

Government Contracting Disputes: It's Not All About the Money

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*Under certain circumstances, urgent circumstances, desperate circumstances, profanity provides a relief denied even to prayer.*¹

I. Introduction

Money isn't everything. This cliché is not only true in life; it is also true in the world of government contract appeals. Nonmonetary remedies are available and viable alternatives to monetary relief. Parties in the government contracting process, at some time or another, find themselves in a dispute and one party wants a specific type of relief . . . this is disputes 101. The relief sought in most contract disputes is monetary.² However, monetary relief does not always make the allegedly wronged party "whole." Sometimes, what the party seeks is nonmonetary relief.

This article serves as a practical guide to contract litigators. The article first identifies the forums available for disputes in government contracting and the particular authorities creating the forum. The article then outlines the nonmonetary remedies available in those forums. The article goes on to identify and address the limitations of nonmonetary relief available to the forums. Finally, the article provides litigators the ability to understand what contractors may ask for and some instances of what they received.

*"What We Have Here Is a Failure to Communicate"*³

Litigation is expensive for all parties to a dispute; this is clear from the language in the Federal Acquisition Regulation (FAR) requiring, as a policy, that contracting officers attempt to settle claims through mutual negotiation.⁴ Yet, not all disputes find resolution with the contracting officer or other available dispute resolution proceedings. Congress created the Contract Disputes Act of 1978 (CDA) to deal with contract disputes in a streamlined and efficient manner.⁵ The next section provides a brief background of the two forums available for disputes.

II. Forums

The CDA includes a choice of forum clause allowing parties to raise appeals in two forums: the Boards of Contract Appeals (BCAs) and the Court of Federal Claims (COFC).⁶ The CDA mandates that the BCAs provide a less expensive and less formal forum for parties of government contracts to litigate their disputes.⁷ The boards possess the authority to grant any relief that would be available to a party asserting a claim in the COFC.⁸ Each government agency has its own board, e.g., the BCA for the Armed Services (ASBCA), for the U.S. Postal Service, for the Postal Rate Commission, for the Tennessee

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¹ ALBERT BIGELOW PAINE, MARK TWAIN, A BIOGRAPHY, <http://paine.classicauthors.net/twainbio/twainbio39.html> (last visited July 5, 2009).

² Michael J. Schaengold & Robert S. Brams, *Choice of Forum Contract Claims: Court vs. Board/Edition II*, WL Briefing Papers No. 06-6, May 2006, at 10, WL 06-6 BRPAPERS 1.

³ COOL HAND LUKE (Warner Bros. 1967) (stated by the captain of Road Prison 36).

⁴ GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 33.204 (Jan. 2009) [hereinafter FAR].

⁵ Thomas C. Wheeler, *Let's Make the Choice of Forum Meaningful*, 28 PUB. CONT. L.J. 655, 655 (1999).

⁶ *Id.*

⁷ Contract Disputes Act of 1978, 41 U.S.C. § 607(e) (2006).

⁸ *Id.* § 607(d).

Valley Authority, and the Civilian BCAs.⁹ These boards have jurisdiction to hear any claim that arises from a decision of an agency's contracting officer.¹⁰ The Civilian BCA has jurisdiction to hear claims arising from a decision of a contracting officer from the executive agencies who do not have their own named boards.¹¹ Although BCAs may grant any relief available to a party asserting a claim in the COFC,¹² the intent of Congress was for the BCAs to hear the routine matters and leave the more difficult issues for the COFC.¹³

The COFC has jurisdiction to hear claims against the United States based on the Constitution, acts of Congress, regulation of an executive department, claims arising from alleged express or implied contracts with the federal government, or claims dealing with liquidated and unliquidated damages in non-tort cases.¹⁴ Initially, the COFC did not possess jurisdiction to rule on nonmonetary claims.¹⁵ This changed when Congress passed the Federal Courts Administration Act of 1992.¹⁶ This Act authorized the COFC to "render judgment" on disputes with contractors "arising under section 10(a)(1) of the [CDA]."¹⁷ These disputes included termination of a contract, rights in tangible or intangible property, adherence to cost accounting standards, "and other nonmonetary disputes on which a decision of the contracting officer has been issued" under the CDA.¹⁸ The next section addresses the particular nonmonetary remedies available to both the BCAs and the COFC which include reformation,¹⁹ rescission,²⁰ declaring a contract void ab initio,²¹ and declaratory relief.²²

