

YEAR IN REVIEW: THE FEDERAL CIRCUIT'S 2019 GOVERNMENT CONTRACT LAW DECISIONS

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INTRODUCTION

This year in review discusses many of the U.S. Court of Appeals for the Federal Circuit's most important 2019 government contract decisions, explaining their impact on the overall trajectory of procurement law. In 2019, as usual, government contracts appeals occupied only a small fraction of the Federal Circuit's docket, which was dominated by intellectual property disputes.¹ Yet, the few government contract decisions the Federal Circuit did issue in 2019 carry great consequence. It remains important for procurement practitioners to keep a careful eye on the Federal Circuit's government contracts docket and decisions, not only to stay informed of developments in the law but also to

1. *Appeals Filed, by Category*, U.S. CT. APPEALS FOR FED. CIR., http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/04_-_Appeal_Filed_by_Category_2019_Final.pdf [<https://perma.cc/9VSH-2EHC>].

understand how the Federal Circuit decides government contracts appeals and better anticipate where the law may turn next.²

I. DISCUSSION: THE FEDERAL CIRCUIT’S 2019 GOVERNMENT CONTRACTS DECISIONS

A. Cost & Pricing

The Federal Circuit issued two precedential decisions in 2019 addressing significant issues of government contract cost, pricing, and accounting. *Raytheon Co. v. Secretary of Defense*³ disrupts prior understandings of the differences between costs that are *unallowable* and costs that are *expressly unallowable*.⁴ *Bechtel National, Inc. v. United States*⁵ confirms that contractor recovery of litigation settlement costs will continue to be governed by the strict rule established by the controversial 2009 decision *Geren v. Tecom*.⁶

1. Raytheon: Broadening the scope of expressly unallowable costs

The *Raytheon* decision involved the difference between costs that are unallowable and costs that are expressly unallowable. By finding that certain salary costs “associated with” lobbying were *expressly* unallowable—as opposed to unallowable—the Federal Circuit departed from the express definitional distinction between unallowable costs and expressly unallowable costs, creating uncertainty as to how other types of unallowable costs will be categorized moving forward.⁷

a. Context

The Federal Acquisition Regulation’s (FAR) Part 31 Cost Principles identifies forty-six categories of costs and addresses the extent to which those costs are unallowable.⁸ Although many types of costs may be unallowable, a smaller subset of costs are expressly unallowable. The government will not reimburse unallowable costs, which must be

2. See generally The Hon. Jimmie V. Reyna & Nathaniel E. Castellano, *Successful Advocacy in Government Contracts Appeals Before the Federal Circuit: Context Is Key*, 46 PUB. CONT. L.J. 209 (2016).

3. 940 F.3d 1310 (Fed. Cir. 2019).

4. *Id.* at 1310, 1314.

5. 929 F.3d 1375 (Fed. Cir. 2019).

6. 566 F.3d 1037 (Fed. Cir. 2009); see also *Bechtel Nat’l, Inc.*, 929 F.3d at 1377, 1381.

7. See Paul E. Pompeo & Nathaniel E. Castellano, *Federal Circuit Disrupts Law of Expressly Unallowable Costs*, GOV’T CONT. COST, PRICING & ACCT. REP., Dec. 2019, at 1, 1–3.

8. See generally 48 C.F.R. pt. 31 (2018).

identified and excluded from any billing, claim, or proposal applicable to a government contract.⁹ With respect to expressly unallowable costs, however, contractors are further subject to penalty if they submit to the government any expressly unallowable cost.¹⁰

Expressly unallowable costs are distinguished from unallowable costs by definition. The definition of expressly unallowable costs requires a heightened degree of particularity. An expressly unallowable cost is defined as a “*particular item or type of cost* which, under the express provisions of an applicable law, regulation, or contract, is *specifically named and stated to be unallowable*.”¹¹ This requirement for heightened specificity that a cost is unallowable before it becomes expressly unallowable makes sense: it is one thing for the government to limit its obligation to reimburse contractors for certain categories of costs, but it is a step further to affirmatively penalize a contractor for including a specific item of cost in its invoices.

Raytheon involved certain salary costs associated with lobbying activities. Implementing statutory provisions,¹² FAR section 31.205-22 designates as unallowable costs “associated with” various lobbying and political activities.¹³ Affirming the contracting officer’s underlying decision, the Armed Services Board of Contract Appeals (ASBCA) found that the lobbying costs at issue were subject to penalty because “[c]osts associated with certain named lobbying activities are stated to be unallowable under FAR 31.205-22,” and “they are [thus] expressly unallowable.”¹⁴ *Raytheon* appealed. The narrow question presented to the Federal Circuit was whether salary costs “associated with” employees engaging in lobbying activity qualify as expressly unallowable costs.

b. The Federal Circuit’s decision

The Federal Circuit affirmed the ASBCA decision by a unanimous opinion authored by Judge Dyk and joined by Judges Linn and Taranto.¹⁵ Even though FAR 31.205-22 does not expressly name and

9. See generally 1 KAREN L. MANOS, GOVERNMENT CONTRACT COST & PRICING § 7:12, Westlaw (June 2019 update).

10. 48 C.F.R. § 42.709-1(a)(1) (2018).

11. 48 C.F.R. § 31.0001 (2018) (emphasis added).

12. 10 U.S.C. § 2324(e)(B) (2018).

13. 48 C.F.R. § 31.205-22(a).

14. *Raytheon Co.*, ASBCA No. 57743, 17-1 BCA ¶ 36,724.

15. *Raytheon Co. v. Sec’y of Def.*, 940 F.3d 1310, 1310 (Fed. Cir. 2019).

state salary or compensation as unallowable, the Federal Circuit nevertheless held that such salary costs are expressly unallowable:

The definition in FAR § 31.001 of an “expressly unallowable cost” refers to “a particular item or type of cost.” These two categories of costs confirm that an “expressly unallowable” cost includes more than an explicitly stated “item.” Costs unambiguously falling within a generic definition of a “type” of unallowable cost are also “expressly unallowable.” Here, salaries of in-house lobbyists are a prototypical lobbying expense. Subsection 22 disallows “costs associated with” activities such as “attempt[ing] to influence . . . legislation . . . through communication with any member or employee of the . . . legislature” or “attend[ing] . . . legislative sessions or committee hearings.” Salaries of corporate personnel involved in lobbying are unambiguously “costs associated with” lobbying.¹⁶

In dicta, the Federal Circuit rejected in part prior ASBCA precedent that reached the opposite conclusion.¹⁷ The Board’s prior decision, also involving an appeal by Raytheon, concluded that bonus and incentive compensation costs are not expressly unallowable under FAR 31.205-22 because the costs were not specifically named and stated in the cost principle, i.e., the “associated with” language, was not sufficient to invoke the standard of expressly unallowable costs and the resultant penalty.¹⁸ The Federal Circuit was not persuaded: “That decision is not binding on this court, and in any event, is contrary to the plain language of Subsection 22 to the extent that it concludes that salaries in the form of bonus and incentive compensation for lobbying and political activities are not ‘expressly unallowable.’”¹⁹

c. Implications

The Federal Circuit’s decision blurs the definitional distinction between unallowable and expressly unallowable costs. Whereas the FAR defines expressly unallowable costs as those “specifically named and stated to be unallowable,” the Federal Circuit seems to have adopted a broader test that encompasses “[c]osts unambiguously falling within a generic definition of a ‘type’” deemed unallowable.²⁰ Now, instead of asking which types of costs are specifically named and stated

16. *Id.* at 1313 (internal citation omitted).

17. *Id.* at 1314.

18. Raytheon Co., ASBCA No. 57576, 15-1 BCA ¶ 36043.

19. *Raytheon*, 940 F.3d at 1314.

20. *Id.* at 1312, 1313 (quoting 48 C.F.R. § 31.001 (2018)).

as unallowable, contractors and government personnel must discern what types of cost unambiguously fall within generic definitions of types of unallowable costs.

The Federal Circuit's reasoning could impact other cost principles that speak in terms of costs "associated with" a particular activity. FAR 31.205-1, for example, speaks to the allowability of public relations activities "associated with areas such as advertising, customer relations, etc."²¹ FAR 31.205-27 speaks to "expenditures in connection with" business organization costs.²² The Federal Circuit's holding in *Raytheon* should be understood as limited to the issue of lobbying costs under FAR 31.205-22; indeed, the Federal Circuit's conclusion seems inherently tied to its understanding of the relationship between lobbying and lobbyists: "salaries of in-house lobbyists are a prototypical lobbying expense."²³ However, government auditors will likely rely on the reasoning of the *Raytheon* decision to find a broader range of costs to be expressly unallowable.

2. Bechtel: *Reaffirming* Tecom

The *Bechtel* appeal invited the Federal Circuit to cabin and clarify its controversial *Tecom* decision, which established the general (government-friendly) rule governing the ability of contractors to recover litigation and settlement costs associated with government contracts.²⁴ The Federal Circuit, however, declined the invitation to cabin *Tecom*; and to the extent *Bechtel* clarifies anything, it is that the *Tecom* standard is here to stay.

a. Context

Prior to 2009, contractors were often able to recover from the government third party litigation costs, including those associated with cases involving alleged employment discrimination, which were

21. 48 C.F.R. § 31.205-1(a)(2) (2018).

22. § 31.205-27.

23. *Raytheon*, 940 F.3d at 1313.

