FEDERAL CIRCUIT YEAR-IN-REVIEW 2015—THE FEDERAL CIRCUIT GIVETH, AND THE FEDERAL CIRCUIT TAKETH

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I. INTRODUCTION

In 2015, the U.S. Court of Appeals for the Federal Circuit invoked several principles more than once in deciding government contracts cases with dramatically different outcomes. In analyzing standing, considering exhaustion, interpreting contract terms, and navigating the applicability of government contract regulations to various government entities, the Federal Circuit issued at least one opinion favoring the contractor, and at least one favoring the government. The fact-specific nature of these decisions demonstrates that now, as ever, it is difficult to predict how the Federal Circuit will come out on a particular issue. Indeed, the court's government contracts cases from 2015 demonstrate that the facts have become outcome determinative in even the more procedural of cases. Sorry, Homer, but if 2015 proves anything, it is that facts are not meaningless.[1]

The Federal Circuit's decisions regarding protest standing provide the first example of how the court's application of a particular principle resulted in different ends. In applying principles of timeliness and waiver, the court determined that one pre-award protester had standing and another did not. On the one hand, in *CGI Federal Inc. v. United States*,[2] the Federal Circuit "giveth" when it determined that an offeror did have standing to pursue a pre-award protest at the Court of Federal Claims (COFC), even though the due date for submitting proposals—typically the deadline for filing a protest—had already passed.[3] On the other hand, in *Bannum, Inc. v. United States*,[4] the Federal Circuit "taketh" when it held that a putative contractor had waived its ability to protest solicitation provisions despite its having voiced concerns to the government.[5] In particular, the court determined that mere expression of dissatisfaction regarding an amendment to a solicitation was not enough to avoid waiver;[6] Bannum should have filed a formal protest to preserve its rights. In a slightly different context, in *Tinton Falls Lodging Realty, LLC v. United States*,[7] the court appeared to expand bid protest standing to allow a large business to

1. According to Homer Simpson, "Facts are meaningless. You could use facts to prove anything that's even remotely true!" *See The Simpsons: Lisa, the Skeptic* (FOX television broadcast Nov. 23, 1997).
2. 779 F.3d 1346 (Fed. Cir. 2015).
3. *See id.* at 1347.
4. 779 F.3d 1376 (Fed. Cir. 2015).
5. *See id.* at 1378.
6. *Id.* at 1380.
7. 800 F.3d 1353 (Fed. Cir. 2015).

protest award in a small business competition—a decision that gave new legal remedies to large businesses while creating new threats to small business contractors to have their contracts taken away.[8]

The Federal Circuit also considered the extent to which contractors are required to exhaust administrative options before bringing suit, coming to different conclusions in each case. In *Palladian Partners, Inc. v. United States*,[9] the court ruled that a contractor has to exhaust its administrative remedies before seeking judicial review of a North American Industry Classification System (NAICS) code protest, even where agency relief is precluded by regulation—taking away the original contract awardee's ability to challenge the award to a new contractor under a different NAICS code.[10] At the same time, in *SUFI Network Services, Inc. v. United States*,[11] the Federal Circuit allowed a contractor to pursue a contract claim at the COFC without exhausting all of the procedural requirements set forth in the contract—giving the contractor a chance to recover funds it otherwise would not have.[12]

As in prior years, the Federal Circuit applied the plain meaning doctrine to interpret contract provisions, resulting in decisions favorable to both the government and contractors. These cases exemplify the fact-specific nature of the Federal Circuit's jurisprudence. In *EM Logging v. Department of Agriculture*,[13] the court applied plain meaning to determine whether a contractor's allegedly "flagrant" disregard for contract terms justified termination.[14] The Federal Circuit gave EM Logging the benefit of its determination that, even if EM Logging had violated the contract as alleged, the claimed violations did not rise to the level of "flagrant disregard" described in the termination clause.[15] In *Reliable Contracting Group, LLC v. Department of Veterans Affairs*,[16] the court applied the plain meaning doctrine to determine whether Reliable had met the contract's requirement that Reliable provide "new" backup generators when it provided previously owned generators.[17] According to the majority, to be "new," the equipment must be both unused and in "fresh" condition, but need not be entirely free of cosmetic defects.[18] Although the court found the factual record insufficient to resolve the case,[19] the court's construction of "new" to potentially allow four-year-old equipment

8. *See id.* at 1359 (finding standing to challenge a small business set-aside where successful protest would require an unrestricted rebid of solicitation).

9. 783 F.3d 1243 (Fed. Cir. 2015), *rev'g*, 119 Fed. Cl. 417 (2014).

10. *Id.* at 1261 (finding that because Palladian did not participate in the pending U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) appeal, it failed to exhaust its administrative remedies and is precluded from seeking judicial review).

11. 785 F.3d 585 (Fed. Cir. 2015).

12. *Id.* at 590–91.

13. 778 F.3d 1026 (Fed. Cir. 2015), *rev'g*, CBCA No. 2397, 2013 B.C.A. (CCH) ¶ 35,350.

14. *Id.* at 1030–31.

15. *Id.* at 1033.

16. 779 F.3d 1329 (Fed. Cir. 2015).

17. *Id.* at 1333.

18. *Id.* at 1334.

19. *Id.* at 1335.

to suffice was generous to say the least. Finally, in *G4S Technology LLC v. United States*,[20] the Federal Circuit held that assurances from the government of a prime contractor's financial viability were not enough to bestow third-party beneficiary status on a subcontractor, thereby taking away the subcontractor's ability to collect payment for its services.[21]

The court also examined the extent to which different types of government entities are subject to the rules governing government contractors. In *Colonial Press International, Inc. v. United States*,[22] the Federal Circuit affirmed that the Government Printing Office (GPO), a legislative agency, is not bound by the U.S. Small Business Administration (SBA) Certificate of Competency (COC) Program.[23] The court "taketh" when it rejected a disappointed offeror's argument that the GPO was required to refer its responsibility determination to the SBA rather than make its own determination.[24] Instead, the court confirmed that the Small Business Act does not apply to legislative agencies such as the GPO, and the COC Program is no exception.[25] In *Bay County v. United States*,[26] the court "giveth" when it determined that because Bay County was an "independent regulatory body," the county could revise the rates unilaterally in its utility contracts without negotiating those rates with the U.S. Department of the Air Force.[27]

Not every case the Federal Circuit decided in 2015 has a natural counterpoint, however. Indeed, the court issued two protest decisions that do not fit the theme but that will have significant consequences for contractors. In *K-Con Building Systems Inc. v. United States*,[28] the court considered the extent to which the U.S. Department of Justice and the Contracting Officer (CO) have authority over separate contractor claims once litigation has begun.[29] In *Raytheon Co. v. United States*,[30] the Federal Circuit reinforced the difficult burden an original awardee faces in challenging an agency's corrective action resulting from a U.S. Government Accountability Office (GAO) protest, even where the corrective action is based on outcome prediction rather than a final GAO decision.[31]

In the end, if 2015's decisions prove anything, it is that, despite what Homer Simpson may believe, facts *are* meaningful.

20. 779 F.3d 1337 (Fed. Cir. 2015).
21. Although the court did not explicitly invoke the "plain meaning" doctrine in this case, it construed the third-party beneficiary doctrine with sufficient precision to warrant its discussion alongside the court's true plain meaning cases. *See id.* at 1344.
22. 788 F.3d 1350 (Fed. Cir. 2015).
23. *Id.* at 1352.
24. *Id.*
25. *Id.* at 1358.
26. 796 F.3d 1369 (Fed. Cir. 2015).
27. *See id.* at 1370–71.
28. 778 F.3d 1000 (Fed. Cir. 2015).
29. *See id.* at 1005.
30. 809 F.3d 590 (Fed. Cir. 2015).
31. *See id.* at 595–96.

II. 2015 BY THE NUMBERS

Government contracts appeals represented about four percent of the Federal Circuit's caseload in fiscal year 2015, consistent with the four-to-six percent range that has held fairly steady since 2006.[32] The Federal Circuit's precedential decisions in government contracts appeals represented 7.3% of all Federal Circuit precedential decisions, a jump from last year when government contracts appeals represented only 6.5% of all precedential decisions, but not quite to 2012 levels, when government contracts appeals represented about 9% of all precedential appeals in the Federal Circuit.[33]

A review of the number of precedential opinions that each Federal Circuit judge this year participated in continues to demonstrate that most Federal Circuit judges hear only a small number of cases in any fiscal year:[34]

32. *See United States Court of Appeals for the Federal Circuit*: *Appeals Filed*, *by Category*, *FY 2015*, FED. CIR., http://www.cafc.uscourts.gov/sites/default/files/Caseload%20by%20Category%20%282015%29.pdf (indicating four percent); *United States Court of Appeals for the Federal Circuit: Appeals Filed*, *by Category*, *FY 2014*, FED. CIR., http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/caseload_by_category_appeals_filed_2014.pdf (indicating five percent); *United States Court of Appeals for the Federal Circuit: Appeals Filed*, *by Category*, *FY 2013*, FED. CIR., http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/fy%2013%20filings%20by%20category.pdf (indicating five percent); *United States Court of Appeals for the Federal Circuit: Appeals Filed*, *by Category*, *FY 2012*, FED. CIR., http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/Caseload_by_Category_Appeals_Filed_2012.pdf (indicating four percent); *United States Court of Appeals for the Federal Circuit: Appeals Filed*, *by Category*, *FY 2011*, FED. CIR., http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/Caseload_by_category_2011.pdf (indicating five percent); *United States Court of Appeals for the Federal Circuit: Appeals Filed*, *by Category* , *FY 2010*, FED. CIR., http://www.cafc.uscourts.gov/sites/default/files/the-court/Caseload_by_Category_Appeals_Filed_2010.pdf (indicating five percent); *United States Court of Appeals for the Federal Circuit: Appeals Filed*, *by Category*, *FY 2009*, FED. CIR., http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/ChartFilings09.pdf (indicating five percent).

