

2017 GOVERNMENT CONTRACT LAW DECISIONS OF THE FEDERAL CIRCUIT

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INTRODUCTION

Due to structural, procedural, and practical considerations, the government contracts portion of the U.S. Court of Appeals for the Federal Circuit's docket is relatively modest. The Circuit typically issues fewer than twenty precedential opinions each year in government contracts cases.¹

The court's 2017 docket was consistent with its previous dockets in this regard, with only about ten such decisions. Among these, seven cases can be fairly characterized as being principally about the merits, while the other three are noteworthy for their jurisdictional rulings.

Because the canon of controlling case law grows slowly, each individual case holds the potential to exert significant influence on the decision making of several adjudicative bodies over which the Federal Circuit effectively has the last word. These lower tribunals include the Court of Federal Claims (COFC), the Government Accountability Office Bid Protest Unit, the Boards of Contract Appeals, and several quasi-judicial forums of administrative agencies. This year the court added several useful opinions to the canon.

At the beginning of each Part below, we briefly discuss the reasons why all but a vanishingly few government contracts cases are resolved before they reach the Federal Circuit.

I. CONTRACTOR CLAIMS CASES

Contractor claims cases often take several years to reach the Federal Circuit and typically are resolved long before the court determines the matter. Instead of being addressed through a judicial proceeding, most disagreements that arise in the course of contract performance are addressed on an ongoing basis through administrative procedures, such as change orders and requests for equitable adjustment. These contract actions will be reflected in contract modifications, which may or may not include changes to the price or estimated costs. In many cases, the required computation of damages—the “sum certain” for certified claims under the Contract Disputes Act (CDA)—cannot be made until long after the cause of the damages occurred.

1. Kathleen Hsu, *2015 Survey of Government Contract Cases Before the Federal Circuit*, 65 AM. U. L. REV. 933 (2016); Kyle R. Jefcoat, *The Federal Circuit's 2014 Government Contract Decisions*, 64 AM. U. L. REV. 807 (2015).

The relatively long six-year limitations period under the CDA allows ample time for the parties to work out their differences. In many cases, contractors prefer not to submit certified claims early in the performance period for fear of poisoning the relationship between the parties. Add in the time needed to conduct discovery and a trial at either a Board of Contract Appeals or the COFC and it is little wonder that the five cases discussed below took an average of about ten years from the events in question to reach a Federal Circuit opinion.

A. *Lee's Ford Dock, Inc. v. Secretary of the Army*

*Lee's Ford Dock, Inc. v. Secretary of the Army*² concerned the specificity with which a certified claim to the contracting officer must be stated in order to appeal an adverse contracting officer's final decision ("COFD").³ Ultimately, the Federal Circuit determined that the certified claim must not only state the government action that caused the damages in a sum certain,⁴ but the claimant must also set forth the legal theory that entitles it to recover on its claim.⁵ Additionally, in its jurisdictional analysis, the Federal Circuit stated a rather sweeping condemnation of the use of legislative history in statutory interpretation, which practitioners are sure to cite often, particularly when they believe a plain reading of the statutory text favors the result they advocate.⁶

1. *Background*

Completed in 1952, Kentucky's Wolf Creek Dam created Lake Cumberland, the largest man-made lake east of the Mississippi River.⁷ For nearly fifty years, Lee's Ford Dock has operated a marina on Lake Cumberland under a series of leases with the U.S. Army Corps of Engineers ("the Corps").⁸ The 2001 lease at issue in this case was for twenty-five years (with a lessee option to extend for another twenty-five-

2. 865 F.3d 1361 (Fed. Cir. 2017).

3. *Id.* at 1366.

4. The Federal Acquisition Regulations defines a "claim" to mean "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain." FAR § 2.101 (2017).

5. *Lee's Ford Dock*, 865 F.3d at 1369–70.

6. *Id.* at 1367 ("We therefore decline to restrict the scope of the CDA to a nonlimiting example drawn from the legislative history when the statute uses unambiguously broader language.").

7. Ian Urbina & Bob Driehaus, *Fears for a Dam's Safety Put Tourist Area on Edge*, N.Y. TIMES (Mar. 4, 2007), <http://www.nytimes.com/2007/03/04/us/04dam.html>.

8. *Lee's Ford Dock*, 865 F.3d at 1363.

year term) and comprised 130 acres of water and 36 acres of land.⁹ One condition of the lease allowed the Corps to “manipulate the level of the lake . . . in any manner whatsoever” and stated that Lee’s Ford Dock “shall have no claim for damages on account” of such manipulations.¹⁰

Following a series of structural reviews of the Wolf Creek Dam, in 2007, the Corps deemed it to be in such a deteriorated condition that the water level of Lake Cumberland would have to be lowered to reduce the stress on the dam.¹¹ It would be seven years before the dam was repaired and the lake’s water level returned to its previous elevation.¹² Although the particulars are not stated in the Federal Circuit’s opinion, it is fair to surmise that for the better part of a decade, much of the 130 acres of water surrounding Lee’s Ford Dock was actually mud.¹³

In its certified claim to the Corps, Lee’s Ford Dock alleged that the unprecedented lowering of Lake Cumberland’s water elevation caused it to incur at least \$4,000,000 in damages.¹⁴ In the claim, Lee’s Ford Dock asserted that at the time the parties entered into the lease they “could not have envisioned” that the water elevation would drop for such a long period of time.¹⁵ Lee’s Ford Dock argued that the purpose of the lease—to operate a marina—had been frustrated by the lowering of the lake level and that the Corps should compensate Lee’s Ford Dock for its loss.¹⁶ The contracting officer denied the claim in its entirety.

As presented to the Corps, Lee’s Ford Dock’s claim for recovery under a mutual mistake theory had several legal infirmities.¹⁷ Among them, mutual mistakes of fact must rest on present factual errors, not erroneous predictions of the conditions that may arise in the future.¹⁸ Moreover, even if Lee’s Ford Dock had proven that there were mutual mistakes, the remedy typically would be to set the contract aside, not to

9. *Id.*

10. *Id.*

11. *Id.* at 1363–64.

12. *Id.* at 1364.

13. See Urbina & Driehaus, *supra* note 7 (referring to Lake Cumberland’s residents’ jesting boasts that they “have some of the best ‘mud front’ property in the country” and noting that forty of the lake’s forty-eight boat ramps were dry).

14. *Lee’s Ford Dock*, 865 F.3d at 1364.

15. *Id.*

16. *Id.*

17. See *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 665 (Fed. Cir. 1992) (defining mutual mistake of fact as “[w]here there has been a mutual mistake of material fact, resulting in a contract which does not faithfully embody the parties’ actual intent”).

18. *Dairyland Power Coop. v. United States*, 16 F.3d 1197, 1202, 1203 (Fed. Cir. 1994).

award damages.¹⁹ This is especially so because the claimant did not appear to have shown that the government would have accepted the risk had the parties known of the mutual mistake of fact.²⁰ And even if the contract were reformed, the reformation would be to the contract terms themselves, like an adjustment to the lease rate, and would not include a payment from the government to the contractor for lost revenue.²¹

2. *The Armed Services Board of Contract Appeals's decision*

Deciding it needed a better theory than mutual mistake on appeal to the Armed Services Board of Contract Appeals (ASBCA), Lee's Ford Dock cast its lot with a superior knowledge claim.²² In its one-count breach of contract complaint, Lee's Ford Dock alleged that the Corps's inspections of the Wolf Creek Dam conducted in the 1990s—and not disclosed to Lee's Ford Dock—revealed the deteriorating condition of the dam and indicated that Lake Cumberland would have to be drawn down to repair the dam during the twenty-five-year lease term.²³

In July 2014, the ASBCA granted the Corps's motion to dismiss on the grounds that Lee's Ford Dock had not submitted the superior knowledge claim to the Corps, as required by 41 U.S.C. § 7103(a)(1).²⁴ This decision put the contractor in jeopardy of being time-barred under the CDA's six-year statute of limitations.²⁵ That is, following the ASBCA's dismissal, Lee's Ford Dock reasonably was leery of returning to the Corps in late 2014 for a new COFD that necessarily was premised on the drawing down of Lake Cumberland seven years prior.

Rather than confront the statute of limitations problem, Lee's Ford Dock tried the tack of squeezing a colorable legal theory within the

19. *Sargent v. Dep't of Health & Human Servs.*, 229 F.3d 1088, 1091 (Fed. Cir. 2000) (per curiam).

20. *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 668–69 (Fed. Cir. 1992).

21. *Id.* at 665–66.

22. *See* *GAF Corp. v. United States*, 932 F.2d 947, 949 (Fed. Cir. 1991).

To show a breach under the superior knowledge doctrine, a contractor claiming a breach by non-disclosure must produce specific evidence that it (1) undertook to perform without vital knowledge of a fact that affects performance costs or direction, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

Id.

23. *Lee's Ford Dock, Inc. v. Sec'y of the Army*, 865 F.3d 1361, 1364–65 (Fed. Cir. 2017).

24. *Id.* at 1365.

25. 41 U.S.C. § 7103(a)(4)(A) (2012).

allegations of its original certified claim. In its amended complaint before the Board, the claimant's contract reformation counts alleged that the Corps had made a misrepresentation by not mentioning the dam's condition in the lease and that Lee's Ford Dock had relied on the continued functioning of the dam.²⁶ The ASBCA determined Lee's Ford Dock had not established these allegations.²⁷ Relying largely on the lease condition that gave the Corps unfettered right to manipulate lake levels, the ASBCA also rejected the contract breach count that the Corps's prolonged reduction in the lake's elevation was unreasonable.²⁸

3. *The Federal Circuit's decision*

Whereas agency lawyers typically advocate before the Boards,²⁹ upon appeal to the Federal Circuit, Department of Justice (DOJ) lawyers take over the representation.³⁰ With new lawyers and the broader interest of the entire government at stake, the DOJ argued that neither the ASBCA nor the Federal Circuit had jurisdiction over the claimant's appeal because the lease agreement itself was not a type of contract covered by the CDA.³¹

Under 41 U.S.C. § 7102(a), the CDA only applies to agency contracts for "(1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair, or maintenance of real property; or (4) the disposal of personal property." In this regard, the question before the Federal Circuit was whether the lease constituted a contract for "the disposal of personal property" under 41 U.S.C. § 7102(a)(4).³²

The Federal Circuit found it well settled that a lease interest, even of real property, is a type of personal property that is not itself real

26. *Lee's Ford Dock*, 865 F.3d at 1365–66. Curiously, the ASBCA reached the merits of these claims—even though it had determined that it lacked jurisdiction over the factually similar superior knowledge claim—because mutual mistake was the only premise Lee's Ford Dock had put to the contracting officer in its certified claim. *See* 41 U.S.C. § 7104(a) (only claims subject to a COFD may be appealed to the Boards).

27. *Lee's Ford Dock*, 865 F.3d at 1365.

28. *Id.* at 1366.

29. *See, e.g.*, 48 C.F.R. § 6101.5(a)(2) (2017). "The Boards" is a term of art that practitioners use to refer to various Board of Contract Appeals (BCA), such as the Armed Services BCA, the Civilian BCA, and the U.S. Postal Service BCA.

30. 28 U.S.C. § 516 (2012). The BCA hears appeals from a contracting officer's decision or the contracting officer's failure to make a decision. 48 C.F.R. § 6101.2(a)(1)(i).

31. *Lee's Ford Dock*, 865 F.3d at 1365.

32. *Id.* at 1367.

property.³³ This left the question of whether the Corps “disposed” of the personal property through the lease to Lee’s Ford Dock.³⁴ Relying on the observation that “to dispose of” something carries a broad connotation and that Black’s Law Dictionary’s definitions of “disposal” include “to direct or assign for a use” or to “bestow,” the court determined that with the lease, the Corps had disposed of a personal property right to the claimant to operate a marina on the premises.³⁵

While the court’s interpretation of § 7102(a)(4) is a fair enough reading of the provision, it is far from the only reasonable one. Moreover, the court’s broad reading of “disposal of personal property” appears to be in direct tension with the notion that jurisdictional statutes that waive the federal government’s sovereign immunity are to be strictly construed.³⁶

It would be just as natural to conclude that the “plain reading” of the statutory text is that the “disposal of personal property” refers simply to the sale of a good. Indeed, the first definition of “disposal” in Black’s is “sale,” and the definition of “dispose of” states that it is “[o]ften used in restricted sense of ‘sale’ only, or so restricted by context.”³⁷ In the context of § 7102(a), it would make sense that “disposal” was intended to mean “sale,” as the other three provisions refer to situations in which the government is procuring rather than selling property or services.³⁸

In support of this plain reading the government argued that the legislative history indicated that § 7102(a)(4) was added to the CDA to cover surplus sales contracts conducted by the General Services Administration.³⁹ In enacting the CDA, the Senate report stated that “[c]ontracts for the disposal of personal property are included within the coverage of the bill even though they are for the sale rather than the procurement of property. These contracts are generally referred to as ‘surplus sales’ contracts. The General Services Administration has cognizance over all such sales.”⁴⁰

In rejecting the government’s narrower reading of § 7102(a)(4), the Federal Circuit noted that the Senate report does not state that the section “is *limited* to surplus sales contracts.”⁴¹ But, if legislative history

33. *Id.*

34. *Id.*

35. *Id.* (citing BLACK’S LAW DICTIONARY (4th ed. 1951)).

36. *See e.g.*, *Livingston v. Derwinski*, 959 F.2d 224, 225 (Fed. Cir. 1992).

37. *Disposal*, BLACK’S LAW DICTIONARY 557 (4th ed. 1951).

38. *See* 41 U.S.C. § 7102(a)(1)–(3) (2012).

39. *Lee’s Ford Dock*, 865 F.3d at 1367.

40. S. REP. NO. 95-1118, at 18 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5235, 5252.

41. *Lee’s Ford Dock*, 865 F.3d at 1367.

is to be used at all, it seems to be a tall order to require as a condition of creditability that congressional pronouncements go beyond an explanation of what is intended and explicitly exclude what is not intended. Here, the Senate report explicitly equated the term “disposal” to its typical meaning of “sales,” specifically referenced Government Services Administration’s control of all such sales, and noted that the provision that would be promulgated at § 7102(a)(4) continues a practice that “ha[d] worked well for many years.”⁴²

To be sure, the court was on solid ground in observing both that § 7102(a)(4) is “broad enough to encompass” the lease presented in the case and that it is inappropriate to use legislative history to inject ambiguity into a statute where none exists.⁴³ Rather than reinforcing each other, however, these observations seem to be akin to ships passing in the night. That a statute is “broad enough to encompass” one party’s interpretation does not counsel for the adoption of that interpretation; rather, it suggests that the alternative interpretation, too, is reasonable and therefore potentially amenable to interpretative tools such as legislative history.⁴⁴

4. *Importance of the case*

Whether the demise of legislative history in statutory interpretation is to be cheered or lamented is debatable.⁴⁵ The court’s considered non-use of legislative history in the seemingly ripe circumstances of *Lee’s Ford Dock* calls into question the continued viability of the tool in the Federal Circuit.

