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A Quarterly Publication of the Boards of Contract Appeals Bar Association, Inc.

The President's Column

Welcome to the BCA Bar Journal's first issue of 2016! The BCABA kicked off 2016 with a tremendously informative Trial Practice Seminar on February 9, 2016. BCABA Judicial Division Chair Judge Peter Pontzer and former BCABA president Don Yenovkian teamed with John Tobey, GSA, to bring together a great group of panelists including Owen S. Walker of Smith Pachter McWhorter, PLC; Heidi Osterhout, DOJ; Don Yenovkian, Flour Corporation; and Arthur Taylor, DCMA. The topic of this year's Seminar was Negotiating Settlement Discussions, and the panelists share their candid thoughts and views on a range of topics, including settlement tactics, effective negotiation techniques, and the factors they consider in weighing settlement offers.

Although each of the panelists agreed that the viability of various techniques and proposals discussed depends, in large part, upon the applicable facts and circumstances, they each provided great suggestions and helpful food for thought for those of us engaged in such negotiations.

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BCABA OFFICERS

PRESIDENT:
Erin Sheppard
Dentons US LLP
Washington, DC
Erin.sheppard@dentons.com

VICE PRESIDENT:
Katie Muldoon
Smith Pachter McWhorter PLC
Tysons Corner, VA
kmuldoon@smithpachter.com

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owenc@gao.gov

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Williams Mullen
Tysons Corner, VA
wwozniak@williamsmullen.com

Arthur Taylor
Defense Contract Management Agency
Chantilly, VA
arthur.taylor@dcma.mil

Skye Mathieson
Crowell & Moring LLP
Washington, DC
smathieson@crowell.com

Matthew Keller
Odin Feldman & Pittleman, PC
Reston, VA
Matthew.Keller@ofplaw.com

Hon. Harold (Chuck) Kullberg
Civilian Board of Contract Appeals
Washington, DC
harold.kullberg@cbca.gov

C. Scott Maravilla
FAA Office of Dispute Resolution
Washington, DC
cmaravilla@hotmail.com

Robert J. Preston II
Government Attorney
Alexandria, VA
rjpreston2@gmail.com

Heidi Osterhout
U.S. Dept. of Justice
Washington, DC
heidi.l.osterhout@usdoj.gov

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Arnold & Porter LLP
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kristen.ittig@aporter.com

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Deloitte Advisory
hkanzi@deloitte.com

Ben Kohr
Sikorsky Aircraft Corporation
ben.kohr@gmail.com

Steven Neeley
Husch Blackwell LLP
steve.neeley@huschblackwell.com

Joel Pratt
Dentons US LLP
Joel.pratt@dentons.com

Christine Roushdy
Vinson & Elkins LLP
croushdy@velaw.com

Deborah Norris Rodin
Dentons US LLP
Deborah.rodin@dentons.com

Sonia Tabriz
Arnold & Porter LLP
sonia.tabriz@aporter.com

Laura Semple
Smith Pachter McWhorter PLC
lsemple@smithpachter.com

Tara L. Ward
Wiley Rein LLP
tward@wileyrein.com

Oliya Zamaray
Rogers Joseph O'Donnell, P.C.
ozamaray@rjo.com

PRESIDENT'S COLUMN (*cont'd*)

Despite threats of inclement weather, we had a great turnout and a lively conversation. Our thanks, as always, to Jessie Pierce and the GWU Law School for agreeing to host the event and for all the logistical support leading up to and the day of the event. Don Yenovkian has generously volunteered to plan the 2017 Trial Practice Seminar next January, and I look forward to seeing what intriguing topic he has on tap for next year.

I am excited about the fantastic slate of activities planned for the coming year. Our Board of Governors meeting was held on Tuesday, April 12, 2016. As always, these meetings are open to the full BCABA membership, and anyone wishing to become more involved in the organization is welcomed and encouraged to attend. After that, we are in the process of scheduling the BCABA's Annual Colloquium with GWU, tentatively scheduled for June 8, 2016. This year's Colloquium will focus on future of the Boards of Contract Appeals. Be on the lookout for a formal invitation soon.

On July 13, 2016, we will host the Annual Judges Social. Based upon the rave reviews received in response to last year's event, we will be reprising last year's "Speed Networking" format, and hope you and your colleagues will join us again for what promises to be a great opportunity to chat with BCA Judges in a more informal setting. This year's Judges Social will be held at Dentons US LLP and Susan Ebner has generously agreed to coordinate that event on behalf of the BCABA. Next, Kathryn Muldoon and I are working hard in the planning stages of the BCABA Annual Program. The program is tentatively set for Wednesday, October 19, 2016, with a confirmation and save-the-date to follow soon. Please let Kathryn and myself know if you are interested in helping with the planning process for this year's Annual Program. Kathryn and Smith Pachter McWhorter PLC have also generously agreed to host this year's Executive Policy Forum in December. We're interested in hearing any topics you wish to see covered at either the Annual Program or Executive Policy Forum.

Last, but certainly not least, BCABA Judicial Division Chair Judge Peter Pontzer, PSCBA, and Vice Chair Judge Beth Newsom, ASBCA, report that the Judicial Division is continuing with its quarterly meetings and is hosting the next meeting of the Judicial Division on April 6, 2016 at the Civilian Board of Contract Appeals. The meeting will be a breakfast meeting on the topic of enforcing orders. We welcome the Judicial Division members, and encourage anyone interested in the activities of the larger BCABA to attend Board Meetings and become more involved.

Finally, we are always looking for volunteers to support our activities. If you would like to become more involved in any BCABA programs, or if you have ideas regarding possible new programs, please contact me at erin.sheppard@dentons.com or (202) 496-7533. I hope to see you soon at an upcoming BCABA event.

Best regards,

Erin Sheppard
President
BCABA, Inc.

CASE DIGESTS

Case Digests offer snapshot summaries of the most interesting, topical, and hopefully useful decisions from the boards of contract appeals over the past several months.

A-Son's Construction, Inc., CBCA No. 3491, 3636

December 4, 2015 | Board Judge Lester

By Oliya S. Zamaray | Rogers Joseph O'Donnell, P.C.

Did a contractor sign away certain rights when it entered into bilateral modifications that did not expressly speak to those rights? In response to a request by the Department of Housing and Urban Development ("HUD"), Judge Lester clarified an earlier CBCA decision which left unclear whether a contractor could file a claim for a full month's payment where HUD asserted it was allowed to prorate payments for services not used for a full month. In its clarification, the Board reiterated its rejection of HUD's position and cited four bases in its clarification. Most interestingly, the Board held that the patent ambiguity doctrine did not prevent a contractor from filing a claim in a dispute of prorated charges after it entered into bilateral modification.

Facts

HUD awarded A-Son's Construction, Inc. ("Asons") two Indefinite Quantity / Fixed Unit Rate contracts to provide property maintenance and preservation services at HUD-owned real estate properties. Under those contracts, Asons' duties included inspecting, securing, and providing maintenance at HUD properties. Asons' two contracts were awarded as part of a solicitation under which HUD awarded thirty-five separate Indefinite Quantity / Fixed Unit Rate contracts throughout the country for various property management services.

During the first option-year performance period, HUD informed the contract holders, including Asons, that it would utilize "a scale that ensures all contractors receive some assignments but that lower prices and higher performance will be rewarded." Contractors were provided a window of opportunity to submit "Voluntary Price Reductions" to the contracting officer, which would be used in the pricing portion of the price/performance formula to make the rankings for the next ordering period. Asons took advantage of this opportunity and, through three bilateral modifications reduced its pricing for the first-year options. Asons included a written release of the Government in one of the three price reduction modifications. Specifically, Asons released the Government of "all liabilities, demands, obligations, requests for equitable adjustment, and claims . . . which the contractor . . . has or may have . . . arising under or relating to this modification of the contract." HUD went on to exercise the second and third year options for both contracts and, through bilateral modifications containing release language, Asons again provided reduced prices.

HUD argued that by entering into bilateral modifications to voluntarily reduce its option-year prices, Asons had effectively agreed to allow HUD to prorate monthly fees under option-years for any properties that were in Asons' property maintenance portfolio for less than a full calendar month.

The Board found no basis upon which HUD could prevail on its argument. The Board explained that the written releases contained in some of the bilateral modifications incorporating Asons' voluntary price reductions did not release all contractor claims under the contract, but instead released only those claims arising under or relating to that particular modification of the contract. While the modifications changed the unit prices under the "Total Unit Price" column, they did not change or affect the "Estimated Unit" of any contract line item. The Board also recognized that all of the modifications were forward-looking, providing price changes for option periods not yet performed, and could not apply retroactively to release claims that had accrued in prior periods. The Board then rejected HUD's argument that the modifications effectively changed the terms of the contracts to permit prorating and summarized its reasoning in a September 3, 2015 decision.

HUD sought a clarification of the September 2015 decision, and asked the Board to clarify whether that decision disposed of HUD's argument that Asons' post-award agreement to make voluntary option-year price reductions precluded Asons from objecting to HUD's subsequent proration of option-year monthly fee payments.

CBCA Decision

The Board clarified four bases for its earlier rejection of HUD's argument. First, the bilateral modifications did not expressly change the meaning of the terms "monthly" and "monthly until sold," thus Asons could not be said to have agreed through entry of the bilateral modifications to redefine those terms. Second, Asons could not have waived its proration arguments; the Board could identify no requirement that all existing disputes under a single contract be resolved whenever the need for a contract modification to address a different and unrelated contractual issue arises.

Third, the bilateral modifications could not be said to constitute an accord and satisfaction precluding Asons from arguing against proration of monthly fees, where there was no support for an accord or a satisfaction in the record. Fourth, the patent ambiguity doctrine did not apply here because there was no connection between the modifications of the pricing under the "Total Unit Price" column and the definitions contained in the "Estimated Unit" column of the contract, precluding any post-award duty to inquire.

Even if the patent ambiguity doctrine applied, the Board noted that Asons had submitted its claim to the contracting officer – complaining about proration – in December 2010. Thus, before the parties executed any of the bilateral modifications, Asons had already "inquired" about the proration issue and HUD was well aware of Asons' belief that the contract did not permit monthly fee proration. And although HUD knew Asons' position on proration, HUD took no steps to address and resolve the parties' differing viewpoints on that issue before the modifications were signed. Nor did HUD indicate to Asons that, if Asons signed the modifications, it was accepting HUD's proration position. As such, there was no basis for HUD to assert that Asons implicitly acquiesced to HUD's position by executing these contract modifications.

***Aetna Government Health Plans*, ASBCA No. 60207**

February 10, 2016 | Judge McIlmail

By Deborah Norris Rodin | Dentons US LLP

Aetna Government Health Plans was allowed to proceed with its appeal from the "deemed denial" of its claim for a terminated TRICARE military health contract when the Armed Services Board of Contract Appeals determined that the contracting officer failed to comply with timeliness requirements.

Termination for Convenience

Aetna Government Health Plans ("Aetna") filed a certified claim for damages of $17,066,351 following the government's termination for its convenience of Aetna's TRICARE military health contract. The claim arose from an impasse in negotiations over Aetna's termination settlement proposal. Aetna submitted the claim on July 13, 2015, and the contracting officer received it on July 20, 2015.

On September 11, 2015, the contracting officer responded that the government needed additional documentation from Aetna to evaluate the claim. Notably, the contracting officer also stated that he would issue a final decision on the claim within 90 days of receiving the additional documents.

ASBCA Appeal

On September 21, 2015, Aetna appealed to the Armed Services Board of Contract Appeals ("the Board") on the basis of a "deemed denial" of its claim. The government timely moved to dismiss for lack of jurisdiction, seeking to portray the appeal as premature given that the contracting officer had not yet issued a final decision on Aetna's claim. The government asserted that the additional material was "reasonably necessary" for review of the claim and that such a review would require 90 days to complete. In the alternative, the government requested that the Board stay the appeal and remand to the contracting officer to issue a final decision.

After Aetna opposed the government's requests, the government answered the complaint and admitted that, pursuant to the Contract Disputes Act ("CDA"), the Board had jurisdiction over the appeal.

The Board Denied Motion to Dismiss

The Board denied the government's motion to dismiss, permitting Aetna to pursue the appeal of its claim as a deemed denial, because it concluded that the contracting officer had failed to comply with the CDA. Under the CDA, when a contracting officer receives a certified claim over $100,000, he must either: (1) issue a decision on the claim within 60 days of receiving it; or (2) notify the contractor of a specific date by which the decision will be issued. The Board held that merely providing a timeframe based on the occurrence of a future event is not sufficient, rather the contracting officer must "pinpoint" the exact date by which to expect a decision.

The Board found that, on receiving Aetna's claim, the contracting officer did not issue a timely decision within 60 days or provide a clear date by which he would render a decision. Instead, the Board noted, the contracting officer indicated that the date by which to expect a decision was contingent on receiving the requested documents from Aetna. For this reason, the Board ruled that the contracting officer failed to comply with the CDA requirements and that Aetna properly appealed the decision as a deemed denial.

Additionally, the Board denied the government's request in the alternative to stay the proceedings and remand to the contracting officer, concluding that the government had not provided any rationale to support such a request.

Limitation on Extending a Decision Deadline

The Board's decision highlights the need for the government, like contractors, to comply precisely with the CDA's timeliness requirements and underscores that the government may not extend its deadline for deciding on a claim based on a contingent event. It also makes clear that contractors who file a claim and, within 60 days, do not receive either a decision or a specific date by which the decision will be issued may appeal a deemed denial without waiting for a final decision.

Alion Science and Technology Corporation, ASBCA No. 58992

November 10, 2015 | Judge Melnick

By Sonia Tabriz | Arnold & Porter LLP

The Armed Services Board of Contract Appeals denied Alion Science and Technology Corporation's ("Alion") motion for summary judgment, which contended that the government's claim was time-barred under the Contract Disputes Act of 1978, because there is a genuine dispute of material fact as to whether Alion's final indirect cost rate proposal as submitted on 31 March 2006 triggered accrual of the government's claim.

Final Indirect Cost Rate Proposal

Alion Science and Technology Corporation ("Alion") had several contracts with the federal government, all of which incorporated FAR 52.216-7, Allowable Cost and Payment (Dec 2002), and FAR 52.242-3, Penalties for Unallowable Costs (May 2001).

On 31 March 2006, Alion submitted its final indirect cost rate proposal for fiscal year ("FY") 2005. The submission included: a summary page, which identified proposed rates by cost pool and business segment; Schedules A through E, which provided detail regarding the calculation of proposed rates; Schedules 1 through 26, which provided an additional breakdown by cost type; and corresponding spreadsheets, which allowed for identification of specific costs.

As it relates to salary related costs ("SRC"), Alion asserts that it used a variance account for the different between the standard cost rates and its actual costs. Schedule 14 of the submission contained an entry for the SRC variance, with a recorded amount consisting of various adjustments. However, with one exception, the specific costs that served as a basis for the adjustments were not identified in the 31 March 2006 submission.

DCAA Audit of Proposal

In January 2008, DCAA notified Alion that its final indirect cost rate proposal was inadequate because the Summary of Claimed Indirect Expense Rates did not include SRC and the costs in Schedule H were not presented in sufficient detail. On 8 February 2008, Alion resubmitted Schedule H. On 20 February 2008, Alion submitted a revised "JAMIS" database containing transactional information for tens of thousands of cost transactions. Alion also submitted an SRC proposal on 20 February 2008 and provided additional information regarding SRC costs in June 2008.

DCAA issued an audit report in April 2012 questioning several cost elements and recommending penalties. The Defense Contract Management Agency ("DCMA") administrative contracting officer's then issued a final decision dated 21 August 2013 asserting a claim under FAR 52.242-3. Specifically, the administrative contracting officer assessed penalties against Alion for inclusion of expressly unallowable costs in its final indirect cost rate proposal, including costs for engineering overhead, SRC and non-SRC G&A.

Appeal of Government's Claim

Alion appealed the administrative contracting officer's final decision to the Armed Services Board of Contract Appeals ("the Board"). Alion then moved for summary judgment on the grounds that the government's claim was time-barred under the Contract Disputes Act of 1978 ("CDA"). Summary judgment is proper only where the moving party, here Alion, has established the absence of disputed material facts and that it is entitled to judgment as a matter of law.

Pursuant to the CDA, "each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after accrual of the claim." Failure to submit a claim within the six-year limitations period constitutes an affirmative defense to the claim. To assert the affirmative defense, Alion bears the burden of establishing that the government's claim was untimely.

The administrative contracting officer's final decision asserting a claim for penalties against Alion was dated 21 August 2013. To be untimely, the government's claim must have accrued before 21 August 2007. According to FAR 33.201, a claim accrues "when all events, that fix the alleged liability of either the

Government or the contractor and permit assertion of the claim, were known or should have been known." Claim accrual can be postponed by facts that could not have reasonably been known by the claimant.

Accrual of Government's Claim

To evaluate when the government's claim accrued, the Board first looked to the legal basis of the government's claim against Alion. The government's claim arises under FAR 52.242-3, which provides that the contractor be assessed a penalty if a cost in its final indirect cost rate proposal is expressly unallowable.

The parties do not dispute that Alion submitted its final indirect cost rate proposal on 31 March 2006. The question before the Board was whether it was reasonably knowable from the 31 March 2006 submission that Alion's proposal included the costs alleged by the government to be unallowable.

According to the government, it did not have the detailed transaction data necessary to determine unallowability of Alion's costs with respect to the SRC elements until Alion submitted an SRC proposal on 20 February 2008. With respect to the remaining cost elements, the government asserts that it did not have the detailed transaction data necessary until Alion submitted the revised "JAMIS" database in January 2008. The government argued, in the alternative, that its claim did not accrue until Alion submitted an adequate Schedule H on 8 February 2008.

Alion argues that its 31 March 2006 submission provided transaction-level detail for its costs that triggered accrual of the government's claim, even though the submission did not include supporting data.

Denial of Motion for Summary Judgment

The Board ultimately denied Alion's motion for summary judgment. Alion's 31 March 2006 submission did include some information regarding individual costs. However, the government presented evidence that the 31 March 2006 submission did not include specific cost transactions regarding SRC. Moreover, according to the Board, Alion failed to identify the specific costs at issue within its 31 March 2006 submission. Therefore, there exists a genuine dispute of material fact as to whether Alion's final indirect cost rate proposal as submitted on 31 March 2006 included the costs alleged by the government to be unallowable.

Estes Brothers Construction, Inc., CBCA No. 4963

November 17, 2015 | Judge Daniels
By Sonia Tabriz | Arnold & Porter LLP

Estes Brothers Construction, Inc.'s appeal was dismissed for lack of jurisdiction because its notice of appeal was filed later than the ninetieth day after the contractor received the contracting officer's decision on its claim.

Appeal of Contracting Officer's Decision

Estes Brothers Construction, Inc. ("Estes") was awarded a contract by the Department of Transportation's Federal Highway Administration ("FHWA") to rehabilitate portions of a road in Tennessee (the "Contract"). On January 29, 2015, Estes submitted a claim to FHWA under the Contract. The contracting officer denied the claim and notified Estes of its appeal rights in a decision dated June 10, 2015. Estes received the decision at 1:27 PM on June 11, 2015.

Estes transmitted its notice of appeal of the contracting officer's decision to the Civilian Board of Contract Appeals (the "Board") by e-mail at 4:35 PM on September 9, 2015. The Board accepted Estes's notice of appeal on September 10, 2015. The FHWA moved to dismiss Estes's appeal for lack of jurisdiction on the grounds that Estes's notice was untimely filed.

Ninety-Day Deadline to File Appeal

Pursuant to the CDA, a contractor may appeal a contracting officer's decision to the Board "within 90 days from the date of receipt of [that] decision." 41 U.S.C. § 7104(a). The Board's Rules of Procedures provide that a notice of appeal "is filed upon the earlier of its receipt by the Office of the Clerk of the Board or if mailed, the date on which it is mailed to the Board." "Mailed," here, means placed into the custody of the United States Postal Service.

Under the Rules, a notice of appeal may be transmitted to the Board by e-mail. "The filing of a document by e-mail occurs upon receipt by the Board on a working day." Where the notice of appeal is received by 4:30 PM, the notice is considered filed on that day. If it is received after 4:30 PM, the notice is considered filed on the next working day.

As the Board noted, mail and e-mail are treated differently under the Rules. A notice of appeal may be mailed to the Board as late as 11:59 PM on the ninetieth day after a contractor receives the contracting officer's decision, to be considered timely filed. However, a notice of appeal transmitted by e-mail must be received by the Board by 4:30 PM on the ninetieth day to be considered timely.

Board Lacks Jurisdiction Because Estes's Appeal is Untimely

The CDA deadline for appealing a contracting officer's decision has been strictly construed. According to the Board, failure to file a notice of appeal within the ninety-day deadline divests the Board of jurisdiction.

Here, the ninetieth day after Estes received the contracting officer's decision was September 9, 2015. Estes transmitted its notice of appeal to the Board by e-mail at 4:35 PM on September 9, 2015. Under the Board's Rules, Estes's notice was deemed filed on September 10, 2015, thereby rendering it untimely. As such, the Board held that it did not have jurisdiction over Estes's appeal.

Estes argued that the Rules imposing a 4:30 PM deadline on e-mail filings improperly contracted the Board's statutory jurisdiction over contractor appeals of a contracting officer's decision. The Board disagreed. According to the Board, a contractor may file an appeal at any time of day as long as it is filed by mail. The Board also cited to several court decisions that have allowed for a forum to end its day for receipt of e-filed pleadings at a particular time.

Estes's Appeal Remains Untimely if Deadline is Non-Jurisdictional

The Board also addressed the U.S. Court of Appeals of the Federal Circuit's (the "Federal Circuit") decision in *Sikorsky Aircraft Corporation v. United States*, 773 F.3d 1315 (Fed. Cir. 2014). In *Sikorsky*, the Federal Circuit held that the CDA deadline for submitting a claim to the contracting officer is not jurisdictional.

According to the Board, the *Sikorsky* decision did not address whether the CDA deadline for filing a notice of appeal with the Board was jurisdictional and therefore, the Board continued to follow existing case law that considers the deadline jurisdictional. However, even if the deadline for filing a notice of appeal with the Board is non-jurisdictional, Estes's notice of appeal would still be untimely.

The Federal Circuit has held that the non-jurisdictional deadline for submitting a claim to a contracting officer may be subject to the equitable tolling doctrine. Pursuant to the equitable tolling doctrine, the statute of limitations will not bar a claim where the plaintiff establishes that (1) it has pursued its rights diligently and (2) extraordinary circumstances prevented it from timely filing.

As to Estes's notice of appeal, the Board held that the equitable tolling doctrine was not available because Estes did not argue that the elements applied. Instead, Estes noted that the Board has the power to waive its Rules where application of the Rules yields an injustice, and argued that the Board should do so here and allow for Estes's appeal to proceed. The Board disagreed, holding that waiver of the Rules requires good cause shown and Estes provided no such justification.

The Board ultimately dismissed Estes's appeal for lack of jurisdiction, but not without recognizing Estes's ability to challenge the contracting officer's decision before the U.S. Court of Federal Claims.

Aurora, LLC, CBCA No. 2872

December 21, 2015 | Judges Hyatt, Somers, and Lester

By Deborah L. Houchins | United States Air Force

A subcontractor may pursue claims against the government despite their lack of privity in contract where there is proper sponsorship of the action by the prime contractor and where the cause is taken in the prime contractor's name.

Facts

This case involved a design and construction contract between the U.S. Department of State and Aurora, LLC, for a consulate compound in Jeddah, Saudi Arabia. Though Aurora originally contemplated competing for the work as a joint venture with First Kuwaiti Trading & Contracting, Inc., ultimately Aurora submitted their proposal with First Kuwaiti as their subcontractor. Concern regarding Aurora's project performance resulted in the issuance of a cure notice by the government, then later a show cause letter. The contracting officer notified Aurora of their decision to terminate the contract for default, which led to negotiations and a final agreement where the State Department would suspend the Jeddah consulate contract as Aurora completed work on another consulate compound in another country.

Once construction on the other project was substantially completed, the Jeddah consulate contract would be reinstated. Aurora did not substantially complete the Jeddah project by the identified date. The contracting officer then issued another decision to terminate the Jeddah consulate contract for default. After further negotiations, the contracting officer issued a final decision to terminate for default, with the Government then demanding the $10.7 million performance line of credit provided by First Kuwaiti in furtherance of the contract. First Kuwaiti appealed the State Department's notice of termination for default in the name of Aurora, LLC to the CBCA, with Aurora's knowledge of the action. Department of State moved to have this appeal dismissed for lack of jurisdiction.

Jurisdiction of Aurora's Request for Monetary Damages

The Board dismissed the monetary damages claim attributable to Aurora based on lack of jurisdiction. The claim that was filed sought recovery of $10.7 million in damages, the amount the Government withdrew from the subcontractor's line of credit, as well as any additional costs associated with the Government's termination for convenience (Aurora's interest as the prime). With the claim for costs standing as the only identifiable monetary claim for Aurora and acknowledging that characterization of the termination as "for convenience" had not happened, the Board would have to view Aurora's claim as one for such future costs that could be received if the default termination were overturned and ultimately characterized as a termination for convenience.

Assuming the default termination was overturned and the available remedy of conversion to a termination for convenience occurred, jurisdiction for the Board to decide on the award of monetary damages would not automatically vest. Aurora would have to submit a written claim for monetary damages to the Government and receive a decision. Where unfavorable, Aurora could appeal that, and then the Board would have jurisdiction over the claim. Until that time, the Board would lack jurisdiction over Aurora's monetary damages claim.

Jurisdiction of Termination for Default

The Board determined that it had jurisdiction over the appeal of the termination for default. Though the disposition of the sponsorship arrangement between Aurora and First Kuwaiti permitting First Kuwaiti to pursue claims in the name of Aurora was in question, the claim only sought relief from the termination for default. The Board noted that conversion to a termination for convenience is not a monetary claim, and that there was no separate monetary claim attributable to the subcontractor. The Board found that the prime contractor had standing to challenge the default termination; moreover, the prime and its subcontractor could challenge it together, since the two can be viewed as one party when it comes to appeals of default terminations. The Board highlighted that *Erickson Air Crane Co.*

of Washington v. United States, 731 F.2d 810 (Fed. Cir. 1984), similarly observed the legally permissible practice of a prime allowing its subcontractor to prosecute a claim in the prime's name, particularly where the subcontractor has more at stake in the claim or where they may be the ones who fully possess the facts.

Choleta Fire, LLC, ASBCA No. 59211

November 9, 2015 | Judge Thrasher
By Joel M. Pratt | Dentons US LLP

Choleta Fire, LLC ("Choleta") successfully appealed a contracting officer's final decision that found that Choleta did not complete performance of the contract and, thus, denied Choleta payment of the full contract price.

Facts

On September 23, 2011, the U.S. Army Corps of Engineers ("USACE") awarded a contract to Choleta to complete a prescribed burn of approximately 650 acres of vegetation at Fort Randall, South Dakota. Specifically, the purpose of the controlled burn was "to suppress and control invasive eastern red[ ] cedar, reduce the biomass of cedar piles that were cut and stacked in 2009, increase the abundance of native cool and warm season grasses and forbs, and to decrease the abundance of non-native species."

After two modifications extending the period of performance, for which USACE increased the contract price, Choleta completed the prescribed burn on April 27, 2013. The burn consumed approximately 60-70% of the eastern red cedars and all of the cedar piles. Choleta did not burn all 650 acres but instead burned only approximately 550 acres. Choleta alleged that the government's point of contact ("POC") on the contract only expected about 30% of the eastern red cedars to be burned, and thus, he indicated after the burn that he was extremely pleased with Choleta's performance and accepted it as complete under the contract. Choleta demobilized its personnel at the burn site and invoiced the government for the full amount of the contract, as modified, minus amounts already paid. The government did not remit the full payment; instead, USACE decreased the payment based on the fact that Choleta did not burn all 650 acres. Choleta filed a claim for the remaining balance of the payment due.

