FEDERAL CIRCUIT YEAR-IN-REVIEW 2016—KNOWLEDGE BEFORE WISDOM

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I. INTRODUCTION

"*Knowledge speaks, but wisdom listens.*"[1]

In 2016, as in past years, the U.S. Court of Appeals for the Federal Circuit heard a number of government contract cases involving a diverse set of legal issues. This year, the court considered everything from jurisdictional issues, to proof of economic harm, to the meaning of contract terms and clauses, to the applicability of government contract principles to non-traditional contract vehicles, and much more in between. Each case teaches us something—newfound knowledge we can mull over and try to interpret. Greater, long-lasting wisdom as to the overall meaning and import of these cases, however, remains just out of reach; we are left waiting, listening, for wisdom.

To be sure, several patterns emerge in the Federal Circuit's jurisprudence from this year. For example, a review of 2016 decisions shows that, more often than not, in cases involving contract claims and disputes, the Federal Circuit affirmed the decisions of the boards of contract appeals and the Court of Federal Claims (CoFC). As shown in the more detailed discussion of the cases provided herein, however, merely identifying and articulating this pattern is of little practical value. The real kernels of knowledge come from the decisions themselves.

We can observe, for example, that the Federal Circuit affirmed three decisions by the Armed Services Board of Contract Appeals (ASBCA or the Board), while reversing only one. In *DG21, LLC v. Mabus*,[2] for example, the Federal Circuit agreed with the ASBCA's determination that, where a firm fixed-price contract stipulated that a pricing element was subject to prevailing market rates, the contractor bore the risk of rate fluctuations and was therefore not entitled to an equitable adjustment. In *SUFI Network Services v. United States*,[3] the Federal Circuit affirmed the ASBCA's decision in a Wunderlich Act[4] case, dismissing a government appeal of a $113 million judgment even though the underlying ASBCA decision had been altered by litigation in the federal courts. Finally, in *Laguna Construction Company v. Carter*,[5] the Federal Circuit affirmed the ASBCA's decision granting the government's motion for summary judgment on the ground that Laguna committed a prior material breach of the contract.

We can also note that the Federal Circuit affirmed five separate CoFC decisions on contract claims and disputes. In the first of two more

1. This phrase has been widely attributed to Jimi Hendrix, but may actually be derived from Oliver Wendell Holmes' assertion that "[i]t is the province of knowledge to speak and it is the privilege of wisdom to listen." *See* OLIVER WENDELL HOLMES, SR., THE POET AT THE BREAKFAST TABLE 231 (1906).

2. 819 F.3d 1358 (Fed. Cir. 2016).

3. 817 F.3d 773 (Fed. Cir. 2016).

4. Act of May 11, 1954, Pub. L. No. 83-356, 68 Stat. 81 (codified at 41 U.S.C. §§ 321–322 (2012)) (repealed 2011).

5. 828 F.3d 1364 (Fed. Cir. 2016).

traditional government contract cases, *Northrop Grumman Computing Services, Inc.*,[6] the Federal Circuit agreed with the CoFC's determination that Northrop failed to show harm resulting from its claim that the government breached its contract. Similarly, in *Zafer Taahhut Insaat ve Ticaret A.S. v. United States*,[7] the Federal Circuit affirmed the CoFC's decision that the contractor had not and could not establish that the government constructively changed the contract.

The Federal Circuit agreed with the CoFC's analysis of more unique contract administration issues, too. Indeed, in *Pacific Gas & Electric Co. v. United States*,[8] the Federal Circuit considered the bounds of contract privity in affirming the CoFC's decision that the State of California and several California power companies lacked standing to sue the federal government for breach of contract. In *Liberty Ammunition, Inc. v. United States*,[9] primarily a patent infringement case, the Federal Circuit concurred that, contrary to the plaintiff's argument, a government official did not breach a non-disclosure agreement. Finally, in *Frankel v. United States*,[10] the Federal Circuit affirmed the CoFC's determination that the limitation of liability provision in a "prize competition" contest precluded the plaintiff's breach of contract action.

But where do these observations get us? We cannot say that grouping these cases together somehow provides some overarching wisdom regarding how the Federal Circuit will decide the next contract claim that comes before the court; there are too many variables—too many unknowns—to make any sweeping prediction based on the outcome of claims decisions this year.

Indeed, not every case involving a claim was affirmed. In *Guardian Angels Medical Service Dogs, Inc. v. United States*,[11] the Federal Circuit rejected the CoFC's determination that Guardian's challenge to the government's termination for default was time-barred. According to the Circuit, the CoFC applied the wrong standard for determining whether the Contracting Officer's (CO) decision should be treated as final. The Federal Circuit similarly disagreed with the ASBCA's decision on statute of limitation grounds in *Kellogg Brown & Root Services, Inc. v. Murphy*.[12] There, the Federal Circuit reversed and remanded the case to the ASBCA, holding that the Army could not preclude the claim on statute of limitations grounds when it would not allow KBR to seek reimbursement until resolving the underlying subcontractor dispute.

The so-called pattern similarly does not hold in *Hymas v. United States*,[13] *System Fuels, Inc. v. United States*,[14] or *Rocky Mountain Helium, LLC v. United*

6. 823 F.3d 1364 (Fed. Cir. 2016).
7. 833 F.3d 1356 (Fed. Cir. 2016).
8. 838 F.3d 1341 (Fed. Cir. 2016).
9. 835 F.3d 1388 (Fed. Cir. 2016).
10. 842 F.3d 1246 (Fed. Cir. 2016).
11. 809 F.3d 1244 (Fed. Cir. 2016).
12. 823 F.3d 622 (Fed. Cir. 2016).
13. 810 F.3d 1312 (Fed. Cir. 2016).
14. 818 F.3d 1302 (Fed. Cir. 2016).

States.[15] In *Hymas*, the Federal Circuit reversed the CoFC's decision that it had jurisdiction over a protest action concerning non-procurement instruments—namely, agreements characterized as "cooperative agreements." In *System Fuels, Inc.*, a spent nuclear fuel case, the Federal Circuit reversed the CoFC's decision, holding that the plaintiffs were entitled to the damages for loading the material into the storage canisters and casks. Ultimately, *Rocky Mountain* presents what may be the best example of the futility of seeking clarity in the apparent pattern. In that decision, the Federal Circuit agreed with the CoFC on one holding, disagreed on the next, and ultimately remanded the case to the CoFC for additional proceedings.

Not to mention that the court also decided non-breach of contract claims. In *Per Aarsleff A/S v. United States*,[16] a bid protest action, the Federal Circuit parted ways with the CoFC, holding that the contracting agency did not violate the terms of the solicitation notwithstanding an ambiguity in one of the solicitation provisions. The Federal Circuit disagreed with another of the CoFC's protest decisions in *Coast Professional, Inc. v. United States*.[17] There, the Federal Circuit disagreed with the lower court's determination that it lacked jurisdiction to consider a protest of a General Services Administration (GSA) Federal Supply Schedule (FSS) award-term extension, distinguishing between the government's exercise of an option and the government's issuance of a task order.

This is not to say that no wisdom can be gained from this year's cases. Quite the contrary. Through these opinions, we gain ample knowledge about the Federal Circuit's approach to more traditional government contracts issues such as risk allocation, constructive change, statutory bars to lawsuit, and prejudice. We also gain reference points where there are few uniquely postured cases and cases challenging non-traditional, e.g., government contracts and competitions. The sheer number and variety of decisions the Federal Circuit made on claims this year adds considerable depth to the court's ever-growing precedent, which will help future litigants navigate the next disputes that come before the Circuit.

II. 2016 BY THE NUMBERS

Government contracts appeals continued to represent about four percent of the Federal Circuit's caseload in fiscal year (FY) 2016.[18] This figure has remained fairly constant (within the four-to-six percent range) since 2006.[19]

15. 841 F.3d 1320 (Fed. Cir. 2016).
16. 829 F.3d 1303 (Fed. Cir. 2016).
17. 828 F.3d 1349 (Fed. Cir. 2016).
18. *See United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category, FY 2016*, FED. CIR., http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/FY16_Caseload_by_Category.pdf [https://perma.cc/3296-5H65].
19. *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 [https://perma.cc/A6ER-X5NN] (indicating four percent); *United States Court*

The Federal Circuit's precedential decisions in government contracts appeals represented 6.7 percent of all Federal Circuit precedential decisions, a slight drop from last year, when government contract appeals represented 7.3 percent of precedential decisions.[20]

A review of the number of precedential opinions that each Federal Circuit judge participated in this year continues to demonstrate that most Federal Circuit judges hear only a small number of cases in any fiscal year[21]:

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 [https://perma.cc/D7Q3-NJUD] (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 [https://perma.cc/6P4L-54G7] (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 [https://perma.cc/3BD5-7KJX] (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 [https://perma.cc/8LXJ-FTVC] (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 [https://perma.cc/W5FG-NGLC] (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 [https://perma.cc/3L5S-BWX8] (indicating five percent); *United States Court of Appeals for the Federal Circuit*, *Appeals Filed, by Category*, *FY 2008*, FED. CIR., http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/ChartFilings08.pdf [https://perma.cc/9ER4-GA27] (indicating five percent); *United States Court of Appeals for the Federal Circuit*, *Appeals Filed, by Category*, *FY 2007*, FED. CIR., http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/ChartFilings07.pdf [https://perma.cc/DLL9-QKZK] (indicating five percent); *United States Court of Appeals for the Federal Circuit*, *Appeals Filed, by Category*, *FY 2006*, FED. CIR., http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/ChartFilings06.pdf [https://perma.cc/37WP-E44Q] (indicating five percent).

20. These numbers are based on our own calculations and review. In 2016, we identified sixteen government contracts related precedential opinions issued by the Federal Circuit. In 2015, we identified seventeen government contracts-related precedential opinions out of 232 total precedential opinion issued by the Federal Circuit. Brian G. Walsh et al., *Federal Circuit Year-in-Review 2015: The Federal Circuit Giveth, and the Federal Circuit Taketh*, 45 PUB. CONT. L.J. 553, 557 n.33 (2016) [hereinafter *2015 Year-in-Review*]. In 2014, we identified eighteen government contracts-related precedential opinions out of 278 total precedential opinions in the Federal Circuit. Daniel P. Graham et al., *Federal Circuit Year-in-Review 2014: Where the Rubber Meets the Road*, 44 PUB. CONT. L.J 4, 595, 600 n.40 (2015) [hereinafter *2014 Year-in-Review*]. In 2012, we identified twenty-four government contracts precedential opinions out of 257 total precedential opinions. 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 *2012 Year-in-Review*]. We included all precedential opinions involving government contracts related appeals from the Court of Federal Claims and the boards of contract appeals under the Contract Disputes Act, 41 U.S.C. § 7107(a). We identified the total precedential opinions in Westlaw by searching all Federal Circuit decisions issued between January 1, 2016, and December 31, 2016. We then filtered all the decisions identified as "Reported."