III. Nonmonetary Remedies

A. Reformation

"The general rule is that, to be binding, a contract must be 'sufficiently definite to permit determination of breach and remedies.'"²³ Additionally, the provisions of Federal Acquisition Regulation part 33.205 provide that "a proven request for contract 'rescission or reformation' based on legal entitlement" constitutes a claim for purposes of the CDA.²⁴ A board or court can reform a contract when there has been a unilateral mistake, mutual mistake, or when a contract violates a statute or agency regulation. Keep in mind that "[r]eformation is an extraordinary remedy. Its purpose is not to make a new agreement between the parties, but to establish the true existing one."²⁵ The following sections account for three scenarios in which reformation is available: (1) unilateral mistake with reliance upon misrepresentation, (2) mutual mistake, and (3) contracts written in violation of a statute or regulation.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Wheeler, *supra* note 5, at 655.

¹⁴ Total Med. Mgmt., Inc. v. United States, 104 F.3d 1314, 1319 (Fed. Cir. 1997).

¹⁵ Ralph Nash & John Cibinic, *Nonmonetary Claims: Jurisdiction to Exercise Discretion*, 11 NASH & CIBINIC REP. ¶ 57, at 2 (Nov. 1999).

¹⁶ *Id.*; Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4516.

¹⁷ Nash & Cibinic, *supra* note 15, at 2.

¹⁸ *Id.*

¹⁹ BLACK'S LAW DICTIONARY 1285 (7th ed. 1999) ("3. an equitable remedy by which a court will modify a written agreement to reflect the actual intent of the parties, usually to correct fraud or mutual mistake"). The actual intended agreement usually must be established by clear and convincing evidence. *Id.*

²⁰ Rescission is a party's unilateral unmaking of a contract for legally sufficient reason, such as the other party's material breach. *Id.* at 1308. Rescission is generally available as a remedy or defense for a nondefaulting party and restores the parties to their pre-contractual positions. *Id.* Equitable rescission is a rescission decreed by a court of equity. *Id.*

²¹ A contract is void ab initio. *Id.* at 1568. Null from the beginning, as from the first moment when a contract is entered into. *Id.* A contract is void ab initio if it seriously offends law or public policy, in contrast to a contract that is merely voidable at the election of one party to the contract. *Id.*

²² Schaengold & Brams, *supra* note 2, at 10.

²³ Total Med. Mgmt., Inc. v. United States, 104 F.3d 1314, 1320 (Fed. Cir. 1997) (quoting Modern Sys. Tech. Corp. v. United States, 979 F.2d 200, 202 (Fed. Cir. 1992)).

²⁴ Thompson Numerical, Inc., ASBCA No. 41327, 91-3 BCA ¶ 24,169, at 3.

²⁵ Pac. Coast Molybdenum Co., AGBCA No. 84-162-1, 89-2 BCA ¶ 21,755, at 7.

1. Unilateral Mistake and Reliance upon Misrepresentation

A recent case out of the General Services Administration (GSA) BCA dealt with an alleged unilateral mistake on the part of the government benefiting the contractor. In *Appeal of Parcel 49 C Ltd. Partnership*,²⁶ a dispute existed concerning the base year the parties would use to calculate tax assessment for the property leased by GSA from the partnership.²⁷ Parcel asserted that the parties agreed that the base year would be 2000, whereas GSA asserted that the agreed upon year was 2003.²⁸ The contracting officer submitted a memorandum to Parcel in which he erroneously calculated the government's tax liability on year 2000's assessment.²⁹ Parcel responded agreeing that the calculations were correct.³⁰ The contracting officer later realized his mistake and declined to pay Parcel's claim for the increased tax costs derived from the incorrect base year.³¹ Parcel argued that the written dialogue between Parcel and the contracting officer amounted to a modification of the contract and was therefore entitled to the increased amount.³²

