The Government Contract Decisions of the Federal Circuit

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When I first started teaching federal procurement law at The George Washington University Law School in 1961, I quickly found that the law in this area was a creature of the Court of Claims. Then, as John Cibinic joined me on the faculty in 1963 and we began to write a casebook, we used a large number of Court of Claims decisions as our lead cases.[1] As a result, we were and remained great admirers of

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1 Ralph C. Nash, Jr. & John Cibinic, Jr., Federal Procurement Law (1966). The lead cases from the Court of Claims were *G.L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963) (incorporating mandatory clauses into a contract by operation of law); *Gordon Woodroffe Corp. v. United States*, 104 F. Supp. 984 (Ct. Cl. 1952) (requiring authority to enter into contract); *Branch Banking & Trust Co. v. United States*, 98 F. Supp. 757 (Ct. Cl. 1951) (estopping the government from denying liability when authorized personnel induced the contractor to expend funds); *Fox Valley Engineering, Inc. v. United States*, 151 Ct. Cl. 228 (Ct. Cl. 1960) (ratification of acts of government officials without authority); *Williams v. United States*, 127 F. Supp. 617 (Ct. Cl. 1955) (implied ratification); *Air Terminal Services, Inc. v. United States*, 330 F.2d 974 (Ct. Cl. 1964) (sovereign act defense); *Prestex, Inc. v. United States*, 320 F.2d 367 (Ct. Cl. 1963) (bids must be responsive); *Refining Associates, Inc. v. United States*, 109 F. Supp. 259 (Ct. Cl. 1953) (irrevocability of bids); *National Electronics Laboratories v. United States*, 180 F. Supp. 337 (Ct. Cl. 1960) (validity of contracts calling for price revision); *Boeing Co. v. United States*, 338 F.2d 342 (Ct. Cl. 1964) (validity of title-passing provision in progress payments clause); *Otis Steel Products Corp. v. United States*, 316 F.2d 937 (Ct. Cl. 1963) (small business status of contractor); *Padbloc Co. v. United States*, 161 Ct. Cl. 369 (Ct. Cl. 1963) (implied contract not to disclose proprietary data); *Deloro Smelting & Refining Co. v. United States*, 317 F.2d 382 (Ct. Cl. 1963) (interpretation of contract language); *W.P.C. Enterprises, Inc. v. United States*, 323 F.2d 874 (Ct. Cl. 1963) (*contra proferentum* rule); *R.M. Hollingshead Corp. v. United States*, 111 F. Supp. 285 (Ct. Cl. 1953) (defective specification liability of government); *National Presto Industries, Inc. v. United States*, 338 F.2d 99 (Ct. Cl. 1964) (mutual mistake in basic assumption); *General Bronze Corp. v. United States*, 338 F.2d 117 (Ct. Cl. 1964) (no liability for unauthorized changes); *Aragona Construction Co. v. United States*, 165 Ct. Cl. 382 (Ct. Cl. 1964) (no "cardinal change" because changes within the scope of the contract); *Bruce Construction Co. v. United States*, 324 F.2d 516 (Ct. Cl. 1963) (meaning of "equitable adjustment"); *Arundel Corp. v. United States*, 103 Ct. Cl. 688 (Ct. Cl. 1945) (no differing site condition for after-occurring event); *Mitchell Canneries, Inc. v. United States*, 77 F. Supp. 498 (Ct. Cl. 1948) (impracticability of performance as excusable delay); *Laburnum Construction Co. v. United States*, 325 F.2d 451 (Ct. Cl. 1963) (compensable delay because of defective specifications); *Murphy v. United States*, 164 Ct. Cl. 332 (Ct. Cl. 1964) (no right to default terminate severable portion of contract); *Rumley v. United States*, 285 F.2d 773 (Ct. Cl. 1961) (government has common law right to damages line for contractor breach); *Ramsey v. United States*, 101 F. Supp. 353 (Ct. Cl. 1951) (no interest on damages for government late payment); *Beaconwear Clothing Co. v. United States*, 355 F.2d 583 (Ct. Cl. 1966) (no right of subcontractor to sue the government); *National Surety Corp. v. United States*, 133 F. Supp. 381 (Ct. Cl. 1955) (sureties have priority over assignees); *Watts Construction*

the court. Perhaps our greatest admiration derived from the attitude of the court about its role in the judicial hierarchy.

The Court of Claims perceived itself as the conscience of the nation. That is to say, it believed that one of its major tasks, as the court where citizens could obtain redress for actions of the government, was to show those citizens that the government treated them fairly. As Judge Marion Bennett stated:

> [A]s the Government grows ever larger, it is essential that it should never become more powerful before the law than its most humble citizen, if our system is to survive in freedom. A unique and permanent contribution that the Court of Claims has made over the span of its long life as a public institution is in how it helps to make Government officials accountable to the citizens whose servants they are, but whose relationship to their masters is sometimes forgotten. In helping to inspire a high standard of conduct for Government officials, it serves the nation well. If there is a constant thread running through the court's decisions, it would seem to be in holding the Government and its officials to a strict code of conduct in their relations with citizens. . . . The basic assumption is that the Government can be wrong—a concept rejected by most governments in the world today—and that where found to be wrong it will be brought to account and made to pay.[2]

As a result of this perception, a *fair result* seemed to be lurking in each of the court's decisions—sometimes leading commentators to wonder whether the court hadn't stretched the law. But the court's basic perception of its role was sound. Nothing could be more impor-

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Co. v. United States, 161 Ct. Cl. 801 (Ct. Cl. 1963) (contractor bound by general release of claims); *Nesbitt v. United States*, 345 F.2d 583 (Ct. Cl. 1965) (broad government right to terminate for convenience); *John A. Johnson Contracting Corp. v. United States*, 132 F. Supp. 698 (Ct. Cl. 1955) (disputes clause requires contracting officer's independent decision); *Morrison-Knudsen Co. v. United States*, 345 F.2d 833 (Ct. Cl. 1965) (judicial review standards for factual and legal decisions of appeals boards); *Hughes Transportation, Inc. v. United States*, 121 F. Supp. 212 (Ct. Cl. 1954) (Tucker Act jurisdiction of court over contract claims); *Erie Basin Metal Products, Inc. v. United States*, 107 F. Supp. 588 (Ct. Cl. 1952) (court jurisdiction over fraud claims); and *Bolinders Co. v. United States*, 153 F. Supp. 381 (Ct. Cl. 1957) (no judicial review of contract adjustments under Pub. L. No. 85-804). It is interesting to observe the significant number of decisions rendered between 1961 and 1964 that remain the seminal decisions in the field. Reading these decisions also provides a flavor of the attitude of the court in that period.

[2] MARION T. BENNETT ET AL., THE UNITED STATES COURT OF CLAIMS: A HISTORY, PART II, at 170 (1978). The author also states, "[I]t has been said of the Court of Claims: 'It holds and speaks a nation's conscience.'" *Id.* at 171.

tant than ensuring that the citizens of this country believe that their federal government treats them fairly.

The Federal Circuit seems to have slowly drifted away from this view of its role. Perhaps this has occurred because it is no longer exclusively a court hearing claims against the government.[3] The purpose of this Article is to trace a number of areas where the Federal Circuit has moved away from the decisional attitude of the Court of Claims—not by overtly overruling decisions of that court, but by subtly moving in a different direction.

I. The Contract-Interpretation Process

One of the most puzzling lines of Federal Circuit cases moving the law in a different direction is the line of cases adopting a plain-meaning rule as the paramount rule of contract interpretation. This shift was clearly signaled in 2003 in *Coast Federal Bank, FSB v. United States*,[4] where the Federal Circuit, sitting en banc, stated: "When the contractual language is unambiguous on its face, our inquiry ends and the plain language of the Agreement controls."[5] There had been earlier panel decisions of the court indicating that it was moving in this direction. In one such case, *McAbee Construction, Inc. v. United States*,[6] the court stated:

> We begin [the process of interpretation] with the plain language. . . . Thus, if the "provisions are clear and unambiguous, they must be given their plain and ordinary meaning," and the court may not resort to extrinsic evidence to interpret them. To permit otherwise would cast "a long shadow of uncertainty over all transactions" and contracts.[7]

This excerpt appears to require the judge trying the case to first read the language of the contract and determine if it has a single clear meaning—that is, whether it is unambiguous on its face—without the

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3 In 2008, approximately one-third of the court's caseload involved cases between private parties. United States Court of Appeals for the Federal Circuit: Appeals Filed, by Category, http://www.cafc.uscourts.gov/pdf/chartfilings08.pdf (last visited Mar. 3, 2010).

