

271. 31 U.S.C. § 3551(2).

272. *CGI Fed. Inc.*, 779 F.3d at 1348.

273. 878 F.2d 362 (Fed. Cir. 1989).

274. *Id.* at 364–65.

275. 911 F.2d 699 (Fed. Cir. 1990).

276. *Id.* at 702–05.

277. 448 F.3d 1305 (Fed. Cir. 2006).

278. *Id.* at 1308.

279. 664 F.3d 1380 (Fed. Cir. 2012).

280. *Id.* at 1385.

281. *CGI Fed. Inc. v. United States*, 779 F.3d 1346, 1348 (Fed. Cir. 2015).

282. *Id.* at 1349–50.

283. *Id.* at 1350.

protest at GAO and the date that CGI filed suit at the Court of Federal Claims because it filed for relief immediately.²⁸⁴

The Federal Circuit noted that ruling against CGI as a prospective bidder would negatively affect all prospective bidders.²⁸⁵ Pursuant to 4 C.F.R. section 21.11(b), a GAO protest cannot proceed when the same suit is before “a court of competent jurisdiction,” like the Court of Federal Claims.²⁸⁶ The court explained, “It would be virtually impossible to file a timely GAO protest, wait for a GAO decision, and then file a protest in the Court of Federal Claims prior to the close of bidding.”²⁸⁷ Because CGI actively pursued its protest rights at GAO and, upon GAO’s denial, immediately filed suit at the Court of Federal Claims, the Federal Circuit held that it was a prospective bidder when it filed this suit.²⁸⁸

Further, the court held that CGI had a direct economic interest in the award of the contract because, instead of bidding, CGI protested the solicitation for including payment terms that were contrary to applicable laws and regulations.²⁸⁹

On the merits, the Federal Circuit held because the payment terms were within RFQs issued under a FSS contract, Federal Acquisitions Regulation (FAR) Part 12’s prohibition against contract terms “inconsistent with customary commercial practice” applied.²⁹⁰ Because the revised payment terms were inconsistent, the Federal Circuit remanded the case to the Court of Federal Claims.²⁹¹

3. *Significance*

This decision clarifies the definition of “prospective bidder” for purposes of standing before the Court of Federal Claims, explaining that as long as a bidder “diligently pursue[s]” its claim at the GAO and then at the court after a GAO denial, the bidder retains its “prospective bidder” status.²⁹² While the Federal Circuit has not set

284. *Id.*

285. *Id.* at 1351.

286. *Id.* (citing 4 C.F.R. § 21.11(b) (2015)).

287. *Id.* (explaining that because both a Government Accountability Office (GAO) protest and Federal Claims suit cannot occur simultaneously, the length of time required to resolve a GAO protest is likely to leave a party insufficient time or no time to then file a timely protest at the Court of Federal Claims).

288. *Id.*

289. *Id.*

290. *Id.* at 1352–54.

291. *Id.* at 1354.

292. *Id.* at 1351.

definite parameters as to what constitutes a diligent pursuit of a Court of Federal Claims claim, the sooner a claim is filed, the better.

C. Colonial Press International, Inc. v. United States

1. Background

In *Colonial Press International, Inc. v. United States*,²⁹³ Colonial Press International, Inc., a small business bidder, brought a post-award bid protest of the Government Printing Office (GPO)'s award of a contract to the second lowest bidder after finding Colonial Press's lowest-price bid non-responsible.²⁹⁴ The GPO issued an invitation for bids for a printing order for the U.S. Department of Health & Human Services.²⁹⁵ The GPO received nine bids, with Colonial Press as the lowest price bidder and Fry Communications, Inc. as the second lowest price bidder.²⁹⁶

The GPO reviewed Colonial Press's past performance completing federal contracts in making its responsibility determination.²⁹⁷ Although Colonial Press was late on only six percent of deliveries in a thirteen-month period, three months before the solicitation, Colonial Press had three late deliveries in a one-month period.²⁹⁸ As such, the GPO contracting officer (CO) recommended no award.²⁹⁹ Colonial Press subsequently attempted to explain that one of the noted late deliveries was actually on time.³⁰⁰ However, the GPO CO found sufficient evidence of non-responsibility to recommend no award.³⁰¹

Colonial Press filed a bid protest with GAO, arguing that GPO was required to refer the non-responsibility determination to the Small Business Administration (SBA) for final review pursuant to the SBA's Certificate of Competency Program's requirements.³⁰² The GAO determined that the GPO is not subject to the requirement of the Certificate of Competency Program and that the CO was warranted in

293. 788 F.3d 1350 (Fed. Cir. 2015).

294. *Id.* at 1352–54. Government Printing Office (GPO) procedures require a determination of the responsibility of the bidder, which includes consideration of both the bidder's completion of previous federal contracts and ability to comply with the proposed contract. *Id.* at 1352–53.

295. *Id.* at 1352.

296. *Id.*

297. *Id.* at 1353.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 1354 (citing 15 U.S.C. § 637(b)(7) (2012); 13 C.F.R. § 125.5 (2015)).

its determination.³⁰³ Colonial Press appealed to the Court of Federal Claims,³⁰⁴ and then to the Federal Circuit.³⁰⁵

2. *The Federal Circuit's decision*

The Federal Circuit affirmed the GAO and the Court of Federal Claims decision that the GPO was not required to refer its responsibility determination to the SBA's COC program because it is a legislative agency.³⁰⁶ The Small Business Act states, in relevant part, that SBA shall

certify to [g]overnment procurement officers, and officers engaged in the sale and disposal of [f]ederal property, with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a specific [g]overnment contract. A [g]overnment procurement officer or an officer engaged in the sale and disposal of [f]ederal property may not, for any reason specified in the preceding sentence preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the [SBA].³⁰⁷

The Federal Circuit stated that the applicability of this section of the Small Business Act depended on whether the GPO fell under the definitions of “[g]overnment procurement officer” and “[g]overnment contract.”³⁰⁸ Neither term is defined in the Act.³⁰⁹

However, the Federal Circuit noted that “[g]overnment procurement contract” is defined in 15 U.S.C. § 637c(3) as “any contract for the procurement of any goods or services by any [f]ederal agency.”³¹⁰ The court explained that the term “[f]ederal agency” has been defined in different parts of the United States Code as excluding the U.S. Postal Service, the GAO,³¹¹ and “the Congress.”³¹²

303. *Id.* at 1355; Colonial Press Int'l., Inc., B-408031, 2013 WL 1898787, at *2–3 (Comp. Gen. May 6, 2013).

304. Colonial Press Int'l., Inc. v. United States, 113 Fed. Cl. 497 (2013), *aff'd*, 788 F.3d 1350 (Fed. Cir. 2015).

305. *Colonial Press Int'l.*, 788 F.3d at 1355.

306. *Id.* at 1352, 1356–57.

307. *Id.* at 1356 (citing 15 U.S.C. § 637(b)(7)).

308. *Id.*

309. *Id.*

310. *Id.* at 1356–57 (citing 15 U.S.C. § 637c(3)).

311. *Id.* at 1357 (citing 15 U.S.C. § 632(b)).

312. *Id.* (citing 15 U.S.C. § 637c(2) 551(1)).

Further, the court noted that the GAO, the GPO, and SBA have never subjected the GPO to the SBA's Certificate of Competency Program.³¹³ Therefore, the court found that GPO was not an "agency," its contracts were not "government procurement contract[s],"³¹⁴ and that it was, therefore, not required to refer its determination of Colonial Press's non-responsibility to the SBA.³¹⁵ The court also found that there was a rational basis for SBA's evaluation of the last three months of Colonial Press's performance because agencies have wide discretion in making responsibility determinations.³¹⁶

3. *Significance*

The Federal Circuit's determination that small business responsibility determinations by GPO need not be referred to SBA significantly affects other judicial or legislative offices that solicit bids for government contracts.³¹⁷ Some agencies that solicit bids from small business contractors, such as the Congressional Budget Office or Congressional Research Service, are not subject to reviews by SBA's Certificate of Competency Program because they are legislative agencies and not federal agencies.³¹⁸

D. *Palladian Partners, Inc. v. United States*

1. *Background*

In *Palladian Partners, Inc. v. United States*,³¹⁹ there was a discrepancy over which National American Industry Classification System (NAICS) code, a code that determines the maximum size for a business to qualify for a particular solicitation, was applicable.³²⁰

313. *Id.* at 1357–58.

314. *Id.* at 1357.

315. *Id.* at 1352, 1356–58.

316. *Id.* at 1358.

317. *See id.* at 1354–58 (interpreting "[g]overnment procurement officers" as not including those that are contracting for legislative agencies, such as the GPO, and are exempt from any required Small Business Administration (SBA) determinations). The court explains that even if the legislative agency is contracting for an executive agency (as in this case), the legislative agency is still exempt from SBA determination requirements. *Id.* at 1357.

318. *See id.* at 1356–58 (excluding any agency under Congress's direction from SBA requirements). The court also notes that its holding is consistent with GAO, GPO, and SBA interpretations of the Small Business Act. *Id.* at 1357–58.

319. 783 F.3d 1243 (Fed. Cir. 2015).

320. *Id.* at 1246–47.

