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PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

CHOICE OF FORUM FOR FEDERAL GOVERNMENT CONTRACT CLAIMS: COURT OF FEDERAL CLAIMS vs. BOARD OF CONTRACT APPEALS/EDITION III

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The Contract Disputes Act of 1978 (CDA)[1] provides Government contractors with a choice of forum to challenge an adverse Contracting Officer's (CO) final decision[2] on a contract claim.[3] A contractor has the *exclusive* right to choose the forum to litigate its claim[4] and can either file a suit in the U.S. Court of Federal Claims (CFC) or appeal to the appropriate board of contract appeals.[5] Because the Government cannot appeal a CO's decision, only a contractor may initially invoke the jurisdiction of the CFC or a board.[6] However, once a contractor has filed an action in one of the forums, the choice ordinarily is final.[7] It is therefore very important that the contractor select the most advantageous forum in its initial filing.

The Federal Courts Administration Act of 1992[8] somewhat clarified the circumstances under which a contractor possesses a forum choice by expanding the CFC's jurisdiction to include nonmonetary Government contract disputes.[9] This made the CFC's CDA jurisdiction almost identical to the boards' jurisdiction. Thus, contractors may choose between the CFC and the boards of contract appeals in virtually all CDA litigation resulting from adverse CO final decisions.

As the U.S. Court of Appeals for the Federal Circuit has observed, "[t]he *contractor's choice of forum is an important strategic decision*, given the fundamental differences between the two forums."[10] Since the 2006 publication of the second edition of this BRIEFING PAPER,[11] there have been significant developments and changes related to the CFC and the boards that may affect a contractor's forum selection decision. To assist contractors in selecting the most appropriate forum for resolving their Government contracts dispute, this PAPER provides important and current information about the forums and discusses (1)

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the frequently confusing sources of jurisdiction for contract actions in the court and boards, (2) the claims that may raise special jurisdictional issues, (3) the relief available in Government contract cases at the forums, (4) the important prelitigation considerations that may influence a contractor's forum choice, (5) the similarities and differences between the rules, procedures, and practices of the court and boards that apply to pretrial procedures, accelerated and expedited actions, discovery, motions, trials, and decisions and opinions, and (6) appellate review of CFC and board decisions by the U.S. Court of Appeals for the Federal Circuit.

About The Forums

Court Of Federal Claims

The Federal Courts Improvement Act of 1982 (FCIA) established the U.S. Claims Court pursuant to Article I of the U.S. Constitution.[12] The Claims Court inherited the trial jurisdiction of its predecessor, the U.S. Court of Claims, which the FCIA extended to include preaward bid protest actions.[13] The Federal Courts Administration Act of 1992 (FCAA) expanded the Claims Court's CDA jurisdiction to include nonmonetary disputes[14] and renamed it the *U.S. Court of Federal Claims*.[15] The Administrative Dispute Resolution Act of 1996 added postaward bid protests to the court's jurisdiction[16] and, as of January 1, 2001, made the court the exclusive judicial forum for the resolution of bid protests.[17]

The CFC has national jurisdiction and may sit anywhere within the United States.[18] Prior to the FCAA's enactment, a Federal Circuit decision ruled that the CFC, unlike the boards, could not sit outside the United States.[19] The FCAA abrogated that holding by providing that the CFC can conduct proceedings outside of the United States.[20] Other changes made by the FCAA include specifically granting the court the authority to tax costs, the authority to assess attorney's fees and other costs, and contempt powers.[21]

The CFC's jurisdiction over CDA claims is essentially concurrent with the boards' jurisdiction.[22] Thus, contractors can "appeal" a CO's final decision by filing a law suit in the CFC "in lieu of" appealing to one of the boards, i.e., there is no requirement under the CDA for contractors to exhaust administrative remedies through a board appeal before proceeding to the CFC.[23]

By statute, the CFC is composed of 16 active judges who are nominated by the President, confirmed by the Senate, and serve 15-year terms.[24] The President designates one of the active judges to serve as chief judge until that person reaches the age of 70 or the President designates another judge to be chief judge.[25] At the expiration of their 15-year terms, CFC judges may be reappointed (i.e., be nominated by the President, if the President so chooses, and confirmed by the Senate), or they may take senior status and be available to adjudicate cases.[26]

At present, however, the CFC has only five active judges and 11 judicial vacancies (representing about 69% of the authorized judgeships), five of which have existed since 2013.[27] Some argue that the delay in appointing judges to fill these vacancies adversely affects the CFC because it lacks a full complement of judges to promptly resolve the complex cases on its docket.[28] This situation is mitigated, at least in very substantial part, by the 11 very experienced senior judges who currently serve on the CFC.[29] In addition, during the 115th Congress (which concluded on January 3, 2019), President Trump nominated individuals to fill at least two of these vacancies, but the Senate did not act on the nominations. In the current 116th Congress, which convened on January 3, 2019, President Trump has nominated two individuals to the CFC.[30] The number of vacancies and backlog, which impact the potential for delay in resolution

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of a case, should be carefully considered before filing a case at the CFC or at a board.[31]

Unlike board judges, to be appointed, CFC judges are not required to have Government contracts experience.[32] Therefore, it is not unusual for a Government contracts case to be heard and decided by a CFC judge who does not have a formal Government contracts background.[33] CFC judges also hear a broader spectrum of cases as compared to board judges. In addition to the CDA cases heard by both tribunals, the CFC has jurisdiction over certain other specialized claims against the U.S. Government—over which the boards do not have jurisdiction—including (1) bid protests and non-CDA, Tucker Act contract disputes, and (2) Fifth Amendment takings, patent and copyright, military and civilian pay, tax, Indian claims, vaccine, and congressional reference cases.[34]

Each active CFC judge and most senior CFC judges are assigned at least two law clerks (and many have three law clerks), compared with board judges, who ordinarily do not have a law clerk (or a staff attorney) specifically assigned to a particular judge.[35] Cases are randomly assigned to a single judge; however, directly related cases (those involving the same parties and based on the same or similar claims or those that involve the same contract, property, or patent) are assigned to the judge who was assigned the earliest filed case.[36] The parties have a continuing duty to inform the court of any pending directly related cases filed in the court.[37] "[F]or the convenience of parties or witnesses or in the interest of justice," the CFC may order the consolidation of two or more suits arising from the same contract or transfer such suits to the appropriate board.[38] Therefore, if a contractor files actions based on the same contract at both the CFC and a board, the contractor risks consolidation of the cases in one forum without any control over which forum receives its cases.[39]

Boards Of Contract Appeals

The boards of contract appeals are designed to provide "to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes" arising from Government contracts.[40] The CDA's legislative history states that "[r]ules and regulations developed for the boards [should] be more informal and expeditious and less expensive tha[n] comparable proceedings in the courts. The contractor should feel that he is able to obtain his 'day in court' at the agency boards and *at the same time have saved time and money through the agency board process*."[41] While the CDA specifically authorized the establishment of agency boards of contract appeals,[42] agency boards had been in existence long before the passage of the CDA.[43] For example, the Armed Services Board of Contract Appeals (ASBCA) was created in 1949 through the merger of two predecessor boards and the Postal Service Board of Contract Appeals (PSBCA) was established by the agency in 1958.[44] Under the CDA, the boards are established as "independent, quasi-judicial" forums that do not act as representatives of and, in fact, are "quite distinct from" their respective procuring agencies.[45] In addition, under the CDA, the boards are not subject to direction or control by procuring agency management authorities.[46]

There are currently three boards of contract appeals for which a forum choice is available: (1) the ASBCA, which has jurisdiction over Department of Defense (DOD) (including the Departments of the Army, Navy, and Air Force and all other agencies, components, and entities within the DOD) and National Aeronautics and Space Administration (NASA) contracts;[47] (2) the Civilian Board of Contract Appeals (CBCA or Civilian Board), which has jurisdiction over most civilian, federal executive agency contracts (with the exception of NASA, Tennessee Valley Authority (TVA), and U.S. Postal Service related contracts) and currently has 14 judges;[48] and (3) the PSBCA, which is authorized and carries four board judges[49] and which has jurisdiction over U.S. Postal Service and the Postal Regulatory Commission (formerly the Postal Rate Commission) contracts.[50] The ASBCA (which currently has 23 judges) does not carry the full complement of judges for which it is authorized.[51] Prior to the January 2007 establishment of the CBCA, there were 10 agency boards of contract appeals for which a choice of forum was available.[52]

Board judges must have at least five years' experience in public contract law, are appointed by the agency head and without regard to political affiliation, and may only be removed for cause.[53] Generally, a panel of at least two (and ordinarily three) board judges decides appeals, only one of whom will be present and preside over a hearing.[54] As discussed below, appeals involving small claims, expedited procedures, or some forms of alternative dispute resolution may be decided by a single board judge.[55] Some boards have procedures for reconsideration of panel decisions, or for the review of panel decisions that include a dissent, by an expanded group of board judges—by the *full board* in the case of the Civilian Board[56] or by a *division* of the ASBCA or, in rare circumstances, the Senior Deciding Group of the

ASBCA.[57] While the PSBCA does not have specific rule on this subject, it has considered issues "en banc," i.e., by all four board judges, to overrule a prior PSBCA decision.[58]

Prior to the January 2006 passage of the National Defense Authorization Act for Fiscal Year 2006 (FY 2006 NDAA),[59] many practitioners believed that board litigation tended to be less expensive than CFC litigation. Some practitioners, however, asserted that the boards' more informal approach may have led to greater expense and that certain board judges were more willing to allow the parties to take all their requested depositions rather than restricting them to a limited number. Also, in some instances, board judges may have been less aggressive about maintaining a firm discovery and trial schedule. As a result of the enactment of the FY 2006 NDAA (and the subsequent formalization of the CBCA rules[60]), some practitioners have found that the January 2007 establishment of the Civilian Board of Contract Appeals has increased the formality of litigation before that board. Additionally, some commentators believe the boards are "more conventional" and also less likely "to innovate" with, for example, jurisdictional questions.[61]

FY 2006 National Defense Authorization Act

Notwithstanding its explicitly *defense*-related title, § 847 of the FY 2006 NDAA had a profound impact on eight of the former *civilian* boards of contract appeals.[62] With the exception of the PSBCA and the TVA Board, which remain as separate boards, effective January 6, 2007, the FY 2006 NDAA consolidated the jurisdiction of and cases from the eight other civilian executive branch boards[63] into the *Civilian Board of Contract Appeals* established within the General Services Administration.[64] In addition to specifically establishing the CBCA and PSBCA, the FY 2006 NDAA also amended the CDA to specifically authorize the establishment of the ASBCA.[65]

Before the passage of the FY 2006 National Defense Authorization Act, an executive agency could establish an agency board of contract appeals when the agency head determined, after consultation with the Administrator of the Office of Federal Procurement Policy, that the volume of contract claims "justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties."[66] If the volume of contract claims was insufficient to justify an agency board, or if an agency head otherwise considered it appropriate, the board of another executive agency could decide appeals from decisions by COs of that agency.[67] As a result, it was not always immediately clear which board had jurisdiction to hear a contractor's appeal.[68]

The establishment of the Civilian Board of Contract Appeals substantially clarified this situation. The Civilian Board hears and decides contract disputes between Government contractors and civilian federal executive agencies under the Contract Disputes Act of 1978 and its associated regulations and rules.[69] The Civilian Board also has jurisdiction over certain other disputes, some of which a predecessor board had exercised jurisdiction over before the Act's passage.[70]

The FY 2006 NDAA also affected the ASBCA's jurisdiction.[71] Before the Act's January 6, 2007 effective date, the ASBCA heard appeals from certain civilian agencies, including the Department of Health and Human Services and the Agency for International Development.[72] On January 6, 2007, with the exception of NASA contract appeals, the ASBCA lost its jurisdiction to the Civilian Board to hear new appeals in such cases.[73]

The GSA Administrator (in consultation with the Administrator, Office of Federal Procurement Policy) appoints new judges to the Civilian Board (when vacancies arise) without regard to their political affiliation.[74] As of December 2018, 11 of the original 18 Civilian Board judges (who came from its predecessor agency boards) have retired or died and seven new judges have been appointed.[75] As the then-CBCA Vice-Chair (now Chair) Jeri K. Somers has observed, "[t]he consolidation [of the boards] has been extremely successful, optimizing the role the boards play in resolving contract disputes."[76]

Binding Authority

The CFC and the boards of contract appeals are bound by the decisions of the U.S. Supreme Court, the *precedential* (i.e., published) decisions of the Federal Circuit, and by the published decisions of the Federal Circuit's predecessor courts, the U.S. Court of Claims and the Court of Customs and Patent Appeals.[77] The CFC and the boards have no authority to deviate from the mandate issued by the Federal Circuit in a particular case.[78] The CFC judges are not bound by the decisions of other CFC judges[79] or by the boards of contract appeals' decisions.[80] Similarly, the boards are not bound by decisions of the CFC or of the other boards.[81] Ordinarily, a board will follow its previous panel decisions but such previous decisions may be overruled by the full board or an enlarged panel of the cognizant board (both of

which are relatively rare occurrences).[82] In a *full board* decision, the CBCA ruled that "the holdings of our predecessor boards shall be binding as precedent in this [Civilian] Board."[83] If two or more of the CBCA's predecessor boards disagreed on a legal rule, and the conflict has not been resolved by the Federal Circuit, the panel will apply what it deems to be the "better precedent" and the panel decision will be the CBCA's precedent on the issue.[84]

These rules that concern binding authority may have a significant, and sometimes controlling, impact on a contractor's choice of forum. Before choosing the forum in which to file its action, the contractor should research the key legal issues affecting its case. If the Federal Circuit or one of its predecessors (i.e., the Court of Claims or the Court of Customs and Patent Appeals) has ruled on these issues, those decisions are binding on both the CFC and the boards.[85] In addition, the contractor should determine how the CFC and the boards interpret such binding decisions.

If there are no rulings from the Federal Circuit or its predecessors on the key issues, then the contractor must explore the decisions of the CFC and the boards. If the board in question has ruled on the issues, absent unusual circumstances, the board will usually follow its panels' previous decisions.[86] In fact, the boards sometimes disagree with decisions of other boards and/or the CFC.[87] As discussed above, it also is not unusual to find differing legal interpretations among the CFC judges and CFC judges also sometimes disagree with board decisions.[88] Therefore, in the absence of specific Federal Circuit authority, the boards may offer more predictability for contractors than the CFC because the boards are generally bound by the prior decisions of that specific board but CFC judges are not bound by prior CFC decisions.

Statistics

The prevailing wisdom is that approximately one-third of the CFC's non-vaccine cases involve contract claims against the Government.[89] The statistics for "Contract" claims and "Contract/Injunction" (i.e., bid protests) roughly confirm this assertion even if just the number of "Contract" cases pending at the end of each fiscal year are reviewed. For fiscal years (FYs) 2011, 2012, 2013, 2014, 2015, 2016, and 2017, respectively, 22.8% (286 cases), 30% (337 cases), 45.6% (709 cases), 49.9% (712 cases), 48.5% (681 cases), 48.9% (734 cases), and 33% (374 cases) of the CFC cases pending at end of those years involved "Contract" claims.[90] These percentages do not include congressional reference cases or spent nuclear fuel cases, both of which could arise out of Government contract claims. Nor do they include the CFC's "Contract/Injunction" (i.e., bid protests) cases, which (as shown below) would increase those percentages.

For FYs 2011, 2012, 2013, 2014, 2015, 2016, and 2017, respectively, 14% (122 cases), 16.4% (157 cases), 32.9 % (499 cases), 11.2% (140 cases), 8.4% (121 cases), 8.9% (158 cases), and 7.9% (151 cases) of the complaints filed at the CFC involved contract claims.[91] For FYs 2011, 2012, 2013, 2014, 2015, 2016, and 2017, respectively, 11.1% (97 cases), 9.5% (91 cases), 6.7% (102 cases), 7.7% (95 cases), 9.5% (136 cases), 6.7% (120 cases), and 6.9% (132 cases) of the complaints filed involved bid protests (i.e., "Contract/Injunction").[92] For FYs 2011, 2012, 2013, 2014, 2015, 2016, and 2017, respectively, approximately 5.1% (135 cases), 3.2% (107 cases), 7.9% (127 cases), 10.8% (137 cases), 11.3% (149 cases), 7.1% (104 cases), and 26.4% (511 cases) of the dispositions for those years involved contract claims.[93] For FYs 2011, 2012, 2013, 2014, 2015, 2016, and 2017, respectively, approximately 3.4% (88 cases), 2.7% (92 cases), 6.5% (105 cases), 7.9% (100 cases), 9.4% (124 cases), 7.1% (103 cases), and 6.9% (133 cases) of the dispositions for those years involved bid protests.[94]

In recent years, the vaccine compensation cases, over which the court has jurisdiction pursuant to 42 U.S.C.A. § 300aa-1 et seq., have made up the largest number of cases on the court's docket.[95] At the end of FYs 2016 and 2017, 1,466 and 1,811 vaccine compensation cases were pending in the court compared to 734 and 374 contract claims, the second largest category, for those same years, respectively.[96] The CFC has eight Special Masters devoted solely to the management and adjudication of vaccine cases.[97] Although the number of CFC vaccine cases had declined by 2005, there has been a steady increase in filings since then,[98] and while many of the vaccine cases are resolved without involvement of a CFC judge, the volume of these cases likely continues to slow the court's resolution of other cases on its docket.

For FYs 2011, 2012, 2013, 2014, 2015, 2016, and 2017, respectively, the CFC issued judgments in favor of plaintiffs in the total amounts of approximately $471.1 million, $810.1 million, $1.1 billion, $935.5 million, $12.9 billion, $803.5 million, and $1.3 billion.[99] For those same years, the court awarded judgments, offsets, or sanctions to the defendant in the amounts of approximately $5.7 million, $3.5 million, $3.6 million, $26.2 million, $0, $6.7 million, and $4.3 million, respectively.[100] These judgments and

offsets are for all cases on the court's docket and are not limited to Government contract awards.[101]

Of the ASBCA, CBCA, and PSBCA, only the ASBCA and CBCA publish statistics concerning their dockets on their websites.[102] For FYs 2012, 2013, 2014, 2015, 2016, 2017, and 2018, respectively, the ASBCA docketed 571, 672, 708, 668, 644, 524, and 490 appeals, disposed of 457, 459, 535, 647, 654, 678, and 559 appeals, and sustained 9%, 17.4%, 11.2%, 9.9%, 11.6%, 11.8%, and 17.2% of its disposed of appeals.[103] The ASBCA observed that, of its 86, 140, 109, 121, 133, 139, and 139 dispositions on the merits for FYs 2012, 2013, 2014, 2015, 2016, 2017, and 2018, respectively, 47.7%, 57.1%, 55.0%, 52.9%, 57.1%, 50.3%, and 69.1% of the decisions found merit for the contractor in whole or in part.[104] As of October 1 for the FYs 2012, 2013, 2014, 2015, 2016, 2017, and 2018, respectively, 680, 893, 1,066, 1,087, 1,077, 970, and 901 appeals were pending at the ASBCA.[105] Parties requested ASBCA alternative dispute resolution (ADR) services 24, 34, 28, 37, 41, 31, and 24 times for FYs 2012, 2013, 2014, 2015, 2016, 2017, and 2018, respectively.[106] However, the number of ADR requests can be misleading—and fail to show the magnitude of the usefulness of ADR at the ASBCA—as the requests often involve multiple appeals. For example, in 2018, the 24 requests for the ASBCA's ADR services covered 92 appeals and four undocketed disputes.[107]

For FYs 2011, 2012, 2013, 2014, 2015, 2016, 2017 and 2018,[108] respectively, the Civilian Board docketed 233, 211, 242, 336, 319, 212, 181 and 242 CDA appeals and, for FYs 2011 through 2016, respectively, disposed of 283, 208, 209, 201, 296, 377 appeals.[109] For FYs 2011, 2012, 2013, 2014, 2015, and 2016, respectively, the Civilian Board issued decisions on the merits in 54, 63, 38, 44, 94, and 87 appeals and 80%, 48%, 58%, 64%, 83%, and 70% of those decisions found merit for the contractor in whole or in part.[110] As of October 1 for the years 2011, 2012, 2013, 2014, 2015, and 2016, respectively, 227, 230, 263, 398, 421, and 256 appeals were pending at the Civilian Board.[111] As discussed herein, the Civilian Board also has jurisdiction over a number of non-CDA matters. For FYs 2011, 2012, 2013, 2014, 2015, 2016, 2017, and 2018, respectively, 55%, 44%, 46%, 53%, 38%, 40%, 47%, and 59.2% of the cases docketed at the Civilian Board were contract appeals and, for FYs 2011 through 2016, respectively, 58%, 42%, 46%, 37%, 33%, and 52% of the cases disposed of were contract appeals.[112]

Sources Of Jurisdiction

Contract Disputes Act

Under the CDA, a Government contractor may seek to overturn an adverse CO's final decision on a contract claim, or the CO's failure to issue a decision within a reasonable period of time (i.e., a *deemed denial* of the contract claim), either by filing a lawsuit in the CFC or by filing an appeal at the appropriate agency board of contract appeals.[113] In both forums, the facts and the law are decided *de novo*, so neither the CFC nor the boards are bound by, or owe deference to, a CO's findings of fact or law.[114] A CO's final decision is a jurisdictional prerequisite for appeals under the CDA.[115] Without the issuance of a CO's final decision or the deemed denial of a contractor's claim, neither the boards nor the CFC may assume jurisdiction over a CDA contract dispute.[116]

As a general rule, the contractor is the party named on the contract with the Government and, under the CDA, only it can bring an action before a board or CFC against the Government.[117] The CDA defines a "contractor" as "a party to a Federal Government contract other than the Federal Government."[118] Waivers of sovereign immunity are strictly construed.[119] Thus, subcontractors are generally barred from filing a direct appeal under the CDA.[120] There must be " 'rare, exceptional' circumstances. . .to either create Privity of contract between the subcontractor and the government or to establish some other-than Privity basis allowing the subcontractor to appeal directly to" a board or the CFC.[121] Such circumstances would include, for example, "when the prime contractor acts as a government agent or when the contract documents indicate that the government intended to allow direct subcontractor appeals."[122] While the Federal Circuit has held that CDA jurisdiction does not extend to claims brought by third-party beneficiaries to a contract, it has recognized that the CFC may have jurisdiction to hear such claims under the Tucker Act. Therefore, claims brought by intended third-party beneficiary subcontractors should be appealed to the CFC rather than the boards.[123]

The CDA governs many of the Government contracts suits in the CFC and almost all such suits before the boards. The CDA applies to express and implied-in-fact contracts entered into by an executive agency[124] for (1) the procurement of property, other than real property in being, (2) the procurement of services, (3) the procurement of construction, alteration, repair, or maintenance of real property, or

(4) the disposal of personal property.[125] The CDA, therefore, does not apply to all Government contracts or procurement actions.[126] For example, the CDA does not provide jurisdiction for bid protests or for the recovery of bid preparation costs,[127] but it does provide jurisdiction in connection with lease agreements for real property[128] and the sale of timber by the Government.[129]

The Federal Circuit—the appellate authority for both the CFC and the boards—has upheld the CDA's review procedures even though they do not provide for an Article III trial court or for jury trials.[130] The Federal Circuit reasons that these limitations on dispute resolution are constitutionally permissible as a condition of the waiver of the Government's sovereign immunity to suit.[131]

Federal Courts Administration & Federal Acquisition Streamlining Acts

In a 1991 decision, the Federal Circuit held that the Claims Court did not have jurisdiction over cases that contested only the propriety of default terminations and that were unaccompanied by monetary claims.[132] In contrast, the Federal Circuit had previously ruled that the boards of contract appeals possessed jurisdiction to hear such appeals.[133] The FCAA of 1992, discussed earlier in this PAPER, provides the CFC with jurisdiction over disputes "concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other non-monetary disputes" on which a CO's final decision has been issued under the CDA.[134] In the past, most boards had assumed jurisdiction over such cases.[135] This language also potentially clarifies the boards' ability to provide nonmonetary relief because the CDA provides that the boards may "grant any relief that would be available to a litigant asserting a contract claim in the [CFC]."[136]

In addition to expanding the court's jurisdiction to include nonmonetary CDA disputes, the FCAA amended the CDA so that a defect in a contractor's claim certification does not deprive a court or board of jurisdiction.[137] Instead, a defective certification simply has to be corrected before the court or board's entry of a final judgment in the case.[138] The FCAA also amended the CDA to permit a claim certification to "be executed by any person duly authorized to bind the contractor with respect to the claim."[139] It further provides that for claims in excess of $100,000, a CO is not obligated to render a final decision if, within 60 days after receipt of the claim, the CO notifies the contractor in writing of the reasons why the attempted certification is defective.[140] If a contractor's certification is found to be defective, interest will be paid on its claim (assuming the certification is corrected and it prevails on the claim) from the date on which the CO received the original claim.[141]

The Federal Acquisition Streamlining Act of 1994 amended the CDA to provide U.S. district courts the authority to obtain advisory opinions from a board on matters of contract administration that otherwise would be the proper subject of an appealable CO's final decision.[142] The district court must direct its request to the board that would have jurisdiction under the CDA to adjudicate the contract claim at issue, and the board must provide its advisory opinion in a "timely manner."[143] This authority has not added significantly to the boards' workload; in fact, some boards have only rarely received a request from a district court for such an advisory opinion because, in part, of some district court's denial of such requests.[144]

Tucker Act

The Tucker Act provides a strictly construed, limited waiver of sovereign immunity[145] that grants the CFC jurisdiction over, among other items, express and implied-in-fact contracts with the United States.[146] Contract claims against the Government for more than $10,000 that are not governed by one of the categories enumerated in the CDA must generally be brought in the CFC pursuant to the Tucker Act.[147] Contract actions not governed by the CDA seeking $10,000 or less generally may be filed in either the CFC or the appropriate U.S. district court.[148] A discussion of district court jurisdiction over Government contract actions under the so-called "little Tucker Act"[149] is beyond the scope of this PAPER. However, it is worth noting that to maintain uniformity in Government contracts law, the Federal Circuit has jurisdiction over appeals from such district court decisions,[150] and that a district court, when exercising jurisdiction in this situation, "in effect sits as the Court of Federal Claims."[151]

To maintain a cause of action in the CFC under the Tucker Act, "the contract must be between the plaintiff and the Government" and entitle the plaintiff to money damages in the event of the Government's breach of that contract.[152] The Tucker Act is, however, only a jurisdictional statute; it does not confer any substantive right of recovery. "Such a right must be grounded in [the U.S. Constitution], a contract, a statute, or a regulation."[153] A claimant who does not rely on a breach of contract claim must establish that some substantive provision of law, regulation, or the Constitution

mandates compensation to state a claim within the CFC's Tucker Act jurisdiction.[154]

Under the Tucker Act, assuming a shorter CDA limitation period does not apply, the claimant has six years from the time the claim first accrues to file an action in the CFC.[155] A cause of action under the Tucker Act accrues "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action."[156] In general, a cause of action for breach of contract accrues when the breach occurs.[157] However, the accrual of a claim does not commence until the claimant knew or should have known that the claim existed.[158] To demonstrate that the claim did not accrue on the date of the breach, the claimant "must either show that the defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was 'inherently unknowable' at the accrual date."[159]

Among the (non-CDA) Tucker Act contract cases filed in the last 30 years at the CFC, the court's time has been significantly occupied by the more than 120 "Winstar-related"[160] thrift cases involving breach of contract allegations related to the passage and implementation of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.[161] These cases, while largely concluded, have been a substantial drain on the time and resources of the CFC and, to a lesser extent, the Federal Circuit.[162] Other significant non-CDA Tucker Act contract-related actions include cases where the Government has a contract with a party for other than the procurement of goods or services, such as uranium enrichment cases,[163] spent nuclear fuel cases,[164] the Patient Protection and Affordable Care Act (ACA) cases,[165] contract disputes arising out of grants or cooperative agreements, and "other transaction authority" agreements (OTAs).[166] The boards do not have jurisdiction over these non-CDA cases, so they must be brought in the CFC.

Other Sources Of Jurisdiction

Unless the contractor in appropriate circumstances is able to elect to proceed under the CDA, cases that involve Government contracts that predate the March 1, 1979 CDA effective date are ordinarily governed by the contract's "Disputes" clause (and the Wunderlich and Tucker Acts). For pre-CDA contracts, appeals from a CO's decision ordinarily proceed first to the appropriate board. Under the Wunderlich and Tucker Acts, appeals from board decisions then proceed to the CFC, which in this situation functions as an appellate tribunal, and then to the Federal Circuit.[167] In certain limited situations, because of a contract provision or an applicable regulation or because of the existence of a claim arising under the contract, certain disputes involving non-CDA contracts awarded after the CDA effective date must follow this same procedure.[168]

The CDA did not take away the boards' preexisting authority to exercise non-CDA jurisdiction.[169] Thus, the boards had and continue to have contract jurisdiction under certain regulations. The ASBCA may hear appeals "pursuant to the provisions of any directive whereby the Secretary of Defense or a Secretary of a Military Department has granted a right of appeal not contained in the contract on any matter consistent with the contract appeals procedure."[170] As discussed above, the Civilian Board hears and decides various other classes of cases.[171]

Jurisdictional Issues

Tort Claims

The CFC and the boards of contract appeals do not have jurisdiction over traditional tort actions.[172] Nevertheless, the CFC possesses jurisdiction over claims based upon a "tortious breach" of contract by the Government.[173] Similarly, the boards' jurisdiction extends to certain tort claims that "relate to or arise out of" contract provisions or that involve claims of tortious breach of contract.[174]

Counterclaims & Fraud

Both the CFC and the boards have jurisdiction to consider Government counterclaims.[175] The Federal Circuit has ruled that a Government contractor (by executing a Government contract) waives any right to have a Government counterclaim under, or in connection with, the contract litigated in an Article III trial court or to have a jury trial on the counterclaim.[176]

Ordinarily, the Government may only assert counterclaims that have been the subject of a CO's final decision.[177] Because COs do not have authority to decide fraud claims, however, no CO's final decision is required for the Government to assert fraud counterclaims.[178]

When choosing the appropriate forum for pursuing its contract dispute, a contractor should carefully consider the court's jurisdiction over Government fraud counterclaims.[179] The CFC may hear Government counterclaims based upon

alleged fraud under the Special Plea in Fraud statute (also known as the Forfeiture of Claims Act),[180] the False Claims Act,[181] the Anti-Kickback Act,[182] or the CDA.[183]

A contractor's potential fraud liability may be large enough to more than offset its claim. Under the civil False Claims Act, the Government may claim a civil penalty of up to $22,363 per claim (e.g., each invoice or other request for payment) plus up to three times the Government's damages[184] (and the costs of recovering the penalty and damages) resulting from the contractor's violation of the statute.[185] The Government can also recover under the CDA, which provides that a contractor that submits a fraudulent claim will be "liable to the Federal Government for an amount equal to the unsupported part of the claim plus all of the Federal Government's costs attributable to the cost of reviewing" the fraudulent component of the claim.[186]

Additionally, the Forfeiture of Claims Act provides that a "claim against the United States shall be forfeited. . .by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof."[187] Commission of any fraud under the contract probably will lead to forfeiture of a valid claim.[188] As a result, even if a contractor has a legitimate claim under a contract, if that contractor is found to have committed any acts of fraud under the same contract, it will most likely lose the ability to recover.[189] Thus, if a contractor chooses to initiate suit in the CFC, the contractor's claim may be reduced by setoff or extinguished, or the Government may be awarded affirmative relief. Moreover, once the Government has filed a nonfrivolous counterclaim, the contractor cannot simply withdraw its claim or law suit and expect that the Government's counterclaim also will be withdrawn or dismissed. If the Government has not agreed to dismiss its counterclaim, the CFC will not grant a contractor's request to dismiss its claim unless the CFC has jurisdiction to independently adjudicate the Government's counterclaim.[190]

Contractors may not be able to avoid Government fraud counterclaims based on the expiration of the statute of limitations. Several COFC decisions have held that, under, 28 U.S.C.A. § 2415(f),[191] special plea in fraud and common law fraud counterclaims are not subject to *any* statute of limitations.[192] The Government has asserted that this same exemption applies to False Claims Act counterclaims. However, the CFC recently declined to extend the exemption under 28 U.S.C.A. § 2415(f) to the False Claims Act because it is a separate statutory scheme.[193]

There is also significant confusion concerning the application of the statute of limitations to the CDA's anti-fraud provision.[194] The CDA's anti-fraud provision provides that "[l]iability. . .shall be determined within six years of the commission of [the contractor's] misrepresentation of fact or fraud."[195] The CFC has noted that literal interpretation of this statement could eviscerate the purpose of the CDA's anti-fraud provision by enabling defendants to escape liability through protracted pretrial proceedings that prevent the court from determining liability within six years of the misrepresentation.[196] Some courts have found that the limitations period cannot begin to run until the Government discovers the fraud, and that the earliest the claim could accrue is when the contractor submits a certified claim under the CDA, "regardless of when the conduct rendering the contractor's claim false allegedly occurred."[197] More recently, the CFC has suggested that the limitations period should run from when the fraud occurs, not when the Government discovers it.[198] In light of the confusion and variance in CFC perspectives, however, in deciding whether to pursue a claim at the CFC, contractors should not count on successfully arguing that the Government's fraud counterclaim is time barred.

The boards' jurisdiction over Government fraud counterclaims is more limited. Fraud counterclaims under the Forfeiture of Claims Act, False Claims Act, and CDA anti-fraud provision are outside the boards' jurisdiction.[199] The boards do not have the authority to grant the Government monetary relief or statutory remedies based upon an affirmative Government claim of fraud.[200] The boards also do not have jurisdiction to render final determinations as to the commission of fraud by a contractor.[201] When litigation is commenced before a board in a case that the Government believes involves fraud, the agency will frequently try to obtain a fraud judgment against the contractor in U.S. district court but this presents the added difficulty of convincing the Department of Justice (DOJ) to file a separate district court action. The Government typically files a motion to stay the board litigation, which (depending upon the circumstances) may or may not be granted,[202] while the fraud case is adjudicated in district court.[203]

The boards may consider affirmative defenses involving fraud and are authorized to reject a contractor claim or reduce a contractor claim to the extent that claim is fraudulent or based upon falsified information or documentation.[204] An ASBCA judge recently noted that the Federal Circuit's decision in *Laguna Construction Co. v. Carter*[205] "opened

the door to a government defense before the Boards that looks very much like the Special Plea in Fraud" statute applicable to the CFC.[206] And, while the Federal Circuit's decision in *Laguna Construction* suggests that the boards only have jurisdiction to consider affirmative defenses involving fraud if they do not have to make factual determinations of the underlying fraud,[207] some board cases nevertheless appear to make such factual determinations.[208] In particular, a number of board cases have held that the boards can make factual findings of fraud to determine whether the contract is *void ab initio*.[209]

Therefore, in selecting a forum, a contractor should consider whether the Government will assert a fraud counterclaim. If this likelihood is significant or if there is evidence of fraud connected to the contractor's claim or the award or its performance of the contract, the contractor should first carefully assess the merits of its claim and whether it should be pursued given the possible fraud. If the contractor decides to proceed with the claim, the contractor may be better off doing so before a board than before the CFC. If the action is asserted before the CFC, the Government may have the entire matter, including the fraud claim, adjudicated in a single forum. If that same matter were before a board, the Government could not recover affirmative relief from the contractor based on a fraud claim, nor could it count civil penalties toward any setoff against the contractor's claim.[210] The Government would need to bring a separate and independent action in a U.S. district court. It should be noted, however, that the Government may be able to consolidate CDA claims with its fraud claims in district court. District courts have asserted jurisdiction over Government CDA claims "involving fraud" (i.e., contract claims "the factual bases of which are intertwined with allegations of fraud").[211] Thus, filing at the boards does not guarantee that the Government will have to pursue fraud claims and contract claims in separate forums. Additionally, as discussed above, filing at the boards does not eliminate the possibility that the Government will assert (and the boards will consider) a fraud-type defense.

