MIXED NUTS AND OTHER HUMDRUM DISPUTES: HOLDING THE GOVERNMENT ACCOUNTABLE UNDER THE LAW OF CONTRACTS BETWEEN PRIVATE INDIVIDUALS

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I. INTRODUCTION

It has long been the oft-repeated but also oft-excepted rule that the rights and duties of the Government as a contracting party are "generally" governed by the common law of contracts.[1] The clarity of this rule has been muddied

1. *E.g.*, Clearfield Trust Co. v. United States, 318 U.S. 363, 369 (1943) ("The United States does business on business terms") (quoting United States v. National Exchange Bank of Baltimore, 270 U.S. 527, 534 (1926)); Cooke v. United States, 91 U.S. 389, 398 (1875) (When the United States "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.").

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by almost inevitable tension between the Government's dual characters as sovereign and contracting party. Recently, however, the Supreme Court has reaffirmed this general rule, explicitly and emphatically, in circumstances where contractual arrangements were tested against subsequent or foreseeable legislative or regulatory actions.[2] One might have thought, as did dissenting justices, that these cases did not fall under the "general" rule, but instead were governed by special rules applicable to the sovereign.[3] In *United States v. Winstar Corporation*,[4] the Court's majority (by different rationales) agreed that a statute prohibiting a promised regulatory approval of accounting did not afford the Government a defense to breach of contract claims. The plurality opinion rejected sovereign act arguments, quoting one of the Court's prior decisions, "[w]hen the United States enters into contractual relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[5]

In *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*,[6] the Court required the Government to return a multimillion-dollar payment for conditional offshore drilling rights, whether the contract would not "have proved financially beneficial" due to foreseeable, even likely sovereign objections based on environmental grounds. The Court repeatedly cited the *Restatement (Second) of Contracts* to support its conclusion that restitution was required, and—as if to underscore the principle—analogized the United States of America to "a lottery operator."[7]

The Supreme Court has, in these important decisions, laid down a marker for lower tribunals to observe—specifically, that actions of government contracting officials should be judged under the general law, as if the Government were a private individual without special immunities or privileges. It should be fair to conclude that this rule, now reinforced, applies *a fortiori* to routine acts of contract administration not involving statutory or regulatory interventions. Indeed, as Justice Souter wrote in *Winstar*, sovereign interests should not, in "humdrum" contexts, be placed "at odds with the Government's own long run interest as a reliable contracting partner in the myriad workaday transactions of its agencies."[8]

This declaration raises the question whether, in more routine cases, contracting officials are being held to the standards of contract law that govern private individuals. Four recent decisions of the Court of Appeals for the Federal Circuit cast doubts on this proposition. These cases deal with (a) whether contracting officials' pre-award notice of a contractor's misun-

2. Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000); United States v. Winstar Corp., 518 U.S. 839 (1996).

3. *Mobil Oil Exploration*, 530 U.S. at 624 (Stevens, J., dissenting); *Winstar*, 518 U.S. at 924 (Rehnquist, C.J., dissenting).

4. 518 U.S. 839 (1996).

5. *Id.* at 895 (quoting Lynch v. United States, 292 U.S. 571, 579 (1934)).

6. 530 U.S. 604 (2000).

7. *Id.* at 624.

8. *Winstar*, 518 U.S. at 880, 883.

derstanding precluded an enforceable award, (b) whether a Contracting Officer's knowing instructions to bid to an erroneous solicitation provision required post-award relief, (c) whether a release of claims was obtained through Contracting Officer threats amounting to duress, and (d) whether an agreement about the liquidation of advance payments was enforceable. These decisions indicate that government contracting officials, as they interface with contractors "in the trenches," are not being held accountable under the common law of contracts and indeed are being protected by special rules and presumptions. It is worth examining how these cases might have been analyzed and resolved if these contracting officials had also been judged as "private individuals" or "lottery operators."

II. *GIESLER v. UNITED STATES:* MIXED-UP NUTS

It would be hard to imagine a more workaday procurement than the Government's failed effort to buy mixed nuts in *Giesler v. United States*.[9] Simple as the acquisition might seem, its history, as the Court of Federal Claims observed, "would make even Murphy blush."[10] It also may be said that the differences between the Federal Claims Court and the Federal Circuit in analysis (both legal and factual) and result might make Murphy blink. Although there is a story to be told about these differences, at bottom the appellate court allowed contracting officials charged with pre-award knowledge that a supplier's bid was based on a misunderstanding of requirements nonetheless to make and fully enforce a binding contract. This analysis rested on the premise that the Government's duties were defined by the bid verification rules of the Federal Acquisition Regulation (FAR)[11]—indeed a narrow and arguably erroneous reading of them, without reference to general common law principles as, for example, set forth in the *Restatement (Second) of Contracts*.[12]

A. *The Decision of the Court of Federal Claims*

The Court of Federal Claims, ruling on summary judgment motions, stated the facts of this misadventure (as it saw them).[13] The solicitation seeking bids for mixed nuts referred by number to, but did not attach, a CID, or commercial item description, that specified that only 10 percent of the mixture could be peanuts. The low bid was based on a quote from a supplier who intended to supply a cheaper mix with 60 percent peanuts. The supplier

9. 44 Fed. Cl. 737 (1999), *rev'd*, 232 F.3d 864 (Fed. Cir. 2000).
10. *Geisler*, 44 Fed. Cl. at 738.
11. 48 C.F.R. § 14.407 (1997).
12. Restatement (Second) of Contracts, §§ 151–58 (1982).
13. *Geisler*, 44 Fed. Cl. at 738–741. Chief Judge Baskir's recitation, as noted below, acknowledged that the record on summary judgment was not fully developed and that certain factual points were disputed; however, based on his legal analysis, he deemed the unresolved facts to be immaterial.

negligently failed to obtain or read the referenced CID specifications. When asked by the plaintiff, the supplier assured that it understood the specifications. The Government conducted a pre-award survey of the supplier, and the Government evaluator affirmatively checked on the survey form that "Firm Has and/or Understands Specifications." With respect to this fact, the lower court commented: "We do not know what transpired . . . to produce this response on the form. We may safely assume it did not result from a detailed discussion of the precise specification, including the peanut percentage." In other words, the discussion was "not precise enough" to disclose the misunderstanding.[14]

However, shortly after the site visit (probably the next day), the evaluator received an eight-page fax that stated: "Attached please find copies of *the documents you requested.* They include *product specifications*, Kosher certificate, line 111 start-up check list and mixed nuts roasting and packaging (milestone) charts."[15] Attached was a "sheet specifying the 60% peanut composition" intended by the supplier.[16] The court rejected the Government's argument that this was "a bare transmission." "It had a cover letter purporting to respond to a request, and it included many pages of information pertinent to the contract and to the survey."[17]

Moreover, the faxed documents were made a part of the pre-award survey report by attachment and, prior to award, "passed up the line" to two levels of supervision and then ultimately to the Contracting Officer. All of these government officials denied that they had read the attachments, prompting the court to state, "We do not question the veracity of these denials, certainly not in the absence of a trial in which the witnesses [sic] credibility could be weighed."[18] The court thus left open the factual issue of "actual knowledge," finding it unnecessary to resolve because "the documents were attached to papers which the officials were required to review"[19] and concluding that there is "[n]o question that DLA was on actual or constructive notice that something might well be wrong. At the least, it triggered an obligation to inquire into the meaning of that 60% specification."[20]

Notwithstanding, award was made without inquiry. When shortly thereafter production of the mixed nuts began, it quickly became clear that the supplier intended a nonconforming mixture. The prime contract was terminated for default and the Government claimed excess reprocurement costs, which led to plaintiff's claim for relief through rescission.

14. *Id.* at 738–39.
15. *Id.* at 740.
16. *Id.* Contrary to the fax and deposition testimony proffered by plaintiff, the Government denied that the product specification had been specifically requested. The government evaluator was not available. Of this dispute, the lower court observed: "Were the point important, we would have to credit the letter and the deposition."
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*

Based on this factual analysis and the conclusion that, prior to award, "the government had at least constructive knowledge" of the supplier's nonconforming intent, the Court of Federal Claims granted summary judgment in favor of the contractor. Acceptance of the bid in these circumstances was "over-reaching." Noting that the claim was not for reformation, the court explained that the "rationale" for rescission is "that it would be 'bad faith' on the part of the government to take advantage of a bid it knows or has reason to know is the product of a mistake."[21]

The court rejected three arguments advanced by the Government. First, the Government argued that on a "comparative negligence" standard, the contractor—having failed to read the specification—should lose. The court demurred on the question of which party was more negligent, but stated that this was a matter more of "last clear chance," noting that prior rescission cases had involved egregious blunders and even failures to read specifications.[22] Second, the Government argued that the error was one of "business judgment" for which relief could not be granted under the FAR and relevant precedent, citing *Liebherr Crane Corp. v. United States*[23] (which also involved a failure to read the specifications). The court distinguished *Liebherr* as a case where the contractor, seeking reformation, made "a judgment that a lightweight crane would satisfy requirements that could only be met by a heavier crane," in contrast to a rescission case where the supplier "simply did not realize there was a 10% requirement."[24]

Finally, the Government argued that the FAR bid verification requirement "relates solely to the time when bids are opened and to mistakes in dollar figures." Even if this were so, the court opined that

> the doctrine's principles still apply in our case—an obvious error underlying the low bid, government notice of the error, and the fact that it would be unconscionable for the government to take advantage. . . . The policy is designed to prevent the government from over-reaching by awarding a contract when it knows the contractor made a significant mistake.[25]

Further, relief should be granted under this policy "whether the government learns of the mistake through dollar bid information *or otherwise* . . . or when it opens bids or some subsequent time *prior to award*."[26]

B. *The Decision of the Federal Circuit*

Having escaped liability, the contractor imprudently appealed the denial of attorneys' fees. The appeal turned out to be another "egregious blunder,"

21. *Id.*
22. *Id.* at 742.
23. 810 F.2d 1153 (Fed. Cir. 1987).
24. Geisler v. United States, 44 Fed. Cl. 737, 742 (1999). The lower court's treatment of *Liebherr* would become a red flag of disagreement with the appellate panel.
25. *Id.* at 743.
26. *Id.* (emphasis added). This, too, would be a telling point of difference with the Federal Circuit.

because the panel of the Federal Circuit took an entirely different view of both the facts and the law. The appellate court sustained the Government's cross-appeal, actually granting judgment for the Government (rather than remanding for a trial), and dismissed the contractor's appeal "as moot," because the contractor "is no longer the prevailing party."[27]

Putting aside initially the impact of the law of contracts between private individuals, it is worth noting the difference between the trial and appellate courts over the meaning of *Liebherr Crane Corp. v. United States*[28] and the application of *United States v. Hamilton Enterprises.*[29] The appellate court adopted a narrower view of the circumstances in which these government contract precedents would allow relief, even in the form of rescission.

