2004 GOVERNMENT CONTRACT DECISIONS OF THE FEDERAL CIRCUIT

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INTRODUCTION

The Federal Circuit's 2004 government contracts decisions fall within the following categories: jurisdiction, damages/remedies, contract formation, contract modification/termination, and patent rights. This Article discusses sixteen precedent-setting Federal Circuit opinions dealing with government contracts and sets out the relevant facts, the Federal Circuit's analysis, and the holdings to provide the government contracts practitioner with a year in review of the Federal Circuit's government contracts decisions.[1]

I. JURISDICTION

The jurisdictional cases involve the Federal Circuit's ability to decide disputes involving certain government contracts issues. In *Ains, Inc. v. United States*[2] and *United Pacific Insurance Co. v. Roche*,[3] the Federal Circuit ruled that it could not decide government contracts questions. Although Ains had a contract with the U.S. Mint, the Federal Circuit ruled that the contractor was left without a remedy in the Federal Circuit because Congress never waived sovereign immunity for non-appropriated funding instrumentalities such as the U.S. Mint.[4] The Federal Circuit refused jurisdiction in *United Pacific Insurance* for any claims arising before the surety entered into a novation agreement with the government.[5] In *Christopher Village, L.P. v. United States*,[6] the Federal Circuit defended its exclusive jurisdiction over government contracts matters against encroachment by another circuit.[7] The facts, analysis, and holding of each case are discussed below.

A. Ains, Inc. v. United States

In *Ains*,[8] the Federal Circuit addressed a failure of government contract law that prohibits contractors from bringing suit against a "non-appropriated funds instrumentality" ("NAFI"), and articulated a four-prong

1. Note that the Federal Circuit decided four Winstar-related cases during 2004 that dealt with the impact of the Financial Institutions, Reform, Recovery, and Enforcement Act (FIRREA) upon contracts from the savings and loan crisis era. As these cases are better left for analysis by attorneys focusing on banking and financial institutions, they are excluded from this article. For ease of reference, the cases are: *Admiral Financial Corp. v. United States*, 378 F.3d 1336 (Fed. Cir. 2004); *Glendale Federal Bank, FSB v. United States*, 378 F.3d 1308 (Fed. Cir. 2004); *Hansen Bancorp, Inc. v. United States*, 367 F.3d 1297 (Fed. Cir. 2004); *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360 (Fed. Cir. 2004).
2. 365 F.3d 1333 (Fed. Cir. 2004).
3. 380 F.3d 1352 (Fed. Cir. 2004).
4. *Ains*, 365 F.3d at 1333.
5. 380 F.3d 1352 at 1356.
6. 360 F.3d 1319 (Fed. Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3259 (U.S. June 7, 2004) (No. 04-517).
7. *Id.*
8. 365 F.3d 1333 (Fed. Cir. 2004).

test for identifying a NAFI before dismissing Ains' claim for lack of jurisdiction.[9] Ains received a contract from the Mint to provide information technology and computing support services.[10] Ains brought suit in the Court of Federal Claims alleging the Mint breached several of its obligations under the contract.[11] Perhaps unsurprisingly, Ains cited the Tucker Act as the source of subject matter jurisdiction.[12] The Tucker Act waives sovereign immunity to allow most contractors to sue the United States for breach of contract. There is an exception to Tucker Act jurisdiction, however, and the Federal Circuit used the *Ains* decision to explore and articulate the contours of that exception.[13]

The NAFI exception to Tucker Act jurisdiction is based on the premise that the government has not waived its sovereign immunity to allow private parties to bring breach of contract claims against NAFIs.[14] NAFIs are government instrumentalities that are, among other things, self-supporting.[15] Other definitional aspects of NAFIs were not settled prior to the *Ains* decision. The government argued that the Mint became a NAFI when Congress created the Mint's "Public Enterprise Fund" and fell into the NAFI exception, therefore, precluding jurisdiction.[16] Ains argued that the Mint was not a NAFI, and cited a prior case where the Court of Federal Claims held just that.[17]

The Federal Circuit examined prior influences on NAFI law before developing its own four-prong test to determine whether an entity is a NAFI and, therefore, whether the organization is covered by the Tucker Act jurisdiction exception.[18] The Federal Circuit reviewed the competing influences on the NAFI doctrine and analyzed their impacts on the law.[19] The Supreme Court's NAFI treatment in *United States v. Hopkins*[20] discussed employment contracts between workers and their NAFI employers. The Court ruled that Tucker Act jurisdiction existed for employment contracts generally, but the specific NAFI-employee relationship in question was more analogous to an "appointment" than to an

9. *Id.*
10. *Id.* at 1335.
11. *Id.*
12. "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States. . . ." *Id.* (quoting 28 U.S.C. § 1491(a)(1) (2000)).
13. *Id.*
14. *Id.* at 1336.
15. *Id.* at 1337.
16. *Id.* (referencing 31 U.S.C. § 5136 (2000)).
17. *Id.* at 1336 (referencing *MDB Communications, Inc. v. United States*, 53 Fed. Cl. 245 (2002)).
18. Id. at 1342.
19. Id. at 1337.
20. 427 U.S. 123 (1976).

employment contract.[21] The decision triggered several warnings from judges questioning whether depriving contractors—employees or otherwise—of a forum for their grievances was in line with Congressional intent.[22] Separately, the General Accounting Office ("GAO") also issued its own rulings about which federal entities operated on non-appropriated funds.[23] The GAO, however, defined NAFIs differently than the Federal Circuit's case law.[24]

The Federal Circuit "explicitly declined" to adopt the GAO's NAFI decision and announced a four-prong test for determining NAFI status.[25] The instrumentality is a NAFI if: (1) it does not receive its monies by congressional appropriation; (2) it derives its funding primarily from its own activities, services, and product sales; (3) absent a statutory amendment, there is no situation in which appropriated funds could be used to fund the federal entity; and, (4) there is a clear expression by Congress that the agency was to be separated from general federal revenues.[26] The Federal Circuit applied the test to the Mint, concluded the Mint is a NAFI, and affirmed the Court of Federal Claims' decision to dismiss *Ains* for lack of jurisdiction.[27] In so doing, the Federal Circuit stated:

> The government prevails because no judicial relief is available to contractors who choose to contract with NAFIs. Unless Congress waives a NAFI's sovereign immunity, the courts can entertain only the government's allegations of breach, not those brought by the contractor.[28]

Thus, until Congress acts, contractors need to be aware of the NAFI test and understand their heightened risk before contracting.

B. Christopher Village, L.P. v. United States

Christopher Village L.P.[29] declared void a Fifth Circuit Court of Appeals declaratory judgment regarding the government's liability for breach of contract.[30] The Fifth Circuit expressly decided the case, in order to enable suits for damages in the Court of Federal Claims.[31] In this procedurally complex case, the Federal Circuit sharply defended its jurisdictional

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21. *Id.* at 126-27.
22. *See Ains*, 365 F.3d at 1339-40; *see, e.g.*, Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977).
23. *Ains*, 365 F.3d at 1340-41.
24. *Id.*
25. *Id.* at 1342.
26. *Id.*
27. *Id.* at 1343-44.
28. *Id.*
29. 360 F.3d 1319 (Fed. Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3259 (U.S. June 7, 2004) (No. 04-517).
30. *Id.* at 1319.
31. *Id.* at 1326.

mandate by invalidating a Fifth Circuit declaratory judgment on jurisdictional grounds.[32]

The contracts in question were two Housing and Urban Development ("HUD") agreements that insured mortgages used to construct low income housing to promote property maintenance through rent subsidies from the federal government.[33] The Housing Assistance Payment contract regulated Christopher Village's management of the property by prohibiting rent in excess of the set rents allowed by HUD and by requiring management to "maintain and operate the contract units and related facilities so as to provide decent, safe and sanitary housing as defined by HUD."[34] After operating under the Housing Assistance Payment contract for twenty-five years, the housing facility had deteriorated and required approximately $2 million in repairs.[35] HUD warned Christopher Village that failure to refurbish the property could lead to default and loss of rent subsidies.[36] Management then requested approval for a twenty-nine percent rent increase from HUD in order to finance renovations.[37] HUD refused and demanded that Christopher Village deposit approximately $2 million in escrow to fund the repairs before HUD would consider the requested rent increase.[38] Twenty days later, HUD sent Christopher Village a cure notice.[39] Sixty days following the cure notice, HUD assumed control of the property and the mortgage.[40]

Christopher Village sued HUD in the United States District Court for the Southern District of Texas arguing the $2 million escrow demand was illegal, and attempted to force HUD to re-convey the property to the management company.[41] The district court granted summary judgment for HUD on all counts.[42] Christopher Village appealed to the Fifth Circuit, and while the case was pending HUD sold the property at a foreclosure sale, and it was razed.[43] Though the Fifth Circuit held that the foreclosure and destruction of the property rendered most of Christopher Village's claims moot, the Fifth Circuit held that the request for declaratory judgment was not moot, because Christopher Village "could use the declaration as a predicate for a damages action against HUD in the Court of Federal

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32. *Id.* at 1326-27.
33. *Id.* at 1322.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 1322-23.
38. *Id.* at 1323.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*