24. *Geren v. Tecom, Inc.*, 566 F.3d 1037, 1039 (Fed. Cir. 2009). For (critical) analysis, see, for example, Steven L. Briggerman, *Allowability of Legal Costs: Settlement of Third-Party Litigation*, 23 NO. 9 NASH & CIBINIC REP. ¶ 50, Sept. 2009, at 1, 4; Richard C. Johnson, *Beyond Judicial Activism: Federal Circuit Decisions Legislating New Contract Requirements*, 42 PUB. CONT. L.J. 69, 82–86 (2012); John S. Pachter, *The Incredible Shrinking Contracting Officer*, 39 PUB. CONT. L.J. 705, 736–38 (2010); Edward R. Brown, Note, *Not a Tecom Party: There's "Very Little Likelihood" Geren v. Tecom Will Promote Sound Government Contracting Practices*, 18 GEO. MASON L. REV. 193 (2010).

generally viewed as a cost of doing business.²⁵ The Federal Circuit shifted that presumption in the 2009 *Tecom* decision.²⁶ *Tecom* involved the costs of settling and defending a lawsuit alleging employment discrimination where the contract at issue incorporated the clause at FAR 52.222-26, “Equal Opportunity,” prohibiting employment discrimination.²⁷ The Federal Circuit reasoned that because an adverse judgment in the employment discrimination lawsuit that the contractor had violated Title VII of the Civil Rights Act of 1964 would breach the underlying contract, the costs of defending and settling such a lawsuit were unallowable—unless the contracting officer determined that the Title VII plaintiff had “very little likelihood of success on the merits.”²⁸

The *Bechtel* case involved allowability of costs associated with two discrimination lawsuits brought by former employees on a contract that included FAR 52.222-26, “Equal Opportunity.”²⁹ The contracting officer reviewed the claims and issued a final decision disallowing the contractor’s costs associated with defending the cases, citing *Tecom*.³⁰ The contractor appealed, arguing that because the underlying contract included a specific Department of Energy Acquisition Regulation (DEAR) provision addressing allowability of litigation costs, the *Tecom* standard should not apply. Specifically, Bechtel invoked the qualifying language from *Tecom* suggesting that it only applies “where neither the contract nor the FAR dictates the treatment

25. See, e.g., Gen. Dynamics Corp., ASBCA No. 49372, 02-2 BCA ¶ 30,665 (“Nevertheless, the expenses incurred by a party in litigation are recognized costs of doing business and the cost principles promulgated by the Government over the years have uniformly recognized the allowability of contractor legal fees, within certain parameters.”); Hirsch Tyler Co., ASBCA No. 20962, 76-2 BCA ¶ 12,075 (“[W]e conclude that an ordinarily prudent person in the conduct of competitive business is often obliged to defend lawsuits brought by third-parties, some of which are frivolous and others of which have merit. In either event, the restraints or requirements imposed by generally-accepted sound business practices dictate that, except under the most extraordinary circumstances, a prudent businessman would incur legal expenses to defend a litigation and that such expenses are of the type generally recognized as ordinary and necessary for the conduct of a competitive business.”).

26. See, e.g., Johnson, *supra* note 24, at 85.

27. *Tecom*, 566 F.3d at 1039.

28. *Id.* at 1043–46.

29. *Bechtel Nat’l, Inc. v. United States*, 929 F.3d 1375, 1377–79 (Fed. Cir. 2019).

30. *Id.* at 1377.

of specific costs”³¹ Court of Federal Claims Judge Kaplan rejected this argument, finding the settlement costs unallowable under *Tecom*.³²

b. The Federal Circuit’s decision

Bechtel appealed to the Federal Circuit, arguing primarily that the DEAR clause in the contract at issue rendered the *Tecom* standard inapplicable. Bechtel argued that the regulatory history of the DEAR clause and the parties’ prior course of conduct showed that the Department of Energy (DOE) intended to assume the risk of reimbursing costs associated with defending against third party claims.³³ Bechtel further argued that, in the event the *Tecom* standard did apply, the Federal Circuit should revisit *Tecom* en banc to clarify the scope of its holding.³⁴

The Federal Circuit affirmed by a unanimous, precedential opinion authored by Judge Dyk (who also authored the majority *Tecom* opinion) and joined by Judges Newman and Shall.³⁵ The Federal Circuit did not completely close the door to Bechtel’s theory, acknowledging that: “*Tecom* recognized that the analysis for determining whether the costs are allowable could change if there was a contract provision ‘dictat[ing] the treatment of specific costs.’”³⁶ The Federal Circuit concluded, however, that the DEAR provision at issue in this case did not qualify.³⁷ The Federal Circuit reasoned that while the DEAR clause “generally provides for reimbursement,” it does so only “subject to certain exceptions,” including where other provisions of the contract disallow the costs in question.³⁸ Because the same FAR clauses at issue in *Tecom* appeared in the DOE contract at issue here, FAR 31.204 and 52.222-26, they served to disallow the settlement costs, just as in *Tecom*.³⁹

The panel concluded by recognizing that, as a prior precedential decision, it is “bound by *Tecom*” and noted that the contractor “has not demonstrated that *Tecom* is in any way unsound such that the panel should recommend en banc review pursuant to Federal Circuit Rule 35.”⁴⁰

31. *Tecom*, 566 F.3d at 1041.

32. *Bechtel Nat’l, Inc. v. United States*, 137 Fed. Cl. 423, 432 (2018).

33. *Bechtel*, 929 F.3d at 1379–81.

34. *Id.* at 1381.

35. *Id.* at 1376–77.

36. *Id.* at 1379 (quoting *Tecom*, 566 F.3d at 1041).

37. *Id.* at 1379.

38. *Id.*

39. *Id.* at 1380 (“DEAR 970.5204-31 does not override the FAR provisions that we interpreted in *Tecom* as disallowing those costs.”).

40. *Id.* at 1381.

c. Implications

Bechtel reaffirms the *Tecom* standard and arguably narrows the potential for contractors to sidestep *Tecom* by pointing to express contract provisions and prior course of dealing indicating an agency's willingness to reimburse litigation expenses associated with defending against third party claims. Open issues remain, in particular with respect to how explicit a contract provision must be to avoid the *Tecom* standard.

The *Bechtel* decision is not encouraging to those hoping the Federal Circuit might reign in *Tecom*. Unlike *Tecom*, which was a two-to-one decision with a substantial and reasoned dissent from Judge Lourie,⁴¹ *Bechtel* is unanimous, and the opinion explicitly rejects the need for en banc action.⁴² While the *Bechtel* panel's explicit rejection of the need for en banc review would not preclude a majority of active Federal Circuit judges from voting to revisit *Tecom* en banc, at least three of the twelve active judges would presumably vote against rehearing.⁴³ *Bechtel* did not petition for en banc review.

B. CDA Jurisdiction: Three Sensible Resolutions, No Surprises

Many of the Federal Circuit's most significant and controversial government contracts decisions arise in the area of Contract Disputes Act (CDA) jurisdiction. In the nearly fifty years since Congress enacted the CDA to simplify breach of government contract disputes, the Federal Circuit has riddled the CDA with jurisdictional traps that disproportionately disadvantage contractor claims, often based on trivial noncompliance with vague and unpredictable procedural rules.⁴⁴ Adding insult to injury, it follows clearly from the line of

41. *Geren v. Tecom, Inc.*, 566 F.3d 1037, 1047 (Fed. Cir. 2009) (Lourie, J., dissenting).

42. *Bechtel*, 929 F.3d at 1381.

43. See UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT INTERNAL OPERATING PROCEDURES No. 13 (2008), <http://www.cafc.uscourts.gov/sites/default/files/IOPs122006.pdf> [<https://perma.cc/HX3V-J8J9>].

44. See Nathaniel E. Castellano, *After Arbaugh: Neither Claim Submission, Certification, Nor Timely Appeal Are Jurisdictional Prerequisites to Contract Disputes Act Litigation*, 47 PUB. CONT. L.J. 35, 37 (2017) ("Despite congressional aspirations of fairness and efficiency, decades of judicial and administrative interpretations left the CDA riddled with unintuitive, subjective, and highly contextual procedural traps for the unwary. Worse yet, the Federal Circuit and its predecessor (the U.S. Court of Claims) labeled many of these procedural requirements as jurisdictional, allowing for extraordinary disruptions to the dispute resolution process." (footnote omitted)); Ralph C. Nash & John Cibinic, *The Contract Disputes Act: A Prescription for Wheel-spinning*, 4 NASH & CIBINIC REP. ¶ 29, May 1990.

decisions beginning with the Supreme Court's holding in *Arbaugh v. Y & H Corp.*⁴⁵ that the majority of the CDA's procedural claim-processing requirements carry no jurisdictional status.⁴⁶ With that context, perhaps the Federal Circuit's 2019 government contracts decisions are worth celebrating because the opinions addressing CDA jurisdiction reach sensible conclusions, denying the government's motions to dismiss.

Better still, *DAI Global, LLC v. Administrator of the United States Agency for International Development*,⁴⁷ issued in the final days of 2019, provides a welcome step in the right direction towards simplifying the CDA's jurisdictional framework, particularly with respect to claim certification. And although the *DAI Global* decision did not directly engage with the broader argument that claim certification is not jurisdictional, *DAI Global* does warrant cautious optimism that the Federal Circuit may one day realign the CDA with Congress's clear intent and Supreme Court direction by demoting the CDA requirements of claim submission, certification, and timely appeal from their current, unjustified, jurisdictional status.

1. *DAI Global: Simplifying & relaxing claim certification*

DAI Global properly rejects a line of decisions followed by the Boards of Contract Appeals and some Court of Federal Claims judges holding that they lack jurisdiction where a certification defect is "non-technical" or "the failure properly to certify in the first instance was fraudulent, in bad faith, or with reckless or grossly negligent disregard of the requirements of the relevant statutes or regulations."⁴⁸ The Federal Circuit declined to engage with the broader argument that the CDA certification requirement is not jurisdictional. The *DAI Global* opinion, however, conspicuously avoids any affirmative statement that the CDA certification requirement is jurisdictional. Moreover, several nonprecedential remarks from the Federal Circuit suggest the court is skeptical that certification retains jurisdictional status following the 1992 CDA amendments. Nevertheless, the Boards and some Court of Federal Claims judges treat

45. 546 U.S. 500 (2006).