21. We performed a similar analysis in our review of the 2015, 2014, 2012, and 2011 decisions. *2015 Year-in-Review*, at 558 tb1.1 (2016); *2014 Year-in-Review*, at 601 tbl.1 (2015); *2012 Year-In-Review*, at 701 tbl.1 (2013); 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 tbl.1 (2012). As we did for previous years, we excluded nonprecedential opinions from our analysis based on Federal Circuit Rule 32.1(b), which provides that "[a]n opinion or order which is

Judge	Participated	Drafted Majority	Participated Without Writing	Concurring	Dissenting	Total Opinions
Active Judges						
Chen	2	0	2	0	0	0
Dyk	4	2	2	0	0	2
Hughes	4	1	3	0	0	1
Lourie	3	1	2	0	0	1
Moore	2	2	0	0	0	2
Newman	5	1	2	0	2	3
O'Malley	1	0	1	0	0	0
Prost	7	2	5	0	0	2
Reyna	4	1	2	1	0	2
Stoll	3	1	1	0	1	2
Taranto	3	2	1	0	0	2
Wallach	6	2	4	0	0	2
Senior Judges & Judges Sitting By Designation						
Bryson	0	0	0	0	0	0
Clevenger	0	0	0	0	0	0
Linn	0	0	0	0	0	0
Mayer	2	1	1	0	0	1
Plager	0	0	0	0	0	0
Schall	1	0	1	0	0	0

As in the last few years,[22] in 2016, each judge participated in fewer than ten precedential government contracts related appeals.[23] The active judges participated in an average of 3.7 government contracts related appeals.[24]

Reversing a trend from the last two years,[25] the government contracts-related workload was spread more evenly among the active judges, with most judges authoring one or two majority opinions each.[26] Only two of the twelve active judges did not author a majority opinion this year.[27] At the same time, no active judge authored more than two majority opinions.[28]

designated as nonprecedential is one determined by the panel issuing it as not adding significantly to the body of law." FED. CIR. R. 32.1(b).

22. *See, e.g.*, *2015 Year-in-Review*, *supra* note 20, at 558 tbl.1; *2014 Year-in-Review*, *supra* note 20, at 601 tbl.1.

23. *See supra* tbl. 1.

24. *See supra* tbl. 1.

25. *See 2015 Year-in-Review*, *supra* note 20, at 558 tbl.1; *2014 Year-in-Review*, *supra* note 20, at 601 tbl.1.

26. *See supra* tbl. 1.

27. *See supra* tbl. 1.

28. *See supra* tbl. 1.

III. THE FEDERAL CIRCUIT'S 2016 KEY GOVERNMENT CONTRACTS CASES—KNOWLEDGE BEFORE WISDOM

A. *Knowledge Is Power*[29]*: Affirmed Claims and Disputes Cases*

1. *DG21, LLC v. Mabus*

In *DG21, LLC v. Mabus*, the Federal Circuit evaluated whether a contractor was entitled to an equitable adjustment for a firm fixed-price contract stipulating that a pricing element was subject to prevailing market rates.[30] The court affirmed the ASBCA's decision below and held that when the plain language of the contract states that prices are subject to market rates, the contractor assumes the risk of unexpected costs.[31]

In September 2005, the U.S. Department of the Navy issued a solicitation anticipating award of a firm price-fixed contract for the provision of base operating support services at Diego Garcia, a small atoll in the Indian Ocean.[32] The contractor would be required to implement a fuel conservation initiative, with the goal of reducing fuel use by ten percent per year of the contract.[33] The solicitation specified two categories of fuel for the contractor to utilize: "government-furnished fuel," which the Navy would provide and the contractor could use without payment, and "contractor-furnished fuel," which the Navy would also provide and for which the contractor would reimburse the Navy "at the prevailing [Department of Defense (DoD)] rate at the time of purchase."[34] The solicitation included historical fuel prices for the contractors to consider in crafting their proposals, as well as references to several provisions of the Federal Acquisition Regulation (FAR), including FAR 52.243-4, which states that changes to the general scope of a contract entitles the contractor to an equitable adjustment.[35]

DG21, LLC submitted a proposal stating that if fuel rates varied from historical rates by ten percent or more, it would seek an equitable adjustment.[36] The Navy clarified that the solicitation was firm fixed-price, and, consequently, "DG21 assume[d] the full risk of consumption and/or rate changes."[37] The Navy also clarified that the solicitation's historical fuel consumption rates were provided for informational purposes only and questioned DG21's decision not to include an escalation clause.[38] DG21 replied that it believed fuel costs would decrease overall and therefore did not see a reason to alter its

29. The phrase "knowledge is power" is usually attributed to Sir Francis Bacon. His exact words, found in *Meditationes Sacrae*, were "ipsa scientia potestas est": "knowledge itself is power." *See* JOHN BARTLETT, FAMILIAR QUOTATIONS (10th ed. 1919), http://www.bartleby.com/100/139.39.html.

30. 819 F.3d 1358, 1361–62 (Fed. Cir. 2016).

31. *Id.* at 1362.

32. *Id.* at 1359.

33. *Id.*

34. *Id.*

35. *Id.* at 1359–60.

36. *Id.* at 1360.

37. *Id.*

38. *Id.*

pricing proposal.[39] In a subsequent version of its proposal, however, DG21 removed the equitable adjustment provision.[40] The Navy accepted DG21's final proposal and awarded it the contract.[41]

During DG21's contract performance, fuel prices (and the prevailing DoD rate) rose substantially to more than double the historical rates included in the solicitation.[42] DG21 sought to cap the price for fuel at a ten-percent change from the historical rates, despite having removed the language from its final proposal.[43] The Navy rejected the request, and DG21 reimbursed the Navy for all consumed "contractor-provided" fuel."[44]

In July 2011, DG21 requested an equitable adjustment to account for escalating fuel costs under the contract.[45] DG21 reasoned that because the government determined the prevailing DoD rate and invoiced DG2 for fuel, the change in fuel price was a "change" to the contract pursuant to FAR 52.243-4.[46] The CO denied the request, and DG21 appealed the CO's decision to the ASBCA.[47] The Board denied DG21's appeal, reasoning that fluctuations in the prevailing DoD rate of fuel would not constitute a change even if FAR 52.243-4 applied, because the contract language anticipated fluctuations in the market.[48] The Board also found that DG21's interpretation would undermine the purpose of the contract—to conserve fuel—and eliminate DG21's incentive to establish a fuel conservation program.[49] Finally, the Board "rejected DG21's argument that the Navy constructively changed the contract by charging more than the fuel price listed in the solicitation because the plain language of the contract contemplated market fluctuations in fuel price."[50] DG21 appealed to the Federal Circuit.

In reviewing the Board's decision de novo, the Federal Circuit affirmed the CO's denial of an equitable adjustment under the contract.[51] DG21's principal argument on appeal was that the Board erred in determining that FAR 52.243-4 "did not allocate the risk of market fluctuations in fuel prices to the Navy."[52] The court disagreed, holding that because the contract stated that the Navy would charge DG21 the prevailing DoD rate, and the Navy in fact only charged that rate, there was no change that triggered FAR 52.243-4.[53] The court also noted the general rule that "[t]he essence of

39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 1361.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 1361, 1362.
52. *Id.* at 1361.
53. *Id.* at 1361–62.

a firm fixed-price contract is that the contractor, not the government, assumes the risk of unexpected costs."[54] The court reasoned that both the Navy's earlier response to DG21 stating that the company was "assum[ing] the full risk of consumption and/or rate changes" and DG21's admission that fuel prices fluctuate yearly sufficiently established that DG21 knew the risk associated with not bargaining for better price protections.[55] Consequently, the court was unwilling to "rewrite the clauses to provide [DG21] protections the government did not agree to" and affirmed the Board's decision.[56]

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

In *SUFI Network Services v. United States*, the Federal Circuit reaffirmed the long-standing principle that for contracts that adopt the standards of review of the Wunderlich Act,[57] the United States cannot appeal an adverse board of contract appeals' decision where there is no claim of fraud or bad faith on the part of the board.[58] In *SUFI*, the Federal Circuit affirmed the ASBCA's decision dismissing the U.S. Department of the Air Force's appeal of a $113 million judgment, holding that under the Wunderlich Act, the government could not appeal the Board's decision even though litigation had altered the decision in the federal courts.[59]

Under a contract with the Air Force, SUFI Network Services, Inc. "invested money to build and to operate telephone systems at certain Air Force bases."[60] In return for its investment, SUFI would share part of the revenue from per-call charges.[61] SUFI submitted multiple claims alleging that the Air Force breached the contract.[62] In response to SUFI's appeal of the deemed denial of its claims, the ASBCA awarded SUFI roughly $2.8 million on one group of claims and approximately $4.6 million on another.[63] SUFI appealed the Board's damages determination to the CoFC under the Wunderlich Act.[64] The CoFC found SUFI was entitled to additional damages, and the United States appealed.[65] In 2014, the Federal Circuit held that the CoFC had not properly applied the standard of review and

54. *Id.* at 1362 (quoting Lakeshore Eng'g Servs., Inc. v. United States, 748 F.3d 1341, 1347 (Fed. Cir. 2014)).
55. *Id.*
56. *Id.* (quoting *Lakeshore Eng'g*, 748 F.3d at 1348).
57. Act of May 11, 1954, Pub. L. No. 83-356, 68 Stat. 81 (codified at 41 U.S.C. §§ 321–322 (2012)) (repealed 2011).
58. 817 F.3d 773, 775, 777 (Fed. Cir. 2016).
59. *Id.* at 775–76.
60. *Id.* at 775.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*

remanded to the ASBCA.[66] The new Board decision was more favorable to SUFI than the earlier Board decision, awarding SUFI roughly $113 million.[67]

The United States filed a request for review of the new award at the CoFC.[68] The court denied the request, explaining that under the Wunderlich Act, only the contractor can appeal a Board decision.[69] According to the CoFC, under the Act, the standards of which were incorporated into SUFI's contract, in the absence of fraud or bad faith, the boards are the authorized representatives of the United States for disputes.[70] Thus, for the purposes of the case, the "United States" is the ASBCA: "The Air Force designated the ASBCA as its authorized representative for disputes arising under the contract. For purposes of this case, the 'United States' is the ASBCA, not the Department of Justice."[71] According to the CoFC, "[t]he sole responsibility of the Department of Justice [was] to implement the Board's decision."[72] In other words, even if the Department of Justice was dissatisfied with the Board's decision, the government could not reject the decision and had no right to challenge its merits.[73]