The Agency Denies Choleta's Claim

USACE argued that Choleta did not complete the contract and that USACE did not accept Choleta's performance. The contracting officer agreed. In the final decision letter, the contracting officer stated that Choleta did not completely perform the contract because it only burned 550 of the required 650 acres. Further, the contracting officer denied Choleta's argument that the POC reviewed and accepted performance under the contract. In particular, the contracting officer disputed that the POC accepted Choleta's performance, citing two instances where the POC asked Choleta to "[complete] the remaining portion" of the work.

Choleta Succeeds on Appeal

The Board considered whether Choleta completed the contract and whether USACE accepted Choleta's performance as complete. Though the Board reviewed USACE's and Choleta's arguments interpreting the contract's requirements, the Board did not decide which party's interpretation was correct. Instead, the Board held that because USACE accepted Choleta's performance as complete, the issue of contract interpretation was moot.

The only issue regarding acceptance was whether the POC had, in fact, accepted Choleta's performance. Because the government did not produce sufficient evidence to prove its case, and because the Board drew a negative inference from USACE's failure to produce such evidence, the Board sustained Choleta's appeal.

(1) USACE Failed to Produce Sufficient Evidence to Prove its Case

The Board first held that the parties before the Board have to prove their cases *de novo*; they may not rely on the contracting officer's findings to prove their case. Choleta submitted "two sworn affidavits from Choleta employees testifying to their personal interaction with [the POC] to prove acceptance." The government submitted no evidence but, instead, relied exclusively on the findings of fact in the contracting officer final determination. The government's exclusive reliance on the CO final determination was, thus, insufficient because contracting officer final determination findings have no presumptive evidentiary weight.

Though Choleta had the burden to prove USACE's acceptance of contract performance, the Board held that the "burden of production…shifted to the government" to rebut Choleta's argument once Choleta submitted its sworn statements. The Board held that the government did not challenge Choleta's recitation of the facts because the government did not submit sufficiently weighty evidence to do so. The Board thus accepted Choleta's version of the facts as unrebutted. Accordingly, the Board found that the POC did, in fact, accept Choleta's performance as complete.

(2) The Lack of POC Testimony Gave Rise to a Negative Inference

Not only did the government fail to submit evidence from the POC, but the government also made no argument that the POC was unavailable to testify. The Board, therefore, assumed that the government deliberately chose not to produce a statement from the POC because the POC's testimony would have harmed the government's position.

Though the decision contains an apparently robust factual dispute, the Board held that Choleta's factual allegations were unrebutted. The government did not produce any reliable facts for the Board to consider, and its failure to do so was imputed against the government. Accordingly, the Board held that Choleta was entitled to full payment under the contract and remanded the matter to the parties to negotiate quantum.

Jane Mobley Associates, Inc., CBCA 2878

January 5, 2016 | Judge Sheridan

By Libbi J. Finelsen | United States Air Force

The General Services Administration (GSA) unsuccessfully moved to dismiss several counts of an amended complaint filed by Jane Mobley Associates, Inc. (JMA) for lack of jurisdiction or, in the alternative, failure to state a claim for which relief may be granted.

Facts

On February 5, 2010, GSA awarded a task order under JMA's Federal Supply Schedule contract for environmental communications consultant services. The task order was a firm-fixed-price contract for the period February 5 to March 8, 2010, which was extended for two additional months. The extension modification stated that JMA was required to provide documentation showing the hours invoiced and that payment would be based on the hours documented and verified for each labor category and task. The task order was closed out on May 10, 2010.

After contract completion, GSA's Office of Inspector General (OIG) conducted an audit of the task order. The OIG concluded that JMA had overbilled GSA for various labor costs; JMA failed to include the prompt payment discount terms on its invoices; and that JMA was entitled to an upward adjustment for allowable subcontractor costs. OIG recommended that GSA recoup the overbilled amounts.

GSA issued a demand to JMA for the recovery of the alleged overpayments on January 9, 2012. On June 1, 2012, GSA issued a final decision for the overpayment.

JMA timely appealed the final decision. GSA moved to dismiss certain counts of the complaint, but the Board declined to rule on the motion until after the scheduled hearing.

Prior to the hearing, the presiding judge clarified that the sole question before the Board was whether GSA was entitled to recover the alleged overpayment. In its post-hearing brief, GSA attached a new motion to dismiss, arguing that JMA's defenses were distinct "claims" that had not been submitted to the contracting officer for a final decision as required by the CDA.

Motion For Lack Of Jurisdiction

The requirement for a valid claim and a contracting officer's final decision does not apply when a contractor appeals a Government claim and its factual defense only attempts to reduce or eliminate that claim. A valid claim and a contracting officer's final decision are required when the contractor seeks affirmative relief through a contract adjustment.

(1) Jurisdiction Over JMA's Factual Defenses Against the Government Claim

Count I of JMA's complaint alleged that GSA violated FAR 16.2 when it issued the task order. The Board concluded that it had jurisdiction over count I. JMA was attacking the Government's claim with the factual allegation that the parties understood that the contract was firm-fixed price and the task order did not change the nature of the contract.

Similarly, the Board had jurisdiction over count II, which alleged that the Government's demand was invalid because the task order was a firm-fixed price contract for which JMA was paid in full and that GSA's demand for a prompt payment discount was invalid because GSA had the discretion to retain the discount. The Board concluded the factual allegations regarding GSA's conduct during contract administration were not a claim within the meaning of the CDA.

JMA did not present evidence to support count III, a breach of contract claim, at hearing. Therefore, the Board considered this count to be abandoned.

The Board had jurisdiction over count IV, in which JMA contended that GSA violated the implied covenant of good faith and fair dealing by changing the payment practice through the modification. JMA only raised factual defenses, and did not seek a contract adjustment or monetary relief for the alleged violation.

(2) Jurisdiction Over Relief Requested

The Board concluded that it had authority to determine whether JMA was entitled to retain the alleged overpayment even though it cannot grant injunctive relief. In addition, the Board could consider a claim for attorney's fees if an application under the Equal Access to Justice Act, 5 U.S.C. § 504, was submitted after the decision was rendered.

Motion for Failure to State a Claim

The Board found that JMA proffered evidence that may entitle it to relief with respect to counts I and II. The Board did not reconsider its November 14, 2012, decision denying GSA's motion to dismiss count IV for failure to state a claim.

Magwood Services, Inc., CBCA No. 4732

December 21, 2015 | Judge Pollack

By Hellia Kanzi | Deloitte Advisory

In this case, the CBCA considered whether it had jurisdiction under the CDA to hear an appeal from a state court dispute between a prime contractor and its subcontractor that arose out of work under a General Services Administration ("GSA") contract. The Board answered in the negative, finding that CDA jurisdiction does not extend to appeals from private state court litigants.

Facts

Magwood Services, Inc. ("Magwood"), subcontracted with Kane Plumbing ("Kane") on a GSA contract. GSA later terminated its contract with Magwood for the convenience of the Government. In June 2013, Magwood and GSA negotiated and executed a termination settlement agreement in which Magwood received $47,244.28 and settled all claims on the contract.

Subsequent to the termination settlement agreement, Kane filed suit in Richmond General District Court against Magwood seeking relief for costs incurred in performance of the GSA contract. However, Magwood's attorney failed to appear on the trial date and, as a result, the Richmond court entered a default judgment in favor of Kane for $30,900. Magwood then filed the subject appeal, asking the Board to overrule the Richmond court's default judgment and allow it to present a defense against Kane's complaint.

GSA responded by filing a motion to dismiss the appeal asserting that Magwood failed to file a claim as defined by the CDA and that the subject of the appeal was a private issue between a prime and subcontractor. Magwood countered by arguing that the Contracting Officer's Final Decision gave rise to these settlement issues and that the settlement agreement governing Magwood and Kane's relationship was in fact set by GSA, which "dictated" that Kane receive $3,472.

CBCA Holding

The CBCA dismissed the appeal for lack of jurisdiction finding that Magwood failed to identify a claim, within the meaning of the CDA, that either it or GSA had made under the subject contract. The Board reasoned that its jurisdiction flows from the CDA, and that the CDA requires a decision be made pursuant to, among other things, "a claim by a contractor against the Federal Government relating to a contract [and] submitted to the contracting officer[.]" Magwood's inability to link the appeal to a valid claim on its GSA contract divested the Board of jurisdiction.

The Board further noted that the subject of the appeal remained a dispute between two private parties and lacked any meaningful connection to the original GSA contract. In its holding, the Board categorically stated that Magwood "asked the Board to overrule a state court on a matter involving a dispute between two private parties, a contractor and its subcontractor. We have no authority to do this."

Nelson, Inc., ASBCA Nos. 57201, 58166

December 15, 2015 | Judge Peacock (majority opinion)
By Steven A. Neeley | Husch Blackwell LLP

In this case, the Armed Services Board of Contract Appeals overturned a termination for default of a contract for the construction of stone dike extensions on the Mississippi River. The Board held that the termination was improper because the U.S. Army Corps of Engineers (the Corps) failed to give the contractor time extensions for delays that were beyond the contractor's control.

Facts

In July 2009, Nelson, Inc. was awarded a $9.2 million contract to construct stone dike extensions at four different sites on the Mississippi River: Loosahatchie, Robinson Crusoe, Friars Point, and Cow Island. Each site was treated individually, with separate pricing, performance periods, and notices to proceed (NTPs). The work at the Loosahatchie site totaled $590,500 and the Robinson Crusoe work totaled $542,700. The performance periods for both sites were 20 days after issuance of the NTPs. The Friars Point and Cow Island work had substantially higher prices ($4,520,600 and $3,578,100, respectively) and longer performance periods (75 days after NTP and 50 days after NTP, respectively), but, due to the termination, Nelson never performed any work at those sites.

The contract specified that once construction began, the contractor would be required to make "steady and uninterrupted" and "uniform and continuous progress" until the work was complete. But the contract also prohibited the contractor from working when the river reached certain depths, as measured by the river's low water reference plane (LWRP). No work on dikes could be performed if the river was at or above +10 LWRP (i.e., more than 10 feet above the top elevation of the dike). For weirs, no work could be performed if the river was at or above +20 LWRP. The Loosahatchie, Robinson Crusoe, and Friars Point sites were identified in the contract as dikes, and the Cow Island site was identified as a weir.

Nelson encountered numerous delays during performance, primarily on the Loosahatchie site. The Corps issued the NTP for that site on October 1, 2009, but at that time still had not provided a revised set of drawings providing a solution for a "hump" of sedimentation at the site that Nelson discovered when surveying the site. That solution was not provided until October 13, 2009, well into the 20-day performance period for the site. The river level at the Loosahatchie site also exceeded both +10 LWRP and +20 LWRP for numerous days during Nelson's performance, but the Corps determined that only four days were excusable due to high river stages.

Nelson met with the Corps on November 2, 2009, during which the Corps expressed concerns with Nelson's progress and noted that the Loosahatchie was supposed to have been complete by October 26, 2009. Nelson was given until November 3, 2009 to provide a revised plan for future performance. Instead, Nelson requested clarification from the Corps on the river stage limitations that applied at the Loosahatchie site. Two days later, the Corps directed Nelson to stop work and clarified that the +20 LWRP limitation for weirs applied to the Loosahatchie site, even though that site was identified as a dike.

On November 9, 2009, the CO issued a written stop work order directing Nelson to stop all work until a plan for corrective action was approved. Nelson responded on November 16, 2009 and claimed that the Corps' clarification of the +20 LWRP limitation was a change order and that work would be suspended until the river levels receded. Nelson and the Corps met on December 2, 2009 and Nelson offered to accelerate its performance. The parties agreed that Nelson would be given until December 9 to provide a corrective action plan. Nelson submitted the plan on December 8 and the Corps promised to respond by December 15. The Corps did not respond until January 8, 2010, when it rejected Nelson's plan. On February 9, 2010, the Corps terminated the contract for default for "failure to perform the required work in a timely and acceptable manner." Nelson appealed on April 14, 2010.

Discussion

A five-member panel of the Board issued three separate opinions in resolving Nelson's appeal. Although the judges unanimously held that the termination of Friars Point and Cow Island sites was improper, there was disagreement on both the Loosahatchie and Robinson Crusoe sites, and whether the contract work was separable.

ASBCA Majority Opinion

The majority opinion, written by Judge Peacock, determined that the Corps' termination of the entire contract was improper because the contract was separable and because Nelson was delinquent on only part of the contract. According to the majority, "[w]hen a contract is separable (sometimes also referred to as severable, or divisible) and a contractor is delinquent only as to a separable part of the contract work, it is improper for the contracting officer to terminate for default the entire contract." The majority therefore analyzed the termination of each site individually, under the standard announced in *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987), to determine whether there was "no reasonable likelihood" that Nelson could perform the contract within the time remaining.

With respect to the Friars Point and Cow Island sites, the majority determined that the termination of those sites was improper because the Corps never issued NTPs for those sites. Without NTPs, there were no start and completion dates for the work, and thus, "no yardstick to measure whether Nelson failed to diligently prosecute the work at those separable sites."

The majority analyzed the Loosahatchie and Robinson Crusoe sites as one inseparable piece of the work and held that their termination was also improper because there was at least *some* reasonable likelihood that Nelson could complete the work in the time remaining. In the majority's view, Nelson was entitled to additional time for both adverse river conditions and the lack of a solution for the "hump" issue. The parties' disagreement on which river stage limitation applied (i.e., +10 LWRP or +20 LWRP) was irrelevant because, in the majority's view, both interpretations were unreasonable. Nelson's interpretation that +10 LWRP applied was unreasonable because river levels had never been that low at those sites. The Corps' interpretation that +20 LWRP applied was similarly unreasonable because, by its terms, that limitation applied only to "weirs" and the Loosahatchie and Robinson Crusoe sites were identified in the contract as "dikes." Although the Corps argued that Nelson should have known that the sites were actually weirs, rather than dikes, the majority held that the Corps should have clarified its position and provided an appropriate time extension before terminating.

ASBCA Concurring and Dissenting Opinions

Judge Hartman and Judge McIlmail each wrote separate opinions. Judge Hartman concurred with the majority's result, but opined that the majority's conclusion regarding the severable nature of the contract was not controlling. Although he acknowledged that the Board "has on rare occasion 'severed' a contract *sua sponte*," he explained that the Board did so only "to avoid the drastic sanction of a 'total' forfeiture when a problem existed only with respect to a severable part of the contract." Here, though, neither party asserted a partial default or argued that the contract should be severed.

In Judge Hartman's view, the termination was improper because the contract had a 165-day performance period (i.e., the sum of the performance periods for each of the four sites) and Nelson was terminated after only approximately two weeks' worth of work. In light of the time remaining, the evidence in the record did not support the CO's conclusion that "Nelson could not timely complete the remaining work in the 21 or more weeks provided for completion of that work."

Judge McIlmail concurred in part and dissented in part. He agreed with the majority that the termination of the Friars Point and Cow Island work was improper because NTPs for that work were never issued. But he disagreed with the majority's conclusion that Nelson could still complete the Loosahatchie and Robinson Crusoe work in the time remaining. Judge McIlmail analyzed the Loosahatchie and Robinson Crusoe sites individually (in contrast to the majority) and noted that each had 20-day performance periods. He also concluded that Nelson could have performed work for at least 15 days at Loosahatchie and at least 13 days at Robinson Crusoe, and therefore had no more than 5 days and 7 days left, respectively, to finish the work at those sites when the Corps terminated the contract. But based on Nelson's average stone placement rates, Judge McIlmail noted that Nelson would have needed at least 17 more days to complete the Loosahatchie work and at least 26 more days to complete the Robinson Crusoe work. Thus, in his view, the CO reasonably concluded that Nelson could not timely complete the work at those sites within the time remaining.

Olbeter Enterprises, Inc., PSBCA No. 6543

January 12, 2016 | Judge Caramella

By Laura A. Semple | Smith Pachter McWhorter

The Postal Services Board of Contract Appeals (the "Board") sustained an appeal by Olbeter Enterprises, Inc. ("Olbeter") where the Postal Service improperly withheld Olbeter's payments as a result of a terminated contract. The Board held that the Postal Service could have avoided making the payments to Olbeter by terminating the Contract between the Parties earlier.

Contract Terms

On June 28, 2010, the Postal Service renewed Contract No. 156A2 with Olbeter, requiring Olbeter to provide scheduled shuttle services between the Greensburg Mail Processing Center and the Greensburg Post Office in Pennsylvania. The renewal period ran from July 1, 2010 to June 30, 2014. The

Contract provided that the Postal Service would make automatic monthly payments for the regularly scheduled shuttle service.

The Contract contained a Termination with Notice Clause, providing that "[t]he contracting officer or the supplier, on 60 days written notice, may terminate this Contract or the right to perform under it, in whole or in part, without cost to either party." The Contract also contained an Accountability of Supplier Clause, providing in part:

> The supplier is not liable for its failure to perform if the failure arises out of circumstances beyond its control, and without its fault or negligence . . . .
> * * *
> The supplier shall, promptly upon discovery, refund (i) any overpayment made by the Postal Service for service performed, or (ii) any payment for services not rendered.

Termination for Convenience

On August 10, 2012, the Postal Service closed the Greensburg Mail Processing Center. Thereafter, the Postal Service did not require, and Olbeter did not perform, any regularly scheduled shuttle service. The Postal Service continued to pay Olbeter its fixed monthly rate from August 10, 2012 until May 1, 2013, totaling $91,483.40.

The Parties signed an amendment terminating the Contract for convenience effective May 1, 2013. Between October and December 2013, the Postal Service attempted to recover the $91,483.40 from payments otherwise due to Olbeter under other Postal Service contracts. In September 2014, the contracting officer issued a final decision asserting the Postal Service's right to keep the entire amount it previously offset to recoup the overpayments. Olbeter appealed the final decision to the Board.

PSBCA Decision

On appeal, the Postal Service argued it was entitled to offset Olbeter's payments because the Contract was constructively terminated on notice 60 days after the Greensburg Mail Processing Center closed. Additionally, the Postal Service alleged that Olbeter's damages were limited to its lost profits plus the "supplier's wages," or Olbeter's expectancy damages. Finally, the Postal Service argued that requiring it to return the payments would unjustly enrich Olbeter or constitute a windfall.

(1) Constructive Termination

The Postal Service first argued that it constructively terminated the Contract on notice 60 days after closing the Greensburg Mail Processing Center. In making this argument, the Postal Service relied on the last sentence of the Accountability of Supplier Clause, which required Olbeter to refund any payment for services not rendered.

The Board rejected this, finding that the Postal Service "bore the risk that there would be sufficient mail to justify the automatic monthly payments to Olbeter." Olbeter's alleged failure to perform any regularly scheduled shuttle services did not occur due to its own negligence, but due to the Postal Service's decision to close the facility. The Contract specifically permitted the Postal Service to terminate the Contract with notice if it no longer needed Olbeter's services. The Postal Service, however, did not sign the Termination for Convenience until May 2013. "Until that time the Contract remained in force, and the Postal Service remained obligated to make the monthly payments."

The Postal Service also argued for a constructive termination due to Olbeter's knowledge that the Postal Service would not require any further deliveries at the closed location. The Board disagreed, find that "[w]hatever the Postal Service's intentions may have been, and regardless of Olbeter's knowledge of those intentions, the Postal Service could have avoided liability for the monthly payments by partially terminating the Contract."

(2) Expectancy Damages

The Board also rejected the Postal Service's argument to limit Olbeter's recovery to expectancy damages due to its breach of the Contract. Here, neither Party breached the Contract. While the Postal Service did not tender any mail to Olbeter for delivery, it did continue to make the contractually required monthly payments. "Having failed to terminate the Contract until May 1, 2013—and in the absence of a breach by Olbeter—the Postal Service remained obligated to make the monthly fixed-price payments even if it did not tender any mail for delivery, and Olbeter was entitled to keep the payments."

(3) Unjust Enrichment or Windfall to Olbeter

Finally, the Board rejected the Postal Service's argument that requiring it to return the payments would unjustly enrich Olbeter or constitute a windfall. Unjust enrichment is "an equitable doctrine that applies when the parties do not have an express contract." Here, the Parties had an express contract that did not provide a mechanism for retaining offsets. The Board thus required the Postal Service to pay Olbeter the $91,483.40 it offset from Olbeter's other Postal Service contracts.

ServiTodo LLC v. HHS, CBCA 4777

November 13, 2015 | Judge Pollack

By Locke Bell | Jenner & Block LLP

A contracting officer may often wonder if she is meeting the level of diligence expected of her when overseeing the program officials who manage the day-to-day operations of the hundreds of contracts within her purview. In *ServiTodo*, the Civilian Board of Contract Appeals ("CBCA") justified such a concern. Though the decision is non-precedential,[1] its familiar fact pattern should remind contracting officers that they can bind the Government, not only through their affirmative actions, but also through their failure to act after receiving actual or constructive notice of the actions taken by program-level employees.

Facts

On June 6, 2012, the Department of Health and Human Services ("HHS") Centers for Disease Control and Prevention ("CDC") awarded ServiTodo a contract to provide a health communications specialist to support the Division of Unintentional Injury Prevention ("DUIP") at the CDC. To fill the position, ServiTodo subcontracted with All Things Administrative to perform what was expected to be a limited recruitment effort. ServiTodo and All Things Administrative had until September 2012 to fill the position, at which point the hired specialist was to perform on a fixed-price basis until August 31, 2013. However, the companies' efforts were frustrated by two program officials who were unwilling to accept the proposed hire, delaying the specialists' start date to mid-December.

The contracting officer left the day-to-day contract management entirely in the hands of these program officials, as she handled between 300 and 400 contracts

[1] The appellant, ServiTodo, elected the Board's small claim procedure for the appeal, meaning the decision was made by a single judge (Board Judge Pollack), is final and conclusion and may not be set aside except for reasons of fraud, and it has no value as precedent. *See* Board Rule 52, 48 C.F.R. § 6101.52 (2014).

and did not specifically delegate monitoring duties. From the award of the contract in June until late October – when the contractor escalated its disagreement with the program officials' plan to split the proposed position into a two-person hire – the contracting officer had no involvement with the contract. She first learned on October 23, 2012 that services under the contract had not begun, and at that point informed the program officials that the final decision to hire any person under the contract rest with the contractor. Having stated her position, she assumed that the program officials would comply. Yet, the program officials never informed ServiTodo of the contracting officer's decision.

On November 7, 2012, ServiTodo's managing officer called the contracting officer directly, at which point she instructed ServiTodo to hire someone immediately. She also instructed the program officials to allow ServiTodo to do so, but the record showed that they continued to interfere with ServiTodo's ability to do so, without any oversight from the contracting official, until the end of November, when a specialist was finally hired.

After submitting a request for equitable adjustment and a formal claim with the contracting officer, and receiving a final decision, ServiTodo filed its appeal to the CBCA on June 3, 2015. ServiTodo sought approximately $19,400 in unanticipated recruiting expenses it incurred as a result of the program officials' interference, along with additional auditing, accounting and legal fees associated with filing its claim.

CBCA Decision

Though it is black-letter law that the Government cannot be bound by the acts of unauthorized officials, as the CBCA noted in its November 13, 2015 decision, the Government can be bound in the limited instances where, though an authorized official does not give the direction, the authorized official is nevertheless on actual or constructive notice that extra work has been directed. Thus, though the CDC program officials were not authorized to direct ServiTodo to incur additional recruiting expenses, once the contracting officer knew on October 23, 2012 that they had done so and failed to take adequate steps to rectify this direction at that time, the contracting officer effectively authorized the additional work.

Beyond contacting the program officials and telling them not to interfere with the hire, in Judge Pollack's words the contracting officer "took no further active role" and "apparently assumed that [the program officials] would comply with her directions." To Judge Pollack, this amounted to "st[anding] by and allow[ing] the work to continue." Instead, to avoid binding the Government to pay for this additional recruiting effort, the contracting officer should have become involved and avoided letting "what was obviously a troubled contract continue to drift under the direction of the program officials."

Because she failed to do so, the CBCA held that the Government was liable to ServiTodo for additional recruiting costs incurred after – and only after – the contracting officer was contacted on October 23 regarding the hiring issue. Before that time, the program officials were acting without authority to bind the Government; once the contracting officer was notified and took inadequate steps to prevent the program officials' actions, the CBCA held, all subsequent actions to interfere with the hiring process were effectively authorized and binding on the Government.

Though ServiTodo only incurred $6,600 in additional recruiting costs after October 23, the CBCA's decision reminds contracting officers that they cannot merely rely on program-level officials to follow their instructions, but they must also maintain a reasonable level of oversight after-the-fact to avoid unintentionally binding the Government.

JM Carranza Trucking Co.,
PSBCA Nos. 6354, 6367, 6373, 6421, 6422
October 30, 2015 | Judge Pontzer
By Libbi J. Finelsen | United States Air Force

The United States Postal Service successfully opposed a motion to enforce the Board's earlier Decision granting the contractor's Equal Access to Justice Act (EAJA) application in part.

Procedural History

In prior litigation, the Board upheld the Postal Service's termination for default of two contracts with Carranza Trucking and allowed the Postal Service to recover a portion of the costs claimed.

Carranza Trucking applied for legal fees pursuant to EAJA. The Board partially granted its application. The Postal Service applied the EAJA award to offset the outstanding balance owed by Carranza Trucking.

Motion before the Board

Carranza moved for an order enforcing the earlier Board Decision granting the EAJA application or, in the alternative, an order clarifying the earlier Decision. Carranza argued that EAJA fees should be paid directly to its counsel and that the offset was improper. The Postal Service opposed the motion.

Offset was Permissible

The Board denied the motion. EAJA fee awards are payable to the litigant, not counsel for the litigant. Accordingly, EAJA awards are subject to offset if the litigant has outstanding federal debt.