4 Coast Fed. Bank, FSB v. United States, 323 F.3d 1035 (Fed. Cir. 2003).

5 *Id.* at 1040–41. For a critique of this rule, see W. Stanfield Johnson, *Interpreting Government Contracts: Plain Meaning Precludes Extrinsic Evidence and Controls at the Federal Circuit*, 34 PUB. CONT. L.J. 635, 637–71 (2005); *see also* Ralph C. Nash, *The Plain Meaning Rule: Too Much of a Good Thing*, 20 NASH & CIBINIC REP. ¶ 57 (2006) (further discussing recent interpretations of the plain meaning rule).

6 McAbee Constr., Inc. v. United States, 97 F.3d 1431 (Fed. Cir. 1996).

7 *Id.* at 1435 (quoting Alaska Lumber & Pulp Co. v. Madigan, 2 F.3d 389, 392 (Fed. Cir. 1993); Trident Ctr. v. Conn. Gen. Life Ins. Co., 847 F.2d 564, 569 (9th Cir. 1988)) (citations omitted).

aid of extrinsic evidence such as the conduct of the parties in performing the contract or the negotiation history of the words being interpreted. Similarly, in *Metropolitan Area Transit, Inc. v. Nicholson*,[8] the Federal Circuit endorsed that procedure by agreeing that evidence of conduct of the parties could be used to arrive at a clear meaning of the contractual bargain because the trial court had determined that the words of the contract were ambiguous on their face.[9] On the other hand, other decisions of the court since *Coast Federal* are less conclusive on the application of the plain-meaning rule. Thus, in *TEG-Paradigm Environmental, Inc. v. United States*,[10] the court agreed that technical language had a "plain and ordinary meaning" and looked to evidence of course of dealing to *confirm* the plain meaning, but it rejected other extrinsic evidence because it was "unpersuasive."[11] Similarly, in *Thomas Creek Lumber & Log Co. v. Kempthorne*,[12] the court endorsed the plain-meaning rule while, at the same time, recognizing that in other cases it had looked to extrinsic evidence to determine whether an ambiguity existed. Thus, despite declaring that "[t]he conduct of the parties . . . is not necessary, or even relevant[,] to interpret an unambiguous contract," the court also admitted that it had "considered extrinsic evidence in order to discern the presence of an ambiguity in contract terms."[13] Ultimately, however, the *Thomas Creek* court held that "[b]ecause the disclaimer of warranty . . . was unambiguous, this court declines to examine the extrinsic evidence pointed to by the appellant."[14]

Assuming, in spite of these few indications of flexibility, that the court really has mandated the plain-meaning rule, the question is whether this is sound law. The rule seems to require the judge trying the case to determine whether the language of the contract is ambiguous without the aid of extrinsic evidence. Professors Williston and Corbin fought this out many years ago, with Professor Corbin prevailing in 1979 when the *Second Restatement of Contracts* was promulgated.[15] The comments to section 202 state, in relevant part:

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8 Metro. Area Transit, Inc. v. Nicholson, 463 F.3d 1256 (Fed. Cir. 2006).

9 *Id.* at 1260.

10 TEG-Paradigm Envtl., Inc. v. United States, 465 F.3d 1329 (Fed. Cir. 2006).

11 *Id.* at 1338, 1340; *see also* Ralph C. Nash, *Postscript: The Plain Meaning Rule*, 21 NASH & CIBINIC REP. ¶ 64 (2007) (further analyzing the court's rationale in *TEG-Paradigm* and the consequences of its holding).

12 Thomas Creek Lumber & Log Co. v. Kempthorne, 250 F. App'x 316 (Fed. Cir. 2007).

13 *Id.* at 318.

14 *Id.*

15 For a masterful description of the history of this controversy, see Judge Lawrence Block's decision in *Travelers Casualty & Surety Co. of America v. United States*, 75 Fed. Cl. 696,

> *b. Circumstances*. The meaning of words and other symbols commonly depends on their context; the meaning of other conduct is even more dependent on the circumstances. . . . When the parties have adopted a writing as a final expression of their agreement, interpretation is directed to the meaning of that writing in the light of the circumstances.
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> . . . .
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> *g. Course of performance*. The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning. But such "practical construction" is not conclusive of meaning. Conduct must be weighed in the light of the terms of the agreement and their possible meanings.[16]

Although this view has not been adopted by all courts, it would appear to reflect the trend in the law. The fourth (current) edition of *Williston on Contracts* summarizes the situation as follows:

> The change in emphasis from the objective standards of interpretation set forth in the original Restatement to the emphasis on the meaning attached by the parties in the Second Restatement reflects a continuing effort on the part of the drafters, though not yet embraced by most courts, to move away from strict formalism in contract law. The early lawyers dreamed of a lawyer's paradise where all words have a fixed precisely [sic] meaning, and where if the writer has been careful, a lawyer having a document referred to him may sit in his chair, inspect the text and answer questions without raising his eyes. However, the law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal.[17]

Williston on Contracts identifies three reasons for the emergence of this approach. First, "society has become infinitely more complex."[18] As a result, "[i]ndustrial and commercial relationships especially require subtle and intricate expression not to be embraced adequately in a single word provided by the scrivener's art."[19] Sec-

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705–07 (2007); *see also* Ralph C. Nash, *Postscript II: The Plain Meaning Rule*, 21 NASH & CIBINIC REP. ¶ 27 (2007).

16 RESTATEMENT (SECOND) OF CONTRACTS § 202 cmts. b, g (1979) (citations omitted).

17 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 31:1 (4th ed. 1999) (citations omitted).

18 *Id.*

19 *Id.*

ond, as a practical matter, the unfortunate reality of many contractual agreements is that they "are sometimes barely intelligible."[20] Third, and perhaps most convincing of all, is the recognition that "although it might be desirable that words have a fixed and ascertained meaning, inflexibly and rigidly attaching such a fixed meaning . . . may well result in an outcome at variance with the intent of the parties."[21]

Yet despite the clearly articulated rationale behind this shift, not all courts have embraced this approach to the plain-meaning rule:

> The extent to which "objective" contract interpretation has given way to a focus on the meaning attached to the words of a contract by the parties varies from jurisdiction to jurisdiction, and, particularly with respect to formal contracts and fully integrated written agreements; many courts still employ more traditional formulations. Thus, it cannot be asserted that a single, definite standard of contract interpretation prevails. However, it has been said that common sense and good faith are the principal characteristics underlying the interpretation or construction of contracts, and that the construction of a contract as to its operation and effect should depend less on artificial rules than on the application of good sense and sound equity to the object and spirit of the contract in a given case.[22]

The interesting aspect of this summary is that the treatise identifies the movement toward considering extrinsic evidence as an effort to ascertain "the meaning attached by the parties."[23] Implicitly, this is a recognition that the meaning arrived at by a trial judge may not be the same as the meaning of the parties to the contract.

This recognition appears to be the very reason that the Court of Claims was willing to consider all relevant evidence before arriving at a determination of the meaning of the words of the contract. In *Max Drill, Inc. v. United States*,[24] for example, the Court of Claims considered a dispute over whether a contractor was required to paint the wooden sashes of windowsills when the contract did not specifically call for this work. The Court of Claims observed that the appeals board had found extrinsic evidence indicating that the disputed performance had *not* been understood by the parties as being covered by

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20 *Id.*

21 *Id.*

22 *Id.* (citations omitted).

23 *Id.*

24 Max Drill, Inc. v. United States, 427 F.2d 1233 (Ct. Cl. 1970).

the contract.[25] Moreover, the controversy over this aspect of the performance did not arise until a full year after the contract was signed.[26] Yet despite this evidence, the appeals board had determined that the disputed work was unambiguously covered by the contract. In reversing the board's plain-meaning reading of the contract, the Court of Claims criticized the board for "disregarding evidence of the interpretation placed on the contract by the parties thereto for a substantial portion of its life."[27] In explaining its conclusion, the court further stated:

> The interpretation of a contract by the parties to it *before the contract becomes the subject of controversy* is deemed by the courts to be of great, if not controlling weight. It is a canon of contract construction that the interpretation placed by the parties upon a contract during its performance is demonstrative of their intention.[28]

Similarly, in *Macke Co. v. United States*,[29] the Court of Claims held that it was "entirely justified" in considering extrinsic evidence of the parties' intentions to determine the meaning of the words of a contract.[30] In reaching this conclusion, the court stated:

> In this inquiry, the greatest help comes, not from the bare text of the original contract, but from external indications of the parties' joint understanding, contemporaneously and later, of what the contract imported. The case is an excellent specimen of the truism that how the parties act under the arrangement, before the advent of controversy, is often more revealing than the dry language of the written agreement by itself.[31]

It is not clear why the Federal Circuit abandoned this view of the Court of Claims. Perhaps this shift was motivated by distrust of testimony of witnesses many years after the dispute arose, but that does not explain the court's rejection of contemporaneous writings of the parties before or during contract performance. Perhaps it was an effort to reduce the length and complexity of trials involving interpretation issues, yet this does not seem to have been effective because most of the board and the Court of Federal Claims judges still appear to

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25 *Id.* at 1240.