The National Institute on Drug Abuse (NIDA) issued a solicitation as a small-business set-aside under NAICS code 541712, which is limited to businesses with 500 employees or fewer.³²¹ A prospective offeror, Information Ventures, Inc., disagreed with the NAICS code and filed a pre-award bid protest with SBA's OHA pursuant to SBA regulations, asking OHA to amend the solicitation and change the NAICS code to 541611.³²² Under this new code, Palladian would not qualify.³²³ According to SBA regulations, the decision of OHA is final and is not subject to reconsideration.³²⁴ Upon OHA's final decision, the contracting officer is required to amend the solicitation with the new NAICS code.³²⁵

Upon filing the OHA appeal, the CO notified potential offerors of the appeal by updating the solicitation.³²⁶ Palladian received notice of the appeal but did not respond or seek to intervene.³²⁷

OHA granted Information Ventures' appeal and concluded that the second suggested NAICS code, 541611, was the appropriate code for the solicitation.³²⁸ Pursuant to the SBA's regulations, the CO amended the solicitation accordingly.³²⁹

Palladian then appealed the new NAICS code to OHA, arguing that it was inappropriate.³³⁰ Under the new code, Palladian was ineligible to compete.³³¹ Palladian argued that another NAICS code, different from both the original code and the new code, was

321. *See id.* at 1246 (noting that National American Industry Classification System (NAICS) code 541712 corresponds to a research and development company of no greater than 500 employees and Palladian was qualified under that code). A small business set-aside occurs when a solicitation only accepts bids from small businesses. 48 C.F.R. § 2919.502 (2015). The NAICS code determines the maximum size a small business must be to qualify for the particular solicitation. *Palladian Partners, Inc.*, 783 F.3d at 1247.

322. NAICS code 541611 corresponds with administrative and consulting services and has a small business cap no more than "\$14 million average annual receipts." *See Palladian Partners, Inc.*, 783 F.3d at 1248–49.

323. *Id.*

324. 13 C.F.R. § 134.316(d), (f) (2015).

325. 13 C.F.R. § 134.318(b).

326. *Palladian Partners, Inc.*, 783 F.3d at 1248.

327. *Id.*

328. *Id.* at 1249.

329. *Id.*

330. *Id.* at 1249–50.

331. *Id.* at 1250.

appropriate for the solicitation.³³² OHA denied Palladian's appeal, finding that Palladian had failed to exhaust administrative remedies by electing not to participate in Information Ventures' OHA appeal.³³³

On appeal, the Court of Federal Claims reversed, holding that the NAICS code change was arbitrary and capricious because the contracting officer "blindly accept[ed]" OHA's determination without exercising any independent discretion.³³⁴ The government appealed to the Federal Circuit.³³⁵

2. *The Federal Circuit's decision*

After first finding that the Court of Federal Claims had Tucker Act jurisdiction over this matter,³³⁶ the Federal Circuit agreed with SBA and determined that Palladian had not exhausted administrative remedies as it had failed to intervene in Information Ventures' OHA appeal.³³⁷ The SBA's regulations state that "[t]he OHA appeal is an administrative remedy that *must* be exhausted before judicial review of a NAICS code designation may be sought in a court"³³⁸ and that "[a]ny person served with an appeal petition, any intervenor, or any person with a general interest in an issue raised by the appeal may file and serve a response supporting or opposing the appeal."³³⁹ Taken together with the regulation stating that OHA's decision is final and not subject to reconsideration, the Federal Circuit held that "any interested party *who participated in the pending OHA appeal for the solicitation* can seek judicial review of OHA's NAICS code determination."³⁴⁰

Because Palladian did not participate in Information Ventures' challenge of the original NAICS code, the Federal Circuit held that it was barred from seeking relief.³⁴¹ The court declined to excuse

332. *See id.* at 1249–50 (noting that Palladian argued that the correct NAICS code for the solicitation was 519130, which corresponded to companies of no more than 500 employees that perform Internet services or website development).

333. *Id.* at 1250.

334. *Palladian Partners, Inc. v. United States*, 119 Fed. Cl. 417, 443 (2014), *rev'd*, 783 F.3d 1243 (Fed. Cir. 2015).

335. *Palladian Partners, Inc.*, 783 F.3d at 1252.

336. *Id.* at 1252–54 ("As long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction." (citing *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999))).

337. *See id.* at 1257–58 (emphasizing that Palladian's argument seeking to apply an entirely new NAICS code to the solicitation would open the door for any third party to cite another code designation protest an OHA decision).

338. *Id.* at 1255 (citing 13 C.F.R. § 121.1102 (2015)).

339. *Id.* at 1257 (citing 13 C.F.R. § 134.309(a)).

340. *Id.* (emphasis added) (citing 13 C.F.R. § 121.1102).

341. *Id.* at 1258, 1261.

Palladian's failure to exhaust administrative remedies, regardless of whether Palladian was arguing for a new NAICS Code.³⁴² Palladian had been informed about the pending NAICS code appeal to OHA and was invited to comment prior to OHA's final determination; therefore, Palladian had constructive notice that it could have been adversely affected, and thus should have responded.³⁴³ Further, the court reemphasized that, as a policy matter, if Palladian were allowed to appeal the new NAICS code after OHA's determination, then potential offerors could continuously re-litigate NAICS codes.³⁴⁴

3. *Significance*

The Federal Circuit has made clear that any potential offerors on a solicitation who may seek to challenge either the original NAICS code or an amended NAICS code must participate in a OHA appeal regarding the appropriateness of the NAICS code.³⁴⁵ As a change in NAICS codes can exclude certain entities by specifying the number of employees or annual receipts that a company may have, it is in every prospective offeror's best interest to participate in an OHA appeal regarding NAICS codes, even when the prospective offeror is satisfied with the original NAICS code.³⁴⁶

E. *Raytheon Co. v. United States*

1. *Background*

In *Raytheon Co. v. United States*,³⁴⁷ Raytheon, the initial winning bidder, protested the U.S. Air Force's decision to take corrective action and reopen its decision after finding that it had inadvertently given bidders disparate information.³⁴⁸ The Air Force solicited bids for a radar system and required that bidders include in their bid detailed cost estimates as well as ways the bidder could reduce those costs but still complete the contract tasks.³⁴⁹ The Air Force repeatedly

342. *Id.* at 1258.

343. *See id.* at 1258, 1260–61 (noting that, by failing to participate in the appeal and later proposing a new NAICS code, Palladian defeated the purpose of administrative exhaustion by depriving the OHA of the opportunity to apply its expertise in reviewing the proposed NAICS codes and in developing an administrative record for judicial review).

344. *Id.* at 1261.

345. *Id.* at 1258–61.

346. *Id.* at 1249–50.

347. 809 F.3d 590 (Fed. Cir. 2015).

348. *Id.* at 593–95.

349. *Id.* at 592–93.

explained that it would scrutinize cost estimates and proposed reductions to find a responsible bidder with a realistic price.³⁵⁰

Raytheon Company, Northrop Grumman Systems Corporation, and Lockheed Martin Corporation submitted bids.³⁵¹ After reviewing the bids, the Air Force sent evaluation notices to Raytheon and Northrop regarding the treatment of independent research and development (IR & D) costs.³⁵² These notices stated that the FAR and 10 U.S.C. § 2320 do not permit contractors to use IR & D costs as cost reductions on this contract.³⁵³

While Northrop Grumman did not object to the Air Force's statement, Raytheon did.³⁵⁴ Raytheon argued that the Federal Circuit's opinion in *ATK Thiokol, Inc. v. United States*³⁵⁵ allowed IR & D costs for research and development "unless specifically required by the contract."³⁵⁶

The Air Force agreed with Raytheon's interpretation of IR & D costs and communicated to Raytheon that IR & D costs were allowable.³⁵⁷ However, the Air Force never communicated this to Northrop Grumman.³⁵⁸

Raytheon's final proposal included "proposed IR & D cost reductions" while the Northrop Grumman's did not.³⁵⁹ Because Raytheon offered the lowest, Best Value Assessment, the Air Force awarded Raytheon the contract.³⁶⁰

350. *Id.*

351. *Id.*

352. *See id.* at 593 (explaining that both Raytheon and Northrop Grumman, as part of its cost-reduction proposal, billed certain costs as independent research and development (IR & D)). IR & D costs are costs incurred by a contractor for basic research and development that does not directly support any particular contract, but could benefit multiple contracts; thus, a contractor identifying IR & D costs could spread those costs across multiple contracts and, thereby, lower costs for any particular contract. *Id.*; 48 C.F.R. § 31.205-18 (2015); 48 C.F.R. § 9904.402.

353. *See Raytheon Co.*, 809 F.3d at 593 (noting that the U.S. Air Force told Raytheon and Northrop Grumman that they could not claim work that was implicitly or explicitly required by the contract as IR&D costs because it was prohibited by the Federal Acquisitions Regulation (FAR)).

354. *Id.* at 593.

355. 598 F.3d 1329 (Fed. Cir. 2010).

356. *Raytheon Co.*, 809 F.3d at 593-94 (quoting *Raytheon Co. v. United States*, 121 Fed. Cl. 135, 143-45 (2015), *aff'd*, 809 F.3d 590 (Fed. Cir. 2015)); *see Raytheon Co.*, 121 Fed. Cl. at 143 (noting that the Air Force concluded that Raytheon had "substantiated their [sic] initiatives" for cost reductions).

357. *Raytheon Co.*, 809 F.3d at 594.

358. *Id.*

359. *Id.* (quoting *Raytheon Co.*, 121 Fed. Cl. at 167).

360. *Id.*

Both Northrop Grumman and Lockheed Martin filed protests with GAO on multiple grounds, including unequal treatment because of the disparate information on IR & D costs.³⁶¹ After discussions at GAO, the Air Force took corrective action by informing all bidders that it was accepting revised proposals and clarifying its position on IR & D costs.³⁶²

Subsequently, Raytheon challenged the Air Force's decision to reopen bid discussions in the Court of Federal Claims.³⁶³ However, the court came to a similar conclusion that the Air Force engaged in "misleading and unequal discussions" that prejudiced Northrop Grumman.³⁶⁴ Raytheon appealed to the Federal Circuit.³⁶⁵

2. *The Federal Circuit's decision*

The Federal Circuit affirmed the Court of Federal Claims' holdings on appeal, holding that the Air Force violated the FAR when it failed to provide notice to Northrop Grumman that it had changed its position on IR & D costs.³⁶⁶

The court found that the violation provided a rational basis for the government to conclude Northrop Grumman was prejudiced because, but for the violation, there was a "substantial chance" that Northrop Grumman could have won the contract.³⁶⁷ The Federal Circuit held that the Air Force's decision to take corrective action was rational because the Air Force's disparate communications were of "potentially great importance to the bidder's final bidding decisions."³⁶⁸ The Federal Circuit used the standard of "rational basis," the standard under the Administrative Procedure Act and for agency corrective actions, to determine whether to uphold the bid reopening.³⁶⁹

361. *Id.* In its protest, Northrop Grumman argued that it would have submitted a different proposal with more cost reductions if it had known that IR & D costs were allowed. *Raytheon Co.*, 121 Fed. Cl. at 146.