Ultimately, though the claimant won the jurisdictional battle over the breadth of contracts that § 7102(a)(4) covers, it lost the war concerning whether jurisdiction existed over the appeal of its claim under § 7103(a)(1), which requires contractor claims to be submitted to the contracting officer for a decision. Citing Federal Circuit cases

42. S. REP. NO. 95-1118, at 18.

43. *Lee’s Ford Dock*, 865 F.3d at 1367–68 (citing *Indian Harbor Ins. Co. v. United States*, 704 F.3d 949, 956 (Fed. Cir. 2013)).

44. *See Rosete v. Office of Pers. Mgmt.*, 48 F.3d 514, 518 (Fed. Cir. 1995) (noting that statutory text is ambiguous where it is “capable of two reasonable interpretations”).

45. *See*, for example, the extended exchange between Jonathan R. Siegel and John F. Manning regarding the constitutionality and wisdom of courts using legislative history as a tool of statutory interpretation. *Compare* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) (arguing that a court should not attribute a committee’s declaration of intent to Congress as a whole), *with* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457 (2000) (arguing the judicial use of legislative history is constitutional).

that had established that a claim denied in a COFD differs from the one argued on appeal when the appeal “present[s] a materially different factual or legal theory” of relief, the court had little trouble finding that Lee’s Ford Dock’s appellate claim injected a governmental awareness or knowledge component that was absent from the mutual mistake contention argued in the certified claim.⁴⁶ For this reason, the Federal Circuit held that the ASBCA lacked jurisdiction over the marina’s reformation causes of action.⁴⁷

B. Garco Construction, Inc. v. Secretary of the Army

With *Lee’s Ford Dock* and *Call Henry, Inc. v. United States*,⁴⁸ *Garco Construction, Inc. v. Secretary of the Army*⁴⁹ forms a cautionary tale for government contractors in claims cases. The Federal Circuit denied relief to the contractor, Garco Construction (“Garco”), despite Garco’s incurring hundreds of thousands of dollars of additional costs due to what may have been a change in the government’s site access policy and that at least constituted a stricter application of an existing policy.⁵⁰

1. Background

For over twenty years, Garco had regularly performed construction services at the Malmstrom Air Force Base in Great Falls, Montana, with a labor force that largely consisted of persons living in a nearby prison’s pre-release facility.⁵¹ Even though the base security procedures may have given the government the right to prohibit access to convicted felons throughout, no Garco employee had ever been denied access to a worksite on the base.⁵²

The 2006 contract at issue contained a provision that incorporated the convict labor clause at Federal Acquisition Regulation (FAR) § 52.222-3, which generally allows contractors to employ convicts in work-release programs.⁵³ The contract also required contractors to adhere to the base

46. *Lee’s Ford Dock*, 865 F.3d at 1368–69 (quoting *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1006 (Fed. Cir. 2015)).

47. *Lee’s Ford Dock*, 865 F.3d at 1370.

48. 855 F.3d 1348 (Fed. Cir. 2017); *see infra* Section I.E (summarizing the Federal Circuit’s *Call Henry* decision).

49. 856 F.3d 938 (Fed. Cir. 2017), *cert. denied*, 138 S. Ct. 1052 (Mar. 19, 2018).

50. 856 F.3d at 941.

51. *Id.* at 940. Although the claim concerned the ability to access the worksite of Garco’s subcontractor, James Talbott Construction, that nuance is not germane to the decision. For ease of reference, this discussion simply refers to Garco.

52. *Id.*

53. *Id.* at 940 (citing 48 C.F.R. § 52.222-3 (2016)).

access policy that stated that contractor employees would be subject to a “wants and warrants check” in which “[u]nfavorable results will be scrutinized and eligibility will be determined on a case-by-case basis.”⁵⁴

Following an altercation at an on-base Garco jobsite involving a pre-release facility worker, the base commander issued a restrictive interpretation of the base access policy.⁵⁵ The commander’s memorandum interpreted the “wants and warrants check” to mean a general criminal “background check.”⁵⁶ Thus, whereas the policy as written could be interpreted as limited only to persons sought by law enforcement authorities (i.e., those subject to “wants and warrants”), the memorandum explicitly brought those with criminal backgrounds (even if not subject to a warrant) within the ambit of the base access policy.

The commander’s memorandum further interpreted the “scrutiny” of those in a prison pre-release program to require denial of base access.⁵⁷ Two days after the commander issued the memorandum, Garco submitted a request for equitable adjustment, which was later converted into a certified claim that the Air Force’s contracting officer denied.⁵⁸ This claim sought over \$450,000 as compensation for the increased expense of fulfilling the contract under the memorandum.⁵⁹

In a series of decisions, the ASBCA equated the term “wants and warrants” with “background check” and found that the base access policy was a sovereign act.⁶⁰ The ASBCA denied Garco any recovery.⁶¹ Garco’s appeal to the Federal Circuit principally challenged whether the commander’s memorandum on base access constituted a change in policy.⁶²

2. *The Federal Circuit’s decision*

The Federal Circuit affirmed the ASBCA in a split decision.⁶³ The

54. 856 F.3d at 940 (internal quotation marks omitted).

55. *Id.* at 941.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 941–42.

62. *Id.* at 940. Garco made a claim for damages and an acceleration claim. *Id.* This latter claim would have given Garco more time to perform the contract, which may have mitigated the monetary impact the base access policy had on the contractor. As the underlying basis for the acceleration claim is the same as the claim for compensation, however, the acceleration claim, which the *Garco Construction* majority rejected in short order, *id.* at 945, will not be discussed separately here.

63. *Id.* at 940.

court was divided on the question of whether the sovereign acts doctrine is strictly an affirmative defense and thus an argument that can be waived by the parties or, instead, whether it has a sufficiently jurisdictional aspect that the adjudicative body must confront the issue regardless of when it was recognized.⁶⁴ Additionally, and perhaps more significant from a practitioner's viewpoint, the Federal Circuit accorded deference to the commander's interpretation of the base access policy under the *Auer v. Robbins*⁶⁵ standard, which potentially grants agencies unprecedented discretion in applying their internal guidance in individual matters.⁶⁶

a. The sovereign acts split

As a default principle, the United States, as a sovereign, is immune to lawsuits. It is only in circumstances that Congress has explicitly waived sovereign immunity that the government may be sued.⁶⁷ The CDA waives sovereign immunity for contractors' lawsuits against their federal customers.⁶⁸

But the CDA is not the end of the sovereignty discussion. The fact that the government acts as a contracting party does not mean that it has suspended its role as a sovereign. The judicially created sovereign acts doctrine protects the government from liability for its "genuinely public and general" acts that render the contractors' performance impracticable.⁶⁹ The sovereign acts doctrine distinguishes the government from other contracting parties by insulating the government from the ordinary principle of contract law that states that an owner is liable when its act prevents the contractor from performing.⁷⁰

The Federal Circuit panel's majority viewed the sovereign acts doctrine as a run-of-the-mill affirmative defense that may be waived,⁷¹ and it was enough that the government waived sovereign immunity

64. *Id.* at 942, n.2.

65. 519 U.S. 452 (1997).

66. *Garco Constr.*, 856 F.3d at 943 (citing *id.* at 461); see *infra* Section I.B.2.b.

67. See *United States v. King*, 395 U.S. 1, 4 (1969) (stating that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed").

68. 41 U.S.C. § 7105 (e)(1)(A) (2012).

69. *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1366 (Fed. Cir. 2009).

70. See *id.* As applied here, if the commander's memorandum is a generally applicable statement of base access that only incidentally fell on Garco's contract, the second prong of the analysis would be reached—whether application of the new interpretation of the base access procedure rendered performance impractical or impossible. See *id.*

71. *Garco Constr.*, 856 F.3d at 942, n.2.

through the CDA. Thus, because Garco had not challenged on appeal the ASBCA's determination that the base access policy constituted a sovereign act, the majority deemed the issue waived.⁷²

In the dissent, although agreeing that the sovereign acts doctrine is an affirmative defense,⁷³ Judge Evan Wallach nonetheless opined that the doctrine is so "grounded in the [g]overnment's sovereign immunity" that "questions regarding the doctrine's application cannot be waived."⁷⁴ In his view, Garco's failure to appeal whether the base access policy was a sovereign act was not the end of the story; the court should have reached the second question of the sovereign acts analysis.⁷⁵ In this context, the second question would have concerned whether the base could have achieved the aims of its security policy through less restrictive means, such as requiring Garco to hire a third-party law enforcement authority to police the worksite.⁷⁶

However, because the majority did not reach the application of the full sovereign acts doctrine, the main sovereign acts takeaway from this case is that on appeal, a lower tribunal's conclusion regarding a sovereign acts doctrine application may be waived and thus must be challenged.

b. Auer deference

Garco's main contention on appeal was that the commander's memorandum constituted a compensable change to the conditions of the contract.⁷⁷ This issue required the court to determine whether the memorandum's interpretation of the base access policy's "wants and warrants" clause to mean "background check" was a change or merely a clarification of the policy.⁷⁸

On this question, the court considered the policy to be an agency regulation to be accorded *Auer* deference. Under *Auer*, the court must defer to an agency's interpretation of an ambiguous regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation," or there is "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."⁷⁹

Contrary to Garco's argument that the term "wants and warrants" is a

72. *Id.*

73. *Id.* at 946 (Wallach, J., dissenting).

74. *Id.* at 951, n.5.

75. *Id.* at 947.

76. *Id.* at 946.

77. *Id.* at 942 (majority opinion).

78. *Id.* at 945.

79. *Auer v. Robbins*, 519 U.S. 452, 461, 462 (1997).

term of art that is much narrower than the commander's interpretation, the court found the policy's phrase to be ambiguous⁸⁰ and susceptible to the broader connotation of "background check."⁸¹ As a result, the court "conclude[d] that the [memorandum's] interpretation is not plainly erroneous or inconsistent with the regulation, and [the court] therefore must give it controlling weight."⁸²

3. *Importance of the case*

The wide berth the Federal Circuit gave the agency to broaden the number of workers it excluded from the base should be bracing for contractors and their counsel. The base access policy that was interpreted by the commander's memorandum was not a regulation that emerged from notice and comment rulemaking; it simply was local guidance that had been unevenly applied for decades. It seems rather arbitrary for the Air Force to ratchet up base access restrictions without compensating Garco. Indeed, the Supreme Court has declined to afford *Auer* deference when doing so "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"⁸³

Often government contract attorneys try to attach controlling meaning to agency "field memoranda," "operational handbooks," "interpretative letters," and other guidance that is on par with the base access procedures here and argue that the agency should have to abide by them. According controlling weight to even lower level "interpretative memorandums" and similar documents adds further elements of variability and risk to the government contractor's task.

On March 19, 2018, the Supreme Court denied Garco Construction's petition for certiorari.⁸⁴ Justice Clarence Thomas wrote a dissent, which Justice Neil Gorsuch joined.⁸⁵ Terming *Garco Construction* "an ideal case to reconsider [*Auer*] deference,"⁸⁶ the dissent

80. *Garco Constr.*, 856 F.3d at 943.

81. *Id.* at 942–43.

82. *Id.* at 945.

83. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

84. *Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052 (2018) (denying certiorari without explanation).

85. *Id.* (Thomas, J., dissenting).

86. *Id.* at 1053. Justice Thomas referred to the doctrine as "*Seminole Rock* deference" after the case that initially established judicial deference to agency interpretations of their own regulations, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

viewed the doctrine as a “constitutionally suspect” accumulation of power in the executive branch because it allows the promulgating agency the unilateral power to change the regulation’s meaning without an effective judicial check.⁸⁷

Quoting his own observation that *Auer* deference is “on its last gasp,” Justice Thomas noted several recent instances in which the doctrine has been criticized by the Supreme Court.⁸⁸ Whether and when this prognostication comes to pass, today *Auer* still commands five votes on the Supreme Court.⁸⁹ Thus, “[w]hile the military is far better equipped than the courts to decide matters of tactics and security, it is no better equipped to read legal texts,”⁹⁰ for now on Malmstrom Air Force Base, “wants and warrants” means much more than it says.

C. Agility Defense & Government Services v. United States

Former Secretary of Defense Robert Gates has observed that “if Iraq has shown us anything, it [is] the unpredictability of war. Once a conflict starts, the statesmen lose control.”⁹¹ Like policy makers and military officials, government contracting officers must also deal with the unpredictable nature of war when they structure contracts and define requirements necessary to support combat operations and logistics. A requirements-type contract is one flexible contract vehicle that can be used to accommodate unpredictable fluctuations in demand for a particular product or service.

But when the government decides to use a requirements-type contract, it must provide potential offerors with a realistic estimate of the anticipated requirements that is based “on the most current information available.”⁹² In *Agility Defense & Government Services v. United States*,⁹³ the Federal Circuit grappled with the question of how this obligation applies to requirements that are driven by the timing of troop movements in a warzone.⁹⁴ The court held that the government could not rely on historical data to develop estimated quantities

87. *Garco Constr.*, 138 S. Ct. at 1052.

88. *Id.* at 1053.

89. See Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. Rev. 748, 763 (1995) (interpreting Justice William Brennan’s well-known description of the Supreme Court as subject to the “rule of five” as meaning that “it takes five votes to do anything”).

90. *Garco Constr.*, 138 S. Ct. at 1053.

91. Fred Kaplan, *The Professional*, N.Y. TIMES, Feb. 10, 2008 (Magazine), at MM40.

92. 48 C.F.R. § 16.503(a)(1) (2017).

93. 847 F.3d 1345 (Fed. Cir. 2017).