26 *Id.*

27 *Id.*

28 *Id.* (emphasis added) (citations omitted).

29 Macke Co. v. United States, 467 F.2d 1323 (Ct. Cl. 1972).

30 *Id.* at 1325.

31 *Id.*

permit parties to bring in extrinsic evidence.[32] Perhaps the reason was simply the belief that such decisions can force or induce the contracting parties to be more careful in reading the contract before they sign it. Whatever the reason, the Federal Circuit seems to have traded one evil for another. Now trial courts are assaulted by plain-meaning interpretations that lawyers fabricate years after the dispute arose. Armed with dictionaries and thesauruses, a clever attorney can propound interpretations that never occurred to the parties at the time they entered into the contract.

A good example of this phenomenon is found in *SSA Marine, Inc. v. United States*,[33] where the court arrived at an implausible interpretation of badly drafted contract language while, at the same time, reciting the fact that the parties performed the contract following a different interpretation.[34]

In summary, the Court of Claims and Professor Corbin had it right. A judge should not arrive at his or her interpretation of the contract language without scrutinizing all of the actions and communications of the contracting parties before and after the contract's formation. After all, the goal of contract interpretation is to arrive at the interpretation of the parties to the contract—not the interpretation of the judge. Judges should not be deprived of tools that help to determine what the parties agreed to.

II. Contracting Authority of Government Employees

Another rule of the Federal Circuit that has disturbed practitioners (as well as law professors) is the strict rule regarding the authority of representatives of a contracting officer that the court adopted in *Winter v. Cath-dr/Balti Joint Venture*.[35] For over half a century, courts have recognized that the common-law agency doctrine of apparent authority does not apply to the government in its contractual dealings,[36] but the Court of Claims and the appeals boards fashioned a rule of implied authority to arrive at a fair result when a contracting officer appeared to allow a subordinate official to perform contractual acts.

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32 *See, e.g.*, Am. Ordnance LLC v. United States, 83 Fed. Cl. 559, 569–70 (2008) (examining extrinsic evidence when language of contract was deemed ambiguous).

33 SSA Marine, Inc. v. United States, 77 Fed. Cl. 662 (2007).

34 *Id.* at 671–72.

35 Winter v. Cath-dr/Balti Joint Venture, 497 F.3d 1339 (Fed. Cir. 2007). For my analysis of this decision, see Ralph C. Nash, *Contracting Officer Authority: A Strict Requirement*, 21 NASH & CIBINIC REP. ¶ 58 (2007).

36 This was clearly enunciated by the Supreme Court in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384–84 (1947).

Thus, implied authority was found when the government's project engineer induced the contractor to perform work not called for by the contract,[37] where the contracting officer sent an engineer to the contractor's plant to resolve a problem,[38] where the contracting officer sent an employee to discuss the contract work with prospective bidders,[39] and where government employees at the work site waived specification requirements.[40] Implied authority has also been found when Contracting Officer's Representatives ("COR") granted permission to perform extra work,[41] interpreted a vague specification,[42] ordered suspension of the work,[43] and made government property available to the contractor.[44] This is not to say that the Court of Claims or the appeals boards always found that unauthorized employees had contracting officer authority—to the contrary, there were at least as many instances where the court found no authority.[45] But the judges were free to analyze the facts and arrive at a just result, ruling for the contractor when the agency received the performance that it desired and the only impediment to recovery was the bare argument that the contractor should be paid nothing because the contracting officer had not completed the transaction.

The seemingly strict limitation on this flexibility is what shocked many of us when we read the *Winter* decision. In that case, the agency had included three clauses in the contract warning the contractor that the COR had no authority to make changes to the work, but the contracting officer permitted him to take full control of the administration of the contract.[46] This was accomplished by allowing the COR to run the preconstruction conference (although the contract required

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37 Chris Berg, Inc. v. United States, 455 F.2d 1037, 1045 (Ct. Cl. 1972); *see also* Harent, Inc., ASBCA No. 16206, 73-2 B.C.A. (CCH) ¶ 10,074 (May 18, 1973); Lillard's, ASBCA No. 6630, 61-1 B.C.A. (CCH) ¶ 3053 (May 19, 1961).

38 Ctr. Mfg. Co. v. United States, 392 F.2d 229, 236 (Ct. Cl. 1968); *see also* Dorr-Oliver, Inc., ENGBCA No. 3176, 73-2 B.C.A. (CCH) ¶ 10,286 (Sept. 6, 1973).

39 Sylvania Elec. Prods., Inc. v. United States, 458 F.2d 994, 1000, 1008 (Ct. Cl. 1972); Max Drill, Inc. v. United States, 427 F.2d 1233, 1238 (Ct. Cl. 1970).

40 Northbridge Elecs., Inc. v. United States, 175 Ct. Cl. 426, 439 (Ct. Cl. 1966); *see also* Martin Glisson, ASBCA No. 15748, 71-2 B.C.A. (CCH) ¶ 9017 (Apr. 15, 1966).

41 Diversified Marine Tech, Inc., DOTBCA No. 2455, 93-2 B.C.A. (CCH) ¶ 25,720 (Jan. 25, 1993) (finding implied authority because, as the government representative at the site, the COR was the most logical person to act).

42 MJW Enters., Inc., ENGBCA No. 5813, 93-1 B.C.A. (CCH) ¶ 25,405 (Sept. 15, 1992).

43 Farr Bros., ASBCA No. 42658, 92-2 B.C.A. (CCH) ¶ 24,991 (Apr. 15, 1992).

44 Hudson Contracting, Inc., ASBCA No. 41023, 94-1 B.C.A. (CCH) ¶ 26,466 (Oct. 27, 1993).

45 *See, e.g.*, People's Bank & Trust Co. v. United States, 7 Cl. Ct. 665, 668 (Cl. Ct. 1985).

46 Winter v. Cath-dr/Balti Joint Venture, 497 F.3d 1339, 1345–46 (Fed. Cir. 2007).

the contracting officer to hold the conference) where the contractor was told that the COR would handle all requests for equitable adjustment of the contract.[47] When the contractor inquired about the authority of the COR, the contracting officer replied in writing that he

> [s]erves as the Government Construction Manager on all assigned projects[, is] [r]esponsible for construction management and contract administration on assigned projects while providing quality assurance and technical engineering construction advice[, and] [p]rovides technical and administrative direction to resolve problems encountered during construction. A project manager analyzes and [i]nterprets contract drawings and specifications to determine the extent of Contractors' responsibility [and] [p]repares and/or coordinates correspondence, submittal reviews, estimates, and contract modifications in support to ensure a satisfactory and timely completion of projects.[48]

On the basis of this advice, the contractor followed the COR's direction to submit all problems on the job to him in the form of Requests for Information ("RFI") and performed the work in accordance with the instructions of the COR.[49] At the end of the contract, the contractor submitted thirty-seven RFIs that allegedly caused extra expense to the contracting officer, who reviewed them and wrote a final decision, ruling that the contractor was entitled to an equitable adjustment on twelve of them and that equitable adjustments for them should be negotiated with the COR.[50] While this appeared to indicate that the contracting officer was fully in accord with the procedure that had been followed, the agency refused to proceed further, forcing the contractor to file an appeal at the Armed Services Board of Contract Appeals ("Board"). When it appeared that the Board was going to rule that the government was bound by his decision, the contracting officer issued a second decision denying all of the contractor's claims.[51]

The Board found for the contractor on thirteen of the claims, holding that the COR "was not only the key government person with respect to performance, he had *express actual authority* to make any

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47 *Id.* at 1342.

48 *Id.*

49 *Id.* at 1342–43.

50 *Id.* at 1343.