46. Castellano, *supra* note 44, at 36 ("Applying the Supreme Court's new bright-line rule to other CDA requirements that have been traditionally classified as jurisdictional, this article demonstrates that neither claim submission, certification, nor timely appeal requirements are jurisdictional prerequisites to CDA litigation.").

47. 945 F.3d 1196 (Fed. Cir. 2019).

48. *Id.* at 1198 (quoting 138 CONG. REC. 21,033, 21,036 (1992)).

lack of certification as a jurisdictional defect, continuing the need for the Federal Circuit (or Congress) to weigh in.

a. Context for CDA certification

The CDA requires that contractor claims seeking more than \$100,000 must be accompanied by a certification that: (A) “the claim is made in good faith”; (B) “the supporting data are accurate and complete to the best of the contractor’s knowledge and belief”; (C) “the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable”; and (D) the “certifier is authorized to certify the claim on behalf of the contractor.”⁴⁹ FAR 33.207(c) provides exact certification language.⁵⁰

Early Federal Circuit precedent labeled the CDA certification requirement as a jurisdictional prerequisite and established strict, but often unpredictable, standards for certification. The result was a consistent flood of motions to dismiss for lack of jurisdiction based on purportedly inadequate certifications. Litigation of these fact-specific procedural motions served to undermine the CDA’s purpose. As professors Nash and Cibinic remarked in 1990:

There have been so many defective certification cases over the years that they would make a veritable rogue’s gallery of wasted effort I would guess that this has happened approximately 500 times since the CDA was passed The result is mighty curious for an Act that was passed to make the disputes process more efficient—and certainly reveals a serious flaw in the CDA.⁵¹

Reflecting on her tenure at the Armed Services Board of Contract Appeals, the Honorable Ruth C. Burg addressed the impact of certification-related motions:

This plethora of motions was extremely frustrating since it impacted not only a particular case where, if the certification was invalid, the matter had to start all over, but also the entire docket. I still relive the feeling of futility I felt every time a motion to dismiss for failure to certify was submitted for one of the cases before me.⁵²

This inefficiency (and countless unjust outcomes) led Congress to attempt a legislative remedy through the Federal Courts Administration

49. 41 U.S.C. § 7103(b)(1) (2012).

50. 48 C.F.R. § 33.207(c) (2018).

51. See Nash & Cibinic, *supra* note 44.

52. The Hon. Ruth C. Burg, *The Role of the Court of Appeals for the Federal Circuit in Government Contract Disputes: A Historic View from the Bench*, 42 PUB. CONT. L.J. 173, 175 (2012).

Act of 1992,⁵³ which: (1) clarified who could certify a claim, (2) provided that the contracting officer had no obligation to issue a final decision on a claim that was not properly certified, and (3) affirmed that “[a] defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim.”⁵⁴ Just before Congress sent the final bill to President Clinton, Senator Howell Heflin (its sponsor) explained that the amendment “will eliminate the confusion and waste of resources that has resulted from the Contract Disputes Act certification being deemed jurisdictional.”⁵⁵

The Federal Circuit has not provided a precedential holding as to whether failure to certify is still a jurisdictional defect after the 1992 amendments; however, it has suggested in dicta and nonprecedential opinions that failure to certify may not be a jurisdictional issue.⁵⁶ Nevertheless, and despite the 1992 amendment’s plain language and legislative intent, the Boards of Contract Appeals and several judges of the Court of Federal Claims continue to address certification as a jurisdictional requirement.⁵⁷ Often citing FAR provisions and unenacted passages of legislative history, these decisions generally distinguish between “defective certification” and “failure to certify,” the latter of which is still treated as a jurisdictional bar.⁵⁸ They further limited the scope of correctible “defective certifications” to those that are “technically defective.”⁵⁹ Under this line of decisions, a defective certification could not be remedied (and therefore destroyed jurisdiction) where “the failure properly to certify in the first instance

53. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907, 106 Stat. 4506, 4518 (1992) (codified in scattered sections of 18 and 28 U.S.C.).

54. *Id.*

55. See 138 CONG. REC. 34,204 (1992).

56. See *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1329 (Fed. Cir. 2010) (“[W]hile technical compliance with certification is not a jurisdictional prerequisite to litigation of a contractor’s claim under the CDA, it is a requirement to the maintenance of such an action.”); *J&E Salvage Co. v. United States*, No. 97-5066, 1998 WL 133265, at *6 n.4 (Fed. Cir. Mar. 25, 1998) (“Pursuant to the Federal Courts Administration Act of 1992, proper certification of a CDA claim is no longer a jurisdictional requirement.”); *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1545 (Fed. Cir. 1996) (“We part ways with the government at its predicate: that a proper certification of the settlement proposal was a jurisdictional prerequisite.”).

57. See Castellano, *supra* note 44, at 62–63 & n.192.

58. *Id.* at 62.

59. *Id.*

was fraudulent, in bad faith, or with reckless or grossly negligent disregard of the requirements of the relevant statutes or regulations.”⁶⁰

b. Prior proceedings

The *DAI Global* appeal involved several subcontractor claims submitted by DAI to the United States Agency for International Development (USAID) contracting officer. DAI submitted the subcontractor claims under a DAI cover letter that was characterized as a certification, but the cover letter did not match the FAR’s template certification language.⁶¹ The contracting officer initially notified DAI on July 10, 2017 that she would issue a decision on the claims by August 24, 2017. However, on “July 19, 2017, 70 days after DAI submitted its claims, the contracting officer sent a second letter informing DAI that the submission did not contain a contractor certification.”⁶²

DAI appealed to the Civilian Board of Contracts Appeals. The government sought dismissal for lack of jurisdiction due to inadequate certification.⁶³ The Board rejected the argument that DAI’s various correspondences with USAID qualified as a correctable, technically defective certification.⁶⁴ The Board recited the line of decisions holding that “if the certification is made with intentional, reckless, or negligent disregard for the applicable certification requirements, it is not correctable.”⁶⁵ After comparing the DAI correspondence with USAID to prior decisions, the Board found that DAI’s claim submission was “reckless” with respect to certification and “therefore not salvageable.”⁶⁶

c. The Federal Circuit’s decision

DAI appealed to the Federal Circuit, arguing principally that its certification was defective, but correctable. More specifically, DAI argued that the Board deviated from the plain language of the 1992 CDA amendment by relying on unenacted legislative history to impose

60. 138 CONG. REC. 21,033, 21,033 (1992); see *Dev. Alternatives, Inc. ex rel. Ersm (Afg.) Ltd. v. U.S. Agency for Int’l Dev.*, CBCA 5942, CBCA 5943, CBCA 5944, CBCA 5945, CBCA 5946, 18-1 BCA ¶ 37,147.

61. *DAI Global, LLC v. Adm’r of the U.S. Agency for Int’l Dev.*, 945 F.3d 1196, 1197 (Fed. Cir. 2019).

62. *Id.*

63. *Id.*

64. *Id.* at 1197–98.

65. *Dev. Alternatives, Inc.*, CBCA 5942, CBCA 5943, CBCA 5944, CBCA 5945, CBCA 5946, 18-1 BCA ¶ 37,147.

66. *Id.*

the narrow “technical defect” standard.⁶⁷ DAI further argued that, in light of Supreme Court precedent, the certification requirement is not jurisdictional at all.⁶⁸

The Federal Circuit reversed and remanded.⁶⁹ Judge Moore authored the unanimous precedential opinion, joined by Judges Schall and Taranto.⁷⁰ The *DAI Global* decision squarely rejects the line of decisions holding that only “technically defective” certification may be corrected:

Contrary to the Board’s statement of the law, there is no statutory requirement that a defect in a certification be merely “technical” to be correctable. Nor is there a statutory basis for finding a defective certification uncorrectable based on “intentional, reckless, or negligent disregard for the applicable certification requirements.” In reaching the opposite conclusion, the Board relied on the text of an unenacted version of the governing statute, which passed only in the Senate

The statute, as enacted, mentions only “defective certification[s]” without reference to the technical nature of the defect or mens rea. It is axiomatic that a statute should not be read to implicitly include language specifically rejected by Congress We hold that § 7103(b)(3) does not limit defects to those that are technical in nature nor does it limit a contractor’s right to correct a defect if the initial certification was made with “intentional, reckless, or negligent disregard for the applicable certification requirements.”⁷¹

The Federal Circuit did not address the broader issue of whether certification is a jurisdictional requirement, avoiding any direct assertion that certification is or is not jurisdictional.

The opinion concludes recognizing that, because the Contracting Officer admittedly did not issue her decision rejecting the claim for lack of certification until more than sixty days after the claim was submitted, the claim was deemed denied and therefore properly appealable to the Board:

It is undisputed that the contracting officer failed to notify DAI of the defect within the statutory period. DAI submitted its claims on May 10, 2017 and did not receive notice of the defect until July 19,

67. See Opening Brief of Appellant at 16, 19, *DAI Global, LLC v. Adm’r of the U.S. Agency for Int’l Dev.*, CBCA 5942, CBCA 5943, CBCA 5944, CBCA 5945, CBCA 5946, 18-1 BCA ¶ 37,147.

68. See *id.* at 25–26 (citing Castellano, *supra* note 44, at 69–72).

69. *DAI Global*, 945 F.3d at 1197.

70. *Id.*

71. *Id.* at 1198–99 (internal citations omitted).

2017, more than 60 days after DAI filed its claim. The contracting officer was therefore required to issue a decision on DAI's claims. But the contracting officer failed to do so. Because the contracting officer failed to issue a decision within the statutory period, DAI's claim was deemed denied and became appealable to the Board.⁷²

d. Implications

It is worth emphasizing that contractors are best advised to closely abide by all CDA and FAR claim submission requirements. That said, there is much to be gained from decisions, like *DAI Global*, that rightly relax and simplify the CDA's jurisdictional requirements, which are often used to justify dismissal of valid claims based on hyper-technical, nonprejudicial deviations from the CDA and FAR-prescribed procedures. As the Supreme Court has emphasized, jurisdictional tests should be as simple and predictable as possible.⁷³ From that perspective, eliminating the distinction between "technical" and other defects that might arise in the claim certification process is a step in the right direction for the long-term success of the CDA as a dispute resolution vehicle.