33. These numbers are based on our own calculations and review. In 2015, we identified seventeen government contracts-related precedential opinions out of 232 total precedential opinions issued by the Federal Circuit. In 2014, we identified eighteen government contracts-related precedential opinions out of 278 total precedential opinions in the Federal Circuit. *See* Daniel P. Graham et. al., *Federal Circuit Year-in-Review 2014: Where the Rubber Meets the Road*, 44 PUB. CONT. L.J 595, 600 n.40 (2015) [hereinafter *Federal Circuit Year-in-Review 2014*]. In 2012, we identified twenty-four government contracts-related precedential opinions out of 257 total precedential opinions. *See* Daniel P. Graham et al., *Federal Circuit Year-in-Review 2012: Guarding the Gates of Government Contracts Litigation*, 42 PUB. CONT. L.J. 695, 700 n.33 (2013) [hereinafter *Federal Circuit Year-in-Review 2012*]. We included all precedential opinions involving government contracts-related appeals from the COFC and the boards of contract appeals under the Contract Disputes Act, 41 U.S.C. § 7107(a) (2012). We identified the total precedential opinions in Westlaw Next by searching all Federal Circuit decisions issued between January 1, 2015, and December 31, 2015. We then filtered all the decisions that were identified as "Reported."

34. We performed a similar analysis in our review of the 2014, 2012, and 2011 decisions. *See Federal Circuit Year-in-Review 2014*, *supra* note 33, at 601; *Federal Circuit Year-in-Review 2012*, *supra* note 33, at 701; Daniel P. Graham et al., *Federal Circuit Year-In-Review 2011: Certainty and Uncertainty in Federal Government Contracts Law*, 41 PUB. CONT. L.J. 473, 480 (2012). As we did for previous years, we excluded non-precedential opinions from our analysis based on Federal Circuit Rule 32.1(b), which provides that "[a]n opinion or order which is designated as non-precedential is one determined by the panel issuing it as not adding significantly to the body of law." FED. R. APP. P. 32.1(b).

Table 1

Judge	Participated	Drafted opinion	Participated without writing	Concurrence	Dissent	Total opinions
Active Judges						
Lourie	7	0	7	0	0	0
Bryson	1	0	1	0	0	0
Dyk	3	1	2	0	0	1
Prost	4	1	3	0	0	1
Moore	5	3	2	0	0	3
Newman	6	0	4	0	2	2
O'Malley	2	2	0	0	0	2
Reyna	4	2	1	0	1	3
Wallach	1	0	1	0	0	0
Taranto	9	3	6	0	1	4
Hughes	1	1	0	0	0	1
Chen	3	1	2	0	0	1
Stoll	0	0	0	0	0	0
Senior Judges & Judges Sitting by Designation						
Clevenger	3	1	2	0	0	1
Linn	1	0	1	0	0	0
Mayer	0	0	0	0	0	0
Plager	1	1	0	0	0	1
Schall	1	1	0	0	0	1

As with the last few years, no judge participated in more than nine precedential government contracts-related appeals. This year, like last, the court's active judges participated in an average of three-and-a-half government contracts-related appeals.[35]

Continuing a new trend that started last year, the government contracts-related workload was unevenly spread among the judges: Judge Taranto and Judge Moore played a heavier role in drafting (three majority opinions each) while four active judges did not draft a single opinion (majority, concurring, or dissenting).[36] Last year, Judge Reyna drafted five majority opinions, Judges Dyk and Taranto each drafted three majority opinions, and six active judges did not draft a single majority opinion.[37]

35. *See Federal Circuit Year-in-Review 2014*, *supra* note 33, at 602.
36. *See supra* tbl.1.
37. *Federal Circuit Year-in-Review 2014*, *supra* note 33, at 602 (citations omitted).

III. THE FEDERAL CIRCUIT'S 2015 KEY GOVERNMENT CONTRACTS CASES—A STUDY IN THE APPLICATION OF FACTS TO LAW

A. *Bid Protest Timing*

1. *CGI Federal Inc. v. United States*

The Federal Circuit's decision in *CGI Federal Inc. v. United States*[38] provides the first example of the court's ruling in contractors' favor, i.e., of its "giving" to contractors, at least with respect to bid protest timing.[39] In particular, the Federal Circuit confirmed a protester's ability to file a pre-award protest at the COFC after first filing a protest at the GAO, even if the deadline for proposal submission passed while the protest was pending.[40] The court also held that the mandate in Federal Acquisition Regulation (FAR) Part 12 prohibiting agencies from including noncommercial terms in solicitations or contracts for commercial items applies to orders under the General Services Administration's (GSA) Federal Supply Schedule (FSS) program.[41]

This case revolved around a solicitation issued by the Centers for Medicare & Medicaid Services (CMS) for recovery audit services, or recovery audit contractors (RACs), to identify and recover overpayments made to Medicare providers.[42] CMS historically paid RACs on a contingency fee basis, so RACs earn a percentage of the improper payments recovered.[43] As the original RAC contracts were nearing an end, CMS issued a request for quotations (RFQ) seeking to place orders under the FSS program for new RAC services but under altered payment terms.[44] The new payment terms required the RACs to wait an additional 80 to 380 days after performing their recovery services (identifying the improper overpayments) before the RACs could invoice CMS for their contingency fee.[45] Instead of submitting a quote, CGI, an incumbent RAC, filed a pre-award protest at the GAO, challenging the new payment term on the grounds that the term was unduly restrictive of competition and inconsistent with customary commercial practice.[46] While the protest was pending before the GAO, the RFQ's deadlines for submitting proposals passed.[47]

The GAO denied CGI's protest on both grounds.[48] Three business days later, CGI filed a protest at the COFC, in which it challenged the same terms on the same grounds.[49] At the COFC, the government moved to

38. 779 F.3d 1346 (Fed. Cir. 2015).
39. *See id.* at 1350.
40. *Id.* at 1351.
41. *Id.* at 1353–54 (citing FAR 12.102(c)).
42. *See id.* at 1348.
43. *Id.*
44. *Id.*
45. *Id.*
46. *See id.* at 1353 n.6.
47. *Id.* at 1348.
48. *Id.*
49. *Id.*

dismiss CGI's protest, arguing that CGI did not have standing because CGI did not submit a quote prior to the deadlines established in the RFQs.[50] The COFC denied the government's motion to dismiss but denied CGI's protest on the merits.[51] The COFC, however, stayed its judgment pending CGI's appeal to the Federal Circuit.[52]

On appeal, the Federal Circuit affirmed the COFC's holding that CGI had standing but reversed the COFC's decision on the merits.[53] On the standing issue, the Federal Circuit reiterated that it interprets "interested party" under the Tucker Act, 28 U.S.C. § 1491(b)(1), consistent with the Competition in Contracting Act, 31 U.S.C §§ 3551–3556, to mean "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."[54] Recognizing that CGI did not submit a proposal and that the deadline for submitting proposals had passed prior to the filing of CGI's COFC protest, the court found that CGI nonetheless qualified as a prospective offeror at the time CGI filed its initial protest at GAO.[55] The Federal Circuit then explained that because CGI "diligently and continuously pursued its rights in the GAO and then . . . in the Court of Federal Claims," CGI maintained its prospective offeror status throughout the proceedings.[56] Rejecting the government's argument that CGI's prospective offeror status expired when the deadline for submitting quotations passed during the GAO protest, the Federal Circuit reasoned that Congress intended for prospective offerors, like actual offerors, to be able to first pursue their protests at GAO (a congressionally encouraged forum) without losing their right to continue their protests at the COFC if unsuccessful.[57] The court concluded its analysis on the standing issue by finding that CGI had a direct economic interest because the payment term was illegal and caused CGI not to submit a quote.[58] In so holding, the Federal Circuit rejected the government's argument that this type of injury should be inadequate because all offerors were "equally disadvantaged."[59]

Turning to the merits, the court focused on the plain language of FAR Part 12.[60] FAR Part 12 establishes procedures that shall be used for the acquisition of commercial items.[61] Among those procedures, FAR Part 12 includes a provision prohibiting agencies from including in any "solicitations

50. *Id.*
51. *Id.*
52. Order, CGI Fed. Inc. v. United States, No. 14-355C (Fed. Cir. Sept. 2, 2014), ECF No. 53, at 1.
53. *CGI Fed.*, 779 F.3d at 1347.
54. *Id.* at 1348 (quoting 31 U.S.C. § 3551(2)(A) (2012)).
55. *See id.* at 1350.
56. *Id.* at 1349–50.
57. *See id.* at 1351.
58. *Id.* at 1351–52.
59. *Id.* (citing Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1360–62 (Fed. Cir. 2009)).
60. *See id.* at 1353.
61. *See id.* at 1352 (citing FAR 12.102(a)).

or contracts" terms that are "inconsistent with customary commercial practice."[62] The Federal Circuit first found that the procurement at issue was indeed an acquisition for commercial items.[63] More specifically, the court explained that the type of procurement notice used here, an RFQ, was a solicitation and that the contemplated orders would be contracts.[64] As a result, the Federal Circuit held that FAR Part 12's commercial term mandate applied.[65] Because the COFC already had found—and the government had not challenged—that the term was inconsistent with customary commercial practice, the court found CMS's new payment term to be illegal.[66] Accordingly, the Federal Circuit reversed and remanded the COFC's decision, giving CGI another opportunity to compete for the contract at issue.[67] Thus, because the contractor had filed successive protests in a timely fashion, it was able to obtain the relief it sought from the Federal Circuit.