362. *Raytheon Co.*, 809 F.3d at 594–95.

363. *Id.* at 595.

364. *See Raytheon Co.*, 121 Fed. Cl. at 164–65, 167 (holding that the FAR does not allow agencies to communicate "incorrect, confusing, or ambiguous" information, and the FAR requires agencies to inform offerors when it knows that an offeror's interpretation of a solicitation is meaningfully inconsistent with that of its own and that of a successful offeror).

365. *Raytheon Co.*, 809 F.3d at 595.

366. *Id.* at 596.

367. *Id.* at 597.

368. *Id.* at 596.

369. *See id.* at 595–96 (holding that the Air Force was free to reopen the bid as long as the GAO's determination had a rational basis).

The Federal Circuit also held that the Air Force violated 48 C.F.R. section 15.306(e)(1), which prohibits government personnel involved in the acquisition from engaging in “conduct that . . . [f]avors one offeror over another.”³⁷⁰ The Federal Circuit interpreted that regulation in the context of competitive bidding to “require[] that the agency avoid giving materially disparate information to bidders on matters that could easily affect their decisions about important aspects of the final competing offers that the agency will be comparing.”³⁷¹

The Federal Circuit found that the Air Force violated this regulation when it communicated critical IR & D cost guidance to both bidders and then changed its position without notifying Northrop Grumman.³⁷² This cost accounting provision was important to each bidder’s bottom line and, thus, the disparate information favored Raytheon.³⁷³

Further, the Federal Circuit held that Northrop Grumman was prejudiced by the Air Force’s actions.³⁷⁴ In doing so, the court first held that the Court of Federal Claims was correct in relying upon the GAO attorneys’ finding of prejudice because it is presumed, notwithstanding evidence to the contrary, that government officials apply their agency’s legal standards when deciding issues.³⁷⁵ On the merits, the court examined the confidential record, which provided evidence that Northrop Grumman would have decreased its bid if it had known about the treatment of IR & D costs.³⁷⁶

The court rejected Raytheon’s argument that Northrop Grumman was barred from challenging the Air Force’s IR & D cost position because it did not object to it before the contract was awarded.³⁷⁷ The giving of disparate information was not a challenge to the terms of the

370. *Id.* at 596 (quoting 48 C.F.R. § 15.306(e)(1) (2015)).

371. *Id.* (citing *AshBritt, Inc. v. United States*, 87 Fed. Cl. 344, 368–69 (2009); *Metcalf Constr. Co. v. United States*, 53 Fed. Cl. 617, 625, 633–35 (2002); *Dynacs Eng’g Co. v. United States*, 48 Fed. Cl. 124, 133–34 (2000)).

372. *Id.*

373. *Id.*

374. *Id.* at 597.

375. *Id.* at 596–97 (citing *Nat’l Archives & Records Admin v. Favish*, 541 U.S. 157, 174 (2004); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926); *PowerOasis, Inc. v. T-Mobile USA, Inc.*, 522 F.3d 1299, 1304 (Fed. Cir. 2008)).

376. *Id.* at 597–98.

377. *Id.* (noting that the general rule is if a bidder does not object any particular terms of a given solicitation prior to contract award, the bidder waives the right to challenge that term after an award is made).

solicitation, which requires a challenge before contract award.³⁷⁸ Moreover, Northrop Grumman did not have reason to know of the disparate information violation until the post-solicitation discussions.³⁷⁹

The court also rejected Raytheon's argument that bidders should have known that the IR & D announcement was invalid because it clearly contradicted the FAR.³⁸⁰ The court held that Raytheon's argument could only be successful if it could prove that the Air Force's position regarding IR & D costs would not have mattered to bidders' proposals.³⁸¹ Because Raytheon did not meet this burden of proof, the court rejected the argument.³⁸²

Finally, the Federal Circuit rejected Raytheon's argument that Northrop Grumman was not prejudiced because it would not have taken advantage of IR & D cost reductions.³⁸³ Furthermore, the court held that the GAO attorney and the Air Force had "sufficient reason" to find that Northrop Grumman would have made changes to its final offer if it had known of the Air Force's position on IR & D costs.³⁸⁴

Therefore, the Federal Circuit found that the Air Force's decision to take corrective action was proper.³⁸⁵

3. *Significance*

The Federal Circuit's decision allows a bidder to challenge a disparate communication between the agency and the initial winning bidder after a contract has been awarded.³⁸⁶ Further, the decision shows the court's inclination to give deference to GAO attorneys' determinations of prejudice to the bidder.³⁸⁷

378. *See id.* at 598 (emphasizing that Northrop Grumman would have not have known pre-award that the Air Force changed its position on IR & D costs).

379. *Id.*

380. *See id.* (noting that Raytheon argued since the law was settled on this question, all parties had the same information and, thus, there was no disparate treatment).

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.* at 598–99.

385. *Id.* at 599.

386. *Id.* at 596–97.

387. *Id.* at 596–97, 599.

F. Tinton Falls Lodging Realty, LLC v. United States

1. Background

In *Tinton Falls Lodging Realty, LLC v. United States*,³⁸⁸ Tinton Falls protested the award of a small business set-aside contract to DMC Management Services (“DMC”), arguing that DMC planned to use other-than-small subcontractors to perform the primary and vital requirements of the contract, thereby violating the ostensible subcontractor rule.³⁸⁹

The solicitation was for the management and coordination of lodging and transportation for trainees at the Military Sealift Command (“MSC”).³⁹⁰ The contractor’s responsibilities were to arrange for rooms at hotels, provide transportation from the hotels to the training facilities, forward any police reports regarding illegal activity to MSC, provide emergency medical treatment and transportation to trainees, and maintain a sign-in record at hotel check-ins.³⁹¹ MSC explicitly stated that the number of hotel rooms and amount of transportation per day would vary and that the contractor would be responsible to accommodate all trainees.³⁹² MSC also explicitly stated that it would only be financially responsible for the actual number of hotel rooms used and trips taken.³⁹³

MSC evaluated bidders based on technical requirements, past performance, and price.³⁹⁴ Technical requirements were evaluated using four subfactors: general requirements of the hotels, fire and safety policies, health and sanitation, and transportation from the hotel and the training facility.³⁹⁵

While MSC received a number of proposals on this solicitation, it found that none were technically acceptable.³⁹⁶ MSC eventually accepted the lowest-price, technically acceptable revised bid of Mali, Inc.³⁹⁷ After a size protest, SBA determined that Mali, Inc. was affiliated with Hotels Unlimited, Inc., which had annual receipts of over \$30 million, and therefore did not qualify as a small business.³⁹⁸

388. 800 F.3d 1353 (Fed. Cir. 2015).

389. *Id.* at 1356–57.

390. *Id.* at 1355.

391. *Id.* at 1355–56.

392. *Id.* at 1355.

393. *Id.*

394. *Id.* at 1356.

395. *Id.*

396. *See id.* (noting that the record did not specify a clear reason as to why none of the proposals were technically acceptable).

397. *Id.*

398. *Id.*

MSC then awarded the contract to DMC, the next lowest-price, technically acceptable offeror.³⁹⁹

Tinton Falls filed a size protest against DMC with the MSC contracting officer under the ostensible subcontractor rule, which treats the prime contractor and subcontractor as “joint venturers” for size determination purposes when a subcontractor “performs primary and vital requirements of a contract” or is a subcontractor upon which the prime contractor is “unusually reliant.”⁴⁰⁰ Tinton Falls argued that DMC was “unusually reliant” on its subcontractors to perform the lodging, which was a “primary and vital requirement[] of the contract,” and therefore violated the ostensible subcontractor rule.⁴⁰¹ Indeed, DMC intended to subcontract the lodging services portion of the contract to other-than-small hotels.⁴⁰² However, the MSC contracting officer found that the primary and vital requirements of the contract were the management and coordination of the hotel and transportation, rather than the actual lodging itself.⁴⁰³ Because DMC intended to perform these primary requirements itself, the MSC contracting officer did not find a violation of the ostensible subcontractor rule.⁴⁰⁴ Tinton Falls then appealed to the SBA.⁴⁰⁵

Concomitantly, the MSC contracting officer filed an SBA size protest against Tinton Falls and two other bidders due to their affiliation with Hotels Unlimited.⁴⁰⁶ SBA sustained the protest and found that none of the three entities, including Tinton Falls, were eligible for award under the small business set-aside contract.⁴⁰⁷

Tinton Falls appealed its size protest against DMC to the Court of Federal Claims, which found that SBA had a rational basis for concluding that the primary and vital requirements of the solicitation were management and coordination of the hotels, transportation, and services.⁴⁰⁸ Tinton Falls appealed to the Federal Circuit.⁴⁰⁹

399. *Id.*

400. *Id.* (citing 13 C.F.R. § 121.103(h)(4) (2015)).

401. *Tinton Falls*, 800 F.3d at 1357.

402. *Id.* at 1356–57.

403. *Id.* at 1357.