2. *KBR: More Maropakis malarkey*

Secretary of the Army v. Kellogg Brown & Root Services, Inc. ("*KBR*")⁷⁴ is part of a long-running dispute regarding the allowability of certain private security contractor (PSC) costs that KBR incurred during performance of the Logistics Civil Augmentation Program (LOGCAP).⁷⁵ Despite previously reimbursing PSC costs, the Army changed course, deemed the costs unallowable, and withheld \$44 million from KBR's outstanding invoices.⁷⁶ The dispute traveled through a series of decisions by the ASBCA and the Federal Circuit, with KBR eventually filing an amended complaint at ASBCA alleging prior material breach: "KBR 'is entitled to judgment because the Army breached its contractual obligation to provide adequate force protection and the use of PSCs was a permissible remedy.'"⁷⁷

72. *Id.* at 1200 (internal citation omitted).

73. *See* *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010).

74. 779 F. App'x 716 (2019).

75. *See generally* Ralph C. Nash, *Helping the Government: It Can Be Troublesome*, 33 NASH & CIBINIC REP. NL ¶ 43, Aug. 2019.

76. *Kellogg Brown & Root Servs.*, 779 F. App'x at 717.

77. *Id.* at 718.

The Army moved to dismiss this allegation for lack of jurisdiction on the basis that KBR had not submitted a CDA claim to the contracting officer alleging prior breach as a basis for relief,⁷⁸ relying on the Federal Circuit's controversial decision in *M. Maropakakis Carpentry, Inc. v. United States*.⁷⁹ *Maropakakis* held that where a contractor asserts an argument seeking adjustment of contract terms or payment, even when asserted as an affirmative defense to a government claim, the contractor must first formally submit that argument as a claim to the contracting officer.⁸⁰ The Federal Circuit extended *Maropakakis* to government claims in *Raytheon Co. v. United States*,⁸¹ creating a jurisdictional bar against affirmative defenses asserted by the government that seek an adjustment to contract terms but were not first issued as formal contracting officer final decisions.⁸²

The Board denied the Army's motion and granted summary judgment in KBR's favor.⁸³ With respect to jurisdiction, the Board applied prior Federal Circuit precedent from *Laguna Construction Co. v. Carter*,⁸⁴ which held that the common law defense of prior material breach does not need to be presented as a CDA claim.⁸⁵ *Securiforce International America, LLC v. United States*⁸⁶ extends *Laguna* to confirm that a contractor's common-law affirmative defense of prior material breach is not subject to the *Maropakakis* rule.⁸⁷

On the merits, the Board held that the Army's failure to provide adequate protection constituted a prior material breach, justifying the PSC costs:

The government does not seriously dispute that it was obligated under the LOGCAP III contract to provide force protection to [KBR] and its subcontractors equivalent to that provided to DoD civilians, and obligated . . . to provide them with force protection commensurate with the threat. Indeed, it would be unconscionable to take the position that the contract prohibited [KBR] and its

78. *Id.*

79. 609 F.3d 1323 (Fed. Cir. 2010).

80. *Id.* at 1331. For comprehensive (and highly critical) analysis of *Maropakakis*, see 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, 704–06 (2011).

81. 747 F.3d 1341 (Fed. Cir. 2014).

82. *Id.* at 1353–55.

83. Kellogg Brown & Root Servs. Inc., ASBCA No. 56358, 17-1 BCA ¶ 36,779.

84. 828 F.3d 1364 (Fed. Cir. 2016).

85. *Id.* at 1369–70.

86. 879 F.3d 1354 (Fed. Cir. 2018).

87. *Id.* at 1363.

subcontractors from providing for their own protection, while performing in a war zone, without otherwise providing for their security. Yet, despite the many and continuing failures of the government to provide the promised level of force protection to [KBR] and its subcontractors summarized above, the government seeks to disallow the PSC costs incurred . . . in order to accomplish their mission under the LOGCAP contract despite the government's breach, and argues that its breach was not material. It is hard to imagine a contract breach more material than this one, which eviscerated the promise at the heart of the justification for the government's claim. The government's breach was material.⁸⁸

In the words of Professor Nash: "Believe it or not, the Government appealed this decision."⁸⁹ The Army repeated its argument that KBR's prior material breach allegations should be dismissed for lack of jurisdiction.⁹⁰ In a nonprecedential, unanimous decision authored by Judge Stoll and joined by Chief Judge Prost and Judge Lourie, the Federal Circuit affirmed.⁹¹

The Federal Circuit agreed that *Laguna* controlled, and thus KBR's prior material breach claim did not need to be submitted to the contracting officer as a certified claim.⁹² Although nonprecedential, the *KBR* decision offers helpful guidance through this complex area of law:

Like the contractor in *Securiforce* and the government in *Laguna*, KBR asserts the affirmative defense of prior material breach under the contract as written. KBR hired PSCs only because the Army first breached its force protection obligations. So while the LOGCAP III contract prohibits the use of PSCs, the Army's prior material breach excused KBR's noncompliance with that prohibition. KBR's options were to either cease operations or to hire PSCs; it chose the latter so that it could continue supporting the military. In *Laguna*, we held that the Board had jurisdiction over the government's prior material breach defense under the contract as written, which the government asserted to defeat Laguna's monetary claim. And more recently in *Securiforce*, we reiterated that such a defense "is not a claim for money" and need not be presented to the contracting officer. KBR asserts the same defense here. KBR's prior material breach defense

88. Kellogg Brown & Root Servs. Inc., ASBCA No. 56358, 17-1 BCA ¶ 36,779.

89. Nash, *supra* note 75, at ¶ 43.

90. Sec'y of the Army v. Kellogg Brown & Root Servs., Inc., 779 F. App'x 716, 719 (Fed. Cir. 2019).

91. *Id.* at 717.

92. *Id.* at 719–21.

seeks denial of the Army's monetary claim to over \$44 million, and the Board properly exercised jurisdiction.⁹³

The Federal Circuit found it irrelevant that, due to the posture of the dispute, *KBR* was technically seeking to recover funds already in the government's possession:

We recognize that the posture of this case differs from *Laguna*. The government in *Laguna* asserted its defense to withhold payment whereas KBR asserted its defense to recover payment. We nonetheless conclude that *Laguna's* teachings apply here. The government pays the contractor for services performed, so monies at issue are necessarily in the hands of the government first. Whether prior material breach is asserted to eliminate debt as in *Laguna*, or to recover withheld payments as here, the effect is the same—the defense is asserted to defeat a wrongful monetary claim.⁹⁴

Finally, the Federal Circuit distinguished this case from *Maropakis* and *Raytheon* on the basis that KBR did not seek to adjust the terms of the contract:

Contrary to what the Army argues, this case is not like *Maropakis* or *Raytheon* because KBR does not seek to adjust the terms of the contract. The contractor in *Maropakis* asserted excusable delay as an affirmative defense and sought a time extension for performance under the contract. Our conclusion that the Court of Federal Claims lacked jurisdiction turned on the fact that the contractor was seeking “an adjustment of contract terms.” Similarly, the government in *Raytheon* sought an equitable adjustment to the contract that was less than the dollar amount demanded by the contractor. *Maropakis* and *Raytheon* are thus distinguishable because the parties in those cases sought to change the terms of the contract and did not assert prior material breach as an affirmative defense. As mentioned above, KBR seeks only a denial of the government's monetary claim, not a change to the terms of the contract.⁹⁵

This opinion's nonprecedential status should not lull any party into thinking that the drama of *Maropakis* is finally settled. The case law stemming from *Maropakis* is notoriously complex, and it is still (a decade later) essentially impossible to predict which defenses do and do not need to be presented to a contracting officer in the form of a CDA claim.

93. *Id.* at 721 (internal citations omitted).

94. *Id.*

95. *Id.* (internal citations omitted).

3. HHL: *Distinctions between requests for equitable adjustment and certified claims*

Hejran Hejrat Co. v. U.S. Army Corps. of Engineers,⁹⁶ (“HHL”) addresses the requirement that, before a Request for Equitable Adjustment (REA) can qualify as a claim and provide the basis for CDA jurisdiction, the contractor must request a contracting officer’s decision on the claim and the contracting officer must issue a decision on that claim.⁹⁷

Amidst a dispute with the Army Corps of Engineers regarding contract price adjustments under a contract to provide transportation services in Afghanistan, Hejran Hejrat Co. LTD (“HHL”) submitted to the contracting officer a document titled “Request for Equitable Adjustment,” which requested compensation and stated that the document should be “treated as an REA.”⁹⁸ The contracting officer denied the request in a writing characterized as the “Government’s final determination in this matter.”⁹⁹ HHL appealed to the ASBCA, but the Board dismissed for lack of jurisdiction because, “[a]t no point, in six years of communication with [the agency], has HHL requested a contracting officer’s final decision.”¹⁰⁰ There was apparently no dispute that HHL’s REA satisfied any other claim submission requirement.¹⁰¹

In a unanimous opinion authored by Judge Dyk and joined by Judges Newman and Wallach, the Federal Circuit reversed and remanded to the Board for further proceedings.¹⁰² The Federal Circuit found that “there was a request for a final decision by a contracting officer and a final decision entered by the contracting officer”¹⁰³ First, the Federal Circuit squarely rejected the government’s suggestion that there was any jurisdictional significance to HHL styling its submission as an REA instead of a claim, citing a long line of Federal Circuit precedent recognizing that REAs may satisfy the claim submission requirements.¹⁰⁴ Second, the Federal Circuit rejected the notion that HHL’s REA submission did not include language clearly

96. 930 F.3d 1354 (Fed. Cir. 2019).

97. *Id.* at 1356.

98. *Id.* at 1356–57 (internal quotation and alteration omitted).

99. *Id.* at 1356.

