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## Basic Ordering Agreements: The Catch-22 Chameleon of Government Contract Law

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# BASIC ORDERING AGREEMENTS: THE CATCH-22 CHAMELEON OF GOVERNMENT CONTRACT LAW

*Robert Mahealani M. Seto\**

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This Article is dedicated to Mrs. Keakealani L. Char of Honolulu, Hawaii, a loving Aunt who encouraged me to attend law school. "Who can find a virtuous woman? For her price is far above rubies. . . . She stretcheth out her hand to the poor; yea, she reacheth forth her hands to the needy. . . . Strength and honor are her clothing; and she shall rejoice in time to come." *Proverbs* 31:10, 20, 25 (King James).

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## I. INTRODUCTION

IN times of war, such as the present one between America and the Al-Qaeda worldwide terrorist network, basic ordering agreements (BOAs) may be one of the most important means by which America's Armed Forces receive their military supplies and services. Basic ordering agreements are agreements between the Federal Government and private contractors to provide needed military supplies and/or services, at any future time, if and when the Federal Government needs them. Under BOAs, a private-sector contractor must remain ready, willing, and able to furnish supplies or services to our Armed Forces whenever needed. Accordingly, BOAs are essential to our nation's armed services because they provide those needed military goods, supplies and services at a moment's notice, enabling our nation to immediately respond in an effective way to any attack on America. BOAs allow the Federal Government, e.g., our Army, Air Force, Navy, or Marine Corps, to purchase immediately the vital supplies and services it needs for emergency wars or emergency conflicts.

This article is the story of BOAs: how they began; how they work; and more particularly what their shortcomings are from the viewpoint of the private contractor when it attempts to collect its payments from the Federal Government for its goods and services. This article explains the "Catch-22 Chameleon" problem intrinsic in all BOAs; how my former court, the United States Court of Federal Claims, ruled on this "Catch-22 Chameleon" problem in two conflicting ways; and how the United States Court of Appeals for the Federal Circuit resolved this "Catch-22 Chameleon" problem. This article also proffers suggestions for needed changes to the Federal Acquisition Regulation to help resolve the "Catch-22 Chameleon" problem that has affected all BOAs.

The Federal Acquisition Regulation (FAR)<sup>1</sup> and the Department of

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1. The FAR is the primary document in the Federal Acquisition Regulations System, containing uniform policies and procedures that govern the acquisition activity of all federal agencies. 48 C.F.R. § 1.101 (1999). The FAR is prepared, issued, and maintained jointly by the Secretary of Defense, the Administrator of General Services, and the NASA Administrator. *Id.* at § 1.103. See generally, Federal Acquisition Regulation System, 48

Defense FAR Supplement (DFARS)<sup>2</sup> contain all the rules and regulations which guide the dealings between the Federal Government and private contractors. They both allow for the use of BOAs as a basis for many types of government procurement contracts.<sup>3</sup> The FAR explains that BOAs may be used to expedite contracting for “uncertain requirements for supplies or services when specific items, quantities, and prices are not known at the time the agreement is executed, but a substantial number of requirements . . . are anticipated.”<sup>4</sup> It explicates that BOAs save the government money, thus allowing it to be prudent in spending and ultimately saving the taxpayers’ money.<sup>5</sup> Each BOA must contain,

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C.F.R. §§ 1.000-9905.563 (1999), *also available at* <http://www.arnet.gov/far> (last modified Apr. 4, 2002). *See also* RALPH C. NASH, JR., ET AL., *THE GOVERNMENT CONTRACTS REFERENCE BOOK* 235 (1998).

2. The DFARS is the procurement regulation applicable to the Department of Defense (DOD) that implements and supplements the FAR:

It applies specifically to procurement involving the Office of the Secretary of Defense; the Departments of the Army, Navy, and Air Force; and the Defense Logistics Agency (DLA) and other defense agencies. The FAR and DFARS contain guidance and direction to DOD contracting personnel as to: (1) which provisions, clauses, cost principles, and Cost Accounting Standards are authorized for DOD contracts; and (2) what other procedures and actions must be followed in awarding and administering DOD contracts. The DFARS is not a stand-alone document; it must be read in conjunction with the FAR.

NASH ET AL., *supra* note 1, at 177.

3. *See* FAR Types of Contracts, 48 C.F.R. § 16.703 (1999). The Basic Ordering Agreement is described as:

a written instrument of understanding, negotiated between an agency, contracting activity, or contracting office and a contractor, that contains (1) terms and clauses applying to future contracts (orders) between the parties during its term, (2) a description, as specific as practical, of supplies and services to be provided, and (3) methods for pricing, issuing, and delivering future orders under the basic ordering agreement.

48 C.F.R. § 16.703(a). It adds that a basic ordering agreement “is not a contract,” and therefore, presumably cannot ever be a contract. *Id.* 48 C.F.R. § 216.703(c) adds time limitations to military BOAs by stating: “[t]he period during which orders may be placed against a basic ordering agreement may not exceed three years.” It provides for limited extensions, stating “[t]he contracting officer, with the approval of the chief of the contracting office, may grant extensions for up to two years.” *Id.* Accordingly, it appears that a military BOA may receive one or more two-year extensions indefinitely.

4. 48 C.F.R. § 16.703(b); *see also* THE GOVERNMENT CONTRACTS REFERENCE BOOK which defines a BOA as:

A written instrument of understanding (not a contract) negotiated between a procuring activity and a contractor. A BOA contains (1) terms and clauses that will apply to any future orders placed during the BOAs term; (2) a description, as specific as practicable, of supplies or services to be provided; and (3) methods for pricing, issuing, and delivering future orders. BOAs may be used to expedite contracting for supplies or services when specific items, quantity, and prices are not known but a substantial number of requirements are anticipated. They are frequently issued to multiple contractors and may not be used to avoid the requirements of competition.

NASH ET AL., *supra* note 1, at 55-56 (internal citations omitted).

5. 48 C.F.R. § 16.703(b) adds that “[u]nder proper circumstances, the use of these procedures can result in economies [cost savings] in ordering parts for equipment support by reducing administrative lead-time, inventory, investment, and inventory obsolescence due to design changes.”

*inter alia*, six essential contractual elements of information.<sup>6</sup> Notwithstanding these extensive information requirements, the Federal Government has stubbornly held that BOAs by themselves are not contracts and accordingly do not impart any contractual rights, such as the right to simple payment, to damages, or to lost profits for breach, for the contractors who execute BOAs with the United States Government.<sup>7</sup> Because the Government's non-contractual interpretation of BOAs permits it to cancel BOAs unilaterally and to simultaneously avoid payment of breach of contract damages or lost profits, contractors repeatedly have called upon the United States Court of Federal Claims, the Washington Boards of Contract Appeals (the Washington Boards), and the Comptroller General for help in enforcing their rights under a BOA. The question of when a BOA becomes an enforceable contract and when a private contractor can be assured of receiving payment for its goods and services is the "Catch-22 Chameleon" question. When the Federal Government desires goods and services immediately, it calls the BOA a contract; however, when it wishes to cancel a BOA, it refuses to acknowledge that the BOA is an enforceable contract.

Accordingly, the Government's position on BOAs contains an inherent contradiction and an unreasonable inconsistency. Indeed, it is fundamentally unfair for the Government to treat BOAs as contracts when it serves its purposes, yet deprive private contractors that same right when contractors seek redress before the Washington Boards or United States Court of Federal Claims.<sup>8</sup> Because of BOAs' fundamentally flawed inter-

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6. 48 C.F.R. § 16.703(c)(1) states that each BOA must: (1) "[d]escribe the method for determining prices to be paid to the contractor for supplies or services"; (2) "[i]nclude delivery terms and conditions or specify how they will be determined"; (3) "[l]ist one or more Government activities authorized to issue orders under the agreement"; (4) "[s]pecify the point at which each order becomes a binding contract (e.g., issuance of the order, acceptance of the order in a specified manner, or failure to reject the order within a specified number of days"; (5) "[p]rovide that failure to reach agreement on price for any order issued before its price is established . . . is a dispute under the Disputes Clause included in the basic ordering agreement"; and (6) "[i]f fast payment procedures will apply to orders, include the special data required by [48 C.F.R. §] 13.403."

7. The following cases are from agency boards that date back to 1993: *In re Petersen Equipment*, 96-1 BCA (CCH) ¶ 28,070 (Ag. B.C.A. Dec. 18, 1995) (finding that two Forest Service Emergency Equipment Rental Agreements (ERRAs), standing alone, were not legally binding contracts but were similar to BOAs and therefore lacked the necessary consideration to constitute a contract); *Petersen Equipment*, 95-2 BCA (CCH) ¶ 27,676 (Ag. B.C.A., May 3, 1995) (concluding that the Board lacked jurisdiction over a contractor's claim for wrongful termination because EERAs were BOAs and were thus not binding contracts); *Appeal of Ann Riley & Assocs., Ltd.*, 93-3 BCA (CCH) ¶ 25,963 (D.O.T.C.A.B., Mar. 30, 1993) (deciding that the government could not terminate a contract for default because the agreement did not create a binding contract).

8. As a federal judge for over seventeen years, I have always strongly believed that, if at all possible under the circumstances and relevant law, justice, fairness, and equity must result from any judge's decision. *See, e.g.*, *Harry & Keith Mertz Constr., Inc.*, 97-1 BCA (CCH) ¶ 28,802 (Ag. B.C.A. Feb. 10, 1997) (where, as the presiding judge, I found a way to pay the private contractor for additional work, notwithstanding the fact that the contractor was defaulted; that the contractor did not provide the required 30-day written notice to the contracting officer of the constructive change; and that the contractor did not request extra time because of a constructive suspension). Accordingly, a presiding judge should never allow one party to interpret a law or regulation in two inapposite ways, depending upon

nal inconsistency, BOA litigation before the United States Court of Federal Claims, the Washington Boards, and the Comptroller General has been pervasive, ubiquitous, and extensive, going back at least sixty-four years, or more than half a century of government procurement history.<sup>9</sup> The irony of this problem, i.e., the contractor's "Catch-22 Chameleon" problem, is that the Federal Government's postulation that BOAs are not contracts also simultaneously undermines the Government's legal argument when it wishes to apply the important Truth In Negotiations Act

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which interpretation suited its particular position that particular day, e.g., holding a BOA in one instance a contract when trying to enforce the BOA, and holding a BOA not to be a contract when trying to escape its contractual responsibilities.