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

2. *The Federal Circuit's decision*

The Federal Circuit affirmed the SBA's determination that the primary and vital requirement of the contract was management and coordination of hotel and transportation services and found that SBA had a rational basis for this finding.⁴¹⁰

First, the Federal Circuit examined the issue of Tinton Falls' standing, namely whether there was a "substantial chance" it would have received the contract award but for an alleged error in the procurement process.⁴¹¹ The court relied on *Impresa Costruzioni Geom. Domenico Garufi v. United States*,⁴¹² which held that a bid protestor can establish standing if, upon a successful protest, the government would have to reopen the bidding process.⁴¹³ The Federal Circuit held that if Tinton Falls had been successful in showing DMC violated the ostensible subcontractor rule, disqualifying DMC from being awarded the contract, there would be no eligible small businesses with technically acceptable proposals to which MSC could award the contract.⁴¹⁴ Therefore, MSC would be obligated to reopen the bidding process, either as a small business set-aside or on an unrestricted basis.⁴¹⁵ Because the court found that Tinton Falls would have a substantial chance of receiving the contract if it were solicited on an unrestricted basis, it found that Tinton Falls had standing.⁴¹⁶

On the merits, the Federal Circuit affirmed the SBA's determination that the management and coordination of hotel and transportation services were vital and primary requirements of the solicitation.⁴¹⁷ Even though the solicitation did not specifically identify management and coordination as tasks in the solicitation, and the NAICS code associated with the solicitation was for "Hotels," the court held that the requested task was to ensure that there would be enough hotel rooms and transportation available for trainees on short notice.⁴¹⁸

410. *Id.* at 1358, 1363.

411. *Id.* at 1358.

412. 238 F.3d 1324 (Fed. Cir. 2001).

413. *Tinton Falls*, 800 F.3d at 1359 (citing *Impresa Costruzioni*, 238 F.3d at 1334).

414. *Id.*

415. *Id.* (noting Military Sealift Command's admission that if the protest were successful, there was a realistic possibility that the contract would be solicited on an unrestricted basis).

416. *Id.* at 1360.

417. *Id.* at 1363.

418. *Id.*

3. *Judge Reyna's dissent*

Judge Reyna dissented, arguing that Tinton Falls did not have a “substantial chance” of receiving the contract because it was found to be other-than-small and was not qualified to bid on a small business set-aside contract.⁴¹⁹ Further, Judge Reyna noted that the record showed two other small businesses with lower bids who would have been next in line for the contract even if MSC rebid the contract as unrestricted.⁴²⁰ Therefore, he found that Tinton Falls did not have standing, and the court therefore did not need to reach the merits of the case.⁴²¹

4. *Significance*

This Federal Circuit opinion allows an unqualified other-than-small business to protest the award of a small business set-aside contract when, if the protest is successful, no qualified small businesses would be eligible for award.⁴²² As long as there is a realistic possibility that the government may rebid the contract as unrestricted, the Federal Circuit holds that the qualified other-than-small business has a “substantial chance” to be awarded the contract, and therefore has standing to protest.⁴²³

III. ATTORNEY FEES

A. *SUFI Network Services, Inc. v. United States*

1. *Background*

In *SUFI Network Services, Inc. v. United States*,⁴²⁴ SUFI succeeded on a breach of contract suit against the Air Force at the Armed Services Board of Contract Appeals (ASBCA).⁴²⁵ SUFI then filed a claim for attorney fees with the contracting officer,⁴²⁶ and after six months of silence, SUFI bypassed the ASBCA and filed its claim for attorney fees with the Court of Federal Claims.⁴²⁷

419. *Id.* at 1365 (Reyna, J., dissenting).

420. *Id.* at 1364–65.

421. *Id.* at 1363.

422. *Id.* at 1365.

423. *Id.*

424. 785 F.3d 585 (Fed. Cir. 2015).

425. *Id.* at 588.

426. *Id.*

427. *Id.*

SUFI's contract was with the Air Force Nonappropriated Funds Purchasing Office for telephone systems on Air Force bases.⁴²⁸ In a proceeding before the ASBCA in 2004, the Air Force was found to be in material breach of its contract with SUFI.⁴²⁹ Thereafter, the parties entered into a Partial Settlement Agreement, whereby the Air Force agreed to pay SUFI damages based on its material breach, and agreed that SUFI had the right to pursue further claims arising from the material breach.⁴³⁰ The parties also agreed that the Air Force would pay SUFI interest from the date of receipt of any successful claims.⁴³¹

SUFI requested attorney fees in connection with claims arising from the breached contract.⁴³² However, because SUFI and its attorneys had agreed to a contingency fee arrangement, SUFI was unable to request a specific amount of attorney fees.⁴³³ Therefore, the ASBCA declined to decide whether SUFI was entitled to attorney fees.⁴³⁴

After the ASBCA proceeding, SUFI filed a claim for attorney fees with the Air Force CO under the contract's disputes clause and requested a decision within sixty days.⁴³⁵ The disputes clause requires the CO to issue a written decision on any dispute or claim on the contract.⁴³⁶ The clause also stated that SUFI had ninety days from receipt of the CO's final decision to appeal to the ASBCA.⁴³⁷

However, for over six months, the Air Force contracting officer did not respond to SUFI's numerous requests for a decision on the attorney fees claim.⁴³⁸ Air Force counsel stated that SUFI could consider its claim for attorney fees "deemed deni[ed]."⁴³⁹

SUFI then filed suit at the Court of Federal Claims, seeking attorney fees and interest.⁴⁴⁰ The government filed a motion to dismiss, arguing that SUFI failed to exhaust its contractual remedy under the contract's disputes clause because it did not bring this

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.* at 589 (noting that Sufi asked the Armed Services Board of Contract Appeals for compensation but was only awarded "claim preparation and non-legal consultant expenses").

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.* at 588.

437. *Id.*

438. *Id.*

439. *Id.* at 589.

440. *Sufi Network Servs., Inc. v. United States*, 113 Fed. Cl. 140, 143 (2013).

claim before the ASBCA.⁴⁴¹ The court awarded SUFI reasonable attorney fees as well as interest from the time the attorneys began claim preparation.⁴⁴² However, the court denied SUFI's claim for overhead and lost profits.⁴⁴³ Both parties appealed.⁴⁴⁴

2. *The Federal Circuit's decision*

The Federal Circuit affirmed the award of attorney fees, but did not award SUFI interest.⁴⁴⁵ The Federal Circuit also awarded SUFI its costs for overhead and lost profits.⁴⁴⁶

The Federal Circuit first found that it had Tucker Act jurisdiction over the claim and applied common law and not the Contract Disputes Act to the case because there was no final decision by a CO.⁴⁴⁷ On the issue of exhaustion of contractual remedies, the court held that the CO's six-month delay was evidence that the officer was "unwilling[] to act,"⁴⁴⁸ and that SUFI's contractual remedy, the appeal procedure, was "inadequate or unavailable."⁴⁴⁹ SUFI's remedy under the contract's disputes clause stated that SUFI could only appeal to the ASBCA once it received a CO's final decision.⁴⁵⁰ The CO's failure to act prevented SUFI from accessing the ASBCA;⁴⁵¹ therefore, SUFI had the right to bypass the ASBCA and bring suit before the Court of Federal Claims.⁴⁵² The Federal Circuit also noted that Air Force counsel's written statement that SUFI should consider the claim "denied" came long after the appeal procedure had been rendered "inadequate or unavailable."⁴⁵³

The court affirmed the Court of Federal Claims and awarded SUFI attorney fees, finding that, under common law, SUFI was entitled to be placed in the position it would have been in if the contract had

441. *Id.* at 145.

442. *Id.* at 149.

443. *Sufi Network Servs., Inc.*, 785 F.3d at 589.

444. *Id.*

445. *Id.* at 592–93.

446. *Id.* at 595.

447. *Id.* at 590.

448. *Id.* at 591 (citing *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 430 (1966)).

449. *Id.* at 590 (citing *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234, 240 (1946)).

450. *Id.*

451. *Id.* at 591.

452. *See id.* at 590 (citing *N.Y. Shipbuilding Corp. v. United States*, 385 F.2d 427, 437 (Ct. Cl. 1967)).

453. *Id.* at 591.

been fully performed.⁴⁵⁴ The court concluded that the Court of Federal Claims' calculation of attorney fees using the lodestar method and a standard hourly rate was reasonable.⁴⁵⁵ It thus rejected the government's argument that the hourly rate should have been the rate charged by the attorneys before they entered into a contingency fee arrangement with SUFI.⁴⁵⁶

On the issue of interest on the attorney fees, the Federal Circuit disagreed with the Court of Federal Claims and did not award interest.⁴⁵⁷ To receive interest on attorney fees, SUFI must have actually incurred attorney fees when its attorneys began work.⁴⁵⁸ However, SUFI entered into a contingency fee arrangement with its attorneys before claim preparation, which means that the attorneys were not entitled to attorney fees until the suit was successful.⁴⁵⁹

Finally, the Federal Circuit, using common law, awarded SUFI its costs for overhead and lost profits because these costs would not have been incurred but for the Air Force's breach.⁴⁶⁰

3. *Significance*

This decision states that a contracting officer's delay in issuing a final decision on a claim renders the exhaustion requirement in a contract's disputes clause "inadequate and unavailable."⁴⁶¹ The delay must show the contracting officer's "unwillingness to act."⁴⁶² Here, the court found that a six-month delay was enough to show such unwillingness.⁴⁶³

454. *Id.* at 592.

455. *Id.* at 594 (explaining that the lodestar method involves "multiplying the number of hours by an hourly rate").

456. *Id.*

457. *Id.* at 593.

458. *Id.*

459. *Id.*

460. *Id.* at 594.

461. *Id.* at 591 (citing *United States v. Anthony Grace & Sons*, 384 U.S. 424, 430 (1966)).

462. *Id.* (citing *Anthony Grace & Sons*, 384 U.S. at 430).