Relief Available

The principal remedy available in contract disputes before the CFC and the boards is money damages, which is usually recovered in the form of expectation or reliance damages.[212] However, other remedies may also be available depending upon the circumstances of the dispute. Reformation[213] or rescission[214] of the contract or restitution[215] may be available in both the CFC and boards. In certain circumstances, those tribunals may declare a contract *void ab initio*, nullified, or invalid.[216] On relatively rare occasions, the tribunals have asserted jurisdiction over *quantum meruit* or *quantum valebant* claims, but only in cases involving "implied-in-fact" contracts (e.g., where a contractor provided goods or services pursuant to an express contract, but the Government refused to pay for them because of defects in the contract that rendered it invalid or unenforceable).[217] Neither tribunal has jurisdiction over implied-in-law contracts, unjust enrichment claims, promissory estoppel claims, or allegations of detrimental reliance.[218] Absent express congressional consent, neither forum has the authority to award punitive or exemplary damages.[219] But, both forums may have the authority to award consequential damages in certain circumstances.[220] Both forums may award attorney's fees to a prevailing party under the Equal Access to Justice Act.[221] As noted previously in this PAPER, in 1992, the CFC was provided jurisdiction over cases involving "a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other non-monetary disputes."[222] Accordingly, the CFC has the authority to provide declaratory relief for these nonmonetary CDA disputes.[223] The boards also have this authority, which they routinely exercised before the CFC gained this jurisdiction.[224]

Neither the CFC nor the boards may grant specific performance,[225] injunctive relief,[226] or mandamus relief[227] with respect to contract administration problems. The Civilian Board has ruled that, while it "lacks authority to resolve disputes premised on a theory of promissory estoppel," which is a quasi-contract form of relief, it has authority to award damages "under a theory of equitable estoppel against the Government."[228] Both the boards and the CFC may direct a CO, "[with]in a specified period of time," to issue a final decision "in the event of undue delay" by the CO.[229] However, that authority does not permit the boards or the CFC "to dictate the contents of the decision."[230] The boards cannot direct the reinstatement of a contract, order the award of contracts or task orders, or order a CO to exercise a contract option or to enter into negotiations concerning an equitable adjustment.[231] In addition, the boards do not have the authority to order the CO to issue an apology or a letter of recommendation, order the resignation of Government personnel, direct the performance of specific acts by Government officials, order the assignment of a different CO to a procurement, or order an ejectment.[232] Where the CO has failed to issue a final decision on a contractor's claim within

the required period, either tribunal may be petitioned to direct the CO to issue a decision within a specified time period and in a "deemed denial" action, either tribunal may stay proceedings to obtain the CO's final decision.[233] Neither tribunal may ordinarily discipline an agency's noncompliance with the supervisory and reporting instructions related to congressional oversight.[234]

Neither the boards[235] nor the CFC[236] may award damages resulting from a contractor's debarment; however, the CFC possesses jurisdiction to review the propriety of a debarment decision in connection with a bid protest.[237] And, neither forum has authority to review wage classification disputes.[238]

The CDA gives the boards authority "to grant any relief that would be available to a litigant asserting a contract claim" in the CFC.[239] As the Federal Circuit observed, the "CDA was enacted, in part, to end 'the fragmentation of mechanisms for the resolution of claims in connection with Government contracts.' Complete relief was [generally] made available both at the agency boards of contracts appeals and in the [CFC] precisely to alleviate the fragmentation problem."[240] It is important to remember, however, that the boards' authority to grant relief is limited to contract claims arising under the CDA.[241] For example, unlike the CFC, the boards have no jurisdiction over bid protests, and therefore cannot award non-CDA relief (e.g., bid preparation costs) in such cases.[242] In addition, non-CDA, Tucker Act cases in the CFC have certain prerequisites to the award of money damages.[243]

Although the Federal Circuit has ruled that "when a government contract is breached, there is a presumption that a damages remedy will be available,"[244] the CFC and boards may not be able to award damages for certain breaches of contract; in this regard, as the Federal Circuit has observed, "not every injury resulting from a breach of contract is remediable in damages."[245]

Prelitigation Considerations

Filing Time Limits

The substantially different time limits for bringing an action may dictate the choice between the CFC or a board as the forum for contesting an adverse CO's final decision. A contractor has either (1) 90 days from the "date of receipt" of the CO's final decision to file a simple notice of appeal to the appropriate board (and, then, ordinarily 30 days from its receipt of the notice of docketing of the appeal to file its complaint at the board),[246] or (2) 12 months from the "date of receipt" of the final decision to file suit (i.e., a formal complaint) in the CFC.[247]

The CFC may be the better choice in cases where the contractor will need a substantial amount of time to factually develop its complaint or where it would like to delay the incurrence of the costs associated with preparing a complaint. However, in certain cases, the boards may be the better choice if only the Government (and not the contractor) has relevant information concerning the basis for the claim (e.g., because a CO's final decision on a Government claim does not give the contractor sufficient information to determine the factual and legal basis for the Government's claim). Normally, the contractor is responsible for filing a CDA complaint.[248] However, the boards may (usually at the request of the contractor) direct the Government (instead of the contractor) to file the complaint "if doing so will facilitate efficient resolution of the appeal."[249] Such requests generally will not be granted if the contractor has sufficient information to draft a complaint, even if the contractor is appealing a Government claim.[250] But, where the contractor lacks sufficient information about the factual and legal basis for the Government's claim to draft a complaint that explains the Government's claims and asserts the contractor's defenses thereto, having the Government file the complaint probably promotes more efficient resolution of the claim.[251]

The boards do not have jurisdiction to waive the late filing of an appeal[252] and, similarly, the CFC may not ordinarily consider a suit filed late.[253] Therefore, if a contractor waits more than 90 days to contest the CO's final decision, it ordinarily loses its choice and must file its action in the CFC. Once the period for filing an appeal to a board or a suit in the CFC has expired, the Government may obtain (if necessary, because the contractor is refusing to comply with the final decision) a judgment based on the CO's final decision in state or federal court without litigating the merits.[254]

A related procedural issue concerns the timing and substance of the Government's initial filing(s). At the CFC, the Government has 60 days to file an answer, which must include affirmative defenses and counterclaims.[255] In ASBCA and CBCA cases, the Government generally has 30 days from the date it receives the complaint, which ordinarily is more than 30 days after the notice of appeal is filed, to file its answer.[256] The Government also must file the *Rule 4 (or appeal) file*, which falls under Rule 5 for the PSBCA, within 30 days of receiving the notice of appeal or of docket-

ing depending upon which board, ASBCA or CBCA, the appeal is pending before.[257] Accordingly, at the ASBCA and CBCA, the contractor's complaint is generally filed contemporaneously with its receipt of the Rule 4 file. The PSBCA takes a slightly different approach and has the following deadlines: the appeal file is due within 30 days from receipt of the board's docketing notice, the appellant's complaint is filed within 45 days after receipt of the board's docketing notice, and the Government's answer is due within 30 days from receipt of the complaint.[258] At the PSBCA, therefore, the contractor receives the benefit of reviewing the appeal file before filing its complaint.

The Rule 4 (or appeal) file is supposed to consist of all documents pertinent to the appeal. The exact content requirements varies by board, but documents pertinent to the appeal generally include (1) the CO's final decision, (2) the contract (including pertinent specifications, amendments, plans, and drawings), (3) relevant correspondence between the parties, (4) affidavits or statements of witnesses regarding the matter in dispute made prior to the filing of the notice of appeal and transcripts prepared during the course of proceedings before the agency, and (5) any additional relevant information.[259] As a practical matter, it is not unusual for contractors to receive extensions from the board (but not the CFC) on the due date for the complaint. Also, the Government may receive extensions from the board on the due dates for the Rule 4 file and the answer and from the court on the answer due date.

Election Doctrine

The contractor has the exclusive right to choose a forum for CDA claims. This has led to the establishment of the *Election Doctrine*, which precludes a contractor from pursuing its claim in both forums.[260] Consequently, once a contractor files an action in one forum, that selection is ordinarily binding; the contractor cannot have the action dismissed and then proceed in the other forum.[261] However, a contractor's election of a forum is only binding if that forum has jurisdiction over the proceeding and the contractor's choice of forum was informed, knowing, and voluntary.[262] Election is not binding if the forum selected by the contractor does not have jurisdiction. For example, if a contractor files a board appeal after the 90-day time limit has passed, the board lacks jurisdiction over the dispute, and the contractor may still file suit in the CFC (assuming its suit is timely and the court otherwise has jurisdiction).[263] An appeal of a denial of an improperly certified claim constitutes a valid election and, thus, a contractor may not subsequently appeal such a claim to the other forum.[264] However, the CFC has permitted contractors to file place holder complaints to preserve their CDA appeal rights pending a board's jurisdictional determinations in a related appeal.[265]

Representation & Settlement

In cases before the boards, the federal agencies are ordinarily represented by attorneys from their own staffs.[266] These agency attorneys frequently handle only Government contract cases and often become involved with a procurement before the contract award. Many agencies use the same attorneys who assisted the CO in denying the contractor's claim as trial counsel before the boards.

In the CFC, the DOJ represents the Government. The DOJ attorney will only rarely have had any involvement in the procurement at the agency level and will also have responsibility for a variety of non-Government contract cases. Ordinarily, an agency attorney will serve as *of counsel* to the DOJ attorney, and the agency attorney may also take an active role in discovery and at trial.[267]

The boards permit contractors to represent themselves *pro se*.[268] Thus, a sole proprietor contractor can appear and handle the appeal himself, a partner can represent a partnership, and an officer of the corporation can represent the corporation. Notably, at least one board has explicitly stated that it "give[s] greater procedural latitude to *pro se* appellants than. . .to parties represented by lawyers."[269] Before the boards, contractors may also be represented by an attorney admitted to practice in the highest court of any state or the District of Columbia.[270] In contrast, the CFC permits an individual to appear *pro se* or to represent a member of the individual's immediate family, but requires any other party or organization, including corporations, partnerships, and joint ventures, to be represented by counsel.[271] An attorney must be admitted to the court's bar to practice before the court.[272] The CFC's rules require that there be only one attorney of record for a party in a case at any one time.[273] All other attorneys representing a party are designated as *of counsel*.[274] However, attorneys (i.e., private practitioners) designated as of counsel have full authority to litigate the case and sign pleadings.

In the CFC, only the DOJ (on behalf of the Government) has the actual authority to settle a case—even over the objection of the agency involved in the claim[275]—and the CO is without authority to settle cases filed in the court.[276] Al-

though the DOJ does not frequently exercise its authority to settle without the agency's consent, the existence of this possibility may cause agencies to soften their positions once the DOJ becomes involved. Further, because it was not previously involved in the case, the DOJ may bring a more objective perspective and/or may not be influenced by strained relationships between the parties to the appeal, which could facilitate settlement. These facts could weigh in favor of a contractor filing its case in the CFC if a "fresh look" at the dispute could result in a favorable settlement, narrow the issues, or otherwise facilitate the disposition of the case.

On the other hand, because agencies cannot settle court cases without the agreement of the DOJ, a contractor loses the flexibility it had in dealing solely with agency officials once a case is filed in the CFC. In this regard, because agency counsel may be more familiar with or have greater access to the facts of the case, the actors in the underlying dispute, and the decision makers ultimately responsible for the settlement of the case, board litigation may lead to a faster resolution. The DOJ attorney representing the Government will be new to the case and subject to strict DOJ procedures regarding settlement, which include receiving approval from senior DOJ officials.[277] Furthermore, at least some private practitioners view some (usually more junior) DOJ attorneys as more aggressive and less likely to settle than their agency counterparts and as more likely to want trial experience, possibly at the expense of settling a case. DOJ attorneys also do not ordinarily have to worry about future business relationships with the contractor, unlike agency counsel who may be influenced by this factor. Settlement also can be impeded because the DOJ attorney may be constrained, or otherwise influenced, by more global concerns (e.g., the impact on other cases) related to the issues in the contractor's particular case.[278]

In cases pending before the boards, the CO retains the authority to settle. If the contractor is negotiating a settlement of a case pending before a board with an agency lawyer, it is imperative that the contractor receive the CO's agreement to the settlement because, ordinarily, agency lawyers have no authority to settle cases before the boards unless such authority is expressly delegated by the CO.[279] In the case of the Civilian Board, the parties "may settle a case by stipulating to an award. The Board may issue a decision making the stipulated award if: (1) The Board is satisfied that it has jurisdiction; and (2) The stipulation states that no party will seek reconsideration of, seek relief from, or appeal the Board's decision."[280] The board's decision adopting the parties' stipulation typically will provide or allow for payment by the Government from the Judgment Fund.[281]

Neither the boards nor the CFC may ordinarily reject a settlement that has been agreed to by the CO or DOJ, respectively.[282] The court's Tucker Act jurisdiction is broader than that conferred by the CDA and includes virtually all express and implied-in-fact contracts with the Government.[283] Thus, the CFC ordinarily has authority to enforce settlement agreements.[284] The boards have the authority to decide whether an appeal has been settled because such a determination is a prerequisite to determining whether an appeal is a present, live controversy.[285] Where the Government contests the validity of or refuses to comply with a valid settlement agreement, some boards have ruled that they are without authority to enforce the agreement because the CDA does not provide for jurisdiction over settlement agreements.[286] However, some boards appear willing to review and act upon a motion to enforce a settlement agreement related to an appeal decided by the board.[287] Therefore, for a case that was before a board, if the Government refuses to comply with a settlement agreement, a contractor should file a motion to enforce the decision with the appropriate board, recognizing that it may have to file its *enforcement* (or breach of settlement contract) action in the CFC.

In summary, if a contractor's dispute with the Government has been highly contentious, it may make sense for the contractor to file at the CFC to possibly receive a more objective and detached legal review of the merits of the case. In contrast, the cognizant board may be the preferable forum when the parties are not that far apart in settlement negotiations and may be able to quickly settle.

Alternative Dispute Resolution

Both the court and the boards encourage and support the use of ADR methods.[288] The use of ADR at both forums is voluntary, and there is little practical difference between them. Some practitioners, however, believe that ADR is less ingrained at the CFC than at the boards.[289] The boards may actively aid in ADR efforts before the issuance of a final decision by the CO. For example, the Civilian Board or the ASBCA may engage in ADR efforts on contract-related matters even before the filing of a claim, the issuance of a CO's final decision, or before a contract has been awarded, even with respect to agencies over which it does not have jurisdiction.[290] Between FY 2008 and FY 2018, the ASBCA has provided ADR services in approximately three undocketed disputes per fiscal year.[291]

(1) *Court of Federal Claims*—The CFC promotes the use of ADR techniques through Appendix H to its rules.[292] In August 2016, the CFC revised Appendix H to "more comprehensively describe the range of available ADR techniques and to outline the administrative procedures involved in the initiation and pursuit of ADR proceedings."[293]

The court's ADR techniques are voluntary and cannot be employed unless there is agreement by both the contractor and the Government.[294] Should the parties decide that they wish to employ ADR techniques, they should make this interest known to their assigned judge through an early status conference or in the parties' joint preliminary status report.[295] However, the parties may notify the assigned judge of their desire to pursue ADR at any point in the litigation.[296] The assigned judge will then decide whether to refer the case to ADR.[297] Ordinarily, when the parties request ADR, the assigned judge will concur and refer the case to ADR. The court will then randomly assign the case to a settlement judge or refer it to the third-party neutral selected by the parties.[298] The settlement judge, who typically is randomly appointed by the clerk of the court but who can be recommended by the parties, is not the judge initially assigned to preside over the case. The matter remains on the assigned judge's docket during the ADR process and the assigned judge will require the parties to file periodic reports on the status of the ADR proceeding.[299]

At the court, "[t]here is no single format for ADR. Any procedures agreed to by the parties and adopted by the settlement judge or third-party neutral may be used."[300] ADR techniques at the court include but are not limited to mediation, mini-trials, early neutral evaluation, outcome prediction assistance, and nonbinding arbitration.[301] These processes may be conducted either by a settlement judge or a third-party neutral.[302] Mediation with a settlement judge is the most commonly requested ADR technique.[303] The settlement judge or third-party neutral is intended to be a neutral advisor with whom the parties can discuss the merits of their case in detail.

At the outset of the process, the settlement judge or third-party neutral, together with the parties, will develop a "written memorandum of understanding" that outlines the settlement process.[304] Through these discussions, the settlement judge or third-party neutral can provide the parties with an impartial assessment of the strengths and weaknesses of their respective positions and, in this way, encourage settlement.[305] All ADR proceedings (including communications within the scope of the proceeding and documents generated solely for the proceedings) remain confidential.[306] The assigned judge may sanction parties for failing to maintain confidentiality of the ADR proceedings.[307] At the conclusion of the ADR process, the third-party neutral or settlement judge issues an order concluding the process and indicating whether a proposed settlement has been reached in whole or in part.[308]

The judges of the CFC are dedicated to playing an active role in encouraging the settlement of their cases.[309] To this end, ADR judges will meet with counsel and party representatives to discuss their positions in aid of settlement. This approach has often proven effective. Many of the CFC judges are willing to hold status conferences with the parties whenever either party believes it would assist in clarifying procedural or other issues in the case, or would assist in the disposition or settlement of the case. Some judges are also willing to flexibly schedule the various case milestones so that settlement opportunities present themselves before the parties have expended significant resources in discovery or motions practice.

(2) *Boards of Contract Appeals*—The boards' ADR approach is similar to that of the court.[310] The boards' use of ADR results in part from the CDA, which requires that boards of contract appeals "provide informal, expeditious, and inexpensive resolution of disputes,"[311] as well as from the Administrative Dispute Resolution Act of 1996 (ADR Act), as amended,[312] which requires federal agencies to develop policies addressing the use of ADR in rulemaking, enforcement actions, contract administration, and litigation. The ADR Act provides for the use of *neutrals* to aid in settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials, arbitration, and use of ombudsman or any combination of these ADR methods.[313] The ADR Act amended the CDA by allowing COs and contractors to use any ADR procedure set forth in the ADR Act or other mutually agreeable procedures to resolve a claim certified by the contractor.[314]

The boards generally provide the parties with written notice concerning the availability of ADR with the notice of docketing of the appeal. Addendum II to the ASBCA's rules specifically identifies and describes two examples of ADR techniques commonly used at the ASBCA—nonbinding mediations and binding summary proceedings—and encourages the parties to engage in any other appropriate agreed upon methods of ADR (binding or nonbinding) that may settle the case.[315] At the ASBCA, the board must approve a joint ADR request but ordinarily does not withhold such

approval.[316] To facilitate frank and open discussions, any settlement judge or third-party neutral who has participated in an ADR procedure at the ASBCA that has failed to resolve the underlying dispute will not participate in the restored appeal unless expressly agreed to by the parties in writing and the board concurs.[317] Further, the judge or third-party neutral will not discuss the merits of the appeal or substantive matters involved in the ADR proceedings with other board personnel.[318]

Before the Civilian Board, if the parties agree to ADR, they may request that the board's chair appoint one or more board judges to act as a board neutral or neutrals.[319] The parties may request the appointment of a specific judge or judges as the board neutral(s).[320] Under the Civilian Board's rules, the board provides ADR "services for pre-claim and pre-final decision matters, as well as appeals pending before the Board."[321] However, "[t]he use of ADR proceedings does not toll any statutory time limits."[322] Prior to the August 17, 2018 amendment of the Civilian Board's rules, the CBCA rules identified five examples of available ADR techniques: *Facilitative mediation; Evaluative mediation; Mini-trial; Non-binding advisory opinion*; and *Summary binding decision*.[323] The 2018 amendments to the CBCA's rules replaced the specific examples of ADR techniques with a statement that the "Parties and the Board may agree on any type of binding or nonbinding ADR suited to a dispute."[324] The PSBCA's ADR approach largely mirrors the CBCA's process.[325]

For docketed appeals, if ADR fails to resolve the dispute completely, the appeal will generally return to the presiding Civilian Board judge for adjudication.[326] "[A] Neutral who participates in a nonbinding ADR procedure that does not resolve the dispute is recused from further participation in the matter unless the parties agree otherwise in writing and the Board concurs."[327]

Rules, Procedures & Practices

The CFC and each board have their own rules of procedure. In comparison with the rules of the boards and, in particular, the ASBCA and PSBCA, those of the court are more detailed and formalized. The Rules of the Court of Federal Claims (RCFC) are modeled after the Federal Rules of Civil Procedure, which govern proceedings before the U.S. district courts.[328] The CFC's rules largely incorporate the "Federal Rules of Civil Procedure applicable to civil actions tried by a United States district court sitting without a jury" and also include procedures comparable to those in the local rules of U.S. district courts that conform the Federal Rules to the nature of practice before the CFC.[329] Notably, the "interpretation of the [CFC's] rules will be guided by case law and the Advisory Committee Notes that accompany the Federal Rules of Civil Procedure."[330] CFC judges "may regulate practice [in an individual case] in any manner consistent with federal law or rules."[331]

On June 14, 1979, the Office of Federal Procurement Policy promulgated the Final Uniform Rules of Procedure for Boards of Contract Appeals under the Contract Disputes Act of 1978.[332] Notwithstanding this "uniform" set of rules, each of the boards has its own set of rules that should be carefully consulted. The Civilian Board's rules are more detailed than the rules of the ASBCA or the PSBCA and reference the Federal Rules of Civil Procedure more than 15 times.[333] In contrast, the ASBCA rules reference the Federal Rules of Civil Procedure once,[334] while the PSBCA rules' only reference states that "[t]he Board may consider the Federal Rules of Civil Procedure for guidance in construing those Board rules that are similar to Federal Rules and for matters not specifically covered herein."[335]

Bifurcation

In appropriate circumstances, the CFC and boards will bifurcate cases, which ordinarily means that the tribunal will separately decide entitlement (i.e., liability) and quantum (i.e., amount of damages).[336] Of the four tribunals, bifurcation is most common at the ASBCA. Unlike the other tribunals, in a bifurcated case, if the ASBCA finds entitlement, it will typically remand the case to the parties to resolve quantum.[337] If the parties cannot resolve quantum, the contractor may subsequently file a quantum appeal before the ASBCA.[338] Some practitioners believe that, where damages are ultimately awarded, bifurcation can slow the final resolution of the case.[339]

Pretrial Procedures

(1) *Court of Federal Claims*—Pretrial procedures in the CFC are governed by Appendix A, "Case Management Procedure," to the court's rules.[340] Appendix A, which may be modified by the judge "as appropriate" for the circumstances of the case or as suggested by the parties, defines the responsibilities of the parties and the court before trial and "represents the court's standard pretrial order."[341] It addresses the scheduling and timing for the parties' filing of a joint preliminary status report, the meetings of counsel, the filing of pretrial legal memoranda, the filing of dispositive motions, and the pretrial conference.[342]

After the filing of the complaint, the Government has 60 days to answer.[343] Typically, the Government will request and receive at least a 30-day extension of time to answer. Discovery may last eight to nine months (or longer). The filing of motions and decisions on motions may take another five to six months (or longer). If the matter is not resolved on dispositive motion, the case will probably proceed to trial in approximately two to five months, and a decision may be rendered three to four months (or longer) thereafter.

During the 63 days before the final pretrial conference, typically there will be a meeting of opposing counsel and the exchange and filing of exhibits, witness lists, and pretrial memoranda.[344] Appendix A provides a standard procedure for setting key pretrial dates once the final pretrial conference date is established.[345] For example, if the court were to set November 1 as a contractor's final pretrial conference date, the pretrial meeting of counsel would occur no later than about August 29, the contractor's pretrial memorandum (i.e., the Memorandum of Contentions of Fact and Law plus the exhibit and witness lists) would be due no later than about September 13, and the Government's pretrial memorandum would be due no later than about October 11.[346]

(2) *Boards of Contract Appeals*—The boards' prehearing rules are not nearly as detailed as those of the CFC. As in the court, however, the efficiency with which a case is handled by a board is more a function of the presiding judge than of the rules. The ASBCA has stated its intention to schedule pretrial proceedings in a manner that ensures efficient processing of cases.[347] While it stated that its goal is to "seek the cooperation of the parties in establishing reasonable schedules," the board will "unilaterally establish schedules where the parties fail to respond to requests for proposed schedule dates."[348]

Accelerated & Expedited Procedures

Both the CFC and the boards provide accelerated procedures for certain types of cases. In general, the boards have more structured rules for, and greater experience in, handling these cases, where the dollar amount at issue is $150,000 or less. In this regard, the board rules for *accelerated* and *expedited* cases, which are very small dollar claims of no more than $150,000 (and usually $100,000 or less), frequently result in faster resolution than the CFC's.

(1) *Court of Federal Claims*—Appendix A to the court's rules provides that within 49 days of the Government's filing of an answer, counsel must meet and file a joint preliminary status report.[349] As part of that status report, one or both parties may request an expedited trial schedule.[350] A party may request an expedited hearing with respect to any type of case.[351] However, Appendix A states that an expedited trial schedule is "generally appropriate when the parties anticipate that discovery, if any, can be completed within a 90-day period, the case may be tried within 3 days, no dispositive motion is anticipated, and a bench ruling is sought."[352] While expedited scheduling is not granted as a matter of right and is provided at the discretion of the presiding judge, most CFC judges are accommodating for appropriate cases and particularly where both parties make the request. In the joint preliminary status report, the party or parties should state the reasons in support of a request for expedited scheduling.[353] Although Appendix A provides no guidance as to the date that will be set for an expedited trial, its predecessor, which is no longer in effect, stated that trial should be held "as soon as practicable."[354] While discovery will be limited in expedited proceedings, the current rules provide no guidance on how much discovery will be allowed.[355] The predecessor rule stated that, unless changed by the court or agreement of the parties, discovery was limited to five depositions and 30 interrogatories.[356]

There may be some issues associated with the court's expedited procedures that could potentially impact a contractor's forum choice. First, as noted above, the CFC is not obligated to grant a request for an expedited trial but, nevertheless, most CFC judges are accommodating in appropriate cases.[357] Second, there is no deadline for the court to render a decision but, again, in appropriate cases, CFC judges act expeditiously (and usually within 90 days of all post-trial briefs being submitted).[358] Third, Appendix A suggests that the court will not issue a written opinion in expedited matters.[359] A reasonably detailed bench ruling, however, is often more than sufficient, including for appellate review (if it is sought).

(2) *Boards of Contract Appeals*—The rules of the various boards for accelerated and expedited procedures are substantially the same.[360] Authorized by the CDA, these procedures are available solely at the contractor's election and may not be invoked by the Government.[361] For claims of $100,000 or less, the CDA provides an "accelerated" procedure whereby the board's decision is rendered, "whenever possible," within 180 days of the election of the accelerated procedure.[362] Decisions under the accelerated procedure are rendered by the presiding judge, with the concurrence of at

least one panel member (at the CBCA),[363] the Vice Chair (at the ASBCA),[364] or the Chairman, Vice Chairman, or other designated judge (at the PSBCA).[365] If they disagree, a third panel member (at the CBCA and PSBCA) or Chair (at the ASBCA) will participate in the decision.[366] Decisions under the accelerated procedures are appealable to the Federal Circuit,[367] while decisions under the expedited (small claims) procedures are not appealable except in cases of fraud.[368]

For claims of $50,000 or less (or $150,000 or less for small businesses), the CDA provides an "expedited" procedure that requires a decision to be rendered, "whenever possible," within 120 days of election.[369] For expedited claims, the CDA calls for simplified rules of procedure and a decision by only one judge.[370] Decisions rendered under the expedited procedures may be in summary form, are unappealable (except on grounds of fraud), and have no precedential value.[371]

Under both the expedited and accelerated procedures, the boards may shorten the time periods prescribed under their rules or establish schedules that limit or eliminate pleadings, discovery, or other prehearing activities in order to meet the deadlines for rendering a decision.[372]

At the CBCA, the contractor may elect the accelerated or expedited procedures up to 30 days after receiving the Government's answer.[373] The ASBCA rules require the contractor to elect the accelerated or expedited procedures within 60 days of receiving notice that the appeal has been docketed.[374]

Discovery

Before both the CFC and the boards, the parties generally can expect to engage in an amount of discovery commensurate with the complexity of the case. There is little difference between the forums with respect to the forms of discovery permitted and the means for addressing discovery disputes.[375] However, the CFC's discovery rules, which closely track the Federal Rules of Civil Procedure, are more detailed and definitive—particularly as compared to the ASBCA and PSBCA rules—and provide certain limitations on the amount of discovery.

Some practitioners believe that the boards allow contractors a greater deal of control over the discovery schedule than does the CFC. The court has more defined procedures in place, mandating meetings among counsel and discovery plans.[376] The boards may offer contractors more flexibility, with some board judges allowing contractors to aggressively pursue their cases or to proceed at a more relaxed pace. However, beginning in 2014, discovery at the CBCA appears to have become somewhat more standardized as the board has more regularly published its discovery decisions.[377] Publication of discovery decisions combined with the CBCA's decision to incorporate certain FRCP discovery concepts in its rules suggest that discovery at the CBCA should become more predictable and efficient.[378]

The Rule 4 file was one of the most significant differences between practicing before the boards and the CFC. As discussed above, that Rule, which applies only at the boards, requires the Government to provide the contractor and the board a file consisting of "the documents the Government considers relevant to the appeal."[379] In effect, the rule provides the contractor an initial round of automatic discovery without eliminating any of the customary discovery procedures and provides those documents to the board. The contractor may supplement the Rule 4 file and, absent objection from a party, the documents in the Rule 4 file become part of the record.[380]

When the CFC amended its rules in 2002 to require certain initial disclosures of documents and likely witnesses,[381] the Rule 4 file became a somewhat less significant difference between the forums. The initial disclosures in the CFC ordinarily do not occur until about 63 days after the filing of the Government's Answer,[382] as compared to the requirement that the Rule 4 file be provided within 30 days of the Government's receipt of the notice of appeal or notice of docketing of the appeal.[383] Thus, even if the timetables are only roughly adhered to by the parties, the contractor will probably receive the Rule 4 file earlier—possibly as much as about 93 days earlier—than it would receive the initial disclosures in the CFC. Moreover, the initial disclosures in the CFC do not have to include the documents themselves. Instead, the disclosures may simply identify "by category and location" the relevant documents.[384] When the documents are identified, rather than being produced, there will usually be additional delay before the documents can be reviewed by the contractor. Thus, for some contractors, the Rule 4 file may still be an important difference between the forums.

(1) *Court of Federal Claims*—The rules of discovery in the CFC are similar to those of the Federal Rules of Civil Procedure. While some board judges may (or may not) limit the amount and type of discovery, the court's rules explicitly limit the number of depositions to 10, the length of each de-

position to one day of seven hours,[385] and the number of interrogatories to 25 ("including all discrete subparts").[386] The court may alter these limits or the parties may stipulate to changes to these limits.[387] While the CFC's rules do not limit the number of document requests or requests for admissions, the rules provide that the court may limit the number of requests for admission.[388] Additionally, the court will not permit a party to make an unreasonable number of document requests or engage in protracted or burdensome discovery, and a party may seek a protective order to block improper discovery practices.[389] Appendix A to the CFC's rules provides some guidelines on the format for submitting and responding to interrogatories and requests for admissions.[390] In addition, Appendix A advises that counsel's signature on interrogatory answers is governed by the strict certification requirements contained in the CFC's Rule 11.[391]

To a substantial extent, the duration and extent of discovery may be controlled by the parties. The parties are responsible for proposing a plan and schedule for discovery, including deadlines for completing discovery, in the joint preliminary status report.[392] Generally, the CFC judges will adhere to the discovery plan and deadlines set by the parties, particularly where the parties submit a joint or agreed to plan and schedule. The court frowns on the use of excessive party or judicial resources for discovery or for the resolution of discovery disputes. To this end, Appendix A specifically requires that parties filing a motion to compel discovery or a motion for a protective order must include a statement that the parties have tried to resolve the discovery dispute.[393]

The court has the authority to impose a broad array of sanctions for a party's failure to cooperate in discovery including (1) an order establishing for the purposes of the case certain matters or designating certain facts, (2) an order prohibiting a party from introducing designated matters in evidence, (3) an order striking pleadings in whole or in part, (4) an order staying further proceedings until the order is obeyed, (5) an order dismissing the action or any part thereof or rendering a judgment by default against the disobedient party, or (6) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.[394] Unlike the boards, the court has authority to impose monetary sanctions for failing to cooperate in discovery.[395] Sanctions for discovery abuses may be imposed on counsel as well as on the party itself.[396]

(2) *Boards of Contract Appeals*—The ASBCA and the PSBCA encourage the parties "to engage in *voluntary* discovery."[397] While boards may limit the frequency or extent of use of the discovery methods,[398] the boards' rules do not formally limit the amount of discovery (e.g., the number or length of depositions) that may be taken. However, the Civilian Board's rules provide that "[u]nless otherwise ordered, the scope of discovery is the same as under Rule 26(b)(1) of the Federal Rules of Civil Procedure."[399]

Nothing should prevent the parties to a board proceeding from obtaining discovery as completely as they could in a court proceeding.[400] In this regard, the boards have the authority to compel depositions, testimony, production of documents, responses to requests for admissions or interrogatories, and any other discovery allowed by the board.[401] Under the CDA, the boards specifically have the power to issue subpoenas[402] and may impose sanctions for failure to comply with board orders, including dismissing an appeal for failure to prosecute (where the contractor has failed to answer Government's discovery requests and failed to comply with board orders), barring the introduction of evidence (in certain extreme situations), and deeming admitted requests for admission.[403] However, if a party refuses to comply with a board subpoena, the boards must ask the DOJ to enforce the subpoena in U.S. district court.[404] And, unlike the CFC, the boards do not have the authority to impose monetary sanctions for discovery violations and do not have contempt authority.[405]

Motions

In both the CFC and the boards, most requested actions must be made in the form of a motion filed with the court or board and served on opposing counsel.[406] There are some differences between the forums in the form that a motion must take. The requirements for preparation and submission of motions for summary judgment are generally more detailed in the CFC than in the boards.[407] However, except for subpoena enforcement and monetary sanctions (discussed above), there are no significant differences between the forums in the remedies that may be sought by motions, and the approach to deciding most motions is substantially the same.