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

In *Bannum, Inc. v. United States*,[68] the court did not look favorably on a contractor that voiced concern regarding solicitation terms but did not file an actual pre-award protest. Instead, the court "took" the contractor's ability to seek relief by holding that the contractor had waived its right to pursue the protest.[69]

This appeal addressed two similar procurements by the federal Bureau of Prisons in which Bannum had participated.[70] The agency issued the original solicitation in February 2012, with initial proposals due in April 2012.[71] Bannum and one other offeror submitted proposals.[72] After receiving initial proposals, the agency revised the solicitation by adding a requirement that the offerors' facility comply with the Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. §§ 15601–15609.[73] In response to this amendment, Bannum submitted a six-page letter labeled "'Final Proposal Revision # 3 and AGENCY PROTEST,' in which it restated its earlier price proposal" and noted that its prices did not account for the PREA amendment because of the "enormous amount of information" that would be required to price out the new contract requirement.[74] Bannum also attached a signed copy of the amendment on which it placed an asterisk next to the term requiring compliance with PREA and stating: "Subject to and limited by Bannum's

62. *See id.* at 1353 (quoting FAR 12.302(c)).
63. *Id.* (citing FAR 2.101).
64. *Id.*
65. *Id.* at 1354.
66. *Id.* at 1353–54.
67. *Id.* at 1354.
68. 779 F.3d 1376 (Fed. Cir. 2015).
69. *See id.* at 1378.
70. *See id.* at 1379.
71. *Id.* at 1378.
72. *Id.*
73. *Id.*
74. *Id.*

response to [Final Proposal] # 3 . . . submitted herewith; also, subject to Bannum's reservation of all rights and protests."[75] Four months later, Bannum repeated its objection in response to a request to confirm the bidders' pricing but never filed a formal agency-level protest in accordance with the agency-level protest procedures set forth in the solicitation.[76]

After the agency announced that it had awarded the contracts to the other offeror, Bannum filed protests at GAO challenging the agency's evaluation of proposals.[77] GAO subsequently denied its protests, and Bannum filed new protests at the COFC.[78] At the COFC, in addition to challenging the evaluation of proposals, Bannum also argued that the PREA amendment made the solicitation "materially defective."[79] The COFC dismissed both protests, concluding Bannum was not an "interested party" because it submitted a bid that was materially out of compliance with the terms of the solicitation.[80] Bannum appealed both protests, and the Federal Circuit consolidated the cases.[81]

On appeal, Bannum pursued only its challenge to the solicitation terms, recognizing that it would be an interested party only if it succeeded in that challenge such that "the [government] would be obligated to rebid the contract."[82] The Federal Circuit held that Bannum waived its challenge to the solicitation terms because it "failed to follow any of the various procedures available to bidders for swiftly resolving objections to the terms of the solicitation."[83] The Federal Circuit recognized that Bannum objected to the solicitation terms and "that the government received notice of Bannum's dissatisfaction with the PREA-compliance requirement before awards were made," but held that this was not enough because "mere notice of dissatisfaction or objection is insufficient to preserve Bannum's defective-solicitation challenge."[84]

Ultimately, this decision serves as an important notice to contractors that if they do not want their right to challenge the terms of a solicitation taken from them, they must timely challenge the solicitation using formal protest procedures. The fact that the protester had failed to do so in *Bannum* ultimately proved fatal to its case.

3. *Tinton Falls Lodging Realty, LLC v. United States*

Last but certainly not least, in *Tinton Falls Lodging Realty, LLC v. United States*,[85] the Federal Circuit issued another decision favorable to contractors.

75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 1378–79.
79. *Id.* at 1379.
80. *Id.*
81. *Id.*
82. *Id.* at 1381–82 (internal quotations omitted).
83. *Id.* at 1381.
84. *Id.* at 1380.
85. 800 F.3d 1353 (Fed. Cir. 2015).

There, the court expanded the scope of protesters that have standing to protest the award of a contract by giving large businesses the ability to protest awards in small business set-aside procurements.[86]

In *Tinton Falls*, the Federal Circuit concluded there was no clear error in the COFC's determination that the protester, Tinton Falls, which did not qualify as a small business, had standing to protest the award to another offeror in a procurement set aside for small businesses.[87] The Federal Circuit reached this conclusion based on the "realistic possibility" that, if the awardee were found to be other than small, based on Tinton Falls' protest, the government would have to evaluate whether it could still solicit the contract as a small business set-aside or whether it would need to reopen the bidding process on an unrestricted basis.[88] In the event that the government reopened the bidding process on an unrestricted basis, Tinton Falls would be eligible to compete for the hypothetical reopened bid.[89] The Federal Circuit was clear that it did not intend to rule on whether, in all circumstances, an offeror, unqualified for award in a particular procurement, has standing where it would be a qualified offeror if the contract was solicited with substantially different eligibility requirements.[90] Thus, the precedential effect is uncertain and is made all the more ambiguous by the fact that the Federal Circuit applied the "clear error" standard in reviewing whether the COFC properly found Tinton Falls to have standing—a legal issue usually reviewed de novo on appeal.[91]

The Federal Circuit's decision stems from a U.S. Department of the Navy small business set-aside for the management and coordination of lodging and transportation services for federal civil service mariners who were completing training in Freehold, New Jersey.[92] The solicitation called for the winning contractor to provide hotel rooms near the training center, transportation between the hotels and the training center, and various associated services, such as planning for emergency medical treatment for the mariners housed at the hotels.[93]

After a size protest disqualified the original awardee from receiving the award, the Navy awarded the contract to DMC Management Services, LLC (DMC).[94] Once the award was made to DMC, Tinton Falls filed a size protest with the SBA, alleging that DMC intended to subcontract the lodging services portion of the contract, which accounted for more than eighty percent of the value of the contract, to hotels that did not qualify

86. *See id.* at 1360.
87. *See id.* at 1359.
88. *See id.* at 1360.
89. *See id.*
90. *See id.* at 1360 n.3.
91. *See id.* at 1360 ("Based on the record, we are unable to find clear error in the [COFC's] factual determination that Tinton Falls has demonstrated prejudice.").
92. *Id.* at 1355.
93. *Id.* at 1355–56.
94. *Id.* at 1356.

as small businesses and thus violated the "ostensible subcontractor rule."[95] Ultimately, the SBA disagreed, determining that the primary and vital requirements of the contract were the management and coordination of lodging and transportation services to the training facility, and DMC was not unusually reliant on subcontractors to perform these requirements.[96]

Simultaneously, the Navy CO filed its own size protest against Tinton Falls with the SBA.[97] The CO alleged that Tinton Falls was affiliated with Hotels Unlimited, Inc., a larger parent entity and was thus ineligible for award because it was not a small business, and the SBA agreed.[98] Tinton Falls subsequently appealed the SBA's decision as to the primary and vital requirements of the contract to the COFC, arguing that the SBA lacked a rational basis for determining that the primary and vital requirements of the contract were a coordinated package of lodging and transportation services.[99] The COFC held that the SBA had a rational basis for its conclusion.[100]

On appeal to the Federal Circuit, intervenor DMC argued that Tinton Falls lacked standing to pursue the appeal because Tinton Falls could not demonstrate that there was a "substantial chance" it would have received the contract award, but for the alleged error in the procurement process.[101] DMC maintained, first, that Tinton Falls did not qualify as a small business because of its affiliation with Hotels Unlimited, Inc. and therefore could not compete in a reopened bid process unless the bid was solicited on an unrestricted basis; and, second, that Tinton Falls did not "intend" to win the original contract because it did not submit the lowest-priced bid.[102]

On the first point, the Federal Circuit found no clear error in the COFC's determination that Tinton Falls had standing.[103] The COFC determined that if Tinton Falls was to succeed in proving that DMC was ineligible for award, the government would be obligated to evaluate whether it could still solicit the contract as a small business set-aside, or whether it would need to reopen the bidding process on an unrestricted basis.[104] In the event that the government were to resolicit the contract on an unrestricted basis, Tinton Falls would be able to compete.[105] Because of this "realistic possibility" that the government might rebid the contract on an unrestricted basis, Tinton Falls was able to demonstrate that there was a "substantial

95. *Id.* at 1356–57 (citing 13 C.F.R. § 121.103(h)(4) (2015)).
96. *Id.* at 1357.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 1358.
102. *Id.*
103. *Id.* at 1359.
104. *Id.*
105. *Id.* at 1359–60.

chance" it would have received the contract award but for the alleged error in the procurement process.[106]

On DMC's second point, the Federal Circuit deemed DMC's allegation that Tinton Falls did not intend to win the initial contract irrelevant.[107] To establish that it was prejudiced by the award of the contract and thus had standing, Tinton Falls did not need to show that it would win the contract in competition with other hypothetical bidders, only that it was a qualified bidder and could compete for the contract.[108]

On the merits, the Federal Circuit upheld the SBA's determination that the primary and vital requirements of the contract were the coordination of lodging, transportation, and other services, and thus DMC did not violate the ostensible subcontractor rule.[109] The Federal Circuit pointed to the fact that the contract required coordination between the training facility, the hotels, and the transportation services, as well as other additional activities beyond providing lodging, such as keeping daily logs monitoring the whereabouts of the mariners.[110] Only time will tell if the Federal Circuit's decision in this case will act to generally expand the category of companies that may be deemed interested parties for purposes of filing a protest of a small business award, or if the COFC and GAO will limit its impact by distinguishing the decision based on the case's unique facts.