The Federal Circuit rejected the lower court's reliance on *Liebherr* based on the distinction between a bad business judgment about what would satisfy a specification and a mistake about the contents of the specification. The Circuit relied repeatedly on *Liebherr*'s language that a "misreading of the specification" was a prerequisite: "we cannot imagine any circumstance in which a non-reading can be a misreading."[30] Thus, the error in business judgment, a gross one at that, was the failure to read the specification. Further, based on this language and the logic that there was thus no "mistake" at all, the court extended the *Liebherr* holding that reformation was not available in such inexcusable circumstances to Giesler's defensive claim for rescission.[31]

The court acknowledged *Hamilton*'s holding that

> in limited circumstances. . ., where there is a clear showing that the government failed to discharge [its] regulatory duty, we have permitted rescission of a contract, despite the contractor having made otherwise inexcusable errors in the bid.[32]

However, the appellate panel ruled out reliance on *Hamilton* by a series of factual conclusions (which were either inconsistent with the lower court's or which the lower court had declined to make in the absence of a trial) and by focusing on regulatory bid examination duties rather than notice of mistakes. The appellate panel cited cases instructing Contracting Officers when there is a symptom or basis in the bid to suspect a mistake, such as disparity when compared to other bids or the government estimate, or other anomaly apparent from the face of the bids. These precedents did not address notice of a nonconforming intent to mix in 60 percent peanuts instead of the prescribed 10 percent maximum.[33] The appellate court repeatedly invoked its own finding that the faxed product specification was received *after* the pre-award

27. Geisler v. United States, 232 F.3d 864, 867 (Fed. Cir. 2000).
28. 810 F.2d 1153 (Fed. Cir. 1987).
29. 711 F.2d 1038 (Fed. Cir. 1983).
30. *Geisler*, 232 F.3d at 869–71.
31. *Id.*
32. *Id.* at 871.
33. *Id.* at 872–73.

survey report was "completed,"[34] notwithstanding that the specification was requested during the site visit (as found by the appellate court)[35] and attached to the survey report when it was sent for review up to and including the Contracting Officer (as found by the court below).[36] The court ruled that the verification duties of the contracting officials ended with this "completion" of the pre-award survey and notice of possible mistake thereafter but prior to award had no effect.[37]

Significantly, the Federal Circuit also distinguished *Hamilton* on the basis of an appellate finding of fact that the Government lacked actual knowledge.[38] The Court of Federal Claims had found it inappropriate to resolve this factual issue without a trial and unnecessary to resolve, given the Government's "actual or constructive" and "at least constructive" knowledge.[39] The basis for the appellate finding is not terribly clear, but perhaps it was influenced by the court's view that, under the regulatory scheme and government contract precedents, the post-bid, "post-survey" information was irrelevant to the Government's duties. The Federal Circuit rejected a "generalized duty," stating,

> The duties of the government are detailed in the FAR, and we find no authority, based on the FAR and our case law, to extend these duties and impute to the government knowledge of the mistakes and inconsistencies in all the paperwork that it receives after the opening and verification of bids, and after the pre-award survey report has been completed. To impose such a burden on the government would impose a boundless duty. . . .[40]

In contrast, as noted, the lower court found a generalized duty to avoid "unconscionability" and "over-reaching," bounded by specific notice "prior to award."[41]

C. *Application of the Law of Contracts Between Private Individuals*

Perhaps it would be too venturesome to predict with certainty how this mixed-nuts case would come out under the law of contracts between private individuals. As a leading treatise says, it is "perilous" to lay down dispositive rules, as a mistake may be accompanied by a "great variety of factors" and

34. *Id.* at 874–75. The decision also inexplicably states that the product specification was submitted after "acceptance of their bids," ostensibly in contrast to *Hamilton*, where "the bid submission process was still underway at the time of the government's alleged breach." *Id.* at 872.
35. *Id.* at 874.
36. Geisler v. United States, 44 Fed. Cl. 737, 740 (1999).
37. Geisler v. United States, 232 F.3d 864, 875–76 (Fed. Cir. 2000).
38. *Id.* at 876. The court saw *Hamilton* as a "business judgment" case in which avoidance was allowed because of "actual" government knowledge. *Id.* Although Hamilton's estimate of required manpower was clearly such a misjudgment, the decision speaks of "suspected" error, not actual knowledge. United States v. Hamilton Enterprises, 711 F.2d 1038, 1045 (Fed. Cir. 1983).
39. *Geisler*, 44 Fed. Cl. at 743.
40. *Geisler*, 232 F.3d at 875–76.
41. *Geisler*, 44 Fed. Cl. at 743.

"juristic effects will be found to vary with these factors."[42] But it is clear that, if the Supreme Court means what it has said, the required analysis would be decidedly different from the Federal Circuit's.

As a general proposition, the government contract tribunals will need to evaluate the Government's contract rights and obligations with reference to the *Restatement (Second) of Contracts*, as the Supreme Court did in *Mobil Oil Exploration*.[43] Neither the Court of Federal Claims nor the Federal Circuit observed this discipline, although the lower court's approach was plainly more in line with the general law of contracts. The Federal Circuit laid down, or repeated, depending on one's view of *Liebherr*[44] and *Hamilton*,[45] decisive propositions that narrow available relief for a unilateral mistake in a way not in harmony with that general law. These propositions had the further effect of foreclosing consideration of factors whose evaluation is usually required under the law between private individuals—most significantly, whether the *status quo ante* had changed beyond repair or restoration.

The Federal Circuit's first proposition was that the misapprehension of the specification was no "mistake," at least not as used in the FAR or in *Liebherr*, but rather an error in business judgment.[46] As suggested above, this crucial conclusion seems to have been driven by the contractor's "non-reading" and *Liebherr*'s "misreading" language. However, the general law does not define "mistake" by how it came about. Section 151 of the *Restatement (Second) of Contracts* defines it this way: "A mistake is a belief that is not in accord with the facts."[47] This definition embraces a "mistake" as to a contract's "contents."[48] "An erroneous belief as to the contents or effect of a writing that expresses the agreement is . . . a mistake."[49] Such "mistakes" are indeed to be distinguished from errors in "business judgment," which Corbin describes in the category of "conscious ignorance."[50] Thus, where a party is "aware" of uncertainties in performance, estimates, or forecasts but contracts nonetheless, his misjudgment based on known "limited knowledge" is not treated as a "mistake." This distinction is essentially the one offered by the Court of Federal Claims—i.e., Liebherr's judgment that its lightweight crane would

42. Joseph M. Perillo, Corbin on Contracts § 28.27 at 111–12 (2002). Also, the "Introductory note" to the Restatement (Second) chapter on Mistake states: "The rules governing all of the situations dealt with in this Chapter have traditionally been marked by flexibility and have conferred considerable discretion on the court." Restatement (Second) of Contracts 381 (1981).

43. Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604 (2000).

44. 810 F.2d 1153 (Fed. Cir. 1987).

45. 711 F.2d 1038 (Fed. Cir. 1983).

46. Geisler v. United States, 232 F.3d 864, 870–71 (Fed. Cir. 2000).

47. Restatement (Second) of Contracts § 151 (1981).

48. Perillo, *supra* note 42, § 28.29; Restatement (Third) of Restitution and Unjust Enrichment § 12 ("Mistake in Expression") (draft 2001).

49. Restatement (Second) of Contracts § 151 cmt. a (1981).

50. Perillo, *supra* note 42, § 28.28. Also, comment a to Restatement (Second) of Contracts § 151 explains: "A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a mistake as that word is defined here."

meet the Navy's operating requirements, a judgment about which it was "aware" it lacked perfect knowledge, was different from Giesler's lack of awareness of the specification's contents. One might say, to harmonize the Circuit's view with this general law, that the nut supplier was "consciously ignorant" or "aware" that it did not know the contents of the specification, but the more likely analysis is simply that the supplier held a "belief" that was "not in accord with the facts" because of its own negligence. Under the general contract law, this nonetheless was a "mistake."

Under the general law, the negligent failure to read the specification is not thereby dismissed from the analysis, because it is one of the factors to be considered in determining the "juristic effect" of the mistake. But it is only one factor, and not dispositive in the way the Federal Circuit interprets its *Liebherr* precedent: "Giesler's failure to read the specification is fatal to his claim for rescission."[51] As Corbin cautions, ". . . it is erroneous to lay down an absolute rule that such a mistake is never ground for avoidance."[52] While noting the repeated invocation of the "duty to read" in the case law, his treatise observes that the *Restatement (Second) of Contracts* does not state a general rule with respect to a failure to read.[53]

Section 157 of the *Restatement (Second)* states the general proposition applicable to the contractor's failure:

> A mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation under the rules . . . , unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

The treatise applies the general rule of Section 157 to the circumstance "where a party signs or accepts a written instrument without reading it, thinking that she knows its contents," in this way:

> This type of case should be dealt with just as are other cases of unilateral mistakes. If the other party has no reason to know, and has so materially changed position that it cannot be restored, the first party will be held bound. A party's conduct in signing without reading is certainly not to be recommended. Generally, it may properly be described as careless. But it is not wrongful, and carelessness should not necessarily be penalized as a wrongful act. No more than in the case of other unilateral mistakes should the other party be permitted to reap a profit if the mistake is convincingly proved and the other party can be restored to the *status quo ante*.[54]

Taking advantage is worse than failing to read.

So, in what circumstances under the law of contracts between private individuals does a mistake of one party make a contract voidable? Section 153 of the *Restatement (Second)* summarizes as follows:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed

51. *Giesler*, 232 F.3d at 871.
52. Perillo, *supra* note 42, § 28.38 at 214.
53. *Id.* § 29.11 at 424.
54. *Id.* § 28.38 at 213.

> exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, *or* (b) the other party had reason to know of the mistake or his fault caused the mistake.[55]

Condition (a) has been articulated in this manner in leading treatises:

> Today, avoidance is generally allowed for unilateral mistake if two conditions concur: (1) enforcement of the contract against the mistaken party would be oppressive or, at the least, result in an unconscionably unequal exchange of values; and (2) avoidance would impose no substantial hardship on the other.[56]
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> * * *
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> The requirement that the bidder seek to avoid before any significant reliance by the other party is imposed so that avoidance will cost the other party only its expectation. . . . . [T]he owner's reliance may consist only of release of other bidders, and this reliance will not preclude avoidance if the owner can be compensated for it by an allowance for the cost of readvertising for bids.
>
> The other requirement that the bidder must meet in order to avoid is to show that holding the bidder to the bid would result in a degree of hardship the courts have often characterized as "unconscionable."[57]

This basis for avoidance requires analysis of the materiality of the mistake, but also importantly "the stage of the transaction" at which the mistake surfaced.[58] It is considered unconscionable to take advantage of a mistake where there is no prejudice.

In the mixed-nuts case, the Court of Federal Claims believed that the mistake surfaced "prior to award," and found unconscionability in the form of government overreaching in that circumstance.[59] Having therefore allowed avoidance, the court did not address whether the Government was prejudiced at the later stage when the start of production showed the supplier's persisting mistake. The Federal Circuit, having cut off its inquiry at the "completion of the pre-award survey,"[60] would have been required by the law of contracts between private individuals to inquire whether and to what extent the Government had changed position in reliance after the pre-award survey and even by the time, within two months of award, when production started and the mistake was undeniably known. Or, to use Corbin's formulation, "to what extent and at what cost" could "the *status quo ante* be restored."[61] This analysis was missing, and the Federal Circuit in essence awarded the Government "its expectation" in the form of excess reprocurement costs.[62] Such relief would

55. Emphasis added.
56. Perillo, *supra* note 42, § 28.39 at 224.
57. E. Allan Farnsworth, Contracts § 9.4 at 695–96 (1988).
58. Perillo, *supra* note 42, § 28.37 at 193.
59. And thereby mixed conditions (a) and (b) of § 153 in its analysis. Geisler v. United States, 44 Fed. Cl. 737, 743, 746 (1999).
60. Geisler v. United States, 232 F.3d 864, 876 (Fed. Cir. 2000).
61. Perillo, *supra* note 42, § 28.37 at 193.
62. This issue was, of course, quite irrelevant in Liebherr Crane Corp. v. United States, 810 F.2d 1153 (Fed. Cir. 1987), because the contractor, after performance, sought reformation of the contract price, not avoidance.

not appear to be available under the general law, at least not without concluding that, when the mistake is discovered, the *status quo ante* could not have been restored at a lesser cost.

The alternative ground for relief under *Restatement (Second)* Section 153 is its condition (b): "the other party had reason to know of the mistake or his fault caused the mistake." While the Court of Federal Claims and the Federal Circuit had differing views on whether the Government contributed to the supplier's misapprehension,[63] their real point of difference came over the "constructive knowledge" issue. The Federal Circuit held in effect that the Government could not be charged with constructive knowledge once its regulatory bid verification and pre-award survey functions, as seen by the court, were completed.[64] It is, of course, at least arguable that, under the regulations, the bid verification obligation does not end until award,[65] as the lower court believed. And it seems unlikely that the lower court would have found that the pre-award survey was "completed" before review of documents requested during the survey and attached to the survey report. But the point relevant to this article is that no such limitation on constructive notice appears in the law of contracts between private individuals. The Federal Circuit's analysis, if not its result, is plainly less sympathetic to a mistaken party than the more permissive general law, which—at least as explained by Corbin—might allow avoidance based on notice even *after* award if the *status quo ante* had not been changed materially.[66]

It is true that the avoidance provisions in Section 153 do not apply if, under Section 154(c), the court determines that the risk of the mistake should be assumed by the mistaken party.[67] To harmonize the Federal Circuit decision with the general law, it perhaps may be said that was what, *sub silentio*, the court had in mind. But it seems unlikely that a court, ruling on a case between private individuals, would apply Section 154(c) to the mixed-nuts facts, given "the variety of factors," including particularly the issue about the buyer's knowledge of the mistake. As Corbin summarizes,

> . . . there is practically universal agreement that if the material mistake of one party was . . . known to the other *or was of such a character and accompanied by such circumstances that the other had reason to know of it*, the mistaken party has the power to avoid the contract.[68]

Thus, absent a preemptive risk allocation under Section 154(c), avoidance

63. In this connection, the Federal Claims Court noted the failure to attach the CID to the solicitation, putting "fault" at a rough draw, *Giesler*, 44 Fed. Cl. at 743, whereas the Federal Circuit justifiably put this fact aside by noting the normal practice of referencing accessible specifications, as acknowledged in deposition testimony. *Geisler*, 232 F.3d at 871.

64. *Geisler*, 232 F.3d at 875–76.

65. 48 C.F.R. § 14.407–3 (2001) ("Other mistakes disclosed before award").

66. *Compare* 48 C.F.R. § 14.407–4 (2001) ("Mistakes after award"), which permits rescission where a clear unilateral mistake was "so apparent to have charged the contracting officer with notice of the probability of the mistake."

67. Restatement (Second) of Contracts § 154(c) (1981).

68. Perillo, *supra* note 42, § 28.41 at 255 (emphasis added).

would be allowed where the Government had "reason to know" of this mistake, a test passed under the general law by the pre-award communication of the product specification of 60 percent peanuts.

While it is not absolutely certain how this case would have come out under the general law, two conclusions are clear. First, the Federal Circuit did not apply the general law. Second, given the "variety of factors" potentially to be weighed in this case, a trial would have been appropriate and even necessary for the two courts to understand with more precision and after full process the nature of those factors. This is particularly so with respect to the compilation and review of the pre-award survey report and the question of actual knowledge.[69] Both courts would have been well served by findings of fact after a trial, rather than granting summary judgment, first for one party and then for the other, based on an incomplete record and different views of the facts.

III. *ROBINS MAINTENANCE, INC. v. UNITED STATES:* FREE LAWN MOWING

In *Robins Maintenance, Inc. v. United States*,[70] involving a workaday contract for grounds maintenance at an Air Force base in Georgia, there was no disagreement between the Court of Federal Claims[71] and the Federal Circuit. Both agreed that summary judgment should be granted for the Government, applying the principle that the Government's implied warranty does not protect the contractor from defective specifications if the contractor was not misled. Neither court addressed the "juristic effect" under "government contract law" of the Contracting Officer's actions, including knowingly instructing the contractor to bid based on understated acreage estimates. Nor did either court address the accountability of the Government for the Contracting Officer's actions under the law of contracts between private individuals.

A. *The Court Decisions*

The facts, for purposes of summary judgment, were consistently stated by the courts. To summarize: The Air Force issued a competitive solicitation for

69. Based on its analysis, the Federal Circuit stated that "[t]he crux of the present dispute" is whether the Government, through its pre-award survey, had actual knowledge of the "intention to supply a non-conforming nut mix." Geisler v. United States, 232 F.3d 864 (Fed. Cir. 2000). The Federal Circuit stated:

> Had the 60% figure been included in Central Park's original [sic] bid, it appears that the government would have had a duty to identify the potential mistake, and to notify Central Park with particularity, about it. *See* 48 C.F.R. § 14.407–1.

Geisler, 232 F.3d at 875. It seems more likely this hypothetical would, under the regulations, require the Contracting Officer to reject the bid as nonresponsive. 48 C.F.R. § 14.404–2 (2001). Under the law between private individuals, there would be no meeting of the minds or assent and thus no contract, or if awarded with knowledge, possibly a contract for a lot of peanuts. Restatement (Second) of Contracts, § 20(1)–(2) (1981).

70. 265 F.3d 1254 (Fed. Cir. 2001).

71. No. 97–488C, slip op. and order (Fed. Cl. Aug. 23, 2000).

a grounds maintenance contract. The bid documents included a Technical Exhibit "which set forth acreage and square footage 'workload estimates' so bidders could calculate the number of labor hours in bidding the contract."[72] The plaintiff, the incumbent contractor, knew that the acreage and square footage estimates were "inaccurately too low."[73] Plaintiff's president informed the Contracting Officer of the inaccuracy. The Contracting Officer "instructed" him "to bid the contract based on the solicitation."[74] As recounted by the Federal Circuit, "Ms. Holley told Mr. Dykes not to 'start any trouble' and to proceed to bid on the solicitation as it was written."[75] The plaintiff bid in accordance with the Contracting Officer's instruction and won the contract. The contractor made a claim for equitable adjustment after performance for "almost two years."[76] Thereafter, the Contracting Officer modified the contract "to reflect the correct acreage."[77] The modification provided additional payment for future work, "but not for the time period prior to the modification."[78] The contractor claimed a price adjustment for the pre-modification work, asserting "defective specifications."

The Court of Federal Claims identified the issue it considered dispositive on summary judgment: "The key issue is whether plaintiff . . . is precluded from obtaining an equitable adjustment because it knew the estimates included in the . . . bid materials were inaccurate." The Government argued that it had no liability "whether or not" the inaccuracy "was communicated to the USAF before award." The court agreed: "An incumbent contractor . . . may not recover based on a theory of defective specifications when it has knowledge . . . that the specifications are inaccurate."[79] The lower court did not discuss whether the Contracting Officer's pre-bid knowledge and "instructions," or the subsequent modification, had any legal bearing on government liability.

The Federal Circuit also agreed. Focusing on the implied warranty of specifications established by *United States v. Spearin*,[80] the court said, "[t]he test for recovery based on inaccurate specifications is whether the contractor was misled by these errors in the specifications."[81] The logic was simple: one with knowledge of defects cannot rely on a warranty by implication that the specifications are defect free. The appellate court did acknowledge the unusual facts of this case, which, it said, "raises an issue of first impression for the court":

72. *Id.* at 2.
73. *Id.*
74. *Id.*
75. *Robins Maintenance*, 265 F.3d at 1256.
76. *Robins Maintenance*, No. 97–488C, slip op. at 2.
77. *Id.* at 3.
78. *Id.*
79. *Id.* at 5.
80. 248 U.S. 132 (1918).
81. Robins Maintenance, Inc. v. United States, 265 F.3d 1254, 1257 (Fed. Cir. 2001).

> Nonetheless, appellant argues that its case is unique, and does not fall within the strict *Spearin* rule requiring that the contractor be misled, because RMI informed the Air Force's contracting officer of the errors in Technical Exhibit 2, and the contracting officer told RMI to bid on the solicitation as it was written.[82]

However, the court was not impressed and dismissed these facts as irrelevant:

> RMI's notice to the government does not alter the test for recovery for defective specifications. This is not a situation in which the contractor identified a possible error in the contract, and the government led the contractor to believe there was no error.[83]

This singular focus on the contractor's knowledge left unexamined the possible separate legal import of the Contracting Officer's knowledge of the error in her solicitation and her instructions notwithstanding such knowledge. The contractor's knowledge was considered dispositive of a defective specification claim, and summary judgment for the Government was sustained.