A TWICE-TOLD TALE:

THE STRANGELY REPEATED STORY OF "BAD FAITH" IN GOVERNMENT CONTRACTS

*By Frederick W. Claybrook, Jr.**

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"Men are often more bribed by their loyalties and ambitions than by money."
Justice Jackson, dissenting in *United States v. Wunderlich*[1]

Raising the Curtain

It has been oft told in recent years how the principal forums for government contracts disputes, the U.S. Court of Federal Claims ("CFC") and the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"), have frequently misapplied the contracts law of good faith duties.[2] While the Supreme Court, for well over a century, has repeatedly advised those courts and their predecessors to treat the federal government as it would a private citizen when it is in a contractual relationship and to apply the common law of contracts when interpreting government contracts,[3] those admonitions often have been honored by them in the breach.[4] In the area of good faith duties, this has more than a little irony – indeed, irony with teeth – in that, as the Armed Services Board of Contract Appeals has recognized, "because of its size, power, and potential ability to manipulate the market place, the Government may have obligations of fairness beyond those of the ordinary citizen."[5]

This is not a new concept. In the 1874 case of *Corliss Steam-Engine Co. v. United States*,[6] the newly constituted U.S. Court of Claims pronounced that the federal government must deal with its contractors "in the strictest fairness and justice."[7] This would imply, if anything, that the Government is held strictly accountable to act in good faith and shown no special leniency when contracting with private parties.[8] In case law over the last few decades, however, that rule often seems to have been turned upside down.[9]

The common law, as reflected in § 205 of the *Restatement (Second) of Contracts*, recognizes that good faith duties of cooperation adhere in every contract: "Every contract imposes upon each party a duty of good faith and fair dealing . . . ."[10] Under the common law, the breach of such duties is not presumed, but must be proven, like every other breach, by a preponderance of the evidence.[11] If a party breaches its good faith duties to cooperate and not to hinder the performance of the other party, the breaching party, in common law contractual parlance, acts in "bad faith."[12] The *Restatement* makes this clear in frequently quoted comment *d* to § 205, which defines "Good Faith Performance" by giving examples of *bad faith* contractual actions:

> A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasions of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party's performance.[13]

Thus, under the common law, establishing that the party with whom you contracted acted in *bad faith* only requires you to show, by a preponderance, that the other party did not honor its duties of good faith and fair dealing.[14]

Like with every other contractual breach, motive is not an element of the cause of action.[15] Although, if a breach is willful, it makes proof of the breach easier and plays into the calculus for damages (requiring presumptions against the breaching party to be applied with a heavier hand[16] and even cutting off the breaching party's right to prove an offset to the innocent party's damages in the appropriate case[17]), it is not necessary to prove animus to recover for breach of good faith duties, which, again, is equivalent in the common law to acting in contractual bad faith.[18]

When it comes to applying the law of good faith duties to government contracts, the CFC and Federal Circuit are schizophrenic. They give lip service to the firmly established common law,[19] and sometimes apply it in accordance with the *Restatement*.[20] But they also sometimes layer on additional elements and burdens of proof for contractors complaining of government action or inaction. Starting with the proposition that government agents are presumed to act in good faith, they build an alternative construct on the theory that this presumption can only be overcome, and a "bad faith" breach proven, by a showing of intentional animus or malice by the agency against the contractor, and then only by "well nigh irrefragable proof," which the Federal Circuit has equated with a "clear and convincing" burden.[21] The U.S. Department of Justice ("DOJ") attorneys do their part to exploit this fissure between the common law and Federal Circuit law. Whenever a contractor pleads a violation of good faith duties, DOJ argues that the allegation is essentially that the government acted in bad faith, which (they argue) requires ironclad proof of intentional misconduct targeted at the contractor, which is almost always impossible to demonstrate.[22] For example, in *Croman Corp. v. United States*,[23] when the contractor had made an initial showing that the agency's justification for canceling certain parts of a contract was pretextual, DOJ argued this was the equivalent of saying the agency had acted in bad faith.[24] Instead of requiring the agency to come forward with rebuttal evidence, the Federal Circuit adopted DOJ's characterization and found the contractor's showing inadequate because it did not meet the standard of well-nigh irrefragable proof of subjective malice.[25]

Professors Steven Burton and Eric Andersen, leading authorities on the law of good faith, note that the large majority of common law courts hold to an *objective* standard of whether the party with discretion exercised it within the parties' reasonable expectations stemming from the promises made at contract formation.[26] Only "[a] few very weak common law authorities suggest that a party whose exercise of discretion is motivated by malice or other wrongful motives is in breach of contract for failing to perform in good faith."[27] While not canvassing federal government contracts law in their treatise, Professors Burton and Andersen remark that, under the common law, a party cannot be excused from an improper (i.e., "bad faith") exercise of discretion because the party had a "kind heart and an empty head"[28] and summarize as follows:

> On the question whether wrongful motives establish bad faith, our answer is clear and amply supported by the cases: wrongful reasons may establish bad faith, but an absence of wrongful reasons does not establish good faith. Wrongful reasons establish bad faith not because they are wrongful, but instead because they are outside the reasonable expectations of the parties. An absence of such reasons, however, does not suffice to establish good faith because bad faith may also consist of action for reasons that are disallowed by the contract even though not wrongful.[29]

For years, judges, academics, and other commentators, consistent with this quoted summary of the law, have criticized those government contracts cases requiring a showing of subjective bad faith to prove a breach of good faith duties.[30] Most notably, Judge Wolski, in the 2005 case of *Tecom, Inc. v. United States*,[31] with great erudition and tact, laid out a path between the fractured precedent of the circuit, with his main point being that, in the normal contract setting, a contractor does not have to prove animus to show a breach of the implied duties of good faith, cooperation, and not to hinder performance of the other party.[32] Professor Nash has ridiculed the Federal Circuit's 2010 pronouncement in *Precision Pine & Timber, Inc.*

v. United States[33] that breaches of good faith duties typically involve "bait-and-switch" situations and require "specifically targeted" action by the government,[34] when that is wholly inconsistent with over 100 years of government contracts precedent (not to mention the common law).[35] Moreover, as previously pointed out, the implied premise on which the Federal Circuit builds its animus edifice for breach of good faith duties is faulty;[36] that government agents are presumed to act in good faith does not distinguish federal contracts from private ones.[37] Under the common law, it is presumed that a private party accused of a good faith breach has acted in good faith, but that does not heighten the innocent party's burden of proof or require proof of willfulness.[38] If he breaches his duty of good faith, the guilty party has acted in bad faith, and the innocent party must only prove that by a preponderance of the evidence.[39] But, despite the efforts of judges, academics, and commentators, the confusion continues, as the CFC and the Federal Circuit sometimes lapse into equating allegations of breach of good faith contractual duties with the type of bad faith conduct that requires proof of malice aforethought by a standard greater than a preponderance, as in fraud cases, for example.[40]

The purpose of this article is not to expand on that critique, but to tell another tale, although it is largely the same one. It is the tale of the little phrase, "or so grossly erroneous as necessarily to imply bad faith." This phrase, though normally ignored, appears in both the Contract Disputes Act of 1984 ("CDA")[41] and the Wunderlich Act,[42] from which the CDA authors carried it forward. But it was first penned long before it was codified in the Wunderlich Act, and therein lies our tale.

Act One. The Supreme Court Saves an Important Government Contract by Conditioning a Discretionary Contractual Duty on Good Faith

It was the 1870s, the days of the Indian Wars, when the U. S. Army struggled to tame both tribes and territory. Fingers of track reached into the western expanse, but railroads did not yet crisscross the nation.[43]

Mr. Kihlberg was undoubtedly a hearty soul, such as those storied in the Old West. He was obviously a risk taker – he did business in the often uncivilized territories of the nation, and he was willing to contract with the Army. He agreed to transport

> military, Indian, and government stores and supplies from points on the Kansas Pacific Railway to posts, depots, and stations in portions of Kansas, Colorado, Texas, Indian Territory, and New Mexico, and to such other depots as might thereafter be designated within the States and Territories named, and transport such goods to various posts and depots,[44]

which the doughty Kihlberg did.

The dispute arose over the proper payment for his much needed, high risk work. The contract provided for payment to be calculated by a formula involving distance and poundage.[45] With respect to setting the distance, the contract read as follows:

> Transportation to be paid in all cases according to the distance from the place of departure to that of delivery, the distance to be ascertained and fixed by the chief quartermaster of the district of New Mexico, and in no case to exceed the distance by the usual and customary route.[46]

Now, undoubtedly, the maps they had to work with at that point did not have the accuracy of a Rand-McNally. But one can well understand Mr. Kihlberg's frustration when, after he took all the risk of transporting the goods to their destination, the New Mexico chief quartermaster set distances for the contract that were not by the "usual and customary route" and were even less than "by air line,"[47] which presumably meant "as the crow flies." Mr. Kihlberg took his beef to the Court of Claims, and, finding no solace there,[48] he pursued his case to the Supreme Court.

The first Justice Harlan, writing for a unanimous Court, ruled for the government.[49] He pointed out that the chief quartermaster had "discharged a duty imposed upon him by the mutual assent of the parties," "not simply to ascertain, but to fix, the distances which should govern in the supplement of the contractor's accounts for transportation."[50] Because the contract gave the chief quartermaster the duty to set the distances, the courts could not step in to do so "without doing violence to the plain words of the contract."[51] However, the Court's affirmance was not based on the supposition that a judicial officer could *never* question the finality of the government's decision in such a circumstance. The Court's ruling was based upon its factual determination that

> [t]he difference between [the chief quartermaster's] estimate of distances and the distances by air line, or by the road usually travelled, is not so material as to justify the inference that he did not exercise the authority given him with an honest purpose to carry out the real intention of the parties, as collected from their agreement.[52]

Justice Harlan summarized shortly afterwards in his one-paragraph resolution of this issue as follows:

> [I]n the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action

> in the premises is conclusive upon the [contractor] as well as upon the government.[53]

Perhaps things were simpler for the Supreme Court in the days of the Wild, Wild West. In those days, the Supreme Court could write decisions, like that in *Kihlberg*, of only three pages and without citation to a single authority. So it leaves it somewhat to the imagination to uncover what the Supreme Court was really doing, both practically and in terms of contract theory, and how the facts and theory interacted. One would think that, if motivated only by contract theory, the Court would have struck down the contract for lack of certainty or for indefiniteness. (Of course, this was well before the introduction of the Uniform Commercial Code and *Restatement* and the greater flexibility for open-price terms.[54]) When one party has exclusive control of pricing, with no brake on that power, an agreement between private parties would generally not be enforceable.[55] However, the practicalities of the situation shine through in Justice Harlan's brief opinion. This was a contract with the government for desperately needed services critical to the national defense. In a flight of freewheeling dicta and speculation, Justice Harlan hypothesized,

> Indeed, it is not at all certain that the government would have given its assent to any contract which did not confer upon one of its officers the authority in question. If the contract had not provided distinctly, and in advance of any services performed under it, for the ascertainment of distances upon which transportation was to be paid, disputes might have constantly arisen between the contractor and the government, resulting in vexatious and expensive and, to the contractor oftentimes, ruinous litigation . . . [b]e this supposition as it may . . . .[56]

So how did the Supreme Court save this contract the Army desperately needed from lack of certainty and indefiniteness? Without saying so expressly, the Court imposed a duty of good faith on the exercise of the chief quartermaster s discretion to set the distances. Needless to say, the Court did this well before what is often credited as the first modern articulation of the implied duty of good faith, Justice Cardozo's celebrated, 1933 decision in *Kirke La Shelle Co. v. Paul Armstrong Co*.[57] But imposing a good faith restriction on the chief quartermaster's seemingly unbounded discretion to set distances (at least on the low side to the contractor's disadvantage) is exactly what the Supreme Court was doing.[58]

The Supreme Court in *Kihlberg* articulated that restriction in three parts: that duty could be breached (1) by outright fraud, or (2) by a judgment so off-kilter that it "would necessarily imply bad faith," or (3) by a "failure to exercise an honest judgment."[59] Anticipating issues to come, this three-part enunciation of the good faith duty incorporated regulation of both *intentional* malfeasance (i.e., "fraud") and *unintentional* malevolence that simply skewed the exercise of the duty such that a reasonable, objective person would not consider the discretionary exercise of the duty to be fair, honest, or reasoned, but biased and inconsistent with the justified expectations of the other party. Such bias could be implied from the discretionary act itself.[60] It bears repeating, though, that in 1879 when the Supreme Court decided *Kihlberg* the doctrine of good faith duties was not commonly articulated as a limiting theory in contract law,[61] and so *Kihlberg* can rightfully be seen as a groundbreaking decision in the field. In that sense, it is no surprise that Justice Harlan cited no other precedent for his ruling for the unanimous Court.[62]

Act Two. The Supreme Court Applies the Rule to Other Contract Clauses

Over the rest of the Nineteenth Century, the Supreme Court applied the *Kihlberg* standard of "such gross mistake as would necessarily imply bad faith or failure to exercise honest judgment" in three other principal cases. In doing so, the Court expanded the standards application to other contract clauses giving one party discretionary duties that bind the other, never requiring animus to show a breach of good faith when exercising those duties.

In the 1883 decision of *Sweeney v. United States*,[63] the contractor built a wall with materials that he had previously been told were unacceptable and, after completion, the government's engineer refused to certify the wall's acceptability.[64] The contract provided that payment was contingent on the government's "civil engineer, or other agent, [having] certified that it is in all respects as contracted for . . . ."[65] Applying the *Kihlberg* standard, the Court, in a unanimous opinion by Chief Justice Waite, noted that the engineer's determination was conclusive because the Court of Claims had found that "there was neither fraud, nor such gross mistake as would necessarily imply bad faith, nor any failure to exercise an honest judgment on the part of the officer in making his inspections."[66] In this decision, there is no indication that the contractor was required to have proven intentional misconduct to meet the "gross mistake as would necessarily imply bad faith" standard.

Justice Harlan again wielded the pen for a unanimous Court in the 1885 decision of *Martinsburg & Potomac Railroad Co. v. March*.[67] Although the dispute was between private parties only, a contractor and a railroad, Justice Harlan applied the *Kihlberg* and *Sweeney* decisions to analyze the effect of contract clauses that gave the railroad's engineer final say in whether the work was satisfactory, clauses that used language strikingly similar to that construed in *Sweeney*.[68] Justice Harlan held that the contractor had not even stated a cause of action because the railroad's engineer had refused to issue a certificate of satisfaction when the contractor had not averred that the engineer "had been guilty of fraud, or had made such gross mistake in his estimates as necessarily implied bad faith, or had failed to exercise an honest judgment in discharging the duty imposed upon him."[69] Justice Harlan went on in dicta, however, to remark that the judge had improperly explained the applicable standard to the jury. The trial judge had instructed the jury to determine whether the engineer had acted with "fraud or intentional misconduct" or had committed a "gross mistake."[70] Justice Harlan instructed that this was insufficient, because the trial court should have further explained that "the mistake must have been so gross, or of such a nature, as necessarily implied bad faith upon the part of the engineer."[71] He explained that, from the contract's clauses, it must be "presumed" that the parties were aware of the possibility that the engineer might err or make common mistakes.[72] He then stated that, while the parties chose to risk such mistakes,

> the law presumes they did not intend to waive . . . that the engineer should, at all times, and in respect of every matter submitted to his determination, exercise an honest judgment, and commit no such mistakes as, under all the circumstances, would imply bad faith.[73]

Although the Court spoke in dicta, three points of relevance can be discerned from this latter passage in *Martinsburg*. First, the Court believed it was applying in government contracts cases (like *Kihlberg*) the same rule as applied in private disputes (like *Martinsburg*). Second, there is a distinction between, on the one hand, fraud or intentional misconduct and, on the other, gross mistakes that would imply bad faith or lack of an honest effort or judgment. In other words, the party alleging breach of the exercise of a discretionary duty did not have to prove *intentional* misconduct, but only bias, *which could be shown from the very result of the exercise of discretion itself*. Third, this duty not to exercise discretion in bad faith was imposed on the parties as a matter of law. While not yet articulating it in terms of good faith duties[74] (Justice Cardozo's decision in *Kirke LaShelle Co*. was still almost a half-century in the future), the Court nevertheless implied that the contracting parties intended such a restraint on discretionary action by one party that could deprive the other party of the benefit of its bargain.[75]

In 1891, the Supreme Court, in *Chicago, Santa Fe & California Railroad Co. v. Price*,[76] again applied the *Kihlberg* rule in a contract between private parties.[77] In that case, the Court made a sharp distinction between intentional fraud and unintentional errors, thereby indicating that willful misconduct was *not* required under the *Kihlberg* standard.[78] However, the Court did not yet indicate a modern understanding of good faith duties, holding that "mere incompetency or mere negligence" does not equate to a mistake "so gross as to imply bad faith."[79]

Act Three. The Court of Claims and the Supreme Court Solidify That Bad Faith Does Not Require Intentional Misconduct

The Court of Claims read *Kihlberg, Sweeney*, and *Martinsburg* to apply a bad faith standard to limit government contracts clauses that on their face give absolute discretion to the government. The court understood the standard to allow it to police the performance of government agents such that a contractor could prevail *without* proving intentional wrongdoing. If the agent's exercise of discretion was so unreasonable or out of bounds that it implied a bias in favor of his government employer or demonstrated the lack of an honest (good faith) attempt to fulfill his contractual duty, the exercise of discretion was a breach, whether or not done with an intent to injure the contractor. Zeal to favor the government or a desire to protect the public fiscally did not excuse the irrationality; to the contrary, these natural motivations were some of the very reasons discretionary decisions of government agents needed to be policed in public contracts.

This was demonstrated in the 1912 case of *Ripley v. United States*.[80] *Ripley* involved building a jetty in a Texas harbor.[81] Like in contracts discussed in prior cases, this contract gave the government engineer the right to decide the acceptability of the contractors performance, in this case when blocks could be put on top of the jetty's core base (and thereby provide workers more protection and reduce delays in the work) and whether the contractor was using the correctly sized blocks.[82] The Court of Claims found that the engineer's refusal to allow blocks to be added as requested by the contractor "was gross error and an act of bad faith on his part."[83] It made no similar finding with respect to the size of the blocks, but the Court of Claims granted the contractor relief on both aspects of the case.[84]

On appeal, Justice Lamar, for a unanimous Supreme Court, noted that, once again, the Court was dealing with a contract that vested final discretion in one party's agent to determine satisfactory performance by the other.[85] As to the size of the block, then, the Court reversed the Court of Claims because, in "the absence of fraud, or gross mistake implying fraud," the government's decision "was conclusive."[86]

This formulation of the *Kihlberg* test, on first glance, would seem to equate bad faith with fraud, requiring intentional misconduct. But the passage is dicta and, when read in context, is not retrenching on the *Kihlberg* rule. It is dicta because the Court of Claims did not find a gross mistake necessarily implying bad faith with respect to the issue of the size of the stone.[87] Thus, if the dicta were intended as a new test, it was not applied in *Ripley*. Moreover, Justice Lamar seemingly committed his own "gross mistake" by misquoting the Court's prior precedent. The "gross mistake implying *fraud*" formulation (instead of "implying *bad faith*") was repeated earlier in the opinion in the following curious passage related to the laying of the blocks:

> The contract provided that these blocks should be put in place when "in the judgment of the United States agent in charge" the core or mound had sufficiently consolidated. Until the agent determined that the core had settled, the contractor had no right to do this part of the work. No matter how long the delay or how great the damage, he was entitled to no relief unless it appeared that the refusal was the result of "fraud or of such gross mistake as would imply a fraud." *Martinsburg & P.R. Co. v. March*, 114 U.S. 549; *United States v. Mueller*, 113 U.S. 153. [88]

This formulation quoted by Justice Lamar, "fraud or of such gross mistake as would imply a *fraud*" does not appear in either the *Martinsburg* or *Mueller* decisions he cited. In fact, the *Mueller* decision does not even discuss the *Kihlberg* rule.

When *Ripley* is read in fuller context, it is also clear that Justice Lamar was not trying to scale back on the *Kihlberg* test, but to apply it. Indeed, language immediately following the passage quoted above appears to *expand* the test to explain that *capricious* and *unreasonable* action equates to a "gross mistake necessarily implying bad faith." The Supreme Court in this passage moved still closer to modern articulations of good faith duties:

> But the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agents judgment should be exercised not *capriciously* or fraudulently, but *reasonably and with due regard to the rights of both the contracting parties*. The finding by the court that the inspectors refusal was a gross mistake and an act of *bad faith* necessarily, therefore, leads to the conclusion that the contractor was entitled to recover the damages caused thereby.[89]

Taken together with the lack of any finding by the Court of Claims that the government inspector acted fraudulently, but that he acted only with a gross error of judgment implying bad faith, *Ripley* cannot reasonably be read to have cabined the agent's good faith duties to be only to refrain from fraud or other intentional misconduct. Indeed, four years later, in 1916, the Supreme Court upheld a decision of the Secretary of the Treasury, on appeal by a contractor, when the contract made that officer's decision final, because there was "no attempt to impugn [his] *good faith*."[90] In other words, the Supreme Court, almost a century ago, equated lack of good faith with contractual bad faith.[91]

And that is the way that the Court of Claims consistently understood the law in the first half of the Twentieth Century. For example, in *Levering & Garrigues Co. v. United States*,[92] a construction contractor sued for delay damages.[93] The contract specified that the agency's appeals board held final decision-making authority on such matters.[94] The board granted the suit in part, but also assessed liquidated damages against the contractor for twenty-three days of delay.[95] Before the Court of Claims, the government recited the restrictive formulation of Justice Lamar's dicta in *Ripley*, arguing that such final decisions could not be set aside unless they were "fraudulent or so grossly erroneous that *fraud* will be implied."[96] The Court of Claims rejected that reading of *Ripley*, citing *Ripley* instead to strike down the assessment of liquidated damages for the twenty-three day delay because it was "so *arbitrary* and grossly erroneous as to constitute *bad faith*."[97] The Court of Claims made no findings that the government decision makers had acted with animus or intent to injure the contractor. The court based its conclusions of bad faith strictly upon the facts that (a) there was no evidence in the record to support the attribution of the delay to the contractor and (b) there was no evidence supporting the board's disallowance of the contractor's proven costs.[98] In other words, by 1931, arbitrary and capricious conduct and decisions that were unreasonable or not based on substantial evidence were equated with bad faith acts.[99]

Approximately a decade later, in *Penker Construction Co. v. United States*,[100] the Court of Claims reiterated its power to set aside the agency's "final decision" under a disputes clause if it was "arbitrary, capricious, or so grossly erroneous as to imply bad faith."[101] This test was met in that case in part because the agency's decision was not supported by substantial evidence.[102] Two years later, in 1944, the court in *Needles v. United States*[103] required proof by the contractor "by the greater weight of the credible evidence of record"[104] (i.e., by a preponderance of the evidence), and rejected the need to show actual bias or animus, finding that arbitrary acts demonstrate lack of requisite good faith, or bad faith, "by the use of an objective standard."[105] Similarly, in *Penner Installation Corp. v. United States*,[106] the Court of Claims in 1950 rejected the idea that the "so grossly erroneous as to imply bad faith" standard required proof of animus against the contractor, repeating that the test was satisfied when there was evidence of evident partiality towards the government by its agent, which could be demonstrated by the substance of the decisions themselves.[107]

This consistent reading by the Court of Claims of the "bad faith" standard – equating it with arbitrary, unreasonable, or capricious action and decisions not based on substantial evidence – not only was consistent with the text and rulings of the relevant Supreme Court cases;[108] it was also consistent with the contemporaneous reiteration by the Supreme Court that, when the government steps into the market place, it steps "off its pedestal" as sovereign and its conduct is dictated by the rules applicable to private citizens.[109] During this period, the "rules applicable to private citizens" were marked by the maturation of the common law of good faith duties being applied to the exercise of discretion of a contractual power given to one of the parties.[110] Moreover, Congress in 1946, with the passage of the Administrative Procedure Act ("APA"), adopted the "arbitrary and capricious" review standard for agency action.[111] Congress in that act also embraced the "substantial evidence" and "abuse of discretion" tests under which agency action could be reviewed and set aside.[112]

By mid-century, then, it seemed clearly settled that the *Kihlberg* standard for reviewing the government's exercise of contract discretion was *not* limited to fraud and intentional wrongdoing. Instead "such gross mistake as would necessarily imply bad faith" was basically equated with what became the APA's standards of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "unsupported by substantial evidence."[113] Fraud, of course, was still forbidden, but fraud by a government agent acting on behalf of his employer is not as great a danger as it is with respect to a private party acting on his own behalf. Nevertheless, government agents are just as prone to abusing their discretion in gross, arbitrary, capricious, and abusive ways as are private citizens. They are just as prone to wear unintended blinders or to have their vision clouded by overzealous attachment to the interests of their employer or by hopes of personal advancement.[114] Indeed, such biases are all the easier to rationalize in government contracts, when the ultimate intent may be to save the government money or to benefit the troops – noble goals in the abstract, but not when they are used to divest contractors of their justified contractual expectations.[115]

Act Four. The *Wunderlich* Majority's Backsliding Generates an Immediate Backlash

Given the progressive acceptance of good faith duties in contracts in the common law and Congress's expansion of the corresponding judicial review of other agency action, the continued broadening of the "bad faith" finality exception first articulated in *Kihlberg* to include arbitrary and capricious conduct and failure of agency boards to act on the basis of substantial evidence was entirely predictable. The Court of Claims in its 1951 decision in *Wunderlich v. United States*[116] continued that trend, finding that the department heads resolution of a dispute arising under the contract was not entitled to finality because it was "arbitrary," "capricious," and "grossly erroneous."[117] The Court of Claims issued no less than 111 pages of fact-finding on approximately forty claims, each and every one of which had been denied *en toto* by the Secretary of the Interior, whose decision on questions of fact per the contract was to be "final and conclusive."[118] The court found the secretary's decisions in some respects to be devoid of evidentiary support – and, thus, to be so grossly erroneous as to necessarily imply bad faith – and granted judgment in those instances for the contractor.[119]

It came as a thunderbolt out of nowhere, then, when the Supreme Court reversed the Court of Claims in *Wunderlich*. Justice Minton, for a divided Court, in one short paragraph took the *Kihlberg* standard – "in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment"[120] – to a place it had never been, ruling that it required a showing of *intentional dishonesty*:

> In *Ripley v. United States*, 223 U.S. 695,704, gross mistake implying bad faith is equated to "fraud." Despite the fact that other words such as "negligence," "incompetence," "capriciousness," and "arbitrary" have been used in the course of the opinions, this Court has consistently upheld the finality of the department head's decision unless it was founded on fraud, alleged and proved. So fraud is in essence the exception. By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest. The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract.[121]

The dissenting justices did not take the majority to task for its cribbed (and inaccurate) reading of *Ripley* and its related precedent. Instead, they focused on broader public policies. Justice Douglas, joined by Justice Reed, while acknowledging that the case "reveals only a minor facet of the age-long struggle," broadly observed, "Absolute discretion is a ruthless master. It is more destructive of freedom than any of mans other inventions."[122] He decried the new rule:

> It makes a tyrant out of every contracting officer. He is granted the power of a tyrant even though he is stubborn, perverse or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected.[123]

Justice Douglas articulated his opinion that the *Kihlberg* rule should be affirmed as the Court of Claims had been interpreting it for years: "We should allow the Court of Claims, the agency close to these disputes, to reverse an official whose conduct is plainly out of bounds whether he is fraudulent, perverse, captious, incompetent, or just palpably wrong."[124]

Justice Jackson penned a separate dissent in *Wunderlich*. He began by noting that the Court of Claims, with its substantial experience, had concluded "that contracting officers and heads of departments sometimes are abusing the power of deciding their own lawsuits which these contract [disputes clause] provisions give to them."[125] He criticized the majority for essentially reading out of the *Kihlberg* standard its critical text, "or such gross mistakes as necessarily implied bad faith," text which the Court had recently reaffirmed.[126] Justice Jackson then spoke more theoretically, analogizing to fiduciary obligations and the standards of good faith and fair dealing:

> [O]ne who undertakes to act as a judge in his own case or, what amounts to the same thing, in the case of his own department, should be under some fiduciary obligation to the position which he assumes. He is not at liberty to make arbitrary or reckless use of his power, nor to disregard evidence, nor to shield his department from consequences of its own blunders at the expense of contractors. . . . [H]e who bargains to be made judge of his own cause assumes an implied obligation to do justice. This does not mean that every petty disagreement should be readjudged, but that the courts should hold the administrative officers to the old but vanishing standard of good faith and care.[127]

Justice Jackson argued that, if anything, this judge-made rule should be expanded, not contracted, and should definitely not be constricted to intentional misconduct:

> I think that we should adhere to the rule that where the decision of the contracting officer or department head shows "such gross mistake as necessarily to imply bad faith" there is a judicial remedy even if it has its origin in overzeal for the department, negligence of the deciding official, misrepresentations – however innocent – by subordinates, prejudice against the contractor, or other causes that fall short of actual corruption. Men are often more bribed by their loyalties and ambitions than by money.[128]

The majority decision in *Wunderlich* provoked immediate outrage.[129] Justice Minton in that decision had voiced the challenge, "[i]f the standard of fraud that we adhere to is too limited, that is a matter for Congress,"[130] and Congress quickly accepted it.[131] Within two years, representatives and senators had introduced no less than eight, complementary bills "to overcome the effect of the Supreme Court decision" in *Wunderlich*.[132] The House report on the bill as passed, which became known as the "Wunderlich Act," noted that representatives of both industry and government had all spoken in favor of the proposed legislation in public hearings.[133] The House report noted that the *Wunderlich* majority had overturned the prior existing law that decisions should be set aside if they were arbitrary, capricious, or so grossly erroneous as to necessarily imply bad faith.[134] The representatives quoted the Court of Claims in this regard, noting that court's observation that, before

Wunderlich, it had equated *Kihlberg*'s "bad faith" standard with the failure to observe good faith duties:

> Until the time of the decision in that case [*Wunderlich*], this court had reviewed the contracting officer's decision when it was shown to be arbitrary, capricious, or so grossly erroneous as to imply bad faith, notwithstanding the parties had contracted that all matters of disputed fact might be decided by one of the parties to the contract. *Such a provision we had understood called for the highest good faith on the part of the interested party making the decision.*[135]

The House report then quoted approvingly from the dissenting opinions of both Justice Douglas and Justice Jackson and concluded that the *Wunderlich* decision was not "consonant with tradition that everyone should have his day in court and that contracts should be mutually enforceable."[136] The act restored "the standards of review based on arbitrariness and capriciousness," which the House report noted "have long been recognized as constituting a sufficient basis for judicial review of administrative decisions," (correctly) citing *Ripley* in support – an obvious slap at the *Wunderlich* majority's inaccurate reading of that case.[137] The House report then continued by noting that the act was also designed to overturn the effect of the Supreme Court's 1950 decision in *United States v. Moorman*[138] by outlawing any clause in a government contract that purports to make an agency official's decision final on a matter of law.[139]