9. Searching Westlaw using, *inter alia*, the terms "Basic Ordering Agreements," "Memorandum of Understandings," "Memorandum of Agreements," "Uniform Grain Storage Agreements," "Master Agreement for Repair and Alteration of Vessels," and "Extreme Emergency Rental Agreements," revealed a total of 743 disputes requiring decisions from agency boards, federal courts, or the Comptroller General's Office, going back over half a century. While the number may be slightly less because there may have been some overlap in cases, nevertheless the search demonstrated the extensive disputes and litigation engendered by Basic Ordering Agreements. A Westlaw search of the Comptroller General's Decisions under the search term "Memorandum of Understanding" revealed 180 decisions dating as far back as November 18, 1936, sixty-five years ago. *See, e.g.,* Acting Comptroller General Elliott to the Sec'y of Agric., 16 Comp. Gen. 499 (1936) (where a university challenged paying benefits to a U.S. Army veterinarian working for it on a grant, the Comptroller General stated that the agreement is both legal and proper since the funds of the department were used for separate and distinct purposes apart from those of the university). A Westlaw search of all federal courts using the search terms "Memorandum of Agreement" & "Government Contract" revealed forty-seven decisions dating back fifty-two years. *See, e.g.,* Essex Const. Co., Inc. v. Comm'r, 12 T.C. 1212 (1949) (finding that the subcontractor did not have an enforceable contract with the prime, therefore the government did not have to pay the subcontractor). A similar search of all the agency boards using the term "Memorandum of Understanding" revealed 128 decisions going back forty-six years. *See, e.g.,* Appeal of Georgia Power Co., IBCA 31 (1955) (holding that a MOA between TVA and Georgia Power Company, where the company was billed for electrical energy relative to the wasting of water at the direction of the Corps of Engineers, was not a contract). A search among all agency boards for decisions concerning "Basic Ordering Agreements" revealed 116 cases dating back thirty-three years. *See, e.g.,* Appeal of Fairchild Hiller Corp. Republic Aviation Div., 68-1 BCA (CCH) ¶ 7,025 (A.S.B.C.A. 1968) (holding the BOA to be a contract because of detrimental reliance). A similar search of the Comptroller General's decisions using the term "Basic Ordering Agreements" revealed 114 decisions dating back thirty-four years. *See, e.g.,* To Traid Corp., B-159,718, 1967 WL 2255 (Comp. Gen. Jan. 25, 1967) (holding that the BOA with Traid for gun camera magazines was not an enforceable contract). A search of all federal courts using the term "Basic Ordering Agreements" revealed twenty-two decisions dating back twenty-three years. *See, e.g.,* Sperry Flight Sys. v. United States, 548 F.2d 915 (Ct. Cl. 1977) (granting the Government's 12(b)(1) Motion to Dismiss for Lack of Jurisdiction because the BOA was not a contract). A search of all the agency boards using the term "UGSA," for Uniform Grain Storage Agreements, revealed nineteen decisions that date back twenty-two years. *See, e.g.,* Appeal of Van Stafford, 79-2 BCA (CCH) ¶ 13,979 (Ag. B.C.A. 1979) (finding that under UGSA the CCC may issue an order for grain at any time). A search of all federal courts using the combined terms of "Memorandum of Understanding" and "Government Contract" revealed seventy-nine cases dating back nineteen years. *See, e.g.,* Estate of Schott v. Comm'r, 43 T.C.M. (CCH) ¶ 1188 (1982). Finally, a search of all agency boards using the term "EERA," for Extreme Emergency Rental Agreements, revealed five decisions dating back six years. *See, e.g.,* Petersen Equip., 95-2 BCA (CCH) ¶ 27,676 (Ag. B.C.A. 1995) (granting the government's 12(b)(1) Motion to Dismiss after finding that the Government had no legal obligation to place orders with Appellant under the EERA).

(TINA)<sup>10</sup> to BOAs. Because TINA only applies to enforceable contracts, the Government's contention that BOAs are not contracts would deny TINA's application to BOAs. This article explores this entire "Catch-22 Chameleon" problem inherent in BOAs, from its genesis to its ultimate resolution by the United States Court of Appeals for the Federal Circuit (the Federal Circuit), and proffers my denouement for further improvements and refinements.

Through the middle 1990s, almost all of the Washington Boards of Contract Appeals (BCAs)<sup>11</sup> and the United States Court of Federal Claims (Federal Claims Court) continued to hold that BOAs, pursuant to the FAR, were *not* contracts and accordingly could not form the basis of providing the Federal Claims Court or the Washington Boards of Contract Appeals with jurisdiction to hear contract assertions from government contractors seeking, *inter alia*, Contracts Dispute Act (CDA)<sup>12</sup> monetary claims.<sup>13</sup> Therefore, any contractor filing such a suit before the

10. Truth in Negotiations Act, 10 U.S.C. § 2306(a) (2002); 41 U.S.C. § 254(b) (2002).

11. The Boards of Contract Appeals are administrative boards established in the different procuring agencies to hear and decide disputes under the Contract Disputes Act (CDA) of 1978. NASH ET AL., *supra* note 1, at 64. There are presently 11 BCAs. The CDA established the BCAs at 41 U.S.C. § 607(a) and defined their jurisdiction over federal contract performance disputes at 41 U.S.C. § 607(d). *Id.* The personnel, rules of procedure, and decisions of the BCAs are published in the *Contractor Appeals Decisions Reporter*, Commerce Clearing House, Inc., Chicago, IL. 60646. *Id.* at 65.

12. The Contracts Disputes Act of 1978, 41 U.S.C. §§ 601-13 (2001), establishes the procedures to be used by contractors and contracting officers in resolving disputes arising out of and relating to contracts:

The Act contains detailed provisions for handling contract claims by and against the Government, including (1) certification of contractor claims of \$100,000 or more . . . , (2) contractor and Government claims as the subject of a decision of the contracting officer, (3) appeal from a contracting officer's decision to a Board of Contract Appeals (BCA) within 90 days or to the U.S. Court of Federal Claims within 12 months of becoming final, (4) appeals from either the BCAs or the Court of Federal Claims to the Court of Appeals for the Federal Circuit, (5) establishment of the BCAs and Administrative Judges (members of the BCAs), (6) Small Claims Procedures and Accelerated Procedures before the BCAs, (7) payment of interest on claims to contractors, (8) BCA subpoena power, (9) penalties for submission of fraudulent claims, and (10) payment of claims.

NASH ET AL., *supra* note 1, at 123. *But see* Hicks Corner's Grain Elevator, Inc., 91-3 BCA (CCH) ¶ 24,073 (Ag. B.C.A. 1991) (in a split decision, the Agriculture BCA held that a "bare" Uniform Grain Storage Agreement standing alone could be an enforceable contract).

13. The accrual of a claim occurs on the "date when all events, which fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred." 48 C.F.R. § 33.201. In government contract law, a claim is:

a written demand or assertion by one of the contracting parties seeking, as a matter of right, the payment of money, the adjustment or interpretation of contract terms, or other relief arising under, or relating to the [government] contract. A claim arising under the contract is a claim that can be resolved under a contract clause providing for relief sought by the claimant; [whereas] a claim relating to the contract is one for which no specific contract clause provides such relief. A written demand or assertion by the contractor seeking payment of money [from the Government] exceeding \$100,000 is subject to the Certification of Claim requirement of the CDA and FAR 33.207.



U.S. Court of Federal Claims, for example, would be extremely vulnerable to having its appeal prematurely dismissed via a Rule 12(b)(1) Motion to Dismiss.<sup>14</sup> In fact, the Motion to Dismiss under Rule 12(b)(1) of the U.S. Court of Federal Claims' rules, has been one of the favorite legal weapons for Federal Government attorneys faced with a claim based upon a BOA or similar type of agreement. During the relatively short time-period of March 1984<sup>15</sup> to March 2000,<sup>16</sup> Department of Justice attorneys filed more than 222 Motions to Dismiss for Lack of Jurisdiction, pursuant to Rule 12(b)(1), 155 of which were granted by the Federal Claims Court,<sup>17</sup> and sixty-seven of which were denied.<sup>18</sup> Accordingly, by a winning ratio of approximately two to one, the Department of Justice<sup>19</sup> was extremely successful with its 12(b)(1) Motions to Dismiss for Lack of Jurisdiction. It was very successful because its Motion to Dismiss for Lack of Jurisdiction simply pleaded, pursuant to the FAR, that the BOA in question was *not* a contract, and therefore the Federal Claims Court or Board of Contract Appeals lacked CDA jurisdiction because there was no "express or implied" contract present between the Federal Government and the contractor.<sup>20</sup> Because the FAR states unequivocally that

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NASH ET AL., *supra* note 1, at 93.

14. *See, e.g.*, Trauma Serv. Group, Ltd. v. United States, 33 Fed. Cl. 426 (1995) (when the government requested a dismissal pursuant to its rule 12(b)(1) Motion to Dismiss for lack of jurisdiction asserting that the Memoranda of Understanding were not enforceable contracts).

15. Bettini v. United States, 4 Cl. Ct. 755 (1984).

16. McAfee v. United States, 46 Fed. Cl. 428 (2000).

17. *See, e.g.*, Vaizburd v. United States, 46 Fed. Cl. 309 (2000) (granting 12(b)(1) motion to dismiss since plaintiff had same action pending in other court); Lakewood Assocs. v. United States, 45 Fed. Cl. 320 (1999) (granting motion to dismiss under 12(b)(1) since plaintiff's claim was not ripe for judicial review); Chaney v. United States, 45 Fed. Cl. 309 (1999) (granting motion to dismiss under Rule 12(b)(1) since statute of limitations had run).

18. *See, e.g.*, McAfee v. United States, 46 Fed. Cl. 428 (2000) (denying motion to dismiss under Rule 12(b)(1) denied because an express or implied contract existed); Confidential Informant v. United States, 46 Fed. Cl. 1 (2000) (denying motion to dismiss under 12(b)(1) because court could not determine if plaintiff could have dealt with a government agent with implied, actual authority to contract); Bailey v. United States, 46 Fed. Cl. 187 (2000) (denying motion to bar suit under Rule 12(b)(1) since the operative facts of plaintiff's breach of contract claim were not the same as those in the criminal case and associated forfeiture and accounting for expenses reviews pending before another federal court).