The United States appealed to the Federal Circuit.[74] The Federal Circuit affirmed, finding the government did not provide any reason for the court to upend CoFC's decision.[75] The court noted that under existing precedent, the United States could not have sought review of the Board decision if it had been an initial decision; the fact that this was a decision on remand did not affect the fact that the Board's decision was the position of the United States.[76]

The government argued it should be able to appeal because the Wunderlich Act has since been repealed.[77] The court recognized that the repeal of the Wunderlich Act would mean this decision has little future impact, but its repeal did not provide a basis for rejecting application of precedents under the Act.[78]

Finally, the government argued it should be allowed to challenge the Board decision so the CoFC and the Federal Circuit could ensure that the Board complied with the Federal Circuit's original order remanding the case.[79] The Federal Circuit rejected that argument, saying the precedent

66. *Id.* at 776.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 777 (citing Fischbach & Moore Int'l Corp. v. United States, 617 F.2d 223, 226 (Ct. Cl. 1980)).
71. SUFI Network Servs., Inc. v. United States, 122 Fed. Cl. 257, 262 (2015), *aff'd*, 817 F.3d 773 (Fed. Cir. 2016); *see also SUFI*, 817 F.3d at 777.
72. *SUFI*, 817 F.3d at 777.
73. *Id.*
74. *Id.*
75. *Id.* at 778.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

cited by the government stood for only basic, inapplicable principles related to "mandate compliance."[80] Further, the Federal Circuit noted, the government's argument was contrary to the "mandate compliance" exception to the Wunderlich Act, which recognizes that all the rights and duties at issue are within the power of the parties to determine by agreement.[81] Here, the government, through the Board, took a position on the contract, and SUFI accepted that position.[82]

The Federal Circuit went on to explain that even if a "mandate compliance" exception existed here, there was no violation of the mandate articulated in the prior Federal Circuit decision.[83] Nothing in the court's previous mandate altered the rule that the United States is bound by its own Board's determinations.[84] Further, any such mandate did not give the United States any rights the Board did not already recognize.[85] Lastly, the Federal Circuit ordered the Board to consider whether an adverse inference should be drawn against the government; the Board did so, showing there was no violation of the mandate.[86] The Federal Circuit concluded by stating that the United States' mandate-violation contention simply takes issue with the Board's failure to discuss each evidentiary argument.[87] But because there was no requirement in the Federal Circuit's 2014 mandate, there was no violation.[88]

3. *Laguna Construction Co., Inc. v. Carter*

In *Laguna Construction Company v. Carter*, the Federal Circuit affirmed the ASBCA's decision granting the government's motion for summary judgment on the ground that Laguna Construction Company, Inc. committed a prior material breach of the contract, which excused the government's nonpayment of Laguna's vouchers totaling $2.87 million.[89] Consistent with the Board's decision, the Federal Circuit found Laguna breached the Allowable Cost and Payment Clause in the contract because its vouchers were inflated improperly to include the payment of kickbacks from subcontractors.[90]

Laguna, a contractor that performed cost-reimbursable task orders in Iraq, submitted a claim after the government failed to pay over $2.87 million in subcontractor costs.[91] After receiving no decision from the CO, Laguna appealed to the ASBCA.[92] In responding to Laguna's appeal, the government raised the affirmative defense of fraud, arguing it was not liable for

80. *Id.* at 778–79.
81. *Id.* at 779.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 780.
87. *Id.* at 781.
88. *Id.* at 781–82.
89. 828 F.3d 1364, 1366, 1372 (Fed. Cir. 2016).
90. *Id.* at 1366, 1371.
91. *Id.* at 1366, 1372.
92. *Id.*at 1366.

Laguna's claim because Laguna had committed the first material breach by engaging in a kickback scheme with its subcontractors.[93]

During performance of the contract, Laguna's officers and employees received kickbacks for awarding subcontracts,[94] which the government began investigating in January 2008.[95] In October 2010, Laguna's project manager pleaded guilty to conspiracy to pay or receive kickbacks: he admitted to working with subcontractors to submit inflated invoices to the government from April 2005 to March 2008.[96] In February 2012, a federal grand jury issued a criminal indictment against three principal officers, alleging they received kickbacks for awarding subcontracts.[97] In July 2013, the executive vice president and chief operating officer of Laguna pleaded guilty to conspiring to defraud the government by participating in a kickback scheme from December 2004 to February 2009.[98]

The ASBCA granted the government's motion for summary judgment, finding Laguna had "breached the duty of good faith and fair dealing because its employees' criminal acts . . . were imputed to Laguna [and] that Laguna breached the Allowable Cost and Payment clause in the contract because its vouchers were improperly inflated" due to the kickbacks.[99] The Board held that the breach was material, and Laguna's first material breach "provided the government with a legal excuse for not paying [Laguna's] invoices."[100] Laguna appealed the decision to the Federal Circuit, arguing that "the Board did not have jurisdiction over the government's affirmative defense of fraud, and in the alternative, that the Board erred in granting the government's summary judgment motion."[101]

The Federal Circuit affirmed the Board's opinion.[102] The court first held the ASBCA had jurisdiction over the government's affirmative defense because, even though the Board did not have jurisdiction over the underlying fraud actions, the ASBCA could exercise jurisdiction over an affirmative defense involving fraud as long as it did not need to make factual determinations about the fraud.[103] Because the ASBCA's decision relied on the criminal conviction of one of Laguna's officers, the Board was permitted to exercise jurisdiction over the defense.[104]

The court then affirmed the Board's decision to grant summary judgment for the government.[105] The court explained that a contractor's prior breach of

93. *Id.* at 1367.
94. *Id.*
95. *Id.* at 1366.
96. *Id.* at 1366–67.
97. *Id.* at 1367.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 1367–68.
102. *Id.* at 1373.
103. *Id.* at 1368–69.
104. *Id.* at 1369.
105. *Id.* at 1372–73.

a contract "can bar a contractor's breach claim against the government."[106] The court disagreed with Laguna's argument that the Contract Disputes Act (CDA) displaces the common law prior material breach rule, finding that the CDA did not foreclose the applicability of established precedent.[107] The court also noted that it had previously "permitted the government to rely on a fraud-based affirmative defense in a contract governed by the CDA."[108] The court also found that although "the government could have chosen to terminate the contract for default or sought remedies under the Anti-Kickback Act, [] it was not required to do so."[109]

The court held that Laguna committed the first material breach by violating the Allowable Cost and Payment Clause.[110] The court agreed with the Board's determination that the employees' participation in the kickback scheme "constituted material breach that may be imputed to Laguna, since both employees were operating under the contract and within the scope of their employment when they manipulated the contracting process."[111] The court disagreed with Laguna's argument that the breach was not material because the government may audit and reconcile costs, finding that "government contracts tainted by kickbacks are hurtful because the government would be 'saddled with' an unreliable subcontractor, which 'undermines the security of the prime contractor's performance.' "[112]

The court went on to reject Laguna's final argument that the government waived its prior material breach defense.[113] According to Laguna, because the government knew of the kickback scheme as early as January 2008—when the government first began investing the kickbacks—but continued to perform the contract until 2015, the government had waived its defense.[114] The Federal Circuit found the argument unpersuasive "[i]n light of the facts of [the] case."[115] The court concluded that "the government did not have a 'known right' that would have invoked the prior material breach rule" until after the guilty plea was entered in July 2013.[116] Further, the court rejected the idea that the government continued to perform until 2015 and that Laguna relied on such continued performance to its detriment.[117] Laguna completed physical work in 2010, and the government's only subsequent acts were conducting audits and making cost reimbursements.[118] Thus, because the government had

106. *Id.* at 1369.
107. *Id.* at 1369–70.
108. *Id.* at 1370 (citing J.E.T.S., Inc. v. United States, 838 F.2d 1196, 1201 (Fed. Cir. 1988)).
109. *Id.* at 1371.
110. *Id.* at 1372.
111. *Id.* (internal quotation marks omitted).
112. *Id.* (quoting United States v. Acme Process Equip. Co., 385 U.S. 138, 144–45 (1966)).
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*

not intentionally relinquished or abandoned a known right, the government had not waived its right to invoke the prior material breach rule.[119]

4. *Northrop Grumman Computing Systems, Inc. v. United States*

In this case, Northrop Grumman Computing Systems, Inc. appealed the CoFC's decision granting the government's motion for summary judgment.[120] The CoFC had granted the motion on the ground that "Northrop failed to show any harm resulting from its claim that the [g]overnment had breached the contract."[121] The Federal Circuit affirmed the judgment, finding Northrop's actual financial position was equal to what it expected to be had the government fully performed the contract.[122]

In July 2001, the U.S. Immigration and Customs Enforcement (ICE) "awarded Northrop a Delivery Order to supply and support network monitoring software produced by Oakley Networks."[123] The delivery order required Northrop to furnish the software and services through a lease for one year with three option years.[124] Approximately one month after ICE awarded Northrop the delivery order, the parties executed a modification requiring the government to "use its best efforts to secure funding" for the three option years.[125]

Without notifying the government, Northrop entered a private agreement with ESCgov, Inc., an IT services company.[126] Northrop assigned all payments due under the Delivery Order to ESCgov, and ESCgov agreed to pay Northrop and Oakley an agreed upon sum.[127] "The agreement also absolved Northrop from any liability to ESCgov for 'failure of the [g]overnment to exercise a renewal option' so long as Northrop 'use[d] its best efforts to obtain the maximum recovery from the [g]overnment.'"[128] ESCgov then "assigned its rights under the Northrop-ESCgov agreement to Citizens Leasing Corp . . . , a financial institution."[129] None of the above-listed parties notified the government of the assignments.[130]

The government paid Northrop a $900,000 fee for the base year, but did not use the software in any of its investigations.[131] ICE notified Northrop it would not "exercise the lease's first option year because it did not secure funding" and did not subsequently exercise any of the other option years.[132]

119. *Id.*
120. 823 F.3d 1364, 1366 (Fed. Cir. 2016).
121. *Id.*
122. *Id.* at 1368–69.
123. *Id.* at 1366.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* (quoting Northrop Grumman Computing Sys., Inc. v. United States, 120 Fed. Cl. 460, 462 (2015)).
129. *Id.*
130. *Id.*
131. *Id.* at 1366–67.
132. *Id.* at 1367.