B. *Exhaustion*

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

In *Palladian Partners, Inc. v. United States*,[111] the Federal Circuit "took" an awardee's ability to challenge award to a new contractor under a different NAICS code when it held that contractors must exhaust their administrative remedies before seeking judicial review of NAICS code protests, even when the contractor is precluded from seeking relief.[112] In particular, the court held that contractors must exhaust their administrative remedies before bringing a COFC action challenging an NAICS code designation by either (1) bringing an NAICS appeal at the SBA Office of Hearings and Appeals (OHA) or (2) intervening in the NAICS appeal of another contractor.[113] If they fail to take one of those actions, contractors are precluded from subsequently challenging the NAICS code designation in court.[114]

A division of the National Institutes of Health (NIH) issued a small business set-aside solicitation to fund a Coordination Center for Centers of

106. *Id.* at 1359–60.
107. *Id.* at 1360.
108. *Id.*
109. *Id.* at 1363.
110. *Id.*
111. 783 F.3d 1243 (Fed. Cir. 2015), *rev'g* 119 Fed. Cl. 417 (2014).
112. *See id.* at 1261.
113. *See id.* at 1255.
114. *See id.* at 1261.

Excellence in Pain Education.[115] As required, the solicitation defined the size limits of eligible small business offerors by identifying a NAICS code.[116] This NAICS code was based on the CO's discretion to select the code that best described the nature of the work to be performed.[117]

Information Ventures, Inc., an interested small business vendor, filed an NAICS code appeal at OHA challenging the NAICS code designated for the procurement.[118] Pursuant to SBA's regulations governing NAICS code appeals,[119] OHA instructed the CO to amend the solicitation to provide notice of the appeal to all potential offerors, which included Palladian Partners, Inc.[120] No potential offerors intervened in the appeal.[121] OHA ultimately disagreed with the CO's NAICS code designation and issued a decision mandating that the NAICS code be changed to a code OHA determined to be a better match to the solicitation's primary purpose.[122] The CO subsequently amended the solicitation to include the new NAICS code.[123] The new NAICS code, however, had the effect of excluding Palladian from the competition.[124]

Palladian filed a pre-award bid protest at the COFC, arguing that the CO's designation of the new NAICS code (based on OHA's decision) was arbitrary and capricious.[125] The COFC found that, by "'blindly accept[ing] the NAICS code chosen' by OHA," the CO "failed to exercise his discretion" properly.[126] The COFC determined that requiring Palladin to intervene in Information Ventures' appeal, as urged by the government, met the futility exception to the exhaustion requirement: small businesses would be required to file "useless motions in order to preserve their rights."[127] The COFC expressed concern that small businesses would "be forced to expend significant time and money to involve themselves in potentially costly litigation" that may ultimately be unnecessary.[128] The COFC went on to find that a third NAICS code actually best described the work, and thus granted Palladian's request for a permanent injunction against review and receipt of proposals.[129]

115. *Id.* at 1247–48.
116. *See id.* at 1248.
117. *See id.* at 1251 (citing FAR 19.102(b)(1)).
118. *See id.* 1248.
119. *See id.* (citing 13 C.F.R. § 121.1103(b)(1) (2015)).
120. *Id.*
121. *Id.*
122. *See id.* at 1249.
123. *Id.*
124. *See id.* at 1250.
125. *Id.* Palladian's simultaneous appeal to OHA was dismissed on the ground that SBA's regulations precluded OHA from reconsidering its prior NAICS code decision for that procurement. *Id.*
126. *Id.* at 1251 (quoting Palladian Partners, Inc. v. United States, 119 Fed. Cl. 417, 443 (2014)).
127. *Id.* at 1256 (quoting *Palladian*, 119 Fed. Cl. 417 at 437).
128. *Id.* (quoting *Palladian*, 119 Fed. Cl. 417 at 437).
129. *Id.* at 1251.

On appeal, the Federal Circuit reversed the COFC decision.[130] The court agreed with the government that SBA's regulations specifically require contractors to exhaust their administrative remedies before seeking judicial review.[131] The court further found that because OHA NAICS code appeals are final and not subject to reconsideration under SBA's regulations, interested parties must intervene in a pending NAICS code proceeding to preserve their rights to judicial review.[132] Because Palladian failed to intervene in Information Ventures' original NAICS code appeal, it failed to exhaust its administrative remedies.[133]

The Federal Circuit also concluded that these circumstances did not meet any exception to the exhaustion requirement.[134] The Federal Circuit rejected the COFC's conclusion that the futility exception applied, stating that the futility exception is narrow and that contractors can intervene in NAICS code appeals simply by "filing a letter with OHA," thus preserving their right to judicial review.[135] The court further rejected Palladian's argument that it was excused from intervening in the earlier appeal because Information Ventures' appeal presented the same argument that Palladian was trying to advance—that OHA was required to consider a broader set of codes than it had.[136] The Federal Circuit concluded that such reasoning would result in "endless cycles of NAICS code litigation."[137]

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

On the other end of the spectrum, in *SUFI Network Services, Inc. v. United States*,[138] the Federal Circuit "gave" a contractor the ability to pursue remedies even though it had not exhausted all of the procedural requirements set forth in the contract.[139] In so doing, the court expanded the remedies available to contractors in disputes with the government involving non-appropriated funds contracts.[140] Thus, in the future, when COs delay issuing final decisions to contractor claims, contractors may take their dispute directly to federal court in lieu of following the procedures of the contract's disputes clause.[141] In addition, the Federal Circuit held that contractors holding non-appropriated funds contracts may recover attorney fees, overhead, and lost profits in a breach of contract action against the government.[142]

130. *Id.* at 1247.
131. *Id.* at 1255.
132. *See id.* at 1257.
133. *Id.* at 1258.
134. *See id.* at 1261.
135. *Id.* at 1256–57 nn.3, 4.
136. *Id.* at 1261.
137. *Id.*
138. 785 F.3d 585 (Fed. Cir. 2015).
139. *See id.* at 590–91.
140. *See id.*
141. *See id.*
142. *Id.* at 592, 595.

SUFI Network Services, Inc. and the Air Force Nonappropriated Funds Purchasing Office (AFNAFPO) entered into a partial settlement agreement covering the government's material breach of a contract between the parties.[143] The settlement provided that if SUFI prevailed on its additional claims under the contract, the government would pay SUFI interest from the earlier of either the date AFNAFPO received the claim or the date SUFI "actually incurred" damages.[144] Soon after, SUFI submitted claims to the CO.[145] Under the disputes clause, the CO was required to issue a final decision, which could be appealed to the Armed Services Board of Contract Appeals (ASBCA).[146] The CO, however, never responded to SUFI's claims, so SUFI appealed, deeming its claims denied.[147]

The ASBCA ruled largely in favor of SUFI on the merits but did not award SUFI any of its attorney fees.[148] After the appeal, SUFI submitted a claim for its attorney fees to the CO.[149] Once again, the CO failed to issue a final decision.[150] Six months later, agency counsel informed SUFI it could deem the claim denied for the purposes of an appeal to the ASBCA.[151] SUFI instead sued AFNAFPO at the COFC for attorney fees, interest accruing on the fees, overhead costs, and lost profits.[152]

The COFC found that the CO's failure to issue a final decision on the attorney fees constituted a material breach of the contract and rendered the contractual remedy both inadequate and unavailable.[153] This breach excused SUFI from exhausting its contractual remedies by pursuing an appeal at the ASBCA.[154] The COFC awarded SUFI its fees with interest accruing from the date SUFI's attorneys first began work preparing its claim for attorney fees.[155] The COFC, however, denied SUFI's claims for overhead and lost profits incurred in connection with its claim preparation efforts because the FAR prohibited their recovery.[156] The government appealed, and SUFI cross-appealed.[157]

The Federal Circuit agreed that SUFI was excused from exhausting its contractual remedies due to the government's prior material breach for failing to issue final decisions.[158] Through its breach, the court determined that

143. *Id.* at 588.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 588–89.
148. *Id.* at 589. SUFI could not identify a specific amount of attorney fees because SUFI's attorneys were working on a contingency fee basis. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 589, 591.
155. *Id.* at 589, 593.
156. *Id.* at 589, 594.
157. *Id.* at 589.
158. *See id.* at 590.

the government effectively negated SUFI's available contractual remedies.[159] SUFI's claim thus was properly before the COFC.[160] The Federal Circuit also affirmed the award of attorney fees because the common law governed the contract rather than the FAR.[161]

The Federal Circuit, however, disagreed with the COFC's judgment regarding interest, overhead, and lost profits.[162] Regarding the accrual of interest, the court found the relevant date was the date SUFI actually submitted the claim.[163] Because the attorneys worked on a contingency fee basis, SUFI would have owed its attorneys nothing had SUFI lost.[164] The court thus reasoned that SUFI did not actually incur any legal expenses—and thus did not incur "damages"—until after winning its case.[165] Therefore, the earliest date SUFI could use for calculating interest was the date it submitted its claim.[166]

Regarding the COFC's ruling on the availability of the recovery of overhead and lost profits, the Federal Circuit found the COFC erred in applying FAR principles to SUFI's contract with AFNAFPO.[167] The court found that common law, not the FAR, applies to non-appropriated funds contracts.[168] Because overhead and lost profits were recoverable at common law, the Federal Circuit concluded that they would also be recoverable here.[169]