19. The United States Government is the most successful, the most frequent, and the most important litigant in the federal courts. For example, in fiscal year 1996, the United States was a party in 48,755 civil cases filed in U.S. District Courts. The responsibility of defending the United States from CDA and Tucker Act claims, however, falls directly upon the Civil Division of the United States Department of Justice. Over one hundred years ago, in 1868, Congress gave the Attorney General the responsibility for representing the United States in all cases brought before the U.S. Court of Claims for any contract, agreement, or transaction with the executive departments, bureaus, or offices of executive departments. After creation of the Department of Justice in 1870, a unit evolved within it that became known as the Division for the defense of claims against the United States or the Court of Claims Division. The Attorney General created a new Claims Division in 1933 that consolidated responsibility for most of the litigation areas that compose the present day Civil Division. GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT 19-20 (2000).

20. *See* 41 U.S.C. § 602(a) (2000).

BOAs are *not* contracts, contractors then faced the Herculean task of proving, by a preponderance of the evidence, that subsequent acts and circumstances warranted a magical transition from a BOA to an enforceable contract.<sup>21</sup>

Part I of this Article above, provided an introduction and overview. Part II describes the history of the use of BOAs in Government procurement, focusing on representative BOAs such as the: Memorandum of Understanding (MOU), Memorandum of Agreement (MOA), Master Agreement for the Repair and Alteration of Vessels (MARAVs), Uniform Grain Storage Agreement (UGSA), and Emergency Equipment Rental Agreement (EERA). Part II also explains the important role that BOAs served in Government procurement history. Part III examines the holdings in *Reynolds v. Army & Air Force Exchange Service*,<sup>22</sup> *Trauma Service Group v. United States*,<sup>23</sup> and *Total Medical Management, Inc. v. United States*.<sup>24</sup> Part III also examines how *Trauma Service Group (TSG)* and *Total Medical Management (TMM)* have modified the law set forth in *Reynolds* and made it so much easier for a Federal Government contractor to overcome a Rule 12(b)(1) Motion to Dismiss. Part III additionally explains in more detail the dismantling of the stricter requirements in *Reynolds*, pursuant to the Federal Circuit's decisions in *Spruill v. Merit Systems Protection Board*<sup>25</sup> and *Gould v. United States*<sup>26</sup> Part IV discusses *National Micrographics Systems, Inc. v. United States*<sup>27</sup> and *McAfee v. United States*,<sup>28</sup> two representative U.S. Court of Federal Claims cases that fully embrace the new holdings in *TSG* and *TMM*. Part IV also analyzes the possible effect *TSG* and *TMM* could have on BOAs and their coverage by the Truth in Negotiations Act (TINA).<sup>29</sup> Part IV additionally focuses on the "consideration" requirement for BOAs. Part IV discusses whether "bare" BOAs, which have not been activated by actual performance, can nevertheless survive a Rule 12(b)(1) motion. Part IV finally considers some of the FAR and DFARS sections which should be amended in view of the Federal Circuit's holdings in *TSG* and *TMM*. Part V, the Conclusion, summarizes how helpful *TSG* and *TMM* should be in assisting government contractors to overcome Rule 12(b)(1) Motions to Dismiss filed by the Government and summarizes the help that

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21. See 48 C.F.R. § 16.703 (2002).

22. 846 F.2d 746, 748 (Fed. Cir. 1988) (holding that once the Government contests the lack of subject matter jurisdiction, e.g., by filing a Rule 12(b)(1) Motion in the U.S. Court of Federal Claims, Appellant "bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence").

23. 104 F.3d 1321, 1325 (Fed. Cir. 1997) (a well-pled allegation of a contract in the complaint is sufficient to overcome a Rule 12(b)(1) challenge to jurisdiction).

24. 104 F.3d 1314, 1325 (Fed. Cir. 1997) ("the law is clear, for the Court of Federal Claims to have jurisdiction, a valid contract must only be pleaded, not ultimately proven").

25. 978 F.2d 679 (Fed. Cir. 1992).

26. 67 F.3d 925 (Fed. Cir. 1995).

27. 38 Fed. Cl. 46 (1997).

28. 46 Fed. Cl. 428 (2000).

29. 10 U.S.C. § 2306(a) (2002); 41 U.S.C. § 254(b) (2002).

*TSG* and *TMM* can provide bare BOAs, i.e., BOAs without any actual performance, to qualify as contracts themselves.

Accordingly, the Federal Circuit's *TSG* and *TMM* decisions will have extensive and important legal ramifications. These two decisions will go far to help alleviate the "Catch-22 Chameleon" problem BOAs have presented in the past, by making it much harder for the Government to arbitrarily disavow the fact that most BOAs, where the contractor has started to fulfill its promises under the BOA, can qualify as enforceable contracts. Further, the Government should be in a much better position to impose the requirements and sanctions of TINA if BOAs are considered to be enforceable contracts.

## II. BASIC ORDERING AGREEMENTS: HISTORY, DEFINITION, AND THE UNIFORM STORAGE GRAIN AGREEMENT (UGSA), AN IMPORTANT BOA

This part explains the genesis of BOAs, from the French and Indian War until the end of WWII. It reveals the important role that BOAs have played in America's procurement history, particularly during periods of war, and explains the multiple forms BOAs can take. Finally, it discusses one of the most fascinating modern-day BOAs, the Uniform Grain Storage Agreement (UGSA), the various life stages UGSAs go through before they reach maturity, and at what stage they can be considered to be enforceable contracts.

### A. THE HISTORY OF BOAs: PROCUREMENT HISTORY LEADING TO THE DEVELOPMENT OF BASIC ORDERING AGREEMENTS

#### 1. *The French and Indian War to the Civil War*

During the French and Indian War<sup>30</sup> the British colonial army purchased services and supplies through contractors who were full staff officers.<sup>31</sup> These officers functioned as general contractors, sub-contracting a variety of tasks.<sup>32</sup> The Continental Congress adopted their system when it established its official procurement structure.<sup>33</sup> At the onset of the Revolutionary War, supply was a paramount problem for Congress because labor and goods were in short supply.<sup>34</sup> In addition, the superior funding

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30. The French and Indian War of 1754-63, the last of four North American wars waged between the British and the French, was a war between England (with the Colonies) against the French for the right to control the upper Ohio Valley. A victory for the British would have allowed the traders and settlers from Virginia and Pennsylvania to settle the Ohio Valley. On the other hand, a victory for the French would have added to their empire in Canada and the Northwest. Both the French and British saw the Ohio Valley as strategic to the ultimate control over the heart of North America. Colonel George Washington, who fought with the British, was instrumental in helping the British win the French and Indian War. JAMES A. HENRETTA, FRENCH AND INDIAN WAR, Microsoft® Encarta® Online Encyclopedia 2000, at <http://encarta.msn.com> (last visited Apr. 22, 2002).

31. JAMES F. NAGLE, HISTORY OF GOVERNMENT CONTRACTING 15 (2d ed. 1999).

32. *Id.* at 14.

33. *Id.* at 23-24.

34. *Id.* at 17.

of Britain and its colonial loyalists permitted British forces to wage economic war as well, by voluntarily paying excessive prices for supplies and services in the very same markets from which Congress had to buy.<sup>35</sup> The effect of this economic war caused inflationary devaluation of Continental currency.<sup>36</sup> Accordingly, in part because of these wartime experiences, the government became concerned with finding more reasonable and efficient procurement procedures.<sup>37</sup> It was thought that farming out contracting functions to private enterprise would result in operating savings to the government.<sup>38</sup> Finally, it was hoped this new less centralized and more efficient contracting system would result in obtaining better supplies at lower overall cost to the Continental government.<sup>39</sup>

These efficiency and accountability procedures, fostered in part by the Revolutionary War, endured through the 1850s.<sup>40</sup> The Civil War, however, overburdened the procurement system because both the North and the South were bidding for the same goods and supplies. The procurement infrastructure of the North lacked experienced officers to oversee their system, and many new and dishonest civilian appointees conspired with equally dishonest contractors to cheat the government.<sup>41</sup> On April 13, 1861, two days after the fall of Fort Sumter, President Lincoln mobilized a militia of 75,000 men,<sup>42</sup> and on May 3, 1861, by proclamation, he doubled the size of the Navy, increased the strength of the regular Army to 22,000 men, and called for 42,000 more volunteers<sup>43</sup>—making the Civil War the first war that truly tested our nation's industrial capacity.<sup>44</sup> With the Harper's Ferry Armory almost totally destroyed and facing an inundation of new recruits, the Federal Government was even forced to utilize foreign markets to procure arms,<sup>45</sup> demonstrating that equipping the Federal army was an immense problem of severe urgency<sup>46</sup> that unfortunately was exacerbated by rampant profiteering.<sup>47</sup>

The Civil War saw the Quartermaster Department buying numerous products, from camp kettles to gunboats; however, each commodity posed its own problem. The emergency conditions of the Civil War, combined with a concomitant failure to follow procedures, caused both additional fraud and waste.<sup>48</sup> Due to the stress of the Civil War, the failure to follow procedures became endemic. With the advent of the telegraph and new mail routes, purchase orders were flowing by telegram and let-

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35. *Id.* at 17-18.

36. *Id.*

37. *Id.* at 60.

38. *Id.* at 48.

39. *Id.*

40. *Id.* at 175.

41. *Id.*

42. *Id.* at 176.

43. *Id.*

44. *Id.* at 175.

45. *Id.*

46. *Id.* at 176.