In passing the Wunderlich Act[140] (more accurately, the "Anti-Wunderlich Act"), Congress expressly added the arbitrary and capricious factors for review, as well as the review standard from the APA that fact findings must be supported by substantial evidence and cannot be contrary to law.[141] The act read that an agency decision is final and conclusive "unless the same is fradulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."[142] It also provided that no effect was to be given to any contract provision attempting to make an agency decision maker's findings of law conclusive.[143]

While the "capricious or arbitrary" language was expressly added to the *Kihlberg* formulation, in actuality Congress was simply adopting the gloss which the Supreme Court from the Nineteenth Century and the Court of Claims in the Twentieth Century had put on the "so grossly erroneous as necessarily to imply bad faith" standard.[144] In other words, an agency violated good faith duties inherent in exercising its decision-making authority if it acted arbitrarily or capriciously or outside the evidence when deciding a contract dispute.[145] Congress emphatically *rejected* the idea that bad faith only applied to intentional misconduct or animus against the contractor and expressly *adopted* the understanding that, by failing to act in consonance with good faith duties, a government agent acts in bad faith.[146]

This was driven home by the Court of Claims in *Hoel-Steffen Construction Co. v. United States*.[147] The court was there confronted with the refusal of the contracting officer to permit a substitution under an Approval of Subcontractors clause.[148] The court did not find that the contracting officer had any malicious intent, but it did find that he had misunderstood the legal and factual circumstances and that his denial was "arbitrary and capricious."[149] The court further explained that, under the Wunderlich Act, the appropriate exception to limit the contracting officer's discretion under the Approval of Subcontractors clause was "so grossly erroneous as necessarily to imply bad faith."[150] It concluded that the agency's refusal "fits into this language as into a glove . . . ,"[151] and expressly rejected the suggestion that bad faith in this context requires a showing of a specific intent to injure the contractor.[152]

Denouement

Just ask O.J. Simpson: burdens of proof are a big deal. O.J. was not convicted of murdering his ex-wife and her new boyfriend when the jury had to find him guilty beyond a reasonable doubt,[153] but he was found responsible for their wrongful deaths when a later jury found it more likely than not that he had killed them.[154] Why the different burdens in O.J.'s two trials? The first was criminal; the latter, civil. The first threatened O.J. with loss of liberty; the latter, loss of money. In both trials, however, his innocence and good faith were assumed at the outset; it was up to the state (in the criminal trial) and then the families of the deceased (in the civil trial) to prove his guilt by the applicable standard. In the civil trial, the families also proved by a preponderance of the evidence that the killings were done with malice, justifying enhanced damages.[155]

Should the U.S. Government in its civil trials be held to a higher or a lower standard than O.J. Simpson in his civil trial? Is more or less at stake for the U.S. Government in a contracts case than O.J. had at stake in his wrongful death tort case? O.J. was subjected to obloquy by the civil verdicts; the United States suffers no such risk to its corporate being in a contract action. O.J. was wealthy, but the multi-million-dollar civil verdicts bankrupted him; contract damages will not bankrupt the U.S. Government. And should private citizens be held to the higher standard of conduct than their government? President Lincoln surely made this call correctly: "It is as much the duty of government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals."[156]

From the start, when the Supreme Court in *Kihlberg* recognized that good faith duties constrained discretionary contractual actions, it was not necessary to show specific intent to harm to apply that brake.[157] In *Kihlberg*, for example, if the mileage fixed by the government agent had been half of any legitimate estimate, the Court undoubtedly would have found the quartermaster s exercise of his discretion to be "grossly erroneous" and, thus, made in "bad faith," even if innocently done.[158] "Bad faith" in this specific context would simply be the lack of a good faith effort to exercise his discretion in a way consistent with the purpose of the deal to estimate the mileage and not to do so in a way inconsistent with the justified expectations of the freight forwarder.[159]

The principle of *Kihlberg* and other early good faith cases was applied in disputes clause cases. The Court of Claims, as the good faith doctrine developed in the common law and disputes clauses calling for administrative resolutions of claims "arising under" the contract became commonplace, equated "so grossly erroneous as to imply bad faith" with arbitrary and capricious action and decisions not supported by substantial evidence of record.[160] That standard was adopted by Congress in the APA in 1946.[161] When, five years later, the Supreme Court in *Wunderlich* basically applied the Federal Arbitration Act review standard requiring fraud for decisions of independent arbitrators[162] instead of the APA standard for agency actions,[163] Congress promptly reinstated the "no specific intent" standard for contracts in which the federal government was a party.[164]

With this history, it is ironic that, over half a century later, the Federal Circuit still struggles with a consistent application of the modern law of good faith, contractual duties.[165] Half-measures are not what is needed to remedy the disconnect. Congress decreed an "about face" after the Supreme Court's majority misstep in *Wunderlich*.[166] But Congress is not realistically available to fix this current confusion. The Federal Circuit will need to heal itself by heeding the Supreme Courts admonitions for the last 100 years that, when the United States enters into contracts, it has no greater rights than those of a private party.[167] It should recall the words and example of its predecessor: "As always, the federal contract law we apply should take account of the best in modern decision and discussion."[168] This is the correct application of the Supreme Court's repeated instruction to apply the common law of contracts to government contracts.[169]

That common law lays out the following rules relating to contractual good faith duties:

1. Every contract has implied good faith duties that each party will cooperate with the other to achieve the purpose of the contract and that neither party is to exercise its discretion in a way to frustrate the other

party obtaining the benefits of its bargain or to violate the other party's justified expectations.[170]

2. The breach of good faith duties is, contractually, the same as acting in bad faith.[171]

3. No specific intent, malice, or animus toward the other party need be shown to prove a breach of good faith duties (i.e., bad faith). It can be occasioned by neglect, stupidity, breach of law or other duty, or intent to advantage oneself, one's employer, or other third parties.[172]

4. Breach of good faith duties, or bad faith, need only be proven by the same burden as every other contractual breach, by a preponderance.[173] Government agents, like private parties, are presumed to act in good faith until the opposite is shown. Government agents are not entitled to a greater presumption of propriety than private parties.[174]

5. Willfulness, intentionality, animus, or malice is relevant in two senses, contractually. First, its presence is a strong (but not necessary) indicator of bad faith.[175] Second, its presence eases the degree of exactitude needed by the aggrieved party to prove damages for the breach or to bar the breaching party from proving an offset to the aggrieved party's proven damages.[176] This subjective bad faith, again, must only be proven by the wronged party by a preponderance.[177] To repeat, while subjective bad faith may reinforce the likelihood of a breach of good faith duties, in and of itself, it is not a breach, but becomes actionable when it is put to work by action or inaction that undermines specified obligations and/or rights in the contract.[178]

These rules are applicable to the field of government contracts from start to finish, from bid protest actions to terminations.[179] When colorable violations of good faith duties are alleged in bid protest actions, they should be viewed as a breach of the implied contract to give fair and honest consideration to an offer, a duty that arises under 28 U.S.C. § 1491(a),[180] as well as a breach of express duties in the Federal Acquisition Regulations ("FAR"),[181] also redressable under § 1491(b).[182] Similarly, unilateral discretionary actions by government officials during performance must continue to be bounded by good faith duties, such as decisions whether to accept a value engineering change proposal[183] or to grant an award fee.[184]

The Federal Circuit has put some good faith boundaries on the government's exercise of the termination for convenience clause, but it needs to give the topic a thorough reevaluation. The law supports that an agency abuses its discretion and violates good faith duties if it terminates and there were no changed circumstances.[185] Thus, if the government knew of a better contracting opportunity at the time it awarded a contract and then terminates to acquire the better deal, it breaches its good faith duties.[186] Presumably, the logic of this precedent is that there are no "changed circumstances" if the agency knew of the better deal *before* it contracted.

But why should there be any difference in result if the agency acted when it discovered the better deal *after* contracting? Some requirements contract cases suggest that it makes no difference,[187] and that is certainly the case under the common law. If a requirements buyer finds a better price during the contract term, he is not free to buy his requirements elsewhere.[188] The requirements seller priced his product on the assumption that he would supply all the needs, and so a diversion violates the justified expectations of the seller – no matter when the better market pricing is discovered or materializes.[189] Whether before or after contract award, a termination to acquire better pricing, whether partial or total, actual or constructive, would breach the buyers good faith duties under the contract.[190] Nor is it necessary for there to be subjective animus to disqualify a termination action, in a requirements context or any other.[191] The focus must be on the justified expectations of the contractor under the contract and whether a termination violates them.[192] A contractor has a justified expectation that the termination clause will not be exercised unless there are changed circumstances.[193] This means that it may not be used just to get a better deal, no matter when discovered, or to recapture benefits already bargained away.[194]

Unfortunately, the Federal Circuit still often strays far from the proper path, as shown in *Precision Pine*[195] and in its late-2012 decision in *Road & Highway Builders, LLC v. United States*.[196] At issue in the latter case was the validity of a settlement agreement in which the Internal Revenue Service ("IRS") released tax liens on certain properties in exchange for $ 100,000, when the liens turned out to be worthless, but were not understood to be so at the time.[197] This agreement was not a procurement contract subject to the FAR, and both the CFC and the Federal Circuit analyzed the issue as whether IRS acted in "bad faith" – which it defined as with "specific intent to injure" – by clear and convincing evidence.[198] The taxpayer invoked Judge Wolski's analysis in *Tecom* that these heightened burdens of proof applied only when fraud or some other quasi-criminal wrongdoing was involved,[199] but the Federal Circuit rejected that limitation as inconsistent with its precedent, citing procurement cases.[200]

The issue in *Road & Highway Builders* was whether the agreement was void for lack of consideration because the lien turned out to be worthless.[201] The court properly recited the applicable common law, as reflected in the *Restatement*, that forbearance of a right (in that case, to tax) is valid, adequate consideration provided the forbearing party believes in good faith its right may fairly be determined to be valid.[202] But it then drove off the common-law highway by equating the *Restatement*'s "good faith belief" standard with an intent to injure the other party as set out (improperly) in some of its procurement cases. The common law requires neither proof of animus nor a heightened "clear and convincing" burden. Instead, to show lack of good faith in such a case, it is only necessary to show, by a preponderance, that one party knew it was getting something for nothing.[203] No specific intent to injure the other party need be shown.[204] Unfortunately, the Federal Circuit expanded its erroneous application of good faith law into this new territory, rather than limiting it and starting on the road back to the proper application of common-law principles.[205]

The term *bad faith* is used differently in different legal contexts. Sometimes it does, indeed, invoke concepts of intentional or grossly negligent behavior.[206] *Contractual* bad faith, however, is the equivalent of failing to act consistently with good faith duties. The standard for those duties is a constant – to act consistently with, and not to frustrate, the justified contractual expectations of the other party or "to reappropriate the benefits the other party expected to obtain from the transaction."[207] However, the application of that fixed standard varies with the facts of the particular case. If the parties specifically delimit one party's duties, the other party has no justified expectation that the other party will exercise its discretion in his favor. And, sometimes, laws and regulations impose duties on the government that would not apply to private parties, most obviously in contract negotiation and formation.[208]

Conclusion

In *Kihlberg v. United States*, the Supreme Court in 1879 effectively ruled that the government's exercise of discretion under a federal contract is limited by good faith duties.[209] This rule, until 1951, continued to develop and expand along with the common law of good faith duties, requiring only an objective analysis in the context of the reasonable contractual expectations of the parties, not subjective animus or fraud.[210] When, in that year in *United States v. Wunderlich*, the Supreme Court tried to turn back the clock, misreading its own prior precedent in the process, Congress promptly overruled it.[211]

Unfortunately, this story is a twice-told tale, because the Federal Circuit has rolled back the clock by a century or more and has failed to apply the modern law of contractual good faith duties in multiple instances. That law does *not* require a showing of malice or intentional animus, but only action inconsistent with the reasonable expectations of the parties.[212] As elaborated in the *Restatement*, this breach of good faith duties is the equivalent of contractual bad faith.[213] This common law, consistent with more than a century of admonitions by the Supreme Court that the United States is generally subject to the same rights and responsibilities as private parties when it contracts, should be applied uniformly throughout the contracting process, from formation, during performance, to termination.

** – Frederick W. Claybrook, Jr. is a partner in Crowell & Moring LLP, Washington, D.C. The opinions expressed in this article are solely his own.*

Endnotes

[1] 342 U.S. 98, 103 (1951) (Jackson, J., dissenting).

[2] *See, e.g.*, Stuart B. Nibley & Jade Totman, *Let the Government Contract: The Sovereign Has the Right, and Good Reason, to Shed Its Sovereignty When It Contracts*, 42 Pub. Cont. L.J. 1, 7 (2012); Ralph C. Nash, Jr., *Postscript: Breach of the Duty of Good Faith and Fair Dealing*, 24 Nash & Cibinic Rep. ¶ 22 (May 2010); Frederick W. Claybrook, Jr., *Good Faith in the Termination and Formation of Federal Contracts*, 56 MD. L. Rev. 555 (1997).

[3] *See, e.g.*, Mobil Oil Exploration & Producing S.E., Inc. v. United States, 530 U.S. 604, 614, 622, 624 (2000) (applying and relying extensively for general common-law principles on the *Restatement (Second) of Contracts)*; United States v. Winstar Corp., 518 U.S. 839, 863, 869-70, 887, 895-96, 904, 907-08 (1996) (plurality opinion); Winstar Corp., 518 U.S. at 911-12 (Breyer, J., concurring); Clearfield Trust Co. v. United States, 318 U.S. 363, 369 (1943); Lynch v. United States, 292 U.S. 571, 579 (1934); Sinking-Fund Cases, 99 U.S. 700, 719 (1879) ("The United States are as much bound by their contracts as are individuals."); United States v. Bostwick, 94 U.S. 53, 66 (1876) ("The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf."); Cooke v. United States, 91 U.S. 389, 398 (1875) (ruling that, when the federal government "enters the domain of commerce, it submits itself to the same laws that govern individuals there").

[4] *See, e.g.*, Steven L. Schooner & Pamela J. Kovacs, *Affirmatively Inefficient Jurisprudence?: Confusing Contractors' Rights to Raise Affirmative Defenses with Sovereign Immunity*, 21 Fed. Cir. B.J., 685, 686 (2012) (criticizing the Federal Circuit

not applying normal contractual principles to allow contractors to raise affirmative defenses); Richard C. Johnson, *Beyond Judicial Activism: Federal Circuit Decisions Legislating New Contract Requirements*, 42 Pub. Cont. L.J. 69 (2012) (criticizing, inter alia, the Federal Circuit deviating from the common law with respect to estoppel, use of experts, and affirmative defenses); W. Stanfield Johnson, *The Federal Circuit's Great Dissenter and Her "National Policy of Fairness to Contractors*," 40 Pub. Cont. L.J. 275 (2011) (utilizing dissents written by Judge Newman to demonstrate that "the Federal Circuit has inappropriately moved the balance of its government contract jurisprudence toward protecting the sovereign"); Frederick W. Claybrook, Jr., *It's Patent That "Plain Meaning" Dictionary Definitions Shouldn't Dictate: What Phillips Portends for Contract Interpretation*, 16 Fed. Cir. B.J. 91 (2006) (observing that the Federal Circuit deviates from the common law as stated in the *Restatement (Second) of Contracts when interpreting contracts); Daniel P. Graham, Departing from* Hadley: *Recovering Lost Profits on Collateral Undertakings in Suits Against the Government*, 35 Pub. Cont. L.J. 43 (2005) (criticizing the Federal Circuit for deviating from the common law with respect to the articles subject); W. Stanfield Johnson, *Mixed Nuts and Other Humdrum Disputes: Holding the Government Accountable Under the Law of Contracts Between Private Individuals*, 32 Pub. Cont. L.J., 677 (2003) [hereinafter *Mixed Nuts*] (analyzing several Federal Circuit decisions that deviate from the common law of contracting).

[5] R & R Enters., 89-2 BCA ¶ 21,708 at 109, 148 (Mar. 24, 1989).

[6] 10 Ct. CI. 494 (1874), *aff'd*, 91 U.S. 321 (1875).

[7] *Id*. at 502; *see also* S&E Contractors, Inc. v. United States, 406 U.S. 1, 10 (1972) ("A citizen has a right to expect fair dealing from his government.").

[8] Corliss Steam-Engine Co., 10 Ct. Cl. at 502.

[9] *See supra* note 2.

[10] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) [hereinafter RESTATEMENT]; *see also* U.C.C. § 1-203 ("Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance or enforcement."); § 1-201(19) (defining good faith as "honesty in fact in the conduct or transaction concerned"). *See generally* E. Allen Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666, 666 (1962); Robert S. Summers, "*Good Faith" and General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195, 196 (1968).

[11] STEVEN J. BURTON & ERIC G. ANDERSEN, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT 107 (1995) [hereinafter Burton & Andersen]. Judge Wolski in *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 758 (2005), traces this principle back as far as Justice Story's words in *Bank of the United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 69-70 (1827) ("[T]he law . . . presumes that every man, in his private and official character, does his duty, until the contrary is proved."); *see also* Tecom, Inc., 66 Fed. Cl. at 760-61 (citing Supreme Court cases as early as 1836 applying a presumption of regularity and good faith action in wholly private contexts).

[12] BURTON & ANDERSEN, *supra* note 11, at 36-37; Summers, *supra* note 10, at 217.

[13] RESTATEMENT § 205 cmt. d.

[14] *Id.*; BURTON & ANDERSEN, *supra* note 11, at §§ 3.1-.4; *see also* U.S. Ecology, Inc. v. Neb., 358 F.3d 528, 547-48 (8th Cir. 2004) (applying federal law for an interstate compact and relying on Restatement § 205, equating breach of good-faith duties with bad faith).

[15] BURTON & ANDERSEN, *supra* note 11, at 75.

[16] According to the RESTATEMENT:

> Doubts are generally resolved against the party in breach. A party who has, by his breach, forced the injured party to seek compensation in damages should not be allowed to profit from his breach where it is established that a significant loss has occurred. A court may take into account all the circumstances of the breach, including willfulness, in deciding whether to require a lesser degree of certainty, giving greater discretion to the trier of the facts.

RESTATEMENT § 352 cmt. a; *cf*. 28 U.S.C. § 2412(d)(1)(D) (2012) (equating willful violation of law with bad faith).

[17] *See* LaSalle Talman Fed. Sav. Bank, N.A. v. United States, 317 F.3d 1363, 1372 (Fed. Cir. 2003). In *LaSalle Talman*, the Federal Circuit noted that the willfulness of a breach or other equitable circumstances might cause a court to disallow proof of an offset to breach damages. *Id.* As an example, the court cites the Sixth Circuit's decision in Great Lakes Transmission Co. v. Grayco Constructors, Inc., 506 F.2d 498 (6th Cir. 1974), in which the court refused to permit proof of an offset because the breaching party acted negligently. *Id.* at 504; *see also* United Protective Workers of Am., Local No. 2 v. Ford Motor Co., 223 F.2d 49, 54 (7th Cir. 1955) (allowing only compensatory damages when no bad faith or misconduct, but innocent breach).

[18] RESTATEMENT § 205 cmt. d. An analogous application of this is found in the law of recovery against losing plaintiffs in civil rights cases under fee-shifting statutes. The Supreme Court in Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978), held that, to recover fees, the winning defendant must show *objective* bad faith measured by the plaintiffs action being "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith," but proof of *subjective* bad faith makes an award all the more appropriate. *Id.* at 421-22.

[19] *See, e.g.*, Medlin Constr. Grp., Ltd. v. Harvey, 449 F.3d 1195, 1200 (Fed. Cir. 2006) ("The general rules of contract interpretation apply to contracts to which the government is a party."); Maxima Corp. v. United States, 847 F.2d 1549, 1556 (Fed. Cir. 1988) ("The need for mutual fair dealing is no less required in contracts to which the government is a party, than in any other commercial arrangement.").

[20] *E.g.*, Metcalf Constr. Co. v. United States, 742 F.3d 984, 991 (Fed. Cir. 2014) (rejecting argument that the implied duty of good faith must mirror an express duty set out in the contract); Centex Corp. v. United States, 395 F.3d 1283, 1304 (Fed. Cir. 2005) (citing and quoting RESTATEMENT § 205 with approval; however, also noting government's action was "specifically targeted"); Malone v. United States, 849 F.2d 1441, 1442-45 (Fed. Cir. 1988); *see also* Rumsfeld v. Applied Cos., 325 F.3d 1328, 1334 (Fed. Cir. 2003) (applying duty to estimate requirements in good faith, not negligently); B.R. Burke Corp. v. United States, 277 F.3d 1346, 1360 (Fed. Cir. 2002) (relying upon RESTATEMENT § 205 to hold that, by submitting for approval a work plan it had reason to know was inadequate, contractor violated his duty of good faith and fair dealing); Aviation Contractor Employees, Inc. v. United States, 945 F.2d 1568, 1572-73 (Fed. Cir. 1991) (observing that open terms are enforceable due to duty to negotiate in good faith); Pac. Far E. Lines v. United States, 394 F.2d 990, 990 (Ct. CI. 1968). *See generally* Claybrook, *supra* note 4, at 101-03 n.75 (noting Federal Circuit's use of the *Restatement* in almost 150 decisions).

[21] *See* Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002). For a critique of *Am-Pro* as inconsistent with the common law, see *Mixed Nuts, supra* note 2, at 696-705.

[22] The task, however, has been accomplished on rare occasions. *E.g.*, The Libertaria Assocs., Inc. v. United States, 46 Fed. Cl. 702, 712 (2000). The Civilian Board of Contract Appeals has also rebuffed attempts by agency attorneys to require animus as an element of a breach of good-faith duties. *E.g.*, Sigma Servs., Inc. v. HUD, 12-2 BCA ¶ 35,173 (Nov. 5, 2012) ("A claim that [the agency] breached the implied covenant of good faith does not require a showing of bad faith.") (citation omitted); Jane Mobley Assocs., Inc. v. GSA, 12-2 BCA ¶ 35,178 (Nov. 14, 2012).

[23] 724 F.3d 1357 (Fed. Cir. 2013).

[24] *Id.* at 1364.

[25] *Id.* at 1364-65.

[26] BURTON & ANDERSEN, *supra* note 11, at 89-90.

[27] *Id.* at 75.

[28] *Id.* at 83 (internal quote marks omitted).

[29] *Id.* at 77-78; *see also id.* at 289-90.

[30] *E.g.*, Daniel E. Toomey et al., *Good Faith and Fair Dealing: The Well-Nigh Irrefragable Need for a New Standard in Public Contract Law*, 20 Pub. Cont. L.J. 87, 88, 124-25 (1990).

[31] 66 Fed. Cl. 736 (2005).

[32] *Id.* at 757-72. Judge Wolski concludes that a heightened burden applies only for fraud or quasi-criminal conduct and goes so far as holding that "when the government actions that are alleged are not formal, discretionary decisions, but instead the actions that might be taken by any party to a contract, the presumption of good faith has no application." *Id.* at 769. The Federal Circuit in *Road & Highway Builders, LLC v. United States,* 702 F.3d 1365 (Fed. Cir. 2012), repudiated the *Tecom* analysis with respect to the presumption that a government official acts in good faith as inconsistent with its precedent. *Id.* at 1369. *Road & Highway Builders*, properly read, does not deal with contractual duties. *See infra* notes 196-203 and accompanying text.

[33] 596 F.3d 817 (Fed. Cir. 2010).

[34] *Id.* at 829.

[35] Nash, *supra* note 2, at 67-68; *see also* Raytheon Missile Sys., 13-1 BCA ¶ 35,241 (Jan. 1, 2013) (noting that *Precision Pine* injected into government contracts cases which "have nothing to do with sovereign immunity" the concept of "specifically targeted action"). The Federal Circuit has subsequently restrictively read *Precision Pine* in *Metcalf Construction Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014).

[36] Claybrook, *supra* note 2, at 576-77; *see also Mixed Nuts, supra* note 2, at 698-705.

[37] *See supra* note 11.

[38] BURTON & ANDERSEN, *supra* note 11, at 107; *see also* Huna Totem Corp. v. United States, 35 Fed. Cl. 603, 613 (1996) ("there is a presumption that both parties have fulfilled their duties of good faith and fair dealing" (i.e., both the government and the private party)).

[39] BURTON & ANDERSEN, *supra* note 11, at 107. Moreover, under the common law, even animus and malice in a breach setting, when relevant, do not *require* proof of specific intent. While, under the common law, malice connotes willfulness, it does not require personal ill will, but merely intentional action for a wrongful purpose to gain some advantage at the other party's expense. *See* Bitterman v. Louisville & Nashville R.R. Co., 207 U.S. 205, 223 (1907) (stating that personal ill will is not required for malice in law, only wanton disregard of the rights of the other to gain personal advantage); Getschow v. Commonwealth Edison Co., 444 N.E.2d 579, 584 (Ill. App. Ct. 1982) ("It is also well settled that malice, when used in this context, does not require a showing of ill will, hostility or an intent to injure . . . ."), *aff'd in part and rev'd in part*, 459 N.E.2d 1332 (Ill. 1984) (internal quotation marks omitted); Coleman v. Whisnant, 35 S.E.2d 647, 656 (N.C. 1945) ("The word *malicious* used in referring to malicious interference with formation of a contract does not import ill will, but refers to an interference with design of injury to plaintiff or gaining some advantage at his expense.") (internal quotation marks omitted); *see also* In re Posta, 866 E 2d 364, 367-68 (10th Cir. 1989) (stating that malicious intent under the Bankruptcy Code may be proven by either direct evidence with specific intent to injure or, "[m]ore commonly, . . . by evidence that the debtor had knowledge of the creditor's rights and . . . proceeded to take action in violation of those rights"); BALLENTINE'S LAW DICTIONARY 768 (3d ed. 1969) (defining malice as an "improper motive, not necessarily a positive malignity; a willful disregard of the rights of another, whether in accomplishing an unlawful purpose or a lawful purpose by an unlawful means"); BLACK'S LAW DICTIONARY 956-57 (6th ed. 1990) ("Malice in law is not necessarily personal hate or ill will, but it is that state of mind which is reckless of law and of the legal rights of the citizen.")

[40] *See generally* Tecom, Inc. v. United States, 66 Fed. Cl. 736, 771 n.41, 757-73 (2005). Judge Wolski in *Tecom* criticizes, for example, *Boston Edison Co. v. United States,* 64 Fed. Cl. 167, 186 (2005), and *J. Cooper & Associates, Inc. v. United States,* 53 Fed. Cl. 8, 23 (2002), for applying a clear and convincing evidence standard. Another example of a heightened bad faith standard is with regard to a court exercising its authority to sanction by awarding attorneys fees due to bad faith litigation conduct. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991). Even though the courts often require an improper "bad faith" motive to impose such a sanction, the Federal Circuit and other circuits have emphasized that showing the

requisite bad faith does not require proof of actual intent, but can be proven by conduct. *E.g.*, First Bank v. Hartford Underwriters Ins. Co., 307 F.3d 501, 522-25 (6th Cir. 2002) (holding that lack of merit to positions taken supported inference that claim was brought to harass and to force settlement of other claims); Fink v. Gomez, 239 F.3d 989, 992-94 (9th Cir. 2001) (holding that it is not necessary to prove subjective motivation, but can prove bad faith by evidence of improper purpose and reckless conduct); L.E.A. Dynatech, Inc. v. Allina, 49 F.3d 1527, 1531 (Fed. Cir. 1995) (inference of bad faith adequately supported by flip-flop of litigation positions).

[41] Pub. L. No. 95-563 § 10(b), 92 Stat. 2383, 2388 (codified as amended at 41 U.S.C. § 7107(b) (2012)).