Northrop challenged the government's decision to not exercise the first option year in a claim to the CO, arguing that the government failed "to use its best effort[s] to secure funding."[133] The CO denied the claim, and Northrop challenged the decision in the CoFC. During the course of litigation, Northrop disclosed to the government the existence of the ESCgov and Citizens agreements for the first time.[134] The CoFC concluded that Northrop was seeking damages based on a "'pass-through' theory" and dismissed the lawsuit on jurisdictional grounds.[135] According to the CoFC, "Northrop failed to provide the CO with 'adequate notice' of its claim."[136] The Federal Circuit reversed, holding Northrop's claim satisfied the statutory requirements for a claim pursuant to the CDA.[137] On remand, the government moved for summary judgment for failure to show damages.[138] The CoFC granted the motion and dismissed the complaint, holding that the government had demonstrated Northrop was not entitled to damages under the delivery order.[139] Northrop again appealed to the Federal Circuit.

On appeal, Northrop argued the CoFC improperly treated the payments Northrop received under the assignment as a substitute for payments that the government agreed to make pursuant to the delivery order.[140] The court rejected that argument, reasoning "the undisputed facts are that Northrop's financial position [was] equal to what it expected to profit had the [g]overnment exercised all the option years."[141] Moreover, Northrop arguably was in a better position than it anticipated when it assigned the payments, and Northrop had not established any particular harm from the government's alleged breach.[142]

The court also rejected Northrop's argument that it was improper for the court to consider the payment from ESCgov to Northrop in determining whether Northrop was harmed because contract damages account for both a party's losses and the losses that a party avoided.[143] Finally, the court rejected Northrop's contention that its ruling was inconsistent with precedent regarding pass-through claims. The court noted that, in the cases cited by Northrop, the contractor had disclosed and received permission to subcontract with another entity;[144] here, by contrast, Northrop "failed to obtain permission from the [g]overnment before assigning the Delivery Order."[145]

133. *Id.*
134. *Id.*
135. *Id.* (quoting Northrop Grumman Computing Sys., Inc. v. United States, 709 F.3d 1107, 1110 (Fed. Cir. 2013)).
136. *Id.* (quoting *Northrop Grumman Computing Sys.*, 709 F.3d at 1110).
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 1367–68.
141. *Id.* at 1368.
142. *Id.*
143. *Id.* at 1369.
144. *Id.*
145. *Id.*

5. *Zafer Taahhut Insaat ve Ticaret A.S. v. United States*

In *Zafer Taahhut Insaat ve Ticaret A.S. v. United States*, the Federal Circuit considered a contractor's claim for costs incurred as a result of a purported constructive change.[146] Zafer Taahhut Insaat ve Ticaret A.S., a Turkish contractor, was the holder of a firm-fixed-price prime contract with the U.S. Army Corps of Engineers (USACE) to construct a support facility at Bagram Air Force Field in Afghanistan.[147] The contract required Zafer to deliver construction materials to the project's site and "assume[] the risk 'for all costs and resulting loss or profit.'"[148] The contract initially was scheduled to be completed in November 2012, but because USACE could not make the site available until several months prior to the delivery date, it issued a bilateral modification setting a new completion date and increasing the contract price.[149] Unrelatedly, in November 2011, the Pakistani government closed its border and an associated "Karachi/Afghan" route in response to a combat incident involving the United States and NATO in which twenty-four Pakistani citizens allegedly were killed.[150] The route was closed until July 2012.[151]

The closure of this shipping route affected Zafer's logistics capabilities.[152] Zafer informed USACE there would be additional delays and requested guidance on how to proceed, including whether it should incur additional costs to re-route delayed shipments.[153] In response, USACE acknowledged the difficulties Zafer was experiencing but stated that Zafer was obligated "to deliver the materials . . . by any means necessary" and without further compensation.[154] USACE further informed Zafer it could apply for a non-compensable time extension.[155] Zafer replied, challenging USACE's position and asserting Zafer was not only entitled to time, but also for increased costs.[156] The parties exchanged several additional rounds of correspondence regarding the issue before Zafer submitted a formal request for an equitable adjustment—and later a claim—seeking the costs incurred due to the route closure.[157] The CO denied Zafer's claim.[158]

Zafer filed suit in the CoFC alleging that USACE constructively changed the terms of the contract by ordering it to perform despite the delays caused by the road closure, and by ineffectively and inefficiently negotiating with

146. 833 F.3d 1356, 1358 (Fed. Cir. 2016).
147. *Id.*
148. *Id.* (citing FAR 16.202-1).
149. *Id.* at 1359.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* (internal quotation marks omitted).
155. *Id.*
156. *Id.*
157. *Id.* at 1359–60.
158. *Id.* at 1360.

the Pakistani government to re-open the closed route.[159] The court granted the government's motion for summary judgment, finding that Zafer had not and could not establish USACE constructively changed the contract.[160]

The Federal Circuit affirmed the lower court's decision.[161] The court noted first that Zafer failed to allege one of the necessary elements for a constructive change claim—namely, that the government denied a request for an extension of time.[162] The court determined that the correspondence between the parties simply reflected a continuing conversation aimed at resolving the issues presented by the road closure.[163] Second, the court held that the delays could not be attributed to the U.S. government merely because the U.S./NATO incident led to the road closure or because the U.S. government failed to secure a more expeditious resolution via negotiations.[164] The Pakistani government ultimately made the decision of when to close the route and when to re-open it.[165]

6. *Pacific Gas & Electric Co. v. United States*

In *Pacific Gas & Electric Co. v. United States*, the Federal Circuit affirmed the CoFC's decision that the State of California and several California power companies lacked standing to sue the federal government for breach of contract.[166] This case concerned the purchase and sale of electricity in the California market and involved three entities: Californian exchanges, two federal energy producers, and Californian consumers (appellants).[167]

California had established two non-profit exchanges in the late 1990s when it restructured and deregulated its energy market.[168] Both exchanges were responsible for acquiring and distributing electricity between producers and consumers in California and for setting electricity prices.[169] The energy producers were two federal government agencies: the Western Area Power Administration and the Bonneville Power Administration.[170] The energy consumers in turn were the Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and the State of California.[171] The consumers sued the United States seeking repayment of funds the producers allegedly overcharged the consumers.[172] The CoFC dismissed the appellants' breach of contract action, holding that the

159. *Id.*
160. *Id.* at 1361.
161. *Id.* at 1366.
162. *Id.* at 1363.
163. *Id.* at 1363–64.
164. *Id.* at 1364.
165. *Id.*
166. 838 F.3d 1341, 1345 (Fed. Cir. 2016).
167. *Id.* at 1346.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 1345.
172. *Id.*

appellants lacked standing because they were not in privity of contract with the federal government.[173]

On appeal, the appellants argued that a contract existed between two groups—one consisting of all electricity consumers and the other consisting of all electricity producers, including the two federal agency producers, in California.[174] Under the appellants' theory, all consumers were in privity of contract with all producers in the California markets, including the government sellers.[175] The appellants argued that their cause of action was supported on alternative agency and third-party beneficiary theories.[176] The government countered that the contracts at issue were only between "middleman" exchanges that facilitated and operated the California electricity markets on the one hand and the consumers and producers individually on the other.[177] Under the government's theory, both the government and the consumers were in privity of contract with the exchanges, but the consumers were not in privity of contract with the government.[178]

The Federal Circuit rejected the appellants' arguments, holding that the consumers were not in direct privity of contract with the government producers, failed to demonstrate an agency relationship, and did not qualify as third-party beneficiaries.[179] The court rejected the appellants' privity of contract argument for several reasons. First, relying on contact provisions and the Uniform Commercial Code (UCC), the court found that because the exchanges essentially acted as middlemen between consumers and producers, a contractual relationship never formed between them.[180] Second, the court examined decisions issued by the Federal Energy Regulatory Commission (FERC) and the Ninth Circuit, holding that contracts between Californian market participants (i.e., consumers and producers) and the exchanges were "middleman contracts" for the purchase and sale of electricity and that no contractual privity existed between market participants.[181] Finally, the court held it was not unfair to deny consumers recovery of overpayments because they could have sought recovery from the exchanges directly.[182] In sum, the court concluded the appellants lacked privity of contract or any other relationship with the government that would confer standing.[183] Accordingly, the court affirmed the CoFC's holding.[184]

173. *Id.*
174. *Id.* at 1346.
175. *Id.*
176. *Id.* at 1351.
177. *Id.* at 1346.
178. *Id.*
179. *Id.* at 1362–63.
180. *Id.* at 1351–54.
181. *Id.* at 1357–58.
182. *Id.* at 1358.
183. *Id.* at 1345.
184. *Id.* at 1363.

In a dissenting opinion, Judge Newman disagreed with the court's holding that the exchanges alone were liable for payment of the overcharges.[185] Judge Newman emphasized that the overcharges were not disputed and the federal power producers made windfall profits as a result of the error.[186] Judge Newman stated further that the court had authority to enforce payment of refunds from the United States to the appellants under both the Constitution and the Tucker Act.[187] Judge Newman concluded that whether under a theory of contract or taking, the CoFC had jurisdiction to provide a remedy for the overpayments.[188] For these reasons, she would have overturned the lower court decision.[189]

7. *Liberty Ammunition, Inc. v. United States*

In this patent infringement case, the Federal Circuit undertook an extensive exercise in claims construction to determine whether the government infringed on Liberty Ammunition Inc.'s patent in violation of 28 U.S.C. § 1498.[190] The Federal Circuit also considered whether the CoFC erred in denying the plaintiff's breach of contract claim alleging that an official from the U.S. Department of the Army violated a non-disclosure agreement (NDA) with Liberty.[191] Ultimately, the Federal Circuit reversed the CoFC, finding no government violation of § 1498.[192] With regard to the contract portion of Liberty's claim, however, the Federal Circuit found no clear error in the trial court's decision denying Liberty's breach of contract claim.[193]

In 2005, Liberty's founder, P.J. Marx, submitted a patent application for a bullet comprised of a steel nose and copper tail connected by a metal interface located between the two ends.[194] The patent was issued in 2010.[195] In the interim, Mr. Marx met with several Army officials to discuss and demonstrate a prototype of the new bullet.[196] One such meeting took place in February 2005 between Mr. Marx and Lieutenant Colonel Glenn Dean, who was the Chief of Small Arms for the U.S. Infantry Directorate of Combat Development.[197] Prior to any discussion of the prototype, Mr. Marx and Lieutenant Colonel Dean executed an NDA, intended to protect the proprietary nature of discussions as well as the prototype itself.[198] At the conclusion of the February 2005 meeting, Mr. Marx provided Lieutenant Colonel