47. *Id.*

48. *Id.* at 177.

ter, as well as by formal contracts. In some instances, a single contractor would receive all three to effect purchases of its product.<sup>49</sup> Accordingly, the law of contracts was disregarded, and large quantities of supplies were procured without benefit of being priced until after delivery was effected,<sup>50</sup> a corollary to today's unpriced BOAs. In 1861, Montgomery Meigs became the Quartermaster General.<sup>51</sup> In order to contain cost, avoid profiteering, and improve efficiency, he developed the genesis of an umbrella document that contemplated the issuance of future purchase orders.<sup>52</sup> This document was a "standing invitation to manufacturers,"<sup>53</sup> but in form it was actually an advertisement for bids, stating that bids would be opened and a contract awarded within ten days of publication with the further stipulation that the low bidder would be awarded additional contracts from time to time.<sup>54</sup> In this manner Meigs attempted to contain the price inflation he assumed would occur if he advertised or placed large orders.<sup>55</sup>

## 2. *Immediately After the Civil War*

At the end of the Civil War the military demobilized very quickly.<sup>56</sup> The War Department bureaus were instructed to reduce spending to absolute minimum levels "in view of an immediate reduction of forces in the field and garrison and the speedy termination of hostilities."<sup>57</sup> Government contracting diminished to the point where some industries, such as gun manufacturers, became virtually bankrupt, while other manufacturers more adaptable to civilian life, such as shoe manufacturers prospered by turning their skills developed in wartime to the civilian market.<sup>58</sup> This slowdown in government purchases permitted the government to return to centralized purchasing,<sup>59</sup> and permitted a re-examination of the variety of contract clauses used by various departments. In 1878, the first rules to promote uniformity were promulgated by the Secretary of War.<sup>60</sup>

Subsequently, the Mexican War, the Philippine Insurrection, the Boxer Rebellion, and the Spanish American War created the same furious contracting activity as had the outset of the Civil War.<sup>61</sup> Technology, however, had changed the nature of industrial build-up. Beef, for example, was no longer delivered on the hoof; rather, it was delivered in refrig-

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49. *Id.*

50. *Id.* at 193.

51. *Id.* at 189.

52. *Id.* at 191.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 215.

57. ARMSTRONG, BULLETS AND BUREAUCRATS, THE MACHINE GUN AND THE UNITED STATES ARMY, 1861-1916, 1943 (Greenwood Press 1982).

58. See NAGLE, *supra* note 45, at 215-21.

59. *Id.* at 220.

60. *Id.*

61. *Id.* at 241-42.

ated train cars directly to rail sidings by new packing companies, such as Armour and Swift.<sup>62</sup> A new umbrella document was created called the “depot commissary order.” Meat packers received these “umbrella orders” for carloads, and even trainloads of meat, and Army regiments drew directly from the rail cars at the depot.<sup>63</sup>

The turn of the twentieth century saw renewed interest in centralization and standardization of contracting. The General Supply Committee, which replaced the Dockery Commission’s Board of Awards, began the standardization process in 1913.<sup>64</sup> It promulgated a standard solicitation form, a standard contract form, and a standard bond.<sup>65</sup> Approximately 1,200 copies of this precursor to the Federal Acquisition Regulation were printed. The General Supply Committee and the Treasury continued to plead for more centralization, but World War I intervened.<sup>66</sup> The National Defense Act of 1916, perhaps the most comprehensive piece of military legislation, incorporated almost word for word the recommendations of the Army War College study on military procurement policy. Included within was the recommendation, “[t]hat the president be empowered to place an order with any firm for any product usually produced or capable of being produced by such firm.”<sup>67</sup>

### 3. *World War I and the Blanket Order—An Umbrella for Formal Occasions*

This umbrella, the “Blanket Order,” was in use in private industry as early as 1916.<sup>68</sup> It specified terms pertaining to future orders, e.g., it might specify the price and total quantity but not the exact amount to be ordered of each variation contemplated under the Blanket Order, which could vary based on requirements.<sup>69</sup> This embodiment of the umbrella document gained fuller expression during World War I.<sup>70</sup> *Williamson Heater Co. v. United States* is an illustrative case regarding a blanket order just prior to the end of World War I hostilities.<sup>71</sup> In *Williamson*, the

62. *Id.* at 243.

63. *Id.*

64. *Id.* at 254.

65. *Id.* at 254-55.

66. *Id.*

67. *Id.* at 270-71.

68.

Blanket orders for shoes, to be filled several months later, given by a dealer to a manufacturer and accepted, which specified the styles of shoes and the kind of leather, number of pairs, and price of each style, *held* to constitute binding contracts, though the sizes and widths were left to be specified later, in accordance with the custom of the trade . . . . The complaint alleges that between June 1, 1916, and November 1 of the same year, the Macdonald & Kiley Company sold and delivered to the defendant shoes of the reasonable value and agreed price of \$38,143.61.

*Carroll v. Melville Shoe Corp.*, 272 F. 49, 49-50 (2d Cir. 1921).

69. *Id.*

70. *Williamson Heater Co. v. United States*, 58 Ct. Cl. 63 (1923) (commencing of performance of the BOA created an enforceable contract).

71. *Id.* at 64.

Government issued a blanket order contemplating the purchase of one thousand furnaces, without obligation to itself, to be effected by purchase orders or requisitions.<sup>72</sup> It issued an order for 480 of the furnaces only three days before the end of World War I; the Government then refused to purchase the ordered furnaces.<sup>73</sup> The contractor appealed to the Board of Contract Adjustment of the War Department that denied an agreement had been formed obligating the government to pay for its order of 480 furnaces.<sup>74</sup> The United States Court of Claims held that, under the Dent Act and the facts of the case (including the issuance of a purchase order and the commencement of performance by the contractor), an agreement binding the Government was in fact created.<sup>75</sup>

On June 10, 1933, President Franklin Roosevelt issued Executive Order 6166 abolishing the General Supply Committee and substituting the Procurement Division in its place.<sup>76</sup> The Procurement Division supervised virtually all procurement, but permitted the military services to do their own contracting, subject to forms and regulations promulgated by that division.<sup>77</sup> During the period between 1933 and 1939, the Procurement Division established a new umbrella document, the "General Schedule of Supplies," allowing executive departments to place purchase orders under this expansive document.<sup>78</sup>

#### 4. *World War II, the President Takes Over and the Use of Letters of Intent*

Immediately after Pearl Harbor was bombed on December 7, 1941, Congress enacted the First War Powers Act authorizing the President to award government contracts without regard to the usual attendant provi-

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72. *Id.* at 70.

73. The Dent Act, ch. 92, 40 Stat. 1272 (1919), was enacted in response to a decision by the Comptroller of the Treasury, which denied termination settlements for certain "informal" wartime contracts (i.e., contracts awarded hastily without full observation of procurement regulations). *See* 25 Comp. Dec. 398 (1918). The Dent Act authorized the Secretary of War to compensate contractors under wartime agreements, however informally executed, but prohibited recovery of anticipatory profits.

74. *Williamson Heater Co.*, 58 Ct. Cl. at 71.

75. *Id.*

76. *See* NAGLE, *supra* note 31, at 358.

77. *Id.*

78. The Procurement Division "established a General Schedule of Supplies from which the executive departments could order. The departments could buy outside the General Schedule of Supplies if it did not include an item or if an emergency existed. The division continued the standardization of forms begun by the IBCA." *Id.* President Roosevelt's Director's Order No. 73, approved on June 10, 1939,

immeasurably strengthened the Procurement Division. Although it emptied the War and Navy Departments and the Marine Corps, it directed that the division "shall hereafter undertake the performance of procurement of all supplies [expansively defined] for use either at the seat of government or in the field." More importantly, it provided the division with an infrastructure to fulfill the expanded role. It transferred "all records and property pertaining to, or utilized in, the procurement of supplies by any agency, and all personnel engaged in the procurement of supplies for any agency," to the Procurement Division.

*Id.*

sions of law.<sup>79</sup> Pursuant to subsequent executive orders, the President delegated his plenary government contract powers to, *inter alia*, the War and Naval secretaries, the Maritime Commission, the Treasury Department, the Department of Agriculture, and the Federal Works Agency.<sup>80</sup> Through these various executive agencies, the Government feverishly awarded contracts for supplies and services without adequately considering prices, often by using unpriced letters of intent.<sup>81</sup> These letters of intent, which were simply preliminary understandings that the parties intended to enter upon a contract,<sup>82</sup> were therefore not contracts themselves. These letters of intent were used extensively by the Government during the entire World War II period.<sup>83</sup> For example, during the first four months of 1942, the Navy made commitments of \$8.4 billion, of which \$5.3 billion were accomplished by letters of intent.<sup>84</sup>

During the first half of 1942, the Government awarded more than \$100 billion in contracts, sometimes even surpassing its ability to pay.<sup>85</sup> To handle the chaotic rush for procurement contracts, the President created the new War Production Board (WPB) in 1942 and the Office of War Mobilization in 1943.<sup>86</sup> The latter agency was created to handle the chaotic government procurement problem for the remainder of World War II.<sup>87</sup>

Accordingly, BOAs and similar instruments have played a pivotal role in shaping our present government procurement system, as reflected in today's FAR and DFARS. This historical government-procurement learning experience taught our nation, sometimes through the college of hard knocks, the shortcomings as well as the positive attributes of BOAs and similar instruments such as the letters of intent.

## B. THE DEFINITION OF BOAs

Because the FAR<sup>88</sup> uses the term "instrument of understanding" to define a BOA,<sup>89</sup> it is important to determine what this more generic term encompasses. A search of the United States Code Annotated revealed no occurrences of the term "instrument of understanding" (IOU). West's Supreme Court database indicated that the Supreme Court had never

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79. NAGLE, *supra* note 31, at 409.

80. *Id.*

81. *Id.* at 410.

82. NAGLE, *supra* note 31, at 26.

83. NAGLE, *supra* note 31, at 410.

84. *Id.*

85. *Id.* at 411.

86. *Id.* at 410, 412.

87. *Id.* at 412.

88. The FAR has been defined as the primary document in the Federal Acquisition Regulations System, containing uniform policies and procedures that govern the acquisition activity of all federal agencies. The GSA has made the FAR available on the Internet at <http://www.arnet.gov/far>. Other Internet sites where the FAR can be found include: <http://www.farsite.hill.af.mil> (Hill AFB site); and <http://www.fedmarket.com> (The Federal Marketplace commercial site). NASH ET AL., *supra* note 1, at 235.