100. *Id.*

101. *Id.* at 1357–58.

102. *Id.* at 1356.

103. *Id.*

104. *Id.* at 1357.

requesting a contracting officer's decision, quoting prior precedent that the Federal Circuit is

loathe to believe that in this case a reasonable contractor would submit to the contracting officer a letter containing a payment request after a dispute had arisen solely for the contracting officer's information and without at the very least an implied request that the contracting officer make a decision as to entitlement. Any other finding offends logic.¹⁰⁵

Third, the Federal Circuit rejected the government's argument that the HHL REA did not request a contracting officer's final decision because prior HHL communications on the issue had expressly stated that they did not seek a contracting officer's final decision.¹⁰⁶ The Federal Circuit noted that, while prior correspondence may have expressly stated that no decision was requested, the ultimate REA did not include any such disclaimer, and postdated the earlier correspondence by more than a year.¹⁰⁷ On this point, the Federal Circuit also found relevant that the REA "was sworn unlike earlier submissions, and thus had a formality lacking in the earlier submissions."¹⁰⁸

C. St. Bernard Parish: *Punting the Rick's Mushroom Problem*

*St. Bernard Parish Government v. United States*¹⁰⁹ is significant because of the important issue the Federal Circuit avoided, leaving the Court of Federal Claims judges divided as to their jurisdiction over breach of contract disputes arising under cooperative agreements and other nonprocurement contracts. This issue grows more important as the government increasingly relies on nonprocurement contracts like cooperative agreements and so-called "Other Transactions."¹¹⁰

105. *Id.* at 1358 (quoting *Transamerica Ins. Corp. v. United States*, 973 F.2d 1572, 1578 (Fed. Cir. 1992), *overruled in part by* *Reflectone, Inc. v. Dalton*, 60 F.3d 1573, 1579 n.10 (Fed. Cir. 1995) (en banc)).

106. *Id.*

107. *Id.*

108. *Id.*

109. 916 F.3d 987 (Fed. Cir. 2019).

110. See Nathaniel E. Castellano, "Other Transactions" Are Government Contracts, and Why It Matters, 48 PUB. CONT. L.J. 485, 486, 490, 499 (2019) (recognizing increased use of "Other Transactions" in lieu of procurement contracts, providing legal argument that Other Transactions are contracts with the government, and recognizing the jurisdiction risk created by *Rick's Mushroom* to breach of contract claims arising from Other Transactions).

1. Context

The Federal Circuit's decision in *Rick's Mushroom Service Inc. v. United States*¹¹¹ creates uncertainty as to whether the Court of Federal Claims and the Federal Circuit will construe nonprocurement contracts (such as cooperative agreements and Other Transactions) to satisfy the "money mandating" requirement for Tucker Act jurisdiction.¹¹² "The Tucker Act is merely a jurisdictional statute and does not create a substantive cause of action . . ." and so, "the plaintiff must look beyond the Tucker Act to identify a substantive source of law that create[d] the right to recovery of money damages against the United States."¹¹³ The Federal Circuit affirmed in *Rick's Mushroom* the Court of Federal Claims' dismissal for lack of jurisdiction of a plaintiff's alleged breach of a cooperative agreement where the parties had agreed to a cost-sharing arrangement. The opinion reasons that "the cost-share agreement does not provide a substantive right to recover money-damages and Rick's does not point to a money-mandating source of law to establish jurisdiction"¹¹⁴ This was a departure from the general rule that money damages are presumed an available and adequate remedy for breach of contract, and that therefore, a plaintiff need not identify any additional money mandating source of law when alleging breach of contract under the Tucker Act.¹¹⁵

Applying *Rick's Mushroom*, the Federal Circuit has reached the same conclusion with respect to the alleged breach of a confidentiality agreement with the government where there was no indication that a breach would entitle the plaintiff to money damages.¹¹⁶ Certain Court of Federal Claims decisions, including the decision on appeal in *St. Bernard Parish*, have relied on *Rick's Mushroom* to conclude that nonprocurement contracts, particularly cooperative agreements, are not entitled to a presumption of money damages.¹¹⁷

111. 521 F.3d 1338 (Fed. Cir. 2008).

112. *Id.* at 1343–44. For (critical) analysis, see 3 KAREN L. MANOS, GOVERNMENT CONTRACT COSTS & PRICING § 90:6 (June 2019 update); Ralph C. Nash, *Does the Implied Warranty of Specifications Attach to Cooperative Agreements?: A Surprising Answer*, 22 NO. 12 NASH & CIBINIC REP. ¶ 71, Dec. 2008.

113. *Rick's Mushroom Serv., Inc.*, 521 F.3d at 1343.

114. *Id.*

115. *See* LaBatte v. United States, 899 F.3d 1373, 1378–79 (Fed. Cir. 2018) (compiling cases).

116. *See* Higbie v. United States, 778 F.3d 990 (Fed. Cir. 2015).

117. *St. Bernard Par. Gov't v. United States*, 134 Fed. Cl. 730, 734–35 (2017), *aff'd on other grounds*, 916 F.3d 987 (Fed. Cir. 2019); *see also* Anchorage v. United States, 119 Fed. Cl. 709, 713 (2015).

Yet, several Federal Circuit decisions have rejected government attempts to apply *Rick's Mushroom* beyond the unique facts of that case, reaffirming the general presumption of money damages arising from a breach of contract—at least in the context of settlement agreements.¹¹⁸ And, at least one judge on the Court of Federal Claims has distinguished *Rick's Mushroom* to find jurisdiction over alleged breach of cooperative agreement claims.¹¹⁹ While the appeal in *St. Bernard Parish* offered an opportunity to address this jurisdictional confusion, the Federal Circuit decided the case on other grounds.

2. *The Federal Circuit's decision*

St. Bernard Parish involved a cooperative agreement between the Parish and the Emergency Watershed Protection Program office of the U.S. Department of Agriculture, which required the Parish to install emergency watershed protection measures to relieve hazards created by Hurricane Katrina at a cost not to exceed a fixed amount.¹²⁰ After performance, a dispute arose as to the amount the government would pay, and the Parish sued for breach of contract in the Court of Federal Claims.¹²¹ Following *Rick's Mushroom*, Court of Federal Claims Judge Damich concluded that the court lacked jurisdiction over a breach of contract claim arising from a cooperative agreement.¹²²

The Parish appealed. In a unanimous opinion authored by Judge Bryson and joined by Judges Lourie and Wallach, the Federal Circuit agreed that the Court of Federal Claims lacked jurisdiction, but avoided entirely the *Rick's Mushroom* issue.¹²³ Instead, the Federal

118. See *LaBatte*, 899 F.3d at 1378–79 (finding jurisdiction over breach of settlement agreement); *Rocky Mountain Helium LLC v. United States*, 841 F.3d 1320, 1326–27 (Fed. Cir. 2016) (finding jurisdiction over breach of settlement agreement); *Holmes v. United States*, 657 F.3d 1303, 1311–12, 1316 (Fed. Cir. 2011) (finding jurisdiction over settlement agreement based on nexus to future employment).

119. See *San Antonio Hous. Auth. v. United States*, 143 Fed. Cl. 425, 463–64 (2019).

120. *St. Bernard Par.*, 134 Fed. Cl. at 732–34 (2017).

121. *Id.*

122. *Id.* at 734–35. Curiously, the Court of Federal Claims also concluded that it lacked jurisdiction due to lack of consideration on the basis that the contract did not “direct[ly] benefit” the government. *Id.* at 735–36. While it is true that cooperative agreements entail the government paying a private party to provide a benefit to a third party, it is not obvious why the government does not receive consideration when it enters into such a contract, i.e., it promises compensation in return for the consideration of the contractor delivering the promised benefit to the third party. See Ralph C. Nash, *Cooperative Agreements: A Possible Remedy*, 33 NASH & CIBINIC REP. NL ¶ 16, Mar. 2019.

123. *St. Bernard Par.*, 916 F.3d at 991–98.

Circuit reasoned that the particular program through which the cooperative agreement was established was created under a statutory authority that provided for district court jurisdiction over agency action under the program.¹²⁴ While that holding may provide an answer to some cooperative agreement disputes, it leaves considerable uncertainty—and clear disagreement among the Court of Federal Claims judges—regarding Court of Federal Claims jurisdiction over breach of contract allegations arising from cooperative agreements and other nonprocurement contracts.

D. Significant Decisions With (Curious) Nonprecedential Designation

Curiously, three of the Federal Circuit's most significant 2019 procurement decisions were designated as nonprecedential. The first, *KBR* (discussed above in the context of CDA jurisdiction) provided helpful analysis of the notoriously complex *Maropakis* line of decisions. Next, in *American Relocation Connections, L.L.C. v. United States*,¹²⁵ a panel of three of the Federal Circuit's most recently appointed judges provided useful (but nonprecedential) analysis of the prejudice requirement in bid protests.¹²⁶ Finally, in *Safeguard Base Operations, LLC v. United States*,¹²⁷ the Federal Circuit dismissed as moot an appeal that many in the procurement community hoped would be used to bring clarity to the standards that the Court of Federal Claims judges apply to Competition In Contracting Act (CICA) override challenges.¹²⁸

The Federal Circuit's Rules and Internal Operating Procedures (IOPs) address the significance of nonprecedential designation. Pursuant to Federal Circuit Rule 32.1, parties "are not prohibited or restricted from citing nonprecedential dispositions issued after January 1, 2007," and the "court may refer to a nonprecedential decision in an opinion or order and may look to a nonprecedential disposition for guidance or persuasive reasoning, but will not give one of its own nonprecedential dispositions the effect of binding precedent."¹²⁹ Nonprecedential designation can serve to effectively insulate a decision from en banc rehearing, as the Practice Notes to Federal Circuit Rule 35 warn that a "petition for rehearing en banc is

124. *Id.* at 992, 997–98.

125. 789 F. App'x 221 (Fed. Cir. 2019).

126. *Id.*

127. 792 F. App'x 945 (Fed. Cir. 2019).