463. *Id.*

IV. CONTRACT/REGULATORY/STATUTORY INTERPRETATION

A. Bay County v. United States

1. *Background*

In *Bay County v. United States*,⁴⁶⁴ Bay County, Florida brought two Contract Disputes Act claims against the U.S. Air Force for refusing to pay the increasing rates set forth by Bay County on long-time sewer and water contracts.⁴⁶⁵ Bay County owns and operates Bay County Utilities, which provides water and sewer services throughout the county.⁴⁶⁶ Bay County has had a contract for water services with the Air Force since 1966 and a contract for sewer services since 1985.⁴⁶⁷ Both of these contracts included provisions requiring the parties to mutually negotiate new rates.⁴⁶⁸

In 1994, the FAR was amended to include two new clauses for utility contracts.⁴⁶⁹ The amendment added FAR 52.241-8, which states that when the government contracts with an unregulated utility, parties are required to negotiate new rates (the negotiated rates clause).⁴⁷⁰ The amendment also added FAR 52.241-7, which states that when the government contracts with a regulated utility, the government is required to pay the rate approved by the regulator without negotiation (the no further negotiation clause).⁴⁷¹

The Defense Federal Acquisition Regulation Supplement includes similar provisions.⁴⁷² It applies the negotiated rates clause if the utility is unregulated or subject to a “non-independent regulatory body.”⁴⁷³ The no further negotiations clause is applied when an “independent regulatory body” oversees the utility.⁴⁷⁴ An independent regulatory body is defined as “a state-wide agency, or an agency with less than state-wide jurisdiction when operating pursuant to state authority. The body has the power to fix, establish, or control the rates and services of utility suppliers.”⁴⁷⁵ A nonindependent

464. 796 F.3d 1369 (Fed. Cir. 2015).

465. *Id.* at 1372; *see also* 48 C.F.R. § 41.501(d)(1)–(2) (2015).

466. *Bay Cty.*, 796 F.3d at 1371.

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.* (citing 48 C.F.R. § 41.501(d)(2)).

471. *Id.* (citing 48 C.F.R. § 41.501(d)(1)).

472. *Id.*

473. *Id.* (emphasis omitted) (citing 48 C.F.R. § 41.501(d)(2)).

474. *Id.* (citing 48 C.F.R. § 41.501(d)(1)).

475. *Id.* at 1372 (emphasis added) (citing 48 C.F.R. § 241.101).

regulatory body is defined as “a body that regulates a utility supplier which is owned or operated by the same entity that created the regulatory body, e.g., a municipal utility.”⁴⁷⁶

Bay County brought suit against the Air Force for failing to pay the utility rates set by Bay County.⁴⁷⁷ The Court of Federal Claims held that, under Florida law, Bay County is an independent regulatory body because it is an agency of the state that is authorized to regulate utility rates.⁴⁷⁸

2. *The Federal Circuit’s decision*

The Federal Circuit found that because Bay County was delegated authority by the State of Florida to control utility rates, regulate collection and disposal, and collect rates and fees while still being overseen by the state, it was classified as an independent regulatory body, and was therefore not obligated to negotiate rates for water or sewer services.⁴⁷⁹

The Federal Circuit agreed with the Court of Federal Claims, holding that Bay County was an independent regulatory body based on the plain meaning of “independent regulatory body,” as defined by the Defense Federal Acquisition Regulation Supplement (DFARS) at 48 C.F.R. section 241.101.⁴⁸⁰ Specifically, the court relied on Florida law,⁴⁸¹ which states that “a county in the performance of certain functions is an agency or arm of the state.”⁴⁸² Because Bay County was authorized by the state of Florida to control utility rates, regulate water and sewage collection and disposal, and collect rates and fees, the court found that Bay County was an independent regulatory body.⁴⁸³

476. *Id.* at 1372–73 (citing 48 C.F.R. § 241.101).

477. *See id.* at 1372 (detailing the county’s attempts to recover the Air Force’s unpaid balance for utilities).

478. *See Bay Cty. v. United States*, No. 11-157C, 2013 WL 5346523, *3–4 (Fed. Cl. 2013) (rejecting the government’s argument that the Air Force should have been able to consult available labor statistics, pricing publications, or requests for more information when determining whether a rate increase proposed by a nonindependently regulated utility is reasonable because Bay County was an independent regulatory body), *aff’d*, 796 F.3d 1369 (Fed. Cir. 2015).

479. *Bay Cty.*, 796 F.3d 1370–73.

480. *See id.* at 1373 (“Bay County has been authorized by the State of Florida to fix, establish, and control the rates and services of utility suppliers.” (emphasis omitted)); 48 C.F.R. § 241.101 (defining independent regulatory body).

481. The FAR and DFARS were “written in terms of state authority and jurisdiction.” *Bay Cty.*, 796 F.3d at 1373. Therefore, state law governs. *Id.*

482. *Id.* at 1373 (quoting *Amos v. Mathews*, 126 So. 308, 321 (Fla. 1930)).

483. *See id.* (citing Fla. Stat. § 125.01(1)(k)(1) (2014)).

The court further explained that Bay County could not be classified as a nonindependent regulatory body because the definition requires that a single entity both create the regulatory body and regulate the utility supplier.⁴⁸⁴ Because Florida created Bay County and Bay County regulated the utility supplier, Bay County Utilities, the court found that no such single entity existed.⁴⁸⁵

The Federal Circuit rejected the government's argument that the Air Force should receive deference in the interpretation of the DFARS by way of the canon of *eiusdem generis*⁴⁸⁶ because the use of *eiusdem generis* is only applicable when there is uncertainty in the correct meaning of words, whereas the court found the phrase at issue was sufficiently-definable through an application of plain-meaning reasoning.⁴⁸⁷ Because the court relied on the phrase's plain meaning, such tools of statutory interpretation were unnecessary.⁴⁸⁸

3. *Significance*

This decision reinforces that the determination of whether a utility is able to establish new rates without negotiation in government contracts depends on whether, under state law, the entity meets the definition of "independent regulatory body" or "nonindependent regulatory body."⁴⁸⁹

B. *DayDanyon Corp. v. Department of Defense*

1. *Background*

In *DayDanyon Corp. v. Department of Defense*,⁴⁹⁰ DayDanyon brought suit against the U.S. Department of Defense for breach of contract, claiming that the government failed to order the guaranteed minimum quantity of Collapsible Joint Modular Intermodal

484. See *id.* at 1372–73; 48 C.F.R. § 241.101 (defining a nonindependent regulatory body to include a municipal utility).

485. See *Bay Cty.*, 796 F.3d at 1373.

486. "A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." *Eiusdem generis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

487. See *Bay Cty.*, 796 F.3d at 1376 (rejecting application of *eiusdem generis* to this case because the phrase "an agency with less than state-wide jurisdiction" was not a general term and would not be subject to overly-broad interpretation).

488. *Id.*

489. *Id.* at 1373.

490. 600 F. App'x 739 (Fed. Cir. 2015).

Containers (“JMICS”) under an indefinite quantity contract.⁴⁹¹ On April 23, 2009, DayDanyon was awarded an indefinite quantity contract for JMICS,⁴⁹² which stated, “Orders may be issued on this contract for a period of TWO YEARS . . . After First Article Test approval, the required delivery for product quantities under this contract is 120 days after the date of the resulting delivery orders.”⁴⁹³ The CO argued that the contract’s two-year base period ran until April 23, 2011.⁴⁹⁴

The guaranteed minimum delivery under the contract was 500 JMICS per year.⁴⁹⁵ For the entirety of the two-year contract, the guaranteed minimum delivery was 1000 JMICS total.⁴⁹⁶

The contract incorporated FAR 52.216-22, which states:

Any order issued during the effective period of this contract and not completed within that period shall be completed by the Contractor within the time specified in the order. The contract shall govern the Contractor’s and Government’s rights and obligations with respect to that order to the same extent as if the order were completed during the contract’s effective period; provided, that the Contractor shall not be required to make any deliveries under this contract after Two Years.⁴⁹⁷

On May 3, 2010, the Department of Defense issued a delivery order for 500 JMICS.⁴⁹⁸ Pursuant to the requirement of delivery within 120 days of the issuance of the delivery order, the delivery date was set for August 31, 2010 and subsequently extended to March 2011.⁴⁹⁹ However, DayDanyon failed to deliver any JMICS by the March 2011 deadline.⁵⁰⁰

On April 6, 2011, DayDanyon filed a certified claim with the contracting officer.⁵⁰¹ The claim stated that the Department of Defense was required to order 1000 JMICS by December 24, 2010, 120 days prior to the conclusion of the two-year base period.⁵⁰² DayDanyon’s

491. *See id.* at 739 (claiming the government failed to order the minimum number of Collapsible Joint Modular Intermodal Containers (“JMICS”) by the ordering deadline, December 20, 2010).

492. *Id.* at 740.

493. *Id.*

494. *Id.* at 741.

495. *Id.* at 740.

496. *Id.*

497. *Id.*; *see* 48 C.F.R. § 52.216-22 (2014).

498. *DayDanyon Corp.*, 600 F. App’x at 740.

499. *Id.*

500. *Id.*

501. *See id.* (referring to DayDanyon’s certified claim for \$720,700.00, made on the grounds that the Department of Defense breached the contract by failing to order the minimum quantity within the specified time frame).