89. 48 C.F.R. § 8.405-2 (2001).



used the term; neither had the Court of Appeals for the Federal Circuit. The Court of Federal Claims (as the Claims Court) has used the phrase only twice,<sup>90</sup> each time merely quoting the FAR definition of a basic ordering agreement as a written "instrument of understanding." The various Boards of Contract Appeals have done likewise in just four instances.<sup>91</sup> However, none of the sources above has attempted to provide a definition of the metes and bounds of an "instrument of understanding." Even *The Government Contracts Reference Book*<sup>92</sup> does not include "instrument of understanding" within its pages. "Instrument," however, is defined, in its broadest sense, to be any writing produced for its evidentiary value.<sup>93</sup> It is further defined as any writing that memorializes an act or agreement, or one that gives evidence of a right to the payment of money.<sup>94</sup> Looking at the second term, an "understanding," in the law of contracts,<sup>95</sup> is an agreement. It is a valid contract, particularly if accompanied by an expression to show that it represents a meeting of the minds of the parties.<sup>96</sup> In this manner, an "understanding" that is memorialized in an "instrument" would be a contract.

In a federal procurement setting, an oral understanding that anticipates finalization in written form is not a contract because the lack of a writing indicates a lack of mutual intent to form a binding contract.<sup>97</sup> Further, the United States cannot enforce an oral agreement against a contrac-

90. *Almar Indus., Inc. v. United States*, 16 Cl. Ct. 243, 245-46 (1989); *W. Pioneer, Inc. v. United States*, 8 Cl. Ct. 291, 297 (1985).

91. *Petersen Equip.*, 95-2 BCA (CCH) ¶ 27,676 (Ag. B.C.A. 1995); *Russell L. Kisling*, 88-2 BCA (CCH) ¶ 20,825 (Ag. B.C.A. 1988). *Gen. Dynamics Corp., Elec. Boat Div.*, 83-2 BCA (CCH) ¶ 16,907 (A.S.B.C.A. 1983). *McDonnell Douglas Corp.*, 75-1 BCA (CCH) ¶ 11,337 (N.A.S.A. B.C.A. 1975).

92. *NASH ET AL.*, *supra* note 1, at 243.

93. It is a written document satisfying the requisites of negotiability prescribed by U.C.C. article 3.

94. U.C.C. § 3-104 defines "negotiable instrument" and UCC § 8-102 defines "security" and other writings that evidence a right to the payment of money. *See, e.g.*, *Moore v. Diamond Dry Goods Co.*, 54 P.2d 553, 554 (Ariz. 1936). *See also* BLACK'S LAW DICTIONARY 154 (6th ed. 1999) ("bearer instrument"); *id.* at 164 ("bill"); *id.* at 271 ("commercial paper"); *id.* at 1035-36 ("negotiable instrument").

95. Black's Law Dictionary defines "understanding" as follows:

in the law of contracts, an agreement. An implied agreement resulting from the express terms of another agreement, whether written or oral. An informal agreement, or a concurrence as to its terms. A valid contract engagement of a somewhat informal character. This is a loose and ambiguous term, unless it is accompanied by some expression to show that it constituted a meeting of the minds of parties upon something respecting which they intended to be bound.

BLACK'S LAW DICTIONARY 1526 (6th ed. 1990). *See also id.* at 67 ("agreement"); *id.* at 322-23 ("contract").

96. *Id.*

97. According to the RESTATEMENT OF CONTRACTS § 26 (1932) and CORBIN ON CONTRACTS § 30 (1963), oral understandings contemplating the finalization of legal obligations in a written document are not themselves actual contracts. The oral understandings must first be contracts before they are enforceable. *See, e.g.*, *SCM Corp. v. United States*, 595 F.2d 595, 598 (Ct. Cl. 1979).

tor,<sup>98</sup> nor may a contractor enforce one against the United States.<sup>99</sup> Assuming that an “understanding” between the United States and a contractor possesses all the required elements of a federal procurement contract, it must be memorialized in a writing to be enforceable as such against the United States.<sup>100</sup> Thus, a federal procurement contract is an understanding embodied in an instrument and would therefore be an “instrument of understanding.” However, only “instruments of understanding” that satisfy the statutory and common-law requirements for a procurement contract will attain contract status.<sup>101</sup>

The Code of Federal Regulations (CFR) discloses the existence of five IOUs. They are, in order of appearance: the Standing Ordering Agreement<sup>102</sup> (SOA), the Basic Agreement<sup>103</sup> (BA), the Basic Ordering Agreement<sup>104</sup> (BOA), the Master Agreement for Repair and Alteration of Vessels<sup>105</sup> (MARAV), and the Interagency Support Agreement (ISA).<sup>106</sup> The CFR only uses the term IOU to label the five agreements. It makes no further mention of IOUs. It does not include any other agreements as IOUs, but does not exclude any other agreements. It does not define the term, but merely designates these five agreements as members of the class of “instruments of understanding.” Among the five CFR-denominated IOUs, only the ISA does not require a government contractor to be a party to the agreement.<sup>107</sup> While existing within the procurement set-

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98. The D.C. Circuit has held as follows:

The issue before this court is limited to the question whether the CCC, a government agency, can obtain damages for an unperformed oral contract for carriage. We believe that both the relevant statutes and regulations require that government contracts such as the charter agreement here be written in order to be enforceable by the Government. Hence, in answer to the certified question we hold that this oral contract is unenforceable.

*United States v. Am. Renaissance Lines, Inc.*, 494 F.2d 1059, 1061-62 (D.C. Cir. 1974).

99. 31 U.S.C.A. § 1501(a) states in pertinent part that “[a]n amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of . . . a binding agreement between an agency and another person . . . that is . . . in writing, in a way and form, and for a purpose authorized by law . . . .” The District of Columbia Court of Appeals has held “that government contracts of this type [must] be in writing, and that contracts which are merely oral are not enforceable.” *Am. Renaissance Lines, Inc.*, 494 F.2d at 1062. The United States Court of Claims also has held that “[t]o the extent that plaintiff’s contract is based on an express oral contract, it fails on the additional ground that it violated the statutory requirements that an agreement be in writing in order to bind the government.” *Prestex, Inc. v. United States*, 3 Cl. Ct. 373, 377 n.5 (1983).

100. *Prestex, Inc.*, 3 Cl. Ct. at 377.

101. See *Trauma Serv. Group v. United States*, 104 F.3d 1321 (Fed. Cir. 1997); *Total Med. Mgmt. v. United States*, 104 F.3d 1314 (Fed. Cir. 1997).

102. 41 C.F.R. § 101-37.100 (2000) (defined within definition of “rental aircraft”).

103. 48 C.F.R. § 16.702 (2000).

104. 48 C.F.R. § 16.703 (2000).

105. 48 C.F.R. § 217.7101 (2000).

106. 48 C.F.R. § 842.101 (2000).

107. A standing ordering agreement “is a written instrument of understanding, negotiated between an agency, contracting activity, or contracting office and contractor . . . .” 41 C.F.R. § 101-37.100 (2000). A basic agreement “is a written instrument of understanding, negotiated between an agency or contracting activity and a contractor . . . .” 48 C.F.R. § 16.702 (2000). A basic ordering agreement “is a written instrument of understanding, negotiated between an agency, contracting activity, or contracting office and a contractor . . . .” 48 C.F.R. § 16.703 (2000). A master agreement for repair and alteration of vessels

ting,<sup>108</sup> the ISA is executed between two federal agencies or contract activities,<sup>109</sup> not between a contractor and the Government. Further, the ISA, while not stated to be a contract, is required to specify the rights and obligations of the parties, as well as the funding and reimbursement arrangements.<sup>110</sup> In contrast, the FAR states that the BA,<sup>111</sup> the BOA,<sup>112</sup> and the MARAV<sup>113</sup> are not contracts.

The Code of Federal Regulations' IOUs share common elements. First, the SOA, the BA, the BOA, and the MARAV are negotiated between a contractor and the government, and each anticipates the possibility, but not the necessity, of the placement of future orders. Second, they contain clauses, terms, and conditions that would be applicable to any future orders or contracts between the parties.<sup>114</sup> The ISA, however, has the earmarks of a contract.<sup>115</sup> While the SOA, BA, BOA, and MARAV contemplate the issuance of future orders, which would become contracts

"is a written instrument of understanding, negotiated between a contracting activity and a contractor . . ." 48 C.F.R. § 217.7101 (2000).

108.

Pursuant to FAR policy encouraging interagency cross-servicing in field-contract support services, contracting officers of the Department of Veterans Affairs will utilize the support services of other agencies to the extent feasible. Examples of such services are: preaward surveys; quality assurance and technical inspection of contract items; and review of contractors' procurement systems. Requirements for support services available from any other Government department or agency will be obtained on the basis of an approved negotiated interagency support agreement.

48 C.F.R. § 842.101(a) (2000).

109.

An interagency support agreement is a written instrument of understanding executed between the parties to the agreement. The agreement should state clearly the accord which has been reached between the two parties involved, especially the obligations assumed by the rights granted each. The agreement will be specific with respect to resources to be provided by both the supplying and receiving activities. It will also provide for funding and reimbursement arrangements, and clauses permitting revisions, modifications thereto, or cancellation thereof, will be included.

48 C.F.R. § 842.101(b) (2000).

110. *Id.*

111. "A basic agreement is not a contract." 48 C.F.R. § 16.702(a)(2) (2000).

112. "A basic ordering agreement is not a contract." 48 C.F.R. § 16.703(a)(3) (2000).

113. "Master agreement for repair and alteration of vessels . . . [i]s not a contract." 48 C.F.R. § 217.7101(a)(2) (2000).

114. "[A] standing ordering agreement . . . is a written instrument of understanding, negotiated between an agency, contracting activity, or contracting office and contractor that contains: (1) terms and clauses applying to future contracts (orders) between parties during its term . . ." 41 CFR § 101-37.100 (2000). "A basic agreement is a written instrument of understanding, negotiated between an agency or contracting activity and a contractor, that (1) contains contract clauses applying to future contracts between the parties during its term . . ." 48 C.F.R. § 16.702(a) (2000). "A basic ordering agreement is a written instrument of understanding, negotiated between an agency, contracting activity, or contracting office and a contractor, that contains (1) terms and clauses applying to future contracts (orders) between the parties during its term . . ." 48 C.F.R. § 16.703 (2000). "Master agreement for repair and alteration of vessels—(1) Is a written instrument of understanding, negotiated between a contracting activity and a contractor that—(A) Contains contract clauses, terms, and conditions applying to future contracts for repairs, alterations, and/or additions to vessels . . ." 48 C.F.R. § 217.7101 (2000).