Claims."[44] The Fifth Circuit similarly held that HUD's own regulations required that HUD at least entertain a rent request and remanded with instructions for the district court to issue Christopher Village's requested declaratory judgment.[45]

The case reached the Court of Federal Claims after Christopher Village filed a class action suit for breach of contract.[46] The Court of Federal Claims denied class certification.[47] While the damages action was pending, Management Assistance Group, Inc., a limited partner of Christopher Village, pled guilty to engaging in an illegal insurance kickback scheme that involved the property in question in the case decided by the Federal Circuit in 2004.[48] In the Federal Circuit case, the government claimed that the guilty plea constituted a prior material breach by Christopher Village which excused the government of liability for any later breach HUD committed.[49] In response, Christopher Village claimed it was entitled to a judgment on the merits "because res judicata required the Court of Federal Claims to accept the Fifth Circuit's liability holding."[50]

The Federal Circuit dismissed Christopher Village's argument that res judicata required a decision on the merits, stating that the Fifth Circuit had no jurisdiction over the government contracts question.[51] On the merits, the Court of Federal Claims found for the government based upon the government's prior material breach argument.[52] Christopher Village and its managing general partner, Wilshire, appealed to the Federal Circuit.[53]

The Federal Circuit took offense to another circuit issuing a judgment as a "predicate" to suit in the Court of Federal Claims.[54] The Federal Circuit found that the Fifth Circuit had no jurisdiction to issue a decision in a breach of government contract action.[55] The Federal Circuit then thoroughly discussed the importance of its exclusive jurisdiction over government contract matters.[56] Finally, the Federal Circuit eliminated all traces of the Fifth Circuit's decision by mandating that the Court of Federal Claims decide all government contract issues de novo rather than allow

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44. *Id.* at 1323-24 (quoting Christopher Village, Ltd. v. Retsinas, 190 F.3d 310, 315 (5th Cir. 1999)).
45. *Id.* at 1324.
46. *Id.*
47. *Id.*
48. *Id.* at 1325.
49. *Id.* at 1325-26.
50. *Id.* at 1326.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 1333 ("Although we are reluctant to conclude that one of our sister circuits has acted beyond its jurisdiction, we find that it plainly did so here.").
55. *Id.* at 1329.
56. *Id.* at 1329-33.

collateral estoppel to dictate some of the findings.[57] The Federal Circuit then conducted its own de novo review, ruling that Christopher Village and Management Assistance Group, Inc.'s kickback scheme constituted a material breach that occurred before the government's refusal to consider a rent increase. As such, the doctrine of first material breach precluded any recovery by Christopher Village, even though the government was unaware of the contractor's prior breach at the time of its refusal to consider the rent increase.[58]

C. United Pacific Insurance Co. v. Roche

In *United Pacific Insurance*,[59] the Federal Circuit dealt with the compensation due to a surety holding an indemnity agreement but no novation agreement when the surety completes performance of a defaulting government contractor and seeks compensation for its work.[60] Union Pacific, the surety that completed performance of a 1995 Air Force contract to renovate buildings, held an indemnity agreement from its insured contractor that assigned to the surety all of the contractor's "rights . . . [and] claims . . . arising from or out of' the construction contract, including 'all moneys due' thereunder."[61] The government was not a party to the surety or indemnity agreements, and United Pacific had no role in contract formation or performance until its insured contractor defaulted.[62]

When the contractor began experiencing financial problems it asked the contracting officer to make all future progress payments to United Pacific.[63] The contracting officer refused to do so without a novation agreement, which United Pacific did not provide, so the government continued to pay the contractor rather than the surety.[64] When the contractor ultimately abandoned performance, the government and United Pacific entered into a takeover agreement where United Pacific would complete performance and the government would pay United Pacific the remaining amount due under the contract.[65] After completing performance, United Pacific sought equitable adjustment of the contract price, including amounts paid to the insured contractor prior to the takeover agreement.[66] When the contracting officer denied United Pacific's claims, the surety

57. *Id.* at 1333.
58. *Id.* at 1336-37.
59. United Pac. Ins. Co. v. Roche, 380 F.3d 1352 (Fed. Cir. 2004).
60. *Id.*
61. *Id.* at 1354 (citing United Pac. Ins. Co., 03-2 B.C.A. (CCH) ¶¶ 32,267, 159,606 (ASBCA 2003)).
62. *Id.* at 1354-55.
63. *Id.* at 1354.
64. *Id.*
65. *Id.* at 1354-55.
66. *Id.* at 1355.

appealed to the Armed Services Board of Contract Appeals.[67] The board issued a holding based upon a 2002 Federal Circuit case, *Fireman's Fund Insurance Co. v. England*,[68] that it lacked jurisdiction over all matters prior to United Pacific's takeover agreement, including United Pacific's claim that the original construction contract itself was illegal.[69]

In *United Pacific Insurance*, the Federal Circuit reaffirmed its holding in *Fireman's Fund*, calling the situation with United Pacific "almost identical."[70] The Federal Circuit reiterated that, prior to takeover agreements, sureties are not "contractors" under the Contract Disputes Act, and their pre-takeover claims cannot be heard by the Federal Circuit.[71] The one claim that arose after the takeover agreement was United Pacific's claim for the balance due on the construction contract from the time of the takeover agreement through completion.[72] The Federal Circuit pointed to the Federal Acquisition Regulation requirement conditioning final payment under the contract upon United Pacific's executing a release of claims against the government arising out of the contract.[73]

II. DAMAGES/REMEDIES

A substantial portion of the Federal Circuit's 2004 government contracts decisions dealt with when damages or remedies would be due. *Hi-Shear Technology Corp. v. United States*[74] discussed when the "jury verdict" method of calculating damages could be used, retreating from a 2003 decision requiring the use of the jury verdict method in certain cases.[75] Marking a shift in the law, *E.I. Du Pont De Nemours and Co. v. United States*[76] and *Ford Motor Co. v. United States*[77] both held that the Anti-Deficiency Act did not extinguish open-ended indemnification provisions in World War II contracts, and therefore the contractors were entitled to recover costs of environmental cleanup. The language of these holdings, however, does not seem to be limited to World War II or to CERCLA cleanup. *Rumsfeld v. General Dynamics Corp.*[78] stands for the proposition that the Major Fraud Act prevents apportionment and reimbursement of

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67. *Id.* at 1354-55.
68. 313 F.3d 1344 (Fed. Cir. 2002).
69. *United Pac. Ins. Co.*, 380 F.3d at 1354-55.
70. *Id.* at 1355.
71. *Id.* at 1355-56.
72. *Id.* at 1357.
73. *Id.* at 1358 (citing 48 C.F.R. § 52.232-5(h) (1994)). The Federal Circuit issued no opinion concerning whether the final payment would be paid in full after United Pacific executed its release. *Id.*
74. 356 F.3d 1372 (Fed. Cir. 2004).
75. *Id.* at 1381-82.
76. 365 F.3d 1367 (Fed. Cir. 2004).
77. 378 F.3d 1314 (Fed. Cir. 2004).
78. 365 F.3d 1380 (Fed. Cir. 2004).

legal costs in one proceeding when the same misconduct is alleged in another proceeding that has unallowable costs. The Federal Circuit used *Marathon Oil Co. v. United States*[79] to limit the availability of post-judgment interest, stating that Congress did not waive sovereign immunity for all judgments, despite the text in 28 U.S.C. § 1961(c)(2) that "interest shall be allowed on all final judgments against the United States."[80] *England v. Sherman R. Smoot Corp.*[81] eliminated the "*McMullan* presumption," which favored contractors by shifting the burden of proof on fault for contract delay to the government when a contracting officer delays contract performance.[82] *PGBA, LLC v. United States*[83] held that even after an award is ruled arbitrary or capricious, a contract does not have to be set aside and recompeted for if the balance of hardships favors continuing with performance.[84]

A. Hi-Shear Technology Corp. v. United States

In *Hi-Shear Technology*,[85] the Federal Circuit ruled that the "jury verdict" method of calculating damages for a negligently prepared requirements estimate is an appropriate method for making a contractor whole.[86] In doing so, the Federal Circuit cleared up some confusion regarding damage measures, which resulted from dicta in the 2003 *Rumsfeld v. Applied Cos.*[87] decision. The action in *Hi-Shear Technology* arose when the government's need for parts, advertised in its invitation for bids, far exceeded the number ordered in two spare parts requirements contracts.[88] The government bundled its need for approximately 1,100 spare parts into two separate acquisition packages and calculated the quantities that would be required for each part in each package.[89] In its invitation for bids, the government requested prices for three ranges of needs, stating that the advertised quantities fell in the low-middle range of expected need.[90] The U.S. Army Communications-Electronics Command ("CECOM") expected bidders to take advantage of economies of scale and to propose prices that declined with quantity ordered.[91]

In its successful bids for each of the acquisition packages, however, Hi-

79. 374 F.3d 1123 (Fed. Cir. 2004).
80. 28 U.S.C. § 1961(c)(2) (2000).
81. 388 F.3d 844 (Fed. Cir. 2004).
82. *Id.* at 846, 857.
83. 389 F.3d 1219 (Fed. Cir. 2004).
84. *Id.* at 1225-27.
85. 356 F.3d 1372 (Fed. Cir. 2004).
86. *Id.* at 1374, 1381-82.
87. 325 F.3d 1328 (Fed. Cir. 2003), *cert. denied*, 540 U.S. 981 (2003).
88. 356 F.3d at 1374.
89. *Id.*
90. *Id.* at 1374-75.
91. *Id.* at 1375.