185. *Id.* (Newman, J., dissenting).
186. *Id.* at 1363–64.
187. *Id.* at 1365–67.
188. *Id.* at 1367.
189. *Id.*
190. 835 F.3d 1388, 1391 (Fed. Cir. 2016).
191. *Id.* at 1394.
192. *Id.* at 1391.
193. *Id.*
194. Liberty Ammunition, Inc. v. United States, 119 Fed. Cl. 368, 380 (Fed. Cl. 2014).
195. *Liberty*, 835 F.3d at 1391.
196. *Id.* at 1393.
197. *Id.*
198. *Id.*

Dean with several rounds of his ammunition, some of which the Army later tested.[199]

The Army eventually introduced its successor ammunition, which, according to Liberty, practiced claims of its 2010 ammunition patent without a license to do so.[200] In 2011, Liberty filed suit against the government in the CoFC under 28 U.S.C. § 1498.[201] Liberty also alleged the Army's new ammunition reflected a breach of contract—namely, the NDA executed in 2005 between Mr. Marx and Lieutenant Colonel Dean.[202]

The CoFC held that the Army's ammunition infringed Liberty's patent.[203] Although the court entered a judgment for damages in Liberty's favor, the court dismissed Liberty's breach of contract claims, finding the government was not bound by the NDA signed by Lieutenant Colonel Dean because he lacked authority to bind the government.[204]

On appeal, the government successfully challenged the trial court's construction of two claim terms—"reduced area of contact" and "intermediate opposite ends"—both of which related to Liberty's patented ammunition design.[205] The Federal Circuit found the CoFC's construction of both terms was flawed.[206] First, the lower court's construction of "reduced area by contact" was incorrect because, when the lower court considered the possible patent infringement of the Army's new ammunition, it did not limit its comparison baseline to the Army's predecessor ammunition.[207] Furthermore, Liberty's expert chose not to test the Army's successor ammunition against the predecessor bullet, leaving the plaintiff with "no evidence in its favor."[208] Second, the Federal Circuit found fault with the trial court's construction of "intermediate opposite ends."[209] According to the Federal Circuit, the government's proposed construction of the term, which the lower court had rejected, was, in fact, "fully supported by the plain claim language and specification."[210] Because the Army's ammunition did not meet the proper construction of "immediate opposite ends" or "reduced area of contact," the Federal Circuit held "that the [g]overnment [had] not violated Liberty's patent rights under § 1498."[211]

199. *Id.* at 1394.
200. *Id.*
201. *Id.* This statute waives the government's sovereign immunity and provides a remedy "[w]henever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same." *Id.* at 1394 n.3 (quoting 28 U.S.C. § 1498(a) (2012)).
202. *Id.* at 1394.
203. *Id.* at 1391.
204. *Id.*
205. *Id.* at 1391, 1395, 1399.
206. *Id.* at 1391.
207. *Id.* at 1397.
208. *Id.* at 1397–98.
209. *Id.* at 1399.
210. *Id.*
211. *Id.* at 1401.

The Federal Circuit also found no clear error in the trial court's determination that Lieutenant Colonel Dean lacked the authority required to enter an enforceable NDA with Liberty on behalf of the government.[212] Liberty maintained that the Army exploited its technology, which was protected by the NDA that Mr. Marx and Lieutenant Colonel Dean had signed in 2005.[213] The Federal Circuit relied on the well-recognized principle of procurement law that a government agent must have actual authority—whether express or implied—to bind the government to a contract.[214] Liberty conceded that Lieutenant Colonel Dean lacked express actual authority to enter the NDA but argued that he nevertheless had implied actual authority.[215] The Federal Circuit reasoned that government employees have implied actual authority to enter a binding agreement only when such authority is an integral part of their assigned duties.[216] Because Lieutenant Colonel Dean signed NDAs so infrequently, the Federal Circuit concluded there was adequate support for the trial court's determination that signing NDAs was not integral to his position.[217] Lieutenant Colonel Dean therefore lacked the requisite implied actual authority to bind the government.[218] Thus, the Federal Circuit found the trial court's determination that Liberty could not prevail on its breach of contract claim was not clearly erroneous.[219]

8. *Frankel v. United States*

In *Frankel v. United States*, an individual competing in a "prize competition" to develop a solution for the Federal Trade Commission (FTC) to block illegal "robocalls" attempted to initiate both a bid protest and a claim for breach of contract after his solution was not selected as one of the two winners.[220] The Federal Circuit affirmed the CoFC's rejection of the plaintiff's bid protest challenge as outside the court's jurisdiction for lack of standing[221] and further affirmed the CoFC's determination that the plaintiff's breach of contract claim was "barred by the contest's limitation of liability clause."[222]

The FTC initiated the "Robocall Challenge" as a prize competition pursuant to its authority under 15 U.S.C. § 3719(b).[223] The public announcement

212. *Id.*
213. *Id.*
214. *Id.* at 1401–02 (citing CACI, Inc. v. Stone, 990 F.2d 1233, 1236 (Fed. Cir. 1993); H. Landau & Co. v. United States, 886 F.2d 322, 324 (Fed. Cir. 1989) ("[A]pparent authority will not suffice to hold the government bound by the acts of its agents.")).
215. *Id.* at 1402.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 1403.
220. 842 F.3d 1246, 1247–49 & n.1 (Fed. Cir. 2016) ("A 'robocall' is an automated sales call.").
221. *Id.* at 1251.
222. *Id.* at 1252.
223. *Id.* at 1248. 15 U.S.C. § 3719(b) (2012) provides, "Each head of an agency, or the heads of multiple agencies in cooperation, may carry out a program to award prizes competitively to stimulate innovation that has the potential to advance the mission of the respective agency."

explained that "each submission would be evaluated by a panel of judges based on three criteria—(1) whether the solution would successfully block robocalls, worth 50%; (2) how easily could a consumer use the solution, worth 25%; and (3) whether the solution could feasibly be implemented in practice, worth 25%."[224] The announcement also provided "the submission with the 'highest overall scores' would be awarded a $50,000 prize."[225] As a condition of entry, contestants were required to grant the FTC a non-exclusive license to use their submissions and to release the FTC from "any and all liability in connection with the Prizes or Contestant[s'] participation in the Contest."[226]

After receiving nearly 800 submissions, the FTC informed the judges that they did not need to numerically score each submission.[227] The judges then decided to exclude all submissions that did not propose a particular approach referred to as "filtering as a service ('FaaS') to block robocalls."[228] The judges would then score the remaining submissions numerically.[229] The plaintiff had submitted a "trace-back" solution rather than an FaaS solution, and his solution was not selected as a winner.[230] After learning his submission had not been selected, the plaintiff, acting pro se, initiated a bid protest action under 28 U.S.C. § 1491(b) as well as a breach of contract claim.[231]

In reviewing the plaintiff's bid protest claim, the court affirmed the CoFC's decision that it lacked jurisdiction because the prize competition did not qualify as a procurement contract.[232] The court reached this conclusion by looking to the statute authorizing prize competitions, which requires agencies selecting the prize competition authority to explain why such a competition was preferable "as opposed to other authorities available to the agency, such as contracts, grants, and cooperative agreements."[233] Although this provision refers to "contracts" generally as an "other authority," the court interpreted the reference as meaning "procurement contracts."[234] The court reasoned that the reference to "contracts, grants, and cooperative agreements" should be read in conjunction with how those terms are used in Title 31, where "Congress expressed a desire to 'promote increased discipline in selecting and using *procurement contracts*, grant agreements, and cooperative agreements. . . .'"[235] Based on this interpretation, the court determined prize competitions were distinct from "procurement contracts," which placed them

224. *Frankel*, 842 F.3d at 1248.
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 1248–49.
232. *Id.* at 1251.
233. *Id.* at 1250 (quoting 15 U.S.C. § 3719(p)(2)(B) (2012)).
234. *Id.* at 1251.
235. *Id.* at1250–51 (quoting 31 U.S.C. § 6301(3) (2012)).

outside of CoFC's jurisdiction over protests "in connection with a procurement or a proposed procurement."[236]

Turning to the breach of contract claim, the court affirmed the CoFC's decision that the government was entitled to summary judgment.[237] The court held that because the terms and conditions of the contest included a limitation of liability provision, the plaintiff would need to show "fraud, irregularity, intentional misconduct, gross mistake, or lack of good faith involved in the contest."[238] The plaintiff argued the judges' failure to score all eligible submissions numerically constituted "irregularity and gross mistake," but the court rejected this argument.[239] Instead, the court found that even though the judging criteria provided numerical weights, it did not specifically require judges to score each entry numerically.[240] In the court's view, this left the judges with "discretion to proceed in the manner they thought best."[241]

B. *Modest Doubt*[242]*: Reversals in Claims and Disputes Cases*

1. *Guardian Angels Medical Service Dogs, Inc. v. United States*

In *Guardian Angels Medical Service Dogs, Inc. v. United States*, the Federal Circuit reversed the COFC and held that a CO who previously had issued a final decision terminating a contract for default "vitiated the finality" of that decision when she agreed to accept and respond to additional information from the contractor regarding her decision.[243] In reaching this holding, the court emphasized the need for an objective standard based on the reasonable viewpoint of the contractor for determining whether a CO has begun reconsidering her opinion, and therefore, whether her decision should be treated as final.[244]

Guardian Angels Medical Service Dogs, Inc. had a contract with the Department of Veterans Affairs under which it provided service dogs trained to meet the needs of disabled veterans.[245] After about one year of performance, the VA had concerns with Guardian's performance.[246] On August 31, 2012, the CO sent Guardian a notice advising that the government was terminating the contract for default.[247] In the termination notice, the VA advised Guardian that it had the right to appeal the termination under the disputes clause of the contract.[248]

236. *Id.* at 1251 (quoting 28 U.S.C. § 1491(b)(1) (2012)).
237. *Id.* at 1252.
238. *Id.* at 1251 (quoting Johnson v. BP Oil Co. & Mktg. Corp., 602 So. 2d 885, 888 (Ala. 1992)).
239. *Id.*
240. *Id.*
241. *Id.*
242. "Modest doubt is called the beacon of the mind." WILLIAM SHAKESPEARE, TROILUS AND CRESSIDA, Act II, scene 2, line 15 (c. 1602).
243. 809 F.3d 1244, 1250 (Fed. Cir. 2016).
244. *Id.*
245. *Id.* at 1245–46.
246. *Id.* at 1246.
247. *Id.*
248. *Id.*