94. *Id.* at 1352.

because it possessed information that indicated there was likely to be a surge in requirements above historical levels.⁹⁵

1. Background

The Defense Logistics Agency (DLA) provides logistical support, supplies, and equipment disposition services to troops deployed all over the world.⁹⁶ One component of the DLA, the Defense Reutilization Marketing Service (DRMS), is responsible for disposing of all excess personal property generated by the various military services.⁹⁷ DRMS has established locations throughout the world where surplus property is received and processed for disposal or sold on the scrap market.⁹⁸

DRMS historically processed all surplus property at these locations for the military services.⁹⁹ But in late 2006, the director of DRMS determined that the agency could not handle the expected workload created by planned troop movements.¹⁰⁰ As a result, DRMS issued a solicitation in early 2007 for a first-of-its-kind contract to dispose of surplus property received at locations in Iraq, Afghanistan, and Kuwait.¹⁰¹ The solicitation contemplated the award of a firm-fixed price requirements contract under which the contractor would be responsible for disposing of all surplus property received at six designated locations.¹⁰²

To offset some of the risk to the contractor, DRMS allowed the contractor to retain the proceeds of any surplus property that it could sell for scrap on the open market.¹⁰³ The solicitation also included a special clause that the DRMS drafted and intended to address “significant workload increases or decreases.”¹⁰⁴ Clause H.19 allowed the contractor to recover additional costs (1) if the workload increased at any location by

95. *Id.* at 1351.

96. *Agility Def. & Gov’t Servs., Inc. v. United States*, 122 Fed. Cl. 677, 681 (2015), *rev’d*, 847 F.3d 1345 (Fed. Cir. 2017).

97. *Id.*

98. *Id.*

99. *Agility Def. & Gov’t Servs.*, 847 F.3d at 1347.

100. *Id.* Although it is unclear from the court’s opinion, it appears based on the timing of events that the decision by DRMS was likely influenced by troop movements planned to execute President George W. Bush’s order to send 20,000 troops to Iraq in what became known as “the surge.” David E. Sanger, *Bush Adds Troops in Bid to Secure Iraq*, N.Y. TIMES, Jan. 11, 2007, at A1.

101. *Agility Def. & Gov’t Servs.*, 122 Fed. Cl. at 680, 682.

102. *Id.* at 682.

103. *Agility Def. & Gov’t Servs.*, 847 F.3d at 1348.

104. *Id.*

more than 150% above the average for the three preceding months, and (2) if the parties determined that the increase would continue for more than two months.¹⁰⁵ Alternatively, if there were significant workload decreases at a particular location, DRMS had the right to renegotiate the price paid to the contractor to operate that location.¹⁰⁶

During the solicitation phase, one of the offerors asked DRMS to provide workload history and projections for each location.¹⁰⁷ DRMS told offerors in an amendment to the solicitation that it did not have workload projections.¹⁰⁸ Although DRMS would not provide workload estimates, it did inform offerors that it anticipated an increase in property “turn-ins.”¹⁰⁹ In lieu of providing estimates, DRMS provided a link to a government website that contained historical data that showed the number of property items, as well as the scrap weight and scrap sales received for each location.¹¹⁰ The website also showed the number of personnel DRMS employed at each location.¹¹¹

A later amendment to the solicitation included a spreadsheet that showed the amount of scrap weight expected for all six locations during the base contract year and four one-year option periods.¹¹² The spreadsheet detailed the expected amount of scrap by weight and category (e.g., scrap vehicle, fuels/oil, and electronics).¹¹³ The projected scrap quantities reflected a stable workload for the first two years followed by workload declines in the last three years.¹¹⁴

After Agility won the contract and began performance in early 2008, it immediately inherited a workload that was substantially higher than the historical data suggested.¹¹⁵ During the first year of performance, Agility’s workload was well over double pre-contract levels, and it also inherited significant backlogs at all locations.¹¹⁶ Agility did not have sufficient staff to accomplish the work and eventually added over 100 personnel to perform the contract.¹¹⁷ When Agility attempted to recover funds spent

105. *Agility Def. & Gov’t Servs.*, 122 Fed. Cl. at 682.

106. *Id.*

107. *Agility Def. & Gov’t Servs.*, 847 F.3d at 1347.

108. *Id.*

109. *Id.* at 1348 (internal quotation marks omitted).

110. *Id.* at 1347.

111. *Agility Def. & Gov’t Servs.*, 122 Fed. Cl. at 683.

112. *Id.*

113. *Id.*

114. *Agility Def. & Gov’t Servs.*, 847 F.3d at 1348.

115. *Id.*

116. *Agility Def. & Gov’t Servs.*, 122 Fed. Cl. at 684–85.

117. *Id.* at 685.

on the additional personnel, DRMS took the position that clause H.19 did not apply because the workload was high from the inception of the contract.¹¹⁸ Thus, according to DRMS, there was never a time when the increase was above 150% of the preceding three months.¹¹⁹

After more than two years of performance issues, DRMS terminated Agility's contract for convenience.¹²⁰ Thereafter, Agility submitted two claims seeking an equitable adjustment of nearly \$6 million for costs incurred to process surplus property in excess of the anticipated quantities.¹²¹ The contracting officer awarded Agility just \$236,363.93 and denied the remainder of the claims.¹²²

2. *The Court of Federal Claims's decision*

Agility filed suit in the COFC for the unpaid amounts and increased its overall claim to nearly \$7 million.¹²³ Agility's complaint asserted three alternative theories of recovery: (1) DRMS constructively changed the contract; (2) DRMS provided negligent estimates during the solicitation phase; and (3) DRMS "breached the warranty of reasonable accuracy regarding the information provided during the [solicitation] phase."¹²⁴ The COFC denied Agility's claims on all three theories.¹²⁵

Agility's constructive change claim was premised on DRMS's alleged failure to disclose its superior knowledge about scrap estimates and troop movements prior to contract award.¹²⁶ The COFC rejected this theory because there was no evidence that DRMS had knowledge of "specific planned troop movements."¹²⁷ Further, the COFC found that troop movements in a warzone were unpredictable and the government was not required "to be clairvoyant."¹²⁸ According to the COFC, it was reasonable for DRMS to provide historical data instead of estimates, and the government had no obligation to "search for or create additional information" to provide to offerors.¹²⁹

The COFC turned next to Agility's negligent estimate claim that was

118. *Agility Def. & Gov't Servs.*, 847 F.3d at 1349.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Agility Def. & Gov't Servs. v. United States*, 122 Fed. Cl. 677, 680 (2015).

124. *Id.* at 687.

125. *Id.* at 691.

126. *Id.* at 688.

127. *Id.*

128. *Id.* (quoting *Serv. Technicians, Inc. v. United States*, 37 Fed. Cl. 383, 387 (1997)).

129. *Id.* at 688 (quoting *Medart, Inc. v. Austin*, 967 F.2d 579, 582 (Fed. Cir. 1992)).

similar to, but not co-extensive with, the constructive change claim. To prove its negligent estimate claim, Agility had to show that government estimates were “inadequately or negligently prepared, not in good faith, or grossly or unreasonably inadequate at the time the estimate was made.”¹³⁰ When awarding a requirements contract, FAR 16.503 provides that agencies “shall state a realistic estimated total quantity in the solicitation and resulting contract.”¹³¹ But the COFC found that “[w]hen the scope of a contract is extensive or complex, like the unpredictable demilitarization of vehicles, weapons[,] and other property in the Middle East, there may be ‘no central point to obtain accurate predictions of orders.’”¹³² As a result, the COFC rejected Agility’s negligent estimate claim and concluded that it was reasonable for DRMS to “provide[] objective, historical workload data from which the offerors could extrapolate future needs.”¹³³

Finally, the COFC denied Agility’s claim that DRMS breached “[t]he warranty of reasonable accuracy[, which] is a corollary to the concept of negligent estimate.”¹³⁴ To prevail, Agility had to prove that it detrimentally relied on a material representation DRMS made as part of the solicitation.¹³⁵ Because DRMS expressly declined to provide estimates in the solicitation, the COFC determined it could not have made a material representation regarding the expected workload.¹³⁶ As a result, the COFC found no breach of the warranty of reasonable accuracy by DRMS.¹³⁷

Fundamentally, the COFC viewed its task as “determin[ing] which party, Agility or the [g]overnment, assumed the risk that the costs of performance would be higher than anticipated.”¹³⁸ The COFC observed that this was “an unusually high-risk contract” but concluded that Agility assumed that risk by agreeing to a fixed price contract while knowing that the inherent unpredictability of troop movements could increase requirements.¹³⁹

130. *Id.* at 689 (quoting *Medart*, 967 F.2d at 581).

131. 48 C.F.R. § 16.503(a)(1) (2017).

132. *Agility Def. & Gov’t Servs.*, 122 Fed. Cl. at 690 (quoting *Medart*, 967 F.2d at 582).

133. *Id.* at 689.

134. *Id.* at 691.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 680.

139. *Id.* at 680, 681.

3. *The Federal Circuit's decision*

On appeal, the Federal Circuit reversed the COFC's decision.¹⁴⁰ The court only reached Agility's negligent estimate claim because the other two theories presented alternative bases for recovery.¹⁴¹ The court found that the COFC's decision was erroneous for two primary reasons.¹⁴²

First, the court found that the COFC erred by ignoring that DRMS's projection of scrap quantities was itself an estimate of projected requirements because the weight of scrap was expected to correlate with the number of property items turned in by the military services.¹⁴³ Because DRMS "project[ed] stable and then declining scrap weight," the court found that it essentially provided offerors with an estimate that property turn-ins would "remain constant and then decline."¹⁴⁴ According to the court, it was clear error for the COFC not to treat the scrap projection as an estimate.¹⁴⁵

Second, the court disagreed with the COFC's conclusion that DRMS's provision of historical data satisfied its requirement to provide a realistic estimate.¹⁴⁶ The court held that the government cannot rely solely on historical data if it has other information that is reasonably available that can be used to establish a more realistic estimate.¹⁴⁷ Here, the court found that DRMS possessed information regarding its anticipated requirements that went above and beyond the historical data provided to offerors.¹⁴⁸

Specifically, a memorandum dated prior to contract award indicated that DRMS was aware of planned troop movements and that a surge of equipment and material was expected to be turned in as units departed.¹⁴⁹ Because DRMS anticipated an increase in workload, the court found that DRMS's decision to simply provide offerors with historical workload data was not "the most current information available" and did not provide a "realistic estimate" under FAR 16.503.¹⁵⁰

The court rejected DRMS's argument that the parties' agreement to

140. *Agility Def. & Gov't Servs. v. United States*, 847 F.3d 1345, 1354 (Fed. Cir. 2017).

141. *Id.* at 1349 n.1.

142. *Id.* at 1351.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1351–52.

150. *Id.* at 1352.

clause H.19 foreclosed Agility's negligent estimate claim.¹⁵¹ In the court's view, Agility's claim did not involve the limited subject of clause H.19 but was instead "rooted in DRMS's violation of FAR 16.503, leading to a large disparity between pre-contract estimates and actual workloads during the performance period."¹⁵² The court also denied the government's argument that Agility's receipt of scrap sale proceeds should preclude its recovery.¹⁵³ The court held that Agility was entitled to recover on its negligent estimate claim regardless of how much it was able to recover from scrap proceeds.¹⁵⁴ The court reversed the COFC's denial of Agility's negligent estimate claim and remanded for calculation of Agility's equitable adjustment.¹⁵⁵

4. *Importance of the case*

The government often relies on historical data to predict future needs. In *Agility Defense*, the Federal Circuit clarified that use of historical data does not satisfy the obligation to provide a "realistic estimate" under FAR 16.503 when better and more current information is available to forecast the agency's anticipated requirements.¹⁵⁶ This obligation applies even where, as in *Agility Defense*, the requirements at issue are driven by inherently unpredictable events such as troop movements.¹⁵⁷ In the aftermath of the Federal Circuit's decision, the government will be more vulnerable to potential negligent estimate claims when it chooses to rely on historical data to project future needs under a requirements-type contract.

D. *Agility Public Warehousing Co. KSCP v. Mattis*

In *Agility Public Warehousing Co. KSCP v. Mattis*¹⁵⁸ ("*Agility PWC*"), the Federal Circuit was again confronted with a contract plagued by the

151. *Id.* at 1353.

152. *Id.*

153. *Id.* at 1354.

154. *Id.*

155. *Id.* On remand, the COFC awarded Agility its entire claimed amount of nearly \$7 million. *Agility Def. & Gov't Servs., Inc. v. United States*, 134 Fed. Cl. 723, 725 (2017).

156. *Agility Def. & Gov't Servs.*, 847 F.3d at 1352 (holding that "it was clearly erroneous for the Claims Court to find that DRMS complied with the requirements of FAR 16.503 by providing historical data" instead of its anticipated increase in workload).

157. *Id.* (noting that DRMS was not compelled to "guarantee the accuracy of its estimates or perfectly forecast its requirements" to satisfy its obligation under FAR 16.503).

158. 852 F.3d 1370 (Fed. Cir. 2017).

unpredictability of war. In *Agility PWC*, however, the government's unanticipated actions during contract administration, rather than unreliable pre-award estimates, hampered the contractor's performance. The Federal Circuit held that, although those unanticipated actions did not breach the express terms of the contract, they could still form the basis for a constructive change claim or a claim for breach of the implied duty of good faith and fair dealing.¹⁵⁹

1. *Background*

In May 2003, the Defense Supply Center Philadelphia, a sub-agency of the DLA, awarded a contract to Agility to provide food and non-food products to military customers in Kuwait and Qatar.¹⁶⁰ The original contract pricing structure called for a "unit price" that would include a "delivered price" and a "distribution price."¹⁶¹ The distribution price consisted of various administrative expenses as well as transportation costs from the vendor's distribution facility to the final delivery point.¹⁶² This case involved a dispute concerning the transportation costs included in the distribution price component of the contract's pricing structure.

Shortly after award, the parties modified the contract to expand the service area to include the Iraq deployment zone.¹⁶³ Modification 1 ("Mod. 1") stated that the supply trucks going to Iraq were to be escorted by the military and would not be used for storage purposes at the delivery sites.¹⁶⁴ Modification 2 ("Mod. 2") provided that Agility was entitled to charge the government additional fixed amounts per day for trips lasting longer than three days.¹⁶⁵ The duration of each trip was to be calculated from the time the trucks were loaded until the trucks returned to Agility's distribution facility in Kuwait.¹⁶⁶ There was initially no limit on the maximum fees payable to Agility if trucks remained in Iraq for long periods.¹⁶⁷

159. *Id.* at 1384 (finding that a party might breach its implied duty of good faith and fair dealing by "interfering with another party's performance or acting in such a way as to destroy" the other party's reasonable expectations surrounding the contractual benefits).