Shear offered flat pricing based on the total estimated requirements for each contract as a whole, rather than for each of three quantity ranges.[92] The government exercised the first two option years on each contract, but declined to exercise the final two years after issuing a total of three orders for less than twelve percent and less than twenty percent of the total estimated quantity of spare parts.[93] The Federal Circuit agreed with the Court of Federal Claims' decision that the government issued a negligent parts estimate.[94] The Court of Federal Claims found that CECOM was aware or should have been aware of two factors: first, new incentives for field units to return damaged or defective parts would decrease the need for spare parts; and, second, CECOM had a sizeable number of parts in inventory that would further decrease the need for spares.[95] Hi-Shear filed a certified claim with the contracting officer and sought to recover the fixed overhead and general and administrative costs that it alleged it would have incurred, as well as the gross profit it stated it would have made had the government purchased all of the estimated requirements on each contract for the base and each of four option years.[96] Hi-Shear appealed the contracting officer's denial of its claims to the Court of Federal Claims.[97] The Court of Federal Claims ruled that Hi-Shear was entitled to only a portion of the requested damages for the years the contract actually existed.[98] The Court of Federal Claims denied any compensation for the unexercised option years, finding that the government's failure to exercise those option years was not a result of bad faith, but rather a negligent requirements overstatement.[99] In deciding that damages could not reasonably be computed using actual figures, the Court of Federal Claims employed the "jury verdict" method of calculating damages to award Hi-Shear what CECOM would have estimated its requirements to be had it not been negligent.[100]

Hi-Shear appealed the Court of Federal Claims' $17,793.56 damages calculation to the Federal Circuit, arguing that the "jury verdict" method of damages calculation went against dicta in *Rumsfeld v. Applied Cos., Inc.*[101] In dicta, the Federal Circuit stated that the decision in *Everett Plywood & Door Corp. v. United States*[102] "suggests the proper methodology" for

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92. *Id.* at 1374-75.
93. *Id.* at 1375.
94. *Id.* (referencing Hi-Shear Tech. Corp. v. United States, 53 Fed. Cl. 420 (2002)).
95. *Hi-Shear*, 53 Fed. Cl. at 432.
96. *Id.* at 426.
97. *Id.* at 427.
98. *Hi-Shear*, 356 F.3d at 1376.
99. *Hi-Shear*, 53 Fed. Cl. at 436.
100. *Hi-Shear*, 356 F.3d at 1376.
101. 325 F.3d 1328 (Fed. Cir. 2003).
102. 419 F.2d 425 (Ct. Cl. 1969).

recovery is equitable adjustment.[103] Hi-Shear argued that *Applied Cos.* dicta required equitable adjustment in contract price, which Hi-Shear asserted would result in an award of over $400,000.[104] The Federal Circuit tempered its *Applied Cos.* dicta by reasoning:

> It is true that we stated in *Applied Cos.* that *Everett Plywood* "suggests the proper methodology" for determining the recovery to which a contractor is entitled when the government breaches a requirements contract by providing faulty pre-bid estimates. That is not to say, however, that *Everett Plywood* represents the only approach in such a case.[105]

The Federal Circuit instead reasoned that "in appropriate cases" the law recognizes "flexibility" in determining damages in cases such as *Hi-Shear*.[106] This flexibility allowed the Federal Circuit to affirm the "jury verdict" calculation method and the resulting $17,793.56 damage award.[107]

B. E.I. Du Pont De Nemours and Co., Inc. v. United States

This case addresses the scope of an indemnification provision in a government contract when the site of performance is subject to a Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") cleanup. This case deals with an old contract between E.I. Du Pont de Nemours and Co., Inc. ("DuPont") and the United States to build and operate an ordnance plant in West Virginia during World War II.[108] The 1940 cost-plus-fixed-fee contract called for DuPont to construct and operate a plant that produced chemicals used in World War II ordnance,[109] however, the government would own the plant and all production output.[110] The contract also contained the following indemnification provision:

> It is the understanding of the parties hereto, and the intention of this contract, that all work under this Title III is to be performed at the expense of the Government and that the Government shall hold [DuPont] harmless against any loss, expense (including expense of litigation), or damage . . . .[111]

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103. *Hi-Shear*, 356 F.3d at 1381.
104. *Id.* at 1378.
105. *Id.* at 1381.
106. *Id.* at 1381-82.
107. *Id.* at 1374.
108. E.I. Du Pont De Nemours & Co. v. United States, 365 F.3d 1367, 1369 (Fed. Cir. 2004).
109. *Id.*
110. *Id.*
111. *Id.* at 1370.

The government terminated its contract with DuPont in 1946 and entered into a supplemental agreement with the company.[112] The supplemental agreement contained a clause releasing all claims under the contract except contractor claims for future payments DuPont would make to third parties unknown to DuPont at the time of the supplemental agreement and rights or liabilities relating to DuPont's care or disposition of the ordnance plant.[113]

Nearly forty years after contract termination, the United States Environmental Protection Agency ("EPA") notified DuPont that its West Virginia plant would be placed on the CERCLA clean-up list.[114] DuPont conducted a remedial investigation and clean-up feasibility study which cost more than $1.3 million in consulting and attorney fees.[115] DuPont filed a Contract Disputes Act claim with the Army Corps of Engineers ("Corps") to recover the CERCLA costs.[116] When the Corps did not agree to the claim, DuPont filed this action with the Court of Federal Claims.[117] The Court of Federal Claims granted summary judgment for the government, ruling that although the indemnification agreement was drafted broadly enough to cover DuPont's claim, the Anti-Deficiency Act ("ADA") prohibits such indemnification agreements in the absence of specific appropriation or statutory authority.[118] The Court of Federal Claims ruled that "the state of the law compels us to hold this clause to be void and unenforceable."[119] The Federal Circuit heard Dupont's appeal.[120]

The Federal Circuit cited the indemnity language to hold DuPont harmless for "any . . . expense . . . of any kind whatsoever" as sufficient to include DuPont's CERCLA liability.[121] The Federal Circuit found that the clear expression of indemnification survived any attempt to interpret the contract to avoid indemnifying DuPont for CERCLA costs, and rejected the argument that the government's inability to conceive of a statute like CERCLA justifies excluding it from indemnification.[122] The decision next analyzed the terms of the ADA to determine if it did indeed render DuPont's indemnification clause unenforceable.[123] The ADA language in question states in relevant part, "[n]o executive

112. *Id.* Although neither party could produce a copy of the supplemental termination agreement, the courts found DuPont's evidence credible that one existed. *Id.*
113. *Id.* at 1371.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 1372.
121. *Id.*
122. *Id.* at 1373.
123. *Id.* at 1374.

department . . . shall . . . involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law."[124]

In what the Federal Circuit termed a case of first impression, the Court of Federal Claims ruled that DuPont's so-called open-ended indemnification clause was not enforceable under the ADA because the ADA prohibited such clauses.[125] The Federal Circuit noted, however, that DuPont's indemnification clause fell into the "authorized by law" exception to the ADA,[126] because the Contract Settlement Act of 1944 ("CSA") authorized DuPont's clause.[127] The Federal Circuit found that the objectives section and section 20 of the CSA provided the authorization required to avoid the ADA prohibition.[128] Specifically, section 20 provided that "[e]ach contracting agency shall have authority, *notwithstanding any provisions of law other than contained in this chapter*, . . . (3) *to agree to assume, or indemnify the war contractor against, any claims by any person in connection with such termination claims or settlement."*[129] The Federal Circuit found that this language placed DuPont's indemnification squarely within the ADA's "authorized by law" exception.[130] As a result, the Federal Circuit reversed and remanded the Court of Federal Claims' decision and held that DuPont could recover damages.[131]

C. Rumsfeld v. General Dynamics Corp.

This cost allowability decision reached the Federal Circuit after the government appealed an Armed Services Board of Contract Appeals ("Board") decision allowing General Dynamics to apportion legal costs from portions of a proceeding that resulted in successful outcomes within a single hearing and recover those sums from the government. The Board looked to the legislative history of the Major Fraud Act of 1988, as implemented by FAR 31.205-47(b)(4), to hold that any successful portion of a legal proceeding may be apportioned and submitted to the government for recovery.[132]

The Federal Circuit reversed in part, holding that the plain language of

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124. *Id.* (quoting 31 U.S.C. § 665 (1940)).
125. *Id.* (citing E.I. DuPont de Nemours & Co. v. United States, 54 Fed. Cl. 361, 370-71 (2002)).
126. *Id.*
127. *Id.* at 1375-79.
128. *Id.* at 1375.
129. *Id.* (quoting 41 U.S.C. § 120(a)(2000)) (emphasis in original).
130. *Id.* at 1378.
131. *Id.* at 1380. *See* Ford Motor Co. v. United States, 378 F.3d 1314, 1316-20 (Fed. Cir. 2004) (holding that claims for environmental cleanup of World War II manufacturing plants are not time barred).
132. Rumsfeld v. General Dynamics Corp., 365 F.3d 1380, 1385 (Fed. Cir. 2004).

the Major Fraud Act[133] did not authorize recovery of costs of successful legal arguments within a proceeding when the underlying misconduct is the same misconduct alleged in another proceeding with unallowable costs.[134] In short, apportionment of costs within a proceeding is not allowable.