Perhaps it could be said that the plaintiff did not allege the unexplored facts except in the context of a defective specifications claim and for this reason other theories of recovery were not considered. The explanation seems unlikely,[84] given that the Contracting Officer's knowledge and actions were facts plainly relied upon as a basis for relief, no matter how the claim was labeled.

In any event, the courts' "defective specifications" analysis is questionable in two respects. First, the defects were not in specifications that detailed a plan for performance, as in cases cited by the courts, but rather in a baseline for pricing. The problem in reality was not that the solicitation defectively misled the contractor on *how to perform*, but rather that it defectively informed the contractor on *how to price*. The "defect" thus did not lead the contractor down a ruinous or even unsuccessful course of performance. It simply, but directly, led to a price that did not cover all the work.

Second, "defective specification" cases indicate the possibility that a contractor's knowledge may not defeat a claim depending on the Contracting Officer's knowledge and action (or inaction). For example, in *Wickham Contracting Co. v. United States*,[85] actually relied on by the Federal Circuit,[86] the court carefully noted:

> However, there is no evidence in the record that the contracting officer, or any other responsible government official connected with award of plaintiff's contract, was actually aware of any drawing error prior to the opening of bids, and there is no Board finding that the contracting officer knew at the time of award that Plaintiff's bid was based on the erroneous scale.[87]

82. *Id.* at 1258.

83. *Id.*

84. The court of appeals' opinion does note that the contractor's claims "not based on the erroneous acreage estimates" had been abandoned, but those claims were for added work "other than the additional work that it performed because of the acreage in the specifications." *Id.*

85. 546 F.2d 395 (Ct. Cl. 1976).

86. *Robins Maintenance*, 265 F.3d at 1257.

87. *Wickham*, 546 F.2d at 398 n7. The "factual predicate" of the Robins Maintenance claim was thus explicitly missing in *Wickham*.

In the lawn maintenance case, of course, the Contracting Officer knew of the error and the basis of the bid. In *Wickham*, the Court of Claims also spoke of the duty "to seek clarification of said discrepancy" from an appropriate government official before submitting a bid if the bidder, subsequent to award, "hopes to rely on its unilateral resolution of the discrepancy issue as a basis for a subsequent price adjustment claim."[88] In the lawn maintenance case, the contractor made the inquiry and, far from relying on its own "unilateral resolution," was given a Contracting Officer's "instruction" on how to resolve the discrepancy.[89]

So it is not altogether clear, based on prior Court of Claims precedent, that the Contracting Officer's knowledge and action were irrelevant.[90] On the other hand, it is perfectly clear that neither the Court of Federal Claims nor the Federal Circuit addressed how the case would come out under the law of contracts between private individuals.[91]

B. *Application of the Law of Contracts Between Private Individuals*

The general law of contracts, with its emphasis on intent of the parties and fair dealing between them,[92] would not permit an analysis that did not consider the "juristic effects" of the Contracting Officer's knowledge and actions.

Thus, even though the contractor knew of the discrepancy, these basic facts would be essential to the analysis under the general law: (1) the buyer prepared and was (at least initially) responsible for the defective solicitation; (2) the buyer knew the acreage estimates for bidding were substantially less than the actual acreage; (3) the buyer, when confronted with the error, specifically instructed the seller to price based on the understated estimates (like the other, unsuspecting bidders); (4) the buyer held a competition in which all bidders priced based on the inaccurate estimates; (5) the buyer, when awarding to seller, knew that the price in fact only covered the erroneous estimate; (6) the awarded contract contained a discrepancy known to the buyer and caused by the buyer's conduct of the procurement, as well as a "Changes" clause; (7) the buyer subsequently corrected the underestimated acreage specification through a contract change and allowed an equitable adjustment to cover the previously unpriced work done after the modification; but (8) the buyer refused to pay for all the lawn maintenance services received prior to the modification.

The law of contracts between private individuals would not likely, or lightly, allow a party so thoroughly involved in and responsible for this

88. *Id.* at 398.

89. Robins Maintenance, Inc. v. United States, No. 97–488C, slip op. and order at 2 (Fed. Cl. Aug. 23, 2000).

90. *See also* Chris Berg, Inc. v. United States, 426 F.2d 314 (Ct. Cl. 1970) (award with knowledge and over protest violated law); Johnson Controls v. United States, 671 F.2d 1312 (Ct. Cl. 1982) (overreaching); Rappoli v. United States, 98 Ct. Cl. 499 (1943) (promise of reformation).

91. Nor does it appear from the decisions that the plaintiff asked the court to do so. After the recent Supreme Court decisions, counsel presenting contract claims against the Government should not take a narrow view of the theories and authorities available to them.

92. Restatement (Second) of Contracts §§ 201, 205 (1981).

disparity between services rendered and compensation to reap the benefit. One-sided bargains are not favored and are thoroughly scrutinized.[93] Some commonsense questioning seems unavoidable: What was the Contracting Officer's intent when she gave her instruction and held a competition that priced only part of the work? Was it to reaffirm explicitly the Government's responsibility for the defective estimates? Or was it actually to get something for nothing? If so, what was the contractor's reasonable expectation based on the Contracting Officer's instruction? Further, what intent and expectation was evidenced by the Contracting Officer's later corrective action and upward adjustment of prospective contract compensation? Was it consistent with either intent or expectation—or fair—to refuse to pay fully for services previously rendered?

Under the law of contracts between private individuals, there are a number of potential theories of recovery, given the foregoing facts and issues. Under all it is clear that favorable inferences that might be drawn from these facts *must* be considered before summary judgment could be granted against the contractor. A trial exploring the intent and expectations of the contracting parties would probably be essential to a fair adjudication.[94]

Contract interpretation is an effort to ascertain the meaning of the parties' agreement. The intent of the parties, usually controlling, is determined from their manifestations in words *and conduct*.[95] The terms of the agreement are the appropriate starting point for this inquiry, and, if they have a "plain meaning," may be controlling under a traditional, objective view of contract interpretation.[96] However, this conservative approach is not adopted by the *Restatement (Second)*, which, for example, takes an approach more focused on intent in Section 214:

> Agreements and negotiations prior to or contemporaneous with adoption of a writing are admissible in evidence to establish
>
> (a) that the writing is or is not an integrated agreement;
> (b) that the integrated agreement, if any, is completely or partially integrated;
> (c) the meaning of the writing, whether or not integrated; . . .

Furthermore, Section 212 provides that

93. *Id.* § 208, cmt. c.

94. "A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence." *Id.* § 212(2) (1981). Such a question is not an appellate issue.

95. *Id.* § 202 (1981).

96. Recent decisions of the Federal Circuit suggest a trend back to "plain meaning" resolution, compared to the more flexible, subjective analyses of prior Court of Claims contract interpretation jurisprudence. *E.g.*, *compare* HRE, Inc. v. United States, 142 F.3d 1274 (Fed. Cir. 1998) (relying on plain meaning of one provision, although contract "not a model of clarity") *with* Firestone Tire & Rubber Co. v. United States, 444 F.2d 457 (Ct. Cl. 1971) (reasonable meaning); Hol-Gar Mfg. Corp. v. United States, 351 F.2d 972 (Ct. Cl. 1965) (reasonable meaning to all parts); Gholson, Byars & Holmes Const. Co. v. United States, 351 F.2d 987 (Ct. Cl. 1965) (trade usage in order that parties' intent might prevail over ordinary meaning).

> (1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in light of the circumstances. . . .

The comment for Section 212(1) explains that

> It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in context. Accordingly, the rule stated in Subsection (1) is not limited to cases where it is determined that the language used is ambiguous. Any determination of meaning or ambiguity should only be made in light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usage of trade, and the course of dealing between the parties.

The Contracting Officer's conduct would thus be admissible to establish that the contract was not completely integrated, and, indeed, would be necessary to determine what the agreement meant. Moreover, it could hardly be said that the lawn maintenance contract had a "plain meaning," given the discrepancy between the statement of work and the acreage specification, plus the accompanying presence of the Changes Clause authorizing corrective changes to one or the other.

A court adjudicating a contract dispute between private parties would therefore turn to the *Restatement (Second)*'s "Rules in Aid of Interpretation" and particularly Section 202(1): "Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight."

So how, in light of all the circumstances, is the conduct of the Contracting Officer to be interpreted?

An "unfair" interpretation would be that she was trying to obtain free lawn maintenance services through the device of her own defective acreage estimate. It is extremely unlikely that the Contracting Officer would testify to such an intent, particularly considering her regulatory duties.[97] Even if she did, a court would probably reject such an asserted intent as (a) "overreaching"; (b) not credible "in light of all the circumstances,"[98] including her later corrective change and additional payment; or (c) inconsistent with "the principal apparent purpose" of the contract[99]—grounds maintenance in return for reasonable compensation.

A fair interpretation is that she explicitly reaffirmed the acreage estimate for bidding purposes, for whatever reason (such as possibly the exigencies of the procurement), with intent to correct the discrepancy subsequently through exercise of her "Changes" authority. Such an intent would be consistent with the circumstances, including her otherwise questionable conduct,

97. 48 C.F.R. §§ 16.202–2 and 16.103 required the Contracting Officer to contract based on a "fair and reasonable" price that "will result in reasonable contractor risk." FAR also required the Contracting Officer to "conduct business with integrity, fairness, and openness"—an obligation consistent with the common law of contracts. 48 C.F.R. § 1.102(a)(3) (2001). Further, the Contracting Officer was required by statute and regulation to give plaintiff a fair opportunity to compete in a "full and open competition." 10 U.S.C. § 2304; 48 C.F.R. § 6.101 (2001).

98. Restatement (Second) of Contracts § 202(1) (1981).

99. *Id.*

and would resolve, through a clause in the contract, a government-caused inconsistency in the contract work terms. Such an intent is evident, at least in part, from the Contracting Officer's action in actually modifying the contract to correct the discrepancy and providing further compensation.[100] If it was her intent to issue a corrective modification, it would seem to be impossible to explain why the timing of her modification would limit the also intended price adjustment.

All these circumstances support the conclusion that the price only covered the specified acreage and the contract was meant to compensate the plaintiff for the unpriced services. If that intent was shared, Section 201(1) of the *Restatement (Second)* requires that the contract be interpreted in accordance with that meaning.