The board addressed the issue by applying the *Restatement (Second) of Contracts*, section 155.³³ The board determined that even if the supplemental lease agreements were "clear and unambiguous," the board should look to the parties' actions that led to the drafting of the supplemental lease agreements citing that the comments in the restatement maintain that "the parole evidence rule does not preclude . . . a showing of mistake."³⁴ In applying the *Restatement*, the board found that reformation regarding a contract officer's mistake as to interpreting the contract, should be applied only in cases of evidenced bad faith³⁵ and a failure to act in accordance with reasonable standards of fair dealing.³⁶ The board cited to the *Restatement* affirming that, "[r]eformation is not precluded by the mere fact that the party who seeks it failed to exercise reasonable care in reading the writing."³⁷ When one party has been mistaken and the other has misrepresented circumstances surrounding the mistake, reformation is appropriate where the misled party relied on the misrepresentation.³⁸ Therefore, when one party misrepresents,³⁹ without regard to intent, the party who misrepresented must correct the mistake and cannot hold the mistaken party to the product of their mistake.⁴⁰ The board found that the contracting officer had acted in good faith and in accordance with reasonable standards of fair dealing by waiting until completion of the investigation into the base year issue.⁴¹ The board also ruled that the contracting officer relied upon appellant's misrepresentation concerning the tax base year and the reliance would cause excessive damage to GSA if the contract were not reformed.⁴² Therefore, misrepresentation of the original intent of the parties by one party combined with a unilateral mistake by the other party is not the basis for reformation of a contract.

²⁶ GSBCA No. 16447, 05-2 BCA ¶ 33,013.

²⁷ *Id.* at 1.

²⁸ *Id.*

²⁹ *Id.* at 5.

³⁰ *Id.* at 3.

³¹ *Id.*

³² *Id.* at 6.

³³ *Id.* at 7.

³⁴ *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 157 and cmt. a (1981)).

³⁵ BLACK'S LAW DICTIONARY 134 (7th ed. 1999) ("1. Dishonesty of belief or purpose."). An evasion of the spirit of the bargain. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d.

³⁶ *Parcel 49 C Ltd. P'ship*, 05-2 BCA ¶ 33,013, at 7.

³⁷ *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 157 and cmt. a).

³⁸ *Id.* at 8 (citing *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 665-66 (Fed. Cir. 1992)).

³⁹ *But see* *Edwards v. United States*, 19 Cl. Ct. 663, 670 (1990) (regarding claims of misrepresentation against the Government). The court in *Edwards* determined that in order for a misrepresentation claim to succeed the Government must have made a representation that was erroneous, the representation must have been material, that the representation operated as an inducement to entering the contract, that the plaintiff had a legal right to rely on its accuracy, and that the plaintiff relied on the representation to their detriment. *Id.*

⁴⁰ *Parcel 49 C Ltd. P'ship*, 2005-2 BCA ¶ 33,013, at 8 (citing RESTATEMENT (SECOND) OF CONTRACTS § 172)).

⁴¹ *Id.*

⁴² *Id.*

2. Mutual Mistake

In *Pacific Coast Molybdenum Co.*,⁴³ Pacific Coast sought reformation of the contract alleging mutual mistake as to the value of lumber.⁴⁴ Pacific Coast signed the contract attaching a cover letter referencing prior conversations conducted with the Forest Service in which the parties discussed that the Forest Service may want to appeal the rates concerning the value of the lumber within thirty days.⁴⁵ Pacific Coast claimed that the attached cover sheet created the misunderstanding of the parties that led to the mutual mistake within the contract.⁴⁶ The board held that reformation due to mutual mistake requires a mistake occurring in the writing representing the intent of the parties and not any conversations that occurred in its making.⁴⁷ The fact that the parties would have agreed differently, if they would have known the facts at the time the contract was drafted, does not create an appropriate opportunity or need for reformation.⁴⁸

Pacific Coast further claimed that boards have reformed in past cases when the contract “does not reflect antecedent expressions of the parties at variance with the writing.”⁴⁹ The board agreed that reformation has been used in cases where neither party assumed risk of error within the contract but distinguished those cases from Pacific Coast’s by stating the standard in those cases: specifically, appellants are required to prove that the respondent would have been willing to agree to the reformed terms at the time of the signing, and that the appellant would have been willing to be bound by those same terms at the time of the signing.⁵⁰ Yet another opportunity for reformation for a party arises when a contract violates statutes or regulations.

3. Contract Written in Violation of Statute or Regulation

Contract reformation is also available for contractors who entered a contract with the Government that was in violation of a statute or regulation.⁵¹ Furthermore, if the legislature or agency enacted the statute or regulation to protect contractors, the victimized contractor is not subject to the doctrine of estoppel from filing a claim simply because he performed the contract or failed to protest.⁵² It makes no difference that a contractor files a claim post-award or even post-performance; the remedy is still available.⁵³

Although reformation is explicitly available for contracts violating statutes or regulations, such violations are not an automatic right to the remedy. In *Labarge Products v. West*, the Government violated FAR part 15.610(d) (1984)⁵⁴ by

⁴³ AGBCA No. 84-162-1, 89-2 BCA ¶ 21,755.