115. *See supra* text accompanying note 3.

pursuant to an identifiable IOU,<sup>116</sup> the ISA seems to be pertinent only to itself.<sup>117</sup> It does, however, anticipate future revision, modification, and cancellation<sup>118</sup> and could, in theory, provide for future orders, merely by revision or modification, or provide no order at all by cancellation. Thus, within the context of the CFR, an “instrument of understanding” is a writing produced to evidence a negotiated meeting of the minds of the parties, generally a contracting officer and a government contractor, regarding the terms of potential future purchase orders.

### C. SOME REPRESENTATIVE IOUS NOT DENOMINATED AS SUCH BY THE CODE OF FEDERAL REGULATIONS (CFR)

#### 1. Federal Supply Schedules

The General Services Administration (GSA) awards Federal Supply Schedules (FSS), also known as GSA schedules, which are used to purchase a wide variety of commonly used services and supplies.<sup>119</sup> While discussed in the CFR, they are not referred to as “instruments of understanding.” GSA Schedules are negotiated,<sup>120</sup> indefinite delivery contracts awarded to private contractors, fixing at least the price terms for future agency purchase (delivery) orders within a given period of

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116. “[S]tanding ordering agreement . . . contains . . . methods for pricing, issuing, and delivering future orders.” 41 C.F.R. § 101-37.100 (2000). “A basic agreement . . . contemplates separate future contracts that will incorporate by reference or attachment the required and applicable clauses agreed upon in the basic agreement.” 48 C.F.R. § 16.702(a)(2) (2000). “A basic ordering agreement . . . contains . . . methods for pricing, issuing, and delivering future orders under the basic ordering agreement.” 48 C.F.R. § 16.703(a)(3) (2000). “Master agreement for repair and alteration of vessels . . . [c]ontemplates separate future contracts that will incorporate by reference or attachment the required and applicable clauses agreed upon in the master agreement.” 48 C.F.R. § 217.7101(a)(1)(B) (2000).

117. See *supra* text accompanying note 3.

118. *Id.*

119. This includes both Single Award Schedules (SAS) and Multiple Award Schedules (MAS) as established in the FAR and the FPM. See 48 C.F.R. §§ 8.401 to 8.404-3, 38.101, 38.201 (2000) (FAR); 41 C.F.R. §§ 101-26.000 to 101-26.49040416 (2000) (FPM). This process permits contracting officers, following competitive procedures, to award Indefinite Delivery Contracts to commercial firms, requiring such firms to provide, under “schedule” specified supplies and services at stated prices for given periods of time. This allows ordering offices to issue delivery orders directly to listed contractors, receive direct shipments, make payment directly to contractors, and administer the orders. NASH ET AL., *supra* note 1, at 243.

120. 48 C.F.R. § 538.270 lists several acceptable reasons why the Government is at all times seeking to obtain the offeror’s best price, which it defines as “the best price given to the most favored customer,” but concedes that the Government might not always receive the best price. It goes on to state that:

You may award a contract containing pricing which is less favorable than the best price the offeror extends to any commercial customer for similar purchases if you make a determination that both of the following conditions exists: (1) The prices offered to the Government are fair and reasonable, even though comparable discounts were not negotiated. (2) Award is otherwise in the best interest of the Government.

*Id.* § 538.270(d).

time.<sup>121</sup> While GSA Schedules are considered contracts, no quantity term is specified, either in terms of individual orders or ultimate total. GSA Schedules are not even limited to the use of the GSA, but rather specify other agencies as mandatory users as well.<sup>122</sup> Purchase is not even limited to a single contractor, but instead should be made from the schedule contractor offering the best value for the scheduled item.<sup>123</sup> As such, GSA Schedules anticipate the possibility, but not the requirement, of an award of future orders to any given schedule contractor, and they contain clauses, terms, and conditions that would be applicable to those future orders. Further, they are written instruments,<sup>124</sup> which evidence a meeting of the minds of the parties respecting the terms of future purchase orders.<sup>125</sup> The various Boards of Contract Appeals seem to accept without question that a Federal Supply Schedule is a contract.<sup>126</sup>

121.

The Federal Supply Schedule program, directed and managed by the General Services Administration (GSA), provides Federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying . . . . Indefinite delivery contracts (including requirements contracts) are established with commercial firms to provide supplies and services at stated prices for given periods of time.

48 C.F.R. § 8.401(a).

122.

Ordering procedures for mandatory use schedules. (1) This paragraph (c) applies only to orders against schedule contracts with mandatory users. When ordering from multiple-award schedules, mandatory users shall also follow the procedures in [48 C.F.R. § 8.404(a) & (b)].

(2) In the case of mandatory schedules, ordering offices shall not solicit bids, proposals, quotations, or otherwise test the market solely for the purpose of seeking alternative sources to Federal Supply Schedules.

(3) Schedules identify executive agencies required to use them as mandatory sources of supply. The single-award schedule shall be used as a primary source and the multiple-award schedule as a secondary source . . . .

48 C.F.R. § 8.404(c)(1)-(3).

123. 48 C.F.R. § 8.404(b)(2) states that orders should be placed with the schedule contractor that can provide the supply or service that represents the best value. According to 48 C.F.R. § 38.102-2(b), GSA is to use MAS contracts when "(1) it is not practical to draft specifications or other descriptions for the required supplies or services and there are multiple suppliers able to furnish similar commercial supplies or services; or (2) selectivity is necessary for ordering offices to meet their varying needs." It was decided in *Best Power Technology Sales Corp. v. Austin*, 984 F.2d 1172, 1174 (Fed Cir. 1993), that "[a]n agency can choose, from the MAS, the supply or service with the features it needs and purchase that supply or service on the terms that GSA has previously negotiated with the particular manufacturer or supplier."

124. "The contracting officer shall use the Standard Form 1449, Solicitation/Contract/Order for Commercial Items, if (1) the acquisition is expected to exceed the simplified acquisition threshold; (2) a paper solicitation or contract is being issued; and (3) procedures at 12.603 are not being used. Use of the SF 1449 is nonmandatory but encouraged for commercial acquisitions not exceeding the simplified acquisition threshold." 48 C.F.R. § 12.204 (a). "Except when quotations are solicited via FACNET, electronically, or orally, the SF 1449; SF 18, Request for Quotations; or an agency form/automated format may be used. Each agency request for quotations form/automated format should conform with the SF 18 or SF 1449 to the maximum extent practicable." 48 C.F.R. §13.307(b)(1).

125. *See supra* note 3.

126. Ordinarily, an FSS contract is identifiable as such because of the existence of a supply schedule covering articles and services. *Syst. Dev. Corp., 75-1 BCA (CCH) ¶ 11,304 (Ag. B.C.A. 1975)*. The government, as a contracting party, is the sovereign acting

The U.S. Court of Federal Claims has dealt with the subject of the Federal Supply Schedule Contract (FSSC) on thirteen occasions without questioning their validity as contracts.<sup>127</sup> In no instance has it held that a Federal Supply Schedule Contract is not a valid contract for jurisdictional purposes. The Court of Appeals for the Federal Circuit has apparently concurred in the assumption.<sup>128</sup>

## 2. *Blanket Purchase Agreements (BPA)*

The Blanket Purchase Agreement is used when “[t]here is a wide variety of items in a broad class of supplies or services that are generally purchased, but the exact items, quantities, and delivery requirements are not known in advance and may vary considerably.”<sup>129</sup> The BPA is prepared on a standard form and anticipates the future purchase of supplies by issuance of electronic or written order on an SF 1449 or OF 347,<sup>130</sup> or by written purchase requisition,<sup>131</sup> with private contractors on charge accounts.<sup>132</sup> An electronic order is considered the equivalent of a written order, and is now preferred for the ordering of small quantities of sup-

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as if it were a private party, making promises which it represents are binding and enforceable.

127. “Indefinite delivery contracts (including requirements contracts) are established with commercial firms to provide supplies and services at stated prices for given periods of time.” 48 C.F.R. § 8.401(a). A second technique of procurement is the purchase on an indefinite-quantity basis under formally advertised, competitively awarded ‘requirements’ contracts or (since 1968) under multiple-award, separately negotiated contracts, of items used on a recurring basis by the Government which are to be shipped directly from the manufacturer to the ordering agency. The GSA enters into a procurement contract for these items on an indefinite-quantity basis and then an ordering agency places an order against such contract directly with the manufacturer.

128. The procurement contemplates placing a task order with a GSA FSS with the use of Schedule 874, “Management, Organization, and Business Improvement Services” (MOBIS). GSA has separate contracts with various vendors which are listed on “schedules” for different goods and services. Part 8 of FAR addresses procurements made pursuant to Federal Supply Schedules that are managed by the GSA.

129. 48 C.F.R. § 13.303-2 (2001).

130. “Both SF 1449 and OF 347, Order for Supplies or Services, are multipurpose forms used for negotiated purchases of supplies or services, delivery or task orders, inspection and receiving reports, and invoices. An agency form/automated format also may be used.” 48 C.F.R. § 13.307(b)(2) (2001).

131. 48 C.F.R. § 13.303-5(e) (2001) limits the documentation of purchases to essential information and forms by stating that purchases generally should be made electronically, but when it is not considered economical or practical to use electronic methods, oral orders will be allowed. A paper purchase document may then be issued if it is necessary to ensure that the purchaser and supplier agree on essential elements concerning the transaction. If a paper document is not issued, then the essential elements of the purchase are to be memorialized in either an informal memorandum, or on a form developed locally for this purpose with the pertinent purchase requisitions and the accounting, along with appropriation data all being cited.