160. *Id.* at 1373.

161. *Id.*

162. *Id.*

163. *Id.* at 1374.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

Once Agility began performance, its supply trucks experienced myriad delays on trips from Kuwait to forward operating bases in Iraq.¹⁶⁸ Although the parties expected trips to last seven days at the time of contract award, the average turnaround time was fifteen days.¹⁶⁹ Because some bases lacked cold-storage equipment, soldiers often kept Agility's refrigerated trucks onsite to store food.¹⁷⁰ This resulted in numerous trips that greatly exceeded the fifteen-day average, including one trip that lasted 154 days at a cost of nearly \$100,000.¹⁷¹

The parties eventually engaged in a series of discussions about how to improve the turnaround time.¹⁷² Agility wanted its trucks back more quickly and the government was concerned about the amount of fees paid for lengthy trips under Mod. 2's uncapped fee structure.¹⁷³ Agility proposed to provide more support personnel throughout its distribution network in Iraq in exchange for higher fees.¹⁷⁴ In return, the government proposed to place a twenty-nine-day cap on the transportation fees payable to Agility.¹⁷⁵

Agility expressed concern that the proposed cap was "unqualified" and could result in large losses if trucks were delayed by the government.¹⁷⁶ Agility's representative "stated that Agility would prefer to have the ability to submit exceptions to the [twenty-nine] day rule if the situation is unavoidable despite our best efforts to prevent it."¹⁷⁷ The contracting officer responded by email that "exceptions to the [twenty-nine-]day rule will only be considered in the form of a claim."¹⁷⁸

Despite Agility's reservations, the parties executed Modification 27 ("Mod. 27"), which included the twenty-nine-day cap on fees.¹⁷⁹ Mod. 27 restructured the transportation fees owed to Agility. The new fee structure included a minimum number of days and a minimum cost for trips based on the delivery location in Iraq.¹⁸⁰ Agility was

168. *Id.*

169. *Id.* at 1375.

170. *Id.* at 1374–75.

171. *Id.* at 1375.

172. *Id.*

173. *Id.* at 1375–76.

174. *Id.* at 1376.

175. *Id.*

176. *Id.*

177. *Id.* at 1382 (internal quotation marks omitted).

178. *Id.*

179. *Id.* at 1376.

180. *Id.*

entitled to daily fees for additional days beyond the minimum trip length, except the government would not pay any fees beyond the maximum twenty-nine-day cap.¹⁸¹ Mod. 27 further stated that “additional days beyond the established minimum fees are *only applicable if the delay is customer caused*.”¹⁸² A customer-caused delay was defined under Mod. 27 as a situation in which the military did not have “the capability to off load and return the truck” to Agility.¹⁸³

After the execution of Mod. 27, Agility began submitting claims for payment to cover trucks that were in Iraq longer than twenty-nine days.¹⁸⁴ Agility claimed that the additional costs were recoverable because the military was holding trucks for storage in violation of the provision in Mod. 1, which stated that “trucks will not be used at the sites for storage purposes.”¹⁸⁵ Agility eventually submitted a certified claim seeking approximately \$12.5 million.¹⁸⁶ The contracting officer denied the claim on the basis that Mod. 27 imposed a twenty-nine-day cap.¹⁸⁷

2. *The Armed Services Board of Contract Appeals’s decision*

Agility appealed the contracting officer’s decision to the ASBCA. Agility argued that the government “(1) breached the express terms of the contract, (2) breached its promise to consider exceptions to Mod. 27’s [twenty-nine]-day cap on fees, (3) breached the implied duty of good faith and fair dealing, and (4) constructively changed the contract.”¹⁸⁸ After a ten-day hearing, the ASBCA denied Agility’s appeal.¹⁸⁹

The ASBCA held that the new provisions included in Mod. 27 modified the storage prohibition in Mod. 1. Specifically, the ASBCA found that Mod. 27 would have been “useless and inexplicable” if the government could not use the trucks as storage.¹⁹⁰ Moreover, based on the exchanges between Agility and the contracting officer prior to Mod. 27, the ASBCA determined that Agility understood that the twenty-nine-day cap was “unqualified” such that it was accepting all

181. *Id.*

182. *Id.* at 1383 (quoting Pub. Warehousing Co., ASBCA No. 56022, 15-1 BCA ¶ 36,062, 176,100).

183. *Id.* at 1376.

184. *Id.* at 1377.

185. *Id.* at 1378.

186. *Id.*

187. *Id.*

188. *Id.* at 1380.

189. *Id.* at 1378.

190. *Id.* at 1379 (quoting Pub. Warehousing Co., ASBCA No. 56022, 15-1 BCA ¶ 36,062, 176,110).

risks associated with delays beyond twenty-nine days.¹⁹¹ Having concluded that the government did not breach the express terms of the contract, the Board stated that there was no need to determine whether the government breached the implied duty of cooperation or constructively altered contract performance.¹⁹²

3. *The Federal Circuit's decision*

The Federal Circuit affirmed the ASBCA's interpretation of Mod. 27 and its decision that the government did not breach the express terms of the contract.¹⁹³ Like the ASBCA, the court found that the twenty-nine-day cap was "unqualified" and therefore applied to all government-caused delays, including storage delays.¹⁹⁴ According to the court, "the language of Mod. 27 abrogated any remaining significance of Mod. 1, Paragraph 4," which prohibited the use of trucks for storage purposes.¹⁹⁵ Based on the plain language of Mod. 27 and the supporting extrinsic evidence considered by the ASBCA, the court concluded that the parties intended to share "the risk of travel times rather than hav[e] the government shoulder the burden alone."¹⁹⁶ As a result, the court affirmed the ASBCA's decision to deny Agility's express breach of contract claim.¹⁹⁷

The court also affirmed the ASBCA's denial of Agility's claim that the government breached its promise to consider exceptions to the twenty-nine-day cap imposed under Mod. 27.¹⁹⁸ The court recognized that "neither Agility nor the government ever added or insisted on language in Mod. 27 regarding exceptions to the [twenty-nine]-day cap."¹⁹⁹ Rather, Agility agreed to the unqualified twenty-nine-day cap included in Mod. 27, so its argument was based "entirely on a few lines in an email exchange" between Agility's representative and the contracting officer.²⁰⁰ The exchange between Agility and the government, however, did nothing more than demonstrate that the government "merely agreed

191. *Id.*

192. *Id.* (quoting Pub. Warehousing Co., ASBCA No. 56022, 15-1 BCA ¶ 36,062, 176,110).

193. *Id.* at 1373, 1382.

194. *Id.* at 1380–81.

195. *Id.* at 1381.

196. *Id.* at 1382.

197. *Id.*

198. *Id.* at 1373, 1383.

199. *Id.* at 1382.

200. *Id.*

to *consider* any exceptions to the [twenty-nine]-day cap.”²⁰¹ Because the government was not contractually obligated to make exceptions, the court affirmed the ASBCA’s denial of Agility’s claim.²⁰²

Although the court agreed with the ASBCA’s analysis of the breach of contract claim, the court found that the ASBCA erred by failing to analyze Agility’s implied duty and constructive change claims.²⁰³ The implied duty of good faith and fair dealing cannot be used to expand a party’s express contractual duty.²⁰⁴ But the court held that a “party might breach this implied duty by interfering with another party’s performance or acting in such a way as to destroy the reasonable expectations of the other party regarding the benefits provided by the contract.”²⁰⁵ Thus, even though the government abided by the express terms of the contract, the court explained that the government may have breached its implied duty of good faith and fair dealing by, for example, “unnecessarily delaying the return of Agility’s trucks and not increasing its on-site food storage capabilities.”²⁰⁶ The government could not impose a twenty-nine-day cap on fees but then “engage[] in conduct that made it impossible for Agility to perform within the cap.”²⁰⁷ The court vacated the ASBCA’s decision as to the implied duty claim and remanded the case to the ASBCA to decide that claim in the first instance.²⁰⁸

The court also determined that the ASBCA erred by failing to consider Agility’s constructive change claim.²⁰⁹ To prove a constructive change claim, “a plaintiff must show (1) that it performed work beyond the contract requirements, and (2) that the additional work was ordered, expressly or impliedly, by the government.”²¹⁰ Agility contended that the government constructively changed the contract by increasing the number of instances where trucks were held on site for storage purposes.²¹¹ According to the court, the ASBCA erred in not considering this contention because a contract change does not need to constitute

201. *Id.* at 1383.

202. *Id.* (finding that there was no error in the ASBCA’s judgment on the issue of exceptions).

203. *Id.* at 1385 (vacating the ASBCA’s decision on the implied duty claim).

204. *Id.* at 1384 (citing *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014)).

205. *Id.* (citing *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005)).

206. *Id.*

207. *Id.*

208. *Id.* at 1385.

209. *Id.*

210. *Id.* (quoting *Bell/Heery v. United States*, 739 F.3d 1324, 1335 (Fed. Cir. 2014)).

211. *Id.*

an express breach of contract.²¹² The court therefore instructed the ASBCA to also consider Agility's constructive change claim on remand.

4. *Importance of the case*

Agility PWC solidified the Federal Circuit's trend towards a more expansive view of implied duty claims. The Federal Circuit's 2014 decision in *Metcalfe Construction Co. v. United States*²¹³ was the first case to give new life to contractor claims for breach of the implied duty of good faith and fair dealing. In *Metcalfe*, the court clarified that contractors do not need to show that the government "specifically targeted" benefits of the contract to prove an implied duty claim.²¹⁴ The court in *Metcalfe* was also clear that "a breach of the *implied* duty of good faith and fair dealing does not require a violation of an *express* provision in the contract."²¹⁵ *Agility PWC* reaffirmed this principle. In the wake of *Metcalfe* and *Agility PWC*, implied duty claims will likely proliferate as contractors seek to recover increased costs of performance caused by government actions that frustrate their contractual rights or benefits.

E. *Call Henry, Inc. v. United States*

In contrast to the warzone contracts examined above, the contract at issue in *Call Henry* involved a run-of-the-mill domestic service contract governed by the Service Contract Act (SCA). The contract included a standard SCA price adjustment clause that allowed the contractor to recover increased costs incurred to comply with the statute over the course of a multi-year contract.²¹⁶ The price adjustment clause effectively shifted the risk of increasing compliance costs to the government.²¹⁷ But in *Call Henry*, the court denied the contractor's attempt to recover pension withdrawal liability costs under that provision in a decision that may have significant consequences for service contractors, their employees, and the government.²¹⁸

212. *Id.*

213. 742 F.3d 984 (Fed. Cir. 2014).

214. *Id.* at 992–93.

215. *Id.* at 994.

216. *Id.* at 1351.

217. *Id.* (explaining that the price adjustment clause is the mechanism for providing the price increase that the government is willing to pay when contractors incur increased compliance costs).

218. *Id.* at 1356 (affirming the COFC's decision to dismiss *Call Henry*'s complaint for failure to state a claim).

1. *Service Contract Act background*

The SCA addresses various employment issues that arise when a recompetition results in a new contractor taking over for an incumbent on a federal service contract, and the incumbent employees are “rebadged” to work for the successor contractor.

For one, contracts covered by the SCA must include a “wage determination” that establishes the minimum wages and fringe benefits that must be paid to employees performing the work.²¹⁹ Employees covered under the SCA are entitled to wage rates and benefits that are equal to or greater than (1) the minimum wage under the Fair Labor Standards Act; (2) the prevailing wage rates established by the Department of Labor for the geographic area where the work will be performed; or (3) the rates set by a collective bargaining agreement (CBA) entered into by the incumbent contractor.²²⁰ When an incumbent, or predecessor, contractor has entered into a CBA, the successor contractor must pay at least the same wages and fringe benefits specified in the CBA.²²¹

By requiring a successor contractor to pay at least the same wages and benefits as the predecessor contractor, the SCA protects employees from the effects of competition on government contracts. Without the so-called predecessor contractor rule, incumbent contractors who engaged in collective bargaining would be at high risk of being underbid on the successor contract by one who did not offer fair wages.²²² This would frustrate “one of the [SCA’s] principal policy implications . . . that the U.S. government, as a customer, is willing to pay a premium for services in return for its contractor’s obligation to compensate service employees adequately and fairly.”²²³

To effectuate this policy, the SCA price adjustment clause “provides a framework for increasing the unit labor rates in a service contract when certain events occur that increase the costs of complying with an

219. 41 U.S.C. §§ 6703(1), (2) (2012).

220. *Id.* §§ 6703, 6704.

221. *Id.* § 6707(c)(1); *see also* 48 C.F.R. § 52.222-41(f) (2017).

222. *Call Henry*, 855 F.3d at 1350.

223. *Id.* at 1351; *see also* S. REP. NO. 89-798, at 3–4 (1965) (quoting H.R. REP. NO. 89-948, at 2–3 (1965) (explaining the need for this legislation as federal service contractors are “one of the most disadvantaged groups of our workers and little hope exists for an improvement of their position without some positive action to raise their wage levels . . . [and] [t]he Federal Government has added responsibility in this area”)).

increased wage determination.”²²⁴ For contracts that span multiple years, the price adjustment clause allows the contractor to obtain a price increase if it incurs additional costs to comply with a wage determination or applicable CBA in effect on the anniversary date of the contract or at the beginning of a renewal option period.²²⁵ Because the contractor is entitled to price increases, the price adjustment clause requires the contractor to warrant that its original contract price does not include any contingency to cover costs for which adjustment is provided.²²⁶

In *Lear Siegler Services, Inc. v. Rumsfeld*,²²⁷ the Federal Circuit held that “the price adjustment clause is triggered by changes in an *employer’s cost of compliance* with the terms of a wage determination.”²²⁸ According to the court, the lack of a change in the level of benefits mandated by a CBA is irrelevant to a price adjustment clause inquiry.²²⁹ Thus, in *Lear*, the court concluded that the contractor was entitled to a price adjustment to cover the increased costs it incurred to comply with health benefits defined in the applicable CBA, even though there was no change in the level of benefits required under the CBA.²³⁰

2. Background

In April 2003, Call Henry, Inc., entered into a multi-year, SCA-covered contract to provide inspection, maintenance, and testing services to the National Aeronautics and Space Administration (NASA).²³¹ The contract included a three-year base period and seven one-year options.²³² Call Henry’s employees were members of the International Brotherhood of Teamsters Local Union No. 416 (“the Teamsters”).²³³ Call Henry negotiated a CBA with the Teamsters that was effective from 2003 to 2007.²³⁴

The CBA required Call Henry to join and contribute to the “Teamsters’ Pension Plan,” which was subject to the Multi-Employer Pension Plan Amendment Act (MPPAA).²³⁵ The MPPAA “requir[es]

224. *Call Henry*, 855 F.3d at 1351–52.