If, on the other hand, a common intent cannot be determined, the *Restatement*'s rules of interpretation ask which of the competing understandings should prevail. What, for example, was the lawn maintenance company's intent or "reasonable expectation" when the Contracting Officer instructed it to price only the understated acreage estimate? For all the reasons that support the view that the Contracting Officer must have intended to provide relief from her defective estimate, it certainly follows that the contractor would have reasonably thought so.[101]

If the parties attached different meanings to the agreement, the *Restatement (Second)*'s rules of interpretation require a court to address the issues raised by its Section 201(2):

> Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
>
> (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or
> (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.[102]

The reason-to-know-or-not-know issue is judged based on words, conduct, and context, but also inevitably on reasonableness. Would a contractor reasonably believe the Contracting Officer, through her instructions, intended to force it out of the "full and open competition" required by law, or disadvantage it unfairly in the competition against bidders unsuspecting of the erroneous technical exhibit?[103] Would the Contracting Officer reasonably believe that the contractor understood her instruction to require a bid at a loss

100. Otherwise she would appear to have given away a government right without consideration in return.

101. If courts can presume the good faith of government Contracting Officials, certainly contractors should be entitled to as well. See *infra* where this judicial presumption is examined.

102. Emphasis added. [attached by one of them.]

103. Unsuspecting contractors would be entitled to relief for defective specifications under the Federal Circuit's reasoning. *See* Robins Maintenance, Inc. v. United States, 265 F.3d 1254, 1258 (Fed. Cir. 2001).

that would not be remedied later? These are factual issues that would have to be resolved under *Restatement (Second)*'s Section 201(2). While the result would depend on "words and conduct" and "context," it would be influenced by the *Restatement (Second)*'s aversion to unfair dealing[104] and unconscionability.[105] The words and conduct of the parties are likely to be interpreted to bring about a fair and reasonable result.[106]

If relief cannot be obtained by the process of interpretation of the contract, the law of contracts between private individuals provides an alternative theory for the grounds maintenance contractor. This theory involves implication, a process close to but distinct from interpretation. Thus, if the Changes clause is not a term sufficient to provide relief, the court may supply an "implied" term. The *Restatement (Second)*'s Section 204 ("Supplying an Omitted Essential Term") provides as follows:

> When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances may be supplied by the court.

Thus, it may be said that the grounds maintenance contract lacked a term essential to determination of the parties' rights and duties arising from the Contracting Officer's knowing instruction to bid the understated acreage estimate. What in fact was the implication of that instruction? Was it "Bid it that way *and* (unlike the other bidders) *suffer a loss*? Or was it, "Bid it that way, *and* (treating all competitors the same) *I will fix it later.*" Or "*we'll price the rest later.*"

As the comment to *Restatement (Second)*'s Section 204 explains,

> d. Supplying a term. Sometimes it is said that the search is for the terms the parties would have agreed to if the question had been brought to their attention. Both the meaning of the words used and the probability that a particular term would have been used if the question had been raised may be factors in determining what term is reasonable in the circumstances. But where there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process.

Thus, applying the law of contracts between private individuals, the government contract courts needed to consider whether a "fix-it" term might fairly be supplied to the contract as written, based on the circumstances, including the Contracting Officer's questionable bidding instruction.[107]

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104. Restatement (Second) of Contracts § 205 ("Duty of Good Faith and Fair Dealing") (1981).

105. *Id.* § 208 ("Unconscionable Contract or Term").

106. *Id.* ("Standards of Preference in Interpretation"): "[a]n interpretation which gives a reasonable, lawful and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."

107. If interpretation or implication of a term fails, a court applying Restatement (Second) § 208 might declare a "something-for-nothing" contract induced by the Contracting Officer's knowing and otherwise arguably illegal instruction to bid her own defective estimate to be "unconscionable" and refuse to enforce the contract as written. No doubt a court would consider

In summary, in *Robins Maintenance*,[108] neither the Court of Federal Claims nor the Court of Appeals for the Federal Circuit engaged in the kind of analysis indicated by the general law of contracts. Focusing solely on the impact of the contractor's knowledge of the Government's discrepant acreage estimate under their view of "defective specification" precedents, the courts did not address the legal implications of the Contracting Officer's instructions to bid to those estimates any way. Although recognizing that the Contracting Officer's actions made this a case of first impression, the Federal Circuit was content with the conclusion that her actions "did not [lead] the contractor to believe that there was no error."[109] But the law of contracts between private individuals, as reflected in the *Restatement (Second)* and repeatedly relied on by the Supreme Court in *Mobil Oil Exploration*, would require an examination whether her actions prompted a mutual intent, or led the contractor to reasonably believe, that the resulting price covered only the estimated acreage and would be increased to compensate for the services actually rendered. Applying the *Restatement (Second)*'s principles for ascertaining contract rights and duties, and after trial to determine the facts, the appropriate findings might well be that the explicit bidding instructions lulled the contractor into believing that the Contracting Officer would take responsibility for the government-caused discrepancy—and that the Contracting Officer entered the contract with the intent or at least "with eyes wide open" that corrective action and fair compensation would be required.

IV. *AM-PRO PROTECTIVE AGENCY, INC. v. UNITED STATES:* LUNCH BREAK CLAIMS

Am-Pro Protective Agency, Inc. v. United States[110] involved another workaday contract, this one for guard services, out of which there arose a dispute about compensation for lunch breaks. The problem for Am-Pro was its release of and failure to prosecute its "breaker" claims, the effect of which Am-Pro sought to avoid by asserting duress by the Contracting Officer. The Court of

the role and leverage of the Contracting Officer. *See, e.g.*, Corliss Steam-Engine Co. v. United States, 10 Ct. Cl. 494, 502 (1874) ("strictest fairness and justice"), *aff'd*, 91 U.S. 321 (1875).

In such an event, the remedies are explained by the RESTATEMENT's comments to include "the reasonable value of performance." RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. g (1981) ("Remedies"). General contract law thus affords relief from oppressive contracts where circumstances establish unconscionability. Based on an implied-in-fact or law contract, relief may be granted in the form of *quantum meruit* compensation for services rendered. Relief based on a contract "implied-in-law" would be blocked by sovereign immunity, because the Supreme Court has ruled that Tucker Act jurisdiction waives that immunity only for suits based on express contracts or contracts "implied-in-fact." *E.g.*, Hercules Inc. v. United States, 516 U.S. 417 (1996). However, it does seem probable that a court, particularly applying the general law, would interpret the contract to avoid an unconscionable result and thus to preserve its viability. RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981).

108. *See* Robins Maintenance, Inc. v. United States, 265 F.3d 1254 (Fed. Cir. 2001); Robins Maintenance, Inc. v. United States, No. 97–488C, slip op. and order (Fed. Cl. Aug. 23, 2000).

109. *Robins Maintenance*, 265 F.3d at 1258.

110. 281 F.3d 1234 (Fed. Cir. 2002).

Appeals for the Federal Circuit rejected this duress allegation and indeed sustained summary judgment notwithstanding Am-Pro's affidavit spelling out the alleged coercive actions. In doing so, the court relied on "the high evidentiary burden of proof needed to overcome the presumption that government officials act properly and in good faith."[111] Am-Pro was denied even a trial, not because of the law of contracts between private individuals, but because of special presumptions and privileges in favor of government contracting officials. What makes this case more than illustrative, even extraordinary, is that the Federal Circuit appears to have *extended* the often criticized, special rule requiring proof of government "bad faith," even as the Supreme Court is emphasizing that the Government must play by normal rules of contracting.

A. *The Federal Circuit Decision*

The Federal Circuit spelled out the facts Am-Pro proffered by affidavit in the effort to prevent summary judgment.[112] The contract required Am-Pro to provide guard services for Department of State facilities. Am-Pro believed the Government owed additional compensation for the hours Am-Pro was paying its employees for breaks that the contract required. The Contracting Officer disagreed, believing compensation was provided in the contract price. At a meeting when this issue was discussed, the Contracting Officer stated that,

> if Am-Pro filed a formal claim, she would promptly disapprove it and that, if Am-Pro thereafter appealed her decision, the CO would cancel and re-solicit the existing contract.[113]

Am-Pro submitted a claim for $2.5 million, which the Contracting Officer denied. At a subsequent meeting, the Contracting Officer—according to Am-Pro's affidavit—"repeated her threat of canceling the Contract if Am-Pro continued to have its Contract rights protected by appealing her interpretation of the Contract."[114] Further, the Contracting Officer threatened to "adversely impact [its] ability to contract with other agencies of government. . . ."[115] Within a week of the meeting,

> Am-Pro confirmed that it had "withdrawn" the claim that was subject to the September 1, 1992 final decision of the CO. And it agreed that it would not appeal the CO's final decision or submit any future claim for costs attributable to the "breaker" issue, thereby effectively releasing the government from any future claims for "breaker" hours.[116]

111. *Id.* at 1236.
112. *Id.* at 1236–38.
113. *Id.* at 1236.
114. *Id.* at 1237.
115. *Id.*
116. *Id.*

And the court further noted that, "[u]nder this release, the CO agreed that Am-Pro would not be excluded from any other competition for further Department of State security services contracts."[117]

The Federal Circuit acknowledged that, normally, an affidavit such as Am-Pro's would "probably meet the evidentiary standard needed to avoid summary judgment."[118] The court noted that untimeliness of assertion and lack of corroboration made the affidavit unpersuasive, but the overriding factor was that Am-Pro's assertion of duress did not present "a typical summary judgment issue, one that did not involve a strong presumption in favor of a particular party."[119] According to the court, the affidavit was ineffective to establish duress principally because it did not provide "the clear and convincing evidence needed to show that the CO acted in bad faith."[120]

The Federal Circuit thus invoked an extraordinary presumption in favor of the Government, one that cannot be squared with the recent Supreme Court pronouncements that put government contracting officials' conduct under the scrutiny of the law that applies to private individuals. Under a special line of precedents of the Federal Circuit (and previously the Court of Claims), "well nigh irrefragable" proof is required to establish that a government official has acted in "bad faith." This burden stems from a presumption of good faith. Moreover, as the court noted, "the requirement of 'well nigh irrefragable' proof also sets a high hurdle for a challenger seeking to prove that a government official acted in bad faith," because bad faith must be

(a) equated with "some specific intent to injure";
(b) "motivated alone by malice";
(c) "designedly oppressive"; or
(d) "actuated by animus toward the plaintiff."[121]

Am-Pro's affidavit did not even purport to pass these withering tests.