128. *Id.*

129. Fed. Cir. R. 32.1(c)–(d).

rarely appropriate if the appeal was the subject of a nonprecedential opinion by the panel of judges that heard it.”¹³⁰ Federal Circuit Rule 32.1 does, however, provide a window of opportunity to petition that a nonprecedential opinion be redesignated as precedential.¹³¹

IOP Number 10, provides the official justification for precedential and nonprecedential designations:

2. The purpose of a precedential disposition is to inform the bar and interested persons *other* than the parties. The parties can be sufficiently informed of the court’s reasoning in a nonprecedential opinion.

3. Disposition by nonprecedential opinion or order does not mean the case is considered unimportant, but only that a precedential opinion would not add significantly to the body of law or would otherwise fail to meet a criterion in paragraph 4.¹³²

IOP 10, Paragraph 4, lists circumstances that warrant precedential designation, including where an “issue of first impression is treated”; an “existing rule of law is criticized, clarified, altered, or modified”; an “existing rule of law is applied to facts significantly different from those to which that rule has previously been applied”; a “legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved”; and a “previously overlooked rule of law is treated.”¹³³ Suffice it to say, the Author encounters some difficulty reconciling this list of justifications for precedential designation with the nonprecedential designations assigned to *KBR*, *American Relocation Services*, and *SBO*. Each case seems to satisfy at least one if not several of the IOP 10 criteria.

1. *American Relocation Services: A fresh take on prejudice*

American Relocation Services provides a refreshing and useful perspective for the bid protest prejudice requirement.

a. *Context for prejudice & the “substantial chance” standard*

The Federal Circuit and its predecessors (like the Government Accountability Office (GAO)) have long recognized that in order to succeed, a protester must show not only an error in the procurement process, but also that the protester suffered some prejudice as a result

130. Fed. Cir. R. 35 (Practice Notes).

131. Fed. Cir. R. 32.1(e).

132. UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT INTERNAL OPERATING PROCEDURES, *supra* note 43, No. 10.

133. *Id.*

of that error. In the context of a post-award protest, the prejudice requirement is satisfied if the protester can demonstrate a “substantial chance” of receiving an award but for the procurement error.¹³⁴

The rationale for this substantial chance test was explored in *Morgan Business Associates v. United States*.¹³⁵ The Court of Claims rejected the protester’s argument that any violation of procurement law necessitates a remedy, and also rejected the government’s argument that a protester is only entitled to a remedy if the protester can prove it would have received the contract but for the error.¹³⁶ Striking a middle ground, the Court of Claims reasoned that a protester need only demonstrate a “substantial chance” of success but for the agency error:

We reject, however, plaintiff’s proposition that any breach of the duty to give consideration creates an immediate entitlement to bid preparation costs. Morgan emphasizes that failure to consider its proposal was a violation of statute and procurement regulations, but we have said that “proven violation of pertinent statutes or regulations can, *but need not necessarily*, be a ground for recovery.” Acceptance of plaintiff’s theory would make the Government an insurer for a party’s bid preparation expenses whenever a bid or proposal is lost. This could lead to the far-fetched result that the Government might be responsible for paying bid preparation costs for a proposal that is wholly inadequate on its face, one which would be summarily rejected after even a single reading, or one which has no real chance of acceptance. Bid preparation expenses are a cost of doing business that are “lost” whenever the bidder fails to receive a contract. We cannot assume that a plaintiff has always and necessarily been damaged by the Government’s failure to consider its proposal—but that is the end- result of the rule Morgan puts forward.

Conversely, we are not persuaded by the Government’s argument that plaintiff must show that, but for the failure to consider its proposal, it would have received a contract. . . . [I]t would be virtually impossible for the plaintiff to make a “but for” showing. . . .

We hold, rather, that when the Government completely fails to consider a plaintiff’s bid or proposal, the plaintiff may recover its bid preparation costs if, under all the facts and circumstances, it is established that, if the bid or proposal had been considered, there was a substantial chance that the plaintiff would receive an award—

134. *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1581 (Fed. Cir. 1996) (quoting *CACI, Inc.-Fed. v. United States*, 719 F.2d 1567, 1574–75 (Fed. Cir. 1983)).

135. 619 F.2d 892 (Ct. Cl. 1980).

136. *Id.* at 895.

that it was within the zone of active consideration. If there was no substantial chance that plaintiff's proposal would lead to an award, then the Government's breach of duty did not damage plaintiff. In that situation a plaintiff cannot rightfully recover its bid preparation expenses. This principle of liability vindicates the bidder's interest and right in having his bid considered while at the same time forestalling a windfall recovery for a bidder who was not in reality damaged.¹³⁷

Although subsequent opinions from different judges and different tribunals later employed slightly different formulations of the substantial chance test, the Federal Circuit confirmed in *Statistica, Inc. v. Christopher*¹³⁸ that all of these variations ultimately require that "a protester must demonstrate that but for the alleged error, there was a 'substantial chance that [it] would receive an award—that it was within the zone of active consideration.'"¹³⁹ While the phrases "substantial chance" and "zone of active consideration" were settled by *Statistica*, they have limited utility. The Court of Federal Claims is left with little practical guidance on where to draw the line between (1) prejudicial error that necessitates remand for further consideration (or other remedy) and (2) nonprejudicial error that does not warrant sustaining a protest.

b. American Relocation Services: Framing protester prejudice through the APA

In *American Relocation Services*, Judge Hughes authored a nonprecedential decision joined by Judges Reyna and Chen—three of the court's most recent appointees¹⁴⁰—that recited the generic rule for prejudice but then added a new gloss, emphasizing that the bid protest prejudice requirement is rooted in the Administrative Procedure Act (APA) itself:

We review bid protest cases according to the standards in 5 U.S.C. § 706. 28 U.S.C. § 1491(b)(4). Section 706 instructs courts that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. That rule calls on courts to apply the "same kind of 'harmless-error' rule that courts ordinarily apply in civil cases." See *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009) (discussing identical language in 38 U.S.C. § 7261(b)(2) and noting that "Congress intended [that

137. *Id.* at 895–96 (internal footnotes and citations omitted).

138. 102 F.3d 1577 (Fed. Cir. 1996).

139. *Id.* at 1581 (alteration in original) (quoting *CACI, Inc.-Fed. v. United States*, 719 F.2d 1567, 1574–75 (Fed. Cir. 1983)).

140. Seven of the Federal Circuit's active judges were appointed during the Obama administration in a period spanning from 2010 through 2015. See *Judges*, U.S. CT. APPEALS FOR FED. CIR., <http://www.cafc.uscourts.gov/judges> [<https://perma.cc/HK4K-AQDE>].

statute] . . . to ‘incorporate a reference’ to the APA’s approach”). Similarly, the federal harmless error statute instructs courts to disregard “errors or defects which do not affect the substantial rights of the parties.” 28 U.S.C. § 2111. “The correction of an error must yield a different result in order for that error to have been harmful and thus prejudice a substantial right of a party.” *Munoz v. Strahm Farms, Inc.*, 69 F.3d 501, 504 (Fed. Cir. 1995). Thus, to prevail in its bid protest, ARC must “show a significant, prejudicial error in the procurement process,” meaning it must show that there is a greater-than-insignificant chance that CBP would have issued the 2018 RFQ as a set-aside for small businesses had it not committed the alleged errors. *Alfa Laval Separation, Inc.*, 175 F.3d at 1367.¹⁴¹

The citations to *Shinseki v. Sanders*,¹⁴² the APA’s “harmless error” provision, and the federal “harmless error” statute are all noteworthy.¹⁴³ In *Sanders*, the Supreme Court agreed that the Federal Circuit erred by effectively applying a presumption of prejudice in veterans benefits cases, as opposed to applying the case-by-case analysis generally required to assess harmless error under the APA and federal harmless error statute.¹⁴⁴ *American Relocation* seems to suggest that the bid protest prejudice requirement must be applied based on consideration of the basic principles of APA review. This is consistent with the Court of Federal Claims’ modern source of bid protest jurisdiction, which expressly provides for APA review.¹⁴⁵

On one hand, the *American Relocation* analysis (like the *Sanders* decision) can be read in some cases to strengthen the prejudice requirement, permitting the Court of Federal Claims relatively broad authority (if not responsibility) to deny a protest where it is clear from the record that the protester would not have a substantial chance of receiving award, notwithstanding the alleged procurement error. On the other hand, the *American Relocation* analysis, if extended to its logical end, also reveals the limit of the Court of Federal Claims’ authority to disregard a procurement error as nonprejudicial. In the context of APA review, the harmless error rule is counterbalanced by

141. *Am. Relocation Connections, L.L.C. v. United States*, 789 F. App’x 221, 228 (Fed. Cir. 2019).

142. 556 U.S. 396 (2009).

143. Judge Hughes served as counsel for the United States in *Sanders*, in his prior capacity as a Department of Justice attorney. *Id.* at 399.

144. *Id.* at 406–09, 412–13 (“In *Sanders*’ case, the Veterans Court found the notice error harmless. And after reviewing the record, we conclude that finding is lawful.”).

145. 28 U.S.C. § 1491(b)(4) (2012); *see also* 5 U.S.C. § 706(2)(A) (2012).

another fundamental tenet of APA review, referred to as the *Chenery* doctrine.¹⁴⁶ Under this doctrine, reviewing courts “may not supply a reasoned basis for the agency’s action that the agency itself has not given” and “must judge the propriety of such action solely by the grounds invoked by the agency.”¹⁴⁷

Although not precedential, the *American Relocation Services* analysis—if properly extended to incorporate the *Chenery* doctrine as well as the harmless error rule—offers a useful framework to analyze bid protest prejudice issues. In some cases, like *American Relocation*, the record will make plain that the protester has no substantial chance of receiving award even if an alleged procurement error were remedied. In others, however, remedying the procurement error would necessarily change the evidence before the agency official vested with discretion to make the decision at issue.¹⁴⁸ In such cases, the *Chenery* doctrine would seem to prevent the court from assuming the role of the agency decisionmaker and deciding whether the protester would have a substantial chance of award under the new circumstances.