The CFC applies a streamlined approach to addressing motions. The court will decide many motions, including contested motions, without a hearing.[408] The court will typically decide, without a hearing, motions to amend pleadings, to enlarge or shorten time limits, to file documents out of time or in excess of page limits, to reschedule oral argu-

ment, to substitute counsel, or to reconsider matters.[409] In the interest of expediting the prosecution of a case, the court usually decides these nondispositive motions promptly. On occasion, for example, the CFC has resolved cross-motions for judgment on the administrative record, which are dispositive motions, in bid protests without a hearing.[410]

The CFC may be the forum of choice if a contractor believes it may prevail in its case by dispositive motion. Generally, in the view of some practitioners, the CFC has demonstrated a greater willingness to resolve cases through the use of dispositive motions, including motions for summary judgment.[411] CFC judges frequently use summary judgment as a tool for deciding cases or for narrowing issues in part because of the DOJ's willingness, in some cases, to stipulate to certain of the facts of a case.[412] Moreover, the judges of the CFC have greater resources for addressing motions for summary judgment than are available to board judges. For example, each active CFC judge has at least two full-time law clerks and each senior CFC judge has at least one full-time law clerk, with most active and senior CFC judges carrying three law clerks,[413] whereas ASBCA and PSBCA judges are not assigned a single law clerk.[414] The CBCA has two full-time law clerks for all of the judges plus student law clerks, while the PSBCA has two staff attorneys available to assist its judges. The ASBCA has several staff attorneys who may be available to assist the judges after the assignment of an appeal to a judge.[415]

Although most nondispositive motions will be decided by the court without hearings, former Appendix H to the CFC's rules provided that the court ordinarily will hear oral argument on contested motions if one of the parties requests a hearing in its motion.[416] This remains the general practice for most CFC judges. Such a hearing may be by telephone.[417] Of course, any party may request a hearing on any motion in either forum.

The requirements in the CFC's rules for the filing of motions, briefs, or memoranda that are 10 pages or less are somewhat relaxed.[418] The filing requirements are more complicated for motions longer than 10 pages as well as for motions for summary judgment. A motion over 10 pages must include a table of contents, a table of authorities, a statement of questions involved, and a statement of the case, as well as an argument section.[419] In motions for summary judgment, a party must demonstrate that "a fact cannot be or is genuinely disputed" by citing to appropriate "materials in the record" (e.g., "depositions, documents, electronically stored information, affidavits") or by showing that "an adverse party cannot produce admissible evidence to support the fact."[420] If a party fails to properly support an assertion of fact or has failed to address another party's assertion of fact as required by RCFC 56(c), the court may (1) give the party an opportunity to properly support or address the assertion, (2) consider the fact undisputed for purposes of the motion, (3) grant summary judgment if the motion and supporting materials (including the facts that are considered undisputed) show that the movant is entitled to it, or (4) issue any other appropriate order.[421]

Because motions practice historically has not been as prominent a feature of board proceedings,[422] the board rules on motions generally are not as detailed as those for the CFC. Nevertheless, in recent years, the boards have encouraged the increased use of motions practice.[423] Of the boards, the Civilian Board provides the most detailed coverage on motions in its rules, which specify the required content for motions, time limits for oppositions and replies, and requirements for surreplies.[424] The ASBCA, CBCA, and PSBCA rules specify the content for summary judgment motions.[425] The ASBCA rules specify the time limits for oppositions and replies.[426]

There is little difference between the procedures for and the substance of hearings on motions in the court and the boards. Before either forum, a contractor should expect that the judge presiding over the argument will be familiar with the parties' filings and the law applicable to the case. The approach to questioning from the bench may vary dramatically between judges regardless of the forum. Some judges may use the entire hearing to pose questions to counsel. Some may pose no questions to counsel and simply allow counsel to present their arguments. Still others may take a mixed approach—allowing counsel to present their arguments but at the same time posing questions during argument. Generally, the judges of the court and boards place reasonable limits on the length of hearings and will allow parties to air their arguments fully. For simple, and even some complex motions, many judges of the court and boards are amenable to allowing oral argument to take place by telephone conference. This approach may be particularly appropriate where the contractor's place of business or its counsel are not located in the Washington, D.C. metropolitan area.

Trials & Hearings

The format and conduct of trials in the CFC and the boards are fairly similar. However, CFC trials are conducted

with greater formality while the boards tend to be more lenient in ruling on evidentiary issues, partly because the mission of the boards is to provide a less formal forum for dispute resolution.[427]

(1) *Court of Federal Claims*—Trials in the CFC are conducted in much the same manner as they are conducted in non-jury U.S. district court cases.[428] As required by law, CFC judges examine evidence and testimony, allow the introduction of evidence, and rule on objections to evidence in accordance with the formal requirements of the Federal Rules of Evidence.[429] As with motions, the CFC judges approach trials and evidentiary issues with varying degrees of formality. Some judges of the court will play a more active role than others in witness examination.

(2) *Boards of Contract Appeals*—The level of formality in trials or, more specifically, "hearings" as they are called before the boards varies greatly, depending upon the style of the presiding judge, the relative importance of the case, and the attitude of, or agreement between, the parties. On the whole, however, the parties can generally expect less formal proceedings before the boards[430] than before the court. Furthermore, before the boards, the parties may elect to submit the appeal on the record without a hearing.[431] Generally, the boards will hold a hearing if there are factual questions or the record could be elucidated through testimony and a party desires a hearing. In this regard, the CBCA "will hold a hearing in a case if the Board must find facts and either party elects a hearing," while the PSBCA states that "[a]fter considering the parties' requests, the Board will determine whether a hearing will be held."[432]

Perhaps the most significant difference between board and court proceedings relates to evidence. At the CFC, a contractor faces a more traditional procedure for the submission and acceptance of evidence into the record than at the boards. Generally, the boards use the Federal Rules of Evidence only as a guideline.[433] At least one board judge has observed that because only one judge (from a three-judge panel) presides (i.e., is present) at a hearing, board judges may be reluctant to exclude evidence (especially hearsay) because the other two panel members (and therefore the possible panel majority) might disagree with the presiding judge's decision to exclude evidence.[434]

The primary vehicle for entry of evidence into the record at the boards is the "Rule 4 file," which is Rule 5 at the PSBCA.[435] Pursuant to the boards' rules, the Government must file all documents and tangible things relevant to the claim—including the CO's final decision, the contract, and all relevant correspondence—and provide copies to the contractor. The contractor then has an opportunity to add additional documents and tangible things to the Rule 4 file.[436] All items in the Rule 4 file for which there is no objection become part of the evidentiary record without further procedure at trial.[437]

There are some subtle differences between the rules of the boards regarding the use of hearsay evidence. The ASBCA allows the parties to offer such evidence "as they deem appropriate and as would be admissible under the Federal Rules of Evidence or in the sound discretion of the presiding Administrative Judge or examiner."[438] The Civilian Board "generally admits hearsay unless the Board finds it unreliable," while "letters or copies thereof, affidavits, or other evidence not ordinarily admissible under the Federal Rules [of Evidence], may be admitted in the discretion of the [PSBCA]."[439]

Decisions & Opinions

The judges of the CFC and the boards generally issue written decisions following trials and significant motions. As noted above, cases in the CFC are decided by a single judge. Decisions are not reviewed by other judges of the court. Moreover, the CFC does not employ procedures to ensure consistency in the court's decisions, and any inconsistency is only resolved when and if the matter is appealed to the Federal Circuit. Thus, if both favorable and unfavorable CFC precedents exist, a contractor should not choose the CFC as its forum with the firm expectation that its case will be decided based upon the more favorable court precedent of that court.

While the Claims Court generally published most of its decisions in *U.S. Claims Court Reporter*, and the CFC has published most of its decisions in the renamed *Federal Claims Reporter*, the court also issues unpublished decisions. CFC judges may also issue oral opinions from the bench, particularly in cases that are neither factually nor legally complicated.[440] Appendix A of the court's rules suggests that the CFC may issue decisions from the bench in connection with an expedited trial.[441] However, the rules do not require that the judges of the court issue a decision from the bench. Thus, the expectation of a quick decision from the bench is not guaranteed. Caution should be exercised in selecting the CFC over the boards solely on this basis. In contrast, virtually all board decisions must be issued in writing.[442]

A significant difference between the court and the boards is that the decisions of the boards are collegial. Unlike CFC decisions, board decisions (with the exception of expedited or small claims appeals) are generally the work of a panel of at least two, and usually three, judges, even though hearings before the boards are usually before a single judge. A majority of judges on the panel must agree for the decision to be issued.[443] The collegial process at the boards helps to ensure that decisions of each board are consistent with the prior precedent of that specific board. This process also may be the cause of the perception among some practitioners that (1) the CFC—with only one judge on each case—decides cases faster than the boards; and (2) the boards—with at least two (and usually three) judges reviewing and ruling on a case— are less likely to be reversed on appeal. The authors are not aware of any statistical data confirming or refuting either of these *perceptions*.

On rare occasions, a case before the ASBCA may be decided by more than a three-judge panel; that is, a "division" of the ASBCA may decide a case or, in even rarer circumstances, the Senior Deciding Group of the ASBCA may resolve the case.[444] Before the Civilian Board, a request for full board consideration of a case is "disfavored."[445] However, "[t]he full Board may consider a decision or order when necessary to maintain uniformity of Board decisions or if the matter is exceptionally important."[446] For example, the Civilian Board's first decision was made by the full board in order to clarify "that the holdings of our predecessor boards shall be binding as precedent in this Board."[447]

Full Civilian Board consideration of a case may be initiated by a party's motion or by initiation of the board.[448] In either situation, a majority of the Civilian Board judges must agree to consideration of the case by the full board.[449]

Appellate Review

The Federal Circuit has jurisdiction over appeals from final decisions of the CFC and from final decisions under the CDA (with minor exceptions[450]) of the boards of contract appeals.[451] A party has 60 days from the date of entry of the judgment or order to file a notice of appeal of an adverse CFC decision[452] and 120 days after the date it receives an adverse board decision to file a notice of appeal.[453] Interestingly, if not somewhat oddly, while a notice of appeal of a CO's final decision to a board must be filed in less than one-fourth of the time the contractor has to file suit in the CFC, the contractor has *double* the amount of time to appeal from an adverse board decision than it has to appeal an adverse CFC judgment.[454] For the Government to appeal an adverse board decision, it must obtain the approval of both the agency head and the Attorney General (who has delegated this function to the Solicitor General),[455] while the Government appeal of a CFC decision only requires the approval of the Attorney General (again, through the Solicitor General). Before the enactment of the CDA, absent bad faith or fraud, the Government could not appeal an adverse board decision.[456]

Interlocutory appeals may be granted for CFC decisions,[457] but the boards are generally without authority to certify issues for interlocutory appeal to the Federal Circuit.[458] 28 U.S.C.A. § 1292(c)(1) grants the Federal Circuit jurisdiction over appeals from "from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under" 28 U.S.C.A. § 1295. Among other things, that section provides the Federal Circuit exclusive jurisdiction over "an appeal from a final decision of an agency board of contract appeals" under the CDA.[459] The boards have held that, since 28 U.S.C.A. § 1292(a) and (b) pertain only to district courts, and 28 U.S.C.A. § 1295(a)(10) grants the Federal Circuit authority to review appeals only from "final decisions" of the boards, the boards have no authority to certify interlocutory appeals.[460] Generally, the Federal Circuit has held that it lacks authority to review interlocutory appeals from the boards.[461] The inability to obtain interlocutory review of board decisions could result in significant waste by preventing appeals that could otherwise shorten or simplify litigation.

The Federal Circuit freely reviews CFC decisions for errors of law but will not set aside its findings of fact unless they are "clearly erroneous."[462] The decisions of the boards on questions of law are not final or conclusive and are freely reviewable.[463] Nevertheless, the Federal Circuit has frequently stated that it gives some deference to the board's expertise in interpreting contract regulations or contract law.[464] Board decisions on questions of fact are "final and conclusive and may not be set aside unless the decision is—(A) fraudulent, or arbitrary, or capricious; (B) so grossly erroneous as to necessarily imply bad faith; or (C) not supported by substantial evidence."[465] The Federal Circuit has stressed that even if there is adequate evidence to support an alternative finding of fact, if the one chosen by the board is supported by substantial evidence, it is binding on the court regardless of how the court might have decided the issue on a *de novo* review.[466]

Therefore, the factual findings of the boards, reviewed by the Federal Circuit under the *substantial evidence* standard, are apparently accorded greater deference than the CFC's factual findings, which are reviewed under the "clearly erroneous" standard.[467] In fact, the Federal Circuit has stated that there is a "significant difference" between the standards of "substantial evidence" and "clearly erroneous" and that "in close cases this difference can be controlling."[468] As a practical matter, however, it is difficult to determine the extent to which the different standards of review for factual determinations make a difference in a Federal Circuit appeal. One (now retired) Federal Circuit judge has stated that, with respect to choosing between the CFC and the boards, the difference in the origin of a contract case has practically no impact on the Federal Circuit's review of an appeal.[469]

Federal Circuit statistics show that there are fairly similar overall rates of affirmance in appeals of CFC and board decisions. Table I, below, lists the Federal Circuit reversal rates for the boards and the CFC (which includes many non-Government contract cases) from 2007 to present.[470] Unfortunately, no statistics exist solely on the reversal rate of CFC Government contract decisions and the Federal Circuit's reversal rates for CFC decisions in Table I include many non-Government contract cases.

Table I[471]

Year	Source of Appeal	Percent Reversed
2007	Boards	0%
	Court of Federal Claims	14%
2008	Boards	0%
	Court of Federal Claims	8%
2009	Boards	31%
	Court of Federal Claims	17%
2010	Boards	8%
	Court of Federal Claims	16%
2011	Boards	25%
	Court of Federal Claims	16%
2012	Boards	9%
	Court of Federal Claims	12%
2013	Boards	13%
	Court of Federal Claims	8%
2014	Boards	0%
	Court of Federal Claims	16%
2015	Boards	20%
	Court of Federal Claims	4%
2016	Boards	18%
	Court of Federal Claims	15%
2017	Boards	0%
	Court of Federal Claims	10%
2018	Boards	0%
	Court of Federal Claims	19%

Guidelines

These *Guidelines* are intended to assist a contractor in determining which forum—the Court of Federal Claims (CFC) or a board of contract appeals—is most appropriate for litigating (and settling) its Government contract dispute. They are not, however, a substitute for professional representation in any specific situation:

1. Under the CDA, a contractor has either 90 days from receipt of a CO's final decision to file an appeal with a board or one year to file suit in the CFC. If the contractor lets the 90 days lapse, it may not appeal to a board. Instead, the contractor must file suit in the CFC within one year.

2. Once a contractor files an action in either the CFC or a board, that choice is ordinarily binding. The contractor is precluded from dismissing the action and then proceeding in the other forum.

3. If a contractor files actions in both the CFC and a board that are based on the same contract but involve separate disputes, the CFC has the authority to consolidate the cases in one forum and could consolidate the cases in the forum that the contractor finds less desirable.

4. If the contractor files an action in the CFC, authority to settle the case passes from the CO to the DOJ. The DOJ may, but rarely does, settle cases over the objection of the agency. If the contractor files an appeal at a board, the CO retains authority to settle the case while the appeal is pending at the board.

5. In the CFC, but not the boards, the Government may recover affirmative relief from a contractor in a fraud counterclaim. In contrast, the boards can only reject or reduce a contractor claim based on the Government's affirmative defense of fraud. While the Federal Circuit recently suggested that the boards can only consider fraud as an af-

firmative defense if factual determinations of the underlying fraud were made by another tribunal, some boards may make factual findings relating to fraud where the government alleges that the contract is void ab initio.

6. Although the Federal Circuit applies different standards of review to the factual findings of the CFC and the boards, ordinarily this should not affect the contractor's choice of forum.

7. If the contractor believes it can prevail in its case by dispositive motion, the CFC may be the forum of choice. Generally, the court has shown a greater willingness (and has greater resources) than the boards to resolve cases on dispositive motions, including motions for summary judgment.

8. If the contractor's claim is for $150,000 or less, the contractor may wish to initiate its action before a board under, as appropriate, the special accelerated or expedited procedures. The boards have more experience and more specialized procedures for deciding these cases on an accelerated or expedited basis and will most likely be a less expensive forum for bringing such accelerated or expedited actions.

9. Carefully analyze the case law of the Federal Circuit (and its predecessor courts), the CFC (and the Claims Court), and the boards of contract appeals on the key issues affecting the case. Decisions of the Federal Circuit and its predecessors are binding on the CFC and the boards. Decisions by CFC judges are not binding on other judges of that court or on the boards. While a board will almost always follow prior decisions of panels of that same board, the boards are not bound by decisions of other boards or the CFC.

ENDNOTES:

[1]41 U.S.C.A. §§ 7101–7109.

[2]As discussed below, for purposes of a contractor's right either to (1) file suit in the CFC, or (2) appeal to the appropriate board of contract appeals, an adverse CO's final decision can include the failure of the CO to issue a requested final decision within a reasonable period of time, which is known as a "deemed denial" of the contractor's claim. See 41 U.S.C.A § 7103(f)(5); FAR 33.211(g); Tex. Health Choice, L.C. v. Office of Pers. Mgmt., 400 F.3d 895, 899 (Fed. Cir. 2005); ThinkGlobal, Inc. v. Dep't of Commerce, CBCA No. 4410, 16-1 BCA ¶ 36,489; Civilian Board of Contract Appeals Rule (CBCA R.) 2(d)(2); Armed Services Board of Contract Appeals Rule (ASBCA R.) 1(a)(1), (a)(2). The CBCA rules are codified at 48 C.F.R. Part 6101 and the ASBCA rules are codified at Part 2 of Appendix A to 48 C.F.R. Chapter 2 (the Defense Federal Acquisition Regulation Supplement (DFARS)). See also CBCA, Rules of Procedure, https://www.cbca.gov/howto/rules/procedure.html; ASBCA, Rules and Guidance, http://www.asbca.mil/Rules/rules.html.

[3]41 U.S.C.A. § 7104

[4]41 U.S.C.A. § 7104; LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1554 (Fed. Cir. 1995); S.J. Groves & Sons Co. v. United States, 661 F.2d 171, 173 (Ct. Cl. 1981); Optimus Tech., Inc., CBCA No. 2952, 16-1 BCA ¶ 36,543; Holly Corp., ASBCA No. 24975, 80-2 BCA ¶ 14,675.

[5]41 U.S.C.A. § 7104; see Tex. Health Choice, L.C. v. Office of Pers. Mgmt., 400 F.3d 895, 899 (Fed. Cir. 2005); LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1554 (Fed. Cir. 1995); Nat'l Neighbors, Inc. v. United States, 839 F.2d 1539, 1541 (Fed. Cir. 1988); S. Rep. No. 95-1118, at 2 (1978), reprinted in 1978 U.S.C.C.A.N. 5235, 5236.

[6]See 41 U.S.C.A. § 7104; Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1562 (Fed. Cir. 1990); Optimus Tech., Inc., CBCA No. 2952, 16-1 BCA ¶ 36,543 ("[I]t is the contractor, not the agency, which statute endows with the ability to select a forum to dispute a Government claim. 41 U.S.C.A. § 7104. The agency cannot elect this forum to resolve a Government claim."); United States v. Kasler Elec. Co., 123 F.3d 341, 348 (6th Cir. 1997) ("The CDA gives the contractor the choice between the two available forums for review; 'the result [is] that the Government has no right to determine the forum in which its claims will be litigated.' ") (bracket in original).

[7]Tex. Health Choice, L.C. v. Office of Pers. Mgmt., 400 F.3d 895, 899 (Fed. Cir. 2005) ("Courts have consistently interpreted the CDA as providing the contractor with an either-or choice of forum."); Bonneville Assocs. v. United States, 43 F.3d 649, 653 (Fed. Cir. 1994) (same); Glenn v. United States, 858 F.2d 1577, 1580 (Fed. Cir. 1988); Nat'l Neighbors, Inc. v. United States, 839 F.2d 1539, 1542 (Fed. Cir. 1988); Tuttle/White Constructors, Inc. v. United States, 656 F.2d 644, 646 (Ct. Cl. 1981); Duke Univ. v. Dep't of Health & Human Servs., CBCA No. 5992, 18-1 BCA ¶ 37,023.

[8]Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992).

[9]Pub. L. No. 102-572, § 907(b)(1), 106 Stat. at 4519 (amending 28 U.S.C.A. § 1491(a)(2)).

[10]Bonneville Assocs. v. United States, 43 F.3d 649, 653 (Fed Cir. 1994) (emphasis added); accord Tuttle/White Constructors, Inc. v. United States, 656 F.2d 644, 646 (Ct. Cl. 1981) ("Given the fundamental differences between the two forums, the contractor thus must make an important initial strategic decision; namely, which forum would be better suited to hear its particular claims."); see Phillips/May Corp. v. U.S., 524 F.3d 1264, 1268 (Fed. Cir. 2008); Wesleyan Co. v. Harvey, 454 F.3d 1375, 1380–82 (Fed. Cir. 2006); United States v. Kasler Elec. Co., 123 F.3d 341, 348 (6th Cir. 1997) ("the selection of the forum is a particularly significant strategic choice that the CDA leaves to the contractor"); Sisk, Litigation With the Federal Government

310 (2016) ("Given that the Court of Federal Claims and the Board are generally parallel in process, a sophisticated election of forum is demanded."); S. Rep. No. 95-1118, at 13 (1978), reprinted in 1978 U.S.C.C.A.N. 5235, 5247 (CDA's legislative history states that it is designed to provide "a flexible system that provides alternative forums for resolution of particular kinds of disputes. The claimant should be able to choose a forum according to the needs of his particular case."), quoted in Somers, "Comments on the Fortieth Anniversary of the Contract Disputes Act," 48 Pub. Cont. L.J. 1, 2 (Fall 2018); see Minesen Co. v. McHugh, 671 F.3d 1332, 1341–42 (Fed. Cir. 2012).

[11]See Schaengold & Brams, "Choice of Forum for Contract Claims: Court vs. Board," 06-6 Briefing Papers 1 (May 2006).

[12]Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 105(a), 96 Stat. 25, 27 (1982) (amending 28 U.S.C.A. § 171(a)); see Bowen v. Mass., 487 U.S. 879, 908 n.48 (1988); Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1562 (Fed. Cir. 1990); Swan, "Government Contracts and the Federal Circuit: A History of Judicial Remedies Against the Sovereign," 8 J. Fed. Cir. Hist. Soc'y 105 (2014), available at https://ssrn.com/abstract=2750119.

[13]28 U.S.C.A. § 1491(a)(3) (1994) (prior to repeal by Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(a)(2), 110 Stat. 3870, 3884 (1996)); see also United States v. John C. Grimberg Co., 702 F.2d 1362, 1364, 1369 (Fed. Cir. 1983).

[14]Pub. L. No. 102-572, § 907(b)(1), 106 Stat. at 4519 (amending 28 U.S.C.A. § 1491(a)(2)).

[15]Pub. L. No. 102-572 § 902, 106 Stat. at 4516.

[16]Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(a)(3), 110 Stat. 3870, 3874 (1996) (amending 28 U.S.C.A. § 1491(b)).

[17]Pub. L. No. 104-320, § 12(d), 110 Stat. at 3874–75.

[18]28 U.S.C.A. §§ 173, 2505.

[19]In re United States, 877 F.2d 1568, 1572, 1573 (Fed. Cir. 1989).

[20]Pub. L. No. 102-572, § 906(b), 106 Stat. at 4518 (amending 28 U.S.C.A. § 798).

[21]Pub. L. No. 102-572, §§ 908, 909, 910, 106 Stat. at 4519 (amending 28 U.S.C.A. §§ 1919, 2503, 2521).

[22]Morgan v. United States, 55 Fed. Cl. 706, 708 (2003).

[23]41 U.S.C.A. § 7104(b)(1) ("[I]n lieu of appealing the decision of a contracting officer under section 7103 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims[.]"); see Minesen Co. v. McHugh, 671 F.3d 1332, 1341–42 (Fed. Cir. 2012); Rick's Mushroom Serv., Inc. v. United States, 76 Fed. Cl. 250, 255–56 (2007), aff'd, 521 F.3d 1338 (Fed. Cir. 2008) (contractor may appeal CO's final decision directly to the CFC); Flying Horse v. United States, 49 Fed. Cl. 419, 430 (2001); Swan, "Government Contracts and the Federal Circuit: A History of Judicial Remedies Against the Sovereign," 8 J. Fed. Cir. Hist. Soc'y (2014) ("This election of forum allows contractors to seek a de novo trial on their claims in a court of law [i.e., the CFC] without first exhausting their administrative remedies and appealing to an agency board.").

[24]28 U.S.C.A. §§ 171(a), 172(a).

[25]28 U.S.C.A. § 171(b).

[26]See 28 U.S.C.A. § 178.

[27]U.S. Courts, Current Judicial Vacancies, http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies. Five of the vacancies arose in 2013 and were not filled during the Obama Administration. This is the first time in the court's history "that vacancies that arose prior to the eighth year of one presidency were filled during a different presidency." McMillion, Cong. Research Serv., CRS Insight IN10592, Current Vacancies on the U.S. Court of Federal Claims: Overview and Historical Context 2 (Oct. 13, 2016), available at https://fas.org/sgp/crs/misc/IN10592.pdf.

[28]Wilson, "Claims Court a Quiet Victim of Senate Nomination Deadlock," Law 360 (July 18, 2016); see also McMillion, Cong. Research Serv., CRS Insight IN10592, Current Vacancies on the U.S. Court of Federal Claims: Overview and Historical Context (Oct. 13, 2016), available at https://fas.org/sgp/crs/misc/IN10592.pdf.

[29]As of the publication of this Paper, the 11 Senior Judges on the CFC are Judges Bruggink, Damich, Firestone, Futey, Hodges, Horn, Lettow, Smith, Wiese, Williams, and Wolski. See CFC, Biographies—Judges, Senior Judges, and Special Masters, http://www.uscfc.uscourts.gov/judicial-officers; see also Prouty, "The Direction of Board Practice as the CDA Hits Middle Age: An Upbeat View," 48 Pub. Cont. L.J. 7, 8 n.6 (Fall 2018) ("My understanding is that most senior [CFC] Judges have full or nearly full dockets.").

[30]U.S. Courts, Current Judicial Vacancies, http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies.

[31]See Sisk, Litigation With the Federal Government 310 (2016). After the September 30, 2017 close of the Government's 2017 Fiscal Year, then-CFC Chief Judge Braden reported that "[t]he backlog of cases has been reduced by 25% from 1,501 in fiscal year 2016 to 1,124 in fiscal 2017. The significance of this productivity cannot be overstated—this was accomplished with only ten active judges and six senior judges (each senior with a 50% docket)." CFC, Message From the Chief Judge, http://www.uscfc.uscourts.gov/node/2959 (footnote omitted). This Paper's Statistics section, below, reviews the CFC's and board's recent case load.

[32]Compare 41 U.S.C.A. § 7105(a)(2), (b)(2)(B) with 28 U.S.C.A. §§ 44, 171. If a CFC judge does not have Government contracts experience prior to being appointed to the Court, because of the CFC's very substantial Government contracts docket, she or he will quickly gain such experience upon serving on the CFC.

[33]28 U.S.C.A. § 174(a).

[34]28 U.S.C.A. § 1491; see CFC, Frequently Asked Questions, Jurisdiction, http://www.uscfc.uscourts.gov/faqs; Sisk, Litigation With the Federal Government 237–40 (2016); U.S. Court of Federal Claims Bar Ass'n, Deskbook for Practitioners 7–10 (6th ed. 2017).

[35]See 28 U.S.C.A. § 794 (CFC judges may appoint as many law clerks as the Judicial Conference of the United States approves for district judges).

[36]Rules of the U.S. Court of Federal Claims (RCFC) 40.1, 40.2(a). A party must file a Notice of Directly Related Case(s) if it is aware of the existence of any directly related case(s). RCFC 40.2(a)(2). If a Notice of Directly Related Case(s) is filed with a complaint and the judge assigned the earliest-filed case determines that the subsequently filed case is not directly related to the earliest-filed case, the case is returned to the clerk for random reassignment. RCFC 40.2(a)(4)(A). See RCFC 40.2(b) (providing mechanism for possible reassignment of indirectly related cases).

[37]RCFC 40.2(a). For indirectly related cases, a party may, but is not required to, inform the court of such cases. See RCFC 40.2(b).

[38]41 U.S.C.A. § 7107(d); see also Sharp Elecs. Corp. v. McHugh, 707 F.3d 1367, 1373 n.2 (Fed. Cir. 2013); Morse Diesel Int'l v. United States, 69 Fed. Cl. 558, 562–63 (2006); Giuliani Contracting Co. v. United States, 21 Cl. Ct. 81, 82–83 (1990). A case may also be transferred by order of the assigned judge to another judge upon the agreement of both judges or if the chief judge of the CFC deems it necessary for efficient administration of justice. RCFC 40.1(b), (c); see Morse Diesel Int'l v. United States, 69 Fed. Cl. 558 (2006) (citing Joseph Morton Co. v. United States, 757 F.2d 1273 (Fed Cir. 1985)). The chief judge of the CFC has the authority to "reassign any case" if the chief judge finds "that the transfer is necessary for the efficient administration of justice." RCFC 40.1(c). Then-Chief Judge Smith exercised this authority when approximately 120 thrift cases were filed at the court. Plaintiffs in All Winstar-Related Cases at the Court v. United States, 35 Fed. Cl. 707 (1996). A case may also be transferred by order of the assigned judge, either on a party's motion or on the court's initiative, to another judge upon the agreement of both judges. RCFC 40.1(b).

[39]E.g., Nova Grp./Tutor–Saliba v. United States, 127 Fed. Cl. 591, 594–96 (2016).

[40]41 U.S.C.A. § 7105(g)(1); see Somers, "The Board of Contract Appeals: A Historical Perspective," 60 Am. U. L. Rev. 745 (2011) (discussing the historical development of the boards); Wheeler, "Let's Make the Choice of Forum Meaningful," 28 Pub. Cont. L.J. 655 (Summer 1999) (explaining that the CDA's legislative history makes clear Congress' intent for the boards to offer a faster, less expensive forum for resolving contract appeals).

[41]S. Rep. No. 95-1118, at 25 (1978), reprinted in 1978 U.S.C.C.A.N. 5235, 5259 (emphasis added) ("[B]oard proceedings. . .should be of sufficient positive value in time and monetary savings that contractors would elect to take their appeals to the agency boards."); Somers, "Comments on the Fortieth Anniversary of the Contract Disputes Act," 48 Pub. Cont. L.J. 1, 2 (Fall 2018) (discussing and quoting from the legislative history of the CDA regarding the boards); Minesen Co. v. McHugh, 671 F.3d 1332, 1341–42 (Fed. Cir. 2012) ("Agency boards are designed instead for contractors who find that their case does not warrant 'the maximum due process available under our system,' and instead opt for 'a swift, inexpensive method of resolving contract disputes.' S. Rep. No. 95–118, at 12."); see also Fiscal Year 2017 Annual Report of the United States Civilian Board of Contract Appeals 1 (CBCA "mission is to provide a more efficient, less expensive alternative to traditional federal litigation."), available at https://www.cbca.gov/files/2017-CBCA-Annual-Report.pdf [hereinafter CBCA FY 2017 Annual Report].

[42]See 41 U.S.C.A. § 7105.

[43]Shedd, "Disputes and Appeals: The Armed Services Board of Contract Appeals," 29 Law & Contemp. Probs. 39, 41 (1964) ("At present [1964] there are eleven boards of contract appeals in the various departments and agencies engaged in procurement of supplies and services by contract.").

[44]Shedd, "Disputes and Appeals: The Armed Services Board of Contract Appeals," 29 Law & Contemp. Probs. 39, 56 (1964); Triumph Donnelly Studios, LLC v. U.S. Postal Serv., PSBCA No. 6683, 17-1 BCA ¶ 36,833 & n.5 ("[T]he [PSBCA] first was established in October 1958 by an order from the Postmaster General. The Board was reestablished under the Contract Disputes Act by another order of the Postmaster General in December 1978.").

[45]Optimum Serv., Inc. v. Dep't of the Interior, CBCA No. 4968, 16-1 BCA ¶ 36,357; General Dynamics Ordnance & Tactical Sys., Inc., ASBCA No. 56870, 2010 WL 3119469 (June 1, 2010); Freedom NY, Inc., ASBCA 43965, 05-1 BCA ¶ 32934; Boeing Petroleum Servs., Inc. v. Watkins, 935 F.2d 1260, 1261 (Fed. Cir. 1991); United States v. General Dynamics Corp., 828 F.2d 1356, 1364 (9th Cir. 1987); Commc'ns Res. Grp., Inc., GSBCA No. 11038-C, 92-2 BCA ¶ 24,769; PX Eng'g Co., ASBCA No. 40714, 91-2 BCA ¶ 23,921; Dry Roof Corp., ASBCA No. 29061, 88-3 BCA ¶ 21,096; Four-Phase Sys., Inc., ASBCA No. 26794, 84-2 BCA ¶ 17,416; see Minesen Co. v. McHugh, 671 F.3d 1332, 1340, 1343 (Fed. Cir. 2012) (noting that "ASBCA is a neutral tribunal and not a representative of the agency" and referencing "impartial ASBCA"); Gava v. United States, 699 F.2d 1367, 1372 (Fed. Cir. 1983) (Nichols, J. concurring) (describing ASBCA as "an independent, impartial and well-qualified board"); ASBCA Charter ¶ 1, DFARS app. A, pt. 1 ("The Board shall decide the matters before it independently."); see also Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1202 (Fed. Cir. 1987) ("[A] proceeding in a board of contract appeals is not precisely a combat arena. It is a mode of dispute resolution resorted to by the election of the parties in a tribunal which is part of the government's own executive branch.").

[46]Donat Gerg Haustechnik, ASBCA 42001, 96-2 BCA ¶ 28,333; Minesen Co. v. McHugh, 671 F.3d 1332, 1340 & n.1 (Fed. Cir. 2012) ("the ASBCA is a neutral tribunal and not a representative of the agency"); Four-Phase Sys., Inc., ASBCA 26794, 84-2 BCA ¶ 17,416; PX Eng'g Co., ASBCA 40714, 91-2 BCA ¶ 23,921; Martin Marietta Corp., ASBCA 25828, 84-1 BCA ¶ 17,119; see Commc'ns Res. Grp., Inc., GSBCA 11038-C, 92-2 BCA ¶ 24,769; Time Contractors, JV, DOTCAB 1669, 86-2 BCA ¶ 19,003 (under the CDA, the "authority of the various contract appeals boards does not arise by delegation from the head of the agency").

[47]41 U.S.C.A. § 7105(a).

[48]41 U.S.C.A. § 7105(b); CBCA, Judges, https://www.cbca.gov/board/judges.html; see Schaengold & Brams, "A Guide to the Civilian Board of Contract Appeals," 07-8 Briefing Papers 1, at *3 (July 2007) (noting that "[i]f, as of the January 6, 2006 enactment of the FY 2006 Defense Authorization Act [which established the CBCA], all of the judges on the predecessor boards had moved to the new Civilian Board, there would have been 23 judges on the Civilian Board;" however, because of, e.g., retirements, only 18 of the judges from the predecessor boards joined the CBCA); CBCA, About the Board, https://www.cbca.gov/board/index.html.

[49]These judges are full-time but only work part-time on PSBCA matters because the PSBCA is housed within the Postal Service's Judicial Officer Department, which handles 16 types of cases involving the Postal Service of which the PSBCA is a major one. The Postal Service's Judicial Officer is also the Chair of the PSBCA. See U.S. Postal Service, Judicial Officer, http://about.usps.com/who/judicial/welcome.htm ("The Judicial Officer Department is a neutral, independent forum within the United States Postal Service comprised of the Judicial Officer, the Office of Administrative Law Judges, and the Postal Service Board of Contract Appeals."); PSBCA Rule (PSBCA R.) 1(b)(2); Triumph Donnelly Studios, LLC v. U.S. Postal Serv., PSBCA No. 6683, 17-1 BCA ¶ 36,833 & n.8 ("[T]he Board is part of the Postal Service's Judicial Officer Department, and the Board's Chairman is also the Postal Service's Judicial Officer."); see also, e.g., 39 C.F.R. § 952.26 ("Judicial Officer"). The PSBCA Rules are codified at 39 C.F.R. Part 955.