225. 48 C.F.R. § 52.222-43(d).

226. § 52.222-43(b).

227. 457 F.3d 1262 (Fed. Cir. 2006).

228. *Id.* at 1269.

229. *Id.*

230. *Id.*

231. *Call Henry, Inc. v. United States*, 855 F.3d 1348, 1350 (Fed. Cir. 2017).

232. *Id.*

233. *Id.* at 1352.

234. *Id.*

235. *Id.*

any employer who withdraws from the plan to pay withdrawal liability to the pension fund.”²³⁶ The withdrawal liability is used to fund the employer’s share of its pension plan’s obligations while it was associated with the plan.²³⁷

When the base period of Call Henry’s contract expired in 2007, NASA executed the first option year.²³⁸ Call Henry’s “option contract was a successor contract to the three-year base performance period.”²³⁹ As a consequence, the CBA effective from 2003 to 2007 became the “wage determination” applicable to the first option year.²⁴⁰ Call Henry entered into a new CBA applicable to the first option year and, as “NASA continued to exercise option contracts . . . [,] Call Henry continued to enter into new [CBAs] with the Teamsters.”²⁴¹ During the option periods, Call Henry’s mandatory pension obligations increased, and it became more costly to fund the Teamsters’ Pension Plan under each successive CBA.²⁴² As a result, at each renewal, NASA provided an upward price adjustment on the contract pursuant to the SCA to compensate Call Henry for its increased pension obligations.²⁴³

In 2012, the National Labor Relations Board (NLRB) decertified the Teamsters as the representative for Call Henry’s employees.²⁴⁴ The NLRB’s decertification order resulted in Call Henry’s “withdrawal” from the Teamsters’ Pension Plan. This triggered Call Henry’s liability under the MPPAA.²⁴⁵ Although Call Henry was potentially liable for approximately \$6 million in withdrawal liability, it was able to reduce that amount to less than \$2 million through arbitration.²⁴⁶

After the arbitration decision, Call Henry filed a certified claim to the NASA contracting officer seeking reimbursement for the assessed

236. *Id.*; see 29 U.S.C. § 1381(a) (2012).

237. *Call Henry*, 855 F.3d at 1352 (citing 29 U.S.C. § 1381(b)(1) (2012); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986)).

238. *Id.*

239. *Id.*

240. *Id.* When the government exercises an option, the contractor becomes a “successor” contractor to itself. See 29 C.F.R. § 4.163(e) (2016) (stating that the SCA “is applicable by its terms to a successor contract without regard to whether the successor contractor was also the predecessor contractor”).

241. *Call Henry*, 855 F.3d at 1353.

242. *Id.*

243. *Id.*

244. *Id.* (noting that a new union, the International Association of Machinists and Aerospace Workers, replaced the Teamsters as the representative of the employees).

245. *Id.* (citing 29 U.S.C. § 1381(a) (2012)); see also 29 U.S.C. § 1383(a).

246. *Call Henry*, 855 F.3d at 1353.

MPPAA withdrawal liability under the SCA price adjustment clause.²⁴⁷ In *Call Henry's* view, the withdrawal liability was recoverable as an increased cost of providing pension benefits under its CBA with the Teamsters.²⁴⁸ But NASA's contracting officer disagreed and denied the claim on the basis that "MPPAA withdrawal liability is not an increased cost of complying with the [CBAs], but a result of withdrawal from the pension fund."²⁴⁹

3. *The Court of Federal Claims's decision*

Call Henry filed a single-count complaint at the COFC alleging that NASA breached the contract by failing to adjust the contract price to offset the increased pension costs.²⁵⁰ NASA filed a motion to dismiss *Call Henry's* claim on the grounds that NASA had no contractual obligation to provide an adjustment for *Call Henry's* MPPAA withdrawal liability.²⁵¹ NASA argued that withdrawal liability is not a fringe benefit covered by the SCA but rather a distinct statutory liability under the MPPAA.²⁵² The COFC granted NASA's motion, relying on what the Federal Circuit later characterized as "two independent lines of reasoning."²⁵³

First, the COFC held that the SCA does not incorporate all of the terms of a CBA into the contract, only the wage and fringe benefit amounts.²⁵⁴ The COFC reasoned that *Call Henry's* withdrawal liability was recoverable only if it constituted a "fringe benefit" covered by the SCA.²⁵⁵ Second, the COFC concluded that withdrawal liability is not a "fringe benefit" under the SCA because it is an independent benefit covered by a different statute—the MPPAA.²⁵⁶ Because withdrawal liability is a benefit that is required by another federal law, it could not also be a fringe benefit under the SCA.²⁵⁷ Further, the COFC noted that although the Teamsters' CBA required *Call Henry* to contribute to the Pension Plan, it did not mention withdrawal liability.²⁵⁸

247. *Id.*

248. *Id.* at 1353–54.

249. *Id.* at 1354.

250. *Call Henry, Inc. v. United States*, 125 Fed. Cl. 282, 284 (2016), *aff'd*, 855 F.3d 1348 (Fed. Cir. 2017).

251. *Id.*

252. *Id.*

253. *Call Henry*, 855 F.3d at 1354.

254. *Call Henry*, 125 Fed. Cl. at 286.

255. *Id.*

256. *Id.*

257. *Id.* (quoting 29 C.F.R. § 4.171(c) (2016)).

258. *Id.*

Therefore, the COFC determined that Call Henry's liability under the MPPAA is not a fringe benefit covered by the contract, and, as a result, NASA did not breach the contract by refusing to pay the withdrawal liability under the price adjustment clause.²⁵⁹

4. *The Federal Circuit's decision*

The Federal Circuit affirmed the COFC's decision but, in doing so, effectively sidestepped the question of whether MPPAA withdrawal liability is a fringe benefit covered by the SCA. The court noted that Call Henry, with the support from amicus curiae Professional Services Council, "devote[d] considerable attention" to that issue,²⁶⁰ yet the court determined that the issue was not dispositive in this case.²⁶¹ The court concluded that Call Henry's claim would fail even if the court "held that MPPAA withdrawal liability may, in some cases, be a cost of providing fringe benefits covered by the SCA."²⁶²

Under the court's reasoning, Call Henry's withdrawal liability was not a recoverable cost under the price adjustment clause because it did not result from complying with a wage determination applied to Call Henry's NASA contract.²⁶³ The court distinguished *Call Henry* from *Lear* by explaining that the contractor in *Lear* was contractually bound to the agency to provide certain fringe benefits to its employees pursuant to the mandatory SCA provisions of the contract.²⁶⁴ Here, however, the court concluded that "Call Henry's contract with NASA did not obligate Call Henry to pay MPPAA liability in the event of withdrawal."²⁶⁵

According to the court, "Call Henry independently assumed the risk of MPPAA withdrawal liability" because it chose to negotiate a CBA with the Teamsters that required it to join the Teamsters' Pension Plan.²⁶⁶ The court was convinced that the price adjustment clause did not "allocate the risk of MPPAA liability to the government" under these circumstances because "NASA did not require Call Henry to negotiate with the Teamsters or join the Teamsters' Pension Plan."²⁶⁷ Additionally, NASA had no contractual remedies against Call Henry if

259. *Id.* at 288.

260. *Call Henry, Inc. v. United States*, 855 F.3d 1348, 1355 (Fed. Cir. 2017).

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 1356.

266. *Id.*

267. *Id.*

Call Henry failed to meet its MPPAA withdrawal liability obligations.²⁶⁸ For those reasons, the court affirmed the COFC's dismissal of Call Henry's complaint for failure to state a claim.

5. *Importance of the decision*

Although the Federal Circuit sidestepped the question of whether withdrawal liability is a "fringe benefit," its reasoning nevertheless rejects the view that withdrawal liability is an integral part of the underlying pension benefit guaranteed under the CBA.²⁶⁹ Call Henry owed withdrawal liability for pension benefits that it should have been paying to the employees performing the contract if the Teamsters' Pension Plan had done proper actuarial assessments.²⁷⁰ As a result, the withdrawal liability could be viewed as just a substitute for the pension benefits payable under the CBA and thus the SCA as a "fringe benefit."

But the Federal Circuit's decision declined to recognize the interrelationship between withdrawal liability and the underlying SCA fringe benefit, emphasizing instead the absence of NASA's contractual right to compel payment of the withdrawal liability.²⁷¹ Given the significance of potential MPPAA withdrawal liability, *Call Henry* may cause service contractors to seriously reconsider whether they should enter into CBAs to fulfill their obligations under the SCA.²⁷² This, in turn, could have undesirable effects on workers and the government's efforts to promote fair and equal pay for workers.

II. JURISDICTIONAL CASES

The common denominator among the three 2017 cases discussed in this Section may explain, at least in part, how these cases reached the Federal Circuit. In all of the three cases the parties did not stand in a typical owner-contractor posture, where pressures such as maintaining collegial business relationships and contractor positioning for favorable performance ratings can nudge the parties toward compromise and settlement. One plaintiff was a Native American tribe that received

268. *Id.*

269. *See id.* at 1355 (noting that MPPAA withdrawal liability is not a cost of complying with wage determinations).

270. MPPAA withdrawal liability is based on the "amount of unfunded vested benefits allocable to the employer withdrawn from the plan" and that amount is determined using actuarial assumptions. *See* 29 U.S.C. §§ 1391(a), 1393 (2012).

271. *Call Henry*, 855 F.3d at 1356.

272. *See* Daniel Abrahams & Andrew Crawford, *Pension Withdrawal Liability—The SCA Trap*, 59 GOV'T CONTRACTOR, May 2017, at 3.

statutory block grants from the Department of Housing and Urban Development (HUD); another was a hospital group that complained about reimbursement rates under a federal health care program; and the third was a shareholder of a financial institution who believed that it got the short end of the stick when the government bailed out the institution during the 2008 financial crisis.

As for their contributions to the legal canon, this year's jurisdictional cases further elaborated on considerations that play into whether a statute is "money mandating" for purposes of Tucker Act jurisdiction and also on standing issues for third party claimants.

A. Lummi Tribe of the Lummi Reservation v. United States

In suits against the United States under the Tucker Act, jurisdiction cannot rest upon the Tucker Act alone because it does not create a substantive cause of action.²⁷³ Thus, a plaintiff must identify a separate source of money-mandating substantive law that creates a right to money damages in order to establish jurisdiction under the Tucker Act.²⁷⁴ In *Lummi Tribe of the Lummi Reservation v. United States*,²⁷⁵ the Federal Circuit examined the question as to whether a reduction in future payments under a grant program that conditions the use of funds states a claim under a money-mandating statute.²⁷⁶

1. Background

In 1996, Congress enacted the Native American Housing Assistance and Self-Determination Act (NAHASDA) with the goal of improving housing conditions and socioeconomic status for Indian tribes and their members so that they would be able to "take greater responsibility for their own economic condition."²⁷⁷ The NAHASDA established an annual block grant system that allowed tribes to provide affordable housing to tribe members.²⁷⁸ Specifically, the statute required HUD to make grants according to a specific regulatory formula.²⁷⁹ The tribes were limited in how they could spend these funds, and failure to comply

273. *United States v. Mitchell*, 463 U.S. 206, 216 (1983); *United States v. Testan*, 424 U.S. 392, 398 (1976).

274. *Mitchell*, 463 U.S. at 216–17; *Testan*, 424 U.S. at 398.

275. 870 F.3d 1313 (Fed. Cir. 2017).

276. *Id.* at 1315.

277. 25 U.S.C. § 4101(4) (2012).

278. *Id.* § 4111(a)(1).

279. *Id.* § 4152(b)(1)–(3).

with statutory requirements allowed HUD to recapture funds.²⁸⁰

The Lummi Tribe and three tribal housing entities (“the Tribes”) had qualified for and received NAHASDA block grants.²⁸¹ In 2001, the HUD Inspector General determined that HUD had improperly allocated funds to the Tribes and provided an opportunity to dispute and appeal the findings.²⁸² HUD ultimately recovered the funds erroneously paid by withholding amounts from grant allocations in subsequent years.²⁸³

2. *The Court of Federal Claims’s decision*

The Tribes sued in the COFC under the Tucker Act and the Indian Tucker Act.²⁸⁴ The suit alleged that HUD deprived the Tribes of funds to which they were entitled by misapplying the required formula and by denying the Tribes a hearing.²⁸⁵ The government moved to dismiss for lack of jurisdiction on grounds that the NAHASDA block grant provision was not a money-mandating statute.²⁸⁶ The COFC denied this motion on grounds that the language “shall . . . make grants” and “shall allocate any amounts” in the statute bound HUD “to pay a qualifying tribe the amount to which it is entitled under the formula.”²⁸⁷ Accordingly, the COFC found the statute to be money mandating.²⁸⁸

The Tribes had also argued that HUD’s alleged violations of the procedural requirements for hearing rendered the subsequent withholding of grant funds an illegal exaction.²⁸⁹ The COFC found that even if the agency erred by not affording the Tribes a hearing, the procedural violations could not support an illegal exaction claim.²⁹⁰ The COFC explained that “nothing in the statutory framework . . . suggests that the remedy for failure to afford procedural rights is,

280. 25 U.S.C. §§ 4139, 4161(a)(1).

281. *Lummi Tribe*, 870 F.3d at 1315.

282. *Id.* at 1315–16.

283. *Id.* at 1316.

284. *Id.* (citing 28 U.S.C. §§ 1491(a)(1), 1505 (2012)).

285. *Id.* at 1316.

286. *Id.*

287. *Id.* (citing *Lummi Tribe of Lummi Reservation v. United States*, 99 Fed. Cl. 584, 594 (2011)).

288. *Id.*

289. *Id.* This argument was made after the procedural claim was first dismissed by the COFC and the Tribes amended their complaint.