[42] Pub. L. No. 83-356, 68 Stat. 81 (codified as amended at 41 U.S.C. §§ 321-22 (Supp. 2013)). The Wunderlich Act was temporarily repealed, with a savings clause, in the 2010 recodification of title 41, apparently based on the false assumption that the CDA was applicable to all types of government contracts. The House of Representatives reenacted and recodified the Wunderlich Act in its 2013 technical amendments to the title 41 recodification, but the Senate has not acted on the measure as of August 16, 2014.

[43] For a compelling history of the Comanche Wars, see S.C. Gwynne, THE EMPIRE OF THE SUMMER MOON (2010).

[44] Kihlberg v. United States, 97 U.S. 398, 398 (1879).

[45] *Id.* at 399-400.

[46] *Id.* at 400.

[47] *Id.*

[48] 13 Ct. CI. 148 (1877), *aff'd*, 97 U.S. 398 (1878).

[49] Kilhberg, 97 U.S. 398.

[50] *Id.* at 401.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 402.

[54] *See* U.C.C. § 2-305(4); Restatement §§ 34(1), 331 cmt. a, b.

[55] *See, e.g.*, Corthell v. Summit Thread Co., 167 A. 79 (Me. 1933). *See generally* 1 Arthur Linton Corbin, Corbin on Contracts § 98, at 438-39 (1963) [hereinafter CORBIN ON CONTRACTS].

[56] Kihlberg, 97 U.S. at 401-02.

[57] 188 N.E. 163, 166 (N.Y. 1933). *See generally* BURTON & ANDERSEN, *supra* note 11, at 23-29.

[58] As Corbin explains, when one party has performed under an open-price term, the remedy is identical whether it is considered to be under the contract or, if the contract is not enforceable due to indefiniteness, under quasi-contract. CORBIN ON CONTRACTS § 99, at 444-45. If the Supreme Court had found the contract to fail for indefiniteness, it would still likely have awarded a remedy for the part performed, but would not have been bound by the contract's price term granting discretion to the quartermaster to set the amount. *See* Clark v. United States, 95 U.S. 539, 542-43 (1877) (holding contractor entitled to recover in *quantum meruit* for performance under void contract).

[59] 97 U.S. at 402.

[60] *Id.*

[61] *See generally* BURTON & ANDERSEN, *supra* note 11, at 23-29.

[62] There is earlier precedent that could be cited as the progenitor of the good faith doctrine. Five years earlier, in the 1874 case of *Corliss Steam-Engine Co. v. United States, 10 Ct. Cl. 494 (1874), aff'd, 91 U.S. 321 (1875),* the newly constituted U.S. Court of Claims pronounced that the federal government must deal with its contractors "in the strictest fairness and justice." *Id.* at 502. The Court also recognized the government's implied duties "to do whatever is necessary for him to do to enable plaintiffs to comply with their promise or covenant." United States v. Speed, 75 U.S. 77, 84 (1869); *see also* United States v. Smith, 94 U.S. 213, 217 (1877) (finding implied duty not to interfere with contractor's performance); United States v. Bostwick, 94 U.S. 58, 65-66 (1877) (finding implied obligation in every lease that the lessor will not intentionally or negligently harm the property applicable to the government).

[63] 109 U.S. 618 (1883).

[64] *Id.* at 618.

[65] *Id.*

[66] *Id.* at 620.

[67] 114 U.S. 549 (1885).

[68] *Compare id.* at 550-51, *with* Sweeney, 109 U.S. at 619.

[69] 114 U.S. at 553.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 554.

[74] It can reasonably be argued, however, that the Court's requirement articulated in *Kihlberg* that the exercise of discretion be an "honest judgment," *Kihlberg v. United States, 97 U.S. 398, 402 (1879),* is the linguistic equivalent of "in good faith."

[75] Justice Harlan in *Martinsburg* did not explicate what he perceived to be the difference between "gross mistake" and "such a gross mistake as necessarily implied bad faith." *Id.* at 553. The most obvious explanation, however, is that he faulted the trial court for not expressly instructing the jury that bad faith could be *implied*.

[76] 138 U.S. 185 (1891).

[77] *Id.* at 193.

[78] *Id.* at 195.

[79] *Id.*; *see also* Sheffield & Birmingham Coal, Iron & Ry. Co. v. Gordon, 151 U.S. 285, 292 (1894) (applying *Kihlberg*'s, standard of "fraud or mistake" in context of private agreement).

[80] 45 Ct. CL 621 (1911), *aff'd as modified*, 223 U.S. 695 (1912); *see also* United States v. Gleason, 175 U.S. 588, 602, 607-08 (1900) (describing *Kihlberg* rule, as involving either fraud or gross mistake or negligence).

[81] *See* 223 U.S. at 695-96.

[82] *Id.* at 696-97.

[83] *Id.* at 700.

[84] *See id.* at 496.

[85] 223 U.S. 695 (1912).

[86] *Id.* at 704.

[87] *Id.* at 492.

[88] *Id.* at 701 (citing Martinsburg & P. R. Co. v. March, 114 U.S. 549 (1885); United States v. Mueller, 113 U.S. 153 (1885)).

[89] *Id.* at 701-02 (emphasis added).

[90] Merrill-Ruckgaber Co. v. United States, 241 U.S. 387, 392-93 (1916) (emphasis added).

[91] *See also* United States v. Mason & Hanger Co., 260 U.S. 323, 326 (1922) (ironically stating that the *Kihlberg* standard extended "the rule between private parties to the government" when *Kihlberg* was a forerunner of the law of good faith duties).

[92] 71 Ct. Cl. 739 (1931).

[93] *Id.* at 756.

[94] *Id.* at 757.

[95] *Id.* at 755-56.

[96] *Id.* (emphasis added).

[97] *Id.* at 756-57 (emphasis added).

[98] *Id.* at 754.

[99] *See, e.g.*, Carstens Packing Co. v. United States, 52 Ct. Cl. 430, 434-35 (1917) (equating *Kihlberg* rule with unreasonable action); Mundy v. United States, 35 Ct. Cl. 265, 287 (1900) (equating rule with "the exercise of capricious and wanton power"); *see also* Moore v. United States, 46 Ct. Cl. 139, 172-74 (1910) (finding government liable when agents direction caused contractor loss "which the exercise of ordinary care and skill should have foreseen").

[100] 96 Ct. Cl. 1 (1942).

[101] *Id.* at 36. The discussion above does not purport to be exhaustive of all Court of Claims cases applying the *Kihlberg* rule. *See also, e.g.*, Mitchell Canneries, Inc. v. United States, 77 F. Supp. 498, 502 (Ct. Cl. 1948) (holding that "findings of fact of a contracting officer are binding upon both the Government and the contractor if there is no fraud, gross mistake or arbitrariness"); McShain Co., Inc. v. United States, 83 Ct. Cl. 405, 409 (1936); S. Shipyard Corp. v. United States, 76 Ct. Cl. 468, 480 (1932).

[102] Penker Constr. Co., 96 Ct. Cl. at 36-39.

[103] 101 Ct. Cl. 535 (1944).

[104] *Id.* at 593.

[105] *Id.* at 602-05.

[106] 89 F. Supp. 545, 548 (Ct. Cl. 1950), *aff'd by equally divided court*, 340 U.S. 898 (1950).

[107] *Id.*; *see also* Crowley v. United States, 105 Ct. Cl. 97, 114 (1945) (holding that a clearly erroneous contract interpretation by government agent could "imply bad faith," even if it were"not intentional").

[108] In United States v. Blair, 321 U.S. 730 (1944), the Supreme Court also impliedly recognized that the *Kihlberg* standard could be met with less than intentional wrongdoing. In that case, the contracting officers conduct was alleged to be biased, but the Court found that, even if the contracting officers conduct "was so flagrantly unreasonable or so grossly erroneous as to imply bad faith," that same bias would not be imputed to the appeal board specified in the contracts disputes clause, and so the appeal procedure had to be followed. *Id.* at 736.

[109] Lynch v. United States, 292 U.S. 571, 579 (1934).

[110] *See generally* BURTON & ANDERSEN, *supra* note 11, ch. 2.

[111] 5 U.S.C. § 706 (2012) (originally enacted as Act of June 11, 1946, ch. 324, § 10(e), 60 Stat. 243).

[112] *Id*. The progenitors of the APA's substantial evidence standard are found in the Wagner Act, 29 U.S.C. § 160(e) (originally enacted as Act of July 5, 1935, ch. 372, § 10(e), 49 Stat. 449, 454), which was amended in 1947 by the Taft-Hartley Act to change the review standard from "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a

whole shall be conclusive," which some courts held required affirmance if there was any supporting evidence. *See, e.g.*, NLRB v. Nevada Consol. Cooper Corp., 316 U.S. 105, 106-07 (1942) (holding that the NLRB's findings would be conclusive "if supported by evidence"). Congress adopted the latter standard in the APA in 1946. *See generally* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951).

[113] § 706(2)(A), (E).

[114] The Court of Claims put it this way in *Penner Installation Corp. v. United States*:

> To ask the contracting officer to act impartially when he must decide a dispute between the contractor and his employer is, indeed, putting upon him a burden difficult to bear. And yet the contract requires him to do so.
>
> So, if in any case we say that the contracting officer has not acted in good faith, we mean only that he has not in good faith discharged his duties as an impartial, unbiased judge. We do not at all mean to impugn his fidelity to his employer. Indeed, it is this fidelity to his employer that makes it so difficult for him to act impartially.

89 F. Supp. 545, 548 (Ct. Cl. 1950), *aff'd*, 340 U.S. 898 (1950).

[115] *E.g.*, SUFI Network Servs., Inc. v. United States, 108 Fed. Cl. 287, 295 (2012), *aff'd in part, rev'd in part, vacated in part, and remanded*, No. 2013-5039, 2013-5040, 2014 WL 2210851 (Fed. Cir. May 29, 2014) (finding the ASBCA acted with obvious bias in favor of the government when setting damages despite multiple, willful breaches by the Air Force to assist troops in obtaining free phone calls by circumventing the contracted-for system).

[116] 117 Ct. Cl. 92, rev'd, 342 U.S. 98 (1951).

[117] *See, e.g.*, *id.* at 177, 219.

[118] *Id.* at 96-206.

[119] *See id.* at 207-20.

[120] United States v. Wunderlich, 342 U.S. 98, 99 (1951) (quoting Kihlberg, 97 U.S. at 402).

[121] *Id.* at 100.

[122] *Id.* at 101 (Douglas, J., dissenting).

[123] *Id.*

[124] *Id.* at 102.

[125] *Id.* (Jackson, J., dissenting).

[126] *Id.* (quoting United States v. Moorman, 338 U.S. 457, 461 (1950)).

[127] *Id.* at 103.

[128] *Id.*

[129] *See* S&E Contractors, Inc. v. United States, 406 U.S. 1, 25 (1972) (Brennan, J., dissenting) ("*Wunderlich*'s narrow definition of the fraud exception alarmed the Government as well as contractors, for, in practical effect, it meant that disputes decisions were virtually invulnerable to challenge.").

[130] Wunderlich, 342 U.S. at 100. Words of this type are not unusual for the Court to pen, but they are almost always related to the Courts interpretation of an act of Congress. That was not the context in *Wunderlich*. The *Kihlberg* rule was a judge-made rule which, presumably, the Court had greater authority to alter.

[131] *See generally* 406 U.S. at 47-58, 69-90 (Brennan, J., dissenting). Justice Brennan in his dissenting opinion in *S&E Contractors* gives an overview of the legislative reaction to the *Wunderlich* decision, although his focus was whether the government could challenge an adverse agency determination in the Court of Claims.

[132] H.R. REP. No. 83-1380, at 2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2191, 2191-92. Six bills were introduced within two months of the *Wunderlich* decision. *See* S&E Contractors, 406 U.S. at 69 app. (Brennan, J., dissenting).

[133] H.R. REP. No. 83-1380, at 7.

[134] *Id.* at 2-3.

[135] *Id.* at 3 (quoting Palace Corp. v. United States, 124 Ct. Cl. 545, 549 (1953)) (emphasis added). This articulation of the standard suggests that the law of good faith duties must be applied strictly against those representing the federal government.

[136] *Id.* at 4.

[137] *Id.*

[138] 338 U.S. 457 (1950).

[139] H.R. REP. No. 83-1380, at 5.

[140] Act of May 11, 1954, Pub. L. No. 83-356, 68 Stat. 81 (codified as amended at 41 U.S.C. §§ 321-22 (2006)).

[141] *Compare id., with* 5 U.S.C. § 706 (2006). The Wunderlich Act did not expressly add the APA's "abuse of discretion" test, but that additional phraseology would not appear to add anything of substance to the test. *See* ICSD Corp. v. United States, 934 F.2d 313, 317 (Fed. Cir. 1991) (equating the Wunderlich Act standard, as replicated in the CDA, with "abuse of discretion").

[142] 41 U.S.C. § 321.

[143] *Id.* § 322.

[144] *See* 342 U.S. at 100; H.R. REP. No. 83-1380, at 3 (quoting Palace Corp. v. United States, 124 Ct. Cl. 545, 549 (1953)).

[145] *Id.*

[146] H.R. REP. No. 83-1380, at 3-4.

[147] 684 F.2d 843 (Ct. Cl. 1982).

[148] *Id.* at 844.

[149] *Id.* at 847-50.

[150] *Id.* at 852.

[151] *Id.*

[152] *Compare* Haney v. United States, 676 F.2d 584 (1982), *with* Hoel-Steffen Constr. Co., 684 F.2d at 851. The court distinguished situations in which there were allegations of bad faith in contract administration, citing *Haney,* 676 F.2d 584, and cases in which a statute confers finality on an administrative decision. Hoel-Steffen Constr. Co., 684 F.2d at 851. The court also instructed that its decision in *Knotts v. United States,* 121 F. Supp. 630 (Ct. Cl. 1954), which, in a pay case, required a higher standard of proof for bad faith, the oft quoted "well nigh irrefragable proof," *id.* at 631, was misunderstood as requiring intentional wrong-doing as part of bad faith. The court noted that the standard of review was the *Kihlberg* "so grossly erroneous as to imply bad faith" standard and that the "irrefragable proof" found in *Knotts* "was wholly inferential and circumstantial. No one was found to admit he acted in bad faith." Hoel-Steffen Constr. Co., 684 F.2d at 851. While noting the tensions in its precedent and attempting to minimize them, the court did not resolve them in a principled way. *See generally* Tecom, Inc. v. United States, 66 Fed. Cl. 736, 76469 (2005).

[153] *See* Christo Lassiter, *The O.J. Simpson Verdict: A Lesson in Black and White*, Mich. J. Race & L. 69, 81, 110 (1996).

[154] *See* B. Drummond Ayers Jr., *Jury Decides Simpson Must Pay $ 25 Million in Punitive Award*, N.Y. TIMES (Feb. 11, 1997), http://www.nytimes.com/1997/02/11/us/jury-decides-simpson-must-pay-25-million-in-punitive-award.html?pagewanted=print.

[155] *See id.*

[156] Abraham Lincoln, *First Annual Message, in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 51 (James D. Richardson ed., Wash. Gov't Prtg. Office 1897).

[157] *See* Kihlberg v. United States, 97 U.S. 398, 401 (1879).

[158] *See id.* at 400-02.

[159] *See id.* at 402.

[160] *See supra* Part III.

[161] *See supra* notes 112-14 and accompanying text.

[162] *See* 9 U.S.C. § 10(a)-(b) (1946) (allowing vacating "[w]here the award was procured by corruption, fraud, or undue means" or "[w]here there was evident partiality or corruption in the arbitrators"). Congress passed the Federal Arbitration Act of 1925. Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-14 (1946)).

[163] *See* 5 U.S.C. § 706 (1946).

[164] *See supra* notes 141-47 and accompanying text.

[165] This is not to suggest that the Federal Circuit is the only jurisdiction to have inconsistent precedent in this area. *See, e.g.*, Terri J. Dobbins, *Losing Faith: Extracting the Implied Covenant of Good Faith from (Some) Contracts*, 84 OR L. Rev. 227, 229 (2005) ("Despite decades of attempts to clarify the good-faith duty and its application in various contracts, almost all acknowledge that the cases in which courts have applied the duty of good faith are rife with inconsistencies and confusion, even within single jurisdictions"). As the *Kihlberg* history illustrates, this is to be expected as the common law develops.

[166] *See supra* notes 138-44 and accompanying text.

[167] *See supra* notes 1-8 and accompanying text. There are limited exceptions not applicable here. *See generally* Nibley & Totman, *supra* note 2.

[168] Padbloc Co. v. United States, 161 Ct. Cl. 369, 377 (1963); *see also* Nat'l Presto Indus., Inc. v. United States, 338 F.2d 99, 111 (Ct. Cl. 1964). Of course, as noted above, the Supreme Court in *Kihlberg* provided an early precursor of good-faith duties that anticipated the more explicit development of the common law by half a century. See *supra* notes 44-57 and accompanying text.

[169] *See supra* notes 9-42 and accompanying text.

[170] *See supra* notes 9-18 and accompanying text.

[171] *See supra* note 12 and accompanying text.

[172] *See supra* notes 22-42 and accompanying text.

[173] *See supra* note 11 and accompanying text.

[174] *See supra* notes 19-2 and accompanying text.

[175] *See supra* notes 28-30.

[176] *See supra* notes 16-18 and accompanying text.

[177] *See id.*

[178] *See id.*

[179] *See infra* notes 182-85.

[180] 28 U.S.C. § 1491(a) (2012). *See generally* Claybrook, *supra* note 2, at 593-96.

[181] *See, e.g.*, 48 C.F.R. §§ 1.102(b)(3), 1.102-2(c) (2012). The CFC judges are in conflict as to whether these and similar FAR provisions are only hortatory or provide an independent ground of complaint. *Compare* Castle-Rose, Inc. v. United States, 99 Fed. Cl. 517, 532 (2011) (hortatory), *with* FFTF Restoration Co. v. United States, 86 Fed. Cl. 226, 237-40 (2009) (independent ground).

[182] 28 U.S.C. § 1491(b); *see* PGBA, LLC v. United States, 389 F.3d 1219, 1224 (Fed. Cir. 2004), *aff'g* 60 Fed. Cl. 196, 207; Banknote Corp. of Am. v. United States, 365 F.3d 1345, 1350 (Fed. Cir. 2003), *aff'g* 56 Fed. Cl. 377, 383; CW Gov't Travel, Inc. v. United States, 110 Fed. Cl. 462, 478-79 (2013). The CFC uniformly holds that discovery and evidence outside the administrative record is allowed to test allegations of bias, unfairness, and bad faith, but, applying Supreme Court precedent in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), and Federal Circuit precedent in *Axiom Resource Management, Inc. v. United States*, 564 F.3d 1374 (Fed. Cir. 2009), the court initially requires a strong showing of a potential problem. *See, e.g.*, Line Gov't Servs., LLC v. United States, 95 Fed. Cl. 155, 158 (2010); Madison Servs., Inc. v. United States, 92 Fed. Cl. 120, 129-31 (2010); L-3

Comm'ns Integrated Sys. L.P. v. United States, 91 Fed. Cl. 347, 354-56 (2010). While some cases, like *L-3*, acknowledge the showing for supplementation of the administrative record to prove bias in a bid protest action is less than the clear and convincing standard for the merits required by the Federal Circuit, if the showing is too "strong" or "substantial," the standard risks inconsistency with the *Wunderlich* experience and the modern development of the law. The allegation of animus is serious, but even if ultimately put to the heightened standard of proof on the merits, that should not prevent discovery based on a lesser showing of any plausibility, even if based on the alleged errors or inconsistencies of the challenged agency action itself.

183 *See, e.g.*, M. Bianchi of Cal. v. Perry, 31 F.3d 1163 (Fed. Cir. 1994).

184 *See, e.g.*, Burnside-Off Aviation Training Ctr. v. Dalton, 107 F.3d 854, 859-60 (Fed. Cir. 1997).

185 *See* Salsbury Indus. v. United States, 905 F.2d 1518, 1521-22 (Fed. Cir. 1990); Maxima Corp. v. United States, 847 F.2d 1549, 1553, 1557 (Fed. Cir. 1988).

186 *See* Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1542 (Fed. Cir. 1996); Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578, 1581 (Fed. Cir. 1995).

187 *E.g.*, Rumsfeld v. Applied Cos., 325 F.3d 1328, 1339 (Fed. Cir. 2003).

188 *See id.*

189 *See* Lockheed Martin Aircraft Ctr., 08-1 BCA ¶ 33,832 at 167,446 (Mar. 21, 2008).

190 *See generally* Claybrook, *supra* note 2, at 569-82.

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.*

195 Prior to the hopefully definitive limiting of the *Precision Pine* language by the Federal Circuit in *Metcalf Construction Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014), other courts strove mightily to limit the unfortunate language in *Precision Pine* that on its face seemed to require a showing of intent to injure. *See* Precision Pine & Timber Inc. v. United States, 596 F.3d 817, 829 (Fed. Cir. 2010). The Federal Circuit majority in *Scott Timber Co. v. United States*, 692 F.3d 1365 (Fed. Cir. 2012), noted that a district court order preventing a contractor from obtaining the benefits of his contract gave rise to the "specific intent" language. *Id.* at 1375 n.4. The dissenting judge found the distinction specious and *Precision Pine* in conflict with earlier, controlling circuit precedent and called for its rejection en banc. *Id.* at

1380-82 (Wallach, J., dissenting); *see also* Centex Corp. v. United States, 395 F.3d 1283, 1309 (2005) (finding good faith and cooperation duties breached by congressional action); Struck Constr. Co. v. United States, 96 Ct. Cl. 186, 221 (1942) (holding, in oft quoted language, that the government s actions must be viewed in the aggregate to determine if it met its good faith duties). Some CFC judges limited *Precision Pine* to its facts of another government entity or third party being responsible for the interference with the contractor s justified expectations under the contract, rather than the contracting agency. *See* D'Andre Bros. LLC v. United States, 109 Fed. Cl. 243, 256 n.11 (2013); Fireman's Fund Ins. Co. v. United States, 92 Fed. Cl. 598, 675-77 (limiting *Precision Pine* to when "the Governments alleged wrongful conduct does not arise directly out of the contract; i.e., key to the alleged breach are actions involving another government actor or a third party").

196 702 F.3d 1365 (Fed. Cir. 2012).

197 *Id*. at 1368.

198 *Id*. at 1368-70, *aff'g* 102 Fed. Cl. 88 (2011) (internal quotation marks omitted) (citations omitted).

199 *Id*. at 1369 (citing Tecom, Inc. v. United States, 66 Fed. Cl. 736 (2005)).

200 *Id*. (citing Savantage Fin. Servs., Inc. v. United States, 595 F.3d 1282, 1288 (Fed. Cir. 2010); Nova Express v. Potter, 277 Fed. Appx. 990, 993 (Fed. Cir. 2008); Galen Med. Assocs., Inc. v. United States, 369 F.3d 1324, 1335-37 (Fed. Cir. 2004)).

201 *Id*. at 1368.

202 *Id*. (citing RESTATEMENT § 74(1)).

203 Restatement § 74 cmt. b, illus. 3 ("[T]he bargain is to be judged as it appeared to the parties at the time; if the claim was then doubtful, no inquiry is necessary as to their good faith.").

204 *See id*.

205 *See supra* note 157 and accompanying text.

206 *E.g.*, Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 245, 247, 258-59 (1975) (holding that American Rule proscribes award of attorneys fees except for bad faith actions in litigation amounting to vexatious conduct and other exceptions); *see* 28 U.S.C. § 2412(b) (2012) (making government liable for attorneys fees and expenses to the same extent as a private party).

207 Precision Pine & Timber Inc. v. United States, 596 F.3d 817, 829 (Fed. Cir. 2010); *see also* Metcalf Constr. Co. v. United States, 742 F.3d 984, 991-92 (Fed. Cir. 2014).

[208] Another example is option exercise. A private party typically has no duty to act in any interest except its own in deciding whether or not to exercise an option, and so the other party has no justified expectations to enforce. However, the FAR imposes required considerations, 48 C.F.R. § 17.207 (2012), and so gives rise to justified expectations by the contractor. *See* Gov't Sys. Advisors, Inc. v. United States, 847 F.2d 811, 813 (Fed. Cir. 1988) (describing governments broad discretion whether to exercise an option); ALK Servs., Inc. v. Dep't of Veterans Affairs, 13-1 BCA ¶ 35,260 (Mar. 15, 2013) (reviewing option exercise for bad faith and arbitrary abuse of discretion).

[209] 97 U.S. 398, 402 (1879).

[210] *See supra* notes 15-29 and accompanying text.

[211] 342 U.S. 98, 100 (1951).

[212] *See supra* note 40 and accompanying text.

[213] *See supra* note 205 and accompanying text.

PAYING THE PIPER?

HOW THE FEDERAL CIRCUIT SHIFTED PERFORMANCE RISK TO THE CONTRACTOR BY REDEFINING COST REASONABLENESS

*By Candice D. Schubbe**

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"Risk is the sort of word that is easy to discuss upfront but tough to handle when it comes time to pay the piper." – Nathan Myhrvold[1]

I. INTRODUCTION

In two significant cases involving the same defense contractor, Kellogg Brown & Root Services, Inc. (KBR), the U.S. Court of Federal Claims (COFC) and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) fundamentally altered the cost-reimbursement contract arena. The courts redefined the Federal Acquisition Regulation's (FAR) Cost Reasonableness provision, FAR 31.201-3, and shifted the risk in cost-type contracts from the government to the contractor. In both cases, commonly referred to as *KBR I*[2] and *KBR II*,[3] the courts questioned KBR's business judgment and scrutinized how the logistics company chose to subcontract dining services to the U.S. Army in Iraq under the Logistics Civil Augmentation Program III (LOGCAP III).[4] This post hoc inquiry resulted in the disallowance of significant costs on the grounds that KBR had not prudently negotiated its subcontracts.[5] The courts' collective treatment of cost reasonableness has taken the contracting world by surprise and left contractors wondering whether anything less than near-perfect performance will survive government scrutiny.[6]

The *KBR* decisions represent a change in the relationship between contractors and the U.S. government.[7] This shift turns fifty years of Armed Services Board of Contract Appeals (ASBCA) precedent on its head,[8] eschews the "business-judgment rule,"[9] and calls into question "best efforts" in cost-reimbursement contracting.[10] The *KBR* decisions remove professional discretion from the contracting community and leave contractors open to precision-guided hindsight from contracting officers and courts, neither of which possess the training or expertise to review a contractor's business judgment.[11] This Article highlights how the *KBR* decisions depart from the traditional treatment of costs in reimbursement contracts and examines the potential impact of the *KBR* decisions on the use of cost-reimbursement contracts.

Under the current law, contractors can no longer assume that their best efforts to perform will result in cost reimbursement.[12] This Article argues that the courts should rein in their treatment of cost reasonableness to restore the appropriate balance of risk between contractors and the government. Otherwise, contractors should not incur subcontracting costs without thoroughly documenting the negotiation process, regardless of whether such formalistic processing results in delayed performance.[13] Ultimately, this Article concludes that the *KBR* rulings represent a loss to the government, as contractors will hesitate to quickly meet the government's contract demands; may opt for expensive cost-variable rather than fixed-price subcontracts (where available); or, as a worst-case scenario, may be altogether unwilling to undertake cost-reimbursement contracts because the risk outweighs possible profit.[14]

Part II of this Article provides an overview of the "Cost Reasonableness Standard" as it appears in FAR 31.201-3. Part III then offers a brief explanation of the LOGCAP III contract at issue in the *KBR* decisions. Part IV explores *KBR I* and offers a critique of the courts' newly minted standard of proof for cost reasonableness. Part V then examines *KBR II* and the courts' missed opportunity to rein in its maltreatment of cost reasonableness in *KBR I*. Together, Parts IV and V explain how the *KBR* precedent pushes considerable risk of nonpayment onto cost-reimbursement contracts and alters the business practices of defense contractors. Finally, Part VI examines the practical implications of the *KBR* decisions on government contracting and offers practitioners' tips on how to avoid KBR's pitfalls.