51 *Id.*

changes that were necessary to resolve problems at the site."[52] The Federal Circuit reversed, holding that there had been a limited delegation of authority to the COR but that it did not include the authority to make contract modifications, stating:

> It is very clear . . . that the contracting officer's limited delegation of authority to the [COR] did not include the authority to make contract modifications, nor could it have. For one thing, such a delegation was prohibited by a Department of Defense regulation, which states that "[a] contracting officer's representative (COR) . . . [m]ay not be delegated authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract." Indeed, this express limitation on the COR's authority was incorporated into a clause of the contract itself, which, likewise, states that "[t]he COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract."[53]

The court also addressed whether there could have been implied authority in the COR to modify the contract. Despite conceding that the question of implied authority was a "much closer case" because the Navy had issued directives indicating that the COR *did* have the authority to modify the contract,[54] the court nevertheless rejected this implied-authority argument, stating:

> The problem is that these Navy directives contradicted the clear language of the contract and it is the contract which governs. The law and the unambiguous contract terms compel the result that we reach.
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> Authority to bind the government may be implied when it is an integral part of the duties assigned to the particular government employee. In *Landau*, we held that a government employee possessing both the authority to ensure that a contractor acquired the raw materials needed to fulfill a contract and the authority to draw checks on the government bank account may have also had the "implicit authority" to guarantee payment to the contractor's supplier of raw materials. *Landau*, however, is inapposite to this case. Here, the [COR] could not have had the *implicit* authority to authorize

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52 Cath-dr/Balti Joint Venture, ASBCA No. 53581, 05-2 B.C.A. (CCH) ¶ 33,046 (Aug. 17, 2005) (emphasis added).

53 *Winter*, 497 F.3d at 1345 (quoting 48 C.F.R. § 201.602-2 (1998); 48 C.F.R. § 252.201-700 (1998)).

54 *Id.* at 1346.

> contract modifications because the contract language and the government regulation it incorporates by reference *explicitly* state that only the contracting officer had the authority to modify the contract. Modifying the contract could not be "considered to be an integral part of [the COR project manager's] duties" when the contract explicitly and exclusively assigns this duty to the [contracting officer].[55]

The court thus denied that the COR had either express or implied authority to modify the contract. However, the court, with one of the three judges dissenting, remanded the case to the Board to determine if the contracting officer had ratified the actions of the COR.[56]

This decision appears to signal that the court will disregard the actions of a contracting officer in allowing other government employees to work out problems during the performance of a contract. Contractors have always known that they were at risk in working with a COR to achieve effective performance of the work,[57] but there has always been some slack in the law to accommodate those situations, like in *Winter*, where the contracting officer knowingly turned over the problem-solving function to another government employee. Now we must advise contractors that every issue that arises in the performance of a contract must immediately be brought to the attention of the contracting officer and that an order from the contracting officer must be received before solving the problem. In the current environment, where there are not enough contracting officers to accomplish the work and almost all contracting officers are remote from the site of the work, this will increase their workload with little gain in the effec-

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55 *Id.* (quoting H. Landau & Co. v. United States, 886 F.2d 322, 324 (Fed. Cir. 1989)) (citations omitted).

56 *Id.* at 1348.

57 *See* Constr. Equip. Lease Co. v. United States, 26 Cl. Ct. 341, 346–47 (Cl. Ct. 1992) (COR/Technical Project Officer had no authority to change contract in face of explicit language in appointment letter); Essen Mall Props. v. United States, 21 Cl. Ct. 430, 444–45 (Cl. Ct. 1990) (project manager acting as authorized representative had no authority to bind agency to contract); Elter S.A., ASBCA No. 52349, 01-2 B.C.A. (CCH) ¶ 31,547 (July 25, 2001) (government's construction representatives clearly had no authority to order changes); Cal. Consulting Eng'rs, ASBCA No. 50355, 98-2 B.C.A. (CCH) ¶ 29,995 (Sept. 4, 1998) (COR had no authority to order extra work); Toloff Constr., AGBCA No. 95-227-3, 96-1 B.C.A. (CCH) ¶ 28,156 (Jan. 30, 1996) (COR had no authority to order extra work); David W.E. Cabell, VABCA No. 3402, 93-2 B.C.A. (CCH) ¶ 25,598 (Nov. 17, 1992) (COR had no authority to interpret an unambiguous contract in a manner that leads to additional compensation); Carothers & Carothers Co., ENGBCA No. 4015, 88-3 B.C.A. (CCH) ¶ 21,162 (Sept. 27, 1988) (COR had no authority to issue major change).

tiveness of contract performance. *Winter* appears to be a triumph of form over substance.

III. The Role of Bad Faith in Deciding Contractor Claims

The court has caused considerable confusion as to the role of bad faith in deciding contractor claims for additional compensation because of government action or inaction and in protests of contract awards. This confusion seems to have been caused by the decision in *Am-Pro Protective Agency, Inc. v. United States*,[58] where the concept of bad faith migrated from cases involving termination for convenience to a case involving economic duress. In affirming a decision of the Court of Federal Claims that the contractor had no viable claim for economic duress, the Federal Circuit assumed that a contractor had to prove bad faith on the part of a government official in order to demonstrate such duress.[59] It then discussed the "presumption that government officials act in good faith"[60]—concluding that to overcome this presumption (i.e., to prove bad faith), the contractor had to prove by "clear and convincing evidence" that the government official had a "'specific intent to injure'" the contractor.[61]

The requirement for a contractor to prove bad faith in an economic duress claim does not appear to have taken hold. At least the next panel with an economic duress claim found for the contractor in *Rumsfeld v. Freedom NY, Inc.*[62] using the normal test of whether a wrongful act of the government coerced the contractor without requir-

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58 Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234 (Fed. Cir. 2002).

59 *Id.* at 1239.

60 *Id.* For a thorough analysis of the origins of this presumption, demonstrating that it is overstated, see *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 757–69 (2005).

61 *Am-Pro*, 281 F.3d at 1239–40 (quoting Kalvar Corp. v. United States, 543 F.2d 1298, 1302 (Ct. Cl. 1976)). The other cases cited by *Am-Pro* for the "specific intent to injure" standard are both termination-for-convenience cases. *See id.* at 1240 (citing Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578, 1581 (Fed. Cir. 1995); Torncello v. United States, 681 F.2d 756, 770 (Ct. Cl. 1982)). The *Am-Pro* court also cited other cases not involving termination for convenience with different enunciations of what had to be proved to overcome the presumption of good faith. *Id.* (citing Librach v. United States, 147 Ct. Cl. 605, 614 (Ct. Cl. 1959) (evaluating whether government conduct was "actuated by animus toward" the contractors); Knotts v. United States, 121 F. Supp. 630, 636 (Ct. Cl. 1954) (finding employee's dismissal to be part of a proven "conspiracy . . . to get rid of" employee); Gadsden v. United States, 78 F. Supp. 126, 127 (Ct. Cl. 1948) (asking whether discharge of employee was "motivated alone by malice"); Struck Constr. Co. v. United States, 96 Ct. Cl. 186, 222 (Ct. Cl. 1942) (determining government conduct to be "designedly oppressive")).

62 Rumsfeld v. Freedom NY, Inc., 329 F.3d 1320 (Fed. Cir. 2003); *see also* N. Star Steel Co. v. United States, 477 F.3d 1324 (Fed. Cir. 2007) (following the *Freedom NY* formulation for finding economic duress).

ing proof of bad faith.[63] The duress was found in the withholding of a progress payment for the purpose of forcing the contractor to sign a disadvantageous contract modification, which the court found was either "an unjustifiable breach of the contract's express terms" or "a breach of the duty of good faith and fair dealing."[64]

In contrast, the requirement to prove bad faith by demonstrating a "specific intent to injure" has been regularly argued by the government in cases involving an asserted breach of the duty of good faith and fair dealing.[65] This argument has some attractiveness because of the way the *Second Restatement of Contracts* equates lack of good faith with bad faith in its discussion of this implied duty:

> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.[66]

The judges on the Court of Federal Claims have addressed this government argument in a large number of recent cases and, while believing that they have to deal with *Am-Pro*, have generally taken a balanced view of the situation. In *Information Systems & Networks, Corp. v. United States*,[67] for example, the court acknowledged that because the duty to act in good faith is an implied term in every contract, "a party may breach a contract by acting in bad faith."[68] However, the court reverted to the traditional formulation of the duty of good faith by advising that parties must abide by covenants requiring them "not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the

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63 *Freedom NY*, 329 F.3d at 1329–31.

64 *Id.* at 1331.