To be sure, there will not always be a clear line between cases where the rule of harmless error governs and those where the *Chenery* doctrine requires remand for a new first-instance decision. However, using the lens of the APA’s harmless error rule and the *Chenery* doctrine frames the prejudice question in more functional terms of administrative law, rooted in Supreme Court precedent with potentially persuasive authority generated from decades of APA

146. See *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); see also *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 465–66 (D.C. Cir. 1967) (“Of course an error cannot be dismissed as ‘harmless’ without taking into account the limited ability of a court to assume as a judicial function, even for the purpose of affirmance, the distinctive discretion assigned to the agency.” (citing *Chenery*, 332 U.S. at 196)); 33 WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 8394 (2d ed., Aug. 2019 Update) (discussing the balance between the harmless error rule affirmed in *Sanders* and the *Chenery* doctrine).

147. *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974).

148. See, e.g., *Centerra Grp., LLC v. United States*, 138 Fed. Cl. 407, 421 (2018) (“The prejudice analysis in these circumstances acknowledges that a substantial chance of award to the protester exists even if the precise contours of the but-for world cannot be discerned.”); *Patricio Enters., Inc.*, B-412740 et al., 2016 CPD ¶ 152 (Comp. Gen. May 26, 2016) (“[W]e have no basis—and we decline the agency’s invitation—to speculate about how the SSA would have viewed the relative merits of . . . proposals in light of a new, reasonable . . . evaluation; we cannot conclude that the agency’s source selection decision would not have proceeded differently . . .”).

litigation in U.S. district courts and courts of appeal.¹⁴⁹ Nor would employing these APA doctrines require discarding the longstanding Federal Circuit and Court of Federal Claims precedent applying the “substantial chance” standard. Rather, the harmless error rule and *Chenery* principle serve to help the Court of Federal Claims apply the substantial chance test: to discern between a protester with a substantial chance and a protester with an insubstantial chance and to distinguish between those within the zone of active consideration from those without.

2. SBO: *The Future of CICA Override Challenges*

The third and final of the Federal Circuit’s significant nonprecedential procurement decisions was *Safeguard Base Operations, L.L.C. v. United States* (“SBO”).¹⁵⁰ Many in the procurement community anticipated the SBO decision as the Federal Circuit’s long-awaited opportunity to provide clarity and consistency to the standards that Court of Federal Claims judges apply when reviewing an agency decision to override the automatic CICA stay in response to a GAO protest.¹⁵¹ Instead of reaching the merits, however, the Federal Circuit dismissed the appeal as moot in a nonprecedential decision.¹⁵² Notwithstanding the nonprecedential dismissal, there is much to learn from the case as to the likely future of CICA override challenges.

a. *Context for CICA override challenges*

CICA override challenges are a special flavor of bid protest litigation. One of the most significant features of CICA is the automatic stay. Assuming compliance with strict timeliness requirements, once GAO notifies an agency of a pre-award protest, the Agency may not make award until GAO resolves the protest.¹⁵³ In the context of a post-award protest, the Agency must automatically stay performance of the protested contract award until the GAO protest is resolved.¹⁵⁴ The potential impact of this stay on agency operations is limited by CICA’s

149. See generally *Rationalizing Hard Look Review After the Fact*, Note, 122 HARV. L. REV. 1909 (2009).

150. 792 F. App’x 945 (Fed. Cir. 2019).

151. See Daniel Seiden, *Feds May Be Real Winners if Appeal Helps ‘Confused’ Contractors*, BLOOMBERG L. (Nov. 4, 2019), <https://news.bloomberglaw.com/federal-contracting/feds-may-be-real-winners-if-appeal-helps-confused-contractors> [<https://perma.cc/RH8Z-7JDA>].

152. SBO, 792 F. App’x 945 at 946, 948.

153. 31 U.S.C. § 3553(c) (1) (2012).

154. § 3553(d) (3) (A).

requirement that GAO must issue its decision within 100 days from the date the protest is filed.¹⁵⁵ Absent the automatic stay, successful protesters would often be denied a meaningful remedy unless they obtained a preliminary injunction from the Court of Federal Claims.¹⁵⁶

CICA provides that agencies may, in narrow circumstances, override the automatic stay and proceed with a procurement as the GAO protest process unfolds. For both pre- and post-award protests, override may be justified by “a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision.”¹⁵⁷ For post-award protests, an additional basis for overriding the CICA stay exists where “performance of the contract is in the best interests of the United States.”¹⁵⁸ These are referred to as the “best interests” and “urgent and compelling” standards for CICA stay overrides.¹⁵⁹ The override decision is documented in a written Determination & Findings (D&F).¹⁶⁰

Other than stating these authorities for overriding a CICA stay, neither CICA nor the FAR give agencies meaningful guidance on the standards to consider when drafting a D&F to support a CICA override.¹⁶¹ The primary guidance comes from Court of Federal Claims decisions.

The Federal Circuit confirmed in *RAMCOR Services Group, Inc. v. United States*¹⁶² that the Court of Federal Claims has jurisdiction to decide a protester’s challenge to an override decision.¹⁶³ Following *RAMCOR*, the Court of Federal Claims developed a complex and often conflicting body of case law addressing the legal standards used to review an override decision. The most prominent of these opinions came in 2006 from *Reilly’s Wholesale Produce v. United States*.¹⁶⁴

The *Reilly*’s opinion explained that, while “override decisions are, by nature, fact specific, it is possible to distill from the relevant cases a variety of factors that an agency must consider in making an override

155. § 3554(a)(1).

156. See, e.g., James W. Nelson, *GAO-COCF Concurrent Bid Protest Jurisdiction: Are Two Fora Too Many?*, 43 PUB. CONT. L.J. 587, 612 (2014).

157. 31 U.S.C. §§ 3553(c)(2)(A), 3553(d)(3)(C)(i)(I).

158. 31 U.S.C. § 3553(d)(3)(C).

159. See Kevin J. Wilkinson & John M. Page, *CICA Stays Revisited: Keys to Successful Overrides*, 66 A.F. L. REV. 135, 136 (2010).

160. *Id.* at 139 n.19.

161. See 33 C.F.R. § 33.104 (2018).

162. 185 F.3d 1286 (Fed. Cir. 1999).

163. *Id.* at 1290–91.

164. 73 Fed. Cl. 705 (2006).

decision based upon urgent and compelling circumstances”¹⁶⁵ The *Reilly*’s decision then identifies four factors for consideration:

(i) whether significant adverse consequences will necessarily occur if the stay is not overridden; (ii) conversely, whether reasonable alternatives to the override exist that would adequately address the circumstances presented; (iii) how the potential cost of proceeding with the override, including the costs associated with the potential that the GAO might sustain the protest, compare to the benefits associated with the approach being considered for addressing the agency’s needs; and (iv) the impact of the override on competition and the integrity of the procurement system, as reflected in the [CICA].¹⁶⁶

While almost any CICA override challenge will likely address *Reilly*’s to some extent, the Court of Federal Claims judges are divided on many critical aspects of how those factors should be applied, if at all.¹⁶⁷ Some decisions hold that an agency’s failure to fully consider and address even one of the *Reilly*’s factors is arbitrary.¹⁶⁸ Some reject *Reilly*’s altogether, finding that the only appropriate standard is the APA’s general arbitrary and capricious standard of review and declining to require agencies to address any specific element in the override D&F.¹⁶⁹ Others engage with the *Reilly*’s analysis but decide the case more broadly in terms of the general APA standard.¹⁷⁰ The decisions are also divided as to whether the *Reilly*’s factors are limited to overrides invoking “urgent and compelling” circumstances or whether they extend to overrides that invoke a “best interests” justification.¹⁷¹ Finally, the decisions are divided as to whether a plaintiff has to separately

165. *Id.* at 711.

166. *Id.* (internal citations and footnote omitted).

167. Several articles from agency counsel and the private bar highlight and attempt to grapple with the consequences of this evolving and conflicting body of case law. *See, e.g.*, Cameron S. Hamrick & Michelle E. Litteken, *CICA Stay Overrides at the Court of Federal Claims: What Government Contractors Need to Know*, 43 PUB. CONT. L.J. 687, 693–702 (2014); Kevin J. Wilkinson & Dennis C. Ehlers, *Ensuring CICA Stay Overrides Are Reasonable, Supportable, and Less Vulnerable to Attack: Practical Recommendations in Light of Recent COFC Cases*, 60 A.F. L. REV. 91 (2007); Wilkinson & Page, *supra* note 159, at 138–42.

168. *See* Nortel Gov’t Sols., Inc. v. United States, 84 Fed. Cl. 243, 247–48 (2008).

169. *See* Dynacorp Int’l LLC v. United States, 113 Fed. Cl. 298, 302 & n.4 (2013); Frontline Healthcare Workers Safety Found., Ltd. v. United States, No. 10-17C, 2010 WL 637790 (Fed. Cl. Feb. 4, 2010); PlanetSpace Inc. v. United States, 86 Fed. Cl. 566, 567–68 (2009).

170. *See* The Analysis Grp., LLC v. United States, No. 09-542C, 2009 WL 3747171, at *2–3 (Fed. Cl. Nov. 5, 2009).