II. FAR 31.201-3: THE COST REASONABLENESS STANDARD

The indefinite delivery/indefinite quantity (ID/IQ) cost-reimbursement contract at issue in the *KBR* decisions incorporated FAR 52.216-7.[15] This clause permits a contractor to be reimbursed for subcontracting costs as long as the contracting officer determines such costs are allowable in accordance with FAR Subpart 31.2.[16] Costs are allowable if (among other things) they meet the FAR 31.201-3 reasonableness standard.[17] The *KBR* decisions center on this standard.[18]

In accordance with FAR 31.201-3, "a cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business."[19] This regulation cautions the government to take particular care in examining costs incurred by any contractor that are not subject to "effective competitive restraints."[20] The regulation further specifies that reasonableness will depend on a variety of circumstances, including:

> (1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;
>
> (2) Generally accepted sound business practices, arm's-length bargaining, and Federal and State laws and regulations;
>
> (3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and
>
> (4) Any significant deviations from the contractor's established practices.[21]

Prior to 1985, "incurred costs were entitled to a presumption of reasonableness and the government bore the burden to prove the costs were unreasonable."[22] However, the 1985 amendment to FAR 31.201-3 "squarely acknowledges the lack of that presumption."[23] The amendment places the burden on the contractor whenever the contracting officer challenges reasonableness of a cost.[24] While there is no doubt that contractors carry the burden under the amended FAR 31.201-3, the *KBR* decisions muddied which standard should apply to determine *whether* a contractor has met the burden.[25] Prior to the *KBR* decisions, case law supported a "best efforts" inquiry into cost reasonableness,[26] permitting recovery as long as the contractor exerted its best efforts to perform the contract, and giving deference to the contractor to exercise its independent "business judgment."[27] In the *KBR* decisions, the "best effort" and "business judgment" rules were abandoned to make way for a new judicial standard, which requires contractors to submit proof of near-perfect performance to the courts.[28]

III. LOGCAP III: BAD FACTS MAKE BAD LAW

To understand the *KBR* decisions, it is important to understand the U.S. Army LOGCAP under which KBR was providing dining facility (DFAC) services to the Army during the Iraq War. Aimed at providing *rapid* support to the Army in contingency operations anywhere in the world, the Army implemented LOGCAP in the 1980s.[29] The Army competitively awarded LOGCAP III Contract Number DAAA09-02-D-007 to KBR in 2001[30]--before the invasion of Iraq was even contemplated. Under LOGCAP III, KBR became the sole global provider for logistical support to the Army during "contingency operations,"[31] including dining, "morale and welfare, laundry, and fuel-delivery services."[32] The Army issued task orders (TOs) to KBR as needs arose.[33] Because LOGCAP III was a cost-plus-award-fee agreement that incorporated FAR 52.216-7,[34] the Army was required to reimburse KBR for costs incurred to perform the TOs, plus an award fee.[35]

The terms of LOGCAP III required KBR to be ready to support a six-month deployment of no more than 50,000 troops at a maximum of eight base camps.[36] However, in March 2003, wartime requirements rapidly and unexpectedly expanded the Army's support expectations as the U.S. military began its "shock and awe" aerial bombardment campaign over Iraq and the main contingent of ground troops began invading Iraq from Kuwait.[37] Within a few short months of invasion, the Army issued TOs and modifications to KBR "continuously."[38] The number of troops supported by LOGCAP III quickly jumped from 50,000 maximum to hundreds of thousands of troops at fifty-six sites throughout Iraq.[39] Over the course of Operation Iraqi Freedom, the Army issued *more than 11,000 modifications*, adding more than $2.7 billion in new work to LOGCAP III task orders.[40] For DFAC services alone, the Army changed its requirements from thirty to fifty camps in a matter of months.[41] Adding pressure to KBR, the Army insisted KBR have DFACs up and running within a month of the Army's request for food services to ensure the troops had a hot meal by the Fourth of July.[42] The DFACs at Camp Anaconda near Balad and a camp near Mosul "are the centerpiece" of the conflict in the *KBR* decisions.[43]

To further set the stage for the *KBR* decisions, it must be noted that KBR is not the most sympathetic corporation. Throughout the Iraq war, KBR generated staggering income; labored under a perception of cronyism; and was scrutinized for alleged kickbacks, negligence, unsafe practices, and even sexual assaults.[44] Despite being seen as a war profiteer, the government's reliance on KBR was unprecedented at a time when the situation in Iraq was uniquely fluid and dangerous.[45] In no uncertain terms, KBR's logistical support was crucial to U.S. military operations in Iraq.[46] Even though the Army's demands consistently changed, which placed a considerable strain on KBR's resources, the company performed as promised to the satisfaction of the troops.[47] In recognition, the Army rewarded KBR with high performance awards under LOGCAP III.[48] However, despite the Army's stamp of approval, KBR is still fighting for reimbursement of its performance costs.[49]

IV. *KBR I*: REDEFINING COST-REIMBURSEMENT CONTRACTING

A. *KBR Attempts to Meet the Army's Ever-Changing Demands*

KBR I arose out of a claim for costs incurred in providing DFAC services to the

Army at Camp Anaconda.[50] The Anaconda DFAC was located on one of the largest U.S. military bases in Iraq and fell under LOGCAP III Task Order 59 Appendix A, which covered all life support at Anaconda.[51] The Army directly procured DFAC services for Camp Anaconda prior to issuance of the TO in June 2003.[52]

Because the Army's DFAC requirements exceeded the capability of any one subcontractor, KBR established a "master agreement" system to pre-qualify subcontractors and quickly respond to the Army's needs.[53] KBR limited competition under the master agreement system to nine proposals previously submitted for DFAC services at Camp Cedar/Adder in southern Iraq.[54] An internal board reviewed price and technical ability before ultimately selecting five subcontractors.[55] KBR then issued work orders based largely on geographic location, making each master agreement holder generally responsible for services in a particular area of Iraq.[56]

In June 2003, KBR awarded Tamimi International a master agreement.[57] At the time, Tamimi was already providing DFAC services directly to the Army at Camp Anaconda.[58] When the government added Camp Anaconda to TO 59, KBR became responsible for managing its DFACs.[59] Initially, KBR considered awarding the Camp Anaconda DFAC subcontract to another master agreement holder, but ultimately awarded to Tamimi.[60] In doing so, KBR avoided mobilizing a new subcontractor to the dangerous and remote Anaconda site.[61] With pressure from the Army mounting, KBR quickly issued a work release to Tamimi without following its internal price approval process.[62] Under the terms of the release, KBR would pay Tamimi "a fixed per person/per day" rate based on either the actual DFAC headcount or the Army's projected headcount, "whichever was greater."[63] By September 2003, Tamimi was serving hot meals to troops as a KBR subcontractor, even though KBR officials had not approved the subcontract price.[64] KBR's failure to follow their own approval process held up payments, which resulted in Tamimi initially serving meals to soldiers for no pay.[65]

Meanwhile, the Army continuously modified the overarching DFAC task order. Of particular relevance to *KBR I*, the Army issued a modification in July 2003, requiring KBR to provide DFAC services to 18,700 troops in four separate facilities at Camp Anaconda.[66] Two months later, the Army issued a second modification, increasing the DFAC headcount to 24,900, and ordered KBR to replace two soft-sided DFACs with permanent structures.[67] KBR promptly instructed a construction company to build the new structures; however, the Army objected to paying KBR for the construction because LOGCAP III was for the procurement of services only.[68] KBR then requested Tamimi pay for the construction and amortize the cost through the price it charged KBR.[69] Less than a year later, the Army changed its mind and directed KBR to assume ownership of the Anaconda DFACs.[70]

Recognizing that KBR's internal processing of subcontracts had been neglected in light of the Army's severe demands at the outset of the invasion, KBR assembled a team to review its procurement files in 2004.[71] The review team noted the lack of KBR approval for the Anaconda DFAC prices.[72] To justify the subcontract price as "fair and reasonable,"[73] the team compared Tamimi's Anaconda price elements to its successful competitive bid for the Camp Cedar/Adder subcontract.[74] The team noted Tamimi's Anaconda prices were higher; however, the prices were justified based on obvious differences between the two camps.[75] For example, Camp Anaconda had twice as many dining facilities, was located hundreds of miles farther from Kuwait and supply lines, and was considered more dangerous than the other camp.[76] Furthermore, the Anaconda prices included facility amortization costs due to the Army's directive to build hardened DFACs.[77] Based on the team's findings, KBR officially approved the subcontract price in April 2004.[78]

That same year, KBR's initial DFAC subcontracts began to expire.[79] KBR saw an opportunity to re-compete its subcontracts without the strain of supporting an invasion.[80] Unlike the first generation of DFAC subcontracts, the second generation used a hybrid pricing structure that included fixed-price elements and variable-price elements that would adjust based on actual headcounts.[81] In July 2004, KBR solicited competitive bids for Camp Anaconda from Tamimi and two other vendors.[82] KBR also considered alternatively self-performing the work to save an anticipated $17 million but this effort ultimately failed.[83] Under LOGCAP III, KBR could not use local nationals (Iraqis) to perform services[84] and travel restrictions beyond KBR's control prevented mobilization of adequate labor from other countries.[85] KBR obtained incremental extensions of the Tamimi subcontract to continue Camp Anaconda DFAC services in an effort to gain time to mobilize a workforce for self-performance.[86] Simultaneously, KBR attempted to negotiate cumulative discounts with Tamimi for DFAC services at nine different camps across Iraq, ultimately recouping $16.5 million for services rendered.[87]

As KBR came to realize that self-performance was not viable, Tamimi grew tired of piecemeal contract extensions and threatened to stop performance if KBR did not grant a long-term extension.[88] KBR no longer had time to re-compete the Anaconda DFAC subcontract.[89] In November 2004, KBR met with Tamimi to negotiate prospective and retroactive pricing and to resolve the ownership of the two hardened facilities built in 2003.[90] To negotiate, KBR relied on its Camp Anaconda procurement manager, a seasoned negotiator with twenty-plus years of contract experience in the U.S. Air Force and ten years with KBR working on the LOGCAP contract.[91] Tamimi relied on its vice president and operations manager.[92] To prepare, KBR reviewed the contract file, other DFAC master agreements, and pricing sheets from food service providers at nearly forty other DFACs across Iraq.[93] KBR proposed a monthly target cost within twenty percent of the per-month competitive bid Tamimi made for Anaconda DFAC services in July 2004.[94] KBR's proposal was based on its judgment that negotiating *retroactive* discounts at prices within twenty percent of Tamimi's *prospective* competitive bid would be reasonable.[95] KBR secured a $27 million *reduction* to Tamimi's prospective prices and achieved a retroactive price well within the range of prices for other DFACs.[96] On the question of DFAC ownership, KBR finally took formal possession of the facilities.[97]

As part of a global DFAC settlement negotiation between KBR and the Army,[98] the government had the opportunity to review the negotiated Anaconda DFAC subcontracting prices and ultimately concluded that the reduced prices were reasonable.[99] Nonetheless, the Defense Contract Audit Agency (DCAA) continued to scrutinize the Tamimi subcontracts between 2005 and 2006, issuing an audit report that questioned $39.9 million in Tamimi subcontract costs at Camp Anaconda.[100] This DCAA audit became the basis for the Army's decision to withhold the $41 million at issue in *KBR I*.[101]

B. *The COFC Focuses Its Sights on KBR's Failed Self-Performance*

Dismayed with the results of the DCAA audit, KBR filed suit against the government in the COFC and sought $41 million in unpaid costs.[102] In reviewing cost reasonableness, the court cited FAR 31.201-3: "A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business."[103] The court claimed it would apply, but was not limited to, the FAR's list of factors for reasonableness, including: whether the cost is of a type "generally recognized as ordinary and necessary," "generally accepted sound business practices [and] arm's length bargaining," KBR's responsibility to the government, and "any significant deviations from" KBR's established practices.[104] In reality, the court selectively applied these standards and changed three conventional principles of cost-reimbursement contracting. First, the COFC shifted cost risk under LOGCAP III from the government to KBR.[105] Second, the court limited its consideration of circumstances in Iraq to those beyond KBR's control.[106] Third, the court eschewed the traditional concept of business judgment and gave itself broad discretion to determine cost reasonableness.[107]

1. *KBR I* Shifts Risk Under Variable-Priced Contracts to the Contractor

The COFC bluntly stated that the "[p]laintiff wanted the work, got on the ground early and took on the risk under its cost-plus contracts that it would not be able to pass on to the government its subcontractors' prices negotiated in a challenging environment when the prime contractor had few options."[108] The court's pronouncement on risk allocation contradicts the black letter law on cost-reimbursement contracting, under which "*the government* accepts the risk of increased costs, delays, and nonperformance"[109] while the contractor assumes "*virtually no risk*."[110] The Comptroller General has long recognized this basic principle, stating that the contractor "is [expected] to come out whole, regardless of contingencies, in performing the work in accordance with the contract and the directions and instructions of the Contracting Office ...."[111] Moreover, the FAR directs the government toward the use of variable-priced contracts when the "[u]ncertanties involved in contract performance do not permit costs to be estimated with sufficient accuracy."[112] The FAR goes on to state that the government assumes greater risk when "urgency is a primary factor" or when the performance requirements are "complex" and "unique to the government."[113]

Undeniably, war is replete with uncertainties. From the outset, the Army's support requirements under LOGCAP III exploded from 50,000 troops at eight camps to 200,000 troops at fifty-six camps.[114] After issuing the Iraq life support task order (TO 59),[115] the Army blurred the scope of the TO by issuing 11,000 modifications and $2.7 billion in new work.[116] For DFAC services alone, the Army fluctuated between thirty and fifty camps in a matter of months.[117] At Camp Anaconda, in particular, the Army continuously waffled on its requirements, growing from 18,700 to 24,900 mouths to feed, and changed the type of DFAC from soft-sided to hard-sided construction.[118] Given the government's urgent, complex, and unique needs during wartime,[119] the government, rather than KBR, should have assumed the cost risk under LOGCAP III TO 59. Yet the court thrust the risk on KBR, opining that "[n]o one should be heard to play the violin tune of we-could-not-abandon-our-commitment-to-feeding-the-troops. Sincere as [KBR's] commitment was to providing for the troops, this is no proxy for proof of reasonable costs."[120]

2. *KBR I* Underestimates the Difficulties KBR Faced at Anaconda

While KBR admitted that the outcome of its price negotiations with Tamimi were not ideal from a "conference room" perspective,[121] the company argued that its actions were "prudent" in consideration of the realities at Camp Anaconda.[122] KBR pointed to the exigencies of war, the Army's urgency, and threats to the supply line as factors that weighed heavily on the company's business decisions.[123] To support its argument, KBR cited *Lockheed Martin Tactical Aircraft Systems*[124] and urged the court to consider all circumstances under which KBR was operating.[125] In *Lockheed*, the ASBCA recognized that expenses vary as circumstances change.[126] In particular, where urgency is present or where no alternative sources are available, unusually high costs may be necessary.[127] While the *KBR I* court did not reject *Lockheed* outright, the court built in this caveat to its application:

> [W]hile plaintiff's decisions must be viewed in the context in which they are made, and thus must take into account the realities that KBR personnel and its subcontractor were facing at the time, this willingness to expand "reasonable" beyond the "conference room" is confined to circumstances when KBR was dealing with realities over which it had no control.[128]

This interpretation of *Lockheed* removes nearly all consideration of actual circumstances at Camp Anaconda from the court's analysis because there are very few circumstances over which the contractor has *no control*.[129] Not surprisingly, the COFC's caveat proved fatal for KBR.[130] The court specifically labeled KBR's "disastrous"[131] attempt to self-perform the Anaconda requirement as the catalyst for hasty price negotiations with Tamimi.[132] The COFC also criticized KBR's negotiator as ill-prepared to meet with Tamimi once self-performance failed.[133]

The COFC's failure to consider the real-time circumstances KBR faced at Camp Anaconda is not supported by the FAR or case law. Before *KBR I*, a contractor's *care in exercising control* over its costs, rather than the contractor's "*degree of control* over costs," was the benchmark for determining reasonableness.[134] Based on the principle that an agency incurs more risk in a cost-reimbursement contract than in a fixed-price contract, the courts have typically recognized cost-type contracts as "best-efforts agreement [s]," under which the contractor puts forth its best efforts to provide the good or service.[135] The "best efforts" standard is equivalent to that of good faith.[136] Even if the contractor ultimately does not deliver the desired product or service, the government has gotten what it bargained for – the contractor's best efforts.[137] Contractors have long believed that in a best efforts agreement, the government must pay the contractor's costs as long as the proposed amount is just and reasonable, and the contractor has not engaged in gross negligence or willful misconduct.[138]

The FAR also includes several illustrations of what constitutes "reasonable" in government contracting. For example, FAR 52.228-7(c)(2) allows the contractor to recover costs incurred because of an employee's negligence causing injury to third parties,[139] and FAR 52.246-5 allows the contractor to recover costs for defective services.[140] Furthermore, the termination for default clause in LOGCAP III,[141] FAR 52.249-6, allows the contractor to recover actual costs even if KBR's work was so defective as to warrant a default termination.[142] These terms indicate that reasonableness is a function of the contractor's effort rather than a degree of contractor control.

Moreover, case law is rife with examples of courts finding costs reasonable and recoverable despite the contractor's control over the circumstances giving rise to the cost. For example, the ASBCA has allowed a contractor to recover its costs even though it delivered defective performance because the contractor had not engaged in gross negligence or willful misconduct.[143] In another case, the ASBCA allowed a contractor to recover the cost of reworking aircraft parts despite evidence that the contractor "literally [failed to] comply with ... its [own] Quality Control Procedure ...."[144] The ASBCA also allowed recovery of subcontracting costs where the government ordered changes, and the contractor then requested and accepted a new price for the changed work from the subcontractor without securing quotes from other sources or demanding a breakdown of the new price components.[145] In each case, the contractor certainly had control over its costs but was still allowed to recover because the ASBCA deemed the contractor's *care* in incurring the costs prudent and reasonable.

Even where the contractor made what many would consider *negligent* errors, the ASBCA still allowed cost recovery. In *General Dynamics Corp.*,[146] the ASBCA found the contractor's employees mishandled a transaction that resulted in the order of 600 units rather than sixty units and mislaid documents that resulted in a four-month delay in terminating a subcontractor.[147] Yet, the board allowed the contractor to bill the government for these negligently incurred costs.[148] The board's analysis focused on the volume of orders and terminations successfully processed by the contractor's employees and saw this negligent loss as an occurrence "reasonably incident to contract performance."[149]

The COFC has also taken up cost reasonableness and best efforts in the context of defective performance. In *Best Foam Fabricators, Inc. v. United States*,[150] the COFC considered whether a contractor is "precluded, as a matter of law, from recovering the costs of defective work ...."[151] The COFC adopted the ASBCA's rationale that contractors are entitled to recover reasonable, allocable, and allowable costs incurred with respect to termination inventory "*even if such inventory [does] not comply in all respects with specification requirements*,"[152] as long as the deficiencies do not stem from the contractor's "*gross disregard* ... of its contractual obligations."[153] In short, prior to the *KBR* decisions, a contractor could recover if it had not grossly disregarded contract requirements.[154]

Given the FAR's definition of reasonableness and the ASBCA and COFC case precedent on best-efforts agreements, the court's focus on the contractors' degree of control in *KBR I* is puzzling. In contracting, as in life, decisions are "shaped and driven by previous decisions."[155] Therefore, the appropriate inquiry under a prudent businessperson standard is whether the decision was reasonable at the time it was made.[156] As long as the decision was reasonable and the contractor exerted its best efforts to perform, the risk of failure should fall on the government.[157] Practitioners advocate that any other application of reasonableness under FAR

31.201-3 may suppress the very innovation and effort the government hopes to procure under a cost-reimbursable contract.[158]

If the court had applied the appropriate standard of review, the outcome of *KBR I* could have been significantly different. From the outset of the Iraq war, KBR was under immense pressure to establish the first generation of in-theater DFAC subcontracts, but soon recognized the need to cut DFAC costs as exigency gave way to sustainment operations.[159] To do so, KBR determined self-performance was the most cost-effective means to provide Camp Anaconda's DFAC services, estimating a savings of $17 million.[160] Because the Army would not allow KBR to employ Iraqi nationals, KBR made a valid attempt to mobilize a labor force from other countries;[161] however, third-country travel restrictions thwarted KBR's efforts (a circumstance entirely beyond KBR's control).[162] When Tamimi threatened to leave Camp Anaconda without DFAC services, KBR found the clock had run out on its self-performance plan.[163] Ultimately, KBR had no choice but to continue its relationship with Tamimi.[164] Strangely, the COFC focused on the failure of the self-performance effort[165] without considering the care with which KBR exercised its decision, or the potential benefit to the government had it worked. Neither the record nor the court's findings indicate that KBR's decision was negligent to any degree.

The court's criticism of KBR's self-performance effort provided the foundation for its analysis and rejection of KBR's subsequent price negotiations with Tamimi.[166] As posited in the amicus curiae brief, the outcome of KBR's self-performance should have "no bearing on ... whether KBR's arms-length negotiations with Tamimi were reasonable," unless the decision to self-perform was irrational at the time it was made.[167] Unfortunately, the COFC's departure from precedent and conventional wisdom led to the harsh result that a business decision should be weighed not by its reasonableness on the front end, but by its success or failure on the back end.

3. *KBR I* Disregards the Business Judgment Rule

Surprisingly, the COFC asserted that "FAR 31.201-3 affords the court *significant discretion*" to question a contractor's business decisions while simultaneously acknowledging a lack of case law to support that conclusion.[168] This assertion contradicts the long-standing business judgment rule by allowing an unforgiving post hoc analysis of the contractor's decisions from the comfort of the bench.[169] It is true that a contractor's costs are reimbursable only to the extent that the contracting officer determines such costs to be allowable and reasonable.[170] It is equally true that the contractor bears the burden to prove the reasonableness of its judgment once the government questions a cost as unreasonable.[171] Nonetheless, prior to *KBR I*, the law still afforded the contractor significant discretion without fear of second-guessing from the contracting officer or the court.[172]

Business judgments lie at the heart of cost-reimbursement agreements.[173] In cost-variable contracts, the government procures the knowledge, skill, judgment, and capabilities of the contractor.[174] The contractor has the "right, as well as [the] duty, to use [his knowledge, skill, judgment, and capabilities] to ... [exercise] *his* discretion, not that of the contracting officer, in carrying out all of the factors involved in the performance of the contract."[175] Because the contractor "is entitled to exercise its discretion and sound judgment,"[176] a contractor's costs should not be disallowed under FAR 31.201-3 if the contractor has acted within the scope of this discretion.[177]

As KBR's Federal Circuit brief asserted, the government-contracting business judgment rule is analogous to its corporate law brother, which "recognizes that many important corporate decisions are made under conditions of uncertainty."[178] The corporate rule prevents "ex post judicial hindsight" by judges who lack the training or experience to review complex business decisions, unless the decisions are obviously flawed.[179] Absent gross negligence or willful misconduct, courts should respect "good-faith judgments even if the judgments prove to be mistaken."[180] Like the corporate rule, the government-contract business judgment rule recognizes "a large measure of contractor discretion,"[181] and the FAR "does not encourage second-guessing of the exercise of business judgment."[182] In short, neither the contracting officer nor the court may second-guess a contractor's judgment unless it "border[s] on gross negligence."[183]

One of the best analyses of the interplay between business judgment and FAR 31.201-3 appears in *Boeing Aerospace Operations, Inc.*[184] Ruling on the allowance of lump-sum wage payments to contractor employees,[185] the ASBCA noted that a contractor is given discretion to carry out the performance of a cost-reimbursement contract and may exercise independent judgment in deciding to take on a cost.[186] The Board warned that a contracting officer should refrain from substituting his own judgment for that of the contractor.[187] Instead, the contracting officer should focus on whether the contractor has acted in a non-arbitrary manner.[188]

Had the COFC applied the business judgment rule rather than substituting its own post hoc judgment, the *KBR I* outcome would have been significantly different. The COFC should have reviewed KBR's decision to self-perform and ultimately maintain its subcontracting relationship with Tamimi to determine if those decisions "f[e]ll within a zone of reasonableness at the time [they] were made."[189] Instead, the COFC opted to read independent business judgment out of FAR 31.201-3.[190]

For example, the COFC should have given deference to the evidence that KBR sought and received competitive proposals for the cost of labor before it undertook the self-performance effort. Instead, the court wrote off KBR's effort as "disastrous" simply because it failed.[191] Additionally, the court should have given deference to KBR's choice of negotiator and the business judgment exercised in preparing for and undertaking price negotiations with Tamimi.[192] Instead, the court deemed that the negotiator was unprepared, and that her conduct during negotiations was unreasonable.[193]

Specifically, the court faulted KBR for failing to use all available leverage against Tamimi to strengthen KBR's otherwise weak negotiation position caused by the "disastrous" self-performance.[194] The court pointed out that at the time of negotiations, KBR withheld funds from Tamimi for work performed at Camp Anaconda.[195] According to the COFC, the negotiator should have used the withheld funds as leverage to squeeze more discounts from Tamimi.[196] However, KBR's negotiator explained that withholding the funds would be counterproductive to negotiations because those amounts were actually due and Tamimi could simply sue to recover.[197] Moreover, Tamimi continuously threatened to leave Camp Anaconda, which would have left KBR without a food service subcontractor and unable to fulfill its responsibilities to the government.[198] The negotiator was also aware of the Kuwait DFAC history, where Tamimi had previously worked directly with the Army to have the KBR Camp Arifjan DFAC services removed from LOGCAP III coverage and the contract directly awarded to Tamimi.[199] Given these facts, the negotiator made the business judgment not to irritate Tamimi by withholding funds to gain marginal negotiation leverage.[200]

In reviewing the evidence, the court undervalued KBR's responsibility to the government and overlooked the fact that KBR's negotiations were conducted at arm's length.[201] The court substituted its own judgment in place of KBR's judgment, concluding that KBR's conduct during price negotiations was imprudent.[202] Prior to *KBR I*, neither the contracting officer nor the court stood in the shoes of the contractor.[203] Yet, it appears from the Federal Circuit's endorsement of the COFC's analysis that the court's own "business judgment" is now part and parcel of the reasonableness inquiry.[204] With the court's 20/20 hindsight, this certainly places the contractor at a distinct disadvantage.

C. *The Federal Circuit Simply Adopts the COFC's* KBR I *Analysis*

The Federal Circuit agreed with the COFC's holding and rejected KBR's argument that cost-reimbursement contracts "require only that the contractor gives its 'best efforts' when performing, and that its costs are payable absent gross misconduct."[205] Remarkably, the Federal Circuit could not find support in the text of the FAR or case law for KBR's argument that cost-reimbursement contracts require only the contractor's best effort.[206] Parroting the COFC's conclusion that FAR 31.201-3 gives the court flexibility to determine cost reasonableness,[207] the Federal Circuit found that a cost could be unreasonable even without evidence of misconduct or arbitrary action on KBR's part.[208] The court took no issue with the COFC's after-the-fact inquiry into KBR's business judgment or the COFC's conclusion that KBR's own actions unreasonably exacerbated the company's subcontracting costs.[209] As a result, the Federal Circuit effectively approved the COFC's shift of risk to the contractor under cost-variable contracts, sweeping aside fifty years of legal precedent.