The Federal Circuit thus vacated the COFC opinion with respect to the issues of interest accrual and the recovery of overhead and lost profits and remanded the case for further consideration.[170]

C. *Plain Meaning*

1. *EM Logging v. Department of Agriculture*

In *EM Logging v. Department of Agriculture*,[171] the Federal Circuit gave the contractor the benefit of its interpretation, using the plain meaning doctrine, of the contract's termination clause.[172] At issue was whether the U.S. Forest Service was justified in invoking the termination clause, which allowed for termination if the contractor demonstrated "flagrant disregard for the terms of this contract."[173] The Federal Circuit held that under the Merriam-Webster definition of "flagrant," and within the context of

159. *See id.* at 591.
160. *See id.* at 590.
161. *Id.* at 592, 594.
162. *Id.* at 593.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 592–93.
167. *Id.* at 594.
168. *Id.*
169. *Id.* at 594–95.
170. *Id.* at 595.
171. 778 F.3d 1026 (Fed. Cir. 2015), *rev'g* CBCA No. 2397, 2013 B.C.A. (CCH) ¶ 35,350.
172. *See id.* at 1028, 1030.
173. *Id.* at 1029–30.

examples included in the contract's termination for breach clause, no substantial evidence existed to justify the termination for breach.[174]

The contract in question contained a termination clause that stated that the contract may be terminated if EM Logging "engaged in a pattern of activity that demonstrates flagrant disregard for the terms of this contract."[175] After only four months of performance, the CO terminated EM Logging's contract, citing breaches of three separate contract provisions related to (1) compliance with all "statutory" truck load weight limits, (2) adherence to designated haul routes through the forest when transporting logs, and (3) compliance with notification provisions triggered if any load was delayed in reaching the weigh stations by more than twelve hours.[176]

EM Logging appealed the termination decision to the Civilian Board of Contract Appeals (CBCA).[177] The CBCA majority, with one dissent, determined that EM Logging breached each of these clauses at least once.[178] The majority concluded that these violations independently, and as a whole, constituted flagrant disregard of material contract provisions, justifying the termination.[179] EM Logging appealed the decision to the Federal Circuit.[180]

On appeal, the Federal Circuit found that the Forest Service had not proven by substantial evidence a flagrant disregard for the contract terms.[181] The court began by quoting Merriam-Webster's definition of "flagrant"—"so obviously inconsistent with what is right or proper as to appear to be a flouting of law or morality."[182] The court also quoted the entire termination clause, including the provided examples that would justify a termination for breach: "repeated suspensions for breach" or "causing serious environmental degradation or resource damage."[183] The court then examined, and rejected, each of the Forest Service's arguments.[184] The Federal Circuit found that even if EM Logging had violated the contract as alleged, none of the claimed violations rose to the level of "flagrant disregard," and the violations in evidence were minor compared to the examples in the termination clause.[185]

First, the Federal Circuit stated that the only breach of the load limit clause was a single ticket received for a minor technical violation of Montana law.[186] The court held that the clause required compliance with "statutory" load limits, and the "Forest Service Order [was] not a 'statute.'"[187] Thus, the

174. *Id.* at 1030–31, 1033.
175. *Id.* at 1028 (internal quotations omitted).
176. *See id.* at 1028–29.
177. *Id.* at 1029.
178. *Id.* at 1029–30.
179. *Id.* at 1029.
180. *Id.* at 1028, 1030.
181. *Id.* at 1033.
182. *Id.* at 1030 (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 475 (11th ed. 2003)).
183. *Id.* at 1031 (internal quotations omitted).
184. *See id.* at 1030–33.
185. *Id.* at 1033.
186. *Id.* at 1032.
187. *Id.*

Forest Service's claimed violations of Forest Service Order limits were irrelevant to a breach analysis regardless of how frequent the violations.[188] With only one actual breach of the load limit clause in evidence, the court held, "[t]his single isolated violation does not independently rise to the level of flagrant disregard."[189]

Next, the Federal Circuit addressed the violations of the haul route clause and notification clause.[190] The court found that the Forest Service failed to prove that only the written route descriptions were approved routes, but even if it had, the only evidence of EM Logging's breach of the haul route clause was a "a single, isolated event necessitated by illness" and this too did not provide substantial evidence of flagrant disregard.[191] The court also found that in the absence of specific language, the notification clause required only notice within a reasonable amount of time after the twelve-hour deadline passed.[192] The two delays cited by the Forest Service, both of which occurred before the Forest Service informed EM Logging when the notice was due, were at most "minor, technical violations of the notification clause."[193] Again, the court held that these violations failed to rise to the level of "flagrant disregard" that could justify the termination.[194]

The Federal Circuit finally concluded that even taken together, these few and isolated violations were insufficient to support the CBCA's conclusion that EM Logging flagrantly disregarded the terms of the contract.[195] The Federal Circuit thus reversed the CBCA's decision, concluding that the Forest Service was not entitled to terminate the contract for breach.[196]

2. *Reliable Contracting Group, LLC v. Department of Veterans Affairs*

In *Reliable Contracting Group, LLC v. Department of Veterans Affairs*,[197] the court gave the contractor a break by adopting a generous interpretation of the word "new" as used in the contract's description of a required deliverable to include items in "fresh" condition.[198] In particular, the majority panel consulted multiple dictionary definitions and industry practice before concluding that the "new equipment" called for by the contract included equipment that was both slightly damaged and a little old, so long as it was both unused and in "fresh" condition.[199] The majority remanded the case to the CBCA to determine whether the equipment in question, which the

188. *Id.*
189. *Id.*
190. *See id.*
191. *Id.* at 1032–33.
192. *Id.* at 1033.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. 779 F.3d 1329 (Fed. Cir. 2015).
198. *Id.* at 1330, 1333–35.
199. *Id.* at 1334.

contractor admitted was four years old and in "bad condition," actually met this definition.[200] Though formally agnostic on the majority's definition, the dissent found the contractor's admissions sufficient for the CBCA to find the equipment was not new.[201]

By way of background, Reliable Contracting Group contracted with the Department of Veterans Affairs (VA) for the design and construction of electrical improvements at a VA medical center.[202] The contract required Reliable to install three backup generators that were in "new" condition.[203] The contract did not define "new."[204] The contract did, however, incorporate FAR 52.211-5, which defined "new" as "composed of previously unused components" and capable of factory testing.[205] Reliable, via a subcontractor, delivered three generators, but the generators showed signs of "grime"[206] and "wear and tear."[207] The VA objected and asked Reliable to certify that the generators were new.[208] Reliable initially agreed that the generators were nonconforming, but after an investigation, Reliable concluded that the generators, though four years old and previously owned, were never actually used by the previous owners.[209] This, Reliable argued, meant the generators were in fact "new."[210] Nonetheless, the VA rejected the generators as nonconforming, and Reliable replaced them at a cost of $1,100,000.[211]

Reliable submitted a claim for the replacement costs to the CO.[212] Reliable then appealed a deemed denial to the CBCA.[213] The CBCA, in turn, denied Reliable's appeal, concluding that the generators were not new—they were incapable of factory testing because they were four years removed from the factory setting.[214] Reliable appealed to the Federal Circuit, arguing "new" here meant being composed of unused parts.[215] The VA argued that the FAR definition controlled and that these generators were not new because they were not capable of being factory tested.[216]

The majority disagreed with the CBCA and the VA for a couple of reasons.[217] First, the majority noted that, when initially rejecting the generators as nonconforming, the VA never argued that the generators were incapable

200. *See id.* at 1331, 1335.
201. *See id.* at 1336 (Newman, J., dissenting).
202. *Id.* at 1330 (majority op.).
203. *Id.*
204. *Id.*
205. *Id.* (quoting FAR 52.211-5).
206. *Id.* at 1335.
207. *Id.* at 1331.
208. *See id.*
209. *Id.*
210. *See id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 1332.
215. *Id.*
216. *Id.* at 1331–32.
217. *Id.* at 1332.

of factory testing.[218] The contemporaneous reason given for rejection was aesthetic deficiencies that suggested the generators were not new.[219] Second, the majority concluded that there was no indication that the generators could not be factory-tested because nothing in the contract required the testing be done at the manufacturing factory.[220] Moreover, the contract gave the VA only the option to require factory testing, an option that the VA never exercised.[221]

At the same time, the majority found Reliable's definition of new to be incomplete.[222] Equipment was not "new" simply because it was composed of unused parts or was not previously used by a prior owner.[223] While that definition may be sufficient for the incorporated FAR provision, the term at issue was in a separate provision requiring the equipment be "new."[224] Applying the rule against surplusage, the majority determined that this specific contract provision must require something different than the FAR definition.[225] After consulting (and rejecting) several dictionary definitions, the majority settled on a "freshness" requirement for "new."[226] To be "new," the majority ruled that equipment must be both unused and in fresh condition.[227] The majority noted, however, that "freshness" did not require the equipment to be "entirely free of cosmetic defects"; it required only that any damage not be significant.[228]

In applying this interpretation of "new" to the case at hand, the majority found the factual record insufficient to resolve the case.[229] On the one hand, Reliable admitted contemporaneously that the generators were significantly damaged and nonconforming and would not certify them as new.[230] On the other hand, those statements were not binding judicial admissions, and the subcontractor subsequently submitted an affidavit stating that any damage was insignificant and could be remedied with a "buff and puff."[231] Because the majority could not determine the amount of damage based on the factual record, it vacated the CBCA's opinion and remanded for further factual finding.[232]