65 *See, e.g.*, San Carlos Irrigation & Drainage Dist. v. United States, 84 Fed. Cl. 786, 803 (2008).

66 RESTATEMENT (SECOND) OF CONTRACTS § 205, cmt. d (1979).

67 Info. Sys. & Networks v. United States, 81 Fed. Cl. 740 (2008).

68 *Id.* at 750 (internal quotation marks omitted) (quoting Link v. Dep't of the Treasury, 51 F.3d 1577, 1582 (Fed. Cir. 1995)).

fruits of the contract."[69] It then stated that such interference includes "sharp dealing," which Judge Posner defines as taking "deliberate advantage of an oversight by your contract partner concerning his rights under the contract."[70]

The court then attempted to soften the bad faith standard, stating:

> When a contractor alleges bad faith, in order to overcome the presumption of good faith [on behalf of the government], the proof must be almost irrefragable. Translated into more common parlance, "well nigh irrefragable proof" has been described as "clear and convincing evidence." In the cases where the court has considered allegations of bad faith, the necessary "irrefragable proof" has been equated with evidence of some specific intent to injure the plaintiff. Courts have found bad faith when confronted by a course of government conduct that was "designedly oppressive," or that "initiated a conspiracy" to "get rid" of a contractor. As these cases illustrate, the irrefragable proof standard, though daunting, is not intended to be impenetrable, that is, it does not insulate government action from any review by courts.[71]

Other judges have dealt with the issue more directly, stating that there is no requirement to prove bad faith in order to show that the government breached its duty of good faith and fair dealing.[72]

On the other hand, some judges have cited *Am-Pro* for the proposition that to prove breach of the implied duty of good faith and fair dealing, a contractor must prove that the government acted in bad faith with the specific intent to harm the contractor.[73] Interestingly, some of these cases also go on to recognize the traditional Court of

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69 *Id.*

70 Mkt. St. Assocs. L.P. v. Frey, 941 F.2d 588, 594 (7th Cir. 1991).

71 *Info. Sys. & Networks*, 81 Fed. Cl. at 751 (citations omitted). The court ultimately ruled against the contractor because it had no proof of specific intent to harm when the government allegedly induced the contractor to perform work before it was ordered by a contracting officer. *Id.* at 751–52. Other cases propound similar formulations that recognize proof other than specific intent to harm. *See* Keeter Trading Co. v. United States, 85 Fed. Cl. 613 (2009) (alleged bad faith termination for default); Bannum, Inc. v. United States, 80 Fed. Cl. 239 (2008) (alleged failure to cooperate).

72 *See, e.g.*, Kenney Orthopedic, LLC v. United States, 88 Fed. Cl. 688 (2009); Rivera Agredano v. United States, 70 Fed. Cl. 564 (2006); *see also* Ralph C. Nash, *The Government's Duty of Good Faith and Fair Dealing: Proving a Breach*, 23 NASH & CIBINIC REP. ¶ 66 (2009).

73 The most drastic adoption of this reasoning is in *Southern Comfort Builders, Inc. v. United States*, 67 Fed. Cl. 124, 153–55 (2005), where the court rejected a contention that the government failed to negotiate in good faith. The court applied similar reasoning in *System Fuels, Inc. v. United States*, 66 Fed. Cl. 722, 735 (2005).

Claims cases granting relief for failure to cooperate without any proof of malice or intent.[74]

Judge Victor Wolski has stated in a straightforward way that the duty of cooperation and noninterference has nothing to do with bad faith, the intent to harm, or malice. Judge Wolski's opinion in *Tecom, Inc. v. United States*[75] is instructive in this regard:

> [I]t is clear, particularly when the specific aspects of the duties to cooperate and not to hinder are at issue, that proof of fraud, or quasi-criminal wrongdoing, or even bad intent are not required. Breaches of the implied duty to cooperate have been found when a contracting officer responded to a contractor's requests in an evasive or untimely manner and when liquidated damages were erroneously imposed on a contractor, which substantially impeded [the contractor's] ability to perform during a critical catch-up period. Breach of the duty to cooperate is assessed under a reasonableness standard, and depends upon the particular contract, its context, and its surrounding circumstances.
>
> Similarly, under the implied duty not to hinder performance, Government actions that are unreasonable under the circumstances constitute a breach. This duty has been expressed as the obligation "not to willfully *or negligently* interfere with the contractor in the performance of his contract." The duty has been found breached in such circumstances as when the Government negligently made errors in placing stakes and failed to make adequate advance planning on a project, overzealously inspected work, made untimely changes to contract specifications, and when delay occurs because of excessive supervision or control over the contractor.[76]

Unfortunately, only a few decisions have followed this correct reading of the law, seeking only to determine whether the government's actions unreasonably injured the contractor.[77] These decisions

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74 *See, e.g.*, Renda Marine, Inc. v. United States, 66 Fed. Cl. 639, 649 (2005) (citing S.A. Healy Co. v. United States, 576 F.2d 299, 306 (Ct. Cl. 1978); Peter Kiewit Sons' Co. v. United States, 151 F. Supp. 726, 731 (Ct. Cl. 1957)) (alleged lack of cooperation); Short Bros., PLC v. United States, 65 Fed. Cl. 695, 799 (2005) (citing Lewis-Nicholson, Inc. v. United States, 550 F.2d 26, 32 (Ct. Cl. 1977)) (alleged interference).

75 Tecom, Inc. v. United States, 66 Fed. Cl. 736, 770 (2005).

76 *Id.* (quoting Peter Kiewit Sons' Co. v. United States, 151 F. Supp. 726, 731 (Ct. Cl. 1957)) (citations omitted).

77 *See* Moreland Corp. v. United States, 76 Fed. Cl. 268, 291 (2007) (not granting equitable adjustment after determining government was liable for breach of duty); Die Casters Int'l, Inc. v. United States, 73 Fed. Cl. 174, 196 (2006) (reasonable conduct of government in not funding

do not attempt to deal with the confusing decisional law being addressed in *Information Systems* but merely follow the established logic in cases on the duty of cooperation or not to hinder that have been in government contract law since at least 1876.[78]

The government has also argued that the intent-to-harm standard should be applied to cases involving the implied duty to disclose information (the "superior knowledge" rule). Fortunately, the Court of Federal Claims has recognized that this is stretching the rule too far.[79]

The bad faith requirement has also been applied when a protester alleges that a government official was biased. For example, in *Galen Medical Associates, Inc. v. United States*,[80] the court held that to prove bias a protester had to prove bad faith:

> [W]hen a bidder alleges bad faith, in order to overcome the presumption of good faith [on behalf of the government], the proof must be almost irrefragable. "Almost irrefragable proof" amounts to "clear and convincing evidence." In the cases where the court has considered allegations of bad faith, the necessary "irrefragable proof" has been equated with evidence of some specific intent to injure the plaintiff.[81]

Several Court of Federal Claims decisions have imported this bad faith logic into protests.[82] These decisions have dealt with a number of

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overrun not breach of duty); *see also* Ralph C. Nash, *Nondisclosure of Superior Knowledge: The Scope of the Government's Duty*, 20 NASH & CIBINIC REP. ¶ 1 (2006) (further discussing specific intent to injure the contractor in a claim based on nondisclosure of superior knowledge).

78 *See, e.g.*, United States v. Smith, 94 U.S. 214 (1876) (holding that the government has an implied duty of cooperation with no discussion of need to prove malice or intent to harm).

79 *See* Bannum, Inc. v. United States, 80 Fed. Cl. 239, 247 (2008) (stating that a "superior knowledge" claim will lie as long as "the government was aware the contractor had no knowledge" of the undisclosed information); Rivera Agredano v. United States, 70 Fed. Cl. 564, 574–75 (2006) (holding that the government may be liable to its contracting partner under the "superior knowledge doctrine" even absent a showing of intent to injure); *see also* Nash, *supra* note 77 (containing my dialogue with Steven Feldman of the Corps of Engineers).

80 Galen Med. Assocs., Inc. v. United States, 369 F.3d 1324 (Fed. Cir. 2004).

81 *Id.* at 1330 (citations omitted).