V. *KBR II*: *KBR I* REDUX

A. *KBR (Still) Attempting to Meet the Army's Endless Demands*

In *KBR II*, the COFC and the Federal Circuit revisited cost reasonableness in subcontracting.[210] Similar to *KBR I*, this case arose out of a claim for DFAC service costs under LOGCAP III at a camp in Mosul, yet another region of Iraq.[211] Mosul is located roughly 200 miles north-northwest of Baghdad.[212] In 2004, the anticipated population for the Mosul camp was 2,573 troops.[213] Similar to *KBR I*'s fact pattern, in *KBR II*, KBR initially awarded DFAC subcontracts under its master agreement system[214] but then re-competed the subcontracts in 2004 as first-generation DFAC contracts expired.[215] The second-generation DFAC subcontracts contained "headcount bands"[216] that included "three 1000-person numerical ranges."[217] Each band included semivariable and fixed costs based on the band's stated capacity.[218] The middle band represented the Army's targeted headcount that was included in the subcontract's SOW.[219] The higher and lower headcount bands represented prepriced options that could be implemented, with Army approval, to address fluctuations in troop numbers.[220]

In March 2004, KBR competitively awarded the Mosul subcontract to ABC International Group to build a "Kirby style" (prefabricated metal) facility and provide dining services.[221] ABC's offer included monthly pricing based on a target headcount band covering 2,501 to 3,500 troops, totaling $869,735.[222] By June 2004, soon after ABC began construction of the Kirby-style DFAC, the Army ordered KBR to stop work and start anew, constructing a reinforced concrete dining facility.[223] The Army also notified KBR of an increase in the headcount from 2,573 to roughly 6,200 troops.[224] Due to urgency (imposed by the Army) and the costs associated with mobilizing a new subcontractor, KBR kept ABC in place at Mosul and went about negotiating prices for the changed work.[225] KBR directed ABC to submit a proposal to build and service a reinforced concrete DFAC with a capacity for roughly 6,200 troops.[226]

Like its initial proposal, ABC's new proposal included headcount bands;[227] however, the new total cost for the target headcount band covering 5,501 to 6,500 troops totaled approximately $2,606,600,[228] roughly triple the price quoted for the original target headcount band of 2,501 to 3,500 troops.[229] When asked to explain the price increase, ABC cited the need to provide additional labor and equipment to serve the larger base population, the "drastic increase in the cost of labor," and "a severe shortage of available staff ... willing to work in Iraq."[230]

Using ABC's proposal and its rationale for increased prices, KBR prepared a Price Negotiation Memorandum (PNM) to justify the costs.[231] In the PNM, KBR cited to the urgency of the Army's change order; cited political conditions at the existing site, including violence and beheading of hostages; and provided documentation on the subcontractors' equipment, staffing, design layout and drawings, and material schedules.[232] Unfortunately, the PNM contained a significant mathematical error.[233] KBR's Subcontract Administration Team Leader took the competed rates from ABC's initial subcontract and doubled both the monthly cost and the cost per person, which quadrupled the estimated cost that served as the benchmark for comparison to ABC's new proposal.[234] KBR thus concluded that ABC's proposed pricing was justifiable.[235] Beyond the mathematical error, KBR management further admitted that the PNM "lacked lots of details that *in hindsight* should have been included."[236]

Nonetheless, KBR notified the contracting officer of the new pricing and received no objection or stop work order.[237] KBR informed the contracting officer that the Army's projected headcount far exceeded the actual number of troops being served, since the actual daily headcount had yet to exceed 2,000 troops.[238] Despite this information, the contracting officer did not issue a change order to reduce the target headcount from 6,200 troops.[239] Therefore, ABC proceeded with construction on the new DFAC, preparing to serve at least 6,200 troops in accordance with the Army's TO.[240] ABC performed the requirements, and the Army received title to the reinforced concrete DFAC at the end of the subcontract period.[241]

In 2007, DCAA disapproved reimbursement of $12,529,504 paid to ABC for the dining facility, equipment, labor, and consumables.[242] To support its subcontracting costs, KBR submitted the original price justification and also prepared a new one for the concrete facility.[243] KBR cited the increased violence and urgency to mobilize additional labor as driving forces behind ABC's higher prices.[244] In further support, KBR offered a comparison between the cost of building similar DFACs in Jordan and Iraq to the cost of building the concrete facility at Mosul.[245] The court, however, found KBR failed to demonstrate that "it [had] employed sound business practices and acted as a reasonably prudent business [person] in accepting ABC's proposed prices" for the changed requirements.[246] The court denied recovery of all costs except those related to constructing the concrete DFAC,[247] which totaled roughly $6.7 million.[248]

B. *The COFC Stands By and Extends Its Faulty* KBR I *Analysis*

1. The COFC Reiterates Its *KBR I* Standard of Review

Given the opportunity to revisit FAR 31.201-3 in *KBR II*, the COFC could do nothing to restore the conventional principles of cost-reimbursement contracting that it displaced in *KBR I*.[249] From the outset, *KBR II* cited the same standard of review set forth in *KBR I*.[250] First, the COFC cited FAR 31.201-3 and its nonexhaustive list of criteria for reviewing cost reasonableness.[251] The court then reminded KBR that it was not entitled to a presumption of reasonableness in accordance with FAR 31.201-3(a).[252] Next, the COFC parroted its conclusion that it has "significant discretion" under the FAR to determine "whether claimed costs are reasonable,"[253] but also noted the dearth of case law in which a court or board has exercised such broad discretion under similar circumstances.[254] Finally, the court limited its willingness to consider the wartime environment in which KBR incurred its costs, stating that violence in Iraq is a circumstance bearing some relevance to reasonableness, but that it is not dispositive.[255]

With the weighty burden of proof on its shoulders, KBR again cited *Lockheed* for the proposition that "unusually high costs may be necessary where urgency is present or where no alternative sources are available."[256] Similar to its *KBR I* argument, KBR opined that it had satisfied its burden by showing that: (1) it incurred subcontract costs in performance of an urgent Army TO; (2) the prices resulted from KBR's best efforts to perform in a warzone; and (3) the incurred costs were not the result of KBR's gross negligence or willful misconduct.[257]

The COFC rejected outright KBR's proposed standard of reasonableness as being unsupported by FAR 31.201-3.[258] The court, nonetheless, went on to state that the evidence KBR presented at trial could not have satisfied KBR's proposed standard even if the court had agreed to apply it.[259] The court concluded that KBR was *grossly negligent* in accepting ABC's proposed pricing for the change order, predominately due to KBR's failure to notice the math error in the PNM.[260]

Because the COFC and the Federal Circuit redefined the cost-reimbursement contracting relationship in *KBR I*, finding business judgment irreconcilable with FAR 31.201-3 and shifting cost risk to the contractor,[261] it is not surprising that the court found KBR's business decisions in *KBR II* unreasonable. That KBR made best efforts to perform the Army's change order under exigent circumstances and in an austere environment is of limited relevance to the inquiry of cost reasonableness.[262]

Little deference is due to the contractor's business judgment since *KBR I* established the court's broad authority to critique a contractor's decisions.[263] Most surprisingly, the court determined that a mathematical error in KBR's PNM constituted gross negligence,[264] leaving contractors to wonder whether anything less than nearperfect performance would be accepted by the court in the future.

2. The COFC Adds Another Layer to KBR's Burden of Proof

The COFC further held that the reasonableness of a price could be judged only by comparison to another price.[265] The COFC drew its conclusion from *KBR I*, where the court found a benchmark against which to evaluate Tamimi's subcontract costs.[266] In *KBR I*, the COFC stated that "reasonableness of a price can only be judged in terms of some other price figure[,] [and] [i]t is from this other figure, the conceptual anchor point, that one determines if the questioned price is reasonable."[267]

After finding KBR's decision not to compete the new DFAC requirements under the Army's urgent change order as reasonable,[268] the court nonetheless concluded that KBR's decision to accept ABC's proposed pricing was unreasonable because KBR did not establish a contemporaneous benchmark against which price elements could be compared.[269] The COFC's focus on identifying a reliable benchmark led to an illogical result: KBR's decision to sole-source the change order was reasonable, but the price of the sole-source subcontract was unreasonable because the lack of competition left KBR with no "conceptual anchor point"[270] for comparison.[271] To add insult to injury, the court faulted KBR for citing escalated violence in Iraq as a factor that increased subcontract labor costs without documentation to support its assertion.[272]

This result illuminates why the court was wrong to limit its consideration of the exigent, wartime circumstances when analyzing cost reasonableness in both *KBR* decisions. Because contingency contractors typically perform unusual requirements in austere environments under immense government pressure and short deadlines, price lists are a luxury rarely available for comparison.[273] As one practitioner noted, "there's no Sears catalog that tells you what it should cost to build a dining facility in a war zone."[274] The court's failure to find flexibility in FAR 31.201-3 for the exigencies of war is alarming for the contractor community.[275]

C. *The Federal Circuit Opens the Door to Recover for Negligence – Maybe*

As in the *KBR I* appeal, the Federal Circuit affirmed the COFC findings in *KBR II*.[276] KBR argued that it made a negligent mistake in miscalculating its subcontractor costs and urged the Federal Circuit to address whether "costs incurred as a result of negligent mistakes" could be considered reasonable.[277] Judge Moore acknowledged the inability to redefine reasonableness in *KBR II* because the legal standard had been handed down in *KBR I*;[278] however, the court ultimately conceded that *KBR I* did not address the possible impacts of a negligent mistake on the reasonableness inquiry.[279] The court then went on to punt the issue, concluding that it need not "draw the line" in *KBR II* because the COFC findings showed that KBR was grossly negligent.[280]

As a result, future litigation regarding FAR 31.201-3 may devolve into a squabble over what amount of contractor negligence is tolerable. Some practitioners view the Federal Circuit's deferral of the negligence issue as a glimmer of hope for contractors;[281] however, others find no value in the Federal Circuit's deferral unless the court restores the appropriate risk allocation between the parties, as well as the proper deference to a contractor's business judgment.[282] After all, if KBR's computation and paperwork errors amount to *gross* negligence, it is unclear what level of error the court will deem reasonable.

VI. PRACTICAL IMPLICATIONS OF THE *KBR* DECISIONS

While some practitioners argue that the *KBR* decisions represent no change to FAR 31.201-3, others recognize that the holdings constitute a seismic shift in the relationship between the parties.[283] KBR's attorney warns that the decisions have "potentially devastating" implications for industry.[284] With the Department of Defense spending roughly $140 billion a year on cost-type contracts[285] and with the DCAA's license to reject costs as unreasonable well after performance,[286] the *KBR* decisions easily make cost-variable contracts "far more risky in performance than fixed-price contracts."[287] At the very least, it will impact how the parties behave in future cost-variable contracts – particularly warzone contracts.[288] Ultimately, it may be the government that loses as contractors adapt their business practices to avoid KBR's unfortunate outcome.[289]

The *KBR* decisions may embolden contracting officers and DCAA auditors to analyze subcontract pricing in greater detail and disallow costs more frequently.[290] The government need only question a cost as unreasonable to foist the burden of proof onto the contractor. Once targeted, the contractor's business decisions are given limited deference unless the contractor faced circumstances *entirely* beyond its control.[291] Litigation over LOGCAP III continues and performance on the next generation LOGCAP contracts (LOGCAP IV) is in full swing, but it is unlikely the Federal Circuit will readdress FAR 31.201-3 given its reluctance to take the reins from the COFC on the issue of reasonableness.[292] If the *KBR* decisions represent where the law is headed, a contractor facing a post hoc review of its costs will need to know that minor errors, even in wartime, may be labeled "grossly negligent" and unallowable.[293] Therefore, contractors should be familiar with the *KBR* holdings and proceed with caution in subcontracting.[294]

There is little doubt that contractors will adjust their business practices to account for this shift in risk. Some scholars anticipate contractors will avoid fixed-price subcontracts all together, choosing instead to insulate themselves from risk by awarding cost-reimbursement subcontracts.[295] However, this option is typically unavailable to the warzone contractor.[296] For example, KBR found itself with limited options in Iraq because local subcontractors lacked the accounting systems required for cost-variable subcontracts and DFAC services are commercial.[297] Given the circumstances, KBR was required to use fixed-price subcontracts.[298] This left KBR unable to pull cost and pricing data from Tamimi or ABC to support their prices as reasonable.[299]

As profit margins shrink on cost-type contingency contracts, it is entirely possible that experienced defense contractors will be less willing to undertake such obligations.[300] The uncertainties of war demand that contractors have flexibility to perform when neither the contractor nor the government can definitively price the project beforehand.[301] This flexibility was built into cost-type contracts to increase innovation and maximize the likelihood of successful performance for both parties;[302] however, the rigidity introduced in the *KBR* decisions goes against the typical risk allocation in cost-type contracts and penalizes the contractor for mistakes made in the fluid wartime environment.[303] When contractors are left to bear performance risk almost exclusively,[304] their willingness to innovate decreases.

This shift could operate to the government's disadvantage if contingency contractors side with practitioners and negotiate fixed-price rather than cost-type government contracts.[305] It seems counterintuitive that fixed-price agreements are becoming the less risky option for contractors; however, in a fixed-price arrangement, the contractor can build costs it *may* face, plus a reasonable (and often higher) profit rate, into its price contingency plan.[306] On the other hand, with cost-variable contracts, the contractor now faces the very real possibility that a percentage of its expenses will be disallowed as unreasonable. Where the government is unable to define its requirements with specificity, the contractor must pad its fixed-price contracts with more contingencies and the government pays more than it would have paid under a cost-type arrangement.[307] If large defense contractors start turning down cost-type contingency contracts as unprofitable endeavors, the government will have two undesirable wartime contract options: (1) choose a cost-reimbursement contractor from a shrinking pool of less-experienced (but willing) contenders or (2) pay astronomically more for services from reputable, experienced contractors under fixed terms.

In the event that large defense contractors are still willing to accept cost-type contingency contracts, the government should expect a decrease in contractors' willingness to respond to every performance whim as a result of the *KBR* decisions. *KBR I* highlights why a contractor should carefully and meticulously conduct and document its subcontract negotiations – even if such formalities slow contractor responsiveness to the government's frenetically paced wartime needs. After all, the COFC surprised the contracting community when it proclaimed "[n]o one should be heard to play the violin tune of we-couldn't-abandon-our-commitment-to-feeding-the-troops."[308] Given the court's attitude toward KBR's admirable performance at a time when bullets were flying, it should come as no surprise that contractors are concerned about their ability to recoup costs on future contingency contracts.

Therefore, contractors are advised to pay close attention to subcontract price negotiations.[309] Contractors should be prepared to describe the competition process, including how the subcontractor was chosen and how prices were determined to be fair and reasonable.[310] As the *KBR* decisions illustrate, after-the-fact explanations bring scrutiny from the government and the court.[311] Therefore, real-time documentation is preferable. It is imperative that the contractor's staff is adequately trained on how to negotiate and document subcontract pricing.[312] Staff should ensure that paperwork is carefully crafted and routed for review.[313] The contractor should also consult the contracting officer on subcontract pricing whenever possible.[314] While not dispositive, these steps may preclude the government from later arguing that it would have objected to the subcontract prices had the contractor given notice.[315]

The courts have made it clear that formal documentation is a must.[316] As contractors implement more cautionary practices, the government should expect delayed response time.[317] While it would be preferable for a contractor to focus on the wartime mission rather than paperwork, doing so places the contractor at risk of nonpayment. At the end of the day, the government may find that shirking risk is not worth the price as contractor-provided supplies and services in the warzone lag behind government demand.

VII. CONCLUSION

Undoubtedly, the *KBR* decisions represent a change in the relationship between contractors and the government. Fifty years of case law demonstrate the court's drastically divergent approach to cost reasonableness in the *KBR* cases. By abandoning the business-judgment rule and replacing the best efforts nature of cost-reimbursement contracting with a near-perfect performance requirement, the COFC and Federal Circuit have created uncertainty for contractors. Contracting officers and auditors need only cite FAR 31.201-3 and the *KBR* decisions to second-guess, with 20/20 hindsight, the reasonableness of contractors' costs, shifting the burden to the contractor to justify its business decisions. This imbalance between the parties will certainly lead to "friction, disputes, and [future] litigation."[318] One question left unanswered by the *KBR* court is whether a contractor may still recover costs if the court deems the contractor's faulty business decisions simply negligent rather than grossly negligent. This unanswered question provides little comfort for the contractor performing in the fast paced, chaotic contingency environment, where decisions are complicated by a lack of choices, estimates are unreliable, formalities are a luxury, and prices tend to fluctuate and soar.

As a result of the court's stringent cost-reasonableness standard, contractors are likely to change their business practices to protect their profits. The government may find a number of negative consequences flow from its refusal to pay the piper in *KBR*. While it may appear that the government won the battle against a war profiteer, it may have lost the war against increased expenditures.

** – Major Candice D. Schubbe is a Judge Advocate in the U.S. Air Force and is the Source Selection Branch Chief at the Commercial Law & Litigation Directorate's Contract Law Field Support Center at Joint Base Andrews, Maryland. She received her LL.M. in Government Procurement from The George Washington University Law School.* *Special thanks go to the author's husband Christopher and son Benjamin for their unending support. Thanks also go to Stephen Knight and Karen Manos, whose thoughtful observations contributed valuable depth to the analysis of this topic.* *The views expressed here are the author's and do not reflect an official position of the U.S. Department of the Air Force, U.S. Department of Defense, or any other U.S. government agency.*

Endnotes

[1] Nathan Myhrvold, *Does the Space Program Have a Future?*, SLATE (Feb. 6, 2003, 10:07 A.M.), http://www.slate.com/articles/news_and_politics/dialogues/features/2003/does_the_space_program_have_a_future/stuck_in_the_70s.html.

[2] Kellogg Brown & Root Servs., Inc. v. United States, 103 Fed. Cl. 714 (2012), *aff'd in part*, *rev'd in part*, 728 F.3d 1348 (Fed. Cir. 2013), *reh'g denied*, 563 F. App'x 769 (Fed. Cir. 2014).

3 Kellogg Brown & Root Servs., Inc. v. United States, 107 Fed. Cl. 16, 39 (2012), *aff'd*, 742 F.3d 967 (Fed. Cir. 2014).

4 Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 716; Kellogg Brown & Root Servs., Inc., 107 Fed. Cl. at 17.

5 Ralph C. Nash, *Allowability of Subcontractor Prices: A Surprising Decision*, 26 Nash & Cibinic Rep. ¶ 58, at 162 (Nov. 2012) [hereinafter Nash-1].

6 *See id.* at 162, 164; *see also* Ralph C. Nash, *Postscript: Allowability of Subcontractor Prices*, 27 Nash & Cibinic Rep. ¶ 60, at 184 (Dec. 2013) [hereinafter Nash-2]; Telephone Interview with Stephen D. Knight, member, Smith, Pachter & McWhorter, PLC (Mar. 6, 2014) [hereinafter Knight Interview] (recording on file with author); Telephone Interview with Karen L. Manos, partner resident, Gibson, Dunn & Crutcher, LLP (Mar. 4, 2014) [hereinafter Manos Interview] (recording on file with author).

7 *See* Nash-2, *supra* 6, at 184.

8 *See id.*

9 Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1361-62 (Fed. Cir. 2013).

10 Knight Interview, *supra* note 6; Manos Interview, *supra* note 6; Karen Manos, Lecture at West Government Contracts Year In Review Conference (Feb. 20, 2014) (on file with author). For a discussion on the government contracts business judgment rule, see *infra* Part IV.B.3.

11 *See* Radol v. Thomas, 772 F.2d 244, 257 (6th Cir. 1985).

12 *See* Nash-2, *supra* note 6, at 184.

13 Knight Interview, *supra* note 6; Manos Interview, *supra* note 6.

14 *See generally* Nash-1, *supra* note 5 (discussing the risks for cost-reimbursement contractors); Manos Interview, *supra* note 6.

15 *See* FAR 52.216-7.

16 Kellogg Brown & Root Servs., Inc. v. United States, 103 Fed. Cl. 714, 749 (2012).

17 FAR 31.201-3.

18 *See* Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 749-50; Kellogg Brown & Root Servs., Inc. v. United States, 107 Fed. Cl. 16, 38 (2012).

19 FAR 31.201-3(a).

20 *Id.*

21 FAR 31.201-3(b).

22 Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 749-50 (citing Bruce Constr. Corp. v. United States, 324 F.2d 516, 519 (Ct. Cl. 1963)).

23 *Id.* at 750.

24 *Id.* (citing FAR 31.201-3(a); Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 767 (Fed. Cir. 1987)).

25 *See* Nash-2, *supra* note 6, at 183.

26 Gen. Dynamics Corp. v. United States, 671 F.2d 474, 481 (Ct. Cl. 1982).

27 *See, e.g.*, *id.* at 477-78, 480-81; Boeing Aerospace Operations, Inc., ASBCA Nos. 46274, 46275, 94-2 BCA ¶ 26,802 at 133,271.

28 *See* Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 751 (stating that the COFC inquiry into the reasonableness of KBR's subcontract pricing "must take into account the realities that KBR personnel and its subcontractors were facing at the time" of price negotiations only insofar as KBR was "dealing with realities over which it had no control"); *see also* Knight Interview, *supra* note 6; Manos Interview, *supra* note 6.

29 OFFICE OF THE UNDER SEC'Y OF DEF. FOR ACQUISITION, TECH., & LOGISTICS, BASIC CONTINGENCY OPERATION TRAINING: LOGCAP 3, 6 (2011) [hereinafter, OUSD(AT&L)].

30 *See Kellogg Brown & Root Servs., Inc.*, 103 Fed. Cl. at 716.

31 *Id.*; 10 U.S.C. § 101(a)(13) (2012) defines "contingency operation" as a military operation that:

> (1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
>
> (2) Results in the call or order to, or retention on, active duty of members of the uniformed services [under specified sections of the United States Code] ... during a war or during a national emergency declared by the President or Congress.

Id.

32 Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 716.

[33] *Id.* at 716, 727 n.25.

[34] Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1353 (Fed. Cir. 2013).

[35] Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 716.

[36] *Id.*

[37] *Id.* at 717.

[38] *Id.* at 714, 717, 719, 724; *see also* Brief for Plaintiff-Appellant at 5, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (Fed. Cir. 2013) (No. 12-5106).

[39] Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 717, 720.

[40] COMM'N ON WARTIME CONTRACTING IN IRAQ & AFG., TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 76 (2011).

[41] Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 717-18.

[42] *Id.* at 717. After the initial invasion, Army leadership quickly turned its focus to establishing DFACs in an effort to improve waning troop morale. *See id.* "[T]he troops had been subsisting" almost exclusively on Meals Ready to Eat (MREs) from the time of invasion in March 2003. *Id.* An MRE is a pre-packaged meal designed to be eaten anywhere at any time either cold or heated with a ration heater. *See Soldier Life: Meals, Ready-to-Eat*, U.S. ARMY, www.goarmy.com/soldier-life/fitness-and-nutrition/components-of-nutrition/meals-ready-to-eat.html (last visited May 13, 2014).

[43] Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 718; Kellogg Brown & Root Servs., Inc. v. United States, 107 Fed. Cl. 16, 18 (2012).

[44] *See, e.g.*, Press Release, Dep't of Justice, United States Government Sues Kellogg, Brown & Root Servs. Inc. and Two Foreign Companies for Kickbacks and False Claims Relating to Iraq Support Services Contract (Jan. 23, 2014), *available at* http://www.justice.gov/opa/pr/2014/January/14-civ-070.html; Douglas Ernst, *U.S. Troops in Iraq Fed Ice from Unsanitized Morgue Trailers: Justice Dept.*, WASH. TIMES (Jan. 29, 2014), http://www.washingtontimes.com/news/2014/jan/29/us-troops-iraq-were-fed-ice-unsanitized-morgue-tra/; Ryan J. Reilly, *KBR, Guilty in Iraq Negligence, Wants Taxpayers to Foot the Bill*, HUFFINGTON POST (Jan. 9, 2013, 9:37 PM), http://www.huffingtonpost.com/2013/01/09/kbr-guilty-iraq-negligence_n_2436115.html; Daniel Gilbert, *KBR Alleged Rape Trial Begins*, WALL ST. J. (June 15, 2011), *available at* http://www.wsj.com/articles/SB10001424052702304665904576386272590962; Jarrett Murphy, *Cheney's Halliburton Ties Remain*, CBS NEWS (Sept. 26,

2003), http://www.cbsnews.com/news/cheneys-halliburton-ties-remain.

45 *See generally* TRANSFORMING WARTIME CONTRACTING, *supra* note 40, at 16 (discussing generally the government's overreliance on contractors).

46 *See id.* at 25 (listing KBR as the top contingency contract for support in Iraq and Afghanistan). The government engaged contractors at unprecedented levels to perform the mission in Iraq and support deployed service members and civilian employees. *See id.* at 16.

47 *See, e.g.*, Brief for Plaintiff-Appellant at 25, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (Fed. Cir. 2013) (No. 12-5106) (stating that "KBR successfully performed far beyond the modest requirements of LOGCAP III ... earning [the Army's] praise for 'provision of contracted mission-essential services in Iraq [that] was unprecedented in both its scope and complexity'" (citations omitted)); *see also* David Ivanovich, *KBR Wins Praise Despite Disputes*, HOUS. CHRON. (Apr. 20, 2007, 5:30 AM), http://www.chron.com/business/article/KBR-wins-praise-despite-disputes-1621833.php (explaining that "... KBR remains popular among troops on the ground, thanks to the quality of its food and housing").

48 Brief for Plaintiff-Appellant at 25, Kellogg Brown & Root Servs., Inc., 728 F. 3d 1348 (stating that "[KBR earned] the Army's highest-possible award-fee score"); *see also* Ivanovich, *supra* note 47 (explaining that "the vast majority of [KBR's] ratings ... were 'excellent' or 'very good'").

49 Brief for Plaintiff-Appellant at 25, 728 F.3d 1348.

50 *Id.* at 19.

51 Kellogg Brown & Root Servs., Inc. v. United States, 103 Fed. Cl. 714, 716, 718-19 (2012).

52 *Id.* at 718-20. Task order (TO) 59 provided for all "life support services in Iraq." *Id.* at 719. The scope of work for the order was enormous, requiring the Army to issue the statement of work (SOW) in numerous appendices. *Id.* The Army continuously amended the SOW throughout June into July. *Id.* The Army and KBR did not sign the final version of TO 59 until August 2003, which had an effective period running from June 2003 to April 2005. *Id.* at 719-20. TO 59 encompassed life support to fifty-six sites and required KBR to manage, through its subcontractors, more than 25,000 employees. *Id.* at 720.

53 *Id.* at 718-19. KBR proactively decided to use the master system agreement in early June with knowledge that TO 59 would soon after be issued. *Id.* at 719 n.9.

54 *Id.*

[55] *Id.*

[56] *Id.* at 723. Under this system, pricing for a specific contract was not the only criterion governing which subcontractor would receive award; in some cases, geographic and other logistical considerations weighed in favor of a higher-priced vendor being the "best value" to the Army. *Id.*

[57] *Id.* at 720. KBR had a preexisting relationship with Tamimi. *See id.* at 717. Also, under LOGCAP III KBR provided dining services at Camp Arifjan in Kuwait. *Id.* Issued in 2002, the Arifjan TO *required* KBR to subcontract with Tamimi because Tamimi had previously been under a direct contract with the Army. *Id.* Interestingly, the Army removed DFAC services from the scope of LOGCAP III at Kuwait when KBR's relationship with Tamimi became strained. *Id.* at 717 n.6. The Army reestablished a direct contract relationship with Tamimi. *Id.* The Army further considered awarding all DFAC services in Iraq to Tamimi. *Id.* at 718 n.8. Given the Army's heavy reliance on fraud and kickback counterclaims to defend *Kellogg Brown & Root Services, Inc.*, it is ironic that the Army chose to remove Arifjan's DFAC services from KBR's control to maintain a direct relationship with the contractor that the Army later condemned KBR for using. *Id.* at 717 n.6.

[58] *See id.* at 718; *see also id.* at 724.

[59] *Id.* at 724.

[60] *See id.*

[61] *See id.* at 728 n.29 (describing Camp Anaconda and the routes leading thereto as perilous); *see also id.* at 724 (citing the hazards at Camp Anaconda as a reason to award the work release for DFAC services at Anaconda to Tamimi rather than another master agreement holder).

[62] *Id.* at 724.

[63] *Id.*

[64] *Id.* These less-than-ideal circumstances were caused by the Army's "constantly changing demands" on KBR's already-stressed procurement system. *Id.* at 726-27. KBR's system was based on smaller contingency operations it had previously supported, such as in the Balkans or Somalia. Brief for Plaintiff-Appellant at 7, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (Fed. Cir. 2013) (No. 12-5106). "The war in Iraq far exceeded the limited deployment contemplated by LOGCAP III ... and KBR had difficulty finding sufficient numbers of qualified procurement personnel willing to go into a dangerous war zone." *Id.* at 8.

[65] *See* Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 724.

66 *Id.*

67 *See id.*

68 *Id.* at 724-25.

69 *Id.* at 725.

70 *Id.*

71 *Id.* at 727.

72 *Id.* at 728.

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *See id.* at 724, 728, 745.

78 *Id.* at 729.