D. Marathon Oil Co. v. United States

This case deals with limitations on a contractor's ability to collect post-judgment interest. After appeals, Marathon Oil won a judgment against the United States in 2000.[135] When the United States refused to pay post-judgment interest, Marathon brought suit alleging it was entitled to such interest under 28 U.S.C. § 1961(c)(2).[136]

The judgment amounted to more than $78 million for each oil company whose interests in oil and gas leases purchased from the federal government were harmed by federal legislation passed in 1990.[137] After victory in the Supreme Court, Marathon Oil and others made a demand on the Treasury for post-judgment interest arguing 28 U.S.C. § 1961(c)(2) waives the government's sovereign immunity for post-judgment interest claims.[138] Marathon claimed that post-judgment interest must be paid in "all final judgments against the United States in the United States Court of Appeals for the Federal [C]ircuit."[139]

The Federal Circuit stated that the central issues in the appeal were the proper interpretation of "final judgment" in 28 U.S.C. § 1961(c)(2) and the extent to which the government waived sovereign immunity under the statute.[140] The Federal Circuit began its analysis by stating that rules of statutory construction dealing with sovereign immunity tilt towards a finding of immunity.[141] In order to find a waiver of sovereign immunity, the waiver must be "unequivocably expressed."[142] In order for a court to find an unambiguous waiver, there must be no plausible reading of the statute that allows sovereign immunity to exist unwaived.[143]

After setting the standard for sovereign immunity, the Federal Circuit reviewed the rationale the Court of Federal Claims used to justify its

133. *See* 10 U.S.C. § 2324(k)(5)(C) (2004) ("Contractor costs otherwise allowable as reimbursable under this paragraph are not allowable if (1) such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and the costs of such other proceeding are not allowable.").
134. *General Dynamics Corp.*, 365 F.3d at 1390.
135. Marathon Oil v. United States, 374 F.3d 1123, 1125 (Fed. Cir. 2004).
136. *Id.*
137. *Id.*
138. *Id.* at 1126.
139. *Id.* (quoting 28 U.S.C. § 1961(c)(2) (2000)).
140. *Id.*
141. *Id.* at 1127.
142. *Id.*
143. *Id.* (citing United States v. Nordic Vill., Inc., 503 U.S. 30, 37 (1992)).

refusal to award post-judgment interest.[144] First, the Court of Federal Claims held that 28 U.S.C. § 1961(c)(2) does not waive sovereign immunity for all judgments, as Marathon argued.[145] The Federal Circuit agreed that the language of 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b)(1)(B) limited the language of 28 U.S.C. § 1961(c)(2), requiring post-judgment interest on "all" judgments of the Federal Circuit.[146] Because there is limiting language restricting the scope of sovereign immunity waived under 28 U.S.C. § 1961(c)(2), and because the scope of the waiver is unclear, there is no unequivocal or unambiguous waiver of immunity.[147] Based on these inherent ambiguities, the Federal Circuit affirmed the Court of Federal Claims' decision denying post-judgment interest.[148]

Judge Prost dissented, agreeing with Marathon that 28 U.S.C. § 1961(c)(2)'s language was unequivocal, stating that "interest shall be allowed on *all* final judgments against the United States."[149] As such, Judge Prost felt it unnecessary to find ambiguity in § 1961(b) because that section concerns methods of calculating interest, not whether the government owes interest in the first place.[150]

E. England v. The Sherman R. Smoot Corp.

This Contract Disputes Act ("CDA")[151] case deals with the impact of delays in performance on contractor claims where a contracting officer awarded an extension of the performance period. The central issue was whether the contracting officer's contract completion date extension created a rebuttable presumption that the government was at fault for the delay.[152]

The Sherman R. Smoot Corp. ("Smoot") received a fixed price contract from the Navy for construction performed at the Washington Navy Yard.[153] A variety of delays pushed construction completion back significantly, and Smoot negotiated with the contracting officer for additional time and compensation.[154] When negotiations failed, the government issued a unilateral modification adjusting contract completion and increasing

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144. *Id.*
145. *Id.* at 1128-29.
146. *Id.* at 1132.
147. *Id.* Ambiguity also arose from the lack of congressional appropriation for post-judgment interest in situations like this case. *Id.* at 1138-39.
148. *Id.* at 1139.
149. *Id.* at 1141 (emphasis in original).
150. *Id.*
151. 41 U.S.C. § 605(a) (2000).
152. England v. Sherman R. Smoot Corp., 388 F.3d 844, 845-46 (Fed Cir. 2004).
153. *Id.*
154. *Id.* at 846-47.

Smoot's compensation.[155] Smoot filed a contractor claim for more compensation.[156] When the contracting officer failed to issue a final decision, Smoot appealed to the Armed Services Board of Contract Appeals.[157] The Board found the Navy responsible for the fifty-one day contract delay based on the *McMullan* presumption.[158] The presumption is that the government is responsible for the delay if the contracting officer extends a contract's performance completion date.[159] The Board found the delay compensable, because the Navy failed to rebut the *McMullan* presumption.[160]

The Federal Circuit summarized the operation of the *McMullan* presumption:

> When the Board is faced with a claim by a contractor for costs incurred as a result of a delay, and the government extended the period of contract performance, the Board will invoke a presumption, subject to rebuttal, that the government was at fault for the delay.[161]

The government challenged the *McMullan* presumption as being "at odds" with the CDA[162] and with two prior Federal Circuit decisions: *Assurance Co. v. United States*[163] and *Wilner v. United States*.[164] The government contended that the CDA would be violated by the *McMullan* presumption.[165] The Federal Circuit discussed the tension between the *McMullan* presumption, the CDA, and its two prior holdings, but recognized that the decisions stopped short of overruling the presumption.[166]

The Federal Circuit used *Smoot* as an opportunity to conclude that the *McMullan* presumption is at odds with the CDA.[167] The Federal Circuit held that the CDA expressed a clear congressional intent to afford no

155. *Id.* at 847.
156. *Id.*
157. *Id.*
158. *Id.* at 848; *see* Robert McMullan & Son, Inc., 76-1 B.C.A. (CCH) ¶¶ 11,728, 55,903 (ASBCA 1976) (explaining that the *McMullan* rebuttable presumption exists when modifications extending contract completion dates are issued after all material facts of the delays have taken place and after deliberate consideration by the contractor).
159. *Sherman R. Smoot Corp.*, 388 F.3d at 847.
160. *Id.*
161. *Id.* at 851.
162. *See id.* at 851-52 (stating that contracting officer's findings of fact "should not be binding in any subsequent proceeding").
163. 813 F.2d 1202, 1206 (Fed. Cir. 1987); *see Sherman R. Smoot Corp.*, 388 F.3d at 854 (explaining that *Assurance* held that "in court litigation, a contractor is not entitled to the benefit of any presumption arising from the contracting officer's decision").
164. 24 F.3d 1397, 1401 (Fed. Cir. 1994); *see Sherman R. Smoot Corp.*, 388 F.3d at 854 (holding that "when suit is brought following a contracting officer's decision, the findings of fact in that decision are not binding upon the parties and are not entitled to any deference").
165. *Sherman R. Smoot Corp.*, 388 F.3d at 852.
166. *Id.*
167. *Id.* at 856.

weight to contracting officer findings of fact in interim or final decisions.[168] Since the Federal Circuit overruled the *McMullan* presumption, and because the lower court decision in *Smoot* rested upon that presumption, the Federal Circuit vacated and remanded *Smoot* for a determination on the merits not including the *McMullan* presumption.[169]

F. PGBA, LLC v. United States

This case deals with whether a contract award may survive a court's decision that the award was made arbitrarily or capriciously following a post-award bid protest. PGBA protested a Department of Defense health benefits contract and prevailed.[170] The Court of Federal Claims found that the award was arbitrarily and capriciously made.[171] While the Court of Federal Claims found the award prejudicial to PGBA, it declined to set the contract aside because the balance of hardships and public interest favored continuing performance rather than conducting a new competition.[172] As compensation, PGBA received bid preparation and proposal costs.[173]

PGBA requested that the Court of Federal Claims reconsider its decision not to recompete the contract, because PGBA contended that the Administrative Dispute Resolution Act and Administrative Procedure Act demanded recompetition.[174] PGBA argued that as soon as the contract award was found arbitrary and capricious, the Court of Federal Claims should have set it aside.[175] The Federal Circuit disagreed, stating that it never held that an arbitrary or capricious award must be set aside and found no evidence that Congress intended to abolish courts' equitable discretion to base a recompetition decision on a balance of hardships analysis.[176] The Federal Circuit did not disturb the lower court's ruling.[177]

III. CONTRACT FORMATION

In *Banknote Corp. of America, Inc. v. United States*[178] the Federal Circuit allowed contract cost as an evaluation factor even though it was not listed in the solicitation.[179] This decision may require subsequent narrowing because it could allow the government to use other unlisted

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168. *Id.*
169. *Id.* at 857.
170. PGBA, LLC v. United States, 389 F.3d 1219, 1223 (Fed. Cir. 2004).
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 1224-25.
176. *Id.* at 1227.
177. *Id.* at 1231-33.
178. 365 F.3d 1345 (Fed. Cir. 2004).
179. *Id.* at 354.

evaluation factors that harm the transparency of the contract evaluation process. *NVT Technologies, Inc. v. United States*,[180] *Turner Construction Co. v. United States,*[181] and *M.A. Mortenson Co. v. Brownlee*[182] each address the analytical process the Federal Circuit uses to decide ambiguous specification matters.