[50]41 U.S.C.A. § 7105(d). The CDA also applies to the TVA Board of Contract Appeals in certain limited circumstances. See 18 C.F.R. § 1308.3; 41 U.S.C.A. § 7102(a)(1) (CDA applies only if TVA contract includes disputes clause requiring resolution through agency administrative process); 41 U.S.C.A. § 7102(b)(2) (CDA does not apply to certain TVA contracts, including contracts for the sale of fertilizer and electric power and related to the conduct or operation of the electric power system). The Federal Circuit does not have appellate jurisdiction over TVA Board decisions, unlike the decisions of the other boards. See 41 U.S.C.A. § 7107(a)(2). The forum choice that is the subject of this Paper is unavailable for TVA contracts and, therefore, further discussion of the TVA Board is beyond the scope of this Paper.

[51]See American Bar Ass'n, Government Contract Law: The Deskbook for Procurement Professionals 459 (3rd ed. 2007) (ASBCA consists of 25 to 30 administrative judges); ASBCA, Administrative Judge Biographies, http://www.asbca.mil/Bios/biographies.html (listing the 23 current ASBCA judges). In 1993 and 2000, respectively, the NASA Board of Contract Appeals (NASABCA) and the Corps of Engineers Board of Contract Appeals (ENGBCA) merged into the ASBCA. See Prouty, "The Direction of Board Practice as the CDA Hits Middle Age: An Upbeat View," 48 Pub. Cont. L.J. 7, 9 n.19 (Fall 2018); 58 Fed. Reg. 44,462 (Aug. 23, 1993); ASBCA Docket Up 9% in FY2000 After Merger with ENGBCA, 42 GC ¶ 444; Developments in Brief, 42 GC ¶ 290; FY2000 ASBCA Report of Activities 3 (Oct. 19, 2000).

[52]These boards were the ASBCA; PSBCA; General Services Administration Board of Contract Appeals (GSBCA); Department of Transportation Contract Appeals Board (DOTCAB); Department of Agriculture Board of Contract Appeals (AGBCA); Department of Veterans Affairs Board of Contract Appeals (VABCA); Department of the Interior Board of Contract Appeals (IBCA); Department of Energy Board of Contract Appeals (EBCA); Department of Housing and Urban Development Board of Contract Appeals (HUDBCA); and Department of Labor Board of Contract Appeals (LBCA). See Schaengold & Brams, "A Guide to the Civilian Board of Contract Appeals," 07-8 Briefing Papers 1, at *2 (July 2007).

[53]41 U.S.C.A. § 7105(a), (b)(2), (b)(3). Although the ASBCA Charter ¶ 2, DFARS app. A, pt. 1, states that "[a]ppointment of the. . .Judges of the Board shall be made by the Under Secretary of Defense responsible for acquisition, the General Counsel of the Department of Defense, and the Assistant Secretaries of the Military Departments responsible for acquisition," in response to Lucia v. S.E.C., 138 S. Ct. 2044 (2018), the Secretary of Defense (in July 2018) reappointed all of the current ASBCA judges. Similarly, in light of the Lucia decision, although the CDA states that "[t]he Postal Service Board of Contract Appeals consists of judges appointed by the Postmaster General," 41 U.S.C.A. § 7105(d)(2); accord PSBCA R. 1(b)(2) (PSBCA judges are "appointed by the Postmaster General in accordance with the Contract Disputes Act of 1978"), the Postal Service Governors (who unlike the Postmaster General are appointed by the President, see U.S. Postal Service, Leadership, https://about.usps.com/who/leadership/) reappointed (in September 2018) the PSBCA judges. CBCA judges have also been appointed by their agency head. See 41 U.S.C.A. § 7105(b)(2) ("The Civilian Board consists of members appointed by the Administrator of General Services (in consultation with the Administrator for Federal Procurement Policy)[.]"); see also San Antonio Cattle Co., ASBCA 43714, 92-3 BCA ¶ 25,044; Gregory Timber Res., Inc., AGBCA 84-319-1, 87-3 BCA ¶ 20,086, aff'd, 855 F.2d 841 (Fed. Cir. 1988); 5 U.S.C.A. § 3105; GAO, The Armed Services Board of Contract Appeals Has Operated Independently 15–20 (GAO/NSIAD-85-102, Sept. 23, 1985).

[54]See, e.g., CBCA R. 1(d); ASBCA, Welcome, http://www.asbca.mil/; see also Shapiro, "Inside the Mind of a Board Judge," 25 BCA B.J. 7, 10 (2015). Interestingly, PSBCA R. 1(b)(2) states that "[i]n general, appeals are assigned to a panel of at least three members of the Board."

[55]See 41 U.S.C.A. § 7106; see, e.g., ASBCA R. 12 (Optional Small Claims (Expedited) and Accelerated Procedures).

[56]CBCA R. 1(d), 28; see, e.g., Bus. Mgmt. Research Assocs. v. Gen. Servs. Admin., CBCA No. 464, 07-1 BCA ¶ 33,486, at 1 (full board presiding).

[57]ASBCA R. Preface II(c); ASBCA Charter ¶ 3, DFARS app. A, pt. 1 ("The Chairman may refer an appeal of unusual difficulty, significant precedential importance, or serious dispute within the normal decision process for decision by a Senior Deciding Group established by the Chairman which shall have the authority to overturn prior Board precedent."); see, e.g., The Boeing Co., ASBCA No. 58030 et al., 18-1

BCA ¶ 37,123; AEC Corp., ASBCA No. 42920, 03-1 BCA ¶ 32,071, at 158,488 n.1; Gen. Elec. Co., ASBCA Nos. 36005, 38152, 39696, 91-2 BCA ¶ 23,958; Practicing Before the Federal Boards of Contract Appeals 12 (Am. Bar Ass'n 2012) ("At the ASBCA, if there is a dissent (one of the panel judges disagrees with the decision), the case will be decided by a five-judge panel."); Parsons Evergreene, LLC, ASBCA No. 61784, 18-1 BCA ¶ 37,135, at n.a1 ("Because the two judges who reviewed Judge Clarke's original opinion. . .came to a different conclusion than Judge Clarke on the payroll review issue, the remaining two judges from Judge Clarke's division were asked to consider it, consistent with Board practice and procedure."); Telephone Interview with Hon. Terrence Hartman, ASBCA Judge (Apr. 20, 2006).

[58]Triumph Donnelly Studios, LLC v. U.S. Postal Serv., PSBCA No. 6683, 17-1 BCA ¶ 36,833 & n.1 ("en banc" decision by all four PSBCA judges overruling in part earlier PSBCA three-judge panel decision).

[59]National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136 (2006).

[60]The CBCA promulgated new Rules of Procedure for CDA Cases on August 17, 2018. See Civilian Board of Contract Appeals; Rules of Procedure for Contract Act Cases (Final Rule), 83 Fed. Reg. 41,009 (Aug. 17, 2018); Proposed Rule, 83 Fed. Reg. 13,211 (Mar. 28, 2018). As discussed below, these rules may make discovery at the CBCA more predictable and standardized.

[61]Schooner & Castellano, "Eyes on the Prize, Head in the Sand: Filling the Due Process Vacuum in Federally Administered Contests," 24 Fed. Cir. B.J. 391, 409 n.108 (2015).

[62]Pub. L. No. 109-163, § 847, 119 Stat. at, 3391–95; 71 Fed. Reg. 65,825 (Nov. 9, 2006); 72 Fed. Reg. 36,794 (July 5, 2007) (codified at 48 C.F.R. pts. 6101–6105). See generally Schaengold & Brams, "A Guide to the Civilian Board of Contract Appeals," 07-8 Briefing Papers 1, at *1–3 (July 2007); "Dateline February 2006," 20 Nash & Cibinic Rep. (Feb. 2006). As ASBCA Vice Chairman Prouty has observed, "[t]he CBCA, established on January 6, 2007, merged eight boards of contract appeals encompassing the entire federal government except for NASA, the DoD and its constituent agencies that are embraced by the ASBCA, and the PSBCA and Tennessee Valley Authority Board of Contract Appeals." Prouty, "The Direction of Board Practice as the CDA Hits Middle Age: An Upbeat View," 48 Pub. Cont. L.J. 7, 9 n.19 (Fall 2018).

[63]These boards were the GSBCA, the DOTCAB, the AGBCA, the VABCA, the IBCA, the EBCA, the HUDBCA, and the LBCA. See Schaengold & Brams, "A Guide to the Civilian Board of Contract Appeals," 07-8 Briefing Papers 1, at *2 (July 2007). The FY 1996 NDAA eliminated the GSBCA's jurisdiction over bid protests—which constituted a substantial part of that board's docket—and freed that board's judges to focus more on contract claims litigation. See Schaengold & Brams, "A Guide to the Civilian Board of Contract Appeals," 07-8 Briefing Papers 1, at *8 (July 2007) (citing Clinger-Cohen Act of 1996, Pub. L. No. 104-106, § 5101, 110 Stat. 186, 680 (1996) (eliminating GSBCA's bid protest authority)).

[64]See Pub. L. No. 109-163, § 847(a)–(d), 119 Stat. at 3391–95; 71 Fed. Reg. 65,825; 72 Fed. Reg. 36,794; CBCA, About the Board, https://www.cbca.gov/board/index.html. See generally Schaengold & Brams, "A Guide to the Civilian Board of Contract Appeals," 07-8 Briefing Papers 1 (July 2007).

[65]41 U.S.C.A. § 7105.

[66]41 U.S.C.A. § 607(a) (2000).

[67]See, e.g., 48 C.F.R. § 633.270-2 (2007) (granting GSBCA authority to hear appeals for the Department of State); 48 C.F.R. § 733.270-1 (2007) (granting the ASBCA authority to hear CO appeals from CO final decisions for the Department of Health and Human Services and the Agency for International Development); 48 C.F.R. § 1033.201 (2007) (granting GSBCA authority to hear appeals for the Department of the Treasury); 48 C.F.R. § 1333.70-1 (2007) (granting GSBCA authority to hear appeals for the Department of Commerce); 48 C.F.R. § 3033.211 (2006) (granting DOTCAB authority to hear appeals for the Department of Homeland Security); 48 C.F.R. § 3433.203 (2007) (granting GSBCA authority to hear appeals for the Department of Education).

[68]See, e.g., San Antonio Cattle Co., ASBCA No. 43714, 92-3 BCA ¶ 25,044.

[69]See generally 41 U.S.C.A. §§ 7101–7109; see also 71 Fed. Reg. 65,825; 72 Fed. Reg. 36,794. The exception to this rule is that the Civilian Board does not hear disputes from NASA, the U.S. Postal Service, the Postal Regulatory Commission, and the TVA. See Optimum Serv., Inc. v. Dep't of the Interior, CBCA No. 4968, 16-1 BCA ¶ 36,357 (summarizing the CBCA's authority to hear cases and grant relief); Schaengold & Brams, "A Guide to the Civilian Board of Contract Appeals," 07-8 Briefing Papers 1 at*2, *16 (July 2007).

[70]See Pub. L. No. 109-163, § 847(a), 119 Stat. at 3392 (codified at 41 U.S.C.A. § 7105(b)(4)(B)); see also 71 Fed. Reg. 65,825; 72 Fed. Reg. 36,794; CBCA, About the Board, https://www.cbca.gov/board/index.html (listing other cases over which the CBCA has jurisdiction); CBCA FY 2017 Annual Report, at 2 (same). As the CBCA Chair observed in the CBCA's FY 2018 Annual Report, "under the Robert T. Stafford Disaster Relief and Emergency Act, [the CBCA] arbitrate[s] disputes between applicants and the Federal Emergency Management Agency (FEMA) regarding applications for public assistance grants to address damage caused by" certain hurricanes. "On October 5, 2018, the Stafford Act was amended, designating [the CBCA] as the arbitrator of choice to adjudicate disputes between applicants for public assistance grants and FEMA for any disaster that occurred after January 1, 2016. The amendment significantly expands the potential pool of applicants for disaster relief arbitration coming before [the CBCA]. What this means for [the CBCA] docket is yet to be determined." Fiscal Year 2018 Annual Report of the United States Civilian Board of Contract Appeals 1, available at https://www.cbca.gov/files/2018-CBCA-Annual-Report.pdf [hereinafter CBCA FY 2018 Annual Report].

[71]See Pub. L. No. 109-163, § 847(d)(2), 119 Stat. at

3392–93 (amending 41 U.S.C.A. § 607, now codified at 41 U.S.C.A. § 7105).

[72]48 C.F.R. § 333.203 (2006); 48 C.F.R. § 733.270-1 (2005).

[73]See 41 U.S.C.A. § 7105(e)(1)(A) (establishing jurisdiction of the ASBCA).

[74]41 U.S.C.A. § 7105(b)(2).

[75]CBCA, News, "CBCA Celebrates Ten Years" (Jan. 2017), https://www.cbca.gov/home/news-2017.html; CBCA, Judges, https://www.cbca.gov/board/judges.html; CBCA FY 2017 Annual Report, at 1.

[76]Somers, "The Board of Contract Appeals: A Historical Perspective," 60 Am. U. L.R. 745, 756 (2011); see CBCA FY 2017 Annual Report, at 1 ("The CBCA has proven to be an unqualified success."); Somers, "Comments on the Fortieth Anniversary of the Contract Disputes Act," 48 Pub. Cont. L.J. 1, 4 (Fall 2018).

[77]South Corp. v. United States, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (adopting as precedent for the Federal Circuit the decisions of the predecessor Court of Claims and Court of Customs and Patent Appeals); see, e.g., Coltec Indus. v. United States, 454 F.3d 1340, 1353 (Fed. Cir. 2006); New Era Constr. v. United States, 890 F.2d 1152 (Fed. Cir. 1989); Gevyn Constr. Corp. v. United States, 827 F.2d 752, 754 n.2 (Fed. Cir. 1987) (decisions of the Court of Claims are binding on the Federal Circuit); see also Bath Irons Works Corp. v. United States, 20 F.3d 1567, 1584 (Fed. Cir. 1994) (CFC and ASBCA decisions are not binding on Federal Circuit).

[78]Jewelers Vigilance Comm., Inc. v. Ullenberg Corp., 853 F.2d 888, 892 (Fed. Cir. 1988); In re Wella A.G., 858 F.2d 725, 728 (Fed. Cir. 1988); N. Helex Co. v. United States, 634 F.2d 557, 560 (Ct. Cl. 1980).

[79]See Dellew Corp. v. United States, 855 F.3d 1375, 1382 n.3 (Fed. Cir. 2017) (citing W. Coast Gen. Corp. v. Dalton, 39 F.3d 312, 315 (Fed. Cir. 1994) ("Court of Federal Claims decisions, while persuasive, do not set binding precedent for separate and distinct cases in that court."); Casa De Cambio Comdiv S.A. De C.V. v. United States, 291 F.3d 1356, 1364 n.1 (Fed Cir. 2002); M.K. Ferguson Co. v. United States, No. 12–57 C, 2016 WL 1551650, at 5 (Fed. Cl. Apr. 14, 2016) (same); Atkins N. Am., Inc. v. United States, 105 Fed. Cl. 491, 502 n.10 (2012) ("Prior decisions of the Court of Federal Claims, while persuasive, do not set binding precedent for separate and distinct cases in the Court of Federal Claims.") (quotations and citations omitted).

[80]W. Coast Gen. Corp. v. United States, 19 Cl. Ct. 98, 101 n. (1989); see also Balimoy Mfg. Co. of Venice, Inc. v. Caldera, 243 F.3d 561 (Table), 2000 WL 1459600, at *2 (Fed. Cir. 2000) (unpub.) (noting that although decisions by the boards are not binding precedent, they may provide persuasive authority given the board's experience in construing Government contracts); Vir v. United States, 125 Fed. Cl. 293, 302 (2016) ("The only precedents that are controlling on this court are those of the United States Supreme Court, the United States Court of Appeals for the Federal Circuit, and the United States Court of Claims."); Kerr-McGee Corp. v. United States, 77 Fed. Cl. 309, 317 n.10 (2007) (same).

[81]SWR, Inc., ASBCA No. 56708, 15-1 BCA ¶ 35,832 (The board is bound only "by decisions of the United States Court of Appeals for the Federal Circuit, the court that Congress has selected as the Board's appellate authority in the majority of CDA cases, and of the Circuit's predecessor court, the Court of Claims, which have been adopted by the Circuit as precedent."); M.A. Mortenson Co., ASBCA No. 53346, 05-2 BCA ¶ 33,014 & n.3 (2005); Roy McGinnis & Co., ASBCA 40004, 91-1 BCA ¶ 23,395; Dailing Roofing, Inc., ASBCA No. 34739, 89-1 BCA ¶ 21,311; Smith's, Inc. of Dothan, VABCA No. 2198, 85-2 BCA ¶ 18,133. As an ASBCA Judge has observed, "in addition to the raw numbers, the Boards' decisions have greater influence than they might otherwise because they are binding precedent. Decisions issued by CoFC, 'while persuasive, do not set binding precedent for separate and distinct cases in that court.' ASBCA decisions are binding precedent for future ASBCA appeals, just as CBCA decisions are binding precedent for future CBCA appeals. Thus, when a decision is issued by one of the Boards, except in the extremely rare case of it being overturned by the Federal Circuit, or the even rarer case of it being reversed by the Board's en banc equivalent, it firmly sets the law for disputes before that body in a way that CoFC decisions do not." Prouty, "The Direction of Board Practice as the CDA Hits Middle Age: An Upbeat View," 48 Pub. Cont. L.J. 7, 9 (Fall 2018) (footnotes omitted).

[82]See, e.g., CBCA R. 1(d) ("[P]anel and full Board decisions are precedential.") & 28(a) ("The full Board may consider a decision or order when necessary to maintain uniformity of Board decisions or if the matter is exceptionally important. Motions for full Board consideration are disfavored and are decided by a majority of the Board."); SWR, Inc., ASBCA No. 56708, 15-1 BCA ¶ 35,832 ("[A] prior decision by a panel of this Board is deemed 'binding' precedent in another ASBCA appeal unless the decision has been reversed or otherwise modified by the Board's Senior Deciding Group or our appellate authority."); Triumph Donnelly Studios, LLC v. U.S. Postal Serv., PSBCA No. 6683, 17-1 BCA ¶ 36,833 & n.1 ("en banc" decision by all four PSBCA judges overruling in part earlier PSBCA three-judge panel decision that had found that the PSBCA's jurisdiction was not limited to the four types of contracts included in the CDA and now deciding that PSBCA lacks jurisdiction over a contract dispute between the Postal Service and a customer related to mail delivery because it is outside the CDA's scope); PCA Health Plans of Texas, Inc., ASBCA No. 48711, 89-2 BCA ¶ 29,900, at 148,014, aff'd, 191 F.3d 1353 (Fed. Cir. 1999); Commc'ns Res. Grp., Inc., GSBCA No. 11038-C, 92-2 BCA ¶ 24,769 (Borwick, J., concurring); Gen. Elec. Automated Sys. Div., ASBCA No. 36214, 89-1 BCA ¶ 21,195; see also 41 U.S.C.A. § 7106(b)(5) (administrative determinations and final decisions made under small claims procedures have no precedential value).

[83]Bus. Mgmt. Research Assocs. v. Gen. Servs. Admin., CBCA No. 464, 07-1 BCA ¶ 33,486 (full board).

[84]Hof Constr., Inc. v. Gen. Servs. Admin., CBCA No. 6306, 2018 WL 6604916, slip op. at 6–8 (Dec. 12, 2018) (full board); see CBCA, About the Board, https://www.cbc

a.gov/board/index.html ("The decisions of the predecessor boards continue as binding precedent at the CBCA.").

[85]Coltec Indus. v. United States, 454 F.3d 1340, 1353 (Fed. Cir. 2006) ("There can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our court [Federal Circuit], and our predecessor court, the Court of Claims."). While one CFC opinion views the decisions of the Temporary Emergency Court of Appeals (TECA), whose jurisdiction was transferred to the Federal Circuit in 1993, as binding precedent on the CFC, this appears to be the minority view. See Yankee Atomic Elec. Co. v. United States, 54 Fed. Cl. 306, 310 n.5 (1992). The prevailing view appears to be that TECA decisions are only binding precedent for the type of TECA cases over which the CFC and Federal Circuit have inherited jurisdiction. See, e.g., Jade Trading v. United States, 65 Fed. Cl. 487, 496 (2005) (stating that TECA rulings on evidentiary privilege were not binding on the Federal Circuit); Marriot Int'l Resorts, L.P. v. United States, 61 Fed. Cl. 411, 419 (2004) ("TECA precedent was adopted only for the limited purposes of TECA cases."), aff'd, 437 F.3d 1302, 1306 n.4 (Fed. Cir. 2006) ("The Government argued at the trial court that decisions of [TECA] are binding on this court. The trial court rejected this argument relying on Texas Am. Oil Corp. v. Dep't of Energy, 44 F.3d 1557, 1561 (Fed. Cir. 1995) (en banc) for the premise that TECA case law only applies to those cases transferred to the Federal Circuit as a successor to TECA. The government does not raise this issue on appeal.").

[86]See, e.g., CBCA R. 1(d); PSBCA R. 1(b)(2); Hof Constr., Inc. v. Gen. Servs. Admin., CBCA No. 6306, 2018 WL 6604916 (Dec. 12, 2018) ("[P]anel and full Board decisions are precedential.") (quoting CBCA R. 1(d) (full board)); SWR, Inc., ASBCA No. 56708, 15-1 BCA ¶ 35,832 ("[A] prior decision by a panel of this Board is deemed 'binding' precedent in another ASBCA appeal unless the decision has been reversed or otherwise modified by the Board's Senior Deciding Group or our appellate authority."); Commc'ns Res. Grp., Inc., GSBCA No. 11038-C, 92-2 BCA ¶ 24,769; Gen. Elec. Automated Sys. Div., ASBCA No. 36214, 89-1 BCA ¶ 21,195. A board is not obligated to follow the decisions of other boards or the CFC. See also Shapiro & Shapiro, "Brief Perspectives," 22 Clause 29, 32 (2012) ("My view of [the hierarchy of case sources in Board practice] in descending order of priority, assuming no Supreme Court precedent: Federal Circuit/Court of Claims; the Board you are before; the other Boards; Court of Federal Claims/Claims Court; other sources such as district courts.").

[87]See, e.g., Hof Constr., Inc. v. Gen. Servs. Admin., CBCA No. 6306, 2018 WL 6604916, slip op. at 5–6 (Dec. 12, 2018) (full board); CH2M-WG Idaho, LLC v. Dep't of Energy, CBCA No. 3876, 17-1 BCA ¶ 36,949; Ikhana, LLC, ASBCA No. 60492, 17-1 BCA ¶ 36,871; L-3 Commc'n Integrated Sys., L.P., ASBCA No. 60713, 17-1 BCA ¶ 36,865; A-Son's Constr., Inc. v. Dep't of Hous. & Urban Dev., CBCA No. 3491, 15-1 BCA ¶ 36,089; Roy McGinnis & Co., ASBCA No. 40004, 91-1 BCA ¶ 23,395.

[88]W. Coast Gen. Corp. v. Dalton, 39 F.3d 312, 315 (Fed. Cir. 1994) ("[A] Court of Federal Claims decision directed to one claim brought by a party does not create binding precedent for a separate claim—even a separate claim from the same party."); see also Dellew Corp. v. United States, 855 F.3d 1375, 1382 (Fed. Cir. 2017) ("We reaffirm a well-known principle that the Court of Federal Claims failed to follow here: the Court of Federal Claims must follow relevant decisions of the Supreme Court and the Federal Circuit, not the other way around.").

[89]See, e.g., Sisk, Litigation With the Federal Government 237 (2016) ("About one-third of the COFC's cases involve contract claims against the government. Another one-quarter or so of its cases are tax refund suits against the government. Yet another major portion of the COFC's docket consists of cases in which civilian employees or members of the military sue the government over pay. Also large in number, as well as doctrinal importance, are cases involving claims that the government has taken the plaintiff's property without paying the 'just compensation' required by the Fifth Amendment of the Constitution. Smaller in number, but of historical and political importance, are claims brought against the government by Native Americans and disputes referred to the COFC by Congress. The COFC also hears claims against the United States for patent infringement and copyright infringement and for rights in protected plant varieties.") (quoting Seamon, "The Provenance of the Federal Courts Improvement Act of 1982," 71 Geo. Wash. L. Rev. 543, 548–49 (2003)). Vaccine cases, which are discussed below, are excluded from these percentages because the CFC has eight special masters who primarily deal with these cases. See CFC, Vaccine Claims/Office of Special Masters, http://www.uscfc.uscourts.gov/vaccine-programoffice-special-masters; CFC, Special Masters-Biographies, http://www.uscfc.uscourts.gov/special-masters-biographies. However, CFC judges do spend considerable time on these cases and they reduce the time they have available for other matters, including contract cases.

[90]See Judge Thomas F. Hogan, Judicial Business of the United States Courts, tbl. G2-A (2011) [hereinafter Hogan 2011]; Judge Thomas F. Hogan, Judicial Business of the United States Courts, tbl. G2-A (2012) [hereinafter Hogan 2012]; Judge John D. Bates, Judicial Business of the United States Courts, tbl. G2-A (2013) [hereinafter Bates 2013]; Judge John D. Bates, Judicial Business of the United States Courts, tbl. G2-A (2014) [hereinafter Bates 2014]; James C. Duff, Judicial Business of the United States Courts, tbl. G2-A (2015) [hereinafter Duff 2015]; James C. Duff, Judicial Business of the United States Courts, tbl. G2-A (2016) [hereinafter Duff 2016]; James C. Duff, Judicial Business of the United States Courts, tbl. G2-A (2017) [hereinafter Duff 2017]. These reports are available at http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts. Similar compilations of statistics dating back to the CFC's "Statistical Report for FY 2012" may be found on the CFC website under "Reports/Statistics" at http://www.uscfc.uscourts.gov/reports-statistics.

[91]See Hogan 2011, at tbl. G2-A; Hogan 2012, at tbl. G2-A; Bates 2013, at tbl. G2-A; Bates 2014, at tbl. G2-A; Duff 2015, at tbl. G2-A; Duff 2016, at tbl. G2-A; Duff 2017, at tbl. G2-A.

[92]See Hogan 2011, at tbl. G2-A; Hogan 2012, at tbl. G2-A; Bates 2013, at tbl. G2-A; Bates 2014, at tbl. G2-A; Duff 2015, at tbl. G2-A; Duff 2016, at tbl. G2-A; Duff 2017, at tbl. G2-A.

[93]See Hogan 2011, at tbl. G2-A; Hogan 2012, at tbl. G2-A; Bates 2013, at tbl. G2-A; Bates 2014, at tbl. G2-A; Duff 2015, at tbl. G2-A; Duff 2016, at tbl. G2-A; Duff 2017, at tbl. G2-A.

[94]See Hogan 2011, at tbl. G2-A; Hogan 2012, at tbl. G2-A; Bates 2013, at tbl. G2-A; Bates 2014, at tbl. G2-A; Duff 2015, at tbl. G2-A; Duff 2016, at tbl. G2-A; Duff 2017, at tbl. G2-A.

[95]See, e.g., Duff 2015, at tbl. G2-A; Duff 2016, at tbl. G2-A; Duff 2017, at tbl. G2-A. The National Childhood Vaccine Injury Act requires that all proceedings for compensation over $1,000 under the National Vaccine Injury Compensation Program for a vaccine-related injury or death be brought in the CFC as a petition against the U.S. Government (instead of against the vaccine administrator or manufacturer). See 42 U.S.C.A. § 300aa-11(a).

[96]See Duff 2016, at tbl. G2-A; Duff 2017, at tbl. G2-A.

[97]CFC, Vaccine Claims/Office of Special Masters, http://www.uscfc.uscourts.gov/vaccine-programoffice-special-masters; CFC, Special Masters-Biographies, http://www.uscfc.uscourts.gov/special-masters-biographies.

[98]There were 5,347 vaccine cases pending at the end of FY 2006 compared to 1,466 at the end of FY 2016. Duff, Judicial Business of the United States Courts, tbl. G2-A (2006); G2-A; Duff 2016, at tbl. G2-A. The number of pending vaccine cases (1064) was at the lowest in the past decade at the end of FY 2013 and has risen in the subsequent FYs (1101 pending at the end of FY 2014, 1230 pending at the end of FY 2015, and 1466 pending at the end of FY 2016). Bates 2013, at tbl. G2-A; Bates 2014, at tbl. G2-A; Duff 2015, at tbl. G2-A; Duff 2016, at tbl. G2-A

[99]See Hogan 2011, at tbl. G2-B; Hogan 2012, at tbl. G2-B; Bates 2013, at tbl. G2-B; Bates 2014, at tbl. G2-B; Duff 2015, at tbl. G2-B; Duff 2016, at tbl. G2-B; Duff 2017, at tbl. G2-B.

[100]See Hogan 2011, at tbl. G2-B; Hogan 2012, at tbl. G2-B; Bates 2013, at tbl. G2-B; Bates 2014, at tbl. G2-B; Duff 2015, at tbl. G2-B; Duff 2016, at tbl. G2-B; Duff 2017, at tbl. G2-B.

[101]Duff 2017, at tbl. G2-B.

[102]Historically, most of the predecessor civilian boards did not publish statistics concerning their dockets. The most comprehensive board statistics historically have been provided by the ASBCA.

[103]Report Of Transactions and Proceedings of the Armed Services Board Of Contract Appeals for the Fiscal Year Ending 30 September 2012, at 2 (Oct. 26, 2012) [hereinafter ASBCA FY 2012 Report]; Report of Transactions and Proceedings of the Armed Services Board Of Contract Appeals for the Fiscal Year Ending 30 September 2013, at 2 (Oct. 22, 2013) [hereinafter ASBCA FY 2013 Report]; Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 2014, at 2 (Oct. 21, 2014) [hereinafter ASBCA FY 2014 Report]; Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 2015, at 2 (Oct. 20, 2015) [hereinafter ASBCA FY 2015 Report]; Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 2016, at 2 (Oct. 13, 2016) [hereinafter ASBCA FY 2016 Report]; Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 2017, at 2 (Oct. 10, 2017) [hereinafter ASBCA FY 2017 Report]; Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 2018, at 2 (Oct 10, 2018) [hereinafter ASBCA FY 2018 Report]. The ASBCA Annual Reports are available at http://www.asbca.mil/Reports/reports.html.

[104]ASBCA FY 2012 Report, at 2; ASBCA FY 2013 Report, at 3; ASBCA FY 2014 Report, at 3; ASBCA FY 2015 Report, at 3; ASBCA FY 2016 Report, at 3; ASBCA FY 2017 Report, at 3; ASBCA FY 2018 Report, at 3.

[105]ASBCA FY 2012 Report, at 1; ASBCA FY 2013 Report, at 1; ASBCA FY 2014 Report, at 1; ASBCA FY 2015 Report, at 1; ASBCA FY 2016 Report, at 1; ASBCA FY 2017 Report, at 1; ASBCA FY 2018 Report, at 1.

[106]ASBCA FY 2012 Report, at 3; ASBCA FY 2013 Report, at 3; ASBCA FY 2014 Report, at 3; ASBCA FY 2015 Report, at 3; ASBCA FY 2016 Report, at 3; ASBCA FY 2017 Report, at 3; ASBCA FY 2018 Report, at 3.

[107]ASBCA FY 2018 Report, at 3.

[108]The CBCA changed how it reported certain data in FY 2017. As a result, for FYs 2017 and 2018, "appeals" in the text above also include the rows in the CBCA's "Cases Docketed" Table for requests for reconsideration ("Appeal Recon") of a "[CDA] appeal of a contracting officer's final decision (COFD)" and "Petition[s]" "Requesting an Order for a COFD." See CBCA FY 2017 Annual Report, at 9; CBCA FY 2018 Annual Report, at 8. Some of these statistics are approximate because it is not always possible to isolate the CDA cases in some of the statistical categories (e.g., EAJA and Other).

[109]CBCA FY 2011 Annual Report, at 3 (Oct. 28, 2011); CBCA FY 2012 Annual Report, at 3 (Oct. 31, 2012); CBCA FY 2013 Annual Report, at 3 (Oct. 31, 2013); CBCA FY 2014 Annual Report, at 3 (Oct. 30, 2014); CBCA FY 2015 Annual Report, at 3 (Oct. 30, 2105); CBCA FY 2016 Annual Report, at 3 (Oct. 31, 2016); CBCA FY 2017 Annual Report, at 9; CBCA FY 2018 Annual Report, at 8. Because the CBCA in FY 2017 started to record its statistics in a different manner than in its previous fiscal years, certain statistics that were available through FY 2016 are not available thereafter.

[110]CBCA FY 2011 Annual Report, at 3; CBCA FY 2012 Annual Report, at 3; CBCA FY 2013 Annual Report, at 3; CBCA FY 2014 Annual Report, at 3; CBCA FY 2015 Annual Report, at 3; CBCA FY 2016 Annual Report, at 3. Because the CBCA in FY 2017 started to record its statistics in a different manner than in its previous fiscal years, certain statistics that were available through FY 2016 are not avail-

able thereafter.

[111]CBCA FY 2011 Annual Report, at 3; CBCA FY 2012 Annual Report, at 3; CBCA FY 2013 Annual Report, at 3; CBCA FY 2014 Annual Report, at 3; CBCA FY 2015 Annual Report, at 3; CBCA Annual Report 2016, at 3. Because the CBCA in FY 2017 started to record its statistics in a different manner than in its previous fiscal years, certain statistics that were available through FY 2016 are not available thereafter.

[112]CBCA FY 2011 Annual Report, at 3; CBCA FY 2012 Annual Report, at 3; CBCA FY 2013 Annual Report, at 3; CBCA FY 2014 Annual Report, at 3; CBCA FY 2015 Annual Report, at 3; CBCA FY 2016 Annual Report, at 3; CBCA FY 2017 Annual Report, at 9; CBCA FY 2018 Annual Report, at 8. Because the CBCA in FY 2017 started to record its statistics in a different manner than in its previous fiscal years, certain statistics that were available through FY 2016 are not available thereafter.

[113]See 41 U.S.C.A. § 7104; England v. Sherman R. Smoot Corp., 388 F.3d 844, 852 (Fed. Cir. 2004); United States v. Kasler Elec. Co., 123 F.3d 341, 346 (6th Cir. 1997) ("The CDA is intended to keep government contract disputes out of district courts; it limits review of the merits of government contract disputes to certain forums, both to limit the waiver of sovereign immunity and to submit government contract issues to forums that have specialized knowledge and experience.") (citation omitted).

[114]41 U.S.C.A. §§ 7103(e), 7104(b)(4); VA Venture Pueblo, LLC v. Principi, 119 F. App'x 274, 276 (Fed. Cir. 2014) ("[O]nce an action is brought following a contracting officer's decision, the parties start in court or before the board with a clean slate."); Wilner v. United States, 24 F.3d 1397, 1401–02 (Fed. Cir. 1994) (en banc) ("[A] contractor is not entitled to the benefit of any presumption arising from the contracting officer's [final] decision. De novo review precludes reliance upon the presumed correctness of the [CO's final] decision."); Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1562 (Fed. Cir. 1990); Assurance Co. v. United States, 813 F.2d 1202, 1206 (Fed. Cir. 1987); Magwood Servs., Inc., ASBCA No. 59293, 14-1 BCA ¶ 35,747; Shaw AREVA MOX Servs., LLC, CBCA No. 2407, 12-2 BCA ¶ 35,157; see England v. Sherman R. Smoot Corp., 388 F.3d 844, 853–55 (Fed. Cir. 2004) (discussing Wilner v. United States, 24 F.3d 1397, 1398–01 (Fed. Cir. 1994) (en banc); findings of fact in CO's Final Decision do not constitute "a strong presumption or an evidentiary admission"). Significantly, "[a] major purpose of the [Contract] Disputes Act was to induce resolution of contract disputes with the government by negotiation rather than litigation." Minesen Co. v. McHugh, 671 F.3d 1332, 1338 (Fed. Cir. 2012) (quoting Pathman Constr. Co. v. United States, 817 F.2d 1573, 1578 (Fed. Cir. 1987) (alterations in original)). This Paper is relevant to such negotiations because, if they fail, the contractor will need to make a forum choice and should be prepared to do so before the 90 days to appeal to a board expire.