82 *See* McKing Consulting Corp. v. United States, 78 Fed. Cl. 715, 726–27 (2007) (no bad faith to prove alleged conspiracy to structure procurement to disadvantage protester); Textron, Inc. v. United States, 74 Fed. Cl. 277, 293 (2006) (no sufficient proof of bad faith to support allegation that procurement officials disclosed sensitive government information to competitors); United Enter. & Assocs. v. United States, 70 Fed. Cl. 1, 27 (2006) (no sufficient proof of bad faith in making determination of nonresponsibility); Avtel Servs. Inc. v. United States, 70 Fed. Cl. 173, 213–14 (2005) (no proof of bad faith to show bias after agency removed technical evaluators that appeared to be biased); Dismas Charities, Inc. v. United States, 61 Fed. Cl. 191, 201–03 (2004) (no proof that rescoring of proposals was done in bad faith to injure protester); Info. Tech. & Applications Corp. v. United States, 51 Fed. Cl. 340, 348 (2001) (no proof of specific intent to harm protester in not conducting discussions).

different grounds for protest, but the discussion of bad faith has almost always been unnecessary to resolve the asserted improprieties of the government. They are just one more example of the pervasive impact of *Am-Pro*.

The Federal Circuit, perhaps inadvertently, has caused a great deal of confusion with its language in *Am-Pro*. It would be very helpful if the court would clear the air in this area by following the lead of Judge Wolski in stating that cases involving the implied duties of good faith and fair dealing and of disclosing superior knowledge have nothing to do with the motive of the government employees in following the course of action that injured the contractor and that there is no presumption that the actions taken were reasonable. A decision in the protest arena would also be helpful if it made it clear that there is no requirement to prove bad faith in order to show that a government official was biased or acted improperly in conducting a source selection.

IV. Accounting Disputes

One of the pervasive aspects of government contracting is the complex accounting regime that has been constructed to ensure that the government is not charged with excessive costs by its contractors. Part 31 of the Federal Acquisition Regulation ("FAR") has elaborate guidance on what costs are unallowable,[83] and these "cost principles" are incorporated into many contracts by reference.[84] Major contractors are also subject to the Cost Accounting Standards ("CAS") in determining which costs are allocable to their contracts.[85] The Federal Circuit is regularly faced with litigation regarding these accounting issues and has issued some puzzling decisions in this area.

One of the major issues that has created difficulty is the distinction between allowable costs and allocable costs. The guidance in the cost principles on allowable costs establishes several tests that a cost must meet in order to be allowable: reasonableness, allocability, the terms of a contract, and limitations set forth in the FAR.[86] Aside from allocability, these tests deal with the nature of the cost itself—with the

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83 Federal Acquisition Regulations System, 48 C.F.R. pt. 31 (2008).

84 *See, e.g.*, 48 C.F.R. § 52.216-7 (2008) (the "Allowable Cost and Payment" clause used in cost-reimbursement contracts); *id.* § 52.216-16 (the "Incentive Price Revision—Firm Target" clause used in fixed-price-incentive contracts).

85 These standards are promulgated by the Cost Accounting Standards Board in 48 C.F.R. ch. 99. Direction on their use in contracts is contained in 48 C.F.R. pt. 30.

86 48 C.F.R. § 31.201-2(a).

limitations in the cost principles reflecting policy decisions by the FAR Council that the government should not reimburse a contractor for certain types of costs.[87] The guidance in the CAS on allocability of costs deals with the proper methods of charging costs to different work of a contractor—in most cases between different contracts. These allocability rules are operative without regard to whether a cost is allowable or unallowable.[88]

The Federal Circuit created considerable consternation in the practicing bar by its decision in *Caldera v. Northrop Worldwide Aircraft Services, Inc.*[89] There it held that for a cost to be allocable to a government contract, it had to benefit the government[90]—ignoring the FAR guidance that a cost could be allocable if it was "necessary to the overall operation of the business."[91] The court seemed to grasp this principle in *Boeing North American, Inc. v. Roche*, although it did not explicitly state that *Northrop Worldwide* contained incorrect analysis.[92]

With this background, the court's treatment of accounting issues in *Rumsfeld v. United Technologies Corp.*[93] created additional consternation.[94] The issue in that case was whether "collaboration agreements" with foreign companies were the same as subcontracts, requiring the amounts paid to these companies to be included in the

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87 The most striking examples are interest on borrowed funds, 48 C.F.R. § 31.205-20, contributions and donations, 48 C.F.R § 31.205-8, most entertainment costs, 48 C.F.R. § 31.205-14, and most lobbying and political activity costs, 48 C.F.R. § 31.205-22. The cost principles also contain substantial guidance on the types of costs that fit into the categories of allowable costs.

88 The Office of Federal Procurement Policy clarified this point in a release, stating: "While the Board has exclusive authority for establishing Standards governing the measurement, assignment and allocation of costs, it does not determine the allowability of categories or individual items of cost. Allowability is a procurement concept affecting contract price and in most cases is established in regulatory or contractual provisions." Cost Accounting Standards Board; Statement of Objectives, Policies and Concepts, 57 Fed. Reg. 31,036, 31,036 (July 13, 1992).

89 Caldera v. Northrop Worldwide Aircraft Servs., Inc., 192 F.3d 962 (Fed. Cir. 1999); *see* John Cibinic, *Allowability of Costs: Struggling with the Concept of "Benefit" to the Contract*, 13 Nash & Cibinic Rep. ¶ 62 (1999) (criticizing the *Caldera* decision); *see also* Scott McCaleb, *Searching for a Needle in a Haystack: Conflicts in the Federal Circuit's Government Contracts Jurisprudence*, 11 Fed. Cir. B.J. 705, 713 (2001).

90 *See Caldera*, 192 F.3d at 972.

91 48 C.F.R. § 31.201-4.

92 Boeing N. Am., Inc. v. Roche, 298 F.3d 1274, 1284 (Fed. Cir. 2002); *see* John Cibinic, *Allocability and Allowability of Costs: Vive La Différence*, 16 Nash & Cibinic Rep. ¶ 29 (2002); John Cibinic, *Postscript: Allocability and Allowability of Costs*, 16 Nash & Cibinic Rep. ¶ 45 (2002).

93 Rumsfeld v. United Techs. Corp., 315 F.3d 1361 (Fed. Cir. 2003).

94 See John Cibinic, *Defining "Cost": Using Smoke and Mirrors*, 17 Nash & Cibinic Rep. ¶ 15 (2003).

cost base for the computation of the general and administrative rate to be charged to government contracts.[95] Basically, these agreements required the companies to share the profits and risks of selling the jet engines.[96] Thus, the critical issue was the meaning of the word "costs."[97] Since this was an allocability issue, it was clear that the CAS governed, but they did not define the word.[98] As a result, the Armed Services Board of Appeals decided that generally accepted accounting principles ("GAAP") were the best source to determine the meaning of "costs."[99] It heard testimony from six accounting and economics experts on the CAS and GAAP and decided that, since the GAAP called for an analysis of "the economic substance of business relationships" in determining such issues, the substance of these collaboration agreements was that they were more like joint ventures or consignments than subcontracts—hence the amounts paid were not costs.[100]

The Federal Circuit reversed, holding that this was a matter of interpreting the CAS, which was a question of law to be decided by the court:

> The views of the self-proclaimed CAS experts, including professors of economics and accounting, a former employee of the CAS Board, and a government contracts accounting consultant, as to the proper interpretation of those regulations is simply irrelevant to our interpretive task; such evidence should not be received, much less considered, by the Board on the interpretive issue. That interpretive issue is to be approached like other legal issues—based on briefing and argument by the affected parties.[101]

The court, noting that the CAS did not contain a definition of costs, used several standard dictionaries to reach a definition of the word.[102] Having concluded that its definition of "costs" was correct, it rejected the use of GAAP and ruled for the government.[103] It further concluded that GAAP did not really require the analysis of the economic substance of the agreement to determine what was a cost.[104]

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95 *United Techs. Corp.*, 315 F.3d at 1364, 1368.

96 *Id.* at 1364–65.

97 *Id.* at 1369.

98 *Id.*

99 *Id.* at 1368.

100 *Id.* at 1367–68.

101 *Id.* at 1369.

102 *Id.* at 1370.

103 *Id.* at 1372–73.

104 *Id.* at 1374–75.

This was a close issue that could have been decided either way, and the court has the last say. What is disturbing is the court's rejection of the testimony of accounting experts on the interpretation of the CAS and accounting requirements in general. The CAS are written by accountants, and any observer can quickly see that they contain a considerable amount of accounting language. Thus, one would think that judges would welcome the help of the professionals who write and interpret this language in determining the meaning of the terms used. The court appears to be willing to accept this help in determining the meaning of GAAP but not the CAS. It is difficult to determine the rationale for this distinction. What seems clear is that the court wants judges to use dictionaries and other published aids to find the meaning of words on their own without the aid of expert testimony.