⁴⁴ *Id.* at 2.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 7.

⁴⁸ *Id.* at 2.

⁴⁹ *Id.* at 7 (quoting *Lea Co.*, GSBCA No. 5697, 81-2 BCA ¶ 15,207).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Labarge Prods., Inc. v. West*, 46 F.3d 1547, 1552 (Fed. Cir. 1995).

⁵³ *Id.*

⁵⁴ 48 C.F.R. § 15.610(d), (e) (1984).

(d) The contracting officer and other Government personnel involved [in negotiations] shall not engage in technical leveling.

(e) The following conduct may constitute prohibited conduct . . .

(2) Auction techniques, such as—

(i) Indicating to an offeror a cost or price that it must meet to obtain further consideration;

(ii) Advising an offeror of its price standing relative to another offeror . . .

(iii) Otherwise furnishing information about other offerors’ prices.

Id.

entering into auction-like negotiations with Labarge Products' competitors, creating the appearance of trying to leverage the bid process away from them.⁵⁵ Labarge Products was the lowest bidder for a contract to supply pipe couplings to the U.S. Army.⁵⁶ The Army did not immediately award the contract because it wanted to access drawings and production tooling.⁵⁷ The Army subsequently disclosed Labarge Products' bid information to a competing bidder without their knowledge or approval.⁵⁸ The Army then made a request for "best and final offers from the bidders."⁵⁹ Labarge Products realized that the Army disclosed its bid and therefore committed to a lower bid in attempt to secure its "lowest" bid status.⁶⁰ Labarge Products had the lowest bid and the contracting officer awarded them the contract.⁶¹ Labarge Products performed the contract and subsequently submitted a claim to the contracting officer requesting reformation of the contract to the original bid price in order to compensate the company for the unfair advantage given to its competitors during the bid process.⁶² The Army declined the claim forcing Labarge Products to appeal to the ASBCA.⁶³ The ASBCA denied the appeal and Labarge Products appealed to the COFC.

The COFC ruled that the Government has the opportunity to show that the purpose was rational, reasonable, and unrelated to the violation.⁶⁴ In *Labarge Products*, the court found that the Government adequately made a showing that the request for "best and final offers" was made with the intent of ensuring the quality of the product and not for awarding to another competitor and therefore their practice was rational, reasonable, and unrelated to the violation.⁶⁵ Similarly, in *American Telephone and Telegraph Co. v. United States* the COFC looked to the ruling in *United States v. Mississippi Valley Generating Co.*, wherein "the Court explained that when a statute 'does not specifically provide for the invalidation of contracts which are made in violation of [its provisions]' the court shall inquire 'whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied in [the statute].'"⁶⁶ Thus, the courts must consider the underlying policy of the statute when the statute is silent as to the remedy for noncompliance.⁶⁷

B. Rescission—Holding the Government to a High Standard

A request for rescission "implies some reason existing before the agreement was made, or implies that, because of some mistake, the agreement is different from that which was intended."⁶⁸ Therefore, rescission is available in matters of mistake and fraud.⁶⁹ Rescission places the parties in the position they were in prior to the formulation of any agreement.⁷⁰ Rescission is a remedy acknowledged by the CDA that allows contractors the opportunity to exit the contract when they have made an

⁵⁵ *Labarge Prods., Inc.*, 46 F.3d at 1551.

⁵⁶ *Id.* at 1549.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1550.

⁶³ *Id.* at 1549.

⁶⁴ *Id.* at 1555.

⁶⁵ *Id.* at 1556; *see also* *Logicon, Inc. v. United States*, 22 Cl. Ct. 776 (1991).

⁶⁶ 177 F.3d 1368, 1374 (Fed. Cir. 1999) (quoting *Miss. Valley Generating Co.*, 364 U.S. 520 (1961)).

⁶⁷ *Id.*

⁶⁸ R. PRESTON SHEALEY, *THE LAW OF GOVERNMENT CONTRACTS* [FEDERAL CONTRACTS] 214 (3d ed. 1938).

⁶⁹ *Id.* at 213.