Dissenting, Judge Newman reasoned that however "new" is defined, it should not include old and damaged equipment even if the damage could

218. *Id.*
219. *Id.* at 1331.
220. *Id.* at 1332.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 1333.
225. *Id.*
226. *Id.* at 1333–34.
227. *Id.* at 1334.
228. *Id.*
229. *See id.* at 1334–35.
230. *Id.* at 1335.
231. *Id.*
232. *Id.*

be cured.[233] There was thus nothing arbitrary and capricious in the CBCA's conclusion that the generators were not new, particularly in light of Reliable's refusal to certify them as such and its contemporaneous admission that the generators were nonconforming.[234] On this basis, Judge Newman concluded that there was no reasonable basis for further proceedings.[235]

3. *G4S Technology LLC v. United States*

In *G4S Technology LLC v. United States*,[236] the court did not explicitly invoke the "plain meaning" doctrine, although it construed the third-party beneficiary doctrine to take away a subcontractor's ability to seek relief with sufficient precision to warrant its discussion alongside the court's true plain meaning cases.[237] Here, at the urging of the government, plaintiff G4S Technology continued work under its subcontract up until the prime contractor declared bankruptcy.[238] But when G4S Technology tried to collect payment directly from the government, the Federal Circuit rejected G4S Technology's argument that it was a third-party beneficiary to the loan agreement.[239] As a result, despite assurances of future compensation from the government customer, G4S Technology was left with little remedy to collect payment for its services.[240]

G4S Technology was a subcontractor to Open Range Communications Inc., which received a loan from the U.S. Department of Agriculture Rural Utility Service (RUS) to finance the construction of wireless broadband networks in rural markets.[241] The loan agreement anticipated that subcontractors would be used on the project, and RUS required Open Range to enter into RUS-approved master service agreements (MSAs) with any subcontractors.[242] RUS formally edited and approved a generic MSA for use by Open Range, and Open Range entered into one of these MSAs with G4S Technology.[243]

Open Range encountered financial difficulties shortly after the project began.[244] Open Range's subcontractors, including G4S Technology, threatened to stop work when Open Range began failing to meet its payment obligations.[245] In an effort to encourage the subcontractors to continue performance, RUS made additional loan money available to Open Range and issued public letters confirming that the project was moving forward.[246]

233. *Id.* at 1336 (Newman, J., dissenting).
234. *Id.*
235. *Id.*
236. 779 F.3d 1337 (Fed. Cir. 2015).
237. *See id.* at 1338.
238. *See id.* at 1338–39.
239. *See id.* at 1344.
240. *See id.*
241. *Id.* at 1338.
242. *Id.*
243. *Id.*
244. *See id.* at 1338–39.
245. *Id.* at 1339.
246. *Id.*

RUS also assured the subcontractors that Open Range remained viable.[247] Despite these efforts, Open Range remained unable to fulfill its payment obligations and filed for bankruptcy.[248] G4S Technology subsequently filed suit in the COFC seeking to recover its outstanding payments directly from the government.[249] G4S Technology argued that it was a third-party beneficiary of the loan agreement between RUS and Open Range, its work was authorized and approved by RUS, and G4S Technology performed this work after receiving RUS's payment assurances.[250] The COFC held that it lacked jurisdiction over the case after finding that G4S Technology was not a third-party beneficiary to the contract.[251]

On appeal, the Federal Circuit affirmed.[252] Noting "the privilege of third party beneficiary status should not be granted liberally,"[253] the majority refused to find sufficient evidence of intent by the government to make itself liable to the subcontractors through the loan agreement.[254] The majority held that the loan agreement between RUS and Open Range did not accord a "direct" benefit to the subcontractors, which is required to establish third-party beneficiary status.[255] The majority noted that, in previous cases finding a subcontractor to be a third-party beneficiary, the government always paid the subcontractor "more directly than in the circumstances of this case."[256] The majority also characterized RUS's various assurances and letters as attempts to rebuild Open Range's credibility and to "reinforce the conclusion that Open Range, not RUS, was the party entering into obligations with subcontractors such as G4S."[257]

Finally, the majority expressed concern with bestowing third-party beneficiary status on a subcontractor like G4S Technology in light of the "[government's] responsibilities to safeguard taxpayer funds and advance the public interest."[258] The majority noted that, "[i]f G4S were to prevail here, almost any subcontractor over which the government exerts meaningful oversight and whose work is funded indirectly by the government would be a third party beneficiary of the government's contract with the prime contractor. That cannot be so."[259] The majority thus affirmed the COFC's summary judgment finding.[260]

247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*at 1339–40.
252. *See id.*at 1344.
253. *Id.* at 1340 (citing Flexfab, LLC v. United States, 424 F.3d 1254, 1259 (Fed. Cir. 2005)).
254. *Id.* at 1341.
255. *Id.*
256. *Id.* at 1341–42.
257. *Id.* at 1343.
258. *Id.* at 1344.
259. *Id.*
260. *Id.*

Judge Newman dissented, noting that the government repeatedly provided assurances to the subcontractors, intended for the project to move forward, and obtained continued performance by the subcontractors as a direct result of these representations.[261] Judge Newman asserted that the "United States, like other parties in contractual relationships, may be liable for benefits solicited and received, for which compensation was promised and expected."[262] In Judge Newman's view, the majority's opinion allows the government to avoid payment for the performance it solicited and obtained.[263]

At the end of the day, this decision highlights the risks subcontractors face in relying upon government assurances to continue performance under a subcontract with a financially troubled prime contractor.

Collectively, these three decisions also demonstrate that even centuries' old canons of contract interpretation, such as "plain meaning," can take on different forms based on the facts of a specific case.

D. *Different Entities*

1. *Colonial Press International, Inc. v. United States*

In *Colonial Press International, Inc. v. United States*,[264] the Federal Circuit "taketh" when it rejected a disappointed offeror's argument that the U.S. GPO was required to refer its responsibility determination to the SBA rather than make its own determination.[265] In a case of first impression, the court held that the GPO, a legislative agency, is not bound by the SBA COC Program.[266] A disappointed small business, Colonial Press International, Inc., filed post-award bid protests at the GAO and subsequently at the COFC.[267] Colonial Press argued that, pursuant to the SBA COC Program, GPO was required to refer its responsibility determination to the SBA rather than make its own determination.[268] The Federal Circuit affirmed the lower-court decision that the SBA COC Program was not an exception to the long-standing principle that no part of the Small Business Act applied to legislative agencies such as the GPO.[269]

At issue in this case was an invitation for bids for a contract to print Medicare publications for the Department of Health and Human Services.[270] The solicitation and evaluation were governed by GPO's Printing Procurement Regulation (PPR), which requires GPO to award contracts only to

261. *Id.* (Newman, J., dissenting).
262. *Id.* at 1345.
263. *Id.*
264. 788 F.3d 1350 (Fed. Cir. 2015).
265. *See id.* at 1352.
266. *Id.* at 1358.
267. *See id.* at 1355.
268. *See id.* at 1356 n.3.
269. *See id.* at 1354.
270. *See id.* at 1352.

"responsible bidders."[271] The PPR includes minimum standards for a finding of responsibility, including the ability to comply with proposed delivery schedules.[272] Colonial Press was the lowest-price bidder, so GPO initiated a responsibility review.[273]

For its review, GPO compiled data on Colonial Press's previous GPO contracts, and it identified some late deliveries under those agreements.[274] GPO provided Colonial Press an opportunity to explain and provide any details relating to corrective actions taken to prevent late deliveries in the future.[275] After reviewing Colonial Press's response, the CO found that there was no evidence to believe that Colonial Press's performance would improve in the future.[276] The CO thus notified Colonial Press that it had been found nonresponsible and awarded the contract to the second-lowest bidder.[277] Colonial Press filed a timely post-award bid protest at GAO.[278]

At GAO, Colonial Press argued that the CO's responsibility determination was "an abuse of discretion" and that the responsibility determination should have been referred to the SBA.[279] The SBA COC Program states that a "[g]overnment procurement officer" may not preclude a small business concern from being awarded a "[g]overnment contract" due to a finding of nonresponsibility without referring the matter to the SBA for final disposition.[280] Although GAO previously had found that the SBA COC Program did not apply to GPO procurements, GAO sought clarification from the SBA.[281] The SBA responded that, while compliance with most SBA programs generally is not extended to non-executive branch agencies, the use of the general term "[g]overnment procurement officer" in 15 U.S.C. § 637(b)(7) indicated that Congress may have intended that this provision would extend to legislative agencies such as GPO.[282] GAO nevertheless denied the protest, finding that GPO was not subject to the referral requirements of the SBA COC Program and that the CO had a reasonable basis for the nonresponsibility determination.[283]

Colonial Press then filed a post-award bid protest at the COFC, again arguing that GPO was required to refer the responsibility determination to the SBA and that its nonresponsibility determination was arbitrary and

271. *Id.*
272. *Id.* (citing PRINTING PROCUREMENT REGULATION, GPO PUB. 305.3, ch. I, § 5.4(b) (Rev. 2-11)).
273. *Id.*
274. *Id.* at 1353.
275. *Id.*
276. *Id.* at 1358.
277. *Id.* at 1353.
278. *Id.* at 1353–54.
279. *Id.* at 1354.
280. 15 U.S.C. § 637c(3) (2012).
281. *Colonial Press Int'l*, 788 F.3d at 1354.
282. *Id.*
283. *Id.* at 1354–55.