This special rule has been criticized for good reasons.[122] There is no empirical basis for the presumption that government officials act better than private ones, and no sound policy to support a rule that a Contracting Officer's conduct is not actionable unless he is personally out to get you.

117. *Id.* Notwithstanding this reference to exclusion from competitions, the appellate court found that "nothing in the letters by Am-Pro alludes to the threats that allegedly occurred." The court speculated about the reference to the Contracting Officer's agreement: "This statement likely stems from Am-Pro's concerns that the Small Business Administration might not release the contract from the Section 8(a) program for open competition [sic] and that Am-Pro had recently 'graduated' from Section 8(a) status." *Id.* at n.1 (emphasis added). [likley.] This seems an unlikely interpretation because the Contracting Officer could not bind the SBA, whereas she could conceivably influence State Department procurement.

118. *Id.* at 1241.

119. *Id.*

120. *Id.*

121. *Id.* at 1239–40.

122. Frederick W. Claybrook Jr., *Good Faith in the Termination and Formation of Federal Contracts*, 56 Md. L. Rev. 555 (1997); Daniel E. Toomey, William B. Fisher, & Laurie F. Curry, *Good Faith and Fair Dealing: The Well Nigh Irrefragable Need for a New Standard in Public Contract Law*, 20 Pub. Cont. L.J. 87 (1990).

If ever there was a special rule that should be limited in application, this "bad faith" test is one. Before comparing this rule to the law of contracts between private individuals, it is worth examining its roots. Surprisingly, the rule finds its genesis in personnel disputes, where government officials were accused of wrongfully discharging employees. By statute, these government officials were granted broad discretion to act in the interests of the United States in such employment matters. The language quoted in *Am-Pro* comes naturally in this original setting. The Court of Claims was reluctant to get into these discretionary, but very personal matters. In *Knotts v. United States*,[123] where the plaintiff alleged a wrongful discharge, the court explained,

> Personnel disputes are hard to resolve. In undertaking to do so, we start out with the presumption that the official acted in good faith. We are always loathe to find to the contrary, and it takes, and should take, well-nigh irrefragable proof to induce us to do so.

Notwithstanding this reluctance, the Court of Claims found that, far from serving the "interests of the service," there was "a conspiracy to get rid of plaintiff" so that someone else "could have her job." The court found "personal animus" in a personnel case,[124] language that later would become a prerequisite in impersonal government contract contexts.

Similarly, in *Gadsden v. United States*,[125] the court reviewed the termination of an employee under discretionary statutory standards (such as to "promote efficiency"). The focus was not only on the highly personal nature of the matter, but also on the statutory discretion vested in the government official. The court discussed its limited "power to review" as a matter of administrative law:

> where discretion is conferred on an administrative officer to render a decision, this decision must be honestly rendered, and that if it is arbitrary and capricious, or rendered in bad faith, the courts have power to review it and set it aside.[126]

And then, drawing an analogy to its limited power to review "final decisions" under contract disputes procedures,[127] the court said,

> This court has the question presented to it constantly in cases arising under government contracts, when the contracting officer and the head of the department are given the power to render final decisions on questions of fact. Both this Court and the Supreme Court have many times held that if the decision is arbitrary or capricious or so grossly erroneous as to imply bad faith, it will be set aside.[128]

Otherwise, the court would not "substitute its judgment."[129] Having outlined a presumption based on this limited standard of review, the court applied

123. 121 F. Supp. 630 (Ct. Cl. 1954).
124. *Id.* at 631.
125. 78 F. Supp. 126 (Ct. Cl. 1948).
126. *Id.* at 127.
127. These standards were later adopted in the Wunderlich Act, 41 U.S.C. §§ 321–322 (2003).
128. *Gadsden*, 78 F. Supp. at 127–28.
129. *Id.* at 128.

it to the very personalized context of the employment dispute: If as a matter of fact, the employee was "not removed to promote efficiency," but "maliciously" and "merely because her supervisor did not like him, or merely because he wanted his job for some friend, then obviously the employee discharge was wrongful."[130]

It is not entirely clear why administrative law presumptions and employment law applications found their way to contractual actions of government officials—indeed to actions subject to *de novo* review. One might have thought that statutory discretion would be distinguished from contractual discretion, and that the contract, rather than employment, context would require different tests of unreasonableness. But it is clear that the entry point involved the termination for convenience clause, which—like the employment statutes—gave the government official discretion to act "in the interest" of the Government.

In *Librach v. United States*,[131] where the termination right could "be exercised at will," the contractor's allegations were rejected based on language drawn from the earlier employment cases. It was "presumed" that the officials were "acting conscientiously in the discharge of duties" and were "not actuated by animus" toward the contractor. In *Kalvar Corp., Inc. v. United States*,[132] these notions were carried forward as the Court of Claims declined to convert a termination for convenience into a breach absent a showing of bad faith or abuse of discretion. After noting that "many of our prior decisions seem implicitly to accept the equivalence of bad faith, abuse of discretion, and gross error," the court concluded that there was an "insufficient showing of malicious intent or animus."[133] In *Torncello v. United States*,[134] an *en banc* plurality opinion, seeking to limit the termination power to changed circumstances, stated that otherwise the burden of proving "bad faith" was so onerous as to give the Government an unrestricted "out" and deprive the contract of mutuality. Judge Bennett stated that the "bad faith" constraint on termination was not sufficient consideration

> because the government's presumption of good faith dealing is rebuttable only in the most extreme circumstances, when there is a specific intent to harm the contractor. And the government's obligation to avoid clear abuses of discretion is only an illusion. Without any other limits, the concept of discretion is meaningless.[135]

The Federal Circuit also embraced the "bad faith" standard for upsetting terminations for convenience. The Federal Circuit eliminated the *Torncello* plurality's "changed circumstances" analysis in a sequence of decisions that

130. *Id.*
131. 147 Ct. Cl. 605 (1959).
132. 543 F.2d 1298 (Ct. Cl. 1976).
133. *Id.* at 1303.
134. 681 F.2d 756 (Ct. Cl. 1982).
135. *Id.* at 771.

followed,[136] but reaffirmed the principle that, when terminating for convenience, the Government is presumed to act in good faith unless the contractor can show "through 'well-nigh irrefragable proof' that the government had a specific intent to injure it."[137]

Thus, notwithstanding origins in administrative law concepts applied to employment matters, the "bad faith" test is thoroughly embedded in government contract law as it relates to terminations for convenience. However, with few exceptions, the "bad faith" test has *not* been applied outside that context. Before *Am-Pro*, the Federal Circuit (and the Court of Claims before it) had never applied the onerous "bad faith" test to government duties in the performance of its contracts.[138] Indeed, government contract tribunals have held government officers to standards of "good faith" in other contractual dealings, applying tests more akin to the general law of contracts, and without presumption and without wresting through unnatural issues of malice, personal animus, or specific intent to injure.

In *Pacific Far East Lines, Inc. v. United States*,[139] financial results were subject to a contractual determination, within the Maritime Administration's discretion, whether a nonsubsidized voyage was competing with subsidized service. The Court of Claims set forth its test, stating first that the government

> . . . is normally subject to the same rules of law that govern private parties. . . . A party vested with contractual discretion must exercise his discretion reasonably and may not do so arbitrarily and capriciously.[140]

The court did not mention "well-nigh irrefragable proof" or "bad faith"; however, it did say that "there can be no relief from an erroneous judgment exercised in good faith pursuant to valid discretionary power."[141] The court found the Government's exercise of contractual discretion unsupportable, not because of malice or animus (also not mentioned), but rather because it was an unreasonable switch in position. The motive was not specifically to injure, but rather to "minimize cost to the government"—normally a "commendable" purpose, but unacceptable except "within the framework of the contract."[142]

Where—farther afield from convenience terminations—challenged actions of government officials are not contractually committed to their

136. *E.g.*, Krygoski Constr. Co. v. United States, 94 F.3d 1537 (Fed. Cir. 1996); Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990).

137. Caldwell & Santmeyer, Inc. v. Glickman, 55 F.3d 1578, 1581 (Fed. Cir. 1985).

138. A computer search discloses no such precedent. The court has required "bad faith" proof in cases involving—in addition to terminations for convenience—award protests and defective estimates where allegations of bad faith were made. In England v. Systems Management American Corp., 38 Fd. Appx. 567 (Fed. Cir. 2002) (not citable as precedent), the court discussed the "bad faith" test where the complaint was about delay in approval of contractor's definitized options. The issue is also prominent in pay cases.

139. 394 F.2d 990 (Ct. Cl. 1968).

140. *Id.* at 998.

141. *Id.*

142. *Id.* at 1001.

discretion, it is even clearer that the "bad faith" test has no place. Indeed, it is established government contract law that the Government has a nondiscretionary duty of "good faith and fair dealing." "Every contract contains with it the implied obligation that the parties will act in good faith in performance."[143] This is an affirmative duty, not one merely to avoid "bad faith" as it has been defined in the termination cases. The Federal Circuit's precedent in *Malone v. United States*[144] establishes this proposition. There the contractor sought to justify its failure to proceed diligently based on government actions in contract administration, such as misleading the contractor to rely on an unacceptable workmanship standard. The court invoked the *Restatement (Second)*'s implied obligations of "good faith and fair dealing"[145] and found that the Government had materially breached by not living up to them. Again, there was no mention of "well-nigh irrefragable proof" or "animus." Instead, the court adopted the very different standards for "good faith in performance" defined by the *Restatement (Second)*.[146] In this way, the law of government contracts has differentiated the tests of "good faith in performance" from "bad faith" in terminating for convenience.

This distinction was observed in what is perhaps the leading government contract precedent on the subject of duress or economic coercion—the very subject of the *Am-Pro* decision. In *Systems Technology Associates, Inc. v. United States*,[147] the Federal Circuit explained that a contractor would be relieved from an "involuntary agreement" induced by "an improper threat which left no reasonable alternative." The court specifically invoked "the duty of good faith and fair dealing," as a measure of impropriety, and said that it could be dispositively determined from the "coercive nature of the threat."[148] Thus, as the court summarized:

> An act the Government is empowered to take under law, regulation, or contract may nonetheless support a claim of duress if the act violates notions of fair dealing by virtue of its coercive effect.[149]

"Bad faith" involving malice, animus, or specific intent to injure was not identified as a required element of proof of duress. Indeed, the Federal Circuit specifically noted that the Board of Contract Appeals' "listing of wrongful acts that may constitute duress—acts taken in bad faith, or with malice, or with unconscionable motives—is by no means comprehensive."[150]

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143. Maxima Corp. v. United States, 847 F.2d 1549, 1556 (Fed. Cir. 1988); Burke Reporting Co., DOT BCA No. 3058, 97–2 BCA ¶ 29,323 at p. 145,801; *see* Community Consulting International, ASBCA No. 53489, 2002 WL 1788535.