⁷⁰ *Id.*

error at the time of drafting.⁷¹ Different from reformation, in matters of unilateral mistakes where neither inducement nor misrepresentation existed, rescission prevents parties from unfairly benefiting from their own mistake.⁷²

Boards have utilized rescission when contractors have submitted bids containing material mistakes ultimately leading to those contractors winning the award. In *Appeal of Don Simpson*,⁷³ Simpson submitted a bid on a tree thinning contract that was forty percent lower than the next closest bidder.⁷⁴ Simpson was the lowest responsive, responsible bidder, and therefore the contracting officer awarded him the contract.⁷⁵ Simpson commenced performance by employing another cutter and then, realizing he had miscalculated his bid, informed the contracting officer that “he had misjudged the area and wanted out of the contract.”⁷⁶ The contracting officer ultimately terminated Simpson for default and Simpson appealed.⁷⁷ The board found that the contracting officer did not properly attempt to verify the bid in accordance with the procedures of FAR 14.406-1⁷⁸ and therefore shared “mutual fault” in the failure of the contract and granted the rescission.⁷⁹ The board ruled that although “an erroneous bid based upon a mistake of judgment does not entitle the contractor to reformation of its contract, it is clear that rescission may be granted, at least for some errors in judgment where the Government has . . . failed in its bid verification responsibilities.”⁸⁰ Therefore, tribunals require the Government to act reasonably in its interpretation of the FAR requirements and will hold the Government partially at fault when it fails in its duties.

Yet another example of a board finding fault on the part of the Government and ruling that rescission was proper was in *Appeal of Raco Services, Inc.*⁸¹ Raco was the lowest bidder for a paving contract for the National Park Service.⁸² Prior to the contract being awarded, Raco informed the contracting officer that it was facing foreclosure and would not be able to perform the awarded contract and subsequently requested that its name be removed from the bid process.⁸³ The contracting officer disregarded Raco’s request and relied instead on a Dun & Bradstreet⁸⁴ report which represented Raco as a responsible bidder.⁸⁵ Without further inquiry, the contracting officer awarded the contract to Raco.⁸⁶ Raco failed to perform and the contracting officer terminated the contract for default.⁸⁷ The board held that the contracting officer improperly awarded the contract to Raco on the theory that contracting officers have an affirmative duty⁸⁸ to verify the responsibility of bidders.⁸⁹

⁷¹ In *Appeal of Thompson Numerical Inc.*, the board explained that a party’s belief of entitlement to rescission to “correct or mitigate” the consequences of a mistake “shall be treated as a claim under the [Contract Disputes] Act. ASBCA No. 41327, 91-3 BCA ¶ 24,169, at 3. Therefore, a clear showing of a legally proper request for relief in the form of rescission “must be considered a claim under the CDA.” *Id.*

⁷² SHEALEY, *supra* note 68, at 213.

⁷³ IBCA No. 2058, 86-2 BCA ¶ 18,768.

⁷⁴ *Id.* at 3.

⁷⁵ *Id.* at 2.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ FAR, *supra* note 4, pt. 14.406-1. After the opening of bids, contracting officers shall examine all bids for mistakes. *Id.* In cases of apparent mistakes and in cases where the contracting officer has reason to believe that a mistake may have been made, the contracting officer shall request from the bidder a verification of the bid, calling attention to the suspected mistake. *Id.* If the bidder alleges a mistake, the matter shall be processed in accordance with section 14.406. Such actions shall be taken before award. *Id.*

⁷⁹ Don Simpson, 86-2 BCA ¶ 18,768, at 4.

⁸⁰ *Id.* (citations omitted).

⁸¹ IBCA No. 2260, 87-1 BCA ¶ 19,653.

⁸² *Id.* at 2.

⁸³ *Id.*

⁸⁴ Dun & Bradstreet is a database service that compiles reports on businesses to allow potential customers to evaluate their business relationships. Dunn & Bradstreet Reports, <http://support.dialog.com/searchaids/dialog/dnb.shtml> (last visited July 5, 2009). Dun & Bradstreet business reports provide a complete view of current and future financial performances for hundreds of thousands of U.S. businesses. *Id.* These reports contain vital information that aid customers in reducing credit risk. *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Raco Servs., Inc.*, 87-1 BCA ¶ 19,653, at 2.

⁸⁸ FAR, *supra* note 4, pt 9.103(b). No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. *Id.* In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. *Id.*

Here the board ruled that they view construction or repair contracts similar to supply contracts “where a contractor erroneously or through bad judgment submitted what was clearly too low a bid.”⁹⁰ Therefore, not only is rescission available to the boards, they will apply the theory to prevent a seemingly harsh result to the contractor. When a board or court finds that a contract cannot or should not be reformed or rescinded, they have the authority to exercise the third form of nonmonetary relief discussed in this article: declaring the contract void ab initio.