Guardian submitted several letters to the VA in response.[249] On December 21, 2012, Guardian sent a letter to another official at the VA, arguing that Guardian had fulfilled its duties under the contract and that the default termination should be converted to a termination for convenience.[250] On February 28, 2013, Guardian sent a letter to the Contracting Officer, stating that it was making a formal demand against the agency and that it materially disagreed with the decision to terminate the contract for default.[251] Guardian further argued that it should be paid a percentage of the contract price reflecting the percentage of work it had performed prior to issuance of the notice of termination.[252]

The CO responded on March 31, 2013, explaining that she had received the claim, but that she could not reasonably evaluate or respond due to the lack of supporting documentation.[253] The CO further directed Guardian to provide all expense documentation supporting its claim at its earliest convenience.[254] Only then would the CO proceed with a review of the material and provide a response.[255] Before Guardian had compiled all of the documentation, the CO sent another letter on May 3, 2013, stating she had not received the documentation requested and she had not and would not reconsider the August 2012 termination notice.[256]

On January 7, 2014, more than a year after the initial termination notice, but less than a year after the CO's March 31, 2013, letter, Guardian filed its complaint at the CoFC.[257] The CoFC found the August 2012 termination notice was the agency's final decision, and Guardian's claim was time-barred because it waited more than a year to file its complaint.[258] The CoFC acknowledged that Guardian's February 2013 letter constituted a request for reconsideration of the CO's decision but held the CO did not actually reconsider her decision because she "spent no time reviewing" the request.[259]

On appeal, the Federal Circuit rejected the CoFC's "time spent" standard.[260] Instead, the court held the CO "vitiated the finality of her original default termination notice" when she invited Guardian to submit additional information and agreed to review that information.[261] The court emphasized that, based on the CO's letter, "it was reasonable for [Guardian] to conclude

249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* at 1247.
259. *Id.*
260. *Id.* at 1248.
261. *Id.* at 1250.

that the VA had not yet made any definitive determination on whether to terminate [the contract] for default and that the twelve-month statutory appeal period therefore had not yet begun to run."[262] The court reasoned that the analysis must focus on the CO's actions, not on "her own after-the-fact characterization of those actions."[263] The court also emphasized it was not holding that a mere request for reconsideration, or even a communication from the CO after such a request, would be sufficient to vitiate the finality of a decision.[264]

2. *Kellogg Brown & Root Services, Inc. v. Murphy*

In *Kellogg Brown & Root Services, Inc. v. Murphy*, the Federal Circuit considered whether the six-year statute of limitations of the CDA had run for a claim submitted by Kellogg Brown & Root Services, Inc. (KBR) to the Army for costs incurred by KBR's subcontractor.[265] In reversing and remanding the case to the ASBCA, the Federal Circuit held the Army could not preclude the claim on statute of limitations grounds when it would not allow KBR to seek reimbursement until resolving the underlying subcontractor dispute.[266]

The dispute at issue stemmed from a 2001 Logistics Civil Augmentation Program (LOGCAP) contract between the Army and KBR.[267] Under this cost-plus-award-fee contract, KBR was to construct dining facilities and provide meals and related services for troops in Iraq.[268] At the end of July 2003, KBR terminated the subcontract with KCPC/Morris for "fail[ure] to bring conditions to full contract performance."[269] KCPC/Morris disputed the termination but continued performance at the request of KBR while it transitioned to a new subcontractor in September 2003.[270]

In January 2005, KBR and KCPC/Morris entered a written agreement dividing the disputed costs into two categories: (1) a settlement amount of $17.4 million and (2) an amount related to KCPC/Morris's costs incurred and profit related to its performance under the agreement.[271] With regard to the second category of costs, KBR and KCPC/Morris agreed to cooperate "to prepare a well-supported invoice or invoices to the U.S. [g]overnment."[272]

In August 2006, KCPC/Morris submitted a certified claim to KBR for the second category of costs.[273] KBR forwarded the claim to the Army, stating

262. *Id.*
263. *Id.*
264. *Id.* at 1251–52.
265. 823 F.3d 622, 623 (Fed. Cir. 2016). Kellogg Brown & Root Services, Inc. (KBR) subcontracted with KCPC/Morris, a joint venture between the Kuwait Company for Process Plant Construction & Contracting and the Morris Corporation. *Id.* at 624.
266. *Id.* at 629–30.
267. *Id.* at 624–25.
268. *Id.* at 624.
269. *Id.*
270. *Id.*
271. *Id.* KBR paid the settlement amount; the amount in dispute before the Federal Circuit related only to the second category of costs. *Id.*
272. *Id.*
273. *Id.*

that KBR did "not certify or comment to the validity of [the] costs and [did] not have any other supporting documentation for validation."[274] The Army responded it was KBR's responsibility to negotiate or discuss claims with its subcontractors, and the Army would refuse to consider the information until that dispute concluded.[275] KBR subsequently "sponsored" the KCPC/Morris claim in October 2007, but withdrew the claim in September 2010.[276]

KCPC/Morris filed suit against KBR in federal district court, withdrawing the claim after the parties entered into an agreement for KBR to pay KCPC/Morris for the second category of costs.[277] In May 2012, KBR submitted a certified claim to the Army, seeking to recover the amount it had paid to KCPC under the agreement.[278] KBR appealed the deemed denial of its claim to the Board.[279] The Army moved to dismiss on the ground that the six-year CDA statute of limitations had run.[280] The Board granted the motion to dismiss, finding that all the possible alternative dates the claim could have accrued fell before the cutoff of May 2, 2006.[281] KBR appealed to the Federal Circuit.

At the Federal Circuit, KBR argued that until KCPC/Morris sent its documented and certified claim on August 26, 2006, there was no basis for KBR to determine the "sum certain" required for submission of a CDA claim.[282] The Army argued liability was "fixed" by KBR's cost-reimbursable contract with the Army, even though the amount of the liability was unknown.[283] The court agreed with KBR, noting that pursuant to the FAR, a "claim" for the payment of money does not accrue until the amount of the claim is "known or should have been known."[284]

The court also disagreed with the Board's decision that the request for relevant subcontractor costs was a "non-routine" request for payment (i.e., a payment outside of the scope of the contract) and held that, regardless, any potential "non-routine" requests occurred after May 2, 2006.[285] The court also noted that, in similar situations, the limitations period does not begin running if a claim cannot be filed because mandatory pre-claim procedures—such as an agency's requirement that a contractor resolve a subcontractor dispute prior to presenting a claim for reimbursement—have not yet completed.[286]

274. *Id.*
275. *Id.* at 624–25.
276. *Id.* at 625. KBR's basis for withdrawing the claim was that "[u]pon further review of the data provided by KCPC/Morris, KBR has determined that this constitutes a business dispute between KBR and KCPC/Morris and should be resolved in accordance with [their contract]." *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.* at 626 (citing FAR 2.101).
283. *Id.* at 627.
284. *Id.* (citing FAR 2.101; FAR 33.201).
285. *Id.* at 627–28.
286. *Id.* at 628.

The Army additionally argued that the *Severin* doctrine applied.[287] The Army argued that if KCPC/Morris's claim accrued against KBR, so did KBR's claim against the government.[288] The court disagreed, noting that, under the FAR, the claim could not have accrued until KBR requested, or reasonably could have requested, a "sum certain" from the government, something it was unable to do until resolution of the subcontractor issue.[289] Accordingly, the court reversed the Board's decision and remanded the case for a determination on the merits.[290]

3. *Hymas v. United States*

In *Hymas v. United States*, the Federal Circuit considered limitations on the CoFC's jurisdiction over actions concerning non-procurement instruments—here, agreements characterized as "cooperative agreements."[291] Ultimately, the Federal Circuit reversed the CoFC's decision that it had jurisdiction over the protest action because the cooperative agreements at the heart of the protest were actually procurements.[292]

By way of background, the U.S. Department of the Interior (DOI) Fish and Wildlife Service (FWS) is charged with developing a nationwide program of wildlife conservation and rehabilitation.[293] As part of that mission, the FWS manages public lands, including the Umatilla and McNary Refuges located in the Pacific Northwest, which provide a sanctuary for certain migratory birds and other wildlife.[294] In support of this effort, for more than forty years the FWS has entered into "cooperative farming agreements" (CFAs) under which private farmers are granted rights to farm-specific parcels of public land as long as a portion of the crops is left to feed the wildlife.[295]

In 2013 and 2014, Hymas, seeking to become a participant in the program for the first time, sought to secure a CFA with the FWS.[296] The FWS did not award the CFA using full and open competition, but rather used an alternative priority selection system that gave preference to previous cooperators with a successful record of farming in the refuges.[297] Hymas filed a bid protest at the CoFC in 2013, claiming that the FWS violated the Competition in

287. *Id.* In *Severin*, the court held that if the plaintiffs prove they became liable to their subcontractor for damages in performance of their contract with the government, that liability would constitute actual damages to the plaintiffs and sustain their suit. Severin v. United States, 99 Ct. Cl. 435, 443 (1943).
288. *Kellogg Brown & Root*, 823 F.3d at 628.
289. *Id.* (citing FAR 2.101; FAR 33.201).
290. *Id.* at 630.
291. 810 F.3d 1312, 1317–18 (Fed. Cir. 2016).
292. *Id.* at 1326.
293. *Id.* at 1318.
294. *Id.* at 1314–15.
295. *Id.*
296. *Id.* at 1315.
297. *Id.*

Contracting Act's (CICA)[298] mandate that agencies procure goods and services using full and open competition, the Administrative Procedure Act (APA),[299] and other federal procurement laws.[300]

The CoFC denied the government's motion to dismiss, holding it had jurisdiction over Hymas's protest.[301] According to the CoFC, issuance of these CFAs amounted to a procurement because, through these agreements, the FWS sought and obtained services—namely the feeding of wildlife by the cooperator farmers.[302] On the merits, the court ruled for Hymas and found the FWS violated CICA by failing to conduct "full and open" competition, was not authorized by statute to enter into cooperative agreements like the CFA and thus circumvented the CICA, and violated the Federal Grant and Cooperative Agreement Act (FGCAA) in applying the priority selection system to select a CFA cooperator.[303]

The Federal Circuit reversed the lower court's determination that it had jurisdiction over this CFA under the Tucker Act.[304] Before reaching that conclusion, however, the Federal Circuit examined whether the FWS has statutory authority to enter into cooperative agreements in the first instance and whether the agency properly characterized the CFAs as cooperative agreements.[305] The Federal Circuit found in the affirmative on both issues.[306]

First, the Federal Circuit found the FWS properly interpreted the relevant statutes authorizing it to enter into cooperative agreements such as the CFAs.[307] In particular, the FWS permissibly construed the statutes as allowing the FWS to enter into CFAs with "any person," not just agencies and organizations.[308]

Second, the Federal Circuit held that the FWS properly construed the CFAs as cooperative agreements.[309] The court observed that the language of the Tucker Act "speaks 'exclusively' to 'procurement solicitations and contracts' "—

298. *Hymas*, 810 F.3d at 1316; *see* 41 U.S.C. § 3301(a) (2012) (requiring agencies to use a competitive bidding process when conducting a procurement for property or services).