A. Banknote Corp. of America, Inc. v. United States

This decision was an appeal from a Court of Federal Claims' decision in a consolidated bid protest action challenging a contracting officer's best value determination.[183] In this action, the United States Postal Service ("USPS") solicited bidders to submit proposals for printing stamp products using at least one of three different printing methods.[184] The solicitation indicated no preference in printing method and did not require the offerors to propose or possess capability for each printing method.[185] The USPS solicitation stated that it would make its award based on a "best value" determination.[186] The best value determination would be made based upon the following factors, in descending order of importance: (1) past performance; (2) supplier quality assurance, security, and accountability; (3) supplier production capabilities; and, (4) supplier management capabilities.[187] The solicitation provided that "[c]ost/price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price."[188]

The USPS received offers from five contractors, and the contracting officer issued an Awards Memorandum explaining the rationale of his decision to award contracts to three of the contractors.[189] In addition to "Best Value" determination, the Awards Memorandum ranked offers using an aggregate price analysis and a technical evaluation performed by a committee using a points system.[190] The Awards Memorandum indicated that the USPS had three clear favorites for the three contracts it planned to award.[191] A fourth bidder came in with a high price that was not offset by the offeror's technical abilities.[192] During the debriefing, the contracting

180. 370 F.3d 1153 (Fed. Cir. 2004).
181. 367 F.3d 1319 (Fed. Cir. 2004).
182. 363 F.3d 1203 (Fed. Cir. 2004).
183. 365 F.3d 1345, 1348 (Fed. Cir. 2004).
184. *Id.* at 1348. The USPS required bidders to use gravure, intaglio, or offset printing methods. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 1349.
188. *Id.*
189. *Id.* The three contractors were Sennett, Avery Dennison, and Ashton-Potter. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*

officer said he weighed the price and technical evaluation equally when conducting his best value determination.[193] Two disappointed offerors filed bid protests with the Court of Federal Claims, which consolidated the actions and held arguments to decide the dispute.[194] The Court of Federal Claims found that the USPS properly granted equal weight to price and technical evaluations and held that the award decision was not arbitrary or capricious.[195]

One disappointed bidder appealed the Court of Federal Claims' decision to the Federal Circuit.[196] The Federal Circuit heard the appeal to decide if the USPS decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[197] If so, the Federal Circuit would overturn the USPS action. The Federal Circuit sidestepped the threshold issue of whether the decision standard applied to USPS matters because both parties argued as if the aforementioned standard applied.[198]

The Federal Circuit then explained the Court of Federal Claims' procedural peculiarity providing for judgment on the administrative record.[199] Interpretation of the USPS solicitation was a question of law rather than fact, making judgment on the administrative record the proper standard.[200] Thus, the Federal Circuit first reviewed the question of law, and then queried whether there were any genuine issues of material fact concerning whether the USPS decision lacked a rational basis for its award.[201] The principle question of law before the Federal Circuit was whether the contracting officer evaluated the bids properly in formulating the best value judgment.[202] The Federal Circuit acknowledged that contract price was not included in the list of "primary areas" upon which the USPS would base its best value judgment.[203] Yet, precisely because the price term was not included within the list of primary evaluation areas, the Federal Circuit found that it was reasonable for the contracting officer to view price and technical evaluation as approximately equal.[204] Therefore,

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193. *Id.* at 1350.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.* (citing 5 U.S.C. § 706(2)(A) (2005)). *See generally* GOVERNMENT CONTRACTS: LAW, ADMIN & PROC § 5.10 (Matthew Bender 2005) (elaborating on the role of the contracting officer, his or her agency status, authority to bind, and statutory obligations).
198. 365 F.3d at 1351. The Federal Circuit noted that the USPS is not normally subject to § 706(2)(A) of the Federal Administrative Procedure Act. *Id.*
199. *Id.* at 1352. This is similar to a ruling on a motion for summary judgment. *Id.* It is appropriate when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 1353.
203. *Id.* at 1354.
204. *Id.* at 1356.

the Federal Circuit declined to overturn the contracting officer's judgment that the disappointed bidders' additional cost would not be offset by technical advantages.[205]

B. NVT Technologies, Inc. v. United States

In this bid protest decision, the Federal Circuit ruled against a disappointed bidder that failed to meet its duty to inquire about ambiguous terms within a solicitation.[206] The Navy requested bids for facility maintenance and utility services for a Marine Corps recruit station.[207] A three-stage bid process that included the Navy as a "bidder" would result in a contract award to the lowest cost option.[208] NVT Technologies was the only contractor that completed the bidding process, meaning it was the only contractor competing with the Navy.[209] The Naval Audit Service certified the Navy's technical and price proposals and, after two rounds of discussions, also certified NVT Technologies' proposals.[210] The evaluation team found the technical proposals substantially equal, but NVT Technologies offered a price (after adjustment) that was approximately $4 million higher than the Navy.[211]

NVT Technologies appealed the cost comparison to the administrative appeal authority alleging the Navy's materials estimates were faulty.[212] The government responded by increasing its cost estimate, which remained lower than NVT Technologies's.[213] After losing on appeal, NVT Technologies protested the award to the General Accounting Office, arguing that the Navy's estimate was too low in a number of areas at least in part because of an ambiguous solicitation term.[214] The Court of Federal Claims declined the protest because the disputed solicitation clause was not ambiguous or, in the alternative, the clause was ambiguous but NVT failed to inquire about the ambiguity.[215] NVT Technologies appealed the decision of the trial court to the Federal Circuit.[216]

NVT Technologies argued to the Court of Federal Claims that the proposal specified an improper quantity for ceramic tile repair work, which

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205. *Id.* at 1356-57.
206. NVT Techs., Inc. v. United States, 370 F.3d 1153, 1163 (Fed. Cir. 2004).
207. *Id.* at 1155. The solicitation was part of a government cost comparison required by OMB Circular A-76, where the government would compare its internal costs to provide maintenance and utility services against the cost of contracting out the services. *Id.*
208. *Id.* at 1156.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 1157.
215. *Id.* at 1158.
216. *Id.*

led to different interpretations of the contract's requirements and resulted in a faulty cost comparison.[217] If the government listed the proper volume, NVT Technologies argued, then its cost would have been lower than that of the government.[218] The "heart" of the Federal Circuit proceedings involved the clarity of hundreds of line-item workload estimates described by "Name," "Number," "Unit of Measure," and "Frequency."[219] In preparing its bid for ceramic tile repair, NVT Technologies multiplied the number column by the frequency column, assuming the number meant the number of tiles to be serviced.[220] The Navy, however, took the number column to mean the number of square feet of tile to be serviced.[221] This resulted in NVT Technologies assigning nearly 30,000 man-hours of labor to tilework and the Navy assigning fewer than 1,500 hours.[222] NVT Technologies argued that its interpretation was reasonable, that the government's interpretation was not, and that the solicitation was not ambiguous.[223]

The Federal Circuit's opinion first addressed whether the Navy's solicitation was ambiguous.[224] The first step in an ambiguity analysis is determining whether the solicitation's language plainly supports only one reading, or whether it can support more than one reading.[225] If the Federal Circuit finds that more than one interpretation is possible, each must fall within a so-called "zone of reasonableness."[226] NVT Technologies argued the reasonableness of multiplying the number column by the frequency column and also defended its higher amount of tile requiring replacement.[227] It proposed replacing nearly 75,000 more square feet of tile than did the government's bid, but indicated that the amount was only three percent of a high-traffic floor area.[228] The Federal Circuit held that both NVT Technologies and the government presented bids within the "zone of reasonableness" and that the solicitation was ambiguous.[229]

The Federal Circuit then analyzed whether the ambiguity was patent, thus requiring a contractor to inquire about the term.[230] A patent ambiguity