290. *Id.* at 1317.

without further proof of entitlement, the payment of money.”²⁹¹ The government appealed the holding that NAHASDA was money mandating, and the Tribes appealed the lack of remedy for the procedural violation.²⁹²

3. *The Federal Circuit’s decision*

The Federal Circuit determined that the COFC erred in finding that the NAHASDA was a money-mandating statute.²⁹³ The Federal Circuit determined that “[a] statute is money mandating if either: (1) ‘it can fairly be interpreted as mandating compensation by the Federal Government for . . . damages sustained’; or (2) ‘it grants the claimant a right to recover damages either expressly or by implication.’”²⁹⁴

To reach its decision, the Federal Circuit analyzed its holding in *National Center for Manufacturing Sciences v. United States*.²⁹⁵ There, a statute had mandated that “not less than \$40,000,000 of the funds appropriated in this paragraph shall be made available only for the [plaintiff]” by the Air Force.²⁹⁶ In that case, however, the Air Force had only released \$24,125,000 in funding.²⁹⁷ The plaintiff in *National Center* brought suit in district court, citing Administrative Procedure Act (APA) jurisdiction.²⁹⁸ The Air Force moved to dismiss, or in the alternative, to transfer to the COFC, contending that the case arose under the Tucker Act.²⁹⁹ Ultimately, the Federal Circuit on appeal found that a simple money judgment was not sufficient, that injunctive relief was required, and that the appropriation of funds was limited by statute for specific purposes.³⁰⁰ According to the Federal Circuit, this meant that the district court was not divested of authority to conduct an APA review because the “Tucker Act suit in the [COFC would] not

291. *Id.* (quoting Order at 5, *Lummi Tribe of the Lummi Reservation v. United States*, No. 08-848C (Fed. Cl. Sept. 30, 2015), ECF No. 121 (denying plaintiffs’ motion for summary judgment)).

292. *Id.*

293. *Id.*

294. *Id.* (quoting *Blueport Co. v. United States*, 533 F.3d 1374, 1383 (Fed. Cir. 2008)).

295. 114 F.3d 196, 198 (Fed. Cir. 1997).

296. *Lummi Tribe*, 870 F.3d at 1317 (alteration in original) (quoting *Nat’l Ctr.*, 114 F.3d at 198).

297. *Nat’l Ctr.*, 114 F.3d at 198.

298. *Id.*

299. *Id.*

300. *Id.* at 202.

serve as the ‘other adequate remedy in a court.’”³⁰¹

When the court applied *National Center* to the facts in *Lummi Tribe*, the result was a severe restriction on what remedies would be available to the Tribes. In *Lummi Tribe*, although the Federal Circuit acknowledged that it had not expressly found in *National Center* that the COFC lacked jurisdiction, the Federal Circuit nonetheless concluded that, under NAHASDA, the Tribes are not entitled to an actual payment of money damages in the strictest terms; their only alleged harm is having been allocated too little in grant funding.³⁰² Thus, at best, the Tribes sought a nominally greater strings-attached disbursement, but any monies so disbursed could still be later reduced or clawed back.³⁰³ And, similar to the restrictions on the use of funds in *National Center*, “[t]he Tribes are even restricted with respect to the particular bidding and bond terms they may use for, say, housing construction contracts.”³⁰⁴

The Federal Circuit, analogizing to the holding in *National Center*, refused to stretch the remedy of damages to cover highly regulated future grant disbursements.³⁰⁵ After describing the relief sought as equitable in nature, the Federal Circuit held that “[a]lthough the Tucker Act has been amended to permit the [COFC] to grant equitable relief *ancillary* to claims for monetary relief, there must be an underlying claim for actual presently due money damages from the United States.”³⁰⁶ The Federal Circuit then held that the Tribes’ underlying claim was not for presently due money damages but rather to force the payment of strings attached grants, which were not authorized by statute as a “free and clear transfer of money.”³⁰⁷ The Federal Circuit unanimously concluded that the NAHASDA was not money mandating.³⁰⁸

Separately, the Federal Circuit quickly disposed of the Tribes’ illegal exaction claims on the basis that “[a]n illegal exaction claim must be based on property *taken* from the claimant, not property left *unawarded*

301. *Id.*

302. *Lummi Tribe of the Lummi Reservation v. United States*, 870 F.3d 1313, 1318 (Fed. Cir. 2017).

303. *Id.* (citing 25 U.S.C. § 4161(a)(1) (2012)).

304. 870 F.3d at 1318 (citing 2 C.F.R. § 200.325 (2017); 24 C.F.R. § 1000.26 (2017)).

305. *Id.*

306. *Id.* at 1319 (internal quotation marks omitted) (quoting Nat’l Air Traffic Controllers Ass’n v. United States, 160 F.3d 714, 716 (Fed Cir. 1998)).

307. *Id.*

308. *Id.* at 1317.

to the claimant.”³⁰⁹ Because the Tribes could not show that failure to disburse money that was never in their possession was an illegal exaction, the Federal Circuit also rejected this alternate theory of jurisdiction.³¹⁰

4. *Importance of the case*

Lummi Tribe demonstrates that when seeking to invoke jurisdiction under the Tucker Act, the fact that money damages “may flow from a decision that [an agency] has erroneously interpreted or applied its regulation” is not enough to change the fundamental nature of a case seeking equitable relief into one for money damages.³¹¹ Claims for equitable relief must be ancillary to an underlying claim for actual presently due money damages.³¹² Further, where money may only be paid in the future and any payment is conditioned with restrictions on the way in which it may be used, the statute may not be said to be money mandating.³¹³ Instead, these characteristics tend to reveal that the claim is equitable in nature—seeking to force the government to take action rather than to vindicate rights to legal damages for actions already taken. Finally, while a legal exaction claim may provide a limited source of alternative jurisdiction under the Tucker Act,³¹⁴ such a claim is not viable if it seeks property unawarded to the claimant rather than property taken from the claimant.³¹⁵

As a final note to *Lummi Tribe*, the Federal Circuit observed that the government had taken inconsistent positions with respect to whether the NAHASDA statute was money mandating.³¹⁶ Specifically, in *Modoc Lassen Indian Housing Authority v. U. S. Department of Housing and Urban Development*,³¹⁷ the government had argued to the U.S. Court of Appeals for the Tenth Circuit that a district court’s decision ordering

309. *Id.* at 1319 (citing *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (stating the proposition that an illegal exaction involves money that was “improperly paid, exacted, or taken *from the claimant* in contravention of the Constitution, a statute, or a regulation”)).

310. *Id.*

311. *Id.* (quoting *Katz v. Cisneros*, 16 F.3d 1204, 1208 (Fed. Cir. 1994)).

312. *Id.*

313. *See id.* at 1318–19.

314. *See Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007–08 (Ct. Cl. 1967) (holding that persons can bring suit against the Government under the Act when the Government has the “citizen’s money in its pocket”).

315. *Lummi Tribe*, 870 F.3d at 1319.

316. *Id.* at 1319–20.

317. 864 F.3d 1212 (10th Cir. 2017).

HUD to return funds amounted to an award of money damages, which could only be pursued under the Tucker Act.³¹⁸ In that case, the Tenth Circuit had agreed with the government.³¹⁹ The Federal Circuit stated that “[o]f the government’s two faces, we find the one presented to the Claims Court—the one arguing that this is not a suit for Tucker Act damages—to be the correct one.”³²⁰

B. *Ingham Regional Medical Center v. United States*

In *Ingham Regional Medical Center v. United States*,³²¹ the Federal Circuit was again asked to review whether claimants had stated claims under a money-mandating statute in order to create Tucker Act jurisdiction.³²² The arguments in the case centered on whether an agency’s discretionary interpretation of its statute could give rise to a money-mandating claim.³²³

1. *Background*

In 1956, Congress established a military health care system called TRICARE to provide health care to current and former military members and their dependents.³²⁴ Under the TRICARE program, the Department of Defense (DoD) contracts with outside health care providers to deliver health care to program recipients and reimburses the providers in accordance with guidelines established by DoD.³²⁵ Prior to 2001, the TRICARE statute allowed, but did not require, DoD to use Medicare reimbursement rules when reimbursing providers.³²⁶ But in 2001, Congress amended the statutory language to state that “[t]he amount to be paid to a provider of services . . . shall be determined . . . in accordance with the same reimbursement rules as apply to . . . [Medicare].”³²⁷

318. *Lummi Tribe*, 870 F.3d at 1319 (citing *Modoc Lassen Indian Hous. Auth. v. U.S. Dep’t of Hous. & Urban Dev.*, 864 F.3d 1212, 1217 (10th Cir. 2017)).

319. *Id.* at 1320.

320. *Id.* (internal quotation marks omitted).

321. 874 F.3d 1341 (Fed. Cir. 2017).

322. *Id.* The case never expressly mentions the Tucker Act, but in the COFC, the Tucker Act had been plead as the jurisdictional provision. See Complaint ¶ 5, *Ingham Reg’l Med. Ctr. v. United States*, Case No. 13-821-MBH, Dkt#1 (Fed. Cl. Oct. 21, 2013).

323. *Ingham*, 874 F.3d at 1347.

324. *Id.* at 1342–43.

325. *Id.* at 1343 (citing 10 U.S.C. § 1073(a)(2) (2012) and 32 C.F.R. §§ 199.1 (2008)).

326. *Id.*

327. *Id.* (second alteration in original) (quoting 10 U.S.C. § 1079(j)(2)).

In response to the statutory change, DoD instituted a formal rulemaking process.³²⁸ During the rulemaking process, DoD determined that Medicare was phasing in a new payment methodology for outpatient services and that DoD planned to follow the Medicare approach. However, because of the complexities of the Medicare transition process and the lack of TRICARE cost report data comparable to Medicare's, it was not practicable for DoD to adopt the "Medicare Outpatient Prospective Payment System" for hospital outpatient services.³²⁹

DoD issued its final rule in 2005, and that rule applied until 2009 when a new TRICARE payment system for hospitals, similar to Medicare's rules, was introduced.³³⁰ A group of hospitals that included Ingham Regional Medical Center complained that the Medicare rules were only intended for use with individual health care providers rather than institutions with large overhead costs.³³¹

In response to these complaints, DoD hired an outside consultant to study the accuracy of TRICARE payments. The study concluded that DoD had underpaid hospitals for radiology services but that all other outpatient services had been correctly paid.³³² DoD then published a notice allowing hospitals to request review of their payments for outpatient radiology services.³³³ The process outlined for requesting this review included a requirement for the hospitals to sign a "release and agreement to accept the discretionary adjusted payment by the hospital."³³⁴ The hospitals requested the discretionary payments, and only some signed the release.³³⁵

During the review process, some of the hospitals were represented by counsel and requested a copy of the DoD consultant's study through the Freedom of Information Act.³³⁶ Upon receipt of the study, the hospitals determined that the study contained multiple errors and that

328. *Id.* at 1343–44.

329. *Id.* at 1343 (quoting the DoD's 2002 Interim Final Rule implementing TRICARE program reforms, titled, TRICARE; Sub-Acute Care Program; Uniform Skilled Nursing Facility Benefit; Home Health Care Benefit; Adopting Medicare Payment Methods for Skilled Nursing Facilities and Home Health Care Providers, 67 Fed. Reg. 40,597, 40,601 (June 13, 2002)).

330. *Id.*

331. *Id.*

332. *Id.* at 1343–44.

333. *Id.* at 1344.

334. *Id.* at 1345 (internal quotation marks omitted).

335. *Id.*

336. *Id.* at 1345–46.

all outpatient services had been underpaid.³³⁷

2. *The Court of Federal Claims's decision*

The hospitals brought suit in the COFC alleging that they had been underpaid for all outpatient services.³³⁸ The COFC dismissed Ingham's breach of contract claims on the ground that the claims were barred by the release and dismissed the other claims on the ground that they failed to state a money-mandating claim.³³⁹

3. *The Federal Circuit's decision*

The Federal Circuit first addressed the argument that the release signed by Ingham barred its claim.³⁴⁰ The Court reversed the COFC's determination that Ingham's signed release was "sufficiently broad to bar all of plaintiffs' breach of contract claims."³⁴¹ The Federal Circuit held that "[a]bsent special circumstances, 'a general release bars claims based upon events occurring prior to the date of the release.'"³⁴² But the Federal Circuit found that the government relied on the release in the very same contract it was accused of breaching.³⁴³ In such circumstances, the Federal Circuit held that a release cannot bar claims for breach of contract.³⁴⁴ The Federal Circuit found that Ingham alleged that DoD failed to follow the methodology for calculating payment adjustments in the contract and that DoD's promise to use this methodology had been part of the consideration for the release.³⁴⁵ The Federal Circuit concluded that DoD could not use the release to bar Ingham's contract claims when DoD did not adhere to its own contractual obligations and found that "hold[ing] otherwise would allow an agency to flout its contractual commitments with impunity."³⁴⁶

Turning to the arguments that the COFC had improperly dismissed

337. *Id.* at 1346.

338. *Id.*

339. *Id.* at 1346–47.

340. *Id.* at 1346.

341. *Id.* (internal quotation marks omitted).

342. *Id.* (quoting *Augustine Med., Inc. v. Progressive Dynamics, Inc.*, 194 F.3d 1367, 1373 (Fed. Cir. 1999)).

343. *Id.*

344. *Id.*; see also *Link v. Dep't of Treasury*, 51 F.3d 1577, 1583–84 (Fed. Cir. 1995) (holding agency could not enforce an appeal waiver in a last-chance settlement agreement because the agency had failed to carry out its responsibilities under the agreement).

345. *Ingham*, 874 F.3d at 1347.

346. *Id.* at 1346.

the money-mandating claims for failure to state a claim, the Federal Circuit first determined that the statute was ambiguous and that *Chevron* deference applied.³⁴⁷ The hospitals argued that TRICARE was required to implement a payment system similar to Medicare reimbursement rules for hospitals, but that DoD erroneously used reimbursement rules intended for individual providers instead of hospitals.³⁴⁸ The Federal Circuit found that the TRICARE statute was “money-mandating in the sense that it directs the agency to determine payment amounts in accordance with the same reimbursement rules as Medicare *to the extent practicable*.”³⁴⁹ However, the Federal Circuit found that at the time of the statutory change to the TRICARE statute, the Medicare rules were also changing and that it was impractical for DoD to use them.³⁵⁰ The Federal Circuit also found that nothing in the TRICARE statute required DoD to use the previous Medicare reimbursement approach and that Congress did not prescribe the rules that must be used if the Medicare approach was impractical.³⁵¹ Because it found DoD’s approach reasonable, the Federal Circuit held that the hospitals could not state a money-mandating claim.³⁵²

The hospitals attempted to argue that DoD’s notice allowing for discretionary adjustments had admitted that DoD did not abide by the statute.³⁵³ But the Federal Circuit found that “DoD’s offer of discretionary payment adjustments does not mean it lacked the authority to implement the [reimbursement] rules.”³⁵⁴ The Federal Circuit concluded that both the actions of adopting the initial payment rules and offering discretionary payment adjustments had been within DoD’s discretion under the TRICARE statute.³⁵⁵ Because DoD was not required to implement any specific reimbursement rules and the approach adopted by DoD was reasonable, the Federal Circuit affirmed the COFC’s dismissal of the money-mandating claims.³⁵⁶

347. *Id.* at 1347 (deferring to DoD’s construction of the statute); *see also* *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (holding courts must defer to an agency’s interpretation of a statute if congressional intent is ambiguous or nonexistent and the agency’s construction of the statute is a permissible one).