[115]England v. Swanson Grp., Inc., 353 F.3d 1375, 1379 (Fed. Cir. 2004); Capelouto v. United States, 99 Fed. Cl. 682, 692 (2011).

[116]41 U.S.C.A. §§ 7103, 7014; see Lee's Ford Dock, Inc. v. Sec'y of the Army, 865 F.3d 1361, 1366 (Fed. Cir. 2017); England v. Sherman R. Smoot Corp., 388 F.3d 844, 852 (Fed. Cir. 2004); Am. Bus. Corp. v. Dep't of Labor, CBCA No. 637, 07-1 BCA ¶ 33,524; All Star Metals, LLC v. Dep't of Transp., CBCA No. 91, 07-1 BCA ¶ 33,562.

[117]See 41 U.S.C.A. § 7104; Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1562 (Fed. Cir. 1990); Optimus Tech., Inc., CBCA No. 2952, 16-1 BCA ¶ 36,543 ("[I]t is the contractor, not the agency, which statute endows with the ability to select a forum to dispute a Government claim. 41 U.S.C.A. § 7104. The agency cannot elect this forum to resolve a Government claim."); Key Fed. Fin. v. Gen. Servs. Admin., CBCA Nos. 411, 412, 07-1 BCA ¶ 33,555, at 15 (citing former 41 U.S.C.A. § 606, now 41 U.S.C.A. § 7104); Sisk, Litigation With the Federal Government 310 (2016) ("Because the contracting officer's decision is that of the Government, the Government is not permitted to appeal to either the Board or the [CFC].").

[118]41 U.S.C.A. § 7101(7).

[119]Winter v. FloorPro, Inc., 570 F.3d 1367, 1372 (Fed. Cir. 2009).

[120]Key Fed. Fin., CBCA Nos. 411, 412, 07-1 BCA ¶ 33,555.

[121]Binghamton Simulator Co., ASBCA No. 59117, 14-1 BCA ¶ 35,715 (citing United States v. Johnson Controls, Inc., 713 F.2d 1541, 1550 (Fed. Cir. 1983)).

[122]B3 Solutions LLC, ASBCA No. 60654, 16-1 BCA ¶ 36,578 (citing United States v. Johnson Controls, Inc., 713 F.2d 1541, 1551–56 (Fed Cir. 1983)). However, "[i]t is well established that subcontractors may pursue claims against the Government on sponsorship of the prime contractor. The Government's liability can arise under its contract with the prime contractor, the terms of which have been passed onto subcontractors, where the subcontractor's performance is impacted by the actions or inactions of Government agents." TAS Grp., Inc. v. Dep't of Justice, CBCA No. 52, 07-2 BCA ¶ 33,630, at 3 (citations omitted); see FAR 44.203(c); Aurora, LLC v. Dep't of State, CBCA No. 2872, 16-1 BCA ¶ 36,198; Aurora, LLC v. Dep't of State, CBCA No. 2872, 16-1 BCA ¶ 36,198.

[123]FloorPro, Inc. v. U.S., 680 F.3d 1377, 1380 (Fed. Cir. 2012) ("We observed, however, that the grant of jurisdiction to the Court of Federal Claims under the Tucker Act, 28 U.S.C.A. § 1491(a)(1), 'is broader' than the jurisdiction of the ASBCA under the CDA, and can potentially extend to an intended third-party beneficiary of a government contract.") (citing Winter v. FloorPro, Inc., 570 F.3d 1367, 1372 (Fed. Cir. 2009)); Nelson Constr. Co. v. United States, 79 Fed. Cl. 81, 95 n.15 (2007) (citing D&H Distrib. Co. v. United States, 102 F.3d 542, 547 (Fed. Cir. 1996) ("A particular type of third-party beneficiary, a creditor beneficiary, may be accorded full rights under the original contract in this court.")); B3 Solutions LLC, ASBCA No. 60654, 16-1 BCA ¶ 36,578 ("Thus, we need not address whether B3 Solutions is a third-party beneficiary of the contract because, even if B3 Solutions' assertion is correct, it would not be allowed to bring a direct claim against the government.").

[124]See Agility Logistics Servs. Co. KSC v. Mattis, 887 F.3d 1143, 1148–49 (Fed. Cir. 2018) (holding that a contract

with the Coalition Provisional Authority was not covered by the CDA because it was not an executive agency).

[125]41 U.S.C.A. § 7102(a).

[126]See, e.g., Pasteur v. United States, 814 F.2d 624, 627–28 (Fed. Cir. 1987) (finding that the CDA did not apply to a scientific research related non-disclosure agreement); Newport News Shipbldg. & Dry Dock v. United States, 7 Cl. Ct. 549, 553–54 (1985) (holding that "the Contract Disputes Act was not intended to apply to every type of contract dispute"); Triumph Donnelly Studios LLC v. U.S. Postal Serv., PSBCA No. 6683, 17-1 BCA ¶ 36,833 (PSBCA lacked jurisdiction over a contract for Postal Service to provide services to a private customer because the PSBCA's jurisdiction is limited to the four types of cases enumerated in the CDA at 41 U.S.C.A. § 7102(a)).

[127]LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1551 (Fed. Cir. 1995); Coastal Corp. v. United States, 713 F.2d 728, 730 (Fed. Cir. 1983); United States v. John C. Grimberg Co., 702 F.2d 1362, 1368 (Fed. Cir. 1983); Clean Giant, Inc. v. United States, 19 Cl. Ct. 390, 392–93 (1990); Ammon Circuits Research, ASBCA No. 50885, 97-2 BCA ¶ 29,318, at 3-4; RC 27th Ave. Corp., ASBCA No. 49176, 97-1 BCA ¶ 28,658, at 4.

[128]See, e.g., Ralden P'ship v. United States, 891 F.2d 1575, 1576 (Fed. Cir. 1989); Alvin, Ltd. v. U. S. Postal Serv., 816 F.2d 1562, 1563–64 (Fed. Cir. 1987); Forman v. United States, 767 F.2d 875, 879 (Fed. Cir. 1985); Am. Nat'l Bank of Chi., GSBCA No. 7457, 85-1 BCA ¶ 17,811.

[129]Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1561–62 (Fed. Cir. 1990); Sierra Pac. Indus., AGBCA No. 79-200, 80-1 BCA ¶ 14,383.

[130]See Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1567–68 (Fed. Cir. 1990); Gregory Timber Res., Inc. v. United States, 855 F.2d 841, 843 (Fed. Cir. 1988).

[131]See Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1567–68 (Fed. Cir. 1990); Gregory Timber Res., Inc. v. United States, 855 F.2d 841, 843 (Fed. Cir. 1988).

[132]Overall Roofing & Constr. Inc. v. United States, 929 F.2d 687, 688 (Fed. Cir. 1991), superseded by Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992).

[133]Malone v. United States, 849 F.2d 1441, 1443–44 (Fed. Cir. 1988).

[134]Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907(b)(1), 106 Stat. 4506, 4519 (1992) (amending 28 U.S.C.A. § 1491(a)(2)).

[135]Malone v. United States, 849 F.2d 1441, 1444 (Fed. Cir. 1988); Johnson & Gordon Sec., Inc. v. Gen. Servs. Admin., 857 F.2d 1435, 1437–38 (Fed. Cir. 1988); Gen. Elec. Automated Sys. Div., ASBCA No. 36214, 89-1 BCA ¶ 21,195; Michael M. Grimberg, DOTCAB No. 1543, 87-1 BCA ¶ 19,573; Smith's Inc. of Dothan, VABCA No. 2198, 85-2 BCA ¶ 18,133. But see Seneca Timber Co., AGBCA No. 83-228-1, 86-1 BCA ¶ 19,573.

[136]41 U.S.C.A. § 7105(e)(2).

[137]Pub. L. No. 102-572, § 907(a)(1), 106 Stat. at 4518 (adding 41 U.S.C.A. § 605(c)(6), now 41 U.S.C.A. § 7103(b)(3)).

[138]41 U.S.C.A. § 7103(b)(3). Cf. Eurostyle Inc., ASBCA No. 45934, 94-1 BCA ¶ 26,458 ("[C]omplete absence of any certification is not a mere defect which may be corrected.").

[139]Pub. L. No. 102-572, § 907(a)(1), 106 Stat. at 4518 (adding 41 U.S.C.A. § 605(c)(7), now 41 U.S.C.A. § 7103(b)(2)).

[140]41 U.S.C.A. § 7103(b)(3).

[141]41 U.S.C.A. § 7109(a)(2).

[142]Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, § 2354, 108 Stat. 3243, 3323 (1994) (adding 41 U.S.C.A. § 609(f), now 41 U.S.C.A. § 7107(f)); see, e.g., United States v. Savannah River Nuclear Solutions, LLC, No. 1:16-CV-00825-JMC, 2016 WL 7104823, at *18 (D.S.C. Dec. 6, 2016) (referring Government contracts matter to the CBCA for an advisory opinion); see also United States v. Gen. Dynamics Corp., 644 F. Supp. 1497, 1505 (C.D. Cal. 1986) (in pre-FASA decision, district court acknowledged that "the interpretations of the hierophants who man the ASBCA do form an important part of the whole scheme of regulation of the defense industry"), rev'd on other grounds, 828 F.2d 1356 (9th Cir. 1987).

[143]41 U.S.C.A. § 7107(f).

[144]United States ex rel. Compton v. Midwest Specialties, Inc., 134 F.3d 372 (6th Cir. 1998) (noting that district court denied request to seek advisory opinion from ASBCA); United States v. Midwest Transp., Inc., No. CIV. 08-328-GPM, 2008 WL 4981076, at *4 (S.D. Ill. Nov. 24, 2008) (denying request to obtain advisory opinion from PSBCA); United States v. United Techs., Corp., No. 5:92-CV-375(EBB), 1996 WL 653620, at *4 (D. Conn. Oct. 11, 1996) (denying request to obtain advisory opinion from ASBCA).

[145]Normandy Apartments, Ltd. v. United States, 633 F. App'x 933, 937–38 (Fed. Cir. 2015); Forman v. United States, 329 F.3d 837, 841–42 (Fed. Cir. 2003); Hart v. United States, 910 F.2d 815, 817 (Fed. Cir. 1990).

[146]28 U.S.C.A. § 1491(a)(1); see Slattery v. United States, 635 F.3d 1298, 1321 (Fed. Cir. 2011) (en banc); Atlas Corp. v. U.S., 895 F.2d 745 (Fed. Cir. 1990).

[147]See Doe v. United States, 372 F.3d 1308, 1312 (Fed. Cir. 2004); Galloway Farms, Inc. v. United States, 834 F.2d 998, 999–1000 (Fed. Cir. 1987) (citing United States v. Hohri, 482 U.S. 64, 66–67 n.1 (1987)).

[148]Doe v. United States, 372 F.3d 1308, 1312 (Fed. Cir. 2004).

[149]28 U.S.C.A. § 1346(a)(2).

[150]See 28 U.S.C.A. § 1295(a)(2).

[151]Doe v. United States, 372 F.3d 1308, 1313 (Fed. Cir. 2004) (citing United States v. Sherwood, 312 U.S. 584, 589–91 (1941)).

[152]Dourandish v. U.S., 629 F. App'x 966, 968 (Fed. Cir. 2015) (citing Ransom v. United States, 900 F.2d 242, 244 (Fed. Cir. 1990)).

[153]United States v. Navajo Nation, 556 U.S. 287, 290

(2009); Holmes v. United States, 657 F.3d 1303, 1309 (Fed. Cir. 2011); Carr v. United States, 864 F.2d 144, 146 (Fed. Cir. 1989) (citing United States v. Connolly, 716 F.2d 882 (Fed. Cir. 1983)).

[154]United States v. Navajo Nation, 556 U.S. 287, 290 (2009); Holmes v. United States, 657 F.3d 1303, 1309 (Fed. Cir. 2011); Yancey v. United States, 915 F.2d 1534, 1537 (Fed. Cir. 1990) (citing United States v. Mitchell, 445 U.S. 535 (1983)).

[155]28 U.S.C.A. § 2501.

[156]FloorPro, Inc. v. United States, 680 F.3d 1377, 1381 (Fed. Cir. 2012) (quoting Goodrich v. United States, 434 F.3d 1329, 1333 (Fed. Cir. 2006) (internal quotes omitted)).

[157]FloorPro, Inc. v. United States, 680 F.3d 1377, 1381 (Fed. Cir. 2012); Holmes v. United States, 657 F.3d 1303, 1317 (Fed. Cir. 2011); see also Kinsey v. United States, 852 F.2d 556, 557 (Fed. Cir. 1988) ("[W]here a claim is based on a contractual obligation of the Government to pay money, the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of the contract.") (quoting Oceanic S.S. Co. v. United States, 165 Ct. Cl. 217, 225 (1964)).

[158]Holmes v. United States, 657 F.3d 1303, 1317 (Fed. Cir. 2011); Jones v. United States, 801 F.2d 1334, 1335 (Fed Cir. 1986).

[159]Holmes v. United States, 657 F.3d 1303, 1317 (Fed. Cir. 2011) (quoting Young v. United States, 529 F.3d 1380, 1384 (Fed. Cir. 2008)); see also Banks v. United States, 741 F.3d 1268, 1280 (Fed. Cir. 2014).

[160]United States v. Winstar Corp., 518 U.S. 839 (1996).

[161]Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989).

[162]Some of the "Winstar" cases have generated nine or more opinions before finally being resolved. See, e.g., Bluebonnet Sav. Bank v. United States (Bluebonnet IX), 466 F.3d 1349, 1353–58 (Fed. Cir. 2006) (summarizing prior history including: "Bluebonnet I" holding the enactment of FIRREA breached plaintiffs' contract; "Bluebonnet II" finding the Government's breach foreseeably caused plaintiffs to incur damages but awarding no damages; "Bluebonnet III" reversing trial court's zero-damages determination, remanding to the trial court, and instructing trial court to award damages; "Bluebonnet IV" awarding $132,398,200 in damages based on the Bluebonnet III mandate; "Bluebonnet V" vacating award of $132,398,200 and remanding for determination of the "net financial effect" of the Government's breach; "Bluebonnet VI"; "Bluebonnet VII" awarding $96,798,842 in damages; and "Bluebonnet VIII.").

[163]E.g., Fla. Power & Light Co. v. United States, 307 F.3d 1364, 1370–73 (Fed. Cir. 2002).

[164]Nuclear utilities have filed over 70 cases in the CFC seeking damages from delays by the Department of Energy (DOE) in accepting spent nuclear fuel and high-level radioactive waste under standard contracts entered into by DOE. See U.S. Dep't of Justice, National Courts Section, https://www.justice.gov/civil/national-courts-section-1; Garvey, Cong. Research Serv., R40996, Contract Liability Arising from the Nuclear Waste Policy Act (NWPA) of 1982 (Feb. 1, 2012), available at https://www.everycrsreport.com/reports/R40996.html. The contract breaches are ongoing; therefore, in light of the six-year statute of limitations, nuclear utilities return to the CFC to obtain additional damages. See, e.g., Pac. Gas & Elec. Co. v. United States, 92 Fed. Cl. 175 (2010), aff'd, 668 F.3d 1346 (Fed. Cir. 2012); Energy Nw. v. United States, 69 Fed. Cl. 500 (2006), aff'd sub nom. Dairyland Power Coop. v. United States, 645 F.3d 1363 (Fed. Cir. 2011); Yankee Atomic Elec. Co. v. United States, 42 Fed. Cl. 223 (1998), aff'd sub nom. Me. Yankee Atomic Power Co. v. United States, 225 F.3d 1336 (Fed. Cir. 2011).

[165]See, e.g., Moda Health Plan, Inc. v. United States, 130 Fed. Cl. 436 (2017), rev'd, 892 F.3d 1328 (Fed. Cir. 2018), reh'g & reh'g en banc denied, 908 F.3d 738, cert. petition filed (Feb. 4, 2019); Richardson v. United States, Fed. Cl. No. 18-1731C (filed Nov. 8, 2018); see also http://www.uscfc.uscourts.gov/aca (list of and links to 69 current ACA cases pending at the CFC).

[166]Mo. Health & Med. Org. v. United States, 641 F.2d 870, 871, 873 (Ct. Cl. 1981); see Spectre Corp. v. U.S., 132 Fed. Cl. 626 (2017) (holding without discussion that the CFC had jurisdiction to hear an OTA claim arising from a Space Act Agreement).

[167]See Vista Scientific Corp. v. United States, 808 F.2d 50, 50 (Fed. Cir. 1986). The Government does not have the right to seek review of an adverse board decision under the Wunderlich Act in the absence of claims of fraud or bad faith. SUFI Network Serv., Inc. v. U.S., 817 F.3d 773, 778 (Fed. Cir. 2016). Although Congress repealed the Wunderlich Act in 2011, it will continue to govern a decreasing number of non-CDA cases involving "rights and duties that matured, penalties that were incurred, and proceedings that were begun before the date" the Wunderlich Act was repealed. Pub. L. No. 111-350, 124 Stat. 3677, 3855, 3859 (2011).

[168]Asco-Falcon II Shipping Co. v. United States, 18 Cl. Ct. 484, 491 (1989).

[169]Until recently, the CDA did not apply to nonappropriated funds instrumentalities (NAFIs) (except for those NAFIs listed at 41 U.S.C.A. § 71012(a)) because the NAFIs were not "executive agencies" within the meaning of the CDA. Because of this "NAFI doctrine," the only source of the ASBCA's jurisdiction over appeals involving NAFIs was the portion of the board's charter allowing it to consider appeals to which the parties had contractually agreed to the ASBCA's authority to resolve their disputes. A consequence of the lack of CDA jurisdiction over NAFIs was that the boards had no authority to award interest in such cases. See, e.g., Costruzioni & Impianti, S.R.L., ASBCA No. 53853, 03-1 BCA ¶ 32,201 (jurisdiction over appeal involving NAFI stems from ASBCA Charter and the "Disputes" clause, not the CDA). However, the ASBCA recently held that the NAFI doctrine should no longer be applied to CDA claims, and that it had jurisdiction under the CDA over an appeal involving a NAFI. Parsons Evergreene, LLC, ASBCA No. 58634, 18-1 BCA ¶ 37,136. The board's decision was based on the Federal Circuit's 2011 decision in Slattery v. United States, 635 F.3d 1298, 1313–14 (Fed. Cir.

2011) (en banc), which held that the NAFI doctrine does not apply to Tucker Act cases. See Parsons Evergreene, LLC, ASBCA No. 58634, 18-1 BCA ¶ 37,136 ("[T]he application of the NAFI doctrine to the CDA largely piggybacked on the numerated/non-enumerated distinction shared by both the CDA and the Tucker Act, the Federal Circuit's rejection of that distinction in Slattery leads us to the conclusion that there remains no basis for continuing to apply the NAFI doctrine to CDA appeals.").

[170]ASBCA Charter, 48 C.F.R. ch. 2, app. A (2018).

[171]The FY 2006 NDAA authorized the Civilian Board to assume jurisdiction (with the concurrence of the relevant agency) over disputes heard by a predecessor board immediately before the Act's January 6, 2007 effective date and to assume other functions of such a predecessor board that it exercised immediately before the Act's effective date. Pub. L. No. 109-163, § 847(a), 119 Stat. 3136, 3391–92 (2006). For example, the Civilian Board also currently hears and decides (1) cases arising under the Indian Self-Determination Act, 25 U.S.C.A. § 5321 et seq., (2) disputes between insurance companies and the Department of Agriculture's Risk Management Agency involving actions of the Federal Crop Insurance Corporation under 7 U.S.C.A. § 1501 et seq., (3) claims by federal employees under 31 U.S.C.A. § 3702 for reimbursement of expenses incurred while on official temporary duty travel or in connection with relocation to a new duty station, (4) claims by carriers or freight forwarders under 31 U.S.C.A. § 3726(i)(1) involving actions of the GSA regarding payment for transportation services, (5) applications by prevailing private parties for recovery of litigation and other costs under the Equal Access to Justice Act, 5 U.S.C.A. § 504, and (6) requests for arbitration under § 601 of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, and § 565 of the Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, to resolve disputes between applicants and the Federal Emergency Management Agency as to funding for public assistance grant applications arising from damages caused by Hurricanes Katrina, Rita, and Gustav. See CBCA, About the Board, https://www.cbca.gov/board/index.html; Rules of Procedure of the Civilian Board of Contract Appeals, 72 Fed. Reg. 36,794, 36,819 (July 5, 2007) (codified at 48 C.F.R. pt. 6101); Establishment of the Civilian Board of Contract Appeals, 71 Fed. Reg. 65,825 (Nov. 9, 2006).

[172]28 U.S.C.A. § 1491(a)(1); Rick's Mushroom Serv., Inc. v. United States, 521 F.3d 1338, 1343 (Fed. Cir. 2008); Wood v. United States, 961 F.2d 195 (Fed. Cir. 1992); New Am. Shipbuilders v. United States, 871 F.2d 1077, 1079 (Fed. Cir. 1989); Smithson v. United States, 847 F.2d 791, 795 (Fed. Cir. 1988); Kemper v. United States, 138 Fed. Cl. 1, 19 (2018); Safe Haven Enters., LLC, CBCA No. 3871, 15-1 BCA ¶ 35,928; Rault Center Hotel, ASBCA No. 31232, 91-3 BCA ¶ 24,247; Alfred Bronder, ASBCA No. 29938, 86-3 BCA ¶ 19,102; H&J Constr. Co., ASBCA No. 18521 75-1 BCA ¶ 11,171.

[173]See Awad v. United States, 301 F.3d 1367, 1372 (Fed. Cir. 2002); Wood v. United States, 961 F.2d 195, 198 (Fed. Cir. 1992); Solaria Corp. v. United States, 123 Fed. Cl. 105, 123 (2015), aff'd, 671 F. App'x 797 (Fed. Cir. 2016); Safe Haven Enters., LLC, CBCA No. 3871, 15-1 BCA ¶ 35,928; see also U.S. Marine, Inc. v. United States, 722 F.3d 1360, 1370 (Fed. Cir. 2013).

[174]Safe Haven Enters., LLC, CBCA No. 3871, 15-1 BCA ¶ 35928 (collecting cases in support of jurisdiction over cases involving tortious breach of contract); TAS Grp. Inc., CBCA No. 52, 07-2 BCA ¶ 33,630 (same); Houston Ship Repair, Inc., DOTCAB No. 4505, 06-2 BCA ¶ 33,381; Polaris Travel, Inc., EBCA Nos. C-9401166, C-9403174, 96-2 BCA ¶ 28,518; Aulson Roofing Inc., ASBCA No. 37677, 91-2 BCA ¶ 23,720; Huff & Huff Serv. Corp., ASBCA No. 36039, 91-1 BCA ¶ 23,584.

[175]28 U.S.C.A. §§ 1503, 2508; 41 U.S.C.A. § 7107(e); Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 542 (Fed. Cir. 1988); Brown v. United States, 524 F.2d 693 (Ct. Cl. 1975).

[176]Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1568 (Fed. Cir. 1990); see also Minesen Co. v. McHugh, 671 F.3d 1332, 1340 (Fed. Cir. 2012); Gregory Timber Res., Inc. v. United States, AGBCA No. 84-319-1, 87-3 BCA ¶ 20,086, aff'd, 855 F.2d 841 (Fed. Cir. 1988).

[177]E.g., 1-10 Indus. Assocs., LLC v. United States, 528 F.3d 859, 862 (Fed. Cir. 2008); Boeing Co., ASBCA No. 57490, 12-1 BCA ¶ 34,916; Daff v. United States, 78 F.3d 1566, 1573 n.11 (Fed. Cir. 1996); Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 546 (Fed. Cir. 1988); BMY-Combat Sys. Div. v. United States, 26 Cl. Ct. 826, 849 (1992); Am. Mfg. Co., ASBCA 25816, 83-2 BCA ¶ 16,608; Space Age Eng'g, Inc., ASBCA No. 26028, 82-1 BCA ¶ 15,766, aff'd, 83-2 BCA ¶ 16717; see 41 U.S.C.A. § 7103(a)(3); see also FAR 33.210.

[178]See 41 U.S.C.A. § 7103(c)(1) (The CDA does "not authorize any agency head to settle, compromise, pay, or otherwise adjust any [Government contract] claim involving fraud."); Laguna Constr. Co. v. Carter, 828 F.3d 1364, 1368–69 (Fed. Cir. 2016); Daff v. United States, 78 F.3d 1566, 1573 n.11 (Fed. Cir. 1996); Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 547 (Fed. Cir. 1988); Newtech Research Sys. LLC v. United States, 99 Fed. Cl. 193, 206-07 (2011), aff'd, 468 F. App'x 985 (Fed. Cir. 2012); BMY-Combat Sys. Div. v. United States, 26 Cl. Ct. 826, 849 (1992); Int'l Oil Trading Co., ASBCA No. 57491, 18-1 ¶ 36,985; Supreme Foodservice GMBH, ASBCA No. 57884, 16-1 BCA ¶ 36,387.

[179]See 28 U.S.C.A. §§ 1503, 2508; Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 542 (Fed. Cir. 1988). See generally Nash & Cibinic, "Fraudulent Claims: A Phalanx of Government Remedies," 14 Nash & Cibinic Rep. ¶ 21 (Apr. 2000); Solomson, "When the Government's Best Defense Is a Good Offense: Litigating Fraud and Other Counterclaim Cases Before the U.S. Court of Federal Claims," 11-12 Briefing Papers 1 (Oct. 2011).

[180]28 U.S.C.A. § 2514; Veridyne Corp. v. United States, 758 F.3d 1371, 1376–77 (Fed. Cir. 2014); BMY-Combat Sys. Div. v. United States, 26 Cl. Ct. 826, 848–49 (1992); Ingalls Shipbldg., Inc. v. United States, 13 Cl. Ct. 757, 767 (1987), rev'd on other grounds, 857 F.2d 1448 (Fed. Cir. 1988); Brown Constr. Trades, Inc. v. United States, 23 Cl. Ct. 214, 216 (1991).

[181]31 U.S.C.A. § 3729; Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332, 1340–41 (Fed Cir. 2009); Brown v. United States, 524 F.2d 693, 703 (Ct. Cl. 1975); BMY-Combat Sys. Div. v. United States, 26 Cl. Ct. 826, 849 (1992).

[182]Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1352, 1367 (Fed. Cir. 2013); Morse Diesel Int'l, Inc. v. United States, 79 Fed. Cl. 116, 119 (2007).

[183]41 U.S.C.A. § 7103(c)(2); Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332, 1335–36 (Fed Cir. 2009); BMY-Combat Sys. Div. v. United States, 26 Cl. Ct. 826, 849 (1992); SGW, Inc. v. United States, 20 Cl. Ct. 174 (1990).

[184]In some instances, a contractor can be held liable for violating the False Claims Act, even if the Government is unable to prove damages. See Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332, 1341 (Fed Cir. 2009); Gulf Grp. Gen. Enters. Co. W.L.L. v. United States, 114 Fed. Cl. 258, 316 (2013); Schaengold & Prusock, "The Small Business Jobs Act's Presumption of Loss: It's Rebuttable on the Basis of Value Received by the Government," 29 Nash & Cibinic Rep. NL ¶ 67 (Dec. 2015). If liability, but no damages, is found, the contractor would still be responsible for statutory penalties of up to $22,363 per claim.

[185]31 U.S.C.A. § 3729(a). Although the Act provides for penalties ranging from $5,000 to $10,000, the DOJ has adjusted the penalties pursuant to other statutory authority. See 28 C.F.R. §§ 85.1, 85.5. For violations occurring on or after September 29, 1999 and on or before November 2, 2015, the penalties range from $5,500 and $11,000 per claim. These penalty amounts also applied to violations occurring after November 2, 2015 if the penalty was assessed before August 1, 2016. For penalties assessed after August 1, 2016, and on or before February 3, 2017, whose associated violations occurred after November 2, 2015, the penalties ranged from $10,781 to $21,563. For penalties assessed after February 3, 2017, and before January 29, 2018, whose associated violations occurred after November 2, 2015, the penalties ranged from $10,957 and $21,916. For penalties assessed after January 29, 2018, with respect to violations occurring after November 2, 2015, the penalties range from $11,181 to $22,363. See 28 C.F.R. § 85.5; Civil Monetary Penalties Inflation Adjustment, 83 Fed. Reg. 3944 (Jan. 29, 2018).

[186]41 U.S.C.A. § 7103(c)(2); Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332, 1341 (Fed Cir. 2009) (contractor required to pay penalty of $50.6 million under CDA anti-fraud provision because only $13.3 million out of contractor's $63.9 million CDA claim could potentially have been supported; $50.6 million penalty equaled the unsupported part of the claim, and contractor also forfeited the remaining $13.3 million of its claim). According to the legislative history, the penalties under the CDA's anti-fraud provision are intended to address situations where the Government cannot demonstrate damages under the False Claims Act because it has not yet paid the claim. Congress determined that the per claim penalties under the False Claims Act were insufficient to deter contractors from submitting inflated contract claims to gain negotiating leverage. S. Rep. No. 95-1118, at 19–21 (1978), reprinted in 1978 U.S.C.C.A.N. 5235, 5254.

[187]28 U.S.C.A. § 2514.

[188]Veridyne Corp. v. United States, 758 F.3d 1371, 1377–78 (Fed. Cir. 2014); UMC Elecs. v. United States, 43 Fed. Cl. 776, 790 (1999), aff'd, 249 F.3d 1337 (Fed. Cir. 2001). But see Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1366 & n.18 (Fed. Cir. 2013) ("On its face, the statute is limited to those circumstances where the Government proves fraud 'in the proof, statement, establishment or allowance' of a claim not in the execution of a contract.") (quoting 28 U.S.C.A. § 2514) In Kellogg Brown & Root, the Federal Circuit stated that CFC decisions holding that "[t]he words of the statute make it apparent that a claim against the United States is to be forfeited if fraud is practiced during the contract performance or in the making of the claim" represent "an impermissibly broad reading of the statute." Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1373 (Fed. Cir. 2013) (citations omitted). However, the Federal Circuit's subsequent decision in Veridyne Corp. suggests that the Court has now adopted the broader reading of the statute, holding that where "fraud was committed in regard to the very contract upon which the suit is brought, this court does not have the right to divide the contract and allow recovery on part of it." Veridyne Corp. v. United States, 758 F.3d 1371, 1377 (Fed. Cir. 2014) (quoting Mervin Contracting Corp. v. United States, 94 Ct. Cl. 81, 87–88 (1941)). See Nash, "Postscript: The Court of Federal Claims Forfeiture Statute, 28 Nash & Cibinic Rep. NL ¶ 49 (Sept. 2014) (discussing the Federal Circuit's decision in Veridyne Corp., and observing that "[h]aving misunderstood the Court of Federal Claims' ruling on 28 USCA § 2514, the opinion contains no discussion of the scope of that statute—although by implication it seems to adopt the view that it applies to all claims submitted under a contract where there is fraud in the inception but no fraud in the claims (the broad view). At least it indicates that it believes that is what the Court of Federal Claims held and it does not state that this is an incorrect reading of the statute.").

[189]See Veridyne Corp. v. United States, 758 F.3d 1371, 1378 (Fed. Cir. 2014).

[190]RCFC 41(a)(2); Haddad v. United States, No. 17-307, 2018 WL 6332450, at *1 (Fed. Cl. Dec. 4, 2018).

[191]Strand v. United States, 706 F. App'x 996, 1001 (Fed. Cir. 2017); LW Constr. of Charleston, LLC v. United States, 139 Fed. Cl. 254, 293 (2018) ("Section 2415 sets general time-bars for the government to file a contract, tort, or wage recovery actions in federal court" and "states that 'the provisions of this section shall not prevent the assertion' by the United States of a counterclaim under certain conditions.") (quoting 28 U.S.C.A. § 2415(f)). If a Government counterclaim that would be time barred if asserted as a claim does not arise out of the same "transaction or occurrence" as the contractor's claim, the Government can only assert the counterclaim by way of offset against the contractor's claim. This limitation does not apply to counterclaims that arise from the same "transaction or occurrence" as the contractor's claim. See IML Freight, Inc. v. United States, 639 F.2d 676, 679 (Ct. Cl. 1980); LW Constr. of Charleston, LLC v. United States, 139 Fed. Cl. 254, 301 (2018) (Government argued that counterclaim for unjust enrichment was exempt

from statute of limitations because it arose from the same transaction or occurrence as the contractor's claim, and that, even if the unjust enrichment counterclaim was unrelated to the contractor's claim, Government could still assert the time barred counterclaim by way of offset; CFC determined that the Government's unjust enrichment counterclaim arose from the same transaction or occurrence as the contractor's claim).

[192]LW Constr. of Charleston, LLC v. United States, 139 Fed. Cl. 254, 284 (2018) (common law fraud counterclaims exempt from statute of limitations under 28 U.S.C.A. § 2415(f)); Am. Heritage Bancorp v. United States, 56 Fed. Cl. 596, 606 (2003); First Fed. Sav. Bank of Hegewisch v. United States, 52 Fed. Cl. 774, 786 (2002) (collecting inconsistent decisions concerning whether special plea in fraud counterclaims are subject to statute of limitations). In Shell Oil Co. v. United States, 123 Fed. Cl. 707, 724 (2015), aff'd, 896 F.3d 1299 (Fed. Cir. 2018), the CFC held that the Government's special plea in fraud claim was time barred. On appeal, the Federal Circuit did not reach this issue. Shell Oil Co. v. United States, 896 F.3d 1299, 1314 n.15 (Fed. Cir. 2018) ("Because we affirm the Court of Federal Claims' use of its discretion to deny leave to amend, we need not address its alternative holdings as to. . .the statute of limitations to assert a special plea in fraud pursuant to 28 U.S.C.A. § 2514[.]").

[193]LW Constr. of Charleston, LLC v. United States, 139 Fed. Cl. 254, 293, 296 (2018) (because "[28 U.S.C.A. § 2415(f)] does not address whether or not the government may bring counterclaims that are time-barred pursuant to other statutes of limitations, such as the [False Claims Act] statute of limitations," the court determined it was appropriate to find certain Government False Claims Act counterclaims to be time barred).