C. Void Ab Initio, Nullity, Invalid

1. Automatic When Violating a Statute?

In *American Telephone and Telegraph Co. v. United States*,⁹¹ the Court of Appeals reviewed the certified question resulting from a decision by the COFC of whether a violation of a federal statute made a contract void ab initio.⁹² The court pointed to precedent and legislative intent in determining that an agency’s noncompliance with a federal statute does not logically flow to the conclusion that a contract should be void ab initio.⁹³ When a contract has been fully performed and the issue of noncompliance of a federal statute is raised, courts have “variously sustained the contract, reformed it to correct the illegal term, or allowed recovery under an implied contract theory; the courts have not, however, simply declared the contract void ab initio.”⁹⁴ The courts also must look to performance when weighing whether to invalidate a contract.⁹⁵ In this case, the court recognized the severity of the remedy and stated “the invalidation of a contract after it has been fully performed is not favored but leaves open the use of void ab initio for those contracts that do not reach substantial performance.”⁹⁶ Yet, in cases where there existed criminal conduct there is much less hesitation as indicated by the next case, *Appeal of Erwin Pfister*.⁹⁷

2. Intolerance for Criminal Conduct

In *Erwin Pfister Gen.-Bauunternehmen*, the Government moved to dismiss the case claiming that the two contracts at issue were void ab initio due to their creation by bribery in the inducement.⁹⁸ The contracts dealt with the repair of bathrooms and barracks in Germany.⁹⁹ An investigation into the dealing of the contracting officer and the contractor found that the contracting officer accepted bribes from the contractor to ensure that the contracts were awarded to the contractor.¹⁰⁰ The contractor’s company claimed that the bribes paid and received ultimately had no bearing on the award process since the contractor’s bid was the lowest, and would result in the awarding of the contracts to the contractor’s company regardless of the criminal conduct.¹⁰¹

The board found that the conduct of the contracting officer prevented fair and open competition by failing to inform or post solicitations in the manner prescribed by the rules of the FAR and therefore corrupted the entire award process for those two contracts.¹⁰² The board found that due to the corruption of the process there was no way to ratify and remove the taint of

⁸⁹ *Raco Servs., Inc.*, 87-1 BCA ¶ 19,653, at 3.

⁹⁰ *Id.*

⁹¹ 177 F.3d 1368, 1374 (Fed. Cir. 1999).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 1376.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1375.

⁹⁷ ASBCA No. 45570, 2001-2 BCA ¶ 31,431.

⁹⁸ *Id.* at 1.

⁹⁹ *Id.* at 2.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

the criminal conduct and therefore ruled that the contracts were, in their purest form, void ab initio.¹⁰³ The board stated that “due to the primacy of the public interest in preserving the integrity of the Federal procurement process as well as the overriding concern for insulating the public from corruption” the harsh but just remedy was required.¹⁰⁴ A remedy many times less harsh in enforcement upon the parties, but equally powerful in its effect, is declaratory relief.

D. Declaratory Relief

The BCAs and the COFC have authority to grant declaratory relief to determine the rights of the parties in accordance with the terms of the contract.¹⁰⁵ In *Newport News Shipbuilding and Dry Dock Co. v. United States*, the court held that an appeal requesting an interpretation of the obligations created by the contract and its modifications is in the jurisdictional purview of the boards and they have authority to grant declaratory relief.¹⁰⁶ Because the authority to grant declaratory relief was not given as a means for the tribunals to “micromanage” or involve themselves in the daily activities of contract management, a request for an interpretation by the tribunals does not automatically give a party access.¹⁰⁷ In order for a tribunal to decide to hear a case it must determine the following: (1) is declaratory relief appropriate?; (2) is there a “live dispute?;”¹⁰⁸ (3) will the requested relief resolve the dispute?; and (4) are remedies available to adequately protect the interests of the parties?¹⁰⁹ It is crucial that a request for declaratory judgment be a request for the determination of the rights and obligations of the parties and not a monetary claim “clothed” as a request for a contract interpretation.¹¹⁰ Although the CDA grants authority to the BCAs to grant any relief that would be available to a litigant asserting a contract claim in the COFC¹¹¹ this authority is not absolute, as explained in the next section.