144. 849 F.2d 1441 (Fed. Cir. 1988).

145. Restatement (Second) of Contracts §§ 205, 241 (1981).

146. *Malone*, 849 F.2d at 1445 (quoting Restatement (Second) of Contracts § 205 cmt. d). *See* discussion of these standards below.

147. 699 F.2d 1383 (Fed. Cir. 1983).

148. *Id.* at 1387.

149. *Id.*

150. *Id.* at 1388. *Systems Technology* is soundly based in prior Court of Claims precedent,

This brief recapitulation of the origins and limits of the "bad faith" test, as reflected in government contract precedents, causes wonder and worry about the *Am-Pro* decision, where the duress claim was disposed of based on the impossibility of proving, with "clear and convincing" evidence,[151] threats made with malice, animus, or specific intent to injure. There were good reasons why Am-Pro's claim might fail, perhaps even without a trial, but the "bad faith" test was not one of them. *Am-Pro* failed to discuss or cite *Systems Technology* and disregarded the circuit's prior standards for establishing duress under government contract law, including the definition of "good faith" in that context. The court extended the special "bad faith" rule beyond its boundaries previously established under government contract precedents. *Am-Pro* suggests but hopefully does not mean that proving government breach of good faith duties requires a contractor to meet this peculiar standard.

If *Am-Pro* is not seen as an aberration overcome by a renewed application of general contract law, its precedential effect would be to grant government contracting officials a dangerous license to ignore those obligations of good faith and fair dealing in contractual actions that government contract law has already adopted from the law of contracts between private individuals. This would not only set government contract jurisprudence back, it also would frustrate the fundamental principle of *Winstar* and *Mobil Oil Exploration.*

B. *Application of the Law of Contracts Between Private Individuals*

Am-Pro obviously does not measure the Contracting Officer's threats under the law of contracts between private parties. *Restatement (Second)* Section 175, which states "When Duress by Threat Makes a Contract Voidable," and Section 176, which defines "When a Threat Is Improper," are not discussed. The decision disposes of the duress claim without a trial and without fact-finding addressing the coercive effect (intended, perceived, and actual) of the Contracting Officer's threats. Nor does it address whether the Contracting Officer was dealing fairly when she induced Am-Pro to abandon its statutory rights under the Contract Disputes Act. The bar of the special "bad faith" rule—with its unique burden of "clear and convincing" proof of personal "animus"—resolved the case on summary judgment.

There is no such rule in the general law of contracts, not even with respect

principally Urban Plumbing & Heating Co. v. United States, 408 F.2d 382 (Ct. Cl. 1969), and Fruehauf Southwest Garment Co. v. United States, 111 F. Supp. 945 (Ct. Cl. 1953), neither of which mention "bad faith" as a test. Indeed, *Urban Plumbing* quotes Robertson v. Frank Brothers Co., 132 U.S. 17, 23 (1889), as follows: "When the duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required. . ." 408 F.2d at 391.

151. The court explained that the "well-nigh irrefragable" evidentiary burden of proof required "clear and convincing" evidence, although acknowledging that a dictionary definition would indicate it meant "almost indisputable." Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239–40 (Fed. Cir. 2002). But the more troubling substance of the required "bad faith" remained unexamined and was assumed.

to discretionary termination rights[152] and certainly not with respect to issues of duress. A very different concept of "good faith and fair dealing" pervades contract law. The *Restatement (Second)* provides in Section 205: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."

This section is cross-referenced in the comments to Section 176 dealing with duress: "the threat is improper if it amounts to a breach of the duty of good faith and fair dealing imposed by the contract. *See* § 205."

Under the general contract law, "good faith" is carefully and extensively defined by the *Restatement (Second)* in a way that shows that "bad faith" is simply "the other side of the coin" or a lack of good faith. The comments to Section 205 (and by reference Section 176) make clear that the general law intends a very different standard of contract conduct than the Federal Circuit applied in the *Am-Pro* decision. Comment a explains the "Meanings of 'good faith'" in this way:

> The phrase "good faith" is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes *faithfulness to an agreed common purpose* and consistency with the *justified expectations of the other party;* it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community *standards of decency, fairness or reasonableness.*[153]

Comment d applies this general definition to the obligation of "good faith performance":

> Subterfuges and evasions violate the obligation of good faith in performance *even though the actor believes his conduct to be justified.* But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty.[154]

Further, comment d illustrates "bad faith" as it is understood in the law of contracts between private individuals:

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

With respect to "good faith in enforcement," comment e explains that "the obligation of good faith and fair dealing" extends to "dealing which is candid but unfair, such as taking advantage of the necessitous circumstances of the other party to extort a modification of a contract" or "abuse of a power . . . to terminate the contract."

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152. Burton & Andersen, Contractual Good Faith: Formation, Performance, Breach, Enforcement (1995) at 91–94; *see also* Danella Southwest, Inc. v. Southwestern Bell Tel. Co., 775 F. Supp. 1227, 1236 (E.D. Mo. 1991) ("The implied duty of good faith and fair dealing extends to the cancellation of a contract.").

153. Emphasis added.

154. Emphasis added.

The *Restatement (Second)*'s definitions and explanations make no mention of animus, malice, or specific intent to injure as elements of bad faith for which there must be "well-nigh irrefragable proof." It is therefore clear that under the law of contracts between private individuals, *Am-Pro* could not have been decided as it was. Nor does *Am-Pro* appear to be consistent with prior government contract precedent dealing with duress and good faith in performance, as the decision extends the troublesome "bad faith" rule into areas where the general law's concepts of "good faith and fair dealing" have measured the actions of government contracting officials. The *Winstar* and *Mobil Oil Exploration* decisions may provide a basis for the Federal Circuit to eliminate the "bad faith" test altogether as irrefragably inconsistent with the Supreme Court's general mandate against such special government presumptions and privileges. At a minimum, these decisions should halt the spread of this special government privilege and presumption and eliminate any confusion that it might apply beyond termination-for-convenience confines.

V. *JOHNSON MANAGEMENT GROUP CFC, INC. v. MARTINEZ:* MANAGING APARTMENTS

In *Johnson Management Group, Inc. v. Martinez*,[155] involving a small business set-aside contract for managing government-owned rental properties (including lawn mowing), the Federal Circuit enforced the special rule that the Government is not bound by unauthorized acts of its agents. Most government contract law texts and case books set forth the stern admonition of *Federal Crop Insurance Corp. v. Merrill:*

> Whatever the forum in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.[156]

Johnson Management exposed for examination the tension between this peculiar rule and the Supreme Court's principle that the Government should be accountable under the general law of contracts. The case is particularly interesting because—although the panel majority did not even acknowledge the conflict—the dissenter relied on *Winstar* and *Mobil Oil Exploration* to reject the Circuit's ruling. Thus, the debate about conflict between special sovereign protections and general contract law—and what to do about it—erupted in the Federal Circuit itself, demonstrating that the issue is not just for law journals.

155. 308 F.3d 1245 (Fed. Cir. 2002).

156. 332 U.S. 380, 384 (1947). It is interesting that, for all its repeated citation, the decision was 5 to 4.

The controversy arose because of a specially negotiated provision in a tripartite agreement between HUD, the Small Business Administration (SBA), and Johnson Management, a "socially and economically disadvantaged small business concern."[157] The contract, while incorporating standard form FAR "Advanced Payment" clauses,[158] also set forth this explicit agreement about liquidation of those payments:

> 2. Liquidation of Advance Payments
>
> The payments advanced under this contract will be considered liquidated upon submission of invoices marked as paid by the suppliers. Invoices shall be for the items listed in the Use of Advance Payments clause.

This special provision was "negotiated by an experienced Contracting Officer and reviewed by HUD supervisory authority and legal counsel, with full participation of the SBA."[159] Johnson Management alleged, without contradiction according to the dissent, that the advance payments were "part of the overall compensation to JMG in exchange for a slightly lower price."[160]

With approvals as required, Johnson Management used advance payments to purchase equipment necessary for performance and submitted the "invoices marked as paid by the suppliers." When, for unrelated reasons, HUD terminated the contractor for default, HUD claimed a lien on the purchased equipment or repayment of the advance payments. Johnson Management rejected these claims on the basis that the advances had already been liquidated in accordance with the special provision, as indeed they had been. HUD took the position that the special provision was contrary to FAR and unauthorized, offsetting the advances against amounts due Johnson Management for services provided prior to termination.[161] The dispute ensued and, after the HUD Board of Contract Appeals held that the special provision was void,[162] found its way to the Federal Circuit.

A. *The Decision of the Federal Circuit*

The panel majority had no difficulty ruling in the Government's favor on the "well-settled principle that the government is not bound by the conduct of its agents acting beyond the scope of their authority."[163] The court noted that authority for advance payments derived from a statute requiring "adequate security."[164] Such security, according to statute,

157. *See* 15 U.S.C. § 637 (2003).
158. *Johnson Mgmt.*, 308 F.3d at 1253.
159. *Id.* at 1259–60 (dissenting op.).
160. *Id.* at 1260.
161. *Id.* at 1255.
162. Johnson Mgmt. Corp. CFC, Inc., HUDBCA Nos. 96-C-132-C15, 97-C-109-C2, 00–2 BCA ¶ 31,116 at 453, 677, at 153,677, *recon. denied*, at 153,684.
163. Johnson Management Group CFC, Inc. v. Martinez, 308 F.3d 1245, 1255 (Fed. Cir. 2002).
164. *Id.* at 1253 (referring to 41 U.S.C. § 255(a)).