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217. *Id.* at 1157.
218. *Id.*
219. *Id.*
220. *Id.* at 1158.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 1159; s*ee* Goldstein v. United States, 79 Ct. Cl. 477 (1934) (setting forth the general rule that if a government contract is unambiguous on its face, the court will not hear claims of mistake by the contractor).
225. *NVT Techs.*, 370 F.3d at 1159.
226. *Id.* (citing Metric Constructors, Inc. v. NASA, 169 F.3d 747, 751 (Fed. Cir. 1993)).
227. *Id.* at 1160.
228. *Id.* at 1159-60.
229. *Id.* at 1161-62.
230. *Id.* at 1162. *See generally* GOVERNMENT CONTRACTS: LAW, ADMIN & PROC, *supra* note 197, § 2.170 (elucidating that a contractor who relies on a patent ambiguity bears the

triggers a duty to inquire because it is obvious enough to require a bidder to ask whether its interpretation is reasonable.[231] The government argued that NVT Technologies was on notice concerning the patent ambiguity because the government noted the large proportion of the NVT Technologies price estimate assigned to the "incidental" task of tile replacement.[232] The government also argued patent ambiguity because the solicitation's line items listed the unit of measure differently (in square feet) than the other line items.[233] The Federal Circuit was persuaded by the government's arguments and found the solicitation patently ambiguous.[234] As a result, NVT Technologies' interpretation of the solicitation could not prevail because of the contractor's failure to inquire about the ambiguity.[235]

Finally, the Federal Circuit addressed NVT Technologies' argument that even if there was patent ambiguity, a mistake in a bid may still allow the contractor to prevail.[236] NVT Technologies based this argument on *In re IT Corp.*,[237] which excuses a contractor from its duty to inquire, because a defective solicitation makes it impossible for a contractor to know it must inquire.[238] The Federal Circuit did not agree with this argument, because *In re IT Corp.* is not binding on the Federal Circuit and, even if it were, NVT Technologies received information during discussions that made the patent ambiguity clear.[239]

Judge Prost dissented, arguing that only NVT Technologies' interpretation of the solicitation fell within the "zone of reasonableness."[240] The primary reason for Judge Prost's dissent was that the solicitation used numerous frequency indicators and formats for work items.[241] Judge Prost argued that the ambiguity was latent, should be construed against the government, and could not trigger a contractor duty to inquire.[242]

C. Turner Construction Co., Inc. v. United States

This decision by the Federal Circuit involves a dispute over the

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risk of continuing without clarification).

231. *NVT Techs.*, 370 F.3d at 1162.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. Comp. Gen. B-289517.3 (2002).
238. *NVT Techs.*, 370 F.3d at 1163.
239. *Id.* (citing Robins Maint., Inc. v. United States, 265 F.3d 1254, 1258 (Fed. Cir. 2001) (quoting Johnson Controls, Inc. v. United States, 671 F.2d 1312, 1320 (Ct. Cl. 1982)); *see also* Community Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1579-80 (Fed. Cir. 1993) (discussing patent ambiguity and the contractor's duty to clarify ambiguous terms).
240. *NVT Techs.*, 370 F.3d at 1163-64 (Prost, J., dissenting).
241. *Id.* at 1165 (Prost, J., dissenting).
242. *Id.* at 1166-67 (Prost, J., dissenting).

interpretation of a construction contract at a United States Department of Veterans Affairs ("DVA") facility.[243] The contractor and the contracting officer had differing views about the contract's fire rating requirement.[244] The government insisted that the contractor install additional fire-rated enclosures in areas the contractor believed were not covered by the contract.[245] The contract specification's drawings call for the fire-rated walls, while the panels leading to those enclosures contained an industry abbreviation for standard, non-fire-rated materials.[246] The government demanded fire-rating, and the contractor complied.[247] The contractor argued for recovery of its additional costs through an appeal alleging material change.[248] The contractor's argument did not prevail in the Court of Federal Claims.[249] The Federal Circuit reversed and remanded, stating that the specification language which did not call for fire-rated material trumped the specification's drawings calling for fire-rating.[250] Thus, the contractor's interpretation was "reasonable and prudent" and did not trigger inquiry obligations.[251]

Chief Judge Mayer dissented, arguing that interpreting the contract as a whole leads to the conclusion that fire-rating was required.[252]

D. Mortenson Co. v. Brownlee

Mortenson Co. is an illustration of how the Federal Circuit will require a contractor's argument regarding mistake to be reasonable.[253] The contract in question called for construction of a medical facility at an Air Force base.[254] Mortenson, the prime contractor, relied in part on its subcontractor's, SSM Industries, Inc. ("SSM"), interpretation of the duct work in formulating its bid.[255] SSM misinterpreted the number of manual balancing dampers called for in the specification.[256] The contract called for these manual balancing dampers to allow manual variance of the volume of air in the ducts to maintain balance within the system.[257] SSM believed

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243. Turner Constr. Co., Inc. v. United States, 367 F.3d 1319, 1320 (Fed. Cir. 2004).
244. *Id.* at 1321.
245. *Id.* at 1322.
246. *Id.* at 1323.
247. *Id.* at 1321.
248. *Id.* at 1324.
249. *Id.*
250. *Id.*
251. *Id.* *But see* Hegeman-Harris Co. v. United States, 440 F.2d 1009, 1016 (Ct. Cl. 1971) (noting that reasonable and prudent contractor status is a high threshold, subject to the courts' assessment of the contract's experience, among other factors).
252. *Turner Constr.*, 367 F.3d at 1325-26 (Mayer, C.J., dissenting).
253. 363 F.3d 1203, 1207 (Fed. Cir. 2004).
254. *Id.* at 1204.
255. *Id.*
256. *Id.*
257. *Id.*

2,936 such dampers were required when an additional 1,283 were needed.[258] SSM installed the additional 1,283 dampers and Mortenson filed a pass through claim with the contracting officer for $297,608 to cover the cost of installing the additional dampers.[259] The claim was denied and Mortenson appealed to the Armed Services Board of Contract Appeals, and then again at the Federal Circuit.[260] The Federal Circuit found the pass through claim unreasonable because the contract specification's clear language did not support the contractors' claims.[261] The Federal Circuit did not entertain the contractors' argument that the specification's drawings were confusing, justifying the contractor's mistake, calling that argument "simply wrong."[262] In short, the Federal Circuit would not let the contractors manufacture reasonableness by referring to drawings within the contract's specification.[263]

IV. CONTRACT MODIFICATION/TERMINATION

Empire Energy Management Systems, Inc. v. Roche[264] impacts the body of government contract law in three ways. First, it provides that environmental laws may not be used as an excuse to avoid performance in certain situations.[265] Second, a cure notice that faulted the contractor for failing to begin work is sufficient to justify termination for failure to prosecute or complete the work if it and other communications are sufficient to provide the contractor with notice of performance defects.[266] Third, the case supports the contracting officers' and courts' analytical framework in default terminations mandated by the Federal Circuit's 2003 decision in the A-12 case *McDonnell Douglas Corp. v. United States*.[267] *Gardiner, Kamya & Associates, P.C. v. Jackson*[268] allowed retroactive repricing of contract tasks under certain circumstances.[269] The lasting impact of this case may be to force federal agencies to live up to price increase promises.

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258. *Id.* at 1205.
259. *Id.*
260. *Id.*
261. *Id.* at 1206.
262. *Id.*
263. *Id.*
264. 362 F.3d 1343 (Fed. Cir. 2004).
265. *See id.* at 1353 (holding that a contractor cannot stop work on a contract based solely upon a claim that its actions would violate a regulatory requirement).
266. *Id.* at 1355-56.
267. 323 F.3d 1006 (Fed. Cir. 2003).
268. 369 F.3d 1318 (Fed. Cir. 2004).
269. *See id.* at 1323 (holding that if parties agree to a retroactive repricing provision during contract negotiations, it may be enforced).

A. Empire Energy Management Systems, Inc. v. Roche

This decision implicates the government's right to terminate contacts for default despite a contractor's claim that regulatory agency-imposed delays should prevent default termination.[270] Empire Energy Management Services held a thirty-one-year-long contract to provide utility services at MacDill Air Force Base.[271] The plant would service all of the base's utility needs and was capable of generating electricity, chilled water, hot water, and steam.[272] The Air Force would then pay for these utility services at a discounted price.[273] The contract contained a commercial operation date by which Empire was supposed to have substantially completed construction of the plant.[274] The contract also contained the standard Termination for Default FAR clause 52.249-8.[275] During the first two years of performance, the contract between Empire and the Air Force received several modifications that ultimately changed the location for the base's power plant.[276] The new location was adjacent to land where the Air Force had previously washed fuel bladders, and Empire had concerns about leasing that land and building upon what might be a contaminated area.[277] Delays unrelated to the environmental condition of the land surrounding the power plant's site caused the Air Force and Empire to modify their contract and extend the completion schedule.[278] The modification, known as Modification 7, also stated that the date of the modification's execution was "the starting date for performance" and required completion 300 days from the start date.[279] The Air Force, however, agreed not to terminate the contract until 480 days after the start date, and to provide at least ten days time to cure any defaults other than failure to achieve the commercial operation date.[280]