[194]The CDA states that the six-year statute of limitations for submitting claims for a final decision "does not apply to a claim by the Federal Government against a contractor that is based on a claim by the contractor involving fraud." 41 U.S.C.A. § 7103(a)(4)(B); accord FAR 33.206(b) ("The 6-year period shall not apply. . .to a Government claim based on a contractor claim involving fraud."); Willard, "Limitations of Actions Under the Contract Disputes Act," 13-9 Briefing Papers 1, at *2 (Aug. 2013) (six-year limitations period does not apply to "a claim by the Federal Government against a contractor that is based on a claim by the contractor involving fraud"). This exemption does not, however, mean that Government claims under the CDA's anti-fraud provisions are not subject to any limitations period. Prior to October 1994, the CDA did not specify a time limitation for submitting non-fraud related CDA claims. See 41 U.S.C.A. § 605(a) (1994). The six-year limitations period to the CDA was added when FASA was enacted. See Pub. L. No. 103–355, § 2351, 108 Stat. 3243, 3322 (1994); H.R. Conf. Rep. No. 103-712, 203, 1994 U.S.C.C.A.N. 2607, 2633. When Congress amended 41 U.S.C.A. § 605(a) (renumbered as 41 U.S.C.A. § 7103(a)) to add the limitation period for submitting non-fraud CDA claims, the CDA's anti-fraud provision (formerly 41 U.S.C.A. § 604, now 41 U.S.C.A. § 7103(c)) already imposed a deadline on the Government for claims involving fraud. See 41 U.S.C.A. § 604 (1994); 41 U.S.C § 7103(c)(2). As the D.C. Circuit has noted, "[i]n excepting claims involving fraud from the limitations period in [41 U.S.C.A.] § 605(a) [now 41 U.S.C.A. § 7103(a)(4)], Congress presumably meant only to avoid implicitly abrogating [41 U.S.C.A.] § 604 [now [41 U.S.C.A.] § 7103(c)(2)]." Menominee Indian Tribe of Wis. v. United States, 614 F.3d 519, 530 (D.C. Cir. 2010).

[195]41 U.S.C.A. § 7103(c)(2).

[196]UMC Elec. Co. v. United States, 45 Fed. Cl. 507, 509 (1999).

[197]Jana, Inc. v. United States, 34 Fed. Cl. 447, 452 (1995); see also UMC Elec. Co. v. United States, 45 Fed. Cl. 507, 509 (1999); SGW, Inc. v. United States, 20 Cl. Ct. 174, 181 (1990).

[198]Hernandez, Kroone & Assocs., Inc. v. United States, 110 Fed. Cl. 496, 529 n.8 (2013) (citing Gabelli v. S.E.C., 568 U.S. 442, 448 (2013)).

[199]Laguna Constr. Co. v. Carter, 828 F.3d 1364, 1368 (Fed. Cir. 2016); Supply & Serv. Team GMBH, ASBCA No. 59630, 17-1 BCA ¶ 36,678 (holding that the board lacked authority to adjudicate a fraud related defense of prior material breach where there had been no third-party determination of fraud). But see Int'l Oil Trading Co., ASBCA No. 57491, 18-1 BCA ¶ 36,985 (holding that the board has authority to determine whether a contract is void ab initio on the basis of the contractor's fraud).

[200]L.C. Gaskins Constr. Co., ASBCA No. 58550, 17-1 BCA ¶ 36,780; Supreme Food Serv. GMBH, ASBCA No. 57884, 16-1 BCA ¶ 36,387; see also Laguna Constr. Co. v. Carter, 828 F.3d 1364, 1368 (Fed. Cir. 2016) (affirmative defense of fraud by the Government is not a "claim" seeking the payment of money damages).

[201]Laguna Constr. Co. v. Carter, 828 F.3d 1364, 1369 (Fed. Cir. 2016); Supply & Serv. Team GMBH, ASBCA No. 59630, 17-1 BCA ¶ 36,678; Turner Constr. Co. v. General Servs. Admin., GSBCA 16840, 06-2 BCA ¶ 33,391; TDC Mgmt. Corp., DOTCAB No. 1802, 90-1 BCA ¶ 22,627; Fidelity Constr. Co., DOTCAB No. 1113, 80-2 BCA ¶ 14,819, aff'd, 700 F.2d 1379 (Fed. Cir. 1983); Quality Env't Sys., Inc., ASBCA No. 22178, 87-3 BCA ¶ 20,060; Warren Beaves, DOTCAB No. 1324, 83-1 BCA ¶ 16,232; see also Pub. Warehousing Co. K.S.C., ASBCA No. 58078, 13 BCA ¶ 35,460 (board can consider contract claims even where fraud is alleged because the board need only determine whether the statements underlying the claim are correct or incorrect and need not determine whether the contractor had the requisite intent).

[202]Pub. Warehousing Co. K.S.C., ASBCA No. 59020, 17-1 BCA ¶ 36,630 (granting one-year stay); BAE Sys. Tactical Vehicle Sys. LP, ASBCA No. 59491, 16-1 BCA ¶ 36,450 (denying indefinite stay); Kellogg Brown & Root Servs., Inc., ASBCA No. 57530, 16-1 BCA ¶ 36,449 (denying stay).

[203]E.g., Pub. Warehousing Co. K.S.C., ASBCA No. 59020, 17-1 BCA ¶ 36,630; BAE Sys. Tactical Vehicle Sys. LP, ASBCA No. 59491, 16-1 ¶ 36450; Pub. Warehousing Co. K.S.C., ASBCA No. 58078, 13 BCA ¶ 35,460; see also Kellogg Brown & Root Serv., Inc., ASBCA No. 57530, 16-1 BCA ¶ 36,554 (holding that the board is not required to

"suspend appeals indefinitely whenever the government has merely filed a fraud case elsewhere that might establish an affirmative defense of prior material breach if and whenever proven").

[204]Laguna Constr. Co. v. Carter, 828 F.3d 1364, 1368–69 (Fed. Cir. 2016) (finding the ASBCA had jurisdiction to consider a fraud related affirmative defense where one of the contractor's principles had previously plead guilty to criminal fraud charges); Pub. Warehousing Co. K.S.C., ASBCA No. 58078, 13 BCA ¶ 35,460 (board can consider contract claims even where fraud is alleged because the board need only determine whether the statements underlying the claim are correct or incorrect, and need not determine whether the contractor had the requisite intent); Nash, "Government Defenses To Avoid Payment: They're Working," 29 Nash & Cibinic Rep. NL ¶ 7 (Feb. 2015); Nash, "Postscript: The Affirmative Defense of Contractor Fraud," 28 Nash & Cibinic Rep. NL ¶ 2 (Jan. 2014).

[205]Laguna Constr. Co. v. Carter, 828 F.3d 1364 (Fed. Cir. 2016).

[206]Prouty, "The Direction of Board Practice as the CDA Hits Middle Age: An Upbeat View," 48 Pub. Cont. L.J. 7, 13–14 (Fall 2018).

[207]Laguna Constr. Co. v. Carter, 828 F.3d 1364, 1368–69 (Fed. Cir. 2016); Supply & Serv. Team GMBH, ASBCA No. 59630, 17-1 BCA ¶ 36,678 (holding that the Government's affirmative defense of fraud could not be proved because it required the ASBCA to make factual findings of fraud, which exceeds the ASBCA's jurisdiction); see also Prouty, "The Direction of Board Practice as the CDA Hits Middle Age: An Upbeat View," 48 Pub. Cont. L.J. 7, 14 (Fall 2018) (citing Supply & Serv. Team GMBH for the proposition that there are "important limitations" on the board's authority to consider Government defenses of fraud).

[208]Int'l Oil Trading Co., ASBCA No. 57491, 18-1 BCA ¶ 36,985; ABS Dev. Corp., ASBCA Nos. 60022, 60023, 17-1 BCA ¶ 36,842; Suh'dutsing Techs., LLC, ASBCA No. 58760, 15-1 BCA ¶ 36,058; Servicios Y Obras Isetan S.L., ASBCA No. 57584, 13 BCA ¶ 35,279; SIA Constr., Inc., ASBCA No. 57693, 14-1 BCA ¶ 35,762, at 174,984–85; Pub. Warehousing Co. K.S.C., ASBCA No. 58078, 13 BCA ¶ 35,460 (board can consider contract claims even where fraud is alleged).

[209]Int'l Oil Trading Co., ASBCA No. 57491, 18-1 BCA ¶ 36,985; ABS Dev. Corp., ASBCA Nos. 60022, 60023, 17-1 BCA ¶ 36,842 ("We disagree that we need any third-party determination here; we possess jurisdiction to determine for ourselves whether a contract is void ab initio because of fraud."); ABS Dev. Corp., ASBCA No. 60022 et al., 2019 WL 326019 (Jan. 7, 2019) (subsequent decision in same case as 17-1 BCA ¶ 36,842 making factual determination that contractor made a material misrepresentation, and that contract was therefore void ab initio); Bryan Concrete & Excavation, Inc. v. Dep't of Veterans Affairs, CBCA No. 2882-R, 16-1 BCA ¶ 36,549.

[210]See 41 U.S.C.A. § 7103(c).

[211]United States v. First Choice Armor & Equip., Inc., 808 F. Supp. 2d 68, 80 (D.D.C. 2011); see, e.g., United States v. DynCorp Int'l, LLC, 253 F. Supp. 3d 89, 114 (D.D.C. 2017) (The exclusive jurisdiction of boards and CFC over CDA claims does not apply to claims "involving fraud." "When the same factual allegations form the basis for both the government's' [False Claims Act] claims and breach of contract claims," the district court has jurisdiction over the contract claims.) (internal quotes and citation omitted); United States ex rel. Shemesh v. CA, Inc., 89 F. Supp. 3d 67, 80 (D.D.C. 2015); United States v. Kellogg Brown & Root Servs., Inc., 800 F. Supp. 2d 143, 160 (D.D.C. 2011); United States v. United Indus., Inc., 929 F. Supp. 947, 951 (E.D. Va. 1996) ("[W]hen a breach of contract or unjust enrichment claim is intimately bound up with and part of the same case or controversy as [a False Claims Act] claim, the government need not pursue the claims in two separate fora, but may instead pursue all claims in federal district court."); United States v. Rockwell Int'l Corp., 795 F. Supp. 1131, 1135, 1138–39 (N.D. Ga. 1992); United States v. JT Constr. Co., 668 F. Supp. 592 (W.D. Tex. 1987). But see United States v. Hughes Aircraft Co., No. CV89-6842-WJR (SX), 1991 WL 133569, at *1 (C.D. Cal. Apr. 5, 1991).

[212]See, e.g., Northrop Grumman Computing Sys., Inc. v. United States, 823 F.3d 1364, 1368 (Fed. Cir. 2016); Vt. Yankee Nuclear Power Corp. v. Entergy Nuclear Vt. Yankee, LLC, 683 F.3d 1330, 1344–45 (Fed. Cir. 2012); S. Cal. Fed. v. United States, 422 F.3d 1319, 1334 (Fed. Cir. 2005); Glendale Federal Bank, FSB v. United States, 378 F.3d 1308, 1313 (Fed. Cir. 2004); Hansen Bancorp, Inc. v. United States, 367 F.3d 1308–09 (Fed. Cir. 2004) (in the event of a breach of contract, identifying three monetary remedies, i.e., expectancy damages, reliance damages, and restitution); Hi-Shear Tech. Corp. v. United States, 356 F.3d 1372, 1382–83 (Fed. Cir. 2004); Energy Capital Corp. v. United States, 302 F.3d 1314, 1324 (Fed. Cir. 2002); Carabetta Enters. v. United States, 68 Fed. Cl. 410, 413–14 (2005), aff'd, 482 F.3d 1360 (Fed. Cir. 2007); CI2, Inc., ASBCA No. 59948, 16-1 BCA ¶ 36,410; Sharon Roedel, PSBCA No. 6347, 12-1 BCA ¶ 35,018; CACI Int'l, Inc., ASBCA No. 53058, 05-1 BCA ¶ 32,948; W. Aviation Maint., GSBCA 14165, 00-2 BCA ¶ 31,123; Steven S. Freedman, PSBCA 3867, 96-1 BCA ¶ 28,170; LBM, Inc., ASBCA 39,606, 91-2 BCA ¶ 24,016; see also S&W Tire Serv., GSBCA 6376, 82-2 BCA ¶ 16,048 (board need not find a remedy-granting clause to award relief).

[213]Lee's Ford Dock, Inc. v. Sec'y of the Army, 865 F.3d 1361, 1368–70 (Fed. Cir. 2017); Nat'l Austl. Bank v. United States, 452 F.3d 1321, 1329 (Fed. Cir. 2006); Giesler v. United States, 232 F.3d 864, 869 (Fed. Cir. 2000); LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1552–53 (Fed. Cir. 1995); Roseburg Lumber Co. v. Madigan, 978 F.2d 660, 665 (Fed. Cir. 1992); Bobula v. U.S. Dep't of Justice, 970 F.2d 854, 859 (Fed. Cir. 1992) (noting that equitable relief is sometimes available in a suit brought under the Tucker Act, when that relief "is incidental to and collateral to a claim for money damages"); Atlas Corp. v. United States, 895 F.2d 745, 750–51 (Fed. Cir. 1990); Am. President Lines, Ltd. v. United States, 821 F.2d 1571, 1582 (Fed. Cir. 1987); United States v. Hamilton Enters., 711 F.2d 1038, 1043 (Fed. Cir. 1983); Applied Devices Corp. v. United States, 591 F.2d 635, 636 (Ct. Cl. 1979); Ho v. United States, 49 Fed. Cl. 96, 100 (2001), aff'd, 30 F. App'x 964 (Fed. Cir. 2002); Jeppesen Sanderson, Inc. v. United States, 19 Cl. Ct. 233, 236

(1990); Sea Shepherd Conservation Soc'y v. Gen. Servs. Admin., CBCA Nos. 5254, 5255, 16-1 BCA ¶ 36,560; Europa Bakery, Inc. Lease Agreement, PSBCA No. 4994, 06-2 BCA ¶ 33,408; Parcel 49 C Ltd. P'ship v. Gen. Servs. Admin., GSBCA 16447, 05-2 BCA ¶ 33,013, aff'd, Parcel 49C Ltd. P'ship v. Doan, 186 F. App'x. 1002 (Fed. Cir. 2006); Wyodak Enters., Inc., VABCA 3678, 95-1 BCA ¶ 27,493; Wheeled Coach Indus. v. Gen. Servs. Admin., GSBCA 10314, 93-1 BCA ¶ 25,245; Pac. Coast Molybdenum Co., AGBCA 84-162-1, 89-2 BCA ¶ 21,755, aff'd, 902 F.2d 44 (Fed. Cir. 1990); Bay Harbor Co., ASBCA 41589 92-3 BCA ¶ 25,210; S. Dredging Co., ENGBCA 5843, 92-2 BCA ¶ 24,886; Thompson Numerical, Inc., ASBCA 41327, 91-3 BCA ¶ 24,169; see FAR 33.205.

[214]Giesler v. United States, 232 F.3d 864, 869 (Fed. Cir. 2000); Dairyland Power Coop. v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994); Roseburg Lumber Co. v. Madigan, 978 F.2d 660, 665 (Fed. Cir. 1992); Creative Times Day Sch., ASBCA No. 59507, 16-1 BCA ¶ 36,535; Thompson Numerical, Inc., ASBCA No. 41327, 91-3 BCA ¶ 24,169; Don Simpson, IBCA No. 2058, 86-2 BCA ¶ 18,768; Sealtite Corp., ASBCA No. 25805, 84-1 BCA ¶ 17,144; FAR 33.205.

[215]Barlow & Huan, Inc. v. United States, 805 F.3d 1049, 1055 (Fed. Cir. 2015); Mobil Oil Exploration & Producing S.E., Inc. v. United States, 530 U.S. 604, 623–24 (2000); Glendale Fed. Bank, FSB v. United States, 378 F.3d 1308, 1313 (Fed. Cir. 2004); Glendale Fed. Bank v. United States, 239 F.3d 1374, 1380 (Fed. Cir. 2001); Roseburg Lumber Co. v. Madigan, 978 F.2d 660, 665 (Fed. Cir. 1992); Acme Process Equip. Co. v. United States, 347 F.2d 509, 528 (Ct. Cl. 1965), rev'd on other grounds, 385 U.S. 138 (1966); Barnes Oil Co. v. United States, 84 F. Supp. 646, 648 (Ct. Cl. 1949); Hometown Fin., Inc. v. United States, 56 Fed. Cl. 477, 484–85 (2003), aff'd, 409 F.3d 1360 (Fed. Cir. 2005); Yates-Desbuild JV v. Dep't of State, CBCA 3350, 17-1 BCA ¶ 36,870 (discussing the availability of restitution damages for contract claims); BAE Sys. San Francisco Ship Repair, ASBCA No. 58810, 16-1 BCA ¶ 36,404; AT&T v. Gen. Servs. Admin., GSBCA No. 14732, 02-1 BCA ¶ 31,713; AT&T v. Gen. Servs. Admin., GSBCA No. 14732, 00-2 BCA ¶ 31,128; Newhall Ref. Co., EBCA No. 363-7-86 et al., 89-3 BCA ¶ 22,142.

[216]Lee v. United States, 895 F.3d 1363, 1372 (Fed. Cir. 2018); AT&T v. United States, 177 F.3d 1368, 1375–76 (Fed. Cir. 1999), aff'd, 307 F.3d 1374 (Fed. Cir. 2002) (en banc); Total Med. Mgmt. v. United States, 104 F.3d 1314, 1321 (Fed. Cir. 1997); Ala. Rural Fire Ins. Co. v. United States, 572 F.2d 727, 733 (Ct. Cl. 1978); John Reiner & Co. v. United States, 325 F.2d 438, 440 (Ct. Cl. 1963); Prestex, Inc. v. United States, 320 F.2d 367, 374–75 (Ct. Cl. 1963); Int'l Oil Trading Co., ASBCA No. 57491, 18-1 BCA ¶ 57,491; Supreme Foodservice GMBH, ASBCA No. 57884, 16-1 BCA ¶ 36, 387; Erwin Pfister Gen.-Bauuntemehmen, ASBCA No.43980 et. al, 01-2 BCA ¶ 31,431; Medica, S.A., ENGBCA No.PCC-142, 00-2 BCA ¶ 30,966; see also Urban Data Sys., Inc. v. United States, 699 F.2d 1147, 1154 (Fed. Cir. 1983); Trilon Educ. Corp. v. United States, 578 F.2d 1356, 1360 (Ct. Cl. 1978).

[217]Lee v. United States, 895 F.3d 1363, 1373–74 (Fed. Cir. 2018) (Federal Circuit has "on occasion approved the use of quantum meruit or quantum valebant as a measure of damages for breach of an implied-in-fact contract."); Int'l Data Prods. Corp. v. United States, 492 F.3d 1317, 1325–26 (Fed. Cir. 2007); Perri v. United States, 340 F.3d 1337, 1343–1344 (Fed. Cir. 2003) (cases where the Federal Circuit and CFC recognized quantum meruit recovery "involved situations in which the plaintiff provided goods or services to the government pursuant to an express contract, but the government refused to pay for them because of defects in the contract that rendered it invalid or unenforceable. Since in that circumstance it would be unfair to permit the government to retain the benefits of the bargain it had made with the plaintiff without paying for them, the courts utilized quantum meruit as a basis for awarding the plaintiff the fair value of what it supplied to the government."); United States v. Amdahl Corp., 786 F.2d 387, 395 (Fed. Cir. 1986); Urban Data Sys., 699 F.2d at 1154 n.8 (Fed. Cir. 1983); Prestex, Inc. v. United States, 320 F.2d 367, 374 (Ct. Cl. 1963); Lee v. United States, 130 Fed. Cl. 243, 259–60 (2017); N.H. Flight Procurement, LLC v. United States, 118 Fed. Cl. 203, 236 (2014) ("While it is true that the Federal Circuit and Court of Claims have permitted quantum meruit recovery, this occurs in the very limited circumstance where a plaintiff provides services or goods to the government pursuant to an attempted express contract, but either some defect prevents an express contract from actually coming into existence or the government simply refuses to pay.") (quoting Enron Fed. Sols., Inc. v. United States, 80 Fed. Cl. 382, 409 (2008)); Fluor Enters. v. United States, 64 Fed. Cl. 461, 465, 495–96 (2005); Transfair Int'l, Inc. v. United States, 54 Fed. Cl. 78, 87 n.12 (2002); Northrop Corp. v. United States, 47 Fed. Cl. 20, 40–41 (2000); Protec GMBH, ASBCA No. 61161, 18-1 BCA ¶ 37,064 ("There is an exception to that general rule [that boards may not award quantum meruit relief] when the government seeks to avoid payment on the grounds that a contract is illegal or void ab initio."); Turner Constr. Co. v. Smithsonian Inst., CBCA No. 2862, 17-1 BCA ¶ 36,739; Honeywell Int'l, Inc., ASBCA No. 57779, 17-1 BCA ¶ 36,820 (determining amount of quantum meruit recovery); Honeywell Int'l, Inc., ASBCA No. 57779, 15-1 BCA ¶ 36,121 (finding entitlement to quantum meruit recovery); Flathead Contr., CBCA No.118, 07-1 BCA ¶ 33,556; Mitch Moshtaghi, ASBCA No. 53711, 03-2 BCA ¶ 32,274 (holding that it had jurisdiction to hear quantum meruit claim to the extent the allegation was based on an implied-in-fact promise). But see United Rentals, Inc., HUDBCA No. 03-D-100-C1, 06-1 BCA ¶ 33,131.

[218]E.g., Int'l Data Prods. Corp. v. United States, 492 F.3d 1317, 1325 (Fed. Cir. 2007); Perri v. United States, 340 F.3d 1337, 1344 (Fed. Cir. 2003) ("We know of no case. . .in which either we, the Court of Claims, or the Court of Federal Claims has permitted quantum meruit recovery in the absence of some contractual arrangement between the parties."); N.H. Flight Procurement, LLC v. United States, 118 Fed. Cl. 203, 235 (2014); RGW Commc'ns, Inc., ASBCA No. 54557, 05-1 BCA ¶ 32,972 (While the boards may grant quantum meruit relief under implied-in-fact contracts, such relief is not available under implied-in-law contracts); United Rentals, Inc., HUDBCA No. 03-D-100-C1, 06-1 BCA ¶ 33,131; United Pac. Ins. Co., ASBCA No. 53051, 03-2 BCA ¶ 32,267, aff'd, 380 F.3d 1352 (Fed. Cir. 2004);

Eaton Corp., ASBCA No. 38386, 91-1 BCA ¶ 23,398; see also Claude Mayo Constr. Co. v. United States, 128 Fed. Cl. 616, 622 (2016) (CFC has no jurisdiction over unjust enrichment claims); XP Vehicles, Inc. v. United States, 121 Fed. Cl. 770, 782–83 (2015) (no jurisdiction over promissory estoppel/detrimental reliance claims); Copar Pumice Co. v. United States, 112 Fed. Cl. 515, 538–39 (2013) (CFC has no jurisdiction over claims for unjust enrichment or promissory estoppel/detrimental reliance); Relyant, LLC, ASBCA No. 59809, 18-1 BCA ¶ 37,085 (board has no jurisdiction over promissory estoppel cases); Pub. Warehousing Co., ASBCA No. 56022, 11-2 BCA ¶ 34,788 (no jurisdiction over unjust enrichment claims).

[219]Kemper v. United States, No. 17–768C, 2017 WL 3274942, at *2 n.2 (Fed. Cl. 2017) (unpub.); Envtl. Safety Consultants, Inc. v. United States, 95 Fed. Cl. 77, 98 (2010); Fields v. United States, 53 Fed. Cl. 412, 420 (2002); Christos v. United States, 48 Fed. Cl. 469, 478 n.22 (2000), aff'd, 300 F.3d 1381 (Fed. Cir. 2002); John Shaw LLC, ASBCA No. 61379, 18-1 BCA ¶ 37,003; John Shaw LLC, ASBCA No. 61379, 18-1 BCA ¶ 37,026; John Shaw LLC, ASBCA No. 61379, 61585, 2018 WL 6578652, slip op. at 9 (Nov. 29, 2018) ("This Board does not have subject matter jurisdiction over punitive or exemplary damages. . .."); Safe Haven Enters., LLC v. Dep't of State, CBCA Nos. 3871 et al., 15-1 BCA 35,928; Janice Cox, ASBCA No. 50587, 01-1 BCA ¶ 31,377, at 154,930–31; Advance Eng'g Corp., ASBCA No. 46889, 95-1 BCA ¶ 27,475, aff'd on recons., ASBCA No. 96-1 BCA ¶ 28,003.

[220]Vt. Yankee Nuclear Power Corp. v. Entergy Nuclear Vt. Yankee, LLC, 683 F.3d 1330, 1344–45 (Fed. Cir. 2012) ("While a specific loss need not be foreseeable, it is well-established that a plaintiff must prove that the type of damages were foreseeable. Similarly, our predecessor court held that consequential damages involves consideration of the type of loss foreseeable by the contracting parties at the time of their agreement. Unquestionably, the foreseeability prong applies to this type of loss.") (citations and quotation omitted); San Carlos Irrigation & Draining Dist. v. United States, 111 F.3d 1557, 1563 (Fed. Cir. 1997) ("Remote and consequential damages are not recoverable in a common law suit for breach of contract. . .especially. . .in suits against the United States for the recovery of common law damages.") (quoting Wells Fargo Bank, N.A. v. United States, 88 F.3d 1012, 1020 (Fed. Cir. 1996)); San Carlos Irrigation & Drainage Dist. v. United States, 877 F.2d 957, 960 (Fed. Cir. 1989) ("[Appellant] may be able to recover consequential damages if it can prove that they were foreseeable at the time of contract formation."); Prudential Ins. Co. of Am. v. United States, 801 F.2d 1295, 1300 (Fed. Cir. 1986) (holding that consequential or special damages, to be recoverable, must be foreseeable at the time the contract is executed); Consol. Edison Co. of N.Y., Inc. v. United States, 67 Fed. Cl. 285, 290 (2005); Boston Edison Co. v. United States, 64 Fed. Cl. 167, 182 (2005); Wells Fargo Bank, N.A. v. United States, 88 F.3d 1012, 1022–24 (Fed. Cir. 1996); Michael Johnson Logging v. Dep't of Agric., CBCA No. 5089, 18-1 BCA ¶ 36,938 ("The concept of consequential damages in contract law involves consideration of the type of loss foreseeable by the contracting parties at the time the contract is executed, not at the time of the breach."); Shaw LLC, ASBCA No. 61379, 18-1 BCA ¶ 37,003 (citing Simplix, ASBCA No. 52570, 06-1 BCA ¶ 33,240 at 164,727) ("[T]he attenuation of the connection between the government's administration of the contract and appellant's claim, essentially for monies allegedly lost under contracts that appellant did not enter with third-parties, is one for a type of consequential damages that are too remote and speculative to be recovered against the government."); Eaton Contracts Servs., Inc., ASBCA No. 52888, 04-1 BCA ¶ 32,536; M&W Constr. Corp., ASBCA No. 53482, 02-1 BCA ¶ 31,804 ("[T]he label 'consequential damages' is generally a confusing and unfavored term and not particularly helpful in determining what damages are recoverable."); PAE Int'l, ASBCA No. 45314, 98-1 BCA ¶ 29,347, appeal sustained, ASBCA No. 98-1 BCA ¶ 29,348 ("[C]consequential or special damages, in order to be recoverable, must be foreseeable at the time the contract is executed.") (internal quotations omitted); Stroh Corp., GSBCA No. 11029, 96-1 BCA ¶ 28,265 ("To be recoverable, consequential damages must be foreseeable at the time of contract award. Foreseeable means within the contemplation of the parties at the time of award.") (citation omitted); Land Movers, Inc., ENGBCA No. 5656, 92-1 BCA ¶ 24,473 (same); Nat'l Park Concessions, IBCA No. 2995, 94-3 BCA ¶ 27,104; Tele-Sentry Sec., Inc., GSBCA No. 8950, 92-3 BCA ¶ 25,088; Dunbar & Sullivan Dredging Co., ENGBCA No. 5218, 87-2 BCA ¶ 19,773. See generally Nash & Cibinic, "Recovering Consequential Damages From the Government: An Impossible Dream?," 5 Nash & Cibinic Rep. ¶ 20 (Apr. 1991).

[221]28 U.S.C.A. § 2412(b); 5 U.S.C.A. § 504; Innovation Dev. Enters. of Am., Inc. v. U.S., 600 F. App'x 743, 746 (Fed. Cir. 2015); Meyer Grp., Ltd. v. United States, 129 Fed. Cl. 579, 584 (2016); Skip Kirchdorfer, Inc. v. United States, 16 Cl. Ct. 27, 34–35 (1988); Dellew Corp., ASBCA No. 58538, 16-1 BCA ¶ 36,534; Hughes Moving & Storage, Inc., ASBCA No.45346, 00-1 BCA ¶ 30,776; see Standard, "The Equal Access to Justice Act: Practical Applications to Government Contract Litigation," 2012-APR Army Law. 4 (Apr. 2012); Whalen, "Equal Access to Justice Act: Recent Developments," 02-05 Briefing Papers 1 (Apr. 2002).

[222]28 U.S.C.A. § 1491(a)(2); Securiforce Int'l Am., LLC v. United States, 879 F.3d 1354, 1361 (Fed. Cir. 2018); Alliant Techsystems, Inc. v. United States, 178 F.3d 1260, 1264–70 (Fed. Cir. 1999); ATK Thiokol v. United States, 68 Fed. Cl. 612, 626 (2005). In Alliant Techsystems, while the Federal Circuit described this statutory language concerning "nonmonetary disputes" as "nonrestrictive" and "open-ended language," it also emphasized that "[t]he discretion to grant declaratory relief only in limited circumstances allows the court or board to restrict the occasions for intervention during contract performance to those involving a fundamental question of contract interpretation or a special need for early resolution of a legal issue." Alliant Techsystems, Inc. v. United States, 178 F.3d 1260, 1268–71 (Fed. Cir. 1999).

[223]Securiforce Int'l Am., LLC v. United States, 879 F.3d 1354, 1361 (Fed. Cir. 2018) (citing examples of declaratory relief in CDA cases and holding that declaratory relief should not be available where "legal remedies would be adequate to protect [the plaintiff's] interests").

[224]Malone v. United States, 849 F.2d 1441, 1445 (Fed.

Cir. 1988); Garrett v. Gen. Elec. Co. 987 F.2d 747, 750–51 (Fed. Cir. 1993); Johnson & Gordon Sec., Inc. v. Gen. Servs. Admin., 857 F.2d 1435, 1437 (Fed. Cir. 1988); Greenland Contractors I/S, ASBCA No. 61113, 18-1 BCA ¶ 36,942; Kaman Precision Prod., Inc., ASBCA No. 56305, 10-2 BCA ¶ 34,529; Rohr, Inc., ASBCA Nos. 44193, 44376, 93-2 BCA ¶ 25,871; Gen. Elec. Automated Sys. Div., ASBCA No. 36214, 89-1 BCA ¶ 21,195; Nachtmann Analytical Lab. v. Int'l Boundary & Water Comm'n, CBCA No. 500, 07-1 BCA ¶ 33,570; Michael Grinberg, DOTCAB No. 1543, 87-1 BCA ¶ 19,573; W. Aviation Maint., Inc. v. Gen. Servs. Admin., GSBCA No.14165, 98-2 BCA ¶ 29,816; Smith's Inc. of Dothan, VABCA No. 2198, 85-2 BCA ¶ 18,133. But see Cedar Lumber, Inc., AGBCA Nos. 85-214-1, 85-221-1, 85-3 BCA ¶ 18,346, rev'd on other grounds, 799 F.2d 743 (Fed. Cir. 1986).

[225]Stevens v. United States, 367 F. App'x 158, 160 (Fed. Cir. 2010); Massie v. United States, 226 F.3d 1318, 1321–22 (Fed. Cir. 2000); Nat'l Ctr. for Mfg. Scis. v. United States, 114 F.3d 196, 198 (Fed. Cir. 1997); Wood v. United States, 961 F.2d 195, 199 (Fed. Cir. 1992); Blackwell v. United States, 23 Cl. Ct. 746, 750 (1991); Edwards v. United States, 19 Cl. Ct. 663, 668 (1990); Sonoma Apartment Assocs. v. United States, 134 Fed. Cl. 90, 104 (2017); Vanalco, Inc. v. United States, 48 Fed. Cl. 68, 74 (2000); Rig Masters, Inc. v. United States, 42 Fed. Cl. 369, 373 (1998); YRT Enters. LLC v. Dep't of Justice, CBCA No. 5701, 17-1 BCA ¶ 36,809; G2G, LLC v. Dep't of Commerce, CBCA No. 4996, 16-1 BCA ¶ 36,266; Eyak Tech., LLC v. Dep't of Homeland Sec., CBCA No. 1975, 10-2 BCA ¶ 34,538, at 170,340 ("The Board does not have jurisdiction to order specific performance or grant injunctive relief."); W. Aviation Maint., Inc. v. Gen. Servs. Admin., GSBCA No. 14165, 98-2 BCA ¶ 29,816 (1992 Tucker Act amendments did not waive the Government's immunity from specific performance suits); Statistica, Inc., ASBCA No. 44116, 92-3 BCA ¶ 25,095; Gen. Elec. Automated Sys., ASBCA No. 36214; John Barrar, ENGBCA No. 5918, 92-3 BCA ¶ 25,074; W. Aviation, GSBCA No. 14165; Hub Testing Labs., Inc., GSBCA No. 11693, 92-3 BCA ¶ 25,081; Sabbia Corp., VABCA No. 5557, 99-2 BCA ¶ 30,394; see Sisk, Litigation With the Federal Government 315–16 (2016).

[226]CompuCraft, Inc. v. Gen. Servs. Admin., CBCA No. 5516, 17-1 BCA ¶ 36,662; Colonna's Shipyard, Inc., ASBCA No. 59987, 16-1 BCA ¶ 36,518; Microtechnologies, LLC, ASBCA No. 59911, 15-1 BCA ¶ 36,125; Rohr, Inc., ASBCA Nos. 44193, 44376, 93-2 BCA ¶ 25,871; Statistica, Inc., ASBCA No. 44116, 92-3 BCA ¶ 25,095; Dixon Pest Control, ASBCA No. 41042, 91-1 BCA ¶ 23,640; First Nationwide Holdings, PSBCA No. 6672, 18-1 BCA ¶ 36,925; Wyskiver, PSBCA No. 3621, 95-2 BCA ¶ 27,755; Sabbia Corp., VABCA No. 5557, 99-2 BCA ¶ 30,394.

[227]Doko Farms v. United States, 13 Cl. Ct. 48, 56 (1987); Smith v. United States, 654 F.2d 50, 52 (Ct. Cl. 1981); Alford v. United States, 3 Cl. Ct. 229, 230 (1983); Zainulabeddin v. United States, 138 Fed. Cl. 492, 507 (2018); Warren v. United States, 106 Fed. Cl. 507, 512 (2012); Pac. Legacy, Inc. v. Dep't of Agric., CBCA No. 641, 08-1 BCA ¶ 33740; Sarang-Nat'l. Joint Venture, ASBCA No. 54992, 06-1 BCA ¶ 33,232; Statistica, Inc., ASBCA No. 44116, 92-3 BCA ¶ 25,095; Raymond Kaiser Eng'rs, ASBCA No. 34133, 87-3 BCA ¶ 20,140; Maria Manges, ASBCA No. 25350, 81-2 BCA ¶ 15,398.

[228]CFP FBI-Knoxville, LLC v. Gen. Servs. Admin., CBCA No. 5210, 17-1 BCA ¶ 36,648; Cal. Bus. Tels., CBCA No. 135, 07-1 BCA ¶ 33,553 (citing P.J. Dick, Inc. v. Gen. Servs. Admin., CBCA No. 461, 07-1 BCA ¶ 33,534); see also Rumsfeld v. United Techs. Corp., 315 F.3d 1361, 1377 (Fed. Cir. 2003); ABB Enter. Software, Inc., F/K/A Ventyx, ASBCA No. 60134, 18-1 BCA ¶ 36,954; Attenuation Envtl. Co. v. Nuclear Regulatory Comm'n, CBCA No. 4920, 16-1 BCA ¶ 36,521 ("To prevail against the Government under a theory of equitable estoppel, an appellant must demonstrate some form of Government 'affirmative misconduct.' ") (citations omitted).