299. *Hymas*, 810 F.3d at 1316; *see* 5 U.S.C. § 706(2)(A) (2012) (requiring a reviewing court to hold unlawful agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

300. *Hymas*, 810 F.3d at 1316.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 1329–30.

305. *Id.* at 1317.

306. *Id.* at 1324.

307. *Id.*

308. *Id.* at 1320–21 (invoking the framework for reviewing an agency's statutory interpretation articulated in Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

309. *Id.* at 1324.

not to cooperative agreements.[310] The court acknowledged that the decision to obtain services using a procurement contract or a grant is a policy decision dictated by what best suits the agency.[311]

In addressing this second question, the Federal Circuit determined that the CoFC erred in determining the CFAs constituted procurement contracts:

> The Claims Court's holdings and Mr. Hymas's arguments rest in large part upon the faulty premise that the definition of "cooperative agreement" in the FGCAA is irrelevant and that 41 U.S.C. § 111 contains the only definition that courts may consult to determine (1) whether a particular transaction constitutes a procurement and, consequently, (2) whether the Claims Court has bid protest jurisdiction over a particular claim.[312]

Instead, the Federal Circuit reasoned that, under the FGCAA, whether an instrument reflects a procurement contract or a cooperative agreement depends on the primary purpose of the relationship.[313] Because the FWS intended to transfer a thing of value to carry out a public purpose while remaining "substantially involved" in the activity and did not acquire property or service for the use by the government, the CFA met the definition of a cooperative agreement.[314]

Having determined that the FWS was authorized to enter CFAs and that it properly construed the CFAs as cooperative agreements, the Federal Circuit quickly disposed of the jurisdiction question.[315] Because the Tucker Act's jurisdiction is concerned exclusively with procurement solicitations and contracts—not grants and cooperative agreements—CoFC did not have jurisdiction over Hymas's suit, and the Federal Circuit directed it to be dismissed.[316]

Judge Stoll dissented and, relying on the Federal Circuit's decision in *CMS Contract Management Services v. Massachusetts Housing Finance Agency*,[317] maintained that the CFA was designed to procure the services of a third party to help the FWS achieve its mission and thus the instrument that an agency was required to use was a procurement contract.[318]

310. *Id.* (emphasis omitted) (quoting Res. Conservation Grp., LLC v. United States, 597 F.3d 1238, 1245 (Fed. Cir. 2010)). The court noted that, although the Tucker Act does not define "procurement," the Federal Circuit has relied on the definition stated in other statutes. *Id.* at 1324–25 (noting, for example, that the FGCAA explicitly distinguished between "cooperative agreements" on the one hand, and "procurements" on the other).

311. *Id.* at 1325–26.

312. *Id.* at 1326.

313. *Id.* at 1327.

314. *Id.* at 1327–28.

315. *See id.* at 1329–30.

316. *Id.*

317. *Id.* at 1330, 1333 (Stoll, J., dissenting) (citing CMS Contract Mgmt. Servs. v. Mass. Hous. Fin. Agency, 745 F.3d 1379, 1381 (Fed. Cir. 2014)).

318. *Id.* at 1330.

4. *System Fuels, Inc. v. United States*

In *System Fuels, Inc. v. United States*, a spent nuclear fuel case, the court held that the plaintiffs were entitled to recover the costs of loading spent nuclear fuel into storage casks when the government breached its contract to take title and dispose of the material.[319]

In 1982, Congress passed the Nuclear Waste Policy Act of 1982 authorizing the Department of Energy (DOE) to "contract with nuclear power utilities as part of its plan for a national nuclear waste disposal system."[320] Under these contracts, the utilities would pay fees into a Nuclear Waste Fund, and the government would take title to and dispose of the utilities' spent nuclear fuel.[321] The contracts also included standard provisions outlining the costs that each party would be responsible for incurring.[322] The utilities would be responsible for providing "all preparation, packaging, required inspections, and loading activities necessary for the transportation of [spent nuclear fuel] and/or [high-level radioactive waste] to the DOE facility."[323] The government would be responsible for "arrang[ing] for, and provid[ing], a cask(s) and all necessary transportation of the [spent nuclear fuel] and/or [high-level radioactive waste] from the [utility's] site to the DOE facility."[324]

In this case, through multiple decisions, the CoFC awarded damages to the plaintiffs in excess of $70 million.[325] Nonetheless, the plaintiffs appealed the CoFC's decisions because those decisions denied the plaintiffs damages for one particular category of costs—namely, the costs incurred to load spent nuclear fuel into storage casks at the storage installations used by the plaintiffs while they awaited (and continue to await) the government's storage of the material.[326] Preparing the material for storage involves two primary steps: (1) loading the spent nuclear fuel into canisters and (2) loading the canisters into storage casks and welding the casks closed.[327] Based on current regulations, DOE has stated it will not accept currently loaded canisters or storage casks when it ultimately takes responsibility for the spent nuclear fuel.[328] As a result, the plaintiffs, under current regulations, anticipate incurring future costs to reload the material before transferring it to the government.[329]

The Federal Circuit reversed the CoFC's decision, holding that the plaintiffs were entitled to the damages for loading the material into the storage canisters and casks.[330] In reaching this conclusion, the court distinguished

319. 818 F.3d 1302, 1306–07 (Fed. Cir. 2016).
320. *Id.* at 1303.
321. *Id.*
322. *Id.*
323. *Id.* (quoting 10 C.F.R. § 961.11).
324. *Id.* (quoting 10 C.F.R. § 961.11).
325. *Id.* at 1304 & n.3.
326. *Id.* at 1304.
327. *Id.*
328. *Id.* at 1306.
329. *Id.*
330. *Id.*

loading the material into "transportation casks," which the government would eventually provide, and loading the material into "storage casks," which the plaintiffs did as an interim solution.[331] The court then explained the contract terms make the plaintiffs responsible only for the costs of loading the material in the "transportation casks."[332] According to the court, the additional costs of loading to the material into storage casks are part of the damages flowing from the government's breach and should have been awarded accordingly.[333]

5. *Rocky Mountain Helium, LLC v. United States*

Rocky Mountain Helium presented the question whether a series of contracts between Rocky Mountain Helium, LLC and the Bureau of Land Management were breached, reinstated, or canceled, and how that affected the CoFC's jurisdiction.[334] Rocky Mountain and the Bureau entered into the first contract involved in this appeal, the "Helium Contract," in 1994 under which Rocky Mountain obtained the right to extract helium gas from certain federal land in Colorado and Utah for twenty-five years.[335] Under the Helium Contact, Rocky Mountain had to pay either rent or royalties, whichever was higher, to the government.[336] Rocky Mountain never extracted helium so no royalties were generated, and it paid rent only for the first year.[337] Eventually, in December 2004, the Bureau notified Rocky Mountain it had canceled the Helium Contract for failure to pay rent.[338] Rocky Mountain appealed this action to the Civilian Board of Contract Appeals (CBCA).

In the midst of the CBCA proceedings, in August 2008 the Bureau and Rocky Mountain entered into a settlement agreement with the goal of reinstating the Helium Contract.[339] The settlement agreement required the Bureau to obtain and provide to Rocky Mountain certain data about the gas composition of the lands covered by the contract.[340] Within ninety days of receiving this data, Rocky Mountain would pay a sum of money to the Bureau to reinstate the contract.[341] Particularly relevant to the Federal Circuit decision, the settlement agreement contained a sunset provision that would

331. *Id.* at 1306–07.
332. *Id.*
333. *Id.* at 1307.
334. 841 F.3d 1320, 1321–23 (Fed. Cir. 2016).
335. *Id.* at 1321.
336. *Id.* Rocky Mountain also obtained preferential rights in the event the Bureau terminated the Helium Contract and engaged in an agreement with another company for the sale or extraction of helium from the land. *Id.*
337. *Id.* at 1322.
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.*

be triggered if Rocky Mountain did not pay the Bureau within the specified time.[342] If the sunset provision was triggered, Rocky Mountain released any claims or interest in the contract and the Bureau would be entitled to contract with third parties for the Helium Contract land.[343] The settlement agreement also provided that disputes would be submitted to a specific CBCA judge for alternative dispute resolution (ADR).[344]

In accordance with the settlement agreement, the Bureau provided Rocky Mountain with the required data.[345] However, Rocky Mountain objected that the data was incomplete, refused to pay the Bureau, and informed the Bureau and the CBCA judge that it wanted to pursue mediation.[346] Roughly one month later, the Bureau informed Rocky Mountain that it was invoking the sunset provision.[347] Rocky Mountain, the Bureau, and the CBCA judge continued to discuss possible ADR, but the CBCA judge never made a written or oral determination and the parties stopped pursuing ADR after September 2009.[348]

Rocky Mountain then sued the Bureau in the CoFC, claiming the Bureau breached both the Helium Contract and the settlement agreement.[349] The CoFC dismissed the complaint because it found that it lacked jurisdiction over both breach claims.[350] The CoFC also dismissed the claim related to the Helium Contract on the merits.[351] With regard to the Helium Contract, the CoFC reasoned that Rocky Mountain lacked constitutional standing because the contract was never reinstated after it was terminated in 2004.[352] As to the settlement agreement, the CoFC decided that because the disputes clause required submission of disputes to the CBCA judge, the CoFC lacked subject matter jurisdiction.[353] Rocky Mountain appealed the dismissal to the Federal Circuit.

The Federal Circuit first disagreed with the CoFC's ruling on standing related to the Helium Contract.[354] The Federal Circuit characterized the CoFC's decision as an impermissible merits determination at a stage where the court should have assumed the merits of the litigant's claim.[355]

342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.* at 1323. Rocky Mountain's statement that it wished to pursue mediation triggered the disputes clause. This statement was made prior to the end of the ninety-day period for payment to the Bureau. *Id.*
347. *Id.*
348. *Id.* Subsequently, in March 2010, the Civilian Board of Contract Appeals closed its alternative dispute resolution file. *Id.*
349. *Id.*
350. *Id.*
351. *Id.*
352. *Id.* at 1323. The CoFC's dismissal on the merits was for the same reason. *Id.*
353. *Id.*
354. *Id.* at 1324.
355. *Id.* at 1325.