132. 48 C.F.R. § 13.303 discusses simplified methods of filling the Government’s anticipated repetitive needs for supplies or services by establishing charge accounts with qualified sources of supply. The design of BPAs reduces administrative costs by accomplishing simplified acquisitions through the elimination of the need for individual purchase documents. They have to contain a description of the agreement, the extent of the obligation, pricing, a purchase limitation, notice of individuals authorized to purchase, dollar limitations, delivery tickets, and invoices. The FAR restricts individual purchases under BPAs not to exceed the dollar limitation for simplified acquisitions, and also states the existence

plies.<sup>133</sup> It is required by regulation to contain terms and conditions applicable to those potential future orders.<sup>134</sup> Like a GSA Schedule, BPAs may be established with more than one contractor,<sup>135</sup> and it is possible that a contractor may receive no actual orders under the BPA. Under a BPA, however, the government is not obligated to make any purchase whatsoever from any particular contractor.<sup>136</sup> Thus, the BPA is a written instrument evidencing agreement between the government and a contractor regarding terms pertaining to potential future orders for supplies.

Boards of Contract Appeals have considered the BPA on numerous occasions. As a rule they have not found the BPA to be a contract,<sup>137</sup> with one exception found in *Graves Excavating*,<sup>138</sup> where the Forest Service used the contractor's excavator for 676 hours pursuant to a BPA and a subsequent task order for 740 hours. The U.S. Court of Federal Claims has considered the subject of the BPA only once. It did not deal with the BPA umbrella standing alone but rather with the combination of a BPA and subsequent "calls" (orders). It treated this combination as a contract.<sup>139</sup> The U.S. Court of Appeals for the Federal Circuit has never discussed the subject of the BPA.<sup>140</sup>

of a BPA does not justify sole source purchasing. See 48 C.F.R. § 13.303-3 (2001). See also NASH ET AL., *supra* note 1, at 63.

133. 48 C.F.R. § 13.303-5(e)(1) (2001).

134. 48 C.F.R. § 13.303-2(c)(1) (2001).

135. "BPAs may be established with— (1) More than one supplier for supplies or services of the same type to provide maximum practicable competition . . ." *Id.*

136. "The following terms and conditions are mandatory . . . . A statement that the Government is obligated only to the extent of authorized purchases actually made under the BPA." 48 C.F.R. § 13.303-3(a)(2) (2001).

137. The BPA contains none of the requisites that would create a requirements contract. It lacks mutuality of consideration. See, e.g., *Dr. Chauncey L. Duren d/b/a Chesapeake Orthopedics*, 90-1 BCA (CCH) ¶ 22,386 (A.S.B.C.A. 1989). Neither party is assuming any duty towards the other. See, e.g., *Julian Freeman*, 94-3 BCA (CCH) ¶ 27,280 (A.S.B.C.A. 1994). "A blanket purchase agreement is not a contract. It is merely a collection of provisions that will only mature into a contract or contracts at such time or times as individual purchase orders may be issued by the government through authorized ordering officers and accepted by the contractor." *Potomac Computers Unlimited, Inc.*, 94-1 BCA (CCH) ¶ 26,304 (D.O.T.C.A.B. 1993).

138. This involved a blanket purchase agreement (call-when-needed equipment rental), Contract No. 45-03J1-8-0067. The contractor argued that it was an indefinite quantity requirements contract and the court agreed with the contractor. The contractor was required to provide services whenever a "call" for such service was made by the Government. The Government quality-assurance representative who was specifically authorized to make such calls made the calls orally and in person. The agreement provided that the Government was only obligated to pay for work performed pursuant to calls made under the agreement with the contractor being obligated to perform all work necessary to accomplish "on-call" services during the period of the agreement. *Graves Excavating*, AGBCA No. 1999-193-1 (Ag. B.C.A. 1999), available at 1999 WL 962478.

139.

Therefore, because United Sales was fully paid on call numbers M26A and M27A of Blanket Purchase Agreement N00189-86-A-7510, if plaintiff United Sales has a legitimate claim against the government regarding the \$91,000.00 withheld, it must be on a contract or contracts other than the one which is the subject of the contracting officer's November 23, 1987 opinion, and the subject of the instant lawsuit.

*United Sales, Inc. v. United States*, 34 Fed. Cl. 88, 97 (1995).

140. A search of the Westlaw "CTAP" database revealed no such cases.

### 3. *Emergency Equipment Rental Agreement (EERA)*

The EERA is a written agreement<sup>141</sup> that has been used by the Forest Service of the U.S. Department of Agriculture to obtain vehicles and equipment to fight forest fires.<sup>142</sup> The Agriculture Board of Contract Appeals (AGBCA) has stated that standing alone, the EERA is not a contract.<sup>143</sup> Prepared on a standard form,<sup>144</sup> it contains negotiated terms, such as payment rates,<sup>145</sup> which apply to future indeterminate orders for equipment.<sup>146</sup> While it may appear odd that only the Agriculture Board of Contract Appeals has heard cases respecting the EERA,<sup>147</sup> this is really not surprising because the Forest Service is one of the agencies subsumed under the Department of Agriculture.

### 4. *The CHAMPUS<sup>148</sup> Memorandum of Understanding*

Within today's managed care medical environment, a CHAMPUS beneficiary may only use an "authorized" provider.<sup>149</sup> A CHAMPUS authorized provider becomes a preferred provider for referral purposes by

141. This agreement contains the Federal General Provisions for Emergency Rental Agreement Form OF-294. *See, e.g.*, Thomas B. Prescott, 00-1 BCA (CCH) ¶ 30,583 (Ag. B.C.A. 1999).

142. Erick and Nicole Ammon, 2000-137-1 (Ag. B.C.A. 2000); Thomas B. Prescott, 00-1 BCA (CCH) ¶ 30,722 (Ag. B.C.A. 1999); Pepper Hewitt, AGBCA No. 99-110-1 (Ag. B.C.A. 1998); Special Operations Group, AGBCA No. 98-166-2 (Ag. B.C.A. 1998); John E. Martin, Jr., 92-2 BCA (CCH) ¶ 25,016 (Ag. B.C.A. 1992).

143. In *Thomas Prescott*, 00-1 BCA (CCH) ¶ 30,583 (Ag. B.C.A. 1999), the Board found an EERA standing alone is not a contract. Its mere existence places no legal obligation on the Government to order any supplies or services and likewise does not obligate the non-government party to provide them if ordered. The Board went on to say that if supplies or services were ordered and delivered then an express contract incorporating the terms of the EERA came into being. *Id.* The Board in *Petersen Equipment*, 95-2 BCA (CCH) ¶ 27,676 (Ag. B.C.A. 1995), also concurred and expressed its agreement with the Government that EERAs were not contracts, but "merely a collection of terms, conditions, and prices that were to become applicable when and if the Forest Service requested emergency supplies and equipment and Appellant agreed to provide them."

144. *Petersen Equip.*, 95-2 BCA (CCH) § 27,676.

145. These rates of payments include all operator expenses, work rates, special rates, guarantees, daily rates, various exceptions to all the above, manner of determining pay, and method of payment. Other exceptions include contractors withdrawing equipment prior to being released by Government. The Government's assumption of risk is outlined with specific exceptions. *See, e.g.*, *Thomas Prescott*, 00-1 BCA (CCH) ¶ 30,583.

146. Since the equipment needs of the Government and availability of any contractor's equipment during an emergency cannot be determined in advance, it is usually agreed that the contractor shall furnish the specified equipment when the Government's needs arise in the future hereon to the extent the contractor is willing and able at the time of order. *See id.* "On May 18, 1996, the parties executed EERA No. 56-9A40-6-1P045 which provided for the possible future rental, with driver, of Prescott's 1988 Ford pickup truck and another truck for use by the FS in the event needed to fight fires." *Id.*

147. A search of the Westlaw databases "FGC-BCA," "FEDCL," and "CTAF" reveals only Agriculture Board of Contract Appeals cases with no mention of cases at the U.S. Court of Federal Claims or the U.S. Court of Appeals for the Federal Circuit.

148. CHAMPUS is the Civilian Health and Medical Program of the Uniformed Services. 32 C.F.R. §§ 199.1-.22 (2002).

149. "Provider required. In order to be considered for benefits, all services and supplies shall be rendered by, prescribed by, or furnished at the direction of, or on the order of a CHAMPUS-authorized provider practicing within the scope of his or her license." 32 C.F.R. § 199.6(a)(7) (2002).



executing a "Memorandum of Understanding" (MOU) with the Director of CHAMPUS of the Department of Defense (DOD).<sup>150</sup> In consideration of promotion of efficiencies inherent in the use of preferred providers, the DOD Secretary may enter into resource sharing agreements with preferred providers that require the Military Treatment Facility Commander to furnish treatment facilities within which to treat CHAMPUS beneficiaries to preferred providers.<sup>151</sup> These resource sharing agreements are typically incorporated within the MOU. The MOU's provisions respecting claim payments come into play only when a CHAMPUS beneficiary presents a CHAMPUS ID Card and requests service.<sup>152</sup> It is an umbrella document which furnishes the terms and conditions of the provision of service under the "order" created by the presentation of a valid CHAMPUS ID along with a request for service.

5. *The Uniform Grain Storage Agreement (UGSA): An Important IOU/BOA Not Specifically Described in FAR*

The UGSA is an important IOU/BOA because it goes through almost the same stages as a normal BOA.<sup>153</sup> Its importance, its complexity, and its chameleon-like features have nurtured a surprising share of litigation in the federal courts and the Boards. In the federal courts, there have been at least sixty-nine appeals on the multitudinous issues that have arisen under a UGSA.<sup>154</sup> In the Boards, however, only the Agriculture Board of Contract Appeals has had to grapple with these issues. This is understandable because the Commodity Credit Corporation (CCC) that administers the UGSAs is an agency subsumed under the Department of Agriculture.<sup>155</sup> The ubiquitous and complex nature of UGSAs' interpretative problems is evidenced by the number of appellate courts that have attempted to interpret the ambiguities of the UGSA: (1) U.S. Court of

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150. "The Director, OCHAMPUS, or designee, may include in a participating provider agreement/MOU provisions . . . which encourage provider participation while improving beneficiary access to benefits and contributing to CHAMPUS efficiency. Such provisions shall be otherwise allowed by this part or by DOD Directive." 32 C.F.R. § 199.6(a)(8)(ii)(A) (2002).

151. "The Secretary of Defense, or designee, may enter into an agreement (external or internal) providing for the sharing of resources between facilities of the uniformed services and facilities of a civilian health care provider . . . if [he] determines that such an agreement would result in the delivery of health care in a more effective, efficient or economical manner." 32 C.F.R. § 199.1(p) (2002).