79 *Id.* at 730.

80 *See id.*

81 *Id.* at 732.

82 *Id.* at 734.

83 *Id.*

84 Brief for Plaintiff-Appellant, at 15 n.10, Kellogg Brown & Root Servs., Inc. v. United States, 742 F.3d 967 (Fed. Cir. 2014) (No. 10-5030).

85 *See* Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 734.

86 *Id.* at 735.

87 *Id.* at 731.

88 *Id.* at 735.

89 *Id.*

90 *Id.* at 736.

[91] *Id.*

[92] *Id.* at 720, 736.

[93] *Id.* at 737-38; Brief for Plaintiff-Appellant at 12-13, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (Fed. Cir. 2013) (No. 12-5106). KBR's negotiator did not have access to Tamimi's cost information because fixed-price commercial-service providers like Tamimi are not required to provide such data. *See, e.g.,* Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 767.

[94] *Id.* at 738.

[95] *Id.*

[96] *Id.* at 738, 741.

[97] *Id.* at 741. The dispute over facility ownership predated December 2004. *See* Kellogg Brown & Root Servs., Inc. v. United States, 107 Fed. Cl. 16, 21 (2012). While KBR argued that facility ownership transferred in September 2004, Tamimi alleged KBR still owed twelve months of amortized costs. *See* Brief for Plaintiff-Appellant at 14-15, Kellogg Brown & Root Servs., Inc., 728 F.3d at 1348.

[98] *See* Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 744.

[99] *Id.*

[100] *Id.* at 747.

[101] *Id.*

[102] *Id.*

[103] *Id.* at 749 (quoting FAR 31.201-3(a)).

[104] *Id.* (citing FAR 31.201-3(b)).

[105] *Id.* at 752.

[106] *Id.* at 751.

[107] *See id.* at 750.

[108] *Id.* at 753.

[109] Brief for Plaintiff-Appellant at 26, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (Fed. Cir. 2013) (No. 12-5106) (citing P.R. Contractors, Inc. v. United States, 76 Fed. Cl. 621, 632 (2007) (quoting JOHN CIBINIC JR. ET AL., ADMINISTRATION OF GOVERNMENT CONTRACTS 245 (4th ed. 2006)))

(emphasis added).

110 *Id.* (citing JOHN CIBINIC JR. & RALPH C. NASH JR., COST-REIMBURSEMENT CONTRACTINGG 2 (3d ed. 2004) (emphasis added)).

111 Letter to Capt. C.A. Cozart, U.S. Army, B-15593, 20 C.P.D. ¶ 632 (Comp. Gen. Apr. 14, 1941). The risk allocation in fixed-price contracting, on the other hand, places the risk of cost overrun predominately on the contractor. *Id.*

112 Brief of Prof'l Servs. Council & Nat'l Def. Indus. Ass'n in Support of Plaintiff-Appellant at 12, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (2013) (No. 12-5106) (citing FAR 16.301-2(a)). *See also* FAR 16.103(b) (allowing for contract types other than fixed price "when a reasonable basis for firm pricing does not exist …").

113 FAR 16.104(d), (f). *See also* Lockheed Martin Tactical Aircraft Sys., ASBCA Nos. 49530, 50057, 00-1 BCA ¶ 30,852 at 152,312 (stating that "[u]nusually high costs may be necessary where urgency is present or where no alternative sources are available") (quoting MELVIN RISHE, GOVERNMENT CONTRACT COSTS 10-7 (Fed. Pub. 1984).

114 Kellogg Brown & Root Servs., Inc. v. United States, 103 Fed. Cl. 714, 716-18 (2012). *See also* Brief for Plaintiff-Appellant at 4, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (Fed. Cir. 2013) (No. 12-5106).

115 Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 717.

116 TRANSFORMING WARTIME CONTRACTING, *supra* note 40, at 76.

117 Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 717-18.

118 *See id.* at 724.

119 *See generally id.* (describing the government's needs during this contracting period).

120 *Id.* at 753.

121 *Id.* at 751.

122 *Id.*

123 *Id.*

124 *Id.* at 750 (citing to Lockheed Martin Tactical Aircraft Sys., ASBCA No. 49530, 00-1 BCA ¶ 30,852, 2000 WL 307741 (Mar. 22, 2000)).

125 Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 751.

126 Lockheed Martin Tactical Aircraft Sys., ASBCA Nos. 49530, 50057, 00-1 BCA ¶ 30,852 at 152,312.

127 *Id.* at 152,312-13.

128 Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 751.

129 Brief of Prof'l Servs. Council & Nat'l Def. Indus. Ass'n in Support Plaintiff-Appellant at 17, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (2013) (No. 12-5106).

130 *See Kellogg Brown & Root Servs., Inc.*, 103 Fed. Cl. at 752.

131 *Id.*

132 *Id.*

133 *Id.* at 756-57.

134 Brief for Plaintiff-Appellant at 27, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (Fed. Cir. 2013) (No. 12-5106) (emphasis added). KBR argued in its brief that "a contractor that entered into a reasonable and prudent business decision that nonetheless failed had control over costs, but courts have held such costs reimbursable ... indeed, that is the *archetype* of a reasonable cost." *Id.*

135 *See, e.g.*, Gen. Dynamics Corp. v. United States, 671 F.2d 474, 480 (Ct. Cl. 1982). *Gen. Dynamics Corp.* was decided by the Court of Claims, which was a predecessor to the COFC. Steven L. Schooner & Pamela J. Kovacs, *Affirmatively Inefficient Jurisprudence?: Confusing Contractors' Rights to Raise Affirmative Defenses with Sovereign Immunity*, 21 Fed. Cir. B.J. 685, 689 n.30 (2011-12). Court of Claims decisions have precedential value over the COFC; general references to the COFC include decisions from the Court of Claims. *Id.*

136 Hughes Commc'ns Galaxy, Inc. v. United States, 47 Fed. Cl. 236, 239 (2000) (citing Triple-A Baseball Club Assocs. v. Northeastern Baseball, Inc., 832 F.2d 214, 225 (1st Cir. 1987)).

137 *See* Gen. Dynamics Corp., 671 F.2d at 481.

138 Letter to Capt. C.A. Cozart, U.S. Army, B-15593, 20 C.P.D. ¶ 632 (Comp. Gen. Apr. 14, 1941). *See also* Brief of Prof'l Servs. Council & Nat'l Def. Indus. Ass'n in Support Plaintiff-Appellant at 12, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (2013) (No. 12-5106); Brief for Plaintiff-Appellant at 27-28, Kellogg Brown & Root Servs., Inc., 728 F.3d 1348; Knight Interview, *supra* note 6.

139 FAR 52.228-7(c)(2).

140 FAR 52.249-5; Brief for Plaintiff-Appellant at 34, Kellogg Brown & Root Servs., Inc., 728 F.3d 1348.

141 FAR 52.249-6.

142 *Id.*; Brief for Plaintiff-Appellant at 34, Kellogg Brown & Root Servs., Inc., 728 F.3d 1348.

143 Morton-Thiokol, Inc., ASBCA No. 32629, 90-3 BCA ¶ 23,207, at 116,470.

144 *Id.* (quoting Willys Motors, Inc., ASBCA No. 4333, 59-1 BCA ¶ 2075, at 8,813-14).

145 *See* Ensign-Bickford Co., ASBCA No. 6214, 60-2 BCA ¶ 2,817, at 14,555-56, 14,562.

146 ASBCA Nos. 5166, 5271, 60-1 BCA ¶ 2,556.

147 *Id.* at 12,392, 12,398.

148 *Id.* at 12,400.

149 *Id.* at 12,399.

150 38 Fed. Cl. 627 (1997).

151 *Id.* at 640. In *Best Foam Fabricators*, the COFC converted a wrongful termination for default into a termination for convenience. *Id.* at 638. "A termination for convenience essentially converts a fixed price contract into a cost-reimbursement contract." *Id.* "As such, the contractor is entitled to recover all allowable costs incurred in the performance of the terminated work ...." *Id.* Allowability is determined in accordance with FAR Part 31 and includes the elements of cost reasonableness. *Id.* at 638-39.

152 *Id.* at 640 (emphasis added) (quoting New York Shipbuilding Co., ASBCA No. 15443, 73-1 BCA ¶ 9,852, at 46,018-19; Best Lumber Sales, ASBCA No. 16737, 72-2 BCA ¶ 9,661, at 45,098; Riverport Indus., Inc., ASBCA No. 30888, 87-2 BCA ¶ 19,876, at 100,521; Youngstrand Surveying, ASBCA No. 90-150-1, 92-1 BCA ¶ 25,017 at 124,694).

153 *Id.* at 640 (emphasis added) (citing New York Shipbuilding Co., 73-1 BCA ¶ 9,852, at 46,019); Morton-Thiokol, Inc., ASBCA No. 32629, 90-3 BCA ¶ 23,207, at 116,471-72 (finding that absent a showing of gross misconduct, the government must reimburse the costs of producing defective work under cost-reimbursement contracts and that proof that defects resulted from contractor's careless mistakes not sufficient to disallow costs); JOHN CIBINIC JR. & RALPH C. NASH JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 1118 (3d ed. 1995) (stating that "[a]llowable costs [following convenience termination] include costs incurred in producing defective material ... as long as the amount of defective material is not unreasonable").

154 *See* Best Foam Fabricators, 38 Fed. Cl. at 644.

155 Brief of Prof'l Servs. Council & Nat'l Def. Indus. Ass'n in Support Plaintiff-Appellant at 17, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (2013) (No. 12-5106).

156 *Id.*

157 *See id.* at 14-15.

158 *See, e.g., id.* at 19-20 ("Regardless of whether the contract is for research and development or for logistical support in a wartime environment, any other rule would stifle the very innovation, business judgment, and best efforts that the [g]overnment procures under a cost reimbursable contract."); *see also* Knight Interview, *supra* note 6; Manos Interview, *supra* note 6.

159 *See* Kellogg Brown & Root Servs., Inc. v. United States, 103 Fed. Cl. 714, 717-20 (2012).

160 *Id.* at 734.

161 Brief for Plaintiff-Appellant, at 15 n.10, Kellogg Brown & Root Servs., Inc. v. United States, 742 F.3d 967 (Fed. Cir. 2014) (No. 10-5030).

162 Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 735.

163 *See id.*

164 *Id.*

165 *See id.* at 758.

166 *Id.*

167 Brief of Prof'l Servs. Council & Nat'l Def. Indus. Ass'n in Support Plaintiff-Appellant at 18-19, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (2013) (No. 12-5106).

168 Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 750 (emphasis added).

169 Knight Interview, *supra* note 6; Manos Interview, *supra* note 6.

170 Kellogg Brown & Root Servs., Inc., 130 Fed. Cl. at 749.

171 *Id.* at 750 (citing FAR 31.201-3(a); Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 767 (Fed. Cir. 1987) (stating that "[t]he government was under no obligation to present evidence attacking an item if [the contractor] did not prove *prima facie* that it

was properly included”)).

172 *See, e.g.*, J.A. Ross & Co., ASBCA No. 2326, et al., 1955 ¶ 61,801 at 52,497.

173 *See id.*

174 *Id.*

175 *Id.*

176 Boeing Aerospace Operations, Inc., ASBCA Nos. 46274, 46275, 94-2 BCA ¶ 26,802 at 133,283.

177 *See id.*

178 Brief for Plaintiff-Appellant at 36, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (Fed. Cir. 2013) (No. 12-5106) (quoting Radol v. Thomas, 772 F.2d 244, 257 (6th Cir. 1985)).

179 *Id*

180 *Id.* (citing *In re* Bal Harbour Club, Inc., 316 F.3d 1192, 1194 (11th Cir. 1985)).

181 *Id.* at 36 (quoting Lockheed-Georgia, ASBCA No. 27660, 90-3 BCA ¶ 22,957 at 115,276).

182 *Id.* at 36-37 (quoting McDonnell Douglas Corp. v. United States, 40 Fed. Cl. 529, 537 (1998)).

183 Brief of Prof’l Servs. Council & Nat’l Def. Indus. Ass’n in Support Plaintiff-Appellant at 10-11, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (2013) (No. 12-5106) (citing Brief for Plaintiff-Appellant at 33-34, Kellogg Brown & Root Servs., Inc., 728 F.3d 1348 (Fed. Cir. 2013) (No. 12-5106)); Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302, 324-25 (1989); Fireman’s Fund Ins. Co., ASBCA No. 39666, 91-1 ¶ 23,372).

184 *See* ASBCA Nos. 46274, 46275, 94-2 BCA ¶ 26,802.

185 *Id.* at 133,283.

186 *Id.*

187 *Id.*

188 *Id.* Unlike the COFC in *KBR I*, the ASBCA considered all relevant circumstances existing at the time of cost incurrence. *Id.* at 133,282 (citing ILC Dover, Inc., ASBCA No. 41878, 93-1 BCA ¶ 25,331; Sterling Millwrights, Inc. v. United States, 26 Cl. Ct.

49, 98 (1992)). The Board even accepted wage surveys prepared post-litigation as evidence of cost reasonableness since such surveys were not available at the time Boeing incurred its costs, finding "no requirement that a cost ... be simultaneously incurred by all contractors or potential contractors similarly situated" to Boeing in order to be recoverable. *Id.* at 133,284 (citing Western Elec. Co., Inc., ASBCA No. 11056, 69-1 BCA ¶ 7,660 at 35,553).

189 Brief of Prof'l Servs. Council & Nat'l Def. Indus. Ass'n in Support Plaintiff-Appellant at 20, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (2013) (No. 12-5106). *Accord* Brief for Plaintiff-Appellant at 39-40, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (Fed. Cir. 2013) (No. 12-5106). Knight Interview, *supra* note 6; Manos Interview, *supra* note 6.

190 *See* Kellogg Brown & Root Servs., Inc. v. United States, 103 Fed. Cl. 714, 749-50 (2012).

191 *Id.* at 758.

192 *Id.* at 756-57.

193 *Id.* at 757.

194 *Id.* at 758.

195 *Id.* at 738-39.

196 *Id.* at 754-56, 758.

197 *Id.* at 739.

198 *Id.*

199 *Id.*

200 *Id.*

201 *See generally id.* at 753-59 (discussing in detail Betty Hayes's negotiations).

202 *Id.* at 757-59.

203 *See* Brief of Prof'l Servs. Council & Nat'l Def. Indus. Ass'n in Support Plaintiff-Appellant at 8, Kellogg Brown & Root Servs., Inc., 728 F.3d 1348; *see also* Boeing Aerospace Operations, Inc., ASBCA Nos. 46274, 46275, 94-2 BCA ¶ 26,802, at 133,283 (explaining that whether the contracting officer or the court would have made the same business decision if in the contractor's shoes is irrelevant).

204 Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1359-60 (Fed. Cir.

2013) (explaining that "KBR offers many pages of non-binding law to illustrate the amount of discretion courts have afforded to contractors ... the standard for assessing reasonableness is flexible, allowing the [COFC] to consider many fact-intensive and context-specific factors").

205 *Id.* at 1359.

206 *Id.*

207 *Id.*

208 *Id.* (citing Boeing N. Am., Inc. v. Roche, 298 F.3d 1274, 1281 (Fed. Cir. 2002)).

209 *See generally id.* (discussing KBR's appeal from the COFC's decision).

210 *See generally* Kellogg Brown & Root Servs., Inc. v. United States, 107 Fed. Cl. 16 (2012) (explaining KBR's burden to provide reasonable justification for claimed costs passed to subcontractor).

211 *Id.* at 18.

212 *Id.*

213 *Id.* at 19.

214 *Id.* at 18.

215 *Id.*

216 *Id.* at 19.

217 *Id.* at 18.

218 *Id.*

219 *Id.*

220 *Id.*

221 *Id.* at 19. KBR erroneously determined that ABC was the lowest-priced offeror after making a mathematical error in calculating the offerors' bids. *Id.* In fact, another proposal was $1 million less; however, the error was not discovered until after KBR awarded the subcontract to ABC. *Id.*

222 *See id.* The lowest headcount band covered 1,500-2,500 troops and totaled $803,100, while the highest headcount band covered 3,501 to 4,500 troops and totaled $977,935. *See id.*

[223] *Id.* at 20.

[224] *Id.*

[225] *See id.* (stating that "the court finds [that] plaintiff was responding to exigent circumstances").

[226] *Id.*

[227] *Id.*

[228] *Id.* at 21.

[229] *See id.* at 19-20.

[230] *Id.* at 21.

[231] *Id.*

[232] *Id.* at 33.

[233] *Id.* at 21.

[234] *Id.* at 22.

[235] *Id.*

[236] *Id.* (emphasis added).

[237] *Id.* at 23.

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] *Id.* at 23-24.

[242] *Id.* at 25.

[243] *Id.* at 26-27.

[244] *Id.* at 27.

[245] *Id.* at 24-25.

[246] *Id.* at 41.

[247] *Id.* at 45.

[248] *Id.*

[249] *Id.* at 38 (discussing the standards for cost reasonableness).

[250] *Id.*

[251] *Id. See supra* Part IV.B for the factors for consideration listed in FAR 31.201-3

[252] Kellogg Brown & Root Servs., Inc., 107 Fed. Cl. at 38-39 (citations omitted).

[253] *Id.* at 39.

[254] *Id.*

[255] *Id.* at 40.

[256] *Id.* at 39-40 (quoting Lockheed Martin Tactical Aircraft Sys., ASBCA No. 49530, 00-1 BCA ¶ 30,852 at 152,312).

[257] *Id.* at 40.

[258] *Id.* at 40-41. The court also scolded KBR for raising this argument only in its post-trial brief. *Id.* at 41.

[259] *Id.* at 41 n.19.

[260] *Id.*

[261] *See* Kellogg Brown & Root Servs., Inc. v. United States, 103 Fed. Cl. 714, 750 (2012).

[262] *See* Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1362 (Fed. Cir. 2013).

[263] *Id.* at 1361-62.

[264] Kellogg Brown & Root Servs., Inc., 107 Fed. Cl. at 41 n.19; *see also* Knight Interview, *supra* note 6; Manos Interview, *supra* note 6.

[265] Kellogg Brown & Root Servs., Inc., 107 Fed. Cl. at 40.

[266] *Id.*

[267] *Id.* (quoting Kellogg Brown & Root Servs., Inc. v. United States, 103 Fed. Cl. 714, 769 (2012)).

[268] *Id.*

[269] *Id.* at 41, 43.

[270] *Id.* at 40 (quoting Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 769).

[271] *Id.*

[272] *Id.* at 42 (finding ABC's statements "self-serving").

[273] Manos Interview, *supra* note 6 (explaining that "[t]here is no price list for moving a DFAC, hardening it, doubling the size. These are 'one of' things that happen in a warzone with the government in a huge hurry to protect the troops .... Even if you were reasonable, you will never be able to prove it."); Knight Interview, *supra* note 6 (asking, "[w]hat are you going to do ... go out and get three bids?").

[274] Dietrich Knauth, *Government Contracts Cases to Watch in 2014*, LAW360 (Jan. 1, 2014), http://www.law360.com/articles/495460/government-contracts-cases-to-watch-in-2014 (quoting Karen Manos of Gibson, Dunn & Crutcher LLP).

[275] Some practitioners argue that the results in the *KBR* decisions indicate a need to revise the FAR to incorporate more flexibility for wartime contracting. *See, e.g.*, Manos Interview, *supra* note 6 (stating that a different set of rules should apply for wartime contracting than peacetime contracting). *See also* Knight Interview, *supra* note 6 (stating that the government and the court need to be more flexible in wartime contracting or the government should graft on FAR provisions specific to contingency contracting).

[276] Kellogg Brown & Root Servs., Inc. v. United States, 742 F.3d 967, 972 (Fed. Cir. 2014).

[277] *Id.* at 971.

[278] Erica Teichert, *Fed. Circ. Says KBR's $12.5M Costs May Be out of Its Hands*, LAW360 (Nov. 5, 2013, 7:24 PM), http://www.law360.com/articles/486506/fed-circ-says-kbr-s-12-5m-costs-may-be-out-of-its-hands (quoting U.S. Circuit Judge Kimberly A. Moore as asking, "which part of the legal standard are we able to add to? ... I'm trying to decide how much room this court has to address reasonableness").

[279] Kellogg Brown & Root Services, Inc., 742 F.3d at 971.

[280] *Id.*

[281] Manos Interview, *supra* note 6; Knight Interview, *supra* note 6.

[282] Manos Interview, *supra* note 6 (stating that the Federal Circuit's deferral of the negligence issue might be the only glimmer of hope for cost-reimbursement contractors to glean from the *KBR* decisions); Knight Interview, *supra* note 6 (stating that the Federal Circuit should revisit the issues presented by the *KBR* decisions rather than allow the law to devolve into secondguessing a contractor's negligence).

[283] *See* Terry L. Albertson, Senior Counsel, Crowell & Moring LLP, Lecture at West Government Contracts Year-in-Review Conference (Feb. 20, 2014) (stating that the court appropriately applied FAR 31.201-3 to the facts in the *KBR* decisions, that the cases are reconcilable with historical treatment of cost-variable contracts as best efforts agreements); *see also* Manos Interview, *supra* note 6 (stating generally that some practitioners have suggested the court was given bad facts leading to a bad result in *KBR I*); Nash-2, *supra* note 6, at 184 (stating that *KBR I* "seem[s] to establish a new understanding of the relationship of the parties"); Knight Interview, *supra* note 6 (describing the change in relationship as "seismic"); Manos Interview, *supra* note 6 (noting the significant change in the relationship between the parties with the contractor taking on more risk than the government).

[284] Michael Lipkin, *KBR Can't Get Full $13M from Army Contract, Fed. Cir. Says*, LAW360 (Feb. 3, 2014, 7:14 PM), http://www.law360.com/articles/506608/kbr-can-t-get-full-13m-from-army-contract-fed-cir-says.

[285] *Id.*

[286] *Id.*

[287] *Id.*

[288] *See, e.g.*, Nash-2, *supra* note 6, at 184 (explaining how contractors may adjust their business judgment in cost-reimbursement contracts post-*KBR*); *see also* Knight Interview, *supra* note 6 (stating that contractors might not want to take on the risk of cost-reimbursement contracts in future contingencies); *see also* Manos Interview, *supra* note 6 (stating that the risks contractors face in cost-reimbursement contracts post-*KBR* could impact willingness to take on this type of contract all together or, at the very least, how the contractor performs in a cost reimbursement contract).

[289] *See* Nash-2, *supra* note 6, at 184.

[290] Knauth, *supra* note 274 (commenting that *KBR I* may "embolden government auditors to second-guess contractor costs"); *see also* Nash-1, *supra* note 5, at 161, 164 (noting the lack of cases on reasonableness of subcontractor pricing prior to *KBR I* and opining that *KBR I* may result in frequent disallowance of such costs); Manos Interview, *supra* note 6 (stating that "DCAA thinks [the *KBR* decisions] are great ... [auditors] are now questioning everything as unreasonable"). *But see* Knight Interview, *supra* note 6 (stating that the *KBR* decisions may not have spurred the government's increased scrutiny of subcontract costs and noting that DCAA's interest in subcontracting as a "target of opportunity" comes and goes over the years).

[291] Kellogg Brown & Root Servs., Inc. v. United States, 103 Fed. Cl. 714, 749-50, 758 (2012) (stating that "once the contracting officer issues a Form 1 questioning costs, the

onus to prove reasonableness of that amount shifts to the [contractor]. It is not the government's task to show that the costs were unreasonable for other reasons until [the contractor] has been able to establish the *prima facie* reasonableness of its costs."); *see also* Kellogg Brown & Root Servs., Inc. v. United States, 107 Fed. Cl. 16, 39 (2012).

292 *See, e.g.*, Brief for Plaintiff-Appellant at 1, Kellogg Brown & Root Servs., Inc. v. United States, 742 F.3d 967 (Fed. Cir. 2014) (No. 10-5030) (listing four related cases pending before the COFC); *see also* OUSD(AT&L), *supra* note 29, at 8.

293 Kellogg Brown & Root Servs., Inc., 107 Fed. Cl. at 41 n.19 (describing KBR's price miscalculation error as grossly negligent).

294 Manos Interview, *supra* note 6 (stating that cost-reimbursement contingency contracts are becoming "enormously risky"); *see also* Knight Interview, *supra* note 6 (stating that cost reimbursement contractors should beware of the risk involved in undertaking contingency contracts because the court will not read flexibility into FAR 31.201-3); Nash-1, *supra* note 5, at 164 (advising parties entering cost-variable contracts to read the *KBR* decision [s] in their entirety).

295 *See* Nash-2, *supra* note 6, at 184 (noting that cost-reimbursement contractors may decide "the only rational business decision is to award cost-reimbursement subcontracts").

296 *See, e.g.*, Kellogg Brown & Root Servs., Inc., 107 Fed. Cl. at 33; FAR 16.301-3(a)(3) (requiring an adequate accounting system as a requirement for award of a cost-variable contract); FAR 16.301-3(b) (prohibiting the use of cost-reimbursement contracts when acquiring a commercial item); Manos Interview, *supra* note 6 (commenting that subcontractors readily available in the warzone typically lack sophisticated CAS and therefore cannot be awarded cost-type contracts).

297 *See, e.g.*, Kellogg Brown & Root Servs., Inc., 107 Fed. Cl. at 32 (noting that "KBR was ... forced to enter fixed-price--rather than cost-reimbursement--contracts with its subcontractors in Iraq because the subcontractors did not have government-approved cost accounting systems").

298 *Id.*

299 *See, e.g.*, Kellogg Brown & Root Servs., Inc. v. United States, 103 Fed. Cl. 714, 767 (2012). Interestingly, Judge Miller speculates that KBR's price negotiator may have been able to obtain cost data from Tamimi in December 2003. *See id.* at 767 n.61. The court's conclusion that the negotiator could have wrangled cost data to which KBR was not entitled under its fixedprice subcontract with Tamimi highlights the burden that contractors face to prove reasonableness. Nash-1, *supra* note 5, at 162.

300 Knight Interview, *supra* note 6 (stating that contractors may be less willing to take on the heightened risks associated with cost-variable contracting during future wars); *see also* Manos Interview, *supra* note 6 (stating cost-variable contracts are becoming "enormously risky" with DCAA questioning everything as unreasonable).

301 Knight Interview, *supra* note 6; Manos Interview, *supra* note 6.

302 Knight Interview, *supra* note 6; Manos Interview, *supra* note 6.

303 Knauth, *supra* note 274 (citing Karen Manos).

304 *See, e.g., id.* (arguing that contractors should not bear all the risk because they need to have the flexibility to perform).

305 Manos Interview, *supra* note 6 (arguing it would be more advantageous for contingency contractors to negotiate fixed-price agreements with the government and build in costs for potential risk plus profit rather than negotiate cost-type contracts with low profit rates given the possibility of losing costs is deemed unreasonable).

306 *See supra* note 300 and accompanying text.

307 *Id.*

308 Kellogg Brown & Root Servs., Inc. v. United States, 103 Fed. Cl. 714, 753 (2012).

309 *See* Nash-1, *supra* note 5, at 164; *see also* Knight Interview, *supra* note 6; Manos Interview, *supra* note 6.

310 Knight Interview, *supra* note 6; Manos Interview, *supra* note 6.

311 *See generally* Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (Fed. Cir. 2013); Kellogg Brown & Root Servs., Inc. v. United States, 107 Fed. Cl. 16 (2012); Kellogg Brown & Root Servs., Inc., 103 Fed. Cl. at 714.

312 Manos Interview, *supra* note 6.

313 *See* Nash-1, *supra* note 5, at 164; *see also* Knight Interview, *supra* note 6; Manos Interview, *supra* note 6.

314 Knight Interview, *supra* note 6.

315 In *KBR II*, the contracting officer was notified of, and did not object to, the incurred costs; however, this fact did not impress the court. Kellogg Brown & Root Servs., Inc., 107 Fed. Cl. at 23.

316 *Id.* at 32.

317 *See* Knight Interview, *supra* note 6; *see also* Manos Interview, *supra* note 6.

318 Brief of Prof'l Servs. Council & Nat'l Def. Indus. Ass'n in Support Plaintiff-Appellant at 21, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (2013) (No. 12-5106).