[229]41 U.S.C.A. § 7103(f)(4).

[230]Hub Testing Labs., Inc., GSBCA No. 11693, 92-3 BCA ¶ 25,081; see Raymond Kaiser Eng'rs, ASBCA No. 34133, 87-3 BCA ¶ 20,140; Temescal Plaza, LLC, PSBCA No. 6437, 13 BCA ¶ 35,238.

[231]Brent Packer v. Soc. Sec. Admin., CBCA Nos. 5038, 5039, 16-1 BCA ¶ 36,260, at 176,901; Sabbia Corp., VABCA No. 5557, 99-2 BCA ¶ 30,394; Steven S. Freedman, PSBCA No. 3867, 96-1 BCA ¶ 28,170; Rohr, Inc., ASBCA Nos. 44193, 44376, 93-2 BCA ¶ 25,871; Hub Testing Labs., Inc., GSBCA No. 11693, 92-3 BCA ¶ 25,081; Erwin Melvie, PSBCA No. 1744, 87-3 BCA ¶ 20, 158 (quoting Janie Marie Winkle, PSBCA No. 1548, 86-3 BCA ¶ 19,255); Consumers Packing Co., ASBCA No, 27092, 82-2 BCA ¶ 15,996. However, merely pleading for these unavailable forms of relief does not divest the boards of jurisdiction to hear appeals over which they otherwise have jurisdiction. See Zeno v. Dep't of State, CBCA No. 4867, 2016 WL 2640622 (May 6, 2016) ("The fact that reinstatement of the contract is not an available remedy, however, does not divest the Board of jurisdiction to entertain appellant's appeal.") (citations omitted).

[232]YRT Enters. LLC dba Tompkins Investigation Serv. v. Dep't of Justice, CBCA No. 5701, 17-1 BCA ¶ 36,809; Chung-Ho Chiao, DOTCAB No. 2264, 91-1 BCA ¶ 23,404; Inslaw, Inc., DOTCAB No. 1609, 90-2 BCA ¶ 22,701; Tom Shaw, Inc., DOTCAB No. 2100, 90-1 BCA ¶ 22,286; Tab Distribs., PSBCA No. 4134, 99-1 BCA ¶ 30,110; Hastetter, PSBCA No. 3064, 92-3 BCA ¶ 25,189.

[233]41 U.S.C.A. § 7103(f)(4), (f)(5); ASBCA R. 1(a)(4), 1(a)(5); PSBCA R. 28(b); CBCA R. 2(a)(5), 2(d)(2).

[234]United Pac. Ins. Co. v. United States, 464 F.3d 1325, 1331 (Fed. Cir. 2006); AT&T v. United States, 177 F.3d 1368, 1375 (Fed. Cir. 1999), aff'd, 540 U.S. 937 (2003); Longshore v. United States, 77 F.3d 440, 443 (Fed. Cir. 1996) ("Congress has undoubted capacity to oversee the performance of Executive Branch agencies, consistent with its constitutional authority. It is not for this court to instruct Congress on how to oversee and manage its creations."); E. Walters & Co. v. United States, 576 F.2d 362, 367 (Ct. Cl. 1978); Parsons Gov't Serv., Inc., ASBCA No. 60663, 17-1 BCA ¶ 36,743.

[235]Colonna's Shipyard, Inc., ASBCA No. 59987, 16-1 BCA ¶ 36,518; Henry Stranahan, ASBCA No. 58392, 13 BCA ¶ 35,312; Ben M. White Co., ASBCA No. 39444, 90-3

BCA ¶ 23,115, aff'd on recons., 91-1 BCA ¶ 23,295.

[236]Imco, Inc. v. United States, 97 F.3d 1422, 1425 (Fed. Cir. 1996); Allen v. United States, 140 Fed. Cl. 550, 563 (2018) ("[D]isqualification, debarment, and suspension decisions have been expressly described 'administrative actions' that do not give rise to money damages. . ..Accordingly, plaintiff's claim for money-damages based on violations of the FAR d[e]barment provisions must be dismissed for lack of jurisdiction."); FAS Support Servs., LLC v. United States, 93 Fed. Cl. 687, 695 (2010); Vincent Schickler v. United States, 54 Fed. Cl. 264, 272 (2002).

[237]FAS Support Servs., LLC v. United States, 93 Fed. Cl. 687, 696 (2010).

[238]Harper/Nielsen-Dillingham, Builders, Inc. v. United States, 81 Fed. Cl. 667, 669 (2008); Inman & Assocs., Inc., ASBCA No. 37869, 89-3 BCA ¶ 22,066.

[239]41 U.S.C.A. § 7105(e)(2).

[240]LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1554 (Fed. Cir. 1995) (quoting Paragon Energy Corp. v. United States, 645 F.2d 966, 972 (Ct. Cl. 1981) (citation omitted)).

[241]Amaratek, ASBCA No. 60503, 16-1 BCA ¶ 36,491; Statistica, Inc., ASBCA No. 44116, 92-3 BCA ¶ 25,095; see also Allen v. United States, 140 Fed. Cl. 550, 59 (2018) ("The Federal Circuit has observed for many years that the CDA 'does not cover all government contracts.") (citations omitted).

[242]28 U.S.C.A. § 1491(b)(1)–(2); Coastal Corp. v. United States, 713 F.2d 728, 730 (Fed. Cir. 1983); Crooked River Logistics, LLC, PSBCA No. 6618, 17-1 BCA ¶ 36,787; Amaratek, ASBCA No. 60503, 16-1 BCA ¶ 36,491; Smoke Blotter, Inc., ASBCA No. 56933, 10-1 BCA ¶ 34,345; Statistica, Inc., ASBCA No. 44116, 92-3 BCA ¶ 25,095; Ammon Circuits Research, ASBCA No. 50885, 97-2 BCA ¶ 29,318; see RC 27th Ave. Corp., ASBCA No. 49176, 97-1 BCA ¶ 28,658. The GSBCA's former jurisdiction under the Brooks Act over certain bid protests involving automatic data processing equipment and services was eliminated in 1996. See Clinger-Cohen Act of 1996, Pub. L. No. 104-106, § 5101, 110 Stat. 186, 680 (1996).

[243]The Tucker Act "does not create a substantive cause of action, and, as such, a plaintiff must identify a separate source of substantive law that creates the right to monetary damages. While the separate source of law need not explicitly provide for enforcement through damages, liability is triggered only if the source can be fairly interpreted as mandating compensation from the Government." "Contract law is a separate source of law compensable under the Tucker Act. . ..Typically, in a contract case, the presumption that money damages are available satisfies the Tucker Act's money-mandating requirement." However, the Government "has not consented to suit under the Tucker Act for every contract. For instance, contracts that are entirely concerned with the conduct of parties in a criminal case, without a clear, unmistakable statement triggering monetary liability, do not invoke Tucker Act jurisdiction. Express disavowals of money damages within a contract's terms likewise defeat jurisdiction. Tucker Act jurisdiction may also be lacking if relief for breach of contract could be entirely non-monetary. In such a case, it is proper for the court to require a demonstration that the agreements could fairly be interpreted as contemplating monetary damages in the event of breach." Higbie v. United States, 778 F.3d 990, 994–95 (Fed. Cir. 2015) (citations and quotations omitted).

[244]Higbie v. United States, 778 F.3d 990, 993 (Fed. Cir. 2015) (citing Sanders v. United States, 252 F.3d 1329, 1334 (Fed. Cir. 2001)).

[245]Wells Fargo Bank, N.A. v. United States, 88 F.3d 1012, 1022 (Fed. Cir. 1996).

[246]41 U.S.C.A. § 7104(a); ASBCA R. 1; CBCA R. 2(d)(1), 6(a); see England v. Sherman R. Smoot Corp., 388 F.3d 844, 852 (Fed. Cir. 2004). The ASBCA has held that a contractor's notification of a CO of its intent to appeal is sufficient to satisfy the notice requirements of the CDA. See Afghan Active Grp., ASBCA No. 60387, 16-1 BCA ¶ 36,349; Axxon Int'l, LLC, ASBCA No. 59497, 15-1 BCA ¶ 35,864 (holding notification of U.S. Army Counsel of intent to appeal rather than ASBCA sufficient notice); Tessada & Assocs., ASBCA No. 59446, 15-1 BCA ¶ 35,969 (holding notice of appeal timely where notice was postmarked before the expiration of the 90-day deadline). But see Soto Constr. Co. v. Dep't of Ag., CBCA No. 3210, 13 BCA ¶ 35,301 (holding that notice of appeal sent to the agency insufficient).

[247]41 U.S.C.A. § 7104(b)(3); see England v. Sherman R. Smoot Corp., 388 F.3d 844, 852 (Fed. Cir. 2004); White Buffalo Constr., Inc. v. United States, 28 Fed. Cl. 145, 147 (1992) (filing one day after the expiration of the 12-month statutory period rendered the complaint untimely).

[248]See ASBCA R. 6; CBCA R. 6.

[249]BAE Sys. Land & Armaments, Inc., ASBCA No. 59374, 15-1 BCA ¶ 35,817 (citing Beechcraft Def. Co., ASBCA No. 59173, 14-1 BCA ¶ 35,592); IBM Corp., ASBCA No. 60332, 18-1 BCA ¶ 37,002; Transworld Sys. Inc. v. Dep't of Educ., CBCA No. 6049, 18-1 BCA ¶ 36,987 (granting appellant's request that the board direct the Government to file a Complaint); Muhammad v. Dep't of Justice, CBCA No. 5188, 16-1 BCA 36,267 ("[T]he Board may, [i]n appropriate cases,. . .exercise its discretion to direct the government to file the complaint."); CBCA R. 6(a) ("The Board may in its discretion order a respondent asserting a claim to file a complaint."); PSBCA R. 7(c) ("Where an appellant has appealed an affirmative claim by the respondent asserted in a final decision by a Postal Service contracting officer, such as a termination for default or a Postal Service claim that a contractor owes the Postal Service money under a contract, the Board may order the respondent to file the complaint[.]").

[250]See, e.g., Gen. Dynamics Corp., ASBCA No. 49339, 96-1 BCA ¶ 28,244, at 141,018; Am. Home Assurance Co., DOT BCA No. 2972, 96-1 BCA ¶ 28,233, at 140,981; Times Mirror Land & Timber Co., AGBCA No. 86-312-1, 87-1 BCA ¶ 19,505.

[251]Lockheed Martin Integrated Sys., Inc., ASBCA No. 59508, 17-1 BCA ¶ 36,597; Muhammad v. Dep't of Justice, CBCA No. 5188, 16-1 BCA ¶ 36,267 ("[I]t will often be more efficient from a procedural standpoint, as well as more useful to the Board, to have the Government rather than the contractor file the initial complaint in an appeal from a

default termination."); BAE Sys. Land & Armaments, Inc., ASBCA No. 59374, 15-1 BCA ¶ 35,817 ("In these particular circumstances, proceedings would be more efficient if the Board could start with a government articulation of the basis for its determination of defective pricing, rather than appellant's speculation about the basis for the government's assertions."); Hughes Aircraft Co., ASBCA No. 46321, 94-2 BCA ¶ 26,801.

[252]Eur-Pac Corp., ASBCA Nos. 61647, 61648, 18-1 BCA ¶ 37,202; Afghan Active Grp., ASBCA No. 60387, 16-1 BCA ¶ 36,349; White Buffalo Constr., Inc. v. United States, 28 Fed. Cl. 145, 147 (1992); Robinson Quality Constructors, ASBCA No. 55784, 09-1 BCA ¶ 34,171.

[253]See Borough of Alpine v. United States, 923 F.2d 170, 172–73 (Fed. Cir. 1991); Gunn-Williams v. United States, 8 Cl. Ct. 531, 534 (1985).

[254]See United States v. Renda Marine, Inc., 667 F.3d 651, 657 (5th Cir. 2012); United States v. Suntip Co., 82 F.3d 1468, 1471, 1474–75 (9th Cir. 1996); United States v. Kasler Elec. Co., 123 F.3d 341, 344 (6th Cir. 1997); Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1562 n.4 (Fed. Cir. 1990) ("The government may obtain a judgment on the basis of such decision in a state or federal court without litigating the merits."); United States v. Ulvedal, 372 F.2d 31, 34–35 (8th Cir. 1967); United States v. Roarda, Inc., 671 F. Supp. 1084, 1085–86 (D. Md. 1987); United States v. Dabbs, 608 F. Supp. 507, 509 (S.D. Miss. 1985).

[255]RCFC 12, 13.

[256]ASBCA R. 6(a)–(b); CBCA R. 6(a)–(b).

[257]Compare CBCA R. 4(a) ("Within 30 days after receiving the Board's docketing notice, the respondent shall file and serve all documents relevant to the appeal[.]") and PSBCA R. 5(a) (Government shall file the appeal file "[w]ithin 30 days from receipt of the Board's docketing notice") to ASBCA R. 4(a) ("Within 30 days of notice that an appeal has been filed, the Government shall transmit to the Board and the appellant an appeal file[.]"). The ASBCA has issued guidance for filing Rule 4 files electronically. Armed Services Board of Contract Appeals Guidance for Submission of Appeal Files and Exhibits in Electronic Form (Feb. 1, 2019), available at http://www.asbca.mil/Rules/rules.html. Other ASBCA filings are made by email to the board. See ASBCA R. 2(a)(3). The ASBCA is "currently in the process of moving to an electronic case management/electronic case filing (ECM/ECF) system." Prouty, "The Direction of Board Practice as the CDA Hits Middle Age: An Upbeat View," 48 Pub. Cont. L.J. 7, 11 & nn.32, 33 (Fall 2018).

[258]See PSBCA R. 5(a), 7(a)–(b). Filings at the PSBCA, including appeal files, are made through an electronic filing system at https://uspsjoe.justware.com/JusticeWeb, which is similar to PACER and free to the parties. See PSBCA R. 1(b)(1), (c)(4) & (5).

[259]E.g., PSBCA R. 5; ASBCA R. 4(a); see also Willard & Jackson, "Selected Procedural Issues at the Boards of Contract Appeals," 98-07 Briefing Papers 1, at *5 (June 1998). The Civilian Board's rules on this subject are more detailed and provide that the Rule 4 file consists of "all documents relevant to the appeal, including: (1) [t]he contracting officer's [final] decision on the claim; (2) [t]he contract including all pertinent specifications, amendments, plans, drawings, and incorporated proposals and parts thereof; (3) [a]ll correspondence between the parties that are relevant to the appeal; (4) [t]he claim with any certification; (5) [r]elevant affidavits, witness statements, or transcripts of testimony taken before the appeal; (6) [a]ll documents relied on by the contracting officer to decide the claim; and (7) [r]elevant internal memoranda, reports, and notes." CBCA R. 4(a). At the CBCA, the parties typically "file the appeal file and supplements thereto in an electronic storage medium (e.g., hard disk or solid state drive, compact disc (CD), or digital versatile disc (DVD))[.]" CBCA R. 4(b)(1). Other filings may be made by email (i.e., e-filing). See CBCA R. 1(b) (definition of "Efile; efiling").

[260]Bowers Inv. Co. v. United States, 695 F.3d 1380, 1383 (Fed. Cir. 2012); BRC Lease Co. v. U.S., 93 Fed. Cl. 67, 71 (Fed. Cl. 2010), citing Nat'l Neighbors, Inc. v. U.S., 839 F.2d 1539, 1541–42 (Fed. Cir. 1988). Separate claims that arise under the same contract, however may properly be brought before the CFC and an agency board, see, e.g., Phillips/May Corp. v. United States, 524 F.3d 1264, 1272 (Fed. Cir. 2008); Placeway Constr. Corp. v. U.S., 920 F.2d 903, 907 (Fed. Cir. 1990), Rockwell Automation, Inc. v. U.S., 70 Fed. Cl. 114 (2006), but doing so potentially could lead to consolidation of the cases in one forum as decided by the CFC.

[261]Bowers Inv. Co. v. United States, 695 F.3d 1380, 1383 (Fed. Cir. 2012); Bonneville Assocs. v. United States, 43 F.3d 649, 653 (Fed. Cir. 1994); Glenn v. United States, 858 F.2d 1577, 1580 (Fed. Cir. 1988); Nat'l Neighbors, Inc. v. U.S., 839 F.2d 1539, 1541–42 (Fed. Cir. 1988); Tuttle/White Constructors, Inc. v. United States, 656 F.2d 644, 646 (Ct. Cl. 1981).

[262]Bonneville Assocs. v. United States, 43 F.3d 649, 655 (Fed. Cir. 1994); Ogunniyi v. United States, 124 Fed. Cl. 525, 534 (2015), aff'd, 655 F. App'x 842 (Fed. Cir. 2016); Palafox St. Assocs., L.P. v. United States, 114 Fed. Cl. 773, 787–88 (2014); Paradigm Learning, Inc. v. United States, 93 Fed. Cl. 465, 474 (2010).

[263]See Nat'l Neighbors, Inc. v. U.S., 839 F.2d 1539, 1543 (Fed. Cir. 1988); Paradigm Learning, Inc. v. United States, 93 Fed. Cl. 465, 474 (2010); see also Brisbin v. U.S., 629 F. App'x 1000, 1004 (Fed. Cir. 2015) (clarifying that the 41 U.S.C.A. § 7103(b)(3)'s 12-month filing deadline is jurisdictional notwithstanding the Federal Circuit's Sikorsky Aircraft Corp. v. United States decision holding that 41 U.S.C.A. § 7103(a)(4)(A)'s six-year deadline to submit a claim to a CO or contractor is not jurisdictional) (citing Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315 (Fed. Cir. 2014)).

[264]41 U.S.C.A. § 7103(b)(3); see Universal Canvas, Inc. v. Stone, 975 F.2d 847, 850 (Fed. Cir. 1992); see also United States v. Grumman Aerospace Corp., 927 F.2d 575, 580 (Fed. Cir. 1992).

[265]See, e.g., Palafox Street Assocs. L.P. v. United States, 114 Fed. Cl. 773, 787 (2014).

[266]See CBCA R. 5(a)(2) ("[I]f allowed by the agency," the Government may appear—but in practice rarely, if ever, does—before the Civilian Board through the CO or the CO's

authorized representative.).

[267]See Sisk, Litigation With the Federal Government 310 (2016) (citing Schaengold & Brams, "Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals," 17 Fed. Cir. B.J. 279, 312–14 (2008)).

[268]E.g., ASBCA R. 15(a); CBCA R. 5(a)(1).

[269]Greenlee Constr., Inc. v. Gen. Servs. Admin., CBCA No. 416, 07-1 BCA ¶ 33,514; see also Orr v. Dep't of Agric., CBCA No. 5299, 17-1 BCA ¶ 36,863.

[270]E.g., ASBCA R. 15(a); CBCA R. 5(b); PSBCA R. 26(a).

[271]RCFC 83.1(a)(3). See, e.g., Balbach v. United States, 119 Fed. Cl. 681 (2015); Woodruff v. United States, 122 Fed. Cl. 761 (2015) (non-attorney cannot represent corporation in the CFC even in the case of financial hardship).

[272]RCFC 83.1(a)(1)(B). Alternatively, the attorney may practice before the CFC if the attorney was a member in good standing of the bar of the U.S. Court of Claims. RCFC 83.1(a)(1)(C).

[273]RCFC 83.1(c)(1).

[274]RCFC 83.1(c)(1).

[275]28 U.S.C.A. §§ 516, 519; Renda Marine, Inc. v. U.S., 509 F.3d 1372, 1379–80 (Fed. Cir. 2007); Sharman Co. v. United States, 2 F.3d 1564, 1571–72 (Fed. Cir. 1993), overruled on other grounds, Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995) (Once a contract claim is in litigation in the CFC, the DOJ "gains exclusive authority to act in the pending litigation."); Hoskins Lumber Co. v. United States, 24 Cl. Ct. 259, 264-65 (1991); Durable Metal Prods., Inc. v. United States, 21 Cl. Ct. 41, 45-46 (1990); Claude E. Atkins Enters. v. United States, 15 Cl. Ct. 644, 647 n.2 (1988); Executive Order No. 6166, reprinted in 5 U.S.C.A. § 901 note; see Exec. Bus. Media v. Dep't of Def., 3 F.3d 759 (4th Cir. 1993).

[276]Securiforce Int'l Am., LLC v. United States, 879 F.3d 1354, 1360 (Fed. Cir. 2018), cert. denied, No. 18-37, 2018 WL 3329191 (U.S. Nov. 13, 2018); K-Con Bldg. Sys., Inc. v. United States, 778 F.3d 1000, 1005 (Fed. Cir. 2015); Sharman Co., 2 F.3d at 1571–72; Hanover Ins. Co. v. United States, 116 Fed. Cl. 303, 310 (2014).

[277]See 28 C.F.R. §§ 0.160–0.172 & app; U.S. Dep't Of Justice, Justice Manual §§ 4-3.110–4-3.432, available at https://www.justice.gov/jm/jm-4-3000-compromising-and-closing.

[278]This paragraph and the preceding paragraph (above) are quoted in Sisk, Litigation With the Federal Government 311–12 (2016).

[279]Coastal Int'l Sec., Inc. v. Dep't of Homeland Sec., DOTCAB No. 4528, 06-2 BCA ¶ 33,385; Marino Constr. Co., VABCA No. 2752, 90-1 BCA ¶ 22,553; J.H. Strain & Sons, Inc., ASBCA No. 34432, 88-3 BCA ¶ 20,909 (declining to enforce a settlement agreement that agency's attorney entered into without authority); J.W. Bateson Co., ASBCA No. 24425, 84-1 BCA ¶ 16,942; Nash & Cibinic, "Settlement of Claims: Who Is Authorized To Do What?," 6 Nash & Cibinic Rep. ¶ 52 (Sept. 1992).

[280]CBCA R. 25(b).

[281]See, e.g., RB Realty Inc. v. Gen. Servs. Admin., CBCA No. 482, 07-1 BCA ¶ 33,487; Bhandari Constructors & Consultants, Inc. v. Dep't of Veterans Affairs, CBCA No. 4 et al., 07-1 BCA ¶ 33,497; New England Design Assocs. v. Dep't of Veterans Affairs, CBCA No. 9 et al., 2007 WL 731066 (Mar. 1, 2007); see CBCA R. 31 ("Payment of Award"); ASBCA R. 19(c); see also 31 U.S.C.A. § 1304; 41 U.S.C.A. § 7108. See generally Chu & Yeh, Cong. Research Serv., R42835, The Judgment Fund: History, Administration, and Common Usage (Mar. 7, 2013), available at https://fas.org/sgp/crs/misc/R42835.pdf;. Vacketta & Kantor, "Obtaining Payment From the Government's 'Judgment Fund,' " 97-03 Briefing Papers 1, at *1–2, *3 (Feb. 1997).

[282]See IMS Eng'rs-Architects, P.C. v. United States, 92 Fed. Cl. 52, 64 (2010), aff'd, 418 F. App'x 920 (Fed. Cir. 2011); Servitodo LLC v. Dep't of Health & Human Servs., CBCA No. 5524, 17-1 BCA ¶ 36,672 ("A settlement agreement is binding on the parties and 'bars further recovery on the issues raised or referred to in it directly or by reference, absent mutual mistake or duress.") (quoting Primetech v. Dep't of Homeland Sec., CBCA No. 2453, 12-2 BCA ¶ 35,130); AM Gen., LLC, ASBCA No. 57662, 12-2 BCA ¶ 35,171 (rejecting subcontractors challenge to a settlement agreement between the Government and prime contractor); Basirat Constr. Firm, ASBCA No. 56808, 12-1 BCA ¶ 34,950 (rejecting contractor's arguments that a settlement agreement was invalid for reasons of coercion, fraud, or mistake).

[283]28 U.S.C.A. § 1491(a)(1); Slattery v. United States, 635 F.3d 1298, 1321 (Fed. Cir. 2011) (en banc); Atlas Corp. v. United States, 895 F.2d 745 (Fed. Cir. 1990).

[284]More specifically, in order to exercise Tucker Act jurisdiction over an alleged breach of a settlement agreement, the CFC must fairly infer that the agreement contemplates money damages, not just "purely non-monetary relief," if a breach occurs. Cunningham v. United States, 748 F.3d 1172, 1176 (Fed. Cir. 2014) (quoting Holmes v. United States, 657 F.3d 1303, 1315 (Fed. Cir. 2011)). In a breach of contract action (including breach of a settlement agreement), money damages are presumed available. Holmes v. United States, 657 F.3d 1303, 1314 (Fed. Cir. 2011). If a settlement agreement "expressly disavow[s] money damages," this would of course rebut the presumption and eliminate the CFC's jurisdiction. Cunningham v. United States, 748 F.3d 1172, 1178 (Fed. Cir. 2014). Notably, a claim of breach is separate from the underlying dispute that the settlement agreement "resolved." See Cunningham v. United States, 748 F.3d 1172, 1178–79 (Fed. Cir. 2014).

[285]See e.g., Primetech v. Dep't of Homeland Sec., CBCA No. 2560, 12-2 BCA ¶ 35,130; Global Ship Sys., LLC v. Dep't of Homeland Sec., CBCA No. 923, 10-2 BCA ¶ 34,496; Trawick Cont., Inc., ASBCA No. 55097, 07-1 BCA ¶ 33,499; Kato Corp., ASBCA No. 51462, 06-2 BCA ¶ 33,293; Marino Constr. Co., VABCA No. 2752, 90-1 BCA ¶ 22,553; Rimar Constr. Co., AGBCA Nos. 88-33-1, 88-232-1, 89-3 BCA ¶ 22,074.

[286]E.g., Marino Constr. Co., VABCA No. 2752, 90-1 BCA ¶ 22,553; Rimar Constr. Co., AGBCA No. 88-33-1,

89-3 BCA ¶ 22,074; cf. State Auto. Mut. Ins. Co., CBCA No. 1185, 08-2 BCA ¶ 33,875 (denying request that board decision "state that the Board retains jurisdiction to enforce the Settlement Agreement" because "[w]hether the Board has jurisdiction to enforce a settlement agreement is a question of law, not a matter as to which parties or the Board may stipulate. The Board makes no determination as to whether its jurisdiction includes the resolution of disputes which may arise under the settlement agreement.").

[287]See, e.g., Long Wave, Inc., ASBCA No. 61483, Sept. 24, 2018, slip op. at 7; Sundt Constr., Inc., ASBCA No. 56293, 09-1 BCA ¶ 34,084; E. Coast Sec. Servs., Inc. v. Dep't of Homeland Sec., DOTCAB No. 4469R, 06-1 BCA ¶ 33,290; Barnes, Inc., AGBCA No. 97-111-1, 97-2 BCA ¶ 29,237; Seagraves Coating Corp., GSBCA No. 13069 (11270)-REIN et. al, 96-2 BCA ¶ 28,543; PRC, Inc., DOTCAB No.2543 et al., 94-2 BCA ¶ 26,613; G.E.T. Constr. Co., ASBCA Nos. 24234, 28709, 84-2 BCA ¶ 17,464; Montgomery Ross Fisher, Inc., VABCA No. 3696, 94-1 BCA ¶ 26,527; Construcciones Electromecanicas S.A., ASBCA No.41413, 94-1 BCA ¶ 26,296.

[288]See generally Park-Conroy & Harty, "Alternative Dispute Resolution at the ASBCA," 00-7 Briefing Papers 1 (June 2000); Practicing Before the Federal Boards of Contract Appeals 16–18 (Am. Bar Ass'n 2012); Wheeler, "Let's Make the Choice of Forum Meaningful," 28 Pub. Cont. L.J. 4, 656–57 (1999); Arnavas & Hornyak, "Alternative Dispute Resolution/Edition II," 96-11 Briefing Papers 1, at *1–3 (Oct. 1996).

[289]Khoury, Sacilotto, & Castiglia, Government Contractors and Litigation Forums: Navigating Litigation Against the Government, at Slide 9 (June 8, 2016), https://m.acc.com/chapters/ncr/upload/Slides-GovernmentLitigation-6-8-2016.pdf.

[290]CBCA R. 54(a); CBCA, General Information About Alternative Dispute Resolution, https://www.cbca.gov/adr/general.html; CBCA, About the Board, https://www.cbca.gov/board/index.html; see also ASBCA R., Addendum II, at ¶ 1 ("the parties are encouraged to consider Alternative Dispute Resolution (ADR) procedures for pre-claim and pre-final decision matters").

[291]Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 2008, at 3 (Oct. 29, 2008); Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 2009, at 3 (Oct. 27, 2009); Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 2010, at 3 (Oct. 28, 2010); Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 2011, at 3 (Oct. 21, 2011); ASBCA FY 2012 Report, at 3; ASBCA FY 2013 Report, at 3; ASBCA FY 2014 Report, at 3; ASBCA FY 2015 Report, at 3; ASBCA FY 2016 Report, at 3; ASBCA FY 2017 Report, at 3; ASBCA FY 2018 Report, at 3; see ASBCA, Annual Reports, http://www.asbca.mil/Reports/reports.html.

[292]See RCFC app. H. Previously, General Orders (e.g., General Orders 40 and 44) established the court's ADR program and procedures. However, on August 1, 2016, an Order revoked General Order No. 44, ADR Automatic Referral Program, and stated that the court will follow the ADR procedures set out in Appendix H of the court's rules. See http://www.uscfc.uscourts.gov/sites/default/files/160801-Order-Revoking-General-Order-44.pdf; see Gregson v. Sec'y of the Dep't of Health & Human Servs., 17 Cl. Ct. 19, 25 (1989); Durable Metal Prods., Inc. v. United States, 21 Cl. Ct. 41, 48 (1990).

[293]RCFC app. H, Rules Committee Notes, 2016 Amendment. In 2007, the CFC renamed its ADR Pilot Program the ADR Automatic Referral Program. See General Order No. 44, Notice of ADR Automatic Referral Program and ADR Automatic Referral Procedures. This Program was terminated in August 2016. See CFC, Order Revoking General Order No. 44 ADR Automatic Referral Program (Aug. 1, 2016), available at https://www.uscfc.uscourts.gov/sites/default/files/160801-Order-Revoking-General-Order-44_0.pdf; CFC, Notice of Adoption of Amendments to Rules (August 1, 2016), available at http://www.uscfc.uscourts.gov/sites/default/files/160801-Notice-of-Adoption.pdf; RCFC app. H, as amended; App. H, Rules Committee Notes, 2016 Amendment. Under the Program, cases before four specific judges also were assigned simultaneously (at the time of the filing of the complaint) to an ADR judge. The Program was designed to study whether early meetings with an ADR judge or meetings with the ADR judge after the close of discovery can facilitate the settlement process. In May 2015, the Committee recommended eliminating the longstanding Program. The Committee found that the Program demonstrated the value in involving a settlement judge or other third-party neutral early in some cases. Accordingly, the Committee recommended that "the program preserve the option of any assigned judge to suggest the use of early neutral evaluation in cases for which the assigned judge believes it may expedite resolution of the case, among other options." U.S. Court of Federal Claims Advisory Council Emeritus Leadership Committee, Alternative Dispute Resolution Proposal: Revisions to Rule 16(f) and Appendix H: Procedures for Alternative Dispute Resolution (Nov. 18, 2015), available at http://www.uscfc.uscourts.gov/sites/default/files/Complete-ADR-Proposal-12-2-15.pdf.

[294]RCFC app. H; Durable Metal Prods., Inc. v. United States, 21 Cl. Ct. 41, 48 (1990).

[295]See RCFC app. A, ¶¶ 3(e), ¶ 4(i); RCFC app. H, ¶ 3.

[296]See RCFC app. H, ¶ 3.

[297]See RCFC app. H, ¶ 3(b).

[298]See RCFC app. H, ¶ 3(b).

[299]RCFC app. H ¶ 3(g).

[300]RCFC app. H, ¶ 3.

[301]RCFC app. H, ¶¶ 1(b), 2(d)–(h).

[302]RCFC app. H, ¶¶ 1(b), 3.

[303]RCFC app. H, ¶ 1(b).

[304]RCFC app. H, ¶ 3(c).

[305]RCFC app. H, ¶ 2(b).

[306]RCFC app. H, ¶ 3(d).

[307]RCFC ¶ 16(f)(2); app. H, ¶ 3(e).

[308]RCFC app. H, ¶ 3(h).

[309]See, e.g., RCFC app. H, ¶ 1 (The CFC "recognizes the value of encouraging the use of alternative dispute resolution (ADR) in appropriate cases. . ..The goal of ADR is to aid parties' efforts in negotiating a settlement of all or part of the dispute.").

[310]See, e.g., CBCA R. 54; CBCA, Alternative Dispute Resolution, https://www.cbca.gov/adr/index.html; ASBCA, Alternative Dispute Resolution (ADR), http://www.asbca.mil/ADR/adr.html; Williams & Page, "The ASBCA's Path to the 'Mega ADR' in Computer Sciences Corporation," 24 The Clause 9, 11–14 (2013) (describing the ASBCA's approach to ADR).

[311]41 U.S.C.A. § 7105(g)(1).

[312]5 U.S.C.A. §§ 571–584.

[313]5 U.S.C.A. § 571(3), (9).

[314]41 U.S.C.A. § 7103(h).

[315]ASBCA R., Addendum II at ¶ 7; see ASBCA R., Addendum II at ¶ 2; see also CBCA R. 54(e) ("Parties and the Board may agree on any type of binding or nonbinding ADR suited to a dispute."); see Prouty, "The Direction of Board Practice as the CDA Hits Middle Age: An Upbeat View," 48 Pub. Cont. L.J. 7, 12 n.34 (Fall 2018) ("There are two main varieties of ADR at the ASBCA. The first is the traditional mediation performed by a Board judge. These are the majority by far. The second is a summary trial with a binding decision by the one judge who hears it with no appeal rights—what many would think of as an arbitration.").

[316]ASBCA R., Addendum II at ¶ 3.

[317]ASBCA R., Addendum II at ¶ 4.

[318]ASBCA R., Addendum II at ¶ 5.

[319]CBCA R. 54(b).

[320]CBCA R. 54(b).

[321]CBCA R. 54(a)

[322]CBCA R. 54(a).

[323]48 C.F.R. § 6101.54(c) (2016).

[324]CBCA R. 54(e).

[325]Telephone Interview with PSBCA Chairman Gary Shapiro (Jan. 15, 2019). Although the PSBCA Rules "do not specifically mention the use of ADR, other Postal Service authorities encourage it." See https://www.adr.gov/adrguide/ch20.html. For example, pursuant to 39 C.F.R. § 601.109, which specifically implements the CDA (as amended), "the Postal Service supports and encourages the use of alternative dispute resolution as an effective way to understand, address, and resolve conflicts with suppliers." 39 C.F.R. § 601.109(b); see USPS Supplying Principles & Practices, ch. 10, Clause B-9, "Claims and Disputes (March 2006)," ¶ g, available at https://about.usps.com/manuals/spp/html/spp10.htm#ep975569 ("When a CDA claim is submitted by or against a supplier, the parties by mutual consent may agree to use an alternative dispute resolution (ADR) process to assist in resolving the claim.").

[326]CBCA, If Alternative Dispute Resolution Does Not Result in Settlement, https://www.cbca.gov/adr/nosettlement.html.

[327]CBCA R. 54(b).