IV. Limitations of the BCAs and COFC

The CDA does not empower BCAs or COFC with the authority to grant equitable relief to parties challenging agency acquisition decisions.¹¹² The boards have very limited authority to order contracting officers to act or refrain from acting. Specifically, the CDA allows contractors “to request the tribunal concerned to direct a contracting officer to issue a [final] decision in a specified period of time . . . in the event of undue delay on the part of the contracting officer.”¹¹³ The authority to order a contracting officer to submit a final decision is as far as their power reaches. Compliance in a purely temporal matter does not extend to the substance of the contractor’s decision. These tribunals have consistently maintained that they lack the authority to grant specific performance, issue injunctive relief, or issue orders in the form of mandamus.¹¹⁴

Often contractors request boards to order contracting officers to effect specific results, or in the alternative, to refrain from acting in a particular manner. Appellants have routinely attempted to get boards to expand their reach into ordering specific performance, injunctive relief, and various forms of mandamus only to have the boards recite the same language: boards lack the authority to grant equitable relief in such forms. A representation of these cases follows.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 750 (Fed. Cir. 1993).

¹⁰⁶ 44 Fed. Cl. 613, 616 (Fed. Cir. 1999).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271 (Fed. Cir. 1999).

¹¹⁰ *Rohr Inc.*, ASBCA No.44193, 93-2 BCA ¶ 25,871, at 4 (citing *Shirley Constr. Corp.*, ASBCA No. 35868, 89-2 BCA ¶ 21,590).

¹¹¹ *Wheeler*, *supra* note 5, at 655.

¹¹² *Statistica, Inc.*, ASBCA No. 4416, 92-3 BCA ¶ 25,095, at 3.

¹¹³ 41 U.S.C. § 605(c)(4) (2006).

¹¹⁴ *Sabbia Corp.*, VABCA No. 5557, 99-2 BCA ¶ 30,394, at 9.

A. Injunctive Relief

1. *Government Exercise My Option!*

In *Appeal of Dixon Pest Control, Inc.*,¹¹⁵ the Government contracted Dixon to provide pest control services.¹¹⁶ The Government chose not to exercise its options and to conduct the services in-house.¹¹⁷ Dixon argued that the Government failed to abide by the procedures found in Office of Management and Budget Circular A-76 and therefore failed to abide by the spirit of the policy guidance.¹¹⁸ Dixon claimed that the Government's failure to exercise the option harmed it and requested reinstatement of the contract.¹¹⁹ The board ruled that it had neither the authority to grant injunctive relief nor specific performance, but as always, the board had the authority to determine the rights of the parties defined in the contract.¹²⁰

2. *They Must Negotiate!*

In *Appeal of Rohr, Inc.*,¹²¹ Rohr brought a complaint before the board stemming from the Government's contractual agreement to enter into negotiations in determining a price concerning a modification in dispute.¹²² Rohr requested the board make a declaration that in accordance with the contract that the contracting officer's decision to invalidate the contract was void and that the contracting officer must enter into negotiations to attempt to resolve the dispute.¹²³ In keeping with previous rulings, the board ruled that it was in no position to order the contracting officer to abide by such a provision of the contract since it did not possess the authority to order injunctive relief or specific performance.¹²⁴ The board dismissed the case.¹²⁵

3. *Just Modify the Contract*

In *Appeal of Statistica, Inc.*,¹²⁶ Statistica requested that the board order the contracting officer to execute a modification to a contract which would bind the Government to two new categories within the contract.¹²⁷ The appeal concerned an information technology contract where the Government had a requirement for two additional positions and the contracting officer requested the incumbent contractor, Statistica, to submit a price proposal.¹²⁸ The contracting officer prepared a modification to the contract to incorporate the two positions but did not issue the modification as the addition of the two positions was determined to be beyond the scope of the current contract; Statistica appealed the decision.¹²⁹ Once again, the

¹¹⁵ ASBCA No. 41042, 91-1 BCA ¶ 23,640.

¹¹⁶ *Id.* at 2.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 3 (citing FED. OFFICE OF MGMT. AND BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (May 29, 2003)).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ ASBCA No. 44193, 93-2 BCA ¶ 25,871.

¹²² *Id.* at 2.

¹²³ *Id.* at 4.

¹²⁴ *Id.* at 5–6.

¹²⁵ *Id.*

¹²⁶ ASBCA No. 4416, 92-3 BCA ¶ 25,095.

¹²⁷ *Id.* at 1.

¹²⁸ *Id.* at 2.