348. *Ingham*, 874 F.3d at 1347.

349. *Id.*

350. *Id.*

351. *Id.* at 1347–48.

352. *Id.* at 1348.

353. *Id.*

354. *Id.*

355. *Id.* (citing 10 U.S.C. § 1079(j) (2) (2012)).

356. *Id.*

4. *Importance of the case*

Ingham illustrates two important jurisdictional points. First, in the Federal Circuit, a release cannot be used to bar claims of breach of the same contract containing the release. Second, with respect to whether a statute is money-mandating, claims based upon a disagreement with agency interpretation of the statute will not support a claim where, under *Chevron*, the agency has discretion in its interpretation of the statute, and the agency's interpretation is reasonable.

C. *Starr International Co. v. United States*

During the 2008 financial crisis, American International Group, Inc. (AIG) was “too big to fail,” as its collapse would have posed a risk to the financial stability of the entire country.³⁵⁷ Apparently, a lawsuit by AIG's largest shareholder, Starr International Co., which sought over \$20 billion in compensation for alleged government improprieties with respect to AIG's stock post-bailout,³⁵⁸ was “too big to settle.”

In *Starr International Co. v. United States*,³⁵⁹ the Federal Circuit examined standing requirements for claims that were derivative of a third party's rights.³⁶⁰ The claims in the case concerned a shareholder suit alleging illegal dilution of value and voting interests as a result of the government's takeover of AIG in the wake of the 2007 housing market collapse.³⁶¹ Although the Federal Circuit applied Delaware law, it first announced the federal standard and then explained that it was applying Delaware law because it was consistent with federal law and did not frustrate it.³⁶²

1. *Background*

AIG is a publicly traded corporation that was caught up in the 2007 collapse of the housing market.³⁶³ Facing mounting stresses on its liquidity, on September 12, 2008, AIG informed the Federal Reserve Bank of New York (FRBNY) that it needed between \$13 billion and \$18 billion to cover its urgent liquidity needs.³⁶⁴ By the morning of September 15,

357. See Renae Merle, *AIG Is No Longer “Too Big to Fail,” Regulators Say*, WASH. POST (Sept. 29, 2017), <https://www.washingtonpost.com/news/business/wp/2017/09/29/aig-is-no-longer-too-big-to-fail-regulators-say>.

358. *Starr Int'l Co. v. United States*, 856 F.3d 953, 957 (Fed. Cir. 2017).

359. 856 F.3d 953 (Fed. Cir. 2017).

360. *Id.* at 958.

361. *Id.* at 957.

362. *Id.* at 966.

363. *Id.* at 958.

364. *Id.*

these needs had ballooned to over \$75 billion, and another major financial institution, Lehman Brothers, had also filed for bankruptcy.³⁶⁵

Realizing that the failure of AIG could destabilize the economy, on September 16, 2008, the FRBNY invoked the Federal Reserve Act to make an \$85 billion loan to AIG with interest and fees in exchange for 79.9% of AIG's equity.³⁶⁶ That same day, all but one of AIG's directors voted to accept the loan notwithstanding the unfavorable terms, viewing it as better than bankruptcy.³⁶⁷ On September 22, 2008, AIG entered into the formal agreement by which the federal government acquired the 79.9% equity interest in the form of preferred stock that was convertible to common stock.³⁶⁸

At the time of the loan, AIG's stock was at times dipping below \$5.00 per share, and the New York Stock Exchange had a minimum share-price requirement of \$1.00 per share.³⁶⁹ Failure to meet this minimum would result in delisting of the stock.³⁷⁰ By early 2009, AIG's stock was falling below this threshold and AIG was at risk of being delisted.³⁷¹ On June 30, 2009, AIG held a shareholder meeting where it proposed two amendments designed to alter the pool of AIG common stock and allow AIG to raise capital and raise the stock prices.³⁷² The first of these amendments—a large increase (nearly double) in the amount of authorized common stock—failed to pass.³⁷³ The second amendment—a reverse stock split—passed, and Starr International Co. (“Starr”) voted in favor of the amendment.³⁷⁴ This helped AIG avoid delisting, but it also made available enough shares of common stock that the government was able to convert its shares.³⁷⁵ The government subsequently sold its shares between 2011 and 2012 for a gain of \$17.6 billion.³⁷⁶ AIG repaid the \$85 billion loan, plus approximately \$6.7 billion in interest and fees.³⁷⁷

365. *Id.*

366. *Id.* at 958–59. FRBNY loaned AIG the \$85 billion by invoking section 13(3) of the Federal Reserve Act. *Id.*; 12 U.S.C. § 343 (2012).

367. *Starr Int'l Co.*, 856 F.3d at 959.

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.* at 959–60.

373. *Id.* at 960.

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

2. *The Court of Federal Claims's decision*

Starr filed suit in the COFC asserting claims on behalf of itself and similarly situated shareholders.³⁷⁸ Starr alleged that the government's initial acquisition of the 79.9% equity interest was an illegal exaction and an illegal taking.³⁷⁹ Starr also alleged that the stock split had been engineered by the government to avoid a shareholder vote, decrease the number of issued shares, and dilute the interests of AIG.³⁸⁰ The government moved to dismiss Starr's claims for lack of standing, but the COFC allowed the claims to proceed to trial without resolving the motion.³⁸¹ Ultimately, the COFC found that the government's acquisition of AIG was an illegal exaction but granted Starr no monetary relief.³⁸² Starr and the government filed cross appeals.³⁸³

3. *The Federal Circuit's decision*

Starr appealed the denial of monetary relief, while the government argued that Starr lacked standing because its claims belonged to AIG and the acquisition was not an illegal exaction.³⁸⁴ The Federal Circuit first addressed whether Starr had standing to pursue its claims directly.³⁸⁵ The Federal Circuit explained that "[f]or a party to have standing, it must satisfy constitutional requirements and also demonstrate that it is not raising a third party's legal rights."³⁸⁶ The Federal Circuit assumed that Starr satisfied the constitutional requirements: (1) an actual or imminent injury in fact that is concrete and particularized, (2) a causal connection between the injury and the conduct complained of, and (3) likely redressability by a favorable decision.³⁸⁷

Turning to whether Starr was asserting a third party's rights, Starr argued that it satisfied the standing principle because the government's acquisition harmed its personal economic and voting interests independent of any harm to AIG.³⁸⁸ The Federal Circuit first explained that both federal and Delaware law were relevant to the question as to

378. *Id.*

379. *Id.* at 960–61.

380. *Id.* at 961.

381. *Id.* at 957.

382. *Id.* at 962.

383. *Id.* at 963.

384. *Id.*

385. *Id.*

386. *Id.* at 964 (citing *Kowalski v. Tesmer*, 543 U.S. 125, 128–29 (2004)).

387. *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

388. *Id.* at 965.

whether Starr had direct standing.³⁸⁹ Under federal law, the Federal Circuit found that shareholders are generally prohibited “from initiating actions to enforce the rights of [a] corporation unless the corporation’s management has refused to pursue the same action for reasons other than good-faith business judgment.”³⁹⁰ Under federal law only “shareholder[s] with a direct, personal interest in a cause of action, rather than injuries [that] are entirely derivative of their ownership interests in a corporation, can bring actions directly.”³⁹¹

The Federal Circuit explained that

[u]nder Delaware law, whether a shareholder’s claim is derivative or direct depends on the answers to two questions: “(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?”³⁹²

In Delaware, a claim need not be based on a shareholder injury that is separate and distinct from that suffered by other stockholders to be direct. Instead, a claim may be direct if “all stockholders are equally affected.”³⁹³ The Federal Circuit discussed the presumption that state law should be incorporated into federal common law unless doing so would frustrate the specific objectives of federal programs. This presumption was “particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards.”³⁹⁴ The Federal Circuit found that Delaware law was consistent with federal law and so found Delaware law applicable to Starr’s claims.³⁹⁵

Turning to Starr’s claims, the Federal Circuit found that under Delaware law, “claims of corporate overpayment are treated as causing harm solely to the corporation and, thus, are regarded as derivative.”³⁹⁶ Starr’s claims were found to be dependent on an injury to the corporation—any dilution in value of a corporation’s stock reduces the value of each share equally, and the remedy usually goes to the corporation to restore the shares’

389. *Id.* at 965–66. The Federal Circuit noted that AIG was incorporated in Delaware.

390. *Id.* at 966 (alteration in original) (quoting *Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990)).

391. *Id.* (quoting *Franchise Tax Bd.*, 493 U.S. at 336–37).

392. *Id.* (quoting *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (en banc)).

393. *Id.* (quoting *Tooley*, 845 A.2d at 1038–39).

394. *Id.* (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991)).

395. *Id.*

396. *Id.* at 966–67 (quoting *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006)).

value.³⁹⁷ Therefore, the Federal Circuit explained that in order to pursue such claims, some other provision of Delaware or federal law must give Starr a direct cause of action to proceed.³⁹⁸

To provide context to its discussion, the Federal Circuit first observed that Starr did not distinguish between its various equity claims for standing purposes and instead characterized them as alleging “the wrongful expropriation of [its] economic and voting interests in AIG for the [g]overnment’s own corresponding benefit.”³⁹⁹ As the burden of demonstrating standing belonged to Starr, the Federal Circuit examined standing based on this theory of harm.⁴⁰⁰ The Federal Circuit also discussed that Starr argued that its case for standing was particularly compelling because the government’s acquisition of AIG was equivalent to a physical exaction where the government engaged in a “physical seizure of four out of every five shares of [shareholders’] stock.”⁴⁰¹

The Federal Circuit declined to adopt Starr’s view of the acquisition, noting a difference between issuance of new stock, which results in equal dilution for all shareholders, and transfer of existing stock, which creates an individual relationship between the parties to the transfer.⁴⁰² The Federal Circuit noted that adopting Starr’s position would largely presuppose the search for a direct and individual injury.⁴⁰³

The Federal Circuit next turned to the merits of Starr’s standing argument.⁴⁰⁴ Starr argued that its claims fell within a “dual-nature” exception in Delaware law that recognized claims that were both derivative and direct in nature.⁴⁰⁵ Claimants must meet two criteria in order for this exception to apply:

- (1) a stockholder having majority or effective control causes the corporation to issue “excessive” shares of its stock in exchange for assets of the controlling stockholder that have a lesser value, and
- (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the

397. *Id.* at 967.

398. *Id.*

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

400. *Id.*

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

402. *Id.*

403. *Id.*

404. *Id.* at 968.

405. *Id.*

public (minority) shareholders.⁴⁰⁶

Starr argued that government controlled the acquisition because of its disparate leverage in the negotiation.⁴⁰⁷ But the Federal Circuit rejected this argument because the dual-nature exception stemmed from a concern about fiduciary misconduct at the expense of minority shareholders.⁴⁰⁸ The Federal Circuit found that Delaware law consistently held that, while control did not require a party to be a pre-existing majority stockholder, it did require a fiduciary relationship.⁴⁰⁹ The Federal Circuit found that outside parties with leverage do not necessarily have any obligation to protect the interests of the counterparty, and even less so with respect to constituents of the counterparty.⁴¹⁰ And the Federal Circuit further found that Starr had not shown any fiduciary relationship or that the government had actually exercised any direction over AIG's conduct.⁴¹¹ Accordingly, the Federal Circuit found the dual-nature exception inapplicable.⁴¹²

Starr next argued that the Supreme Court recognized standing in a case similar to Starr's, *Alleghany Corp. v. Breswick & Co.*⁴¹³ But the Federal Circuit found the *Alleghany* case distinguishable on grounds that the dispute was between shareholders and the corporation, and so there was not an issue as to whether the claim belonged to the shareholders derivatively.⁴¹⁴ In contrast to the shareholders in *Alleghany*, Starr's interests were aligned with AIG, not adverse to it.⁴¹⁵ For this reason, third party standing was not at issue in *Alleghany*, and the case did not help Starr.⁴¹⁶

Starr then argued that the government nullified its voting rights that would have allowed it to block the government's ability to obtain preferred stock.⁴¹⁷ But the Federal Circuit found that Starr had waived this argument, and, in any event, Starr had not demonstrated a fiduciary relationship as would have been required under the only case

406. *Id.* (internal quotation marks omitted) (quoting *Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006)).

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.* at 969.

411. *Id.* at 969–70.

412. *Id.* at 969.

413. 353 U.S. 151 (1957); *Starr Int'l Co.*, 856 F.3d at 970.

414. *Starr Int'l Co.*, 856 F.3d at 970.

415. *Id.*

416. *Id.* at 970–71.

417. *Id.* at 971.

it cited in support.⁴¹⁸

Next, Starr argued that the Fifth Amendment provided an independent basis for standing because it created a special relationship between AIG's shareholders and the government.⁴¹⁹ The Federal Circuit rejected this argument, finding that "Starr does not cite any support for its submission that the Fifth Amendment's Takings Clause creates a [g]overnment 'duty.'"⁴²⁰ Further, "[e]ven if such a duty were to exist, Starr has not demonstrated why that duty would flow directly to a corporation's shareholders rather than the corporation in the context of an equity transaction that affects all preexisting shareholders collaterally."⁴²¹

Finally, Starr argued that it had standing because AIG's shareholders were the "direct target of an illegal act."⁴²² The Federal Circuit found this argument "untethered to reality."⁴²³ While it acknowledged that there was some testimony purportedly showing that the government wanted to punish AIG shareholders, the Federal Circuit pointed out that the COFC never actually reached this conclusion.⁴²⁴

Because Starr did not demonstrate standing, the Federal Circuit did not address the merits of its equity claims.⁴²⁵ Turning to Starr's remaining direct claims related to the conversion of preferred to common stock, the Federal Circuit found the COFC did not clearly err when it found that the primary purpose of the stock split was to avoid delisting, not to exchange the government's shares.⁴²⁶ Judge Evan Wallach filed an opinion concurring in part and concurring in the result, however, stating that he would have examined jurisdictional claims first under the Tucker Act and would have determined that the Federal Reserve Act was not money-mandating.⁴²⁷

4. *Importance of the case*

This case showcases that standing issues can present difficult obstacles to third-party claims. Federal law generally requires a direct

418. *Id.* at 971–72 (distinguishing *Condec Corp. v. Lunkenheimer Co.*, 230 A.2d 769, 777 (Del. Ch. 1967)).