Even though the Federal Circuit rejected the CoFC's standing analysis, the Federal Circuit still found a partial jurisdictional bar to the Helium Contract breach claim.[356] In particular, the court held that the CoFC's six-year statute of limitations barred Rocky Mountain's claim that the Bureau wrongfully terminated the contract in 2004 because Rocky Mountain brought the action more than six years later.[357] At the same time, the Federal Circuit declined to dismiss Rocky Mountain's claim on this basis to the extent the claim was based on allegations that the termination occurred on or after April 21, 2009 (six years before Rocky Mountain filed its claim at CoFC).[358]

Turning to the merits of Rocky Mountain's Helium Contract breach claim, the Federal Circuit agreed the Helium Contract was terminated in 2004 and was never reinstated.[359] The Federal Circuit rejected Rocky Mountain's argument that the settlement agreement reinstated the Helium Contract because Rocky Mountain's breach of the settlement agreement prevented any such reinstatement.[360] In fact, the settlement agreement specifically recited the Bureau had "canceled the Contract on December 29, 2004."[361] The Federal Circuit thus affirmed the CoFC's dismissal of the Helium Contract breach.[362]

As to the settlement agreement, the Federal Circuit noted it had seen no authority suggesting that a contract clause invoking non-binding settlement assistance or ADR could override a clear jurisdictional grant to the CoFC.[363] In addition, the Federal Circuit found that Rocky Mountain had invoked the CBCA's assistance and did so before its payment was due to the Bureau, thereby satisfying the disputes clause.[364] Therefore, the Federal Circuit concluded the CoFC had jurisdiction over the settlement agreement notwithstanding the disputes clause.[365] The government also attempted to argue that because the Tucker Act only confers jurisdiction on the CoFC to hear actions grounded in money-mandating sources of law, and the settlement agreement on which Rocky Mountain's breach claim was based was not money-mandating, the CoFC did not have jurisdiction over the settlement agreement breach claim.[366] The Federal Circuit rejected this argument, explaining that there is a presumption in the civil context that damages are available as a remedy for breach of contract.[367]

356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.* at 1326.
361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.* at 1326–27.
367. *Id.* at 1327 (citing Sanders v. United States, 252 F.3d 1329, 1334 (Fed. Cir. 2001)).

The Federal Circuit remanded the case to the CoFC to address the merits of the settlement agreement claim.[368]

C. *Outside the Frame*[369]*: Non-Claims Decisions*

1. *Per Aarsleff A/S v. United States*

In this bid protest decision, the Federal Circuit reversed the CoFC, holding the contracting agency did not violate the terms of the solicitation by awarding a contract to a Danish corporation that was a wholly owned subsidiary of a U.S.-based company, notwithstanding an ambiguous solicitation provision that required bidders "not be registered as a subsidiary of [a] foreign [i.e., non-Danish] company."[370]

The facts of this case are unusual. The Air Force issued a solicitation for the operation and maintenance of Thule Air Force base, located in Greenland.[371] Because Greenland's foreign policy and defense are controlled by the Danish government, the solicitation was subject to a memorandum of understanding between the United States and Denmark, which required that contracts awarded be procured directly from "Danish/Greenlandic sources" whenever "feasible."[372] In 2013, the Air Force and the U.S. Department of State negotiated with the Danish Ministry of Finance to outline the criteria governing classification of an entity as "Danish/Greenlandic" for purposes of the procurement.[373] The State Department endeavored to create a simple "checklist" of requirements. During the process, a State Department official shared with the Air Force his or her understanding that the Danish central business register (CVR) contained a field indicating whether a company is a subsidiary of a foreign company.[374] The State Department mistranslated and misinterpreted the meaning of this field; the CVR field in question simply indicated whether a company was a branch of a foreign owned company but did not indicate whether it was a subsidiary of a foreign owned company.[375]

The Air Force issued a draft solicitation requiring offerors to submit proof of an established relationship with a Danish bank and stating that the registered office of each offeror "shall be in the Kingdom of Denmark and shall not be registered as a subsidiary of [a] foreign company."[376] An offeror asked the agency to explain what this requirement meant.[377] The Air Force responded by pointing to the publically searchable field in the CVR

368. *Id.*
369. "The only people who see the whole picture . . . are the ones who step out of the frame." Salmon Rushdie, The Ground Beneath Her Feet 41 (1999).
370. 829 F.3d 1303, 1306 (Fed. Cir. 2016).
371. *Id.*
372. *Id.*
373. *Id.*
374. *Id.* at 1306–07.
375. *Id.* at 1307.
376. *Id.*
377. *Id.*

database, which the agency mistakenly thought indicated whether a company was a subsidiary of a foreign company.[378]

Ultimately, the agency awarded the contract to Exelis, a wholly owned Danish subsidiary of a U.S. company.[379] The three unsuccessful offerors filed protests at the Government Accountability Office (GAO), asserting the award to Exelis was improper because its foreign ownership was inconsistent with the solicitation's requirement.[380] The GAO denied the protests on two grounds. First, it found the solicitation provision was clear—there was no requirement to consider foreign ownership.[381] Second, even assuming the solicitation was ambiguous, any ambiguity would have to have been challenged prior to the solicitation of bids and was thus now untimely.[382]

The three offerors then challenged the award decision at the CoFC.[383] The CoFC granted the plaintiffs' motions for judgment on the administrative record.[384] Notably, the CoFC found the solicitation's criteria "defective" and the GAO's interpretation to be contrary to the agency's intent,[385] which would be frustrated by permitting a foreign company to qualify simply by creating a Danish subsidiary and registering in the CVR.[386] Exelis appealed to the Federal Circuit, which reversed the CoFC's holding.[387]

The Federal Circuit conducted a de novo review of the solicitation provision.[388] First, the court found the solicitation language was susceptible to at least two interpretations: either eligibility would be determined according to the information provided in the CVR, or eligibility would be determined according to the registration in the CVR and being the subsidiary of a foreign company, regardless of whether such status was apparent or indicated at the time of registration.[389] However, the Federal Circuit found the agency resolved the ambiguity during the question and answer period by clarifying that the registration is determined by the facial indication in the CVR registry (even though the registry did not indicate where a bidder is a subsidiary of a foreign company).[390] As a result, Exelis was determined to have satisfied the eligibility provisions, notwithstanding the fact that it was controlled and owned by a foreign corporation.[391] Finally, the Federal Circuit held the disappointed offerors had waived their objections to the

378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.* at 1308.
382. *Id.*
383. *Id.*
384. *Id.*
385. *Id.*
386. *Id.*
387. *Id.* at 1308, 1316.
388. *Id.* at 1309.
389. *Id.* at 1310.
390. *Id.* at 1311, 1312.
391. *Id.* at 1311, 1316.

eligibility provision by failing to object to the solicitation containing a patent ambiguity.[392]

2. *Coast Professional, Inc. v. United States*

In *Coast Professional, Inc. v. United States*, the Federal Circuit disagreed with the CoFC's determination that it lacked jurisdiction to consider a protest of a GSA FSS award-term extension.[393] In so doing, the court addressed the difference between the government's exercise of an option and the government's issuance of a task order.[394]

The appellants, Pioneer Credit Recovery, Inc. and Enterprise Recovery Systems, Inc., were private debt collection agencies that held GSA FSS contracts for debt collection services.[395] The Department of Education "issued a Request for Quotations ('RFQ') for debt collection services under Special Item Number 520-4," anticipating award of task orders to contractors under the existing GSA contract.[396] The RFQ advised the task order would include a base term as well as option periods, with a total performance term not to exceed sixty months.[397] The RFQ also included a clause providing for a performance-based award term extension and advised "award term extensions awarded . . . will be executed in the form of a new Task Order issued by the Contracting Officer under the Contractor's then current GSA schedule contract."[398]

In response to GAO recommendations that the agency improve oversight, the Department of Education secretly began auditing task order holders' compliance with consumer protection laws.[399] Reviewers from the agency listened to a sampling of calls each contractor made to defaulted borrowers and counted the number of times the contractor violated consumer protection laws.[400] The Department calculated error rates for the contractors based on the number of calls placed to defaulted borrowers containing at least one violation.[401] Based on the audit findings, the Department did not issue award term extensions to the appellants.[402] The appellants challenged the Department's issuance of award term extensions to competitors, but the CoFC dismissed the claims for lack of jurisdiction.[403]

392. *Id.* at 1312–13.
393. 828 F.3d 1349, 1357 (Fed. Cir. 2016).
394. *Id.* at 1356.
395. *Id.* at 1350.
396. *Id.* at 1352.
397. *Id.*
398. *Id.* at 1353.
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.* Despite the audit findings, both appellants had received scores of "excellent or better" under the Contractor Performance and Continuous Surveillance (CPCS) system. *Id.*
403. *Id.* at 1353–54.

The Federal Circuit reversed, holding that the CoFC had jurisdiction over the protest because the award term extensions constituted "a proposed award or the award of a contract."[404] The government argued that the use of a new task order to effect the award term extension was a "mere formality" and that the new task order should be considered an option;[405] indeed, "the new Task Order [would] be subject to the same terms and conditions as the old Task Order."[406] The Federal Circuit disagreed, holding that "[e]ach new round of Task Orders under a GSA Schedule contract is a 'proposed award or the award of a contract.' "[407]

In reaching this conclusion, the Federal Circuit noted the Supreme Court's recent holding that "issuance of a new Task Order against a GSA [FSS] contract constitutes an award of a contract."[408] The Federal Circuit also emphasized the new task order was not like an option because the contractor could accept or reject the award term extension, whereas the government has a unilateral right to exercise an option.[409]

IV. CONCLUSION

The few patterns that emerge in this year's cases, while potentially of academic interest, do not reveal the sort of global takeaway regarding the court's approach to government contracts cases or law that practitioners so desire. Indeed, tempting as it may be to suggest that the Federal Circuit's overwhelming tendency to affirm the CoFC's and ASBCA's decisions on contract claims and disputes means that those forums have mastered issues that arise during contract administration, or that the Federal Circuit is taking a more hands-off approach to these types of decisions, the reality is that each decision stands on its own. At the end of the day, we may "speak" about the knowledge gained through a careful review of the Federal Circuit's government contracts cases from 2016, but are left to "listen"—i.e., wait—for the overarching wisdom regarding how these cases fit into the court's jurisprudence and what their impact will be on government contract law generally.

404. *Id.* at 1354.
405. *Id.* at 1355.
406. *Id.*
407. *Id.*at 1356.
408. *Id.* at 1354 (citing Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1978–79 (2016)).
409. *Id.* at 1356.