502. *Id.*

rationale was that the contract provided that “delivery orders will specify delivery no less than 120 days from the date of the order” and that DayDanyon “shall not be required to make any deliveries under this contract after Two Years.”⁵⁰³ The CO denied the claim, finding the claim premature because the contract had not yet expired.⁵⁰⁴

On April 20, 2011, three days before the end of the contract’s two-year base period, the contracting officer terminated the contract for default.⁵⁰⁵ On May 18, 2011, DayDanyon submitted the same claim to the contracting officer, stating that the Department of Defense had failed to order the minimum quantity under the indefinite quantity contract.⁵⁰⁶ The contracting officer dismissed this claim, stating that the Department of Defense was not obligated to order the remainder of the guaranteed minimum because the contract was terminated for default before the two-year base period expired.⁵⁰⁷

DayDanyon appealed to the ASBCA, which held that the Department of Defense was not contractually obligated to order 1000 JMICs by December 24, 2010, 120 days before the expiration of the contract’s two-year base period.⁵⁰⁸ DayDanyon appealed to the Federal Circuit.⁵⁰⁹

2. *The Federal Circuit’s decision*

The Federal Circuit held that the contracting officer correctly dismissed DayDanyon’s claim of breach of contract because the Department of Defense had until the expiration of the two-year base period on April 23, 2011 to order 1000 JMICs instead of December 24, 2010, as argued by DayDanyon.⁵¹⁰ The Federal Circuit examined the plain language of the contract and held that the government had

503. *Id.* at 740–41.

504. *Id.* at 741.

505. *See id.* (noting the contracting officer terminated the contract for default for failure to order the requisite amount of s within the specified time frame).

506. *See id.* (noting the claim submitted by DayDanyon on May 18, 2011 was substantively similar to the claim previously submitted on April 6, 2011 and therefore denied on the same basis that the contract had been properly terminated prior to the expiration of the base period).

507. *Id.*

508. *Id.*; DayDanyon Corp., ABSCA No. 57611, 14-1 BCA ¶ 35,616 (holding DayDanyon’s interpretation of the ordering period unreasonable because it effectively reduced the specific ordering period of “TWO YEARS” to twenty months, therefore rendering meaningless the clause requiring orders that are not completed during the contract’s effective period to be completed during the timeframe specified in the order).

509. *See DayDanyon Corp.*, 600 F. App’x at 741.

510. *Id.* at 742.

until the end of the two-year base period to order the minimum guaranteed number of JMICs.⁵¹¹ The court held that the contract was unambiguous as to the timeframe that the Department of Defense had to issue orders.⁵¹² The contract stated that “orders may be issued’ from the ‘DATE OF CONTRACT AWARD [April 23, 2009]’ through ‘TWO (2) YEARS[,]’” April 23, 2011.⁵¹³

The Federal Circuit noted that the contract was ambiguous, as FAR 52.216-22(d) stated that DayDanyon was required to complete any order within 120 days while also stating that DayDanyon “shall not be required to make any deliveries under this contract after Two Years.”⁵¹⁴ However, the Federal Circuit did not resolve this ambiguity, as it found that any interpretation of FAR 52.216-22(d) would not change the ordering period under the contract.⁵¹⁵

Regardless of “whether or not DayDanyon was obligated to deliver beyond the two-year period,” the court held that the ordering period of two years was unambiguously stated in the contract and, thus, the government had until the expiration of that two-year base period on April 23, 2011 to order the guaranteed minimum amount of JMICs as required by the contract.⁵¹⁶ Therefore, as the Department of Defense did not have an obligation to issue orders for the guaranteed minimum by December 24, 2010, the Federal Circuit held that the CO correctly dismissed DayDanyon’s claim.⁵¹⁷

3. *Significance*

While not precedential, this Federal Circuit case further reinforces the court’s reliance on the plain meaning of contract provisions to resolve claims, even when that clear and unambiguous contract provision is logically incompatible with another contract provision.⁵¹⁸ In

511. *Id.* (citing *Bell/Heery v. United States*, 739 F.3d 1324, 1331 (Fed. Cir. 2014)).

512. *Id.*

513. *Id.*; see 48 C.F.R. § 52.216-18 (2014).

514. See *DayDanyon Corp.*, 600 F. App’x at 742 (explaining that 48 C.F.R. § 52.216-22(d) can be interpreted either as stating that DayDanyon need not deliver orders that were placed after April 23, 2011 or as stating that the government may place orders with DayDanyon at any time during the two-year ordering period but that DayDanyon is not required to make any deliveries placed within 120 days of April 23, 2011).

515. *DayDanyon Corp.*, 600 F. App’x at 742; see 48 C.F.R. § 52.216-22.

516. *DayDanyon Corp.*, 600 F. App’x at 742 (noting from the plain language of the contract that the government had two years from the contract award date to order the guaranteed minimum number of JMICs).

517. *Id.*

518. See *id.* (opting not to address the issue of the logically incompatible contract provision because it centered on the non-issue of duty to deliver on behalf of

these situations, contractors should carefully examine their contracts to determine when a contract provision is breached and, consequently, when it has a claim against the government. Failure to do so will lead to dismissal of the claim on the plain language of the contract.

C. Reliable Contracting Group, LLC v. Department of Veterans Affairs

1. Background

In *Reliable Contracting Group, LLC v. Department of Veterans Affairs*,⁵¹⁹ Reliable Contracting Group brought a claim for an equitable adjustment when the VA rejected three backup generators for not being “new” as required under the contract.⁵²⁰ The contract at section 1.47 required that the backup generators be “new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract.”⁵²¹ While “new” was not defined in section 1.47, “new” is defined as “composed of previously unused components” pursuant to FAR 52.211-5, which was incorporated into the contract by reference.⁵²²

Reliable’s sub-subcontractor delivered three backup generators to the site, two of which were described by the VA’s senior resident engineer as “show[ing] a lot of wear and tear including field burns to enlarge mounting holes.”⁵²³ Reliable’s subcontractor further stated that the units were in “BAD CONDITION.”⁵²⁴

However, after examination of the units, Reliable and its subcontractor concluded that the generators were previously purchased by other entities, but never used.⁵²⁵ The VA nevertheless refused to accept these generators, and Reliable’s subcontractor acquired three different generators, which the VA accepted and

DayDanyon as opposed to the claim against the government for failure to order the minimum quantity of JMICs within the argued time frame of the contract).

519. 779 F.3d 1329 (Fed. Cir. 2015).

520. *Id.* at 1330.

521. *Id.*

522. *See id.* (citing 48 C.F.R. § 52.211-5 (2015)).

523. *See id.* at 1331 (stating that Reliable hired a sub-contractor, Fisk Electric Co., to procure the electrical generators, which then contracted with DTE Energy Technologies to provide the generators).

524. *See id.* (reviewing letters between Reliable, its subcontractor, its sub-subcontractor, and the VA’s senior resident engineer and finding that all initially agreed that the generators’ condition failed to meet contract specifications).

525. *Id.*

installed.⁵²⁶ Reliable then filed a claim for an equitable adjustment, which was denied, and appealed the decision to the CBCA.⁵²⁷

The CBA held that the backup generators were not “new” pursuant to FAR 52.211-5, because they did not “meet contract requirements.”⁵²⁸ The contract stated that generators must have been “capable of being tested at the factory.”⁵²⁹ The CBA held that generators issued by a factory in 2000 were incapable of being factory tested in 2004 and thus were not “new.”⁵³⁰ Reliable then appealed directly to the Federal Circuit.⁵³¹

2. *The Federal Circuit’s decision*

On appeal, the Federal Circuit reviewed the CBA’s decision regarding contract interpretation *de novo* and its factual determinations for “substantial evidence.”⁵³² The seminal issue was whether the three backup generators met the contractual requirement that they be “new.”⁵³³

The Federal Circuit disregarded the definition of “new” listed under section 1.79 of the contract.⁵³⁴ Instead, it focused on industry standards and the dictionary definition of the word to hold that “new” meant a “fresh condition.”⁵³⁵ However, because there was conflicting evidence as to the amount of damage to the generators, the court remanded the case back to the CBCA to determine the

526. *See id.* (explaining that the VA’s senior resident engineer rejected the generators delivered by Reliable’s sub-subcontractor because “previous ownership makes them used”).

527. *Id.* (explaining that Reliable sought approximately \$1,100,000 from the VA for expenses incurred when the VA rejected the three original generators).

528. *Id.* at 1331–32 (citing *Reliable Contracting Grp., LLC v. Dep’t of Veterans Affairs*, CBCA 3048, 14-1 BCA ¶ 35,475); 48 C.F.R. § 52.211-5 (2015).

529. *Id.* at 1331 (arguing the incapability of being factory-tested makes the generators not “new”).

530. *Id.* at 1332 (citing *Reliable Contracting Grp.*, CBCA 3048, 14-1 BCA ¶ 35,475, which reasoned that because the contract required the government have the option of being able to witness the generators be factory-tested and Reliable knew this, Reliable could not argue they were “new” when the generators had been sitting in storage for four years and were no longer located at the factory, therefore they were unable to be factory tested).

531. *Id.* at 1331.

532. *Id.* (citing *Rockies Express Pipeline LLC v. Salazar*, 730 F.3d 1330, 1335–36 (Fed. Cir. 2013)).

533. *Id.*

534. *Id.* at 1332.

535. *Id.* at 1334.

extent of the disputed damage and whether any such damage could have been remedied to meet the court's definition of "new."⁵³⁶

The Federal Circuit disagreed with the CBCA's holding that "new" meant "capable of being tested at the factory."⁵³⁷ First, the court explained that this definition of "new" did not match the VA's contemporaneous construction of the contract because the VA never argued that the reason the generators were not "new" was because they were incapable of factory testing.⁵³⁸ Second, the court stated that although the contract required the generators to be factory tested, the contract did not specify when the testing had to be done or if it had to be done independent of a request by the government.⁵³⁹

The Federal Circuit examined the contract and noted two separate provisions of the contract using the word "new."⁵⁴⁰ Section 1.47 stated that the generator itself must be "new" but failed to define "new."⁵⁴¹ Section 1.79 defined "new" as being comprised of unused generator *parts*.⁵⁴² Because "[i]t is a fundamental rule of contract interpretation that the provisions are viewed in the way that gives meaning to all parts of the contract," the Federal Circuit refused to accept that the definition of "new" in section 1.79 applied to section 1.47.⁵⁴³

Instead, finding the definition of "new" in section 1.47 ambiguous, the court adopted a wholly different interpretation of "new" in the contract based on dictionary definitions and industry standards.⁵⁴⁴

536. *Id.* at 1335.