[328]Foreword to the RCFC ("To maintain symmetry between the court's rules and the Federal Rules of Civil Procedure (FRCP), the court has adopted a policy of regularly amending its rules to reflect parallel changes in the Federal Rules of Civil Procedure."); Cutright v. United States, 15 Cl. Ct. 576, 577 (1988), rev'd on other grounds, 953 F.2d 619 (Fed. Cir. 1992); White Mountain Apache Tribe v. United States, 5 Cl. Ct. 288 (1984).

[329]See Foreword to the RCFC.

[330]See Forward to RCFC, 2002 Rules Committee Note.

[331]RCFC 83(b); see RCFC 83 Rules Committee Notes, 2002 Revision.

[332]Final Uniform Rules of Procedure for Boards of Contract Appeals under the Contract Disputes Act of 1978, 44 Fed. Reg. 34,227 (June 14, 1979).

[333]The CBCA promulgated new Rules of Procedure for CDA Cases on August 17, 2018. See 83 Fed. Reg. 41,009 (Aug. 17, 2018); see also 83 Fed. Reg. 13,211 (Mar. 28, 2018) (proposed CBCA rules). The new rules "govern cases filed with the Board on or after September 17, 2018, and all further proceedings in cases then pending, unless the Board decides that using the rules in a case pending on their effective date would be inequitable or infeasible." CBCA R. 1(a); 83 Fed. Reg. at 41,010. In addition to stylistic changes and moving certain forms from the appendix to its rules to its website, the rules incorporate by reference several Federal Rules of Civil Procedure regarding, e.g., discovery, reconsideration, and relief from decision or order. 83 Fed. Reg. at 41,009. This change allows "the Board to adopt and apply case law applying the relevant Federal Rules, as well as any future amendments to those Federal Rules, without revising the Board's rules again." 83 Fed. Reg. at 13,212; see Somers, "Comments on the Fortieth Anniversary of the Contract Disputes Act," 48 Pub. Cont. L.J. 1, 4 & n.21 (Fall 2018). Significantly, the CBCA's rule state that "[t]he Board may apply principles of the Federal Rules of Civil Procedure to resolve issues not covered by these rules." CBCA R. 1(c); see CBCA R. 3(a) (referencing a specific Federal Rule of Civil Procedure), 8(e) (same), 15(b) (same). As ASBCA Vice Chair Prouty has noted, "[i]n many ways, [the CBCA rules] are similar to the Federal Rules of Civil Procedure, although they are certainly shorter. To this outsider, it appears that they have accepted a certain amount of process creep as inevitable, but written their rules to minimize it." Prouty, "The Direction of Board Practice as the CDA Hits Middle Age: An Upbeat View," 48 Pub. Cont. L.J. 7, 11 (Fall 2018) (footnote omitted).

[334]See ASBCA R. 7(c)(2) ("In deciding motions for summary judgment, the Board looks to Rule 56 of the Federal Rules of Civil Procedure for guidance."). ASBCA Vice Chair Prouty has stated that "[a]lthough the ASBCA has revised its own rules relatively recently, we have resisted following the Federal Rules model. To us, this seems to be the best method of preserving flexibility, although to those not familiar with our rules, and more familiar with the Federal Rules, they may feel 'clunky.' " Prouty, "The Direc-

tion of Board Practice as the CDA Hits Middle Age: An Upbeat View," 48 Pub. Cont. L.J. 7, 11 (Fall 2018) (footnote omitted).

[335]PSBCA R. 1(c)(2).

[336]See RCFC app. A, ¶ 4(c) (The Joint Preliminary Status Report, which is filed by the parties at the CFC, must answer the question: "Should trial of liability and damages be bifurcated and, if so, why?"); RCFC app. A, ¶ 14(a)(4) ("[I]f plaintiff believes that bifurcation of the issues for trial is appropriate, the [plaintiff's pretrial Memorandum of Contentions of Fact and Law] shall contain a request therefor, together with a statement of reasons."); Banks v. United States, 102 Fed. Cl. 115, 180 (2011) ("This case has been bifurcated to allow the issues of liability and damages to be treated separately."); CANVS Corp., ASBCA Nos. 57784, 57987, 16-1 BCA ¶ 36,526 ("Quantum issues were bifurcated for possible future proceedings in the event that the Board sustained the appeal with respect to entitlement[.]"). As noted in Practicing Before the Federal Boards of Contract Appeals 14 (Am. Bar Ass'n 2012), "[i]n some cases, to shorten the time needed to process an appeal and save resources, the parties may ask the judge to decide the appeal in two parts: entitlement and quantum. Sometimes the judge will raise this issue. When separate decisions are issued on entitlement and quantum, the appeal is said to be 'bifurcated.' " That handbook further observes that "[t]o decide whether an appeal should be bifurcated, the judge will consider the benefits of splitting the litigation into two parts. In the entitlement phase of an appeal, the merits of a case are addressed, i.e., whether the party is entitled to any relief. The quantum phase determines the amount of money that an entitled party should recover, i.e., what costs the party has proved. If the judge determines in the entitlement phase of an appeal that the claim should be denied. . ., there is no need to move to the quantum phase. If the quantum portion of the claim is particularly complicated and will take a long time to explain and decide, it might be best to have a hearing and obtain a decision on entitlement first, leaving the issue of quantum (what/how much entitlement) to a later date." Practicing Before the Federal Boards of Contract Appeals 14–15 (Am. Bar Ass'n 2012).

[337]See, e.g., CiyaSoft Corp., ASBCA Nos. 59519, 59913, 18-1 BCA ¶ 37,084 ("The appeal is remanded to the parties for resolution of the damages due appellant[.]"). Even if an ASBCA appeal "has been bifurcated in accordance with the Board's standard practice," "[t]he fourth element of a breach of contract claim, damage, also needs to be established by appellant with respect to these [] breach claims. . ..Appellant must present some evidence that it was damaged by the governmental actions of which it complains even in a hearing which is limited to the issue of liability." Since it did so in Ciyasoft, the appeal was remanded to the parties for resolution of damages. CiyaSoft Corp., ASBCA Nos. 59519, 59913, 18-1 BCA ¶ 37,084. Compare NST v. Gen. Servs. Admin., CBCA No. 449, 11-1 BCA ¶ 34,765 (although "proceedings in this appeal were bifurcated" with appellant denied entitlement, a quantum hearing was held on the Government's claim with a monetary award made to the Government); see also Sierra Constr., Inc., PSBCA No. 4950 et al., 05-2 BCA ¶ 33,068 ("proceedings were bifurcated"); Blackstone Consulting, Inc. v. Gen. Servs. Admin., CBCA No. 718, 09-1 BCA ¶ 34,103 ("The Board bifurcated the proceedings into entitlement and quantum;" only entitlement was tried and it was denied.).

[338]See, e.g., Fru-Con Constr. Corp., ASBCA No. 55197, 07-2 BCA ¶ 33,697 ("The parties were unable to resolve the quantum issues. An appeal associated with Fru-Con's quantum claims was docketed as ASBCA No. 55197; an appeal associated with the government's quantum claims was docketed as ASBCA No. 55248. The two quantum appeals were consolidated for a four-day hearing and decision.").

[339]See, e.g., Roth, "Which Courts Have Jurisdiction To Consider Appeals of Maritime CDA Claims," The Procurement Playbook (June 6, 2017), https://www.procurementplaybook.com/2017/06/which-courts-have-jurisdiction-to-consider-appeals-of-maritime-cda-claims/.

[340]RCFC app. A, ¶ 1.

[341]RCFC app. A, ¶¶ 1–2; RCFC app. A, Rules Committee Notes, 2002 Revision.

[342]RCFC app. A, ¶¶ 3–6, 12–14.

[343]RCFC 12(a)(1)(A).

[344]RCFC app. A, ¶¶ 13–16.

[345]RCFC app. A, ¶¶ 11–18.

[346]See RCFC app. A, ¶¶ 13–16 (requiring party shall meet at a "Meeting of Counsel" 63 days before the pretrial conference, plaintiff's memorandum shall be filed 49 days before pretrial conference, and defendant's memorandum filed 21 days before pretrial conference).

[347]FY1991 ASBCA Annual Rep., at 3 (Sept. 31, 1991).

[348]FY1991 ASBCA Annual Rep., at 3 (Sept. 31, 1991). See also CBCA R. 1(a) ("The Board may alter these procedures. . .to promote the just, informal, expeditious, and inexpensive resolution of a case."); CBCA R. 13(d) ("The Board encourages parties to agree on a discovery plan that the Board may adopt in a scheduling order. The Board may modify an agreed discovery plan.").

[349]RCFC app. A, ¶¶ 3–4.

[350]RCFC app. A, ¶ 4(j).

[351]See RCFC app. A, ¶ 4(j).

[352]RCFC app. A, ¶ 4(j).

[353]RCFC app. A, ¶ 4(j).

[354]RCFC app. G, ¶ (6)(b) (repealed 2002).

[355]RCFC app. A, ¶ 4(j) (while discovery to be completed in 90 days, no limits on amount of discovery).

[356]RCFC app. G, ¶ 6(b) (repealed 2002).

[357]See RCFC app. A, ¶ 4(j).

[358]See generally RCFC app. A (setting no deadline for completion of a trial and issuance of decision).

[359]See RCFC app. A, ¶ 4(j).

[360]See ASBCA R. 12; CBCA R. 52–53; PSBCA R. 13.

[361]41 U.S.C.A. §§ 7106(b)(1), 7107(a).

[362]41 U.S.C.A. § 7106(a).

[363]CBCA R. 53(c).

[364]ASBCA R. 12.3(c).

[365]PSBCA R. 13(b)(3).

[366]ASBCA R. 12.3(c); CBCA R. 53(c); PSBCA R. 13(b)(3).

[367]See 41 U.S.C.A. § 7107(a).

[368]See 41 U.S.C.A. § 7106(b)(4).

[369]41 U.S.C.A. § 7106(b)(1), (3); see PSBCA R. 13(a); ASBCA R. 12.1(a).

[370]41 U.S.C.A. § 7106(b)(2).

[371]41 U.S.C.A. § 7106(b)(5), (6); ASBCA R. 12.2(c)–(d); CBCA R. 52(c).

[372]ASBCA R. 12.2(b), 12.3(a); CBCA R. 52(b), 53(b).

[373]CBCA R. 52(a), 53(a).

[374]ASBCA R. 12.1(c).

[375]See Sisk, Litigation With the Federal Government 310 (2016) (citing Schaengold & Brams, "Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals," 17 Fed. Cir. B.J. 279, 325, 330–31 (2008)).

[376]Compare RCFC app. A (detailing the CFC case management procedures), with ASBCA R. 6, 8 (describing the pleading and discovery procedures of the ASBCA).

[377]Byrd, Ganderson & Workmaster, "Predictability of Outcomes in Discovery Disputes at CBCA Improves Over CBCA's First Ten Years With Trend Toward Publication of Discovery Orders," 27 BCA Bar J. 1 (Summer 2017) ("We believe that this trend toward publication should generally result in more predictability of outcomes in discovery disputes, and therefore should facilitate the resolution of potential discovery disputes more efficiently.").

[378]Byrd, Ganderson & Workmaster, "Predictability of Outcomes in Discovery Disputes at CBCA Improves Over CBCA's First Ten Years With Trend Toward Publication of Discovery Orders," 27 BCA Bar J. 1 (Summer 2017); CBCA R. 13(b), 13(c), 14(b), 14(d), 14(f), 15(b).

[379]ASBCA R. 4(a); PSBCA R. 5(a); CBCA R. 4(a).

[380]ASBCA R. 4(b), (d); PSBCA R. 5(b), (e); CBCA R. 4(d), (g).

[381]RCFC 26(a)(1)(A).

[382]RCFC 26(a)(1)(C) (requiring initial disclosure 14 days after the Early Meeting of Counsel). The Early Meeting of Counsel must occur by no later than the deadline for submitting the Joint Preliminary Status Report (i.e., 49 days after the Government files its Answer). See RCFC app. A, ¶¶ 3, 4. The parties frequently agree that the Early Meeting of Counsel will occur on the due date for the Joint Preliminary Status Report to maximize the amount of time available for preparing and submitting their initial disclosures. Since the initial disclosures are due 14 days after the Early Meeting of Counsel, the initial disclosures often occur 63 days after the Government files its Answer.

[383]See ASBCA R. 4(a); CBCA R. 4(a).

[384]See RCFC 26(a)(1)(A)(ii).

[385]See RCFC 30(a)(2)(A)(i), (d)(1).

[386]RCFC 33(a)(1).

[387]See RCFC 26(b)(2), 30(a)(2), 33(a)(1).

[388]See RCFC 26(b)(1)–(2), 34(a), 36(a).

[389]See RCFC 26(c).

[390]RCFC app. A, ¶ 9.

[391]See RCFC app. A, ¶ 9.

[392]RCFC app. A, ¶ 5.

[393]See RCFC app. A, ¶ 10.

[394]RCFC 37(b)(2)(A).

[395]See RCFC 26(g)(3) ("If a certification violates this rule without substantial justification, the court, upon motion or of its own, must impose an appropriate sanction. . ..The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation."); see also Chevron USA, Inc. v. United States, 116 Fed. Cl. 202 (2014) (finding that the Government owed Chevron $904,483 in sanctions (42% of its legal fees) due to the Government's bad faith discovery tactics); M.A. Mortenson Co. v. United States, 15 Cl. Ct. 362, 365 (1988) (requiring Government to pay plaintiff's attorney's fees as sanction for discovery violations), aff'd, 996 F.2d 1177 (Fed. Cir. 1993).

[396]RCFC 26(g)(3).

[397]ASBCA R. 8(a) (emphasis added); PSBCA R. 15(a) (emphasis added).

[398]ASBCA R. 8(a); PSBCA R. 15(b)(1); CBCA R. 13(c).

[399]CBCA R. 13(b).

[400]See CBCA R. 13(a)–(c); see also ASBCA R. 8.

[401]41 U.S.C.A. § 7105(f); see e.g., ASBCA R. 8; CBCA R. 13(e)(3), 14, 15(a), 35(b).

[402]41 U.S.C.A. § 7105(f); ASBCA R. 22(b); PSBCA R. 35; CBCA R. 16. In certain circumstances, the boards may have some difficulties enforcing their subpoenas (particularly against third-party Government agencies). See McGovern et al., "A Level Playing Field: Why Congress Intended the Boards of Contract Appeals To Have Enforceable Subpoena Power Over Both Contractor and the Government," 36 Pub. Cont. L.J. 495, 496–97 (Summer 2007).

[403]See 41 U.S.C.A. § 7105(f); ASBCA R. 8(a), 16 ("If any party fails to obey an order issued by the Board, the Board may impose such sanctions as it considers necessary to the just and expeditious conduct of the appeal."), 17; see, e.g., Ellis Constr. Co., ASBCA No. 50091, 98-1 BCA ¶ 25,552; E-Sys., Inc., ASBCA No. 46111, 97-1 BCA ¶ 28,975; Am. Ballistics Co., ASBCA No. 38578, 92-3 BCA ¶ 124,873. The failure to comply with any direction or order of the CBCA (including an order to provide or permit discovery) could lead to sanctions including: "(1) Taking the facts pertaining to the matter in dispute to be established for the purpose of the case in accordance with the contention of the party who is not at fault; (2) Forbidding the challenge of the accuracy of any evidence; (3) Refusing to allow the party to support or oppose designated claims or defenses; (4) Prohibiting the party from introducing into evidence designated claims or defenses; (5) Striking pleadings or

parts thereof, or staying further proceedings until the order is obeyed; (6) Dismissing the case or any part thereof; (7) Enforcing the protective order and disciplining individuals subject to such order for violation thereof, including disqualifying a party's representative, attorney, expert, or consultant from further participation in the case; (8) Drawing evidentiary inferences adverse to the party; or (9) Imposing such other sanctions as the Board deems appropriate." CBCA R. 35(b); see Mountain Valley Lumber, Inc., AGBCA No. 2003-171-1, 06-2 BCA ¶ 33,339. Additionally, CBCA Rule 21(d) provides that "[i]f a person called as a witness refuses to so swear or affirm, the Board may receive the person's testimony under penalty of making a materially false statement in a Federal proceeding under 18 U.S.C.A. 1001. Alternatively, the Board may disallow the testimony and may draw inferences from the person's refusal to swear or affirm."

[404]ASBCA R. 22(g); CBCA R. 16(g).

[405]E.g., ADT Constr. Grp., Inc., ASBCA No. 55358, 13 BCA ¶ 35,307; Mountain Valley Lumber, Inc. v. U.S. Dep't of Agric., CBCA No. 95, 07-2 BCA ¶ 33,611; E-Sys., Inc., ASBCA No. 46111, 97-1 BCA ¶ 28,975 ("The Board does not have the authority to impose monetary sanctions.") (citing Stemaco Prods., Inc., ASBCA No. 45469, 94-3 BCA ¶ 27,060); RCFC 37(b)(2)(A).

[406]See ASBCA R. 3, 7; RCFC 7(b); CBCA R. 7, 8.

[407]Compare RCFC 56 (listing lengthy procedures for summary judgment motions), with ASBCA R. 7 (noting all the rules for motions in a few short paragraphs). The CBCA has the most detailed board rules on motions. See CBCA R. 8.

[408]See RCFC app. H, ¶ (2) (repealed 2002).

[409]See RCFC app. H, ¶ (2) (repealed 2002). While these examples were provided in a repealed appendix of the court's rules, the authors of this Paper believe that these examples remain accurate.

[410]Partner 4 Recovery v. United States, 141 Fed. Cl. 89 (2018) (docket sheet confirms no oral argument).

[411]See RCFC 12(b)–(c); Bastianelli & Lange, "Litigating With the Federal Government," 20-OCT Constr. Law. 24, 25–26 (Oct. 2000); Sisk, Litigation With the Federal Government 310 (2016). Some practitioners have noted that the boards are "reluctant to deny litigants their day in court, so motions for summary judgment by either party are rarely successful." Weinberg, "Unique Aspects of Practice Before the Boards of Contract Appeals—No Interlocutory Appeals," Morrison & Foerster Govt. Cont. Insights (June 5, 2017), http://govcon.mofo.com/protests-litigation/unique-aspects-of-practice-before-the-boards-of-contract-appeals-no-interlocutory-appeals/.

[412]See, e.g., California ex rel. Yee v. United States, 135 Fed. Cl. 718, 725, 727 (2017).

[413]See 28 U.S.C.A. § 794 (CFC judges may appoint as many law clerks as the Judicial Conference approves for district judges); see also U.S. Courts, Online System for Clerkship Application and Review (OSCAR), http://oscar.uscourts.gov.

[414]See Zack, "Board of Contract Appeals or Court of Federal Claims: The Contractor's Irrevocable Choice," Navigant Constr. Forum 22 (Apr. 2011).

[415]CBCA FY 2018 Annual Report, at 5 ("The [CBCA] law clerk program is active year-round, with part-time Fall and Spring student law clerks, full-time summer law clerks, and full-time, paid, one-year post-graduate law clerks."), available at https://www.cbca.gov/files/2018-CBCA-Annual-Report.pdf; Telephone Interview with PSBCA Chairman Gary Shapiro (Jan. 15, 2019).

[416]See RCFC app. H, ¶ 2 (repealed 2002).

[417]See Magic Brite Janitorial v. United States, 69 Fed. Cl. 319, 320 (2006).

[418]See RCFC 5.4(a)(2).

[419]See RCFC 5.4(a)(2).

[420]RCFC 56(c).

[421]See RCFC 56(e).

[422]Amavas & Ferrell, "Motions Before Contract Appeals Boards," 86-9 Briefing Papers 1, at *2 (Aug. 1986).

[423]See, e.g., Byrd et al., "Predictability of Outcomes in Discovery Disputes at CBCA Improves over CBCA's First Ten Years With Trend Toward Publication of Discovery Orders," 27 BCA Bar J. 7, 7 (2017).

[424]See CBCA R. 8.

[425]See, e.g., ASBCA R. 7(c); CBCA R. 8(f); PSBCA R. (6)(c)(1)–(4); see also PSBCA R. 6(c) ("Motions for summary judgment may be considered by the Board. However, the Board may defer ruling on a motion for summary judgment, in its discretion, until after a hearing or other presentation of evidence.").

[426]ASBCA R. 7(d).

[427]See 41 U.S.C.A. § 7105(g)(1).

[428]See 28 U.S.C.A. § 2503.

[429]28 U.S.C.A. § 2503(b); Fed. R. Evid. 1101(a); see also Davis v. Sec'y of the Dep't of Health & Human Servs., 19 Cl. Ct. 134, 137–38 (1989).

[430]ASBCA Rule 10(c) and PSBCA Rule 21 state that "[h]earings shall be as informal as may be reasonable and appropriate under the circumstances." The word "trial" does not appear in the ASBCA, CBCA, or PSBCA rules.

[431]See ASBCA R. 11; PSBCA R. 12; CBCA R. 19; see also CBCA R. 18(a) ("The presiding judge will set the deadline for an election under this rule.").

[432]See CBCA R. 18(a); PSBCA R. 9; see also ASBCA R. 11(a) ("Hearings will be held at such times and places determined by the Board to best serve the interests of the parties and the Board."). The Civilian Board's rules specifically allow for one party to elect a hearing and the other party to elect to submit its case on the record (i.e., without a hearing), which can result in one party not appearing for the hearing or appearing in a limited role (e.g., to cross-examine witnesses). See CBCA R. 18(b), 19(b) (allowing for hybrid hearings).

[433]See CBCA R. 10 ("[T]he board is guided but not bound by the Federal Rules of Evidence, except that the

Board generally admits hearsay unless the Board finds it unreliable."); see also ASBCA R. 10(c) ("The Federal Rules of Evidence are not binding on the Board but may guide the Board's rulings."); PSBCA R. 14(d) ("The Board may consider the Federal Rules of Evidence for guidance regarding admissibility of evidence and other evidentiary issues in construing those Board rules that are similar to Federal Rules and for matters not specifically covered herein."); see also PSBCA R. 21.

[434]Shapiro, "Inside the Mind of a Board Judge," 25 BCA B.J. 7, 10 (2015) ("Even where I may have been inclined to sustain an [evidentiary] objection, the other two board panelists [who are not present] might disagree. As judge fact-finders, we can always disregard resulting testimony if we ultimately decide it should not have been admitted on evidentiary grounds. Sustaining an objection eliminates the testimony from the record and could deprive my board panel colleagues of their voices.").

[435]See CBCA R. 4; ASBCA R. 4; PSBCA R. 5.

[436]CBCA R. 4(a), (d); ASBCA R. 4(b); PSBCA R. 5(b).

[437]See ASBCA R. 4(d); CBCA R. 4(g); PSBCA R. 5(e).

[438]ASBCA R. 10(c).

[439]CBCA R. 10; PSBCA R. 21; see also PSBCA R. 14(d).

[440]See P.W. Constr., Inc. v. United States, 53 F. App'x 555, 556 (Fed. Cir. 2002); Total Med. Mgmt. v. United States, 104 F.3d 1314, 1319 (Fed. Cir. 1997); Wheeler v. United States, 768 F.2d 1333, 1334 (Fed. Cir. 1985); Burlington N. R.R. v. United States, 752 F.2d 627, 629 (Fed. Cir. 1985); Concourse Grp., LLC v. United States, 131 Fed. Cl. 26, 27 (2017); Geo-Med, LLC v. United States, 126 Fed. Cl. 440, 442 (2017); Kellogg Brown & Root Servs. v. United States, 103 Fed. Cl. 714, 748 (2012), rev'd other grounds, 728 F.3d 1348 (Fed. Cir. 2013); Gulf Grp. Gen. Enters. Co. W.L.L. v. United States, 98 Fed. Cl. 186, 187 (2011).

[441]See RCFC app. A, ¶ 4(j).

[442]ASBCA R. 19; PSBCA R. 29; CBCA R. 25(a) ("The Board issues decisions in writing, except as allowed [by Small Claims Procedures].").

[443]See e.g., CBCA R. 1(d); Preface to the Rules of the ASBCA II(c).

[444]Preface to the Rules of the ASBCA II(c) ("Appeals referred to the Senior Deciding Group are those of unusual difficulty or significant precedential importance, or that have occasioned serious dispute within the normal division decision process."); see Gen. Elec. Co., ASBCA No. 36005, 91-2 BCA ¶ 23,958; Telephone Interview with Hon. Terrence Hartman, Judge, ASBCA (Apr. 20, 2006).

[445]CBCA R. 28(a).

[446]CBCA R. 28(a).

[447]Bus. Mgmt. Res. Assocs. v. Gen. Servs. Admin., CBCA No. 464, 07-1 BCA ¶ 33,486, at 2 (full board).

[448]CBCA R. 28(a), (b).

[449]CBCA R. 28(a), (b).

[450]41 U.S.C.A. § 7102(d) limits appeal of CO final decisions on maritime claims to the appropriate board or U.S. district court. Board decisions are appealed to the appropriate district court. District court decisions are appealed to the appropriate regional U.S. court of appeals. Litigation in district courts raise certain distinct issues, including the following: (1) a local Assistant U.S. Attorney (AUSA) will most likely represent the Government rather than a DOJ National Courts Section attorney; (2) district court judges have less experience with Government contracts and may approach various questions differently than the CFC or boards; and (3) the appropriate regional court of appeals will have appellate jurisdiction over maritime claims decided by a district court rather than the Federal Circuit. When contractors erroneously bring maritime claims to the CFC, the court then must determine whether to transfer the case to U.S. district court or dismiss it. See, e.g., Marine Logistics, Inc. v. England, 265 F.3d 1322, 1324 (Fed. Cir. 2001) (ordering transfer of maritime contract claim to district court); Dalton v. Sw. Marine, Inc., 120 F.3d 1249, 1252–53 (Fed. Cir. 1997) (appeals from board decisions involving maritime contracts proceed to district court).

[451]28 U.S.C.A. § 1295(a)(3), (10); 41 U.S.C.A. § 7107(a)(1). The Federal Circuit lacks jurisdiction over an appeal from a final decision of a board if that decision does not arise under a contract subject to the CDA. See Agility Logistics Servs. Co. KSC v. Mattis, 887 F.3d 1143, 1152–53 (Fed. Cir. 2018) (where ASBCA had jurisdiction over a Government contracts case solely under its charter, see ASBCA Charter, DFARS app. A, pt. 1, 48 C.F.R. ch. 2, app. A, "[b]ecause the Board's decision concerning its charter jurisdiction was not made pursuant to the CDA, [the Federal Circuit] ha[s] no jurisdiction to review it."); Lee's Ford Dock, Inc. v. Sec'y of the Army, 865 F.3d 1361, 1366 (Fed. Cir. 2017). See generally Shea & Schaengold, "A Guide to the Court of Appeals for the Federal Circuit," 90-13 Briefing Papers 1 (Dec. 1990) (discussing the types of Government contract appeals reviewed by the Federal Circuit); Schaengold et al., "Appeals to the Court of Appeals for the Federal Circuit," in ANDA Litigation: Strategies & Tactics For Pharmaceutical Patent Litigators ch. 20 (Am. Bar Ass'n 2d ed. 2016); Schaengold et al., "Evidentiary Issues in Federal Circuit Court of Appeals: Preservation and Avoiding Waiver," in Evidence in Patent Cases ch. 13 (Bloomberg Law 2018).

[452]28 U.S.C.A. § 2522; Fed. R. App. P. 4(a)(1)(B); Federal Circuit Practice Notes to Rule 4.

[453]41 U.S.C.A. § 7107(a)(1); Fed. Cir. R. 15(a)(2); Federal Circuit Practice Notes to Rule 15.

[454]Compare 41 U.S.C.A. § 7104(a) (requiring appeal of CO decision to a board within 90 days), and 41 U.S.C.A. § 7107(a)(1) (allowing 120 days to appeal a board decision to the Federal Circuit), with 41 U.S.C.A. § 7104(b)(3) (allowing appeal of CO decision to the CFC within 12 months), and 28 U.S.C.A. § 2522; Fed. R. App. P. 4(a)(1)(B) (giving only 60 days to appeal a CFC decision to the Federal Circuit).

[455]28 U.S.C.A. § 1295(b); 41 U.S.C.A. § 7107(a)(1)(B).

[456]See Dewey Elecs. Corp. v. United States, 803 F.2d 650, 656 (Fed. Cir. 1986). In Wunderlich Act cases, absent bad faith or fraud, the Government may not appeal adverse

decisions from a board to the CFC. SUFI Network Servs., Inc. v. United States, 817 F.3d 773, 778 (Fed. Cir. 2016).

[457]See, e.g., Laturner v. United States, 135 Fed. Cl. 501, 503–06 (2017) (granting a motion to certify an order for interlocutory review); Bath Irons Works Corp. v. United States, 20 F.3d 1567, 1569 n.1 (Fed. Cir. 1994).

[458]See Weinberg, "Unique Aspects of Practice Before the Boards of Contract Appeals—No Interlocutory Appeals," Morrison & Foerster's Gov't Cont. Insights (June 5, 2017), http://govcon.mofo.com/protests-litigation/unique-aspects-of-practice-before-the-boards-of-contract-appeals-no-interlocutory-appeals/. But see Shawn Montee, Inc., AGBCA No. 2004-153-R et al., 05-1 BCA ¶ 32,889 (concluding that the Board possessed authority to certify questions for interlocutory review).

[459]28 U.S.C.A. § 1295(a)(10).

[460]Pub. Warehousing Co., K.S.C., ASBCA No. 58088, 17-1 BCA ¶ 36,689; Freightliner Corp., ASBCA No. 42982, 94-2 BCA ¶ 26,705; Gen. Dynamics Ordnance & Tactical Sys., ASBCA Nos. 56870, 56957, 10-2 BCA ¶ 34,525; Marshall Associated Contractors, Inc., IBCA No. 1901 et al., 1998 WL 42301; Scott Timber Co., IBCA No. 3771-97, 98-1 BCA ¶ 29,555.

[461]See, e.g., AAA Eng'g & Drafting, Inc. v. Widnall, 129 F.3d 602, 604–605 (Fed. Cir. 1997) (holding that the Federal Circuit lacked jurisdiction over a board order that only resolved issues of entitlement); Teledyne Cont'l Motors, Gen. Prods. Div. v. United States, 906 F.2d 1579, 1582 (Fed. Cir. 1990); United States v. W.H. Moseley Co., 730 F.2d 1472, 1474 (Fed. Cir. 1984) ("well established that this court, as an appellate tribunal, may review only 'final decisions.' ").

[462]E.g., Meridian Eng'g Co. v. United States, 885 F.3d 1351, 1354–55 (Fed. Cir. 2018) ("We review the Court of Federal Claims' legal conclusions de novo and its factual findings for clear error."); Guardian Angels Med. Serv. Dogs, Inc. v. United States, 809 F.3d 1244, 1447 (Fed. Cir. 2016); Ground Improvement Techniques, Inc. v. United States, 618 F. App'x 1020, 1025 (Fed. Cir. 2015); Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1540 (Fed. Cir. 1996); Yancey v. United States, 915 F.2d 1534, 1537 (Fed. Cir. 1990); Atlas Corp. v. United States, 895 F.2d 745, 749 (Fed. Cir. 1990); Milmark Servs., Inc. v. United States, 731 F.2d 855, 857 (Fed. Cir. 1984).

[463]41 U.S.C § 7107(b)(1). The Federal Circuit views contract interpretation as a question of law (without regard to whether the case was before the CFC or a board). See Winter v. Bath Iron Works Corp., 503 F.3d 1346, 1350 (Fed. Cir. 2007).

[464]See K-Con, Inc. v. Sec'y of Army, 908 F.3d 719, 724 (Fed. Cir. Nov. 5, 2018); Agility Logistics Servs. Co. KSC v. Mattis, 887 F.3d 1143, 1148 (Fed. Cir. 2018) ("[W]e give the Board's interpretation of government contracts careful consideration given its considerable experience and expertise.") (citing Interstate Gen. Gov't Contractors, Inc. v. Stone, 980 F.2d 1433, 1434 (Fed. Cir. 1992)); Raytheon Co. v. United States, 747 F.3d 1341, 1352 (Fed. Cir. 2014); SMS Data Prods. Grp., Inc. v. United States, 900 F.2d 1553, 1555 (Fed. Cir. 1990); S.S. Silberblatt, Inc. v. United States, 888 F.2d 829, 831 (Fed. Cir. 1989); Fortec Constructors v. United States, 760 F.2d 1288, 1291 (Fed. Cir. 1985); see also Erickson Air Crane Co. v. United States, 731 F.2d 810 (Fed. Cir. 1984).

[465]41 U.S.C.A. § 7107(b)(2); see also Agility Logistics Servs. Co. KSC v. Mattis, 887 F.3d 1143, 1148 (Fed. Cir. 2018); JRS Mgmt. v. Lynch, 621 F. App'x 978, 981 (Fed. Cir. 2015); Fed. Data Corp. v. United States, 911 F.2d 699, 702 (Fed. Cir. 1990); SMS Data Prods. Grp., Inc. v. United States, 900 F.2d 1553, 1555 (Fed. Cir. 1990); Blount Bros. v. United States, 872 F.2d 1003, 1005 (Fed. Cir. 1989); FMC Corp. v. United States, 853 F.2d 882, 885 (Fed. Cir. 1988); United States v. Boeing Co., 802 F.2d 1390, 1393 (Fed. Cir. 1986).

[466]Blount Bros. v. United States, 872 F.2d 1003, 1005 (Fed. Cir. 1989); FMC Corp. v. United States, 853 F.2d 882, 885 (Fed. Cir. 1988).

[467]See Meridian Eng'g Co. v. United States, 885 F.3d 1351, 1355 (Fed. Cir. 2018) ("A finding may be held clearly erroneous when the appellate court is left with a definite and firm conviction that a mistake has been committed."); Medlin Constr. Grp., Ltd. v. Harvey, 449 F.3d 1195, 1199 (Fed. Cir. 2006) ("Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.") (internal quotes and citation omitted); Tandon Corp. v. Int'l Trade Comm'n, 831 F.2d 1017, 1019 (Fed. Cir. 1987); Milmark Servs., Inc. v. United States, 731 F.2d 855, 857 (Fed. Cir. 1984). See generally SSIH Equip. S.A. v. Int'l Trade Comm'n, 718 F.2d 365, 380–83 (Fed. Cir. 1983) (Nies, J., additional opinion) (explaining review of fact by trial and appellate courts).

[468]Tandon Corp. v. Int'l Trade Comm'n, 831 F.2d 1017, 1019 (Fed. Cir. 1987); see also In re Zurko, 142 F.3d 1447, 1449 (Fed. Cir. 1998) (en banc).

[469]Hon. Paul R. Michel, Circuit Judge, Fed. Cir., "Do Appeals to the Federal Circuit From the Boards and the Claims Court Differ? If so, How?," Remarks at The Ninth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 9, 1991), reprinted in 140 F.R.D. 57, 236 (1992); see Sisk, Litigation With the Federal Government 313 (2016).

[470]See Federal Circuit, Statistics, http://cafc.uscourts.gov/the-court/statistics (containing certain Federal Circuit statistics covering 1997 to 2018). For certain Federal Circuit statistics covering 1982 to 1990, see Shea & Schaengold," A Guide to the Court of Appeals for the Federal Circuit," 90-13 Briefing Papers 1, at *3–4 (Dec. 1990).

[471]Federal Circuit, Appeals Filed, Terminated, and Pending for 2007–2018, http://www.cafc.uscourts.gov/the-court/statistics.

NOTES:

BRIEFING PAPERS