> may be in the form of a lien in favor of the Government on the property contracted for, on the balance in an account in which payments are deposited, and on such of the property acquired for performance of the contract *as the parties may agree*.[165]

These statutory provisions were in turn implemented by the FAR in standard clauses incorporated in the contract. Thus, until Johnson Management had "liquidated" advance payments, such payments were to be deposited in a "special bank account," not to be commingled with other funds, and to be withdrawn only with HUD's countersignature.[166] Further, the FAR required the contractor to "repay to the Government any part of unliquidated advance payments" exceeding contract requirements or limits. Finally, and most relevantly, FAR required that, upon termination, "the Government shall deduct from the amount due to the Contractor all unliquidated advance payments."[167]

Although the FAR did not comprehensively define "liquidated" or "unliquidated," the majority resolved this contract issue in one paragraph drawing an inference from a dictionary reference:

> The concept of liquidation in the context of advance payments is relatively straightforward. The term "liquidate" is defined in Black's Law Dictionary as "to settle (an obligation) by payment or other adjustment." Black's Law Dictionary 94–1 (7th ed. 1999). In order to "liquidate" an advance payment balance, a contractor must do either of two things: (1) repay the advance payments, or (2) perform contract work and then have the government apply to the outstanding balance of the advance payments the amount that otherwise would be paid to the contractor for work.[168]

This definition would seem to be acceptable and even normal usage, but was it a necessary definition in light of the parties' special agreement? Or was the parties' special agreement an "other adjustment"? The panel majority did not consider these questions substantial enough to warrant discussion.[169]

Based on this interpretation, the panel majority concluded that "the contracting officer was not authorized to liquidate Johnson Management's advance payments" in the manner she had agreed to:

> Allowing advance payments to be repaid simply by presentation of subcontractor invoices is squarely contrary to the FAR's Advance Payments clause. As explained above, the Advance Payments clause treats each advance payment as a loan that must be repaid, either directly or through contract performance.[footnote omitted] Allowing a contractor to satisfy its advance payments indebtedness simply by purchasing equipment for contract performance would, in the circumstance of a default by the contractor, improperly convert what is a loan by the government to a gift.[170]

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165. 41 U.S.C. § 255(d) (2003). The italicized language may explain why the majority relied on the regulations implementing the statute, rather than the statute itself. But the language also may be said to give statutory priority over the regulations to the parties' customized agreement.

166. *Johnson Mgmt.*, 308 F.3d at 1253.

167. *Id.* at 1255.

168. *Id.* at 1253.

169. With respect to dictionary analysis, see Doris Day Animal League v. Veneman, No. 01–5351 (D.C. Cir. Jan 14, 2003) ("Whatever the printed dictionaries say, we cannot be sure what was in the mental dictionaries of the members of Congress. And so we will move on.").

170. Johnson Management Group CFC, Inc. v. Martinez, 308 F.3d 1245, 1256 (Fed. Cir. 2002).

Thus, the Federal Circuit ruled that the contract's special liquidation provision was "without force and effect."[171]

B. *The Dissenting Opinion*

Judge Newman, dissenting, did not find the issue so simple. Indeed, she considered it "far-reaching." She questioned "the court's holding that a government agency's error of law is the sole burden of the contractor." "[S]imply excis[ing] the assertedly illegal contract provision . . . significantly chang[es] the bargain," leading to an "unjust" and "unsupportable result."[172] The range of her disagreement is captured in this sentence:

> If the provision is in fact illegal—a matter open to substantial question—it cannot simply be deleted by one of the parties, thereby imposing a major liability on the contractor, indeed a liability unrelated to the basis of the termination.[173]

Judge Newman did not resolve (or completely define) the "substantial question" of illegality, presumably because the "far-reaching issue" was the juristic effect of such an illegal provision. The dissent does gibe the panel majority for inaccurately couching the issue as "whether Johnson is required to return unliquidated advance payments," a point that the FAR mandated and Johnson Management did not dispute. The issue was whether there was an obligation to "repay the advance payments that were fully liquidated in accordance with the liquidation details in the contract."[174] In connection with what might properly constitute a liquidation, Judge Newman noted that "the dictionary definition and FAR clauses quoted by the panel majority do not appear in the contract."[175]

On the issue of illegality, the dissent also notes that "it is incorrect that an agency cannot adjust the provisions of the FAR to particular circumstances, or that no departure is ever permitted."[176] Of course, the FAR permits deviations—and, more readily, one-time deviations—that are approved under its procedures.[177] The record apparently did not resolve this issue, and the judges differed on the burden of proof. As Judge Newman wrote:

> The panel majority, acknowledging that contracting officers may deviate from the FAR, faults Johnson for failing to prove that this contracting officer did not act without authorization. The burden is not on Johnson, for *prima facie* the agency's official action was authorized. Further, it is not disputed that all necessary approvals were obtained by both HUD and the Small Business Administration.[178]

171. *Id.* at 1255.
172. *Id.* at 1259 (dissenting op.).
173. *Id.*
174. *Id.*
175. *Id.* at 1262 n.1. The majority relied in its analysis on interest provisions that were inapplicable to the contract.
176. *Id.* at 1262.
177. 48 C.F.R. § 1.402 (2001).
178. Johnson Management Group CFC, Inc. v. Martinez, 308 F.3d 1245, 1262 (Fed. Cir. 2002).

By invoking the presumption of regularity, Judge Newman exposed its tension with precedent placing the burden of proving authorization on the contractor[179] and the special rule against holding the Government accountable for apparent authority of its agents[180]—a rule nowhere to be found in the law of contracts between private individuals.[181]

But Judge Newman's dissent is not primarily concerned with whether the liquidation clause was authorized or legal. The primary concern centered on the consequences of such an illegal clause—or what the courts should do about it. Her view may be paraphrased in this way: Assuming the government agents erred, the burden of that error should not fall solely on the contractor; the court should place some responsibility on the Government and somehow find "a mutually acceptable alternative" to simply striking the offending clause, which was—after all—part of the bargain.[182]

The dissent does not tell us precisely what that "mutually acceptable alternative" should be. Instead, the dissent reviews Federal Circuit precedent providing "guidance with respect to government error" and illustrating "remedies that do not impeach the integrity of contracts." These precedents provided "relief appropriate to the circumstances" in the form of reformation, estoppel, enforcement, and *quantum meruit* where the Contracting Officer's action was illegal or unauthorized, based on "ordinary principles of equity and justice."[183] "In none of these cases," Judge Newman observed, "was the offending provision simply expunged, changing the balance of the contract."[184]

Estoppel seemed to be the practical means of providing Johnson Management relief, and Judge Newman disposed of Supreme Court precedents denying such relief. Her opinion notes that, in *Office of Personnel Management v. Richmond*,[185] the Court stated, "[W]e need not embrace a rule that no estoppel will lie against the Government in any case in order to decide this case. We leave for another day whether an estoppel claim could ever succeed against the Government."[186] She pointed out that *Burnside-Ott Aviation Training Center, Inc. v. United States*[187] limited *Richmond* to claims "contrary to a statutory appropriation."[188] Judge Newman swiftly distinguished the oft-cited landmark case of *Federal Crop Insurance Corp. v. Merrill*[189] as simply "a matter of incorrect advice by an ill-informed clerk." In contrast, "[t]his is a formal government contract, negotiated by experienced Contracting Officers, fully approved and

179. *E.g.*, Harbert/Lummus Agri-fuels Projects v. United States, 142 F.3d 1429, 1432 (Fed. Cir. 1998).
180. John Cibinic Jr. & Ralph Nash Jr., Formation of Government Contracts 64 (1986).
181. *See* Restatement (Second) of Agency § 8 (1958).
182. *Johnson Mgmt.*, 308 F.3d at 1259.
183. *Id.* at 1260–61.
184. *Id.* at 1261.
185. 496 U.S. 414 (1990).
186. *Id.* at 423.
187. 985 F.2d 1574, 1581–82 (Fed. Cir. 1993).
188. Johnson Management Group CFC, Inc. v. Martinez, 308 F.3d 1245, 1262 (Fed. Cir. 2002).
189. 332 U.S. 380 (1947).

executed by authorized officials, a contract that contained an explicit provision about liquidation of advance payments. . . ."[190] This distinction was accurate and supported by precedent,[191] but also breathtakingly dismissive of this seminal Supreme Court decision.

Perhaps in recognition, Judge Newman then invoked the principle of *Mobil Oil* and *Winstar* to support her position:

> When the government enters into commerce, it is bound by the rules of commerce. *See Mobil Oil Exploration & Producing Southeast, Inc. v United States*, 530 U.S. 604, 607 (2000) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."). The government proposes on this appeal that although this contract provision was a mistake on its part, the government does not bear the consequences of its mistake. However, *the laws of contract and the rules of fair dealing do not evaporate when the government is a party.* When a contract provision becomes illegal, whether due to later-discovered error or statutory enactment, the party that produced the illegality is liable for the injury caused thereby. *See, e.g., United States v. Winstar Corp.*, 518 U.S. 839, 910 (1996).[192]

Judge Newman concluded with language that is both critical of the panel majority and reminiscent of Justice Souter's concern about "the government's own long-run interest as a reliable contracting partner."[193] She charged that "[t]he panel majority's cavalier treatment of the integrity of government contracts disserves the government as well as those who undertake to serve it."[194] And so the issue between special protections for the sovereign and the law of contracts between private individuals was joined within the Federal Circuit itself.

VI. CONCLUSION

These four recent decisions of the Court of Appeals for the Federal Circuit—involving mixed nuts, lawn mowing, lunch breaks, and single-family dwellings—demonstrate that the Government is not being held to the standards of the law of contracts between private individuals, even in workaday contract disputes where sovereign interests would not seem even to be implicated. The four decisions indicate that the Circuit is moving government contract law away from the general contract law—and indeed even from its own earlier precedents that embraced that general law.

190. *Johnson Mgmt.*, 308 F.3d at 1261.

191. *See generally* Am. Elec. Lab., Inc. v. United States, 774 F.2d 1110 (Fed. Cir. 1985) (estopping Government from relying on Limitation of Funds clause); Broad Ave. Landing & Tailoring v. United States, 681 F.2d 246 (Ct. Cl. 1982) (estopping Government re applicable wage rates); Litton Sys., Inc. v. United States, 449 F.2d 392 (Ct. Cl. 1971) (estopping Government from reneging on previously approved accounting practices).

192. *Johnson Mgmt.*, 308 F.3d at 1261 (emphasis added).

193. United States v. Winstar Corp., 518 U.S. 839, 883 (1996).

194. Johnson Management Group CFC, Inc. v. Martinez, 308 F.3d 1245, 1262 (Fed. Cir. 2002).

Winstar and *Mobil Oil Exploration* underscore the obligation of lawyers representing contractors to base their claims not just on government contract precedents, but broadly on the principles of the *Restatement (Second) of Contracts*. Because "workaday" contracts or "humdrum" disputes are unlikely to be reviewed by the Supreme Court, the responsibility falls on government contract tribunals, including particularly the Federal Circuit, to judge the actions of government contracting officials under the general law. Fair adjudication of government contract disputes requires it—as does the credibility of the United States as a contracting party.