171. *See* PMTech, Inc. v. United States, 95 Fed. Cl. 330, 344–45 (2010).

prove entitlement to injunctive relief in order to overturn the stay, or whether defeating the override under the *Reilly's* test is adequate to restore the stay.¹⁷²

This conflicting body of case law leaves agencies and protesters in a tough position. It is difficult (if not impossible) to anticipate what standards will apply in an override challenge, at least until a Court of Federal Claims judge is assigned to the case. Even then, not every judge will have published a definitive position on each issue relevant to a CICA override challenge. This often requires that parties to override litigation must brief their (likely expedited) case against multiple alternative standards. As Professor Schooner noted in 2012:

We would prefer to see the Court of Federal Claims inject certainty and consistency into the procurement process. And we share the frustration of those who complain that, all too often, the luck of the draw at the Court of Federal Claims significantly affects a case's outcome. Absent intervention by the Federal Circuit, however, the lack of clarity surrounding the relevant standard will persist. This is particularly problematic to the extent that nothing in FAR 33.104(c) or (d) prepares a [Contracting Officer or a Head of Contracting Activity] for the requirements currently being imposed by the reviewing court.¹⁷³

With this context, it is not surprising that many in the procurement community have long anticipated that the Federal Circuit would weigh in and add some clarity.

b. The SBO protest, appeal, & dismissal

Safeguard Base Operations, LLC filed a protest at GAO in September 2018, challenging a Department of Homeland Security (DHS) contract award.¹⁷⁴ DHS overrode the CICA stay, and Safeguard filed suit in October 2018 at the Court of Federal Claims seeking a temporary restraining order and preliminary injunction setting aside the CICA stay override.¹⁷⁵ By the end of October 2018, the Court of

172. See, e.g., *Supreme Foodservice GmbH v. United States*, 109 Fed. Cl. 369, 396–97 (2013); *Superior Helicopter LLC v. United States*, 78 Fed. Cl. 181, 194 (2007); *Reilly's Wholesale Produce v. United States*, 73 Fed. Cl. 705, 708–09 n.7 (2006).

173. See Steven L. Schooner, *Postscript III: Challenging an Override of a Protest Stay*, 26 NO. 5 NASH & CIBINIC REP. ¶ 25 (May 2012).

174. See *Safeguard Base Operations, LLC v. United States*, 792 F. App'x 945, 946 (Fed. Cir. 2019).

175. *Id.* at 946–47.

Federal Claims denied Safeguard's motions.¹⁷⁶ By decision issued December 14, 2018, GAO denied Safeguard's protest.¹⁷⁷

Safeguard appealed, arguing that the Court of Federal Claims should have strictly applied the *Reilly*'s factors.¹⁷⁸ Almost a full year after GAO denied Safeguard's initial protest, on December 13, 2019, the Federal Circuit dismissed Safeguard's appeal as moot in a nonprecedential decision.¹⁷⁹ Judge Lourie authored the unanimous decision, joined by Judges Moore and Chen.¹⁸⁰

The panel agreed with the Government and the awardee that "Safeguard's appeal is now moot because the GAO has denied its bid protest, and that decision would have terminated the CICA stay even in the absence of DHS's override."¹⁸¹ The panel rejected Safeguard's argument that deciding the CICA override issues could impact Safeguard's separate appeal from the Court of Federal Claim's decision denying the merits of Safeguard's protest.¹⁸² The panel also rejected the argument that Safeguard's appeal qualified for the narrow mootness exception for issues "capable of repetition, yet evading review."¹⁸³ Rejecting Safeguard's attempted analogy to the Supreme Court's mootness analysis in *Kingdomware Technologies, Inc. v. United States*,¹⁸⁴ the panel described the attenuated chain of events that would need to occur for Safeguard's CICA override challenge to repeat itself:

[W]e conclude that Safeguard has not demonstrated a controversy "capable of repetition, yet evading review." This exception is applicable "'only in exceptional situations,' where (1) 'the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration,' and (2) 'there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.'"¹⁸⁵

A comparison with *Kingdomware* is illustrative. There, the Supreme Court held that the petitioner, a bid protester that had bid on a Department of Veterans Affairs contract since performed,

176. *Id.* at 947.

177. *Id.* at 947 n.1.

178. *Id.* at 948.

179. *Id.* at 949.

180. *Id.* at 946.

181. *Id.* at 947.

182. *See id.* at 948.

183. *Id.*

184. 136 S. Ct. 1969 (2016).

185. *Id.* at 1976.

presented a controversy evading review when it argued that it was deprived of the contract because the VA misinterpreted 38 U.S.C. § 8127(d) (mandating use of the “Rule of Two”) to not apply to certain contracts. While the contract at issue had already been performed, the Court reasoned that the case was not moot because the time period of performance was “too short to complete judicial review,” and “it [was] reasonable to expect that the [VA] [would] refuse to apply the Rule of Two” in the future and that Kingdomware, as a frequent contractor, would be reasonably likely to win a contract in the future if its view of the statute prevailed.

. . . Safeguard—which has never received a federal contract¹⁸⁶—would have to submit another unsuccessful bid, file a GAO protest, and suffer another CICA stay override. Moreover, Safeguard would have to show that the CICA stay override occurred because the agency was not required to justify its decision in light of the *Reilly*’s factors.¹⁸⁷

The decision couches its holding on the panel’s finding that: “Safeguard has not shown a reasonable likelihood that it will be subject to the same action again, and thus it has not presented an exceptional situation justifying invocation of the ‘capable of repetition yet evading review’ exception to mootness.”¹⁸⁸

Although nonprecedential, the *SBO* decision does speak to the standard of review applicable to CICA override challenges. Specifically, the panel decision includes language that seems to cast doubt on the idea that agencies *must* address the *Reilly*’s factors to justify an override, or that the Court of Federal Claims *must* apply the *Reilly*’s framework.¹⁸⁹ Instead, the *SBO* opinion seems to reaffirm that the Court of Federal Claims reviews protests through the APA’s general arbitrary and capricious standard.¹⁹⁰ In doing so, the decision cites Federal Circuit precedent for the proposition that Court of Federal Claims decisions are not binding in future Court of Federal Claims cases.¹⁹¹ It also cites the Federal Circuit’s recent decision in *Dell Federal Systems v. United States*,¹⁹² which rejected the Court of Federal Claims’ application of a

186. As discussed at length during the oral argument, the protester was a joint venture.

187. *SBO*, 792 F. App’x at 948 (internal citations omitted).

188. *Id.* at 949.

189. *Id.* at 948–49.

190. *Id.*

191. *Id.* at 948.

192. 906 F.3d 982 (Fed. Cir. 2018).

heightened “narrow targeting” standard when reviewing corrective action protests:

We note that the *Reilly*’s factors do not even bind the Claims Court, *AINS, Inc. v. United States*, 365 F.3d 1333, 1336 n.1 (Fed. Cir. 2004), *abrogated on other grounds by Slattery v. United States*, 635 F.3d 1298 (Fed. Cir. 2011), let alone comprise an indispensable aspect of an agency rational basis. *Cf. Dell Fed. Sys., L.P. v. United States*, 906 F.3d 982, 992 (Fed. Cir. 2018) (holding that “highly deferential” rational basis test governed Claims Court review of agency action for purposes of deciding injunctive relief in protest of bid reopening).¹⁹³

c. Implications

SBO implicitly suggests that the Federal Circuit may never decide the merits of an appeal from a Court of Federal Claims’ override decision. Although perhaps conceivable through some series of emergency and/or interlocutory motions for stay pending appeal, expedited proceedings, petition for writ of mandamus, etc., it is difficult to conceive of a *realistic* circumstance where the Federal Circuit could receive full briefing and decide an appeal of a Court of Federal Claims’ decision in a CICA override challenge before the 100-day GAO protest deadline expires. As noted, the Federal Circuit’s opinion in *SBO* came almost a full year after GAO denied Safeguard’s protest. Even that outcome was relatively quick, as the Federal Circuit’s own statistics reflect that the median time for deciding an appeal reached fifteen months in Fiscal Year 2019.¹⁹⁴ That being said, because *SBO* is designated as nonprecedential and rests on somewhat fact-specific mootness findings, a future panel could disagree with or distinguish the *SBO* decision and find that the appeal of a CICA override challenge does pass the mootness bar, perhaps as capable of repetition yet evading review.

Assuming the Federal Circuit does not provide binding guidance to clarify the standards that apply to CICA override challenges, the default rule seems to be that any given override challenge will be decided largely at the discretion of the assigned Court of Federal Claims judge. As discussed above, many of those judges have expressed

193. *SBO*, 792 F. App’x at 948–49.

194. *Median Disposition Time Cases Decided by Merits Panels*, U.S. CT. APPEALS FOR FED. CIR., http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/06_Med_Disposition_Chart_Final.pdf [<https://perma.cc/6JFB-F894>].

differing views on important issues relevant to CICA overrides.¹⁹⁵ Accordingly, the safest practice for practitioners (agency counsel and the private bar) is often to take a conservative approach and cover all bases when preparing a D&F or motions for temporary restraining order and preliminary injunction.¹⁹⁶ That may require addressing alternative standards for several issues, particularly if the assigned judge has not issued a definitive position on any given CICA override issue. And, notwithstanding what any Court of Federal Claims judge has decided in the past, parties should be prepared to grapple with the *SBO* panel's commentary regarding the nonbinding nature of *Reilly's* and the significance of the *Dell Federal Systems* decision.

At bottom, *SBO* may not have been the precedential guidance that some in the procurement community hoped would finally unify and clarify the standards applicable to CICA override challenges. The decision, however, does offer several important insights regarding the future of CICA override challenges.

CONCLUSION

The Federal Circuit continued to play a significant role in shaping procurement law in 2019. It remains important for practitioners to keep a watchful eye on the Federal Circuit's docket and carefully read its decisions. The Author has no doubt that will remain just as good advice in the 2020s as it was in the 2010s.

195. See *supra* notes 163–71 and accompanying text.

196. See Wilkinson & Page, *supra* note 159, at 154 (“The Court of Federal Claims jurisprudence in CICA stay override cases remains unsettled. The prudent approach in deciding whether to override a stay would be to (1) start with the four APA factors, (2) because the ‘*Reilly's* factors’ still linger, agencies must consider them, and, (3) because the courts are mixed on whether injunctive relief or declaratory relief is necessary, agencies have to consider that the court will apply the four factors for injunctive relief. Nothing short of such a comprehensive analysis will do.”).