537. *Id.* at 1331–32.

538. *See id.* at 1332 (noting that a party's contemporaneous belief about the meaning of terms in a contract is usually probative or indicative of the meaning of a the term).

539. *See id.* (noting that the generators were later tested by factory-certified technicians, but that the VA declined to observe the testing; therefore, there was no indication that the generators were incapable of factory testing if the government had requested it).

540. *See id.* at 1333 (observing that section 1.79's "new" requirement is meant to describe the quality of the "components" in the machine, while section 1.47's "new" requirement refers to the whole machine, not just its component parts; therefore "there is not justification for treating a generator as new solely because it has not been used").

541. *Id.*

542. *Id.*

543. *See id.* (citing *Mass. Bay Transp. Auth. v. United States*, 129 F.3d 1226, 1231 (Fed. Cir. 1997) (noting that this fundamental rule helps to avoid confusion, conflict of contractual clauses, redundancy, and surplusage)).

544. *Id.* at 1333 (citing *C.A. Acquisition Newco, LLC v. DHL Express (USA), Inc.*, 696 F.3d 109, 113–14 (Fed. Cir. 2012)).

The court interpreted “new” to mean in “fresh condition.”⁵⁴⁵ Therefore, “new” required that the generators “not be used and . . . be free of significant damage, i.e., damage that is not cosmetic.”⁵⁴⁶

In analyzing the facts on the record, the Federal Circuit found that the admissions made by Reliable, its subcontractor, and its sub-subcontractor regarding the state of the backup generators were not binding but probative of the fact that the generators were not “new.”⁵⁴⁷ However, because there was an affidavit from Reliable’s subcontractor’s Executive Vice President, stating that any damage to the backup generators was merely cosmetic, the Federal Circuit found that there was conflicting evidence as to the amount of damage.⁵⁴⁸ Given that the CBCA’s fact-finding did not include the extent of the damage to the backup generators or evidence of whether the damage could be “fully and easily cured,” the Federal Circuit remanded the case back to the CBCA to determine whether the backup generators met the Federal Circuit’s interpretation of “new.”⁵⁴⁹

3. Judge Newman’s dissent

Judge Newman dissented based on the standard of the Federal Circuit’s review.⁵⁵⁰ Pursuant to 41 U.S.C. § 7107(b), the CBCA’s findings of fact are final unless “fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or . . . [un]supported by substantial evidence.”⁵⁵¹ Judge Newman stated that the CBCA did not err in relying on Reliable’s statements that the generators were unacceptable and the subcontractors’ refusal to certify the generators as new.⁵⁵² Further, Judge Newman disagreed with the majority’s definition of “new” in government

545. *Id.* at 1334 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1522 (2002)).

546. *Id.*

547. *Id.* at 1334–35.

548. *See id.* at 1335 (asserting that the cosmetic damage to the generators, consisting of dust, dirt, grime, rust, scraped paint, and/or disconnected hoses did not affect the quality of the generators).

549. *Id.*

550. *Id.* at 1336 (Newman, J., dissenting). *See generally* 41 U.S.C. § 7107(b) (2012) (formerly 41 U.S.C. § 609(b)) (stating the arbitrary and capricious standard of review).

551. *Reliable Contracting Grp., LLC*, 779 F.3d at 1336 (citing 41 U.S.C. § 609(b) (1982) (now codified at 41 U.S.C. § 7107(b))).

552. *See id.* (arguing that the majority had no basis for excluding the evidence of admissions on behalf of Reliable, its subcontractor, and its sub-subcontractor even though the admissions were not made in formal court documents).

contracts.⁵⁵³ She characterized the majority's definition of "new" as including "previously owned and damaged equipment if the damage 'can be fully and easily cured.'"⁵⁵⁴ However, she stated that "[o]ld and damaged equipment does not become new if the damage can be cured."⁵⁵⁵ Therefore, Judge Newman argued that the CBCA's denial of an equitable adjustment was correct.⁵⁵⁶

4. *Significance*

While the Federal Circuit's decision in *Reliable Contracting* concerned the interpretation of "new" in Reliable's contract with the VA, the holding applies to all definitions of "new" within government contracts and under the FAR.⁵⁵⁷ Any future contracts with no definition or an ambiguous definition of "new" will be subject to the Federal Circuit's determination that "new" means "fresh condition."⁵⁵⁸

V. CONTRACT TERMINATION

A. *Allen Engineering Contractor Inc. v. United States*

1. *Background*

In *Allen Engineering Contractor Inc. v. United States*,⁵⁵⁹ Allen Engineering Contractor Inc. ("AECI") argued that it was improperly terminated after replacement payment and performance bonds approved by the U.S. Department of the Navy were found to be fraudulent.⁵⁶⁰ AECI had three separate construction contracts with the United States, and each contract was well over the bond threshold of \$150,000.⁵⁶¹

Pursuant to 40 U.S.C. § 3131, AECI was required to obtain performance and payment bonds for 100 percent of the contract

553. *Id.*

554. *Id.* (citing *id.* at 1335 (majority opinion)).

555. *See id.* (arguing that the VA has no legal or equitable obligation to prove that the "nonconforming" generators can be refurbished and thus, the costs of contractual compliance are not the VA's burden to bear).

556. *Id.*

557. *See id.* (criticizing the majority's definition of the term "new" in government contracts and under the FAR).

558. *See id.* at 1334 (majority opinion) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1522 (2002)).

559. 611 F. App'x 701 (Fed. Cir. 2015).

560. *Id.* at 703.

561. *Id.* at 703-04.

price.⁵⁶² Regulations state that “bonds shall be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570.”⁵⁶³ Performance bonds are designed to protect the government if a contractor defaults and leaves the government with an incomplete project.⁵⁶⁴ Payment bonds are designed to protect contractors and subcontractors that provide labor or materials on a project.⁵⁶⁵

In accordance with this requirement, AECI provided performance and payment bonds through Liberty Mutual Insurance Company.⁵⁶⁶ The Navy approved the bonds, and AECI started work on the three projects.⁵⁶⁷

However, during the project, AECI wanted to replace the bonds with bonds from Pacific Indemnity Company (“PIC”).⁵⁶⁸ The Navy investigated the PIC bonds and agreed to replace the Liberty Mutual bonds with PIC bonds on AECI’s projects.⁵⁶⁹ Two months later, PIC alerted AECI and the Navy that the supposed-PIC bonds on AECI’s projects were actually fraudulent and were never issued by PIC.⁵⁷⁰ Therefore, both the performance bonds and payment bonds on AECI’s three projects were invalid.⁵⁷¹

The Navy suspended work on AECI’s projects and requested that AECI find replacement bonds.⁵⁷² When AECI was unable to secure replacement bonds, the Navy terminated all three contracts for default.⁵⁷³

AECI brought suit against the Navy, arguing that the terminations should have been terminations for convenience.⁵⁷⁴ The Court of Federal Claims held that AECI failed to state a claim on which relief could be granted and dismissed the case.⁵⁷⁵ AECI appealed to the Federal Circuit.⁵⁷⁶

562. *Id.* (citing 40 U.S.C. § 3131 (2012)).

563. *See id.* at 704 (citing 48 C.F.R. § 52.228-15(d) (2015)).

564. *See id.* (citing *Dependable Ins. Co. v. United States*, 846 F.2d 65, 66 (Fed. Cir. 1988)).

565. *See id.* (citing *J.W. Bateson Co. v. United States ex rel. Bd. of Trs. of Nat’l Automatic Sprinkler Indus. Pension Fund*, 434 U.S. 586, 587 (1978)).

566. *Id.*

567. *Id.*

568. *Id.*

569. *Id.*

570. *Id.*

571. *Id.*

572. *Id.*

573. *Id.*

574. *Id.*; *Allen Eng’g Contractor Inc. v. United States*, 115 Fed. Cl. 457, 459–60 (2014), *aff’d*, 611 F. App’x 701 (Fed. Cir. 2015).

575. *Allen Eng’g Contractor Inc.*, 611 F. App’x at 704; *Allen Eng’g Contractor Inc.*, 115 Fed. Cl. at 469.

576. *Allen Eng’g Contractor Inc.*, 611 F. App’x at 705.

2. *The Federal Circuit's decision*

The Federal Circuit affirmed, finding that the Navy properly terminated AECI's three contracts for default.⁵⁷⁷ Pursuant to 48 C.F.R. section 52.249.10(a), the government can terminate a contract for default when a contractor "refuses or fails to prosecute [] work . . . with the diligence that will insure its completion within the time specified in [a] contract."⁵⁷⁸

The Federal Circuit noted government COs' broad discretion when terminating contracts.⁵⁷⁹ The court agreed with the Navy's contracting officer, holding that AECI's failure to furnish replacement bonds was a material breach of the contract justifying termination for default.⁵⁸⁰ Since AECI was prohibited from contract performance without valid replacement bonds, its inability to obtain replacement bonds was a "fail[ure] to prosecute work . . . with the diligence that will insure its completion within the time specified in [a] contract."⁵⁸¹ Merely furnishing bonds at the commencement of contract work was insufficient.⁵⁸²

AECI argued that default should be excused since the Navy's investigation and subsequent approval of the fraudulent bonds contributed to AECI's material breach.⁵⁸³ Alternatively, AECI argued that the Navy's failure to discover that the bonds were fraudulent was a breach of the implied duty of good faith and fair dealing.⁵⁸⁴ The Federal Circuit disagreed, explaining that AECI could not be excused by the Navy's failure, as contractors are in control of the bonds, and bonds exist for the benefit of the government and subcontractors.⁵⁸⁵ Further, the court held that the Navy did not violate the implied duty of good faith and fair dealing because AECI provided no evidence that the Navy knew the bonds were fraudulent before its investigation.⁵⁸⁶ Therefore, because AECI was solely responsible for maintaining performance and payment bonds on its projects and

577. *Id.* at 705, 709.