capricious and lacked a rational basis.[284] However, like GAO, the COFC found that GPO was not subject to the referral requirements of the SBA COC Program.[285] The COFC further upheld the GPO's responsibility determination, citing the broad discretion afforded to agencies in this area.[286] Colonial Press appealed this decision to the Federal Circuit, once again raising the same arguments.[287]

The Federal Circuit affirmed the COFC's decision.[288] The court rejected Colonial Press's argument that the SBA COC Program should be interpreted independently because it was created by an amendment to the Small Business Act and not by the Act itself.[289] Citing what it referred to as a "fundamental canon of statutory construction,"[290] the Federal Circuit held that it would not read 15 U.S.C. § 637c in a vacuum and that it must be construed in light of the entire Small Business Act.[291]

So finding, the Federal Circuit then examined section 637c itself, which defines "[g]overnment procurement contract" as any contract for a "federal agency."[292] The court ruled that the definitions of "federal agency" and "agency" in other provisions of the Small Business Act specifically exclude "the Congress," which other courts have interpreted to encompass legislative agencies and departments.[293] The court also cited the earlier decisions by GAO and interpretations by the SBA, which found GPO was subject to neither the Small Business Act nor the COC Program.[294]

2. *Bay County v. United States*

In *Bay County v. United States*,[295] the Federal Circuit "giveth" to entities contracting with the government when it determined that because Bay County was an "independent regulatory body," the county could unilaterally revise the rates in its utility contracts without negotiating those rates with the Air Force.[296] Addressing an appeal by the United States, the Federal Circuit ruled that Bay County, Florida, a party to a contract with the Air Force, was an "independent regulatory body" according to the plain meaning of the term as it is defined in the Defense Federal Acquisition

284. *Id.* at 1355.
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.* at 1359.
289. *See id.* at 1357.
290. *Id.* (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989)).
291. *Id.* at 1356–57.
292. *Id.* (quoting 15 U.S.C. § 637c).
293. *See id.* at 1357.
294. *Id.* at 1357–58.
295. 796 F.3d 1369 (Fed. Cir. 2015).
296. *See id.* at 1370–71. In deciding this case, the Federal Circuit examined the plain meaning of the phrase "independent regulatory body." The case is included here, however, because of the lesson it imparts regarding the applicability of various rules to nontraditional or quasi-governmental contracting entities.

Regulation Supplement (DFARS).[297] As a result, the county could unilaterally revise the rates in its utility contracts without negotiating those rates with the Air Force.[298]

Bay County owns and operates Bay County Utilities, providing water and sewer services throughout the county.[299] In 1966 and 1985, the Air Force and Bay County entered into contracts under which the county agreed to provide water and sewer services to Tyndall Air Force Base.[300] After the latter contract was executed, the Department of Defense (DoD) adopted regulations governing the setting of rates in utility service contracts.[301] Pursuant to DFARS 241.501(d)(1), if the entity providing utility service to the DoD is subject to oversight by an "independent regulatory body" (IRB), then the government agrees to pay the rate approved by the regulator without further negotiation.[302] As defined in the DFARS, an IRB includes "the Federal Energy Regulatory Commission, a state-wide agency, or an agency with less than state-wide jurisdiction when operating pursuant to state authority. The body has the power to fix, establish, or control the rates and services of utility suppliers."[303] By contrast, the DFARS provides that if a utility is unregulated or subject to a nonindependent regulatory body (NIRB), then the parties have to negotiate any change in rate.[304] The DFARS defines NIRB to mean "a body that regulates a utility supplier which is owned or operated by the same entity that created the regulatory body, e.g., a municipal utility."[305]

While under contract with the Air Force, Bay County increased the rates for its water and sewer services within the county several times.[306] The Air Force ignored each of the rate increases and instead issued unilateral contract modifications setting new rates that were lower than the rates set by Bay County.[307] After unsuccessful claims to the CO and the COFC seeking recovery, Bay County appealed to the Federal Circuit.[308]

The Federal Circuit found that "[b]ased on the plain meaning of these definitions, Bay County is clearly an IRB."[309] The court reasoned that Bay County was an "agency with less than state-wide jurisdiction" because, in its capacity of regulating utilities, Bay County is an agency of the State of Florida, and neither party could reasonably dispute that Bay County had less than state-wide jurisdiction.[310] Moreover, pursuant

297. *See id.* at 1370, 1372–73 (citing DFARS 241.101).
298. *Id.* at 1372.
299. *Id.* at 1371.
300. *Id.*
301. *Id.*
302. *See id.*
303. *Id.* at 1372 (quoting DFARS 241.101).
304. *Id.* at 1371 (citing DFARS 241.501(d)(2)).
305. *Id.* at 1372–73 (quoting DFARS 241.101).
306. *Id.* at 1372.
307. *Id.*
308. *See id.*
309. *Id.* at 1373.
310. *Id.* (internal quotations omitted).

to the Florida statutory code, the county had been authorized by the State of Florida to "fix, establish, and control the rates and services of utility suppliers."[311] The Federal Circuit further noted that Bay County did not fit within the plain meaning of an NIRB because there was no "single entity which both created the relevant regulatory body and own[ed] or operat[ed] the regulated utility supplier."[312] Finally, upon finding that the IRB and NIRB terms were not ambiguous, the Federal Circuit concluded that because the COFC correctly applied the definitions of IRB and NIRB, no further inquiry was required.[313]

Even so, the court addressed four arguments the government had made against applying the plain meaning of the applicable regulations.[314] First, the government relied on DoD's and the Air Force's policy of treating only those utilities regulated by statewide public utility commissions (PUCs) as regulated utilities.[315] The Federal Circuit acknowledged the logic of the government's policy but found that it did not "alter the plain language of the regulations."[316] Second, the government argued that the court should defer to the Air Force's interpretation of the regulatory definitions because its interpretation was consistent with DFARS policy and because the Air Force historically has treated Bay County as an NIRB.[317] Again, the court noted that the regulation was not ambiguous, and thus the court need not defer to a "plainly inconsistent" agency interpretation.[318] Third, the government argued that Bay County falls within the definition of NIRB, but the Federal Circuit rejected each of the government's reasons in turn, citing the DFARS regulations and Florida law.[319] Finally, the government relied on the interpretive principle of *esjudem generis* to argue that "an agency with less than state-wide jurisdiction when operating pursuant to state authority" within the definition of an IRB should be read in context to refer to agencies that are similar to the Federal Energy Regulatory Commission (FERC) and statewide PUCs.[320] As with the government's other arguments, the Federal Circuit rejected this argument, finding that the canon of *ejusdem generis* did not apply here because the phrase "an agency with less than state-wide jurisdiction" is not a general term following a list of specific items.[321]

Having rejected all of the government's arguments, the Federal Circuit concluded that the DFARS regulations did not support the Air Force's position that Bay County was an NIRB and that the plain meaning of IRB

311. *Id.*
312. *Id.*
313. *Id.*
314. *See id.*
315. *Id.* at 1374.
316. *Id.*
317. *Id.*
318. *Id.* at 1374–75.
319. *See id.* at 1375–76.
320. *Id.* at 1376.
321. *Id.*

controlled here.[322] The Federal Circuit thus affirmed the COFC's decision awarding summary judgment to Bay County.[323]

IV. STAND-ALONE GOVERNMENT CONTRACT CASES

A. *K-Con Building Systems, Inc. v. United States*

K-Con Building Systems Inc. v. United States[324] is an important case for two reasons. First, the Federal Circuit affirmed that appealing a CO's final decision to the COFC does not always preclude submitting—and potentially appealing—additional, related claims under a contract.[325] Second, this case stands as a stark reminder that contractors should provide prompt notice to the government of any constructive changes or else risk losing the ability to later recover for the additional expenses incurred.[326]

Plaintiff K-Con Building Systems, Inc. contracted with the U.S. Coast Guard to construct a building for its "cutter support team building" in Michigan for $582,641.[327] K-Con, however, ran into delays during the construction and did not complete the project until 186 days after the original contracted-for completion date.[328] In response, the Coast Guard withheld $109,554 as liquidated damages for tardiness.[329] One of the reasons for the delay was that the Coast Guard had requested changes throughout the project, which K-Con accommodated without objection.[330] After project completion, K-Con filed its first claim seeking remission of the liquidated damages.[331] The claim also alleged that the Coast Guard failed to grant extensions necessary to accommodate the additional work it had requested.[332] But K-Con only alleged these changes generally and expressly sought remission only as a remedy.[333]

The CO denied K-Con's claim in a final decision, which K-Con timely appealed to the COFC.[334] In its complaint, K-Con sought return of the withheld payments on two grounds: first, that the liquidated damages were unreasonable (the liquidated damages claim) and, second, that it should have received an extension on the completion date (the extension claim).[335] While the case was pending at the COFC, K-Con submitted an additional claim to the CO.[336] This time, K-Con sought compensation for the additional

322. *Id.* at 1377.
323. *Id.*
324. 778 F.3d 1000 (Fed. Cir. 2015).
325. *See id.* at 1007.
326. *See id.* at 1009.
327. *Id.* at 1003.
328. *See id.*
329. *Id.*
330. *See id.* at 1004, 1009.
331. *See id.* at 1003.
332. *Id.* at 1004.
333. *See id.*
334. *Id.*
335. *Id.*
336. *Id.*

work necessitated by the Coast Guard's changes (the changes claim).[337] The CO also denied this claim, and K-Con amended its COFC complaint, adding the new claim.[338]