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270. *See* Empire Energy Mgmt. Sys., Inc. v. Roche, 362 F.3d 1343, 1350 (Fed. Cir. 2004) (stating that Empire's first defense alleging improper termination is that Empire would have broken the law had it commenced work prior to receiving total EPA clearance).
271. *Id.* at 1345. Empire entered into the contract with the Air Force on June 10, 1988, and the contract was scheduled to conclude on October 6, 2019. *Id.*
272. *Empire Energy Mgmt. Sys., Inc.*, 03-1 B.C.A. (CCH) ¶ 32,079, ¶ 158,531 (ASBCA 2002).
273. *Empire Energy*, 362 F.3d at 1345.
274. *Id.* at 1345.
275. *Id.*
276. *See id.* (including Modification 6, in which the Air Force obligated Empire to construct a second power plant at a location leased to Empire by the Air Force for a nominal price).
277. *See id.* at 1346 (noting that in an attempt to limit contamination from the fuel bladder cleaning, the Air Force installed an oil-water separator, but that some petroleum products are water soluble, leading to contaminants entering the surrounding groundwater).
278. *See id.* (discussing Empire's dispute with a financing company, which led to a delay in beginning project construction).
279. *Id.* (citing Empire Energy Mgmt. Sys., Inc., 03-1 B.C.A. (CCH) ¶¶ 32,079, 158,539 (ASBCA 2002)).
280. *Id.* This moved the original commercial operation date back 180 days to August 27,

Prior to executing Modification 7, however, the EPA delivered to the Air Force a Resource Conservation and Recovery Act ("RCRA") corrective action report requiring the Air Force to conduct an investigation of several areas, including the fuel separator area next to the base's planned power plant.[281] The EPA's directive required the Air Force to inspect land that encroached upon the proposed power plant's land by three to five feet.[282] The EPA also mandated that the Air Force give notice to it prior to beginning any physical modifications of that three to five-foot area.[283] Eleven days after Empire began performing under its new modified completion schedule, but prior to learning about the EPA's demand for a facility investigation, Empire discovered oil-based contaminants in a storm sewer near the environmentally sensitive portion of its construction site.[284] As a result, Empire stopped work and requested a stop-work order from the Air Force, which it rejected.[285]

The Air Force commissioned an environmental contractor to sample its environmentally sensitive land, and the contractor found that the site was in compliance with all laws and was suitable for power plant construction.[286] The Air Force provided copies of the environmental contractor's report to the EPA and to Empire.[287] Based upon the contractor's report, the EPA ended its investigation of the designated power plant site.[288] The Air Force delivered the EPA's response to Empire and demanded that Empire return to work.[289] Empire, however, refused to return to the job site for more than a year.[290] After a year of non-performance, the Air Force issued a cure notice providing Empire with twelve days to "advise this office in writing . . . of your intentions with regard to the resumption of construction" or face termination for default.[291] Empire responded to the cure notice on the final possible day asserting it had continued performance through furthering its investigation into the "environmental status" of the site and asserting that it could meet the completion date.[292] Empire

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1993. *Id.*

281. *Id.* at 1347.

282. *Id.*

283. *Id.*

284. *Id.* at 1346-47. The work stoppage began on May 4, 1992, and the contaminants were found on May 15, 1992. *Id.*

285. *Id.* at 1347.

286. *Id.*

287. *Id.*

288. *Id.* at 1347-48.

289. *Id.* at 1348.

290. *Id.* The work stoppage lasted from May 15, 1992 through May 24, 1993. *Id.*

291. *Id.* The cure notice was sent on April 28, 1993, threatening termination on May 10, 1993 should Empire fail to respond. *Id.*

292. *Id.* Empire sent its response on May 10, 1993, and indicated that a "fast track construction schedule" would allow them to achieve the commercial operation date by or before August 27, 2003. *Id.*

returned to work, yet did not make up lost time.[293] On the completion date set forth in Modification 7, Empire sent the Air Force a letter arguing against termination for default and asserting that Empire would reach completion date four months after the first possible termination date allowed by Modification 7.[294] The Air Force did not allow Empire to continue to perform, as the contracting officer terminated Empire's contract for default three days after the termination date allowed by Modification 7.[295]

Empire appealed the contracting officer's decision to the Armed Services Board of Contract Appeals.[296] The Board held that the Air Force incorrectly terminated the contract based on the termination date's passing, and ruled that Empire was entitled to fifty-three more days due to excusable delay.[297] However, the Board ruled that termination for failure to make progress was justified because construction was only twenty-eight percent complete and would require 154 more days to complete.[298] The Board also dismissed Empire's arguments that the RCRA investigation hindered construction work because the small area of environmental concern would not affect the majority of the power plant's construction.[299] The Board found Empire's fears regarding environmental contamination baseless, stating "we simply do not believe Empire on the contamination issue."[300] Empire appealed the Board's decision to the Federal Circuit in 2002, challenging the default termination.[301] Empire briefed and argued a number of theories to the Federal Circuit concerning why the Air Force's termination for default was improper.[302] Only the arguments with implications for government contract law are addressed here.

Empire argued that even if EPA approval was not required for construction to continue, Empire could have insisted upon it prior to beginning work.[303] Empire's contract with the Air Force contained a clause

293. *See id.* (remarking that Empire remained behind schedule and requested an additional extension, which the Air Force refused).

294. *Id.* In the letter, dated August 27, 1993, Empire asserted that it would now reach completion by mid-December of 1993. *Id.*

295. *Id.* at 1348-49 (stating that on September 1, 1993, the Air Force terminated the contract because Empire failed to meet the August 27, 2003 date, which was never altered).

296. *Id.* at 1349 (citing Empire Energy Mgmt. Sys., Inc., 03-1 B.C.A. (CCH) ¶¶ 32,079, 158,552 (ASBCA 2002)).

297. *Id.*

298. *Id.* (citing *Empire Energy*, 03-1 B.C.A. (CCH) ¶ 158,552).

299. *Id.* (citing *Empire Energy*, 03-1 B.C.A. (CCH) ¶ 158,554).

300. *Id.* (citing *Empire Energy*, 03-1 B.C.A. (CCH) ¶ 158,544-55).

301. *Id.* at 1350.

302. *See id.* at 1352 (including that Empire could have insisted upon EPA approval prior to beginning work, even though it was not required; that time was not of the essence in this contract; and that termination was inappropriate, because there was no valid cure notice, nor did the contracting officer "conduct an analysis or form a subjective belief that the conditions for default termination were satisfied").

303. *Id.*

requiring Empire to "comply with all Federal, State and local environmental and archeological laws and regulations" and that by resuming construction, Empire could have violated an environmental law.[304] Empire thus attempted to excuse nonperformance by asserting that a performance delay was appropriate because of a possible future violation of law.[305] The Federal Circuit was not swayed, stating "the environmental laws are complex; the mere assertion of a colorable claim by the contractor (later found to be without merit) that its actions would violate some regulatory requirement does not excuse performance."[306]

Empire also argued that time was not of the essence in its contract with the Air Force, therefore the Air Force could not properly terminate the contract due to Empire's delays.[307] Empire argued that, because the financial burden and risk of failure fell squarely on its shoulders, time could not have been of the essence and delay could cause the Air Force no harm.[308] The Federal Circuit refused that argument as well, stating that meeting the commercial operation was a condition of the contract, establishing that time was indeed of the essence.[309]

Finally, Empire argued that termination for default was inappropriate because the contracting officer failed to follow several procedural requirements including issuing a valid cure notice and conducting an analysis of all factors before terminating.[310] Empire argued that the cure notice only specified a failure to begin work on the contract, therefore default termination was improper because it had commenced work.[311] The Federal Circuit relied on its decision in *Halifax Engineering, Inc. v. United States*,[312] reasoning that since Empire "had sufficient notice of the asserted defects" in its performance, default termination was an appropriate remedy.[313]

The Federal Circuit held that the Air Force did not have to issue a second cure notice because the first one was directed at the resumption of construction and because the entire body of communication between the Air Force and Empire placed the contractor on notice of its defects.[314] Empire also argued that the Federal Circuit's 2003 A-12 decision,

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304. *See id.* at 1352-53 (detailing that an entity may be held liable for "disposal" if it disperses contaminated soil during the grading or filling process).
305. *Id.*
306. *Id.* at 1353.
307. *Id.* at 1353-54.
308. *Id.* at 1354.
309. *Id.*
310. *Id.* at 1355-57.
311. *Id.* at 1355.
312. 915 F.2d 689 (Fed. Cir. 1990).
313. *Empire Energy*, 362 F.3d at 1356 (quoting *Halifax Eng'g*, 915 F.2d at 691).
314. *Id.* at 1356.