¹²⁹ *Id.* at 2–3.

board declared that the prayer for injunctive relief was beyond its authority.¹³⁰ The board stated it lacked the authority to order a contracting officer to abide or accept a modification of a contractor.¹³¹

B. Specific Performance

The contractor in *Appeal of Sabbia Corp.* requested both specific performance and injunctive relief. Sabbia won a service contract to paint the Edward Hines Jr. Veterans Affairs (VA) Medical Center for one base year with three one-year option periods.¹³² Sabbia performed the first contract and the contracting officer exercised the first option year.¹³³ After a request by Sabbia to expand the contract to other VA facilities in the Wisconsin and Chicago area, the contracting officer reviewed the contract finding, amongst other issues, that the contract was improperly designated a service contract and the wrong-year funds were used for the ongoing projects.¹³⁴ The contracting officer decided not to expand the contract and ordered the Chief Engineer to cease issuing task orders for the contract.¹³⁵ Sabbia requested the following: (1) declaratory relief by declaring the conduct of Veteran's Affairs "violative" of the contract; (2) an order to force the VA to modify the contract extending the terms for an additional three years; (3) an order extending the contract to include all facilities in the control of the Great Lakes Health Care System Acquisition Center; and (4) an order requiring VA to appoint a new contracting officer.¹³⁶ The board, in following the long list of previous rulings, ruled that they had no authority to issue an order to require a contracting officer to "award task orders" or grant relief in the nature of mandamus.¹³⁷

C. Mandamus¹³⁸ Relief

1. *You Can't Let Me Go!*

In *Appeal of Maria Manges*,¹³⁹ the Government did not renew Manges's teaching contract at West Point Elementary School.¹⁴⁰ The contract was for one-year and renewable "at the option of the government."¹⁴¹ Manges claimed that the failure to renew the contract was a wrongful discharge in violation of a collective bargaining agreement between the school's teachers association and the U.S. Military Academy.¹⁴² Among other requests, Manges requested relief in the form of reinstatement and removal of all references to any unsatisfactory performance of her contract from the school's records.¹⁴³ The board stated that Manges's request for relief equated to a prayer for injunctive relief not available to the board under the CDA and therefore no remedy was available for the relief requested.¹⁴⁴

¹³⁰ *Id.* at 3.

¹³¹ *Id.*

¹³² *Id.* at 2.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 1.

¹³⁷ *Id.* at 9.

¹³⁸ "A writ issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly." BLACK'S LAW DICTIONARY 973 (7th ed. 1999).

¹³⁹ ASBCA No. 25350, 81-2 BCA ¶ 15,398.

¹⁴⁰ *Id.* at 6.

¹⁴¹ *Id.* at 2.

¹⁴² *Id.* at 1.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 7.

2. *Defend Yourself!*

Similarly, in *Appeal of Raymond Kaiser Engineers, Inc./Kaiser Steel Corp., A Joint Venture*,¹⁴⁵ the board received a request from the Appellant, asking that the board direct the contracting officer to issue an order requiring the Government to: defend against a state court action involving Appellant and indemnify Appellant for costs incurred in connection with the state court's action.¹⁴⁶ The board responded by stating that such a request for mandamus exceeded the scope of the board's authority and explained that contract law procedures existed for those seeking reimbursement of costs incurred relating to state court actions.¹⁴⁷ The board further explained that such a direction to a contracting officer exceeded the authority of the board since the board possesses no power to "grant injunctive relief, specific performance or relief in the nature of a mandamus."¹⁴⁸

VI. Conclusion

Although the majority of cases heard by the BCAs and the COFC are requests for monetary relief, nonmonetary remedies such as reformation, rescission, voiding, and declaratory judgments provide parties a clear and concrete resolution to disputes. The authority of these tribunals to hear requests for nonmonetary relief is limited in scope and applied with specificity. The remedies discussed above provide parties and tribunals alternatives to monetary relief allowing the contracting process to continue with as little interruption as possible. Moreover, the authority to grant such remedies aids the tribunals in maintaining judicial efficiency and economy and provides relief to complaining parties at the lowest level. Nonmonetary relief is not only available, but it is also a unique tool for tribunals and parties to forgo pursuing monetary remedies while keeping the government contracting process fluid and moving.

¹⁴⁵ ASBCA No. 34133, 87-3 BCA ¶ 20,140.

¹⁴⁶ *Id.* at 1.

¹⁴⁷ *Id.* at 9.

¹⁴⁸ *Id.*