578. *Id.* at 705; 48 C.F.R. § 52.249-10(a) (2015).

579. *Allen Eng'g Contractor Inc.*, 611 F. App'x at 705 (quoting *Lanterman v. United States*, 75 Fed. Cl. 731, 733 (2007)).

580. *See id.* ("[F]ailure to furnish adequate bonding . . . is a material breach that justifies termination for default." (citing *Airport Indus. Park, Inc. v. United States*, 59 Fed. Cl. 332, 334 (2004))).

581. *Id.*

582. *Id.* at 707.

583. *Id.*

584. *Id.* at 707, 709.

585. *Id.* at 707–09.

586. *Id.* at 709.

failed to do so, prohibiting it from continuing work, the Navy correctly terminated AECI for default.⁵⁸⁷

3. *Significance*

This decision reinforces that contractors are solely responsible for ensuring that any necessary payment and performance bonds on a project are valid and enforceable.⁵⁸⁸ The Federal Circuit is clear that a contractor's inability or even delay in finding replacement bonds is justification for a termination for default.⁵⁸⁹

B. EM Logging v. Department of Agriculture

1. *Background*

In *EM Logging v. Department of Agriculture*,⁵⁹⁰ EM Logging objected to the U.S. Forest Service's termination of its timber sale contract on grounds that it had demonstrated "flagrant disregard" for the terms of the contract.⁵⁹¹ The contract was for a timber sale in the Kootenai National Forest in Montana.⁵⁹² The Forest Service accused EM Logging of violating a number of the contract provisions.⁵⁹³ This included "the load limit clause,"

C5.12#—Use of Roads by Purchaser

All vehicles shall comply with statutory load limits unless a permit from the Forest Service and any necessary State permits are obtained prior to overload vehicle use.

"the haul route clause,"

C6.849—Route of Haul

All products removed from Sale Area shall be transported over the designated routes of haul.

and "the notification clause,"

Purchaser shall notify Forest Service when a load of products, after leaving Sale Area, will be delayed for more than [twelve] hours in reaching weighing location.⁵⁹⁴

587. *Id.* at 707–09.

588. *Id.* at 707–08.

589. *See id.* at 706–09 (holding that AECI was the cause of the default because it "procured and submitted the bonds" that were "later found to be fraudulent and invalid").

590. 778 F.3d 1026 (Fed. Cir. 2015).

591. *Id.* at 1028.

592. *Id.*

593. *Id.*

594. *Id.*

Further, the contract included a termination clause, which stated that the “Contracting Officer, with the concurrence of the Regional Forester, may terminate this contract for breach in the event Purchaser . . . [h]as engaged in a pattern of activity that demonstrates flagrant disregard for the terms of the contract.”⁵⁹⁵

Under the contract, EM Logging was required to submit a map and written descriptions of its proposed haul route.⁵⁹⁶ EM Logging sent a map, which highlighted the proposed haul route, and written descriptions of the haul route.⁵⁹⁷ It also requested an amendment to the notification clause that it be allowed twenty-four hours to reach weighing locations.⁵⁹⁸ The Forest Service approved the map and written descriptions, but denied the modification to the notification clause.⁵⁹⁹

In the first five months of the contract, the Forest Service issued six Notifications of Breach, stating that a number of truck loads exceeded 80,000 pounds gross vehicle weight, that a number of truck and trailer loads exceeded 84,500 pounds gross vehicle weight, and that some loads were delayed more than twelve hours in transit and were transported more than thirteen miles off the approved haul route.⁶⁰⁰ Pursuant to the termination clause, the Forest Service terminated the contract “for repeated and ongoing disregard for the terms of [the] contract almost from the start of logging and hauling operations.”⁶⁰¹

EM Logging appealed to the CBCA, which sustained the termination in a 2-1 decision.⁶⁰² The CBCA held that EM Logging breached the “statutory load limits” due to violations of a Forest Service Order, which prohibited trucks over 80,000 pounds from traveling on roads in the Kootenai National Forest, and one violation of Montana state weight limits.⁶⁰³ Further, the CBCA held that EM Logging breached the haul route clause and notification clause by deviating from haul routes and delaying loads for more than twelve hours.⁶⁰⁴

595. *Id.* (alteration in original).

596. *Id.*

597. *Id.*

598. *Id.*

599. *Id.*

600. *Id.* at 1028–29.

601. *Id.* at 1029.

602. *EM Logging v. Dep’t of Agric.*, CBCA 2397, 2427, 13 BCA ¶ 35350, at *2.

603. *Id.*

604. *Id.* at *10.

Judge McCann of the CBCA dissented, finding that the government did not meet its burden of proof that EM Logging had flagrantly disregarded the contract terms.⁶⁰⁵ Judge McCann argued that a breach of “statutory” load limits only included breaches of state law, not Forest Service order,⁶⁰⁶ and therefore, was only one violation of the load limits clause.⁶⁰⁷ Further, Judge McCann noted that EM Logging followed the haul route highlighted in the map approved by the Forest Service.⁶⁰⁸ Finally, he found that delays in excess of twelve hours were warranted, as the Forest Service later realized that a twelve-hour window was insufficient for transportation.⁶⁰⁹ Therefore, taken together, Judge McCann did not find enough facts to prove a “flagrant disregard” of the contract terms.⁶¹⁰ EM Logging appealed to the Federal Circuit.⁶¹¹

2. *The Federal Circuit’s decision*

The Federal Circuit interpreted the contract de novo and agreed with Judge McCann’s dissent. The court held that while EM Logging breached provisions of the contract, the Forest Service did not prove “flagrant disregard” for contract terms so as to justify termination under the timber sale contract.⁶¹²

The Federal Circuit first looked to the Merriam-Webster Dictionary and to the contract itself to define “flagrant disregard.”⁶¹³ The Dictionary defines “flagrant disregard” as “so obviously inconsistent with what is right or proper as to appear to be a flouting of law or morality.”⁶¹⁴ The contract gave the following examples of “flagrant disregard” of contract terms: “repeated suspensions for breach pursuant to B9.3, causing undesignated timber meeting Utilization Standards to be unnecessarily damaged or negligently or willfully cut, or causing other serious environmental degradation or resource damage.”⁶¹⁵

The court examined the contract to determine if EM’s actions were in “flagrant disregard” of the contract. The Federal Circuit first

605. *Id.* at *12 (McCann, J., dissenting).

606. *Id.* at *13.

607. *Id.* at *15.

608. *Id.* at *20.

609. *Id.*

610. *Id.*

611. *EM Logging v. Dep’t of Agric.*, 778 F.3d 1026, 1030 (Fed. Cir. 2015).

612. *Id.* at 1030, 1033.

613. *Id.* at 1030–31.

614. *Id.* at 1030 (citing MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 475 (11th ed. 2003)).

615. *Id.* at 1030–31.

reviewed the alleged violations of the load limit clause, and found only one.⁶¹⁶ The Federal Circuit found that the load limit clause, which precludes violations of “statutory” load limits, did not preclude violations of a Forest Service order, as the order was not a statute.⁶¹⁷ The court stated that any such violation of the Forest Service order was not a breach of the load limit clause.⁶¹⁸ There was only one violation of a Montana statute, which EM Logging alleged was a simple mistake, and the court found that this isolated event was not enough to prove “flagrant disregard” for the contract terms.⁶¹⁹

The Federal Circuit similarly did not find a violation of the haul route, as the Forest Service approved the only deviation from the highlighted route because the driver’s illness necessitated it.⁶²⁰ The driver had to take a detour to see a doctor, who diagnosed him with bronchia pneumonia.⁶²¹ As this was a single extenuating circumstance, the court found that the Forest Service did not prove flagrant disregard of this clause.⁶²²

Finally, the court examined the two alleged violations of the notification clause, which included a thirteen-day delay and a four-day delay in notifying the Forest Service that deliveries took more than twelve hours.⁶²³ These deliveries were made within forty-eight hours.⁶²⁴ However, both delayed notifications were sent before the Forest Service notified EM Logging that such delay was unreasonable.⁶²⁵ Therefore, the court found that the violations were too technical to be in flagrant disregard of contract terms.⁶²⁶

Even analyzing all violations together, the Federal Circuit held that the Forest Service did not meet its burden of proving that EM Logging flagrantly disregarded contract terms.⁶²⁷

3. *Significance*

This decision defines the relatively high standard the Forest Service must meet to prove “flagrant disregard” and terminate a timber sale

616. *Id.* at 1032.

617. *Id.*

618. *Id.*

619. *Id.* at 1031–32.

620. *Id.* at 1033.

621. *Id.* at 1032.

622. *Id.* at 1033.

623. *Id.*

624. *Id.*

625. *Id.*

626. *Id.*

627. *Id.*

contract.⁶²⁸ Under this termination clause, isolated violations of a number of contract provisions are insufficient for termination.⁶²⁹ The Forest Service must prove a pattern of activity, taken together, that shows a complete disregard of the contract terms.⁶³⁰

CONCLUSION

The Federal Circuit issued very few precedential government contracts decisions in 2015. Decisions were largely issued in accordance with the lower courts and boards' decisions and were based on interpretations of established Federal Circuit precedent. However, whether intended or not, these decisions resulted in favorable decisions for the government.

As the Federal Circuit moves on to its 2016 docket, it remains to be seen whether the Federal Circuit will continue to agree with its lower courts and boards' interpretations of government contracts and defer to the government.

628. *Id.* at 1030–31.

629. *Id.* at 1031–33.

630. *Id.* at 1028–33.