McDonnell Douglas Corp. v. United States,[315] required the contractor to conduct an analysis or form a subjective belief that default termination was justified, and the Air Force failed to follow that requirement.[316] Yet the Federal Circuit found that the contracting officer did conduct such an analysis and determined that Empire could not complete the work before Modification 7's termination date.[317] Though the contracting officer applied the incorrect termination date by failing to include the fifty-three days of excusable delay, courts consider whether the contracting officer's decision was reasonable given all the events that occurred before the termination decision was made—not just those known to the contracting officer.[318] The Federal Circuit held that the Armed Services Board of Contract Appeals' finding that Empire had only completed twenty-eight percent of its work was sufficient to sustain the termination for default.[319] The Federal Circuit affirmed the Board's decision to uphold the default termination.[320]

Chief Judge Mayer dissented, finding that "Empire reasonably could have expected to be held liable for violations of federal environmental law if it had complied" and performed its contract with the Air Force.[321] According to Chief Judge Mayer, Empire was excused from performance and could have completed its obligations in a timely fashion, making default termination inappropriate.[322]

B. Gardiner, Kamya & Associates, P.C. v. Jackson

In this case, the Federal Circuit remanded a Department of Housing and Urban Development ("HUD") Board of Contract Appeals holding because consideration existed to retroactively reprice past performance of contract task orders.[323] The contract in question was an indefinite delivery, indefinite quantity ("IDIQ") agreement awarded pursuant to the Small Business Administration's Section 8(a) program.[324] The contract called for Gardiner, Kamya & Associates, P.C. ("GKA") to perform services, including review and analysis of mortgage insurance claims procured through specific task orders totaling between $2 and $28 million.[325] The

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315. 323 F.3d 1006 (Fed. Cir. 2003).
316. *Empire Energy*, 362 F.3d at 1356.
317. *Id.* at 1356-57.
318. *Id.* at 1357.
319. *Id.* at 1358 (citing *Empire Energy Mgmt. Sys., Inc.*, 03-1 B.C.A. (CCH) ¶¶ 32,079, 158,552 (ASBCA 2002)).
320. *Id.*
321. *Id.* (Mayer, C.J., dissenting).
322. *Id.* (Mayer, C.J., dissenting).
323. Gardiner, Kamya & Assocs. v. Jackson, 369 F.3d 1318, 1319-22 (Fed. Cir. 2004).
324. *Id.* at 1319.
325. *Id.* at 1319-20.

IDIQ solicitation contained various labor categories and corresponding hourly pay rates.[326] For its first two task orders, GKA derived its proposed hours totals from the hours used for the same type of work completed by GKA's predecessor.[327] GKA proposed increased prices for two later task orders because GKA anticipated substantially higher labor costs.[328] HUD reviewed GKA's proposal and determined the proposed levels of effort were too high.[329] After a Defense Contract Audit Agency ("DCAA") audit, GKA submitted a revised proposal substantially reducing the level of effort and labor rates.[330] GKA argued that HUD agreed to ask DCAA during performance for an audit of the work being done under those task orders to allow retrospective and prospective repricing if necessary.[331] Although GKA met with HUD more than once a month to deliver work hour reports by task, HUD never requested a DCAA audit.[332]

When the 1997 contract was about to expire, HUD asked for a no-cost modification to cover six months of effort while HUD competed a new contract to replace GKA.[333] GKA did not agree to the no-cost modification and instead GKA and HUD devised a different plan.[334] The plan extended the period of performance and price, but expressly provided for a different price if a DCAA audit recommended one.[335] The ensuing DCAA audit recommended higher rates for the contract extension.[336] On the basis of the DCAA audit, GKA submitted a claim for retroactive price increase for all work on the 1997 contract.[337] The contracting officer denied the claim, and GKA appealed to the Board.[338] The Board ruled that there was no agreement to retroactively reprice past performance.[339] GKA then appealed to the Federal Circuit.[340]

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326. *Id.* at 1320 (explaining that labor rates were applied to certain effort levels for each different kind of claim review in order to determine the price of each type of review performed under a task order).
327. *Id.* (noting that HUD relied on Irvin Burton & Associates' estimates for task orders 1 and 5).
328. *Id.* GKA requested increased prices for task orders 13 and 14. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.* at 1321. GKA and HUD met more than twenty times in the fifteen month performance period for task orders 13 and 14. *Id.*
333. *Id.* (stating that HUD was preparing to solicit a new "omnibus" contract that would replace GKA's contract and did not wish to interrupt any services during this process).
334. *Id.* (clarifying that GKA did not accept the no cost extension because it thought the levels of effort required were too low, which had an adverse affect on price).
335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.* at 1321-22 (stating that the Board ruled against retroactive application because no individual who possessed "contracting authority" was present during any meetings where that type of agreement could have been reached).
340. *Id.* at 1322.

The Federal Circuit criticized the Board's holding and indicated that a promise by HUD to reprice past work would require a return promise from GKA as consideration before the repricing promise could be enforced.[341] The Federal Circuit faulted the Board's analysis because GKA had no duty to enter into the 1997 contract, its contract minimum had been met and it had no obligation to perform the task order.[342] Thus, the Federal Circuit found that entering into a contract to perform additional work above the contract minimum was sufficient consideration for repricing work completed under the 1997 contract.[343] For this reason, the Federal Circuit reversed and remanded the Board's decision.[344]

V. PATENT RIGHTS

Campbell Plastics Engineering & Manufacturing, Inc. v. Brownlee[345] is a case of first impression that discusses the procedural steps required before a contractor may retain patent rights to an innovation created under a federal government contract.[346]

A. *Campbell Plastics Engineering & Manufacturing, Inc. v. Brownlee*

This case clarifies the importance of invention disclosure statements mandated by FAR 52.227-11 "Patent Rights—Retention by the Contractor."[347] Campbell Plastics Engineering & Manufacturing, Inc. ("Campbell") held a § 8(a) small business contract with the Army to develop components for a protective mask.[348] During contract performance Campbell invented a new method of attaching mask components, called sonic welding.[349] Campbell failed to disclose the invention on DD Form 882 despite numerous requests to do so.[350] Form 882 is required by FAR 252227-7039 incorporated into Campbell's contract.[351] When the government demanded title to Campbell's patented innovation, Campbell brought suit arguing that it disclosed the particulars of its innovation through a series of communications, even if it did not disclose it on Form 882.[352] The Federal Circuit summarized Campbell's arguments as failure

341. *Id.* at 1322-23.
342. *Id.* at 1323.
343. *Id.*
344. *Id.*
345. 389 F.3d 1243, 73 U.S.P.Q.2d (BNA) 1357 (Fed. Cir. 2004).
346. *Id.* at 1247, 1250, 73 U.S.P.Q.2d (BNA) at 1361, 1364.
347. *Id.* at 1244, 1247, 73 U.S.P.Q.2d (BNA) at 1359, 1361.
348. *Id.*, 73 U.S.P.Q.2d (BNA) at 1359.
349. *Id.* at 1244-45, 73 U.S.P.Q.2d (BNA) at 1359. Campbell sent some drawings referencing sonic welding to an ACO representative on December 14, 1992.
350. *Id.* at 1245-46, 73 U.S.P.Q.2d (BNA) at 1360 (noting that Campbell submitted several DD Form 882s, but did not include a mention of a new invention on any of them).
351. *Id.* at 1244, 73 U.S.P.Q.2d (BNA) at 1359.
352. *Id.* at 1246, 73 U.S.P.Q.2d (BNA) at 1360.

to comply with its contract in "form only, which should not result in the forfeiture of title to the subject innovation."[353]

The Federal Circuit reviewed the Bayh-Dole Act 35 U.S.C. §§ 200-212, which FAR 52.227-11 implements, to determine whether form matters in patent rights cases.[354] Through its review, the Federal Circuit found that DD Form 882 plays an important role in standardizing disclosures of innovations and placing the government on notice to protect its rights and interests in the innovations.[355] Without clear notice, the government may not recognize when it needs to analyze its ownership or license rights in innovations.[356] Campbell was given numerous chances to disclose properly, but failed to do so.[357] Therefore, the Federal Circuit found that the government's decision to use its discretion and strip Campbell of title to its sonic welding innovation was proper.[358]

CONCLUSION

While the Federal Circuit issued a number of decisions that could be termed "pro-contractor," when taken as a whole, the 2004 government contract decisions of the Federal Circuit likely will make life more difficult for contractors. The lasting impact of the Federal Circuit's "pro-contractor" indemnification and price increase decisions will be outweighed by other decisions restricting remedies available to contractors. Decisions listed in the damages and remedies sections illustrate this point. While *E.I. Du Pont De Nemours and Co. v. United States* and *Ford Motor Co. v. United States* force the government to live up to indemnification provisions in contracts, the long-term impact of these decisions will probably be outweighed by *Rumsfeld v. General Dynamics Corp.* (restricting reimbursement of legal costs), *Marathon Oil Co. v. United States* (limiting post-judgment interest), *England v. Sherman R. Smoot Corp.* (eliminating a presumption that fault lies with the government when a contracting officer causes delays in contract performance), and *PGBA, LLC v. United States* (performance may continue despite a finding that contract award was arbitrary or capricious).

353. *Id.*, 73 U.S.P.Q.2d (BNA) at 1360.
354. *Id.* at 1247, 73 U.S.P.Q.2d (BNA) at 1361.
355. *Id.* at 1248-49, 73 U.S.P.Q.2d (BNA) at 1362-63.
356. *Id.* at 1249, 73 U.S.P.Q.2d (BNA) at 1362-63.
357. *Id.* at 1245-46, 73 U.S.P.Q.2d (BNA) at 1360.
358. *Id.* at 1250, 73 U.S.P.Q.2d (BNA) at 1363-64.