V. Unabsorbed Overhead Damages

A different type of accounting issue is found in the Federal Circuit's treatment of the recovery of "unabsorbed overhead" in the form of home-office expenses that construction contractors cannot charge to the period anticipated because the government has delayed the work. Whether delayed absorption of such costs causes increased costs of a contractor could be readily determined by an accounting analysis, but the court has decided that the only method of computing such costs is the use of the *Eichleay* formula.[105] Perhaps in recognition of the fact that this results in a windfall for many contractors, the court has devised a rule that the contractor must be "on standby" in order to recover.[106]

In *P.J. Dick Inc. v. Principi*,[107] the court explained that this standby requirement contained three elements. First, the contractor must demonstrate "that the government-caused delay was not only substantial but was of an indefinite duration."[108] Thus, if the government suspends work temporarily but gives the contractor a set date on which the work will resume, then the contractor cannot be "on

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105 Wickham Contracting Co. v. Fischer, 12 F.3d 1574, 1580–81 (Fed. Cir. 1994). The formula is derived from *Eichleay Corp.*, ASBCA No. 5183, 60-2 B.C.A. (CCH) ¶ 2688 (July 29, 1960), and results in the calculation of the daily amount that should be charged to the government for each day of its delays.

106 *See* Ralph C. Nash, *Postscript: Unabsorbed Overhead and the "*Eichleay*" Formula*, 17 NASH & CIBINIC REP. ¶ 33 (2003) (discussing the Federal Circuit's articulation of the standby requirement in suits for the recovery of unabsorbed overhead damages).

107 P.J. Dick Inc. v. Principi, 324 F.3d 1364 (Fed. Cir. 2003).

108 *Id.* at 1371.

standby."[109] Second, the contractor has the burden of showing "that during that delay it was required to be ready to resume work on the contract, at full speed as well as immediately."[110] Accordingly, a contractor cannot be on standby during a delay if the government allows it reasonable time to remobilize its workforce once work resumes.[111] And third, the contractor must prove the "effective suspension of much, if not all, of the work on the contract."[112]

These requirements permit agencies to delay contractors for long periods of time without compensation for unabsorbed home-office expenses by merely stating that a delay is for a fixed period of time or permitting remobilization after the delay is lifted. This rule will do little harm to large contractors where recovery of *Eichleay* damages was always a windfall, but it can seriously injure a small company that has no remaining bonding capacity and, hence, no ability to seek work to compensate for the time lost by the delay.[113] The problem is that the standby requirement is a pure fiction of the court with no connection to the facts on the ground.

The key issue with regard to the recovery of home-office overhead is, and always has been, whether a contractor can take on additional work to compensate for the delayed compensation on a contract that has been significantly delayed. Large companies never faced this issue because they have had the resources to compete for any job that looked promising—whether or not they were in a delay status on one or more contracts at the time. But the ability of small companies to take on additional work is almost always limited by bonding capacity and other factors such as the availability of key employees.[114] Formulating a rule that ignores this reality and threatens to damage these companies is neither good policy nor good law.

VI. Interest on Claims

When the Contract Disputes Act[115] was enacted in 1978, Congress included a seemingly clear statement concerning a contractor's right to be paid imputed interest on claims:

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109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.* (citations omitted).

113 Nash, *supra* note 106, ¶ 33.

114 *Id.*

115 41 U.S.C. §§ 601–613 (2006).

> Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury . . . .[116]

However, in *Richlin Security Service Co. v. Chertoff*,[117] the Federal Circuit held that an appeals board decision holding that a contract should be reformed to state the greater amount owed to Richlin because it owed back wages to its employees did not establish an "amount found due" to the contractor because the contractor had agreed to allow the government to pay the money into an escrow fund.[118] The court therefore went to the legislative history of the Act to determine the meaning of the words "amount found due" and found that interest should be paid only when the contractor had incurred a cost, stating:

> We agree that Richlin was obligated by the contract to pay employees the amount required by the Service Contracts Act, and to pay related tax amounts to the appropriate tax authorities. If Richlin had advanced those amounts to the employees and the tax authorities pursuant to the contract, Richlin might have been entitled to interest. But that is not what occurred. Richlin did not advance a penny of its own money, and indeed claimed that it lacked the resources to make such advances. Rather, the government paid the amounts awarded into an escrow account, and those funds were used to pay the employees and the tax authorities. On the basis of these facts, the Board denied Richlin's request for interest on the award because Richlin did not actually pay any of the back wages out of pocket.
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> We agree with the Board's conclusion.[119]

The legislative history relied on was a Senate report stating:

> The rights of Government contractors who prevail upon claims against the Government are unique since they have been required by language of the contract . . . to perform the work directed by the Government without stopping to litigate. . . . Since *the contractor has been compelled to perform*

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116 *Id.* § 611.

117 Richlin Sec. Serv. Co. v. Chertoff, 437 F.3d 1296 (Fed. Cir. 2006); *see also* Ralph C. Nash, *Interest on Claims: A New Wrinkle*, 20 NASH & CIBINIC REP. ¶ 13 (2006).

118 *Richlin*, 437 F.3d at 1301–02.

119 *Id.* at 1300–01 (citations omitted).

> *the work with its own money*—in the total absence of contract payments or progress payments—there can be no equitable adjustment to the contractor until the contractor recovers the entire cost of the additional work. *The cost of money to finance this additional work while pursuing the administrative remedy, normally called interest, is a legitimate cost of performing the additional work.*[120]

Curiously, the court had ruled in two prior decisions that the Act entitled a contractor to interest from the date a claim was submitted to the contracting officer even though the contractor had not incurred costs until later.[121] It did not, however, find those rulings relevant to its conclusion in *Richlin*.

The most puzzling aspect of *Richlin* is the rejection of the plain-meaning rule and the resort to legislative history to determine the meaning of clear language. There seems to be a well-established principle that the plain-meaning rule is especially important when interpreting statutes because the legislative history is frequently misleading or self-serving (to the members who wrote it).[122] The Federal Circuit espoused this very view in *Norfolk Dredging Co. v. United States*[123]:

> Statutory interpretation begins with the language of the statute. . . . If the language is clear and fits the case, the plain meaning of the statute generally will be regarded as conclusive. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[124]

Yet the court in *Richlin* made no attempt to ascertain the plain meaning of the statute—no dictionaries or thesauruses—but went directly to the dubious legislative history to deprive the contractor of interest on a claim that had taken ten years to resolve. This seems to be completely contrary to the rules used to interpret contract language and regulations discussed earlier.

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120 *Id.* at 1301 (quoting S. REP. NO. 95-118, at 32 (1978)) (emphasis added).

121 Caldera v. J.S. Alberici Constr. Co., 153 F.3d 1381, 1383 (Fed. Cir. 1998); Servidone Constr. Corp. v. United States, 931 F.2d 860, 862 (Fed. Cir. 1991).

122 *See, e.g.*, Garcia v. United States, 469 U.S. 70, 75 (1984) ("[O]nly the most extraordinary showing of contrary intentions from [the legislative history] data would justify a limitation on the 'plain meaning' rule.").

123 Norfolk Dredging Co. v. United States, 375 F.3d 1106 (Fed. Cir. 2004).

124 *Id.* at 1110 (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)) (citations omitted).

VII. Tucker Act Jurisdiction

The most recent puzzler is *Rick's Mushroom Service, Inc. v. United* States,[125] where the court held that it had no jurisdiction under the Tucker Act[126] over a claimed government breach of a cooperative agreement. Despite recognizing that the cooperative agreement was a type of contract, the court stated:

> The government's consent to suit under the Tucker Act does not extend to every contract. The Tucker Act is merely a jurisdictional statute and does not create a substantive cause of action. Therefore, the plaintiff must look beyond the Tucker Act to identify a substantive source of law that creates the right to recovery of money damages against the United States.[127]

This paragraph contradicts the time-honored rule that the court's contract jurisdiction under the Tucker Act stands on its own because the Act itself permits the award of damages for breach of contract. This is clear from two cases cited by the court in *Rick's Mushroom Service*. In the first of these cases, *United States v. Testan*,[128] the Supreme Court stated:

> [T]he Tucker Act is merely jurisdictional, and grant of a right of action must be made with specificity. The respondents *do not rest their claims upon a contract*; neither do they seek the return of money paid by them to the Government. It follows that the asserted entitlement to money damages depends upon whether any federal statute can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.[129]

Several years later, the Court more fully explained this proposition in *United States v. Mitchell*[130]:

> The existence of a waiver [of sovereign immunity from suit] is readily apparent in claims founded upon any express or implied contract with the United States. *The Court of Claims' jurisdiction over contract claims against the Government has long been recognized*, and Government liability in

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125 Rick's Mushroom Serv., Inc. v. United States, 521 F.3d 1338, 1344 (Fed. Cir. 2008); *see also* Ralph C. Nash, *Does the Implied Warranty of Specifications Attach to Cooperative Agreements?: A Surprising Answer*, 22 NASH & CIBINIC REP. ¶ 71 (2008).