The COFC ruled against K-Con on all three claims.[339] The COFC first found that the Coast Guard's assessment of liquidated damages was reasonable.[340] The COFC then found that, because K-Con did not comply with the notice provision in the changes clause, it was deemed to have accepted the changes it now disputed.[341] Finally, the COFC found it lacked jurisdiction over the extension claim because it was never properly the subject of a CO's final decision given that K-Con did not expressly include it in its first claim to the CO.[342] K-Con appealed the decision to the Federal Circuit.[343]

At the Federal Circuit, the government challenged the court's jurisdiction over both the changes claim and the extension claim.[344] The court first examined its jurisdiction over the changes claim.[345] The government argued there was no jurisdiction to hear the changes claim because, like the extension claim dismissed below, it was not the subject of a final decision.[346] The government argued that when litigation begins on a claim, exclusive authority over the matter is vested in the Department of Justice.[347] As a result, the second CO final decision, denying the changes claim, was invalid, and K-Con could not appeal it.[348] The Federal Circuit disagreed.[349] The court explained that its jurisdiction was limited to individual claims, not entire cases.[350] While pending litigation does divest a CO of authority, it does so only as to the claim at issue, not all potential claims that may be submitted to the CO under a contract.[351]

Thus, the relevant question for the court was whether the changes claim was separate from the extension and liquidated damages claims set forth in K-Con's original complaint.[352] The Federal Circuit held that it was.[353] Specifically, the court found that the subsequent changes claim both sought different relief and was brought on a different basis—either of which was sufficient to create a distinct claim.[354] Because the changes claim was

337. *Id.*
338. *Id.*
339. *Id.*
340. *Id.*
341. *See id.*
342. *Id.* at 1007.
343. *Id.* at 1004.
344. *Id.* at 1007.
345. *Id.*
346. *Id.*
347. *See id.* at 1005 (citing Sharman Co. v. United States, 2 F.3d 1564, 1571–72 (Fed. Cir. 1993)).
348. *See id.* at 1007.
349. *See id.* at 1008.
350. *Id.* at 1005.
351. *Id.*
352. *Id.* at 1007.
353. *Id.*
354. *Id.*

separate and distinct from the claims then pending before the COFC, the CO's second final decision was valid and could serve as the basis of a claim.[355] The court then turned to, and quickly affirmed, the COFC's finding that it did not have jurisdiction over the extension claim because K-Con failed to provide fair notice in the initial claim to the CO.[356]

The Federal Circuit next turned to the COFC's decision on the merits.[357] The court first rejected K-Con's challenge to the reasonableness of the liquidated damages.[358] Turning to the notice provision, the court reviewed the changes clause in K-Con's contract, which required K-Con to provide notice of any alleged changes and expressly precluded any equitable adjustment for costs incurred more than twenty days prior to the submission of written notice.[359] The court found that K-Con not only failed to object during the contract's performance, but also waited over two years before raising the issues of constructive changes.[360] While the Federal Circuit recognized that some "extenuating circumstances" might militate against strictly applying the notice provision, it found none present here and affirmed the COFC's decision denying the claims.[361]

B. *Raytheon Co. v. United States*

In *Raytheon Co. v. United States*,[362] the Federal Circuit reinforced the difficult burden an original awardee faces in challenging an agency's corrective action resulting from a GAO protest, even where the corrective action is based on outcome prediction rather than a final GAO decision.[363] The court held that by changing its position during discussions on what costs were allowable as independent research and development (IR&D) costs and communicating that change in position to only one offeror, the Air Force held unequal discussions.[364] The court then concluded that because discussions favored one offeror over another, the Air Force's actions violated the FAR, and, thus, its decision to reopen discussions was reasonable.[365]

After an earlier down-select in a multiphased procurement, the Air Force issued a solicitation for the engineering and manufacturing development phase of a new radar system to three companies: Raytheon Company, Northrop Grumman Systems Corporation, and Lockheed Martin.[366] As part of its evaluation criteria, the Air Force announced that it would evaluate the

355. *Id.*
356. *Id.* at 1007–08.
357. *Id.* at 1008.
358. *Id.* at 1008–09.
359. *Id.* at 1009.
360. *Id.*
361. *Id.* at 1010.
362. 809 F.3d 590 (Fed. Cir. 2015).
363. *See id.* at 596.
364. *Id.*
365. *Id.*
366. *Id.* at 592.

realism of each offeror's proposed cost reductions.[367] During discussions, the Air Force sent evaluation notices to both Northrop and Raytheon related to how the offerors could allocate IR&D costs.[368] IR&D costs are costs associated with research done by the contractor, but not for a particular contract.[369] By categorizing costs as IR&D costs, a contractor can spread those costs out among other contracts, thereby decreasing the costs that any single contract would have to otherwise bear.[370]

Here, the Air Force notified Raytheon and Northrop that under FAR 31.205-18, the offerors could not reduce their costs by allocating certain costs as IR&D costs if those costs were either implicitly or explicitly required for contract performance.[371] Raytheon objected, arguing that *ATK Thiokol, Inc. v. United States* held that research and development costs could be used as IR&D costs unless they were explicitly required by the contract.[372] In response to Raytheon's objection, the Air Force changed its view and instructed Raytheon that it could categorize costs as IR&D costs, unless those costs were explicitly required by the contract.[373] The Air Force did not communicate this new guidance to Northrop (which did not object to the original guidance) or to Lockheed (with which it did not discuss IR&D).[374] In their final proposals, Raytheon reduced its costs by allocating some costs as IR&D; Northrop did not.[375]

The Air Force rated all three offerors equally on the technical subfactors and found their proposed costs to be realistic.[376] Because Raytheon proposed the lowest total price, the Air Force found that it provided the best value and therefore awarded Raytheon the contract.[377] Northrop filed a protest at GAO asserting, among other things, that the Air Force engaged in disparate treatment as a result of its communications about IR&D costs.[378] After conducting a hearing, the GAO attorney assigned to the protests held an outcome prediction conference.[379] In the conference, the GAO attorney stated that it was highly likely GAO would sustain the protest based on the unequal IR&D discussions.[380] In response, the Air Force announced that it would take corrective action by reopening discussions with all offerors to clarify its allowability of IR&D costs.[381]

367. *Id.*
368. *Id.* at 593.
369. *Id.* (citing FAR 31.205-18, 9904.420-30).
370. *Id.*
371. *Id.*
372. *Id.* at 593–94 (citing ATK Thiokol, Inc. v. United States, 598 F.3d 1329, 1334–35 (Fed. Cir. 2010)).
373. *Id.* at 594.
374. *Id.*
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.* at 594–95.

Raytheon then filed a protest in the COFC to challenge the Air Force's decision to take corrective action.[382] Raytheon argued that the Air Force's decision lacked a rational basis and that Northrop failed to show that the Air Force's conduct prejudiced Northrop.[383] The COFC found the Air Force's decision to take corrective action to be reasonable because it had engaged in unequal discussions.[384] The court further found that the GAO attorney, by reaching the merits of the protest, had implicitly concluded that Northrop had a substantial chance at receiving the award, a conclusion the COFC found to be rational given the equal technical ratings and relative price differential.[385]

Raytheon appealed.[386] The Federal Circuit explained that it would uphold the Air Force's decision to reopen discussions if the grounds laid out by the GAO attorney in the outcome prediction conference (even though not a written GAO decision) were rational.[387] The court found that the decision was rational because the Air Force had violated a regulation through its disparate communication about the treatment of IR&D costs and that this violation provided a rational basis for reopening the competition.[388]

The court also agreed with the COFC's determination on the prejudice issue.[389] In upholding the GAO attorney's implicit finding of prejudice, the COFC presumed that the GAO attorney was relying on the same legal standards that GAO would have applied in deciding the protest—namely, the "substantial chance" standard.[390] Given the price differential, it was reasonable for the GAO attorney to conclude that Northrop had a substantial chance at the award.[391] Because this was a question of fact, the COFC appropriately gave deference to the GAO attorney.[392]

The court went on to reject three additional arguments made by Raytheon.[393] First, Raytheon argued that Northrop waived its ability to challenge the Air Force's IR&D guidance by not challenging that guidance in a pre-award protest as a solicitation defect.[394] The court rejected this argument, finding instead that the Air Force's violation here was providing disparate information to two offerors.[395] Second, Raytheon argued that Northrop was not prejudiced because the Air Force's guidance could not have affected the offerors' proposals because that guidance was clearly inconsistent

382. *Id.* at 595.
383. *Id.*
384. *Id.*
385. *Id.*
386. *Id.*
387. *Id.* at 595–96.
388. *Id.* at 596.
389. *Id.*
390. *Id.* at 597 (citing Lockheed Martin Integrated Sys., Inc., B-408134.3 et al., 2013 CPD ¶ 169, at 8 (Comp. Gen. July 3, 2013)).
391. *Id.*
392. *Id.*
393. *See id.* at 597–99.
394. *Id.*
395. *Id.* at 597–98.

with existing law.[396] The court found that Raytheon failed to carry its burden of proof with respect to this argument, especially in light of the "facially evident regulatory violation based on disparate information."[397] Third, Raytheon argued that Northrop was not prejudiced because Northrop would not have been able to take advantage of the revised IR&D guidance to lower its price.[398] The court rejected this argument as "a record-specific question," which the GAO and COFC had reasonably analyzed under the substantial-chance test.[399]

V. CONCLUSION

The government contracts cases coming out of the Federal Circuit this year generally featured similar issues with different results. What the court gave to a contractor in one case, it took away in another by ruling in favor of the government. At the end of the day, because the Federal Circuit's decisions were highly fact-specific, it remains as important as ever to ensure proper procedures when litigating against the government.

396. *Id.* at 598.
397. *Id.*
398. *Id.*
399. *Id.* at 598–99.