419. *Id.* at 972.

420. *Id.*

421. *Id.* (citing *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1073 & n.14 (Fed. Cir. 1994)).

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

423. *Id.* (internal quotation marks omitted).

424. *Id.* at 973.

425. *Id.*

426. *Id.* at 973–74.

427. *Id.* at 975–76.

injury and prohibits derivative claims.⁴²⁸ State law will only apply where it does not frustrate federal law, and so it is unlikely in most instances that this rule would change under an application of state law in federal court. For instance, here the Federal Circuit applied Delaware law because it found it to be consistent with federal law.⁴²⁹ Ultimately, when claims depend on an injury to someone else, they will not satisfy standing requirements.

III. BID PROTEST CASES

Bid protests account for the other two merits decisions handed down by the Federal Circuit in 2017. Different barriers tend to weed out these cases before the Federal Circuit becomes involved. First and foremost, absent an injunction pending the outcome on the merits in the COFC or a stay of the judgment pending appeals taken by contractors, the agency very likely will proceed to award and allow the awarded contractor to perform. Faced with what may be the hollow victory of winning a legal point on appeal, but being left with little remedy because the contract will have been largely performed by the time the Federal Circuit rules, many protesters will drop the case.

A. Diaz v. United States

1. Background

In *Diaz v. United States*,⁴³⁰ appellant Kevin Diaz submitted an “unsolicited proposal” to the U.S. Department of the Navy’s Indian Head Explosive Ordinance Disposal Technology Division under FAR 15.6.⁴³¹ The contracting officer who reviewed the proposal found that it did not meet the FAR 15.606-1 requirements and rejected the proposal.⁴³² Mr. Diaz filed a complaint in the COFC challenging that rejection, but the case was dismissed for lack of subject matter jurisdiction because Mr. Diaz lacked standing under 28 U.S.C. § 1491(b)(1) (2012).⁴³³ Mr. Diaz appealed.⁴³⁴

428. *Id.* at 966 (quoting *Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990)).

429. *Id.*

430. 853 F.3d 1355 (Fed. Cir. 2017).

431. *Id.* at 1357.

432. *Id.*

433. *Id.*

434. *Id.*

2. *The Federal Circuit's decision*

The Federal Circuit reviewed *de novo* the COFC decision to dismiss the case for lack of jurisdiction.⁴³⁵ First, it addressed the COFC's subject matter jurisdiction.⁴³⁶ Section 1491(b)(1) grants subject matter jurisdiction for any "violation of a statute or regulation in connection with a procurement or proposed procurement" and is intended to be "very sweeping in scope."⁴³⁷ Here, because Mr. Diaz had received a significant number of emails from government personnel regarding his proposal, the court found that his proposal qualified as a "proposed procurement."⁴³⁸ Therefore, Mr. Diaz's allegation that the contracting officer had improperly rejected his unsolicited proposal was found to be a non-frivolous allegation of a violation of a regulation in connection with a proposed procurement.⁴³⁹

Second, the court addressed Mr. Diaz's standing to file a bid protest.⁴⁴⁰ Under § 1491(b)(1), a party must show that it is both an "interested party"⁴⁴¹ and that it was "prejudiced by a significant error in the procurement process."⁴⁴² Under the interested party prong, a party must prove (1) that it is an actual or prospective bidder and (2) that it has a direct economic interest in the proposed procurement.⁴⁴³ The court noted that it had not established a standard for evaluating whether a party has a direct economic interest in an unsolicited proposal, but it approved of and adopted the COFC's application of the "substantial chance" standard.⁴⁴⁴ The court therefore examined whether Mr. Diaz would have had a substantial chance of winning a contract which the government had never solicited.⁴⁴⁵

To have a substantial chance of winning the contract based on an unsolicited proposal, a party must conform with the requirements of

435. *Id.*

436. *Id.*

437. *Id.* (quoting *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999)).

438. *Id.* at 1358.

439. *Id.*

440. *Id.*

441. *Id.* (quoting *Digitalis Educ. Sols., Inc. v. United States*, 664 F.3d 1380, 1384 (Fed. Cir. 2012)).

442. *Id.* (quoting *Labatt Food Serv., Inc. v. United States*, 577 F.3d 1375, 1378 (Fed. Cir. 2009)).

443. *Id.* (citing *Digitalis Educ. Sols., Inc. v. United States*, 664 F.3d 1380, 1384 (Fed. Cir. 2012)).

444. *Id.* at 1358–59.

445. *Id.*

FAR 15.6.⁴⁴⁶ In order to be a “valid unsolicited proposal” under FAR 15.603, the proposal must

- (1) [b]e innovative and unique;
- (2) [b]e independently originated and developed by the offeror;
- (3) [b]e prepared without Government supervision, endorsement, direction, or direct Government involvement;
- (4) [i]nclude sufficient detail to permit a determination that Government support could be worthwhile and the proposed work could benefit the agency’s research and development or other mission responsibilities;
- (5) [n]ot be an advance proposal for a known agency requirement that can be acquired by competitive methods; *and*
- (6) [n]ot address a previously published agency requirement.⁴⁴⁷

The contracting officer determined that Mr. Diaz’s proposal did not meet the first and fourth elements and was therefore not a valid proposal.⁴⁴⁸ Mr. Diaz was unable to overcome this determination on appeal.⁴⁴⁹ The court held that Mr. Diaz failed to satisfy his burden to establish interested party status and that he did not have standing.⁴⁵⁰ Based on this finding, the court did not address the requisite showing of prejudice.⁴⁵¹

3. *Importance of the case*

The case addressed the novel issue of the appropriate standard for determining the factors of a direct economic interest in the submission of an unsolicited proposal. The court adopted the post-award standard whereby a plaintiff must show a “substantial chance of winning the contract,” even though the government did not solicit any proposals.⁴⁵²

B. *Dellew Corp. v. United States*

1. *Background*

In *Dellew Corp. v. United States*,⁴⁵³ the U.S. Department of the Army awarded a contract to Tech Systems, Inc. (“TSI”) for logistics support

446. *Id.* at 1358.

447. *Id.* at 1359 (quoting 48 C.F.R. § 15.603 (2017)).

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.* at 1360 n.3.

452. *Id.* at 1358–59.

453. 855 F.3d 1375 (Fed. Cir. 2017).

services in Hawaii.⁴⁵⁴ Dellew filed a post-award bid protest in the COFC, alleging that the award to TSI was improper because “(1) TSI did not accept a material term of the request for proposals when it refused to cap its general and administrative rate, (2) the contract awarded varied materially from TSI’s proposal,” and (3) the “Army had failed to perform an adequate cost realism analysis before awarding the contract to TSI.”⁴⁵⁵

During oral argument on the cross-motions for judgment on the administrative record, the COFC announced that it intended to rule in Dellew’s favor on the merits.⁴⁵⁶ The court repeatedly made clear its view that corrective action would be appropriate, and it encouraged the Army to reconsider its award decision in order to avoid the issuance of a “needless ruling.”⁴⁵⁷

The court required the parties to provide a joint status report within ten days of the hearing.⁴⁵⁸ In the joint status report, the Army announced that it had determined that changed conditions required an amendment to the solicitation.⁴⁵⁹ It terminated the contract with TSI and filed a motion to dismiss Dellew’s protest as moot.⁴⁶⁰

The COFC granted the motion to dismiss the action and declined Dellew’s invitation to issue findings of fact and conclusions of law in support of a finding that Dellew was the prevailing party.⁴⁶¹ In the COFC’s view, given the dismissal of the protest, such findings and conclusions would amount to an advisory opinion, which is prohibited by the Case or Controversy Clause of Article III of the U.S. Constitution.⁴⁶²

Nonetheless, Dellew sought attorney fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(a), (d)(1)(A).⁴⁶³ In its EAJA ruling, the COFC awarded Dellew nearly \$80,000 in fees and costs, holding that its comments during oral argument “carried a

454. *Id.* at 1377.

455. *Id.* at 1377–78.

456. *Id.* at 1378; *Dellew Corp. v. United States*, 127 Fed. Cl. 85, 89 (2016), *rev’d*, 855 F.3d 1375 (Fed. Cir. 2017).

457. *Dellew Corp.*, 855 F.3d at 1378.

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.*; *Dellew Corp. v. United States*, 124 Fed. Cl. 429, 433 n.2 (2015); *see also* U.S. CONST. art. III, § 2, cl. 1.

463. Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified as amended at 28 U.S.C. § 2412(a)(d)(1)(A) (2012)); *Dellew Corp. v. United States*, 127 Fed. Cl. 85, 87 (2016), *rev’d*, 855 F.3d 1375 (Fed. Cir. 2017).

sufficient judicial imprimatur to materially alter the relationship between [Dellew] and [the government] such that [Dellew] qualifies as a prevailing party under the EAJA.⁴⁶⁴ The court listed four reasons why Dellew was a prevailing party: (1) the court had expressed its intention to rule in Dellew's favor at oral argument, (2) it had clearly stated its view that the Army should take corrective action, (3) the Army's corrective action was not voluntary, and (4) the court's comment occurred after the parties had briefed the issues and the court had prepared a written decision.⁴⁶⁵ The government appealed.⁴⁶⁶

2. *The Federal Circuit's decision*

The Federal Circuit reviewed the COFC's finding that Dellew qualified as a prevailing party de novo.⁴⁶⁷ Under the EAJA, "a court shall award to a *prevailing party* other than the United States fees and other expenses . . . incurred by that party in any civil action . . . bought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."⁴⁶⁸ The U.S. Supreme Court has held that a prevailing party is one that obtains a "material alteration of the legal relationship of the parties."⁴⁶⁹ A prevailing party does not include a party who obtained relief through "a defendant's voluntary change in conduct."⁴⁷⁰

The Federal Circuit held that Dellew was not a prevailing party for three reasons. First, the government took corrective action before the COFC issued either an oral or written ruling on the merits.⁴⁷¹ The government's actions were therefore voluntary.⁴⁷² Second, the COFC's expression of intent to rule in Dellew's favor did not carry a sufficient judicial imprimatur to materially change the relationship of the parties because it was not equivalent to a "court-ordered change."⁴⁷³ The COFC explicitly postponed ruling until after receipt of the joint status report and permitted additional briefing, indicating that it was

464. *Dellew Corp.*, 127 Fed. Cl. at 89.

465. *Id.*

466. *Dellew Corp.*, 855 F.3d at 1377.

467. *Id.* at 1379.

468. *Id.* (quoting 28 U.S.C. § 2412(d)(1)(A) (2012)).

469. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791–93 (2001)).

470. *Id.* at 605.

471. *Dellew Corp.*, 855 F.3d at 1380.

472. *Id.*

473. *Id.* at 1381.

offering the government an opportunity to take corrective action but not requiring it to do so.⁴⁷⁴ Third, the COFC improperly relied on its ruling in a prior case, *Universal Fidelity LP v. United States*,⁴⁷⁵ where the court had found the protester to be the “prevailing party” after the court had issued an injunctive order in the plaintiff’s favor.⁴⁷⁶

The Federal Circuit instead found the COFC should have examined relevant Supreme Court and Federal Circuit case law such as *Rice Services, Ltd. v. United States*⁴⁷⁷ and *Brickwood Contractors, Inc. v. United States*.⁴⁷⁸ For these reasons, the Federal Circuit reversed the COFC’s order awarding attorney fees and costs to Dellew.

3. *Importance of the case*

This case establishes that a party is not a prevailing party for purposes of an award of costs/fees under the EAJA when an agency takes corrective action at the suggestion of the court rather than by order of the court. This holding creates a bright line rule in which one may not rightly be deemed to be a “prevailing party” for EAJA purposes absent a written court order requiring the agency to take a certain action.⁴⁷⁹

There is evident tension embedded in the Federal Circuit’s holding. Although whether one is a “prevailing party” under the EAJA is a question of law, the vantage point of the trial court is vastly superior to the Federal Circuit’s in the factual context presented. The COFC judge knew far better than the Federal Circuit panel what was meant by what was said in the hearing on the cross-motions.⁴⁸⁰

In this regard, the practical effect of *Dellew* may be limited and is

474. *Id.*

475. 70 Fed. Cl. 310, 315–16 (2006) (ruling that the protestor was the “prevailing party” within the meaning of the EAJA because the defendant-government’s action in curing deficiencies in the solicitation bid was court ordered and not voluntary, and therefore, was tantamount to a judgment on the merits that altered the legal relationship between the plaintiff and the government).

476. *Dellew Corp.*, 855 F.3d at 1382.

477. 405 F.3d 1017, 1026–27 (Fed. Cir. 2005) (holding that a dismissal order did not confer “prevailing party” status on the plaintiff because it did not function as the equivalent of either an enforceable judgment or a court-ordered consent decree where the defendant undertook voluntary curative action before the COFC issued a ruling).

478. 288 F.3d 1371, 1380 (Fed. Cir. 2002) (finding that a defendant’s action taken due to preliminary comments made by a court ordered change in the legal relationship between the parties that would confer “prevailing party” status on plaintiff); 855 F.3d at 1382.

479. *Dellew Corp.*, 855 F.3d at 1380–83.

480. See *Baron Servs., Inc. v. Media Weather Innovations LLC*, 717 F.3d 907, 918 (Fed. Cir. 2013) (deferring to the trial court’s superior vantage of litigation dynamics).

limitable by COFC judges. In similar circumstances, the COFC judge simply can enter a bare bones “minute order” that directs the government to stay performance and to take other appropriate corrective actions that answer the court’s concerns as stated on the record. This will be sufficient under *Dellew*’s interpretation of the EAJA’s “prevailing party” requirement to support the award of fees and costs to the protester.

CONCLUSION

In 2017, the Federal Circuit spun some cautionary tales for federal contractors who were forced to absorb revenues that were much lower or costs that were much higher than anticipated at the time of contracting. To name a few, a would-be marina operator ended up leasing “mud front” property for years (*Lee’s Ford Dock*), a long-time local construction firm’s workforce was newly barred from the jobsite (*Garco*), and a service contractor got left holding the bag on a huge pension liability (*Call Henry*). While contracting with the federal government certainly can be lucrative for contractors, it is not without traps for the unwary or unlucky.