126 28 U.S.C. § 1491(a)(1) (2006).

127 *Rick's Mushroom Serv.*, 521 F.3d at 1343 (citations omitted).

128 United States v. Testan, 424 U.S. 392 (1976).

129 *Id.* at 400 (emphasis added) (citation omitted).

130 United States v. Mitchell, 463 U.S. 206 (1983).

> contract is viewed as perhaps the widest and most unequivocal waiver of federal immunity from suit. The source of consent for such suits unmistakably lies in the Tucker Act. . . . The same is true for claims founded upon executive regulations. Indeed, the Act makes absolutely no distinction between claims founded upon contracts and claims founded upon other specified sources of law.[131]

The statement in this quotation is so clear that it is somewhat remarkable that the Federal Circuit can cite it for the opposite proposition.

It is certainly true that the Court of Claims made an exception from this general rule in *Kania v. United States*.[132] However, *Kania* was an unusual contract case arising out of the conduct of the government in the criminal law area—specifically a claim that the government had agreed not to prosecute the plaintiff if he testified truthfully in a criminal trial.[133] The court concluded that this was not the type of contract covered by the Tucker Act, stating:

> The contract liability which is enforceable under the Tucker Act consent to suit does not extend to every agreement, understanding, or compact which can semantically be stated in terms of offer and acceptance or meeting of minds. The Congress undoubtedly had in mind as the principal class of contract case in which it consented to be sued, the instances where the sovereign steps off the throne and engages in purchase and sale of goods, lands, and services, transactions such as private parties, individuals or corporations also engage in among themselves. If the government insists on making itself the sole judge of law and fact in all disputes between its contractors and itself, the prices and terms it pays or receives will compare unfavorably with those that obtain in purely private transaction.
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> . . . .
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> . . . It would be reasonable to expect that the court which is to police and, in appropriate cases enforce, agreements for plea bargains, or witness protection, or for immunity, will be the courts in which are or will be pending the criminal prosecutions to which the agreements relate. If this means that money damages for breach are nowhere available, this is the case in any claim area where the Congress has not seen fit to grant its consent to be sued. It is particularly

131 *Id.* at 215–16 (emphasis added) (citations omitted).

132 Kania v. United States, 650 F.2d 264 (Ct. Cl. 1981).

133 *Id.* at 266.

> unreasonable to suppose that Congress in enacting the Tucker Act intended for this court to intervene in the delicate and sensitive business of conducting criminal trials.[134]

Although the Federal Circuit followed this unique treatment of contracts connected with criminal prosecution in *Sanders v. United States*,[135] it also made clear that this approach did not apply to normal contracts:

> It is no doubt also true that in the area of government contracts, as with private agreements, there is a presumption in the civil context that a damages remedy will be available upon the breach of an agreement. Indeed, as a plurality of the Supreme Court noted in *United States v. Winstar Corp.*, "damages are always the default remedy for breach of contract." . . . [A] different rule obtains where the agreement is entirely concerned with the conduct of the parties in a criminal case. [The *Kania*] decision of one of our predecessor courts, the Court of Claims, has previously established that in those circumstances a damages remedy is not ordinarily available.[136]

Clearly, *Rick's Mushroom Service* departs from this reasoning.

Apparently, the court in *Rick's Mushroom Service* must have concluded that a cooperative agreement was more like a criminal law agreement than a normal contract made by the government in its contractual capacity. However, the decision is devoid of any reasoning as to why this is so. Thus, it is difficult to explain the decision except to conclude that it is based on fallacious reasoning.

VIII. An Explanation?

While a search for an explanation of why the Federal Circuit has reached these controversial positions is highly speculative, no appraisal of the court's work in the contracting arena would be complete without it. There seem to be three possible factors moving the Federal Circuit in the direction it has taken. The first is the court's attempt to impose strict rules on the law of government contracting. There seems to be a belief that there are no shades of gray in contracting—that the issues are either black or white. The problem is that the contracting process—in both commercial and government contracts—is not that way. Many of the most vexing problems swing

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134 *Id.* at 268–69.

135 Sanders v. United States, 252 F.3d 1329 (Fed Cir. 2001).

136 *Id.* at 1334–35 (quoting United States v. Winstar Corp., 518 U.S. 839, 885 (1996)).

on close analysis of the facts of an individual case and the legal rules applicable to those facts. This is particularly true with regard to contract interpretation and authority disputes. The dogmatic application of a strict legal rule in these situations—without a close analysis of the factual nuances—can lead to unfair results.

A second possible explanation of the Federal Circuit's direction is a mistrust of trial judges. The fashioning of strict legal rules appears to be taking discretion away from the judges on the Court of Federal Claims and the boards of contract appeals to assess the facts fully and seek a fair outcome. This trend can be seen in all of the areas discussed above—particularly in the accounting area demanding use of the *Eichleay* formula to the exclusion of accounting evidence, thereby depriving judges of the advice of experts in complex accounting matters. The reversals of carefully analyzed board decisions in *Winter* and *Rumsfeld* are striking in this regard. Yet the board judges are the most experienced judges in their field in the federal arena—with a requirement of five years of experience before appointment and having served, in most cases, for many years hearing only government contract disputes.[137] Similarly, the judges on the Court of Federal Claims are highly competent—albeit with less government contracts experience. Historically, all of these judges have demonstrated the ability to sift through complex facts and apply the law to arrive at a fair result. The Federal Circuit's efforts to restrict this endeavor seem misplaced.

A recent example of the lack of deference afforded to the Court of Federal Claims by the Federal Circuit can be seen in *Bell BCI Co. v. United States*,[138] where the Federal Circuit reversed a carefully analyzed decision of the Court of Federal Claims interpreting a release as not barring disruption claims. A dissenting judge deplored the failure of the other two judges to consider the findings of the trial judge, stating:

> This case is a compelling illustration of why appellate tribunals should give due weight to the attributes and benefits of the processes of trial, for such processes enable the trial judge to dig deeply into the events, to figure out what happened and what was intended, and to reach a just result. This is no less important in contract cases than in any other area of law, and no less important when the government is a

137 41 U.S.C. § 438(b)(1)(B) (2006).

138 Bell BCI Co. v. United States, 570 F.3d 1337 (Fed. Cir. 2009).

> party, for today government business affects a significant portion of the nation's commerce.[139]

A third possible explanation for the Federal Circuit's direction may be a desire to impose more rigorous standards on the people in the government and industry that draft and perform government contracts. There is little doubt that government contracting would be more effective if all of the participants in the process were more careful in the language that they use and the techniques they adopt to achieve satisfactory performance. There is little likelihood, however, that court decisions can make this happen. Government contracting is done by business-trained people, generally without legal training, who are pressed for time to get their immediate task accomplished. Thus, most contracts are signed without careful legal review, and the major contracts are so complex that even legal review is not likely to catch all of the glitches in the document. These same contracts are frequently performed under stressful conditions where the main focus is to get the job done. The people on both sides of the transaction generally try to follow the precise rules applicable to government procurement, but there are inevitable failures in this regard. The imposition of strict rules resulting in no recovery for work necessary to meet the government's needs on a contractor that works hard to perform the contract, such as in *Winter*, appears to that contractor to be punitive. The end result of harsh application of strict rules is that American industry regards the government contract as a high-risk venture. It is impossible to ascertain whether this leads to higher prices or more aggressive conduct in other ways, but the government certainly does not benefit from the view that industry should be exceedingly wary when it deals with the government.

Whatever the explanation, it seems clear that the Federal Circuit looks at its role differently than did the Court of Claims. It appears that the court does not seek to show the citizenry that the government deals fairly with it. If this is so, we are all losers.

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139 *Id.* at 1343 (Newman, J., dissenting); *see also* Ralph C. Nash, *Postscript V: The Plain Meaning Rule*, 23 NASH & CIBINIC REP. ¶ 49 (2009) (further discussing the Federal Circuit's lack of deference to plain-meaning decisions from the Court of Federal Claims).