152. 32 C.F.R. § 199.3 (2002) requires a patient to present his or her applicable CHAMPUS identification card (Uniformed Services identification card) to an authorized provider of care. This card identifies the holder of the card to be an eligible CHAMPUS beneficiary.

153. For a discussion of these stages, see discussion *infra* Part IV.B.

154. See, e.g., *Preston v. United States*, 696 F.2d 528 (7th Cir. 1982) (finding the Department of Agriculture liable under the Federal Torts Claims Act when it converted grain stored by the plaintiffs under a UGSA); *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47 (8th Cir. 1973) (finding that grain storage operators violated price support payment guidelines in a cooperative grain storage plan set up under CCC); *Farmers Elevator Mut. Ins. Co. v. J.R. Milam Co.*, 435 F.2d 140 (5th Cir. 1970) (holding grain warehouseman liable for loss in quality and quantity of grain stored under a UGSA).

155. See, e.g., *Farmers Elevator Co.*, 98-1 BCA ¶ 29, 447 (Ag. B.C.A. 1998).

Appeals of the Federal Circuit;<sup>156</sup> (2) Second Circuit;<sup>157</sup> (3) Fifth Circuit;<sup>158</sup> (4) Sixth Circuit;<sup>159</sup> (5) Seventh Circuit;<sup>160</sup> (6) Eighth Circuit;<sup>161</sup> (7) Tenth Circuit;<sup>162</sup> (8) Tax Court;<sup>163</sup> and (9) the United States Court of Federal Claims.<sup>164</sup> UGSAs are administered through the CCC, an agency that is charged with the responsibility, *inter alia*, to help maintain stable prices for agricultural commodities.<sup>165</sup> As a result of CCC's price support programs, it occasionally finds itself with large amounts of price-supported grain to store. This is exactly where the UGSA plays its most important role; it facilitates the acquisition of storage facilities from America's grain warehousemen to store the Government's price-supported grain.<sup>166</sup>

Courts and boards have been less than unanimous on how to define a UGSA: they have called a UGSA a BOA, a Basic Agreement (BA),<sup>167</sup> and a contract.<sup>168</sup> This is understandable, because the UGSA is also like

156. *PLB Grain Storage Corp. v. Blickman*, 113 F.3d 1257 (table, text in Westlaw), unpublished disposition, 1997 WL 242179, 41 Cont. Cas. Fed. (CCH) ¶ 77,103 (Fed. Cir., May 12, 1997).

157. *Cargill, Inc. v. Commodity Credit Corp.*, 275 F.2d 745 (2d Cir. 1960).

158. *Farmers Elevator Mut. Ins. Co. v. J.R. Milam Co.*, 435 F.2d 140 (5th Cir. 1970).

159. *United States v. Ohio Cas. Ins. Co.*, 399 F.2d 387 (6th Cir. 1968).

160. *Preston v. United States*, 696 F.2d 528 (7th Cir. 1982).

161. *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47 (8th Cir. 1973).

162. *Gen. Ins. Co. of Am. v. Commodity Credit Corp.*, 430 F.2d 916 (10th Cir. 1970).

163. *Farmers Grain Co. v. United States*, 33 Fed. Cl. 298 (1995).

164. *Alta Co-op. Elevator v. C.I.R.*, 18 T.C.M. (CCH) 453 (T.C. 1959).

165. 15 U.S.C. § 714 (1997), states that the CCC was created "[f]or the purpose of stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities, products thereof, feeds, and fibers (hereinafter collectively referred to as 'agricultural commodities'), and of facilitating the orderly distribution of agricultural commodities . . . ."

166. In *Hicks Corner's Grain Elevator, Inc.*, the Board explained that "[t]he purpose of the [UGSA] Agreement was to permit CCC to store CCC-owned grain in Appellant's storage facility." *Hicks Corner's Grain Elevator, Inc.*, 91-3 B.C.A. (CCH) ¶ 24,073 (Ag. B.C.A. 1991).

167. *Id.* The dissenting opinion by Judge Edward Houry in *Hicks Corner's Grain Elevator* called the UGSA a BOA and a BA. Judge Houry concluded that the UGSA is a mere collection of terms, conditions, rates and charges which would be applicable only when the Government stored grain in Appellant's warehouse and that the UGSA is in the nature of a BA or BOA, not a contract over which the Board has jurisdiction.

A BOA under the provisions of the FAR is required to have certain provisions which are not contained in the UGSA. Under 48 C.F.R. § 16.703, a BA is to contain clauses required for negotiated contracts; the UGSA does not. Under 48 C.F.R. § 16.702(1), a BA is to contain a provision for discontinuing its future applicability upon a 30-day notice; the UGSA does not. If the UGSA is to be a BA, then the loading order is the "contract" that, according to the FAR, should include a scope of work and price, delivery, and other appropriate terms that apply to the particular contract. 48 C.F.R. § 16.702(d). If the UGSA is a BOA, it does not contain a provision indicating at what point in time it becomes a contract. 48 C.F.R. § 16.703(c). Thus, a CO, before issuing an order under a BOA, is to obtain competition, assure that its use is not prejudicial to other offerors, or obtain other approvals or justifications as if the order were a contract independent of the BOA. 48 C.F.R. § 16.703(d)(1).

168. See, e.g., *United States v. Gilbertson*, 588 F.2d 584, 589 (8th Cir. 1978), where the Eighth Circuit held the UGSA to be a contract:

[S]ummarized briefly, Hastings had entered into a contract, known as a uniform grain storage agreement, with the Commodity Credit Corporation (CCC), an agency of the United States Department of Agriculture. The

a chameleon: (1) there is the "bare UGSA," the actual instrument of understanding or BOA standing alone without any purchase order to activate it, and which the FAR states emphatically (to the extent that it is a simple BOA) is not a contract;<sup>169</sup> (2) there is the UGSA combined with an "Extended Grain Storage Agreement" (EGSA), which creates a duty for the CCC to pay a certain sum of money to a farmer in exchange for the farmer being ready, willing, and able to store a certain quantity of grain;<sup>170</sup> and (3) there is the UGSA where CCC has executed a service or loading order informing the farmer that for a certain sum of money he must be ready, willing, and able to store a certain amount of grain immi- nently.<sup>171</sup> The Agriculture Board of Contract Appeals has wrestled with the primary UGSA issue—at what stage of life does the UGSA become a contract and therefore become enforceable—at least nineteen times.<sup>172</sup>

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[UGSA] contract allows local elevators to store grain which has been pledged by producers for price support loans. Because such grain could only be stored at CCC-approved elevators, the Transportation-Warehouse Division of the Department of Agriculture conducts examinations of warehouse facilities under contract with the CCC in order to determine whether, according to the grain storage agreement, the warehouse is suitable for storage and that the warehouse's inventories as reflected in its records are actually on hand.

*See also* Cargill, Inc. v. Commodity Credit Corp., 275 F.2d 745, 747 (2d Cir. 1960), where the Second Circuit stated that a UGSA was a contract: "[i]n the summer of 1949 Cargill agreed that it would adapt these tanks for the storage of 5,000,000 bushels of corn. The contract was the 1946 form of the Uniform Grain Storage Agreement." *See also*, United States v. Int'l Fid. Ins. Co., 999 F. Supp. 1420, 1428-29 (D. Kan. 1998), where the District Court explained that an UGSA was a contract:

[t]he [CCC], an agency and instrumentality of the United States, 15 U.S.C. § 714, administers the major federal price support and agricultural commodity programs, and as a consequence, obtains grain from producers. 7 U.S.C. § 1421 et. seq. Congress has given CCC authority to enter into contracts, or Uniform Grain Storage Agreements . . . with public warehouses to store this grain. 15 U.S.C. § 714b(h).

169. 48 C.F.R. § 16.703 states clearly in pertinent part that "[a] basic ordering agreement is not a contract."

170. *See, e.g.*, PLB Grain Storage Corp., 94-3 BCA (CCH) ¶ 27,186 (Ag. B.C.A. 1994), where the Board explained an EGSA:

These appeals arose from Uniform Grain Storage Agreement (UGSA) No. A48-3-CCC- 2783, dated May 1, 1980, and an Extended Grain Storage Agreement (ESA) [sic] supplement to the UGSA dated February 12, 1982 (the contract). The agreements were entered into between the Commodity Credit Corporation (CCC) . . . whose contracts are administered by the Agricultural Stabilization and Conservation Service (ASCS), U. S. Department of Agriculture (USDA), and PLB Grain Storage Corporation (Appellant).

The UGSA/EGSA required appellant to make available a facility to store at least 13,541,594 bushels of CCC grain in exchange for CCC's payment of \$10,020.78 per day through December 31, 1986. Although the obligation of CCC to make such payments was not conditioned upon the actual storage of grain, appellant was obligated to protect the quantity and quality of any grain actually stored. *Id.*

171. *See, e.g.*, Gibson in re Dissolution of Delta Prod. Co., 93-2 BCA (CCH) ¶ 25, 615 (Ag. B.C.A. 1992), where the Board explained that sometimes the exact point of offer and acceptance is not crystal clear: "the UGSA does not set forth a specific ordering procedure or specify the manner in which offers and acceptances to store grain are to be made. Accordingly, whether an offer was made will depend upon general contract principles."

172. *See, e.g.*, Means Co., 95-2 BCA (CCH) ¶ 27,837 (Ag. B.C.A.1995) (finding a UGSA was an express contract); Agripen Fermentation Corp., 95-1 BCA (CCH) ¶ 27,389

As discussed later in this article, the BOA also goes through similar phases of its life: (1) the bare BOA that is described by the FAR;<sup>173</sup> (2) the BOA which is subject to an order that is unpriced;<sup>174</sup> (3) the BOA that is priced;<sup>175</sup> and (4) the BOA where there has been performance on the part of the contractor in response to a purchase order or service order.<sup>176</sup>

### III. FROM *REYNOLDS* TO *TRAUMA SERVICE GROUP* AND *TOTAL MEDICAL MANAGEMENT*

When ruling on 12(b)(1) motions to dismiss, the U.S. Court of Federal Claims, almost without exception, cited *Reynolds v. Army & Air Force Exchange Service*<sup>177</sup> as one of the leading Federal Circuit cases delineating the elements to be addressed on this motion. In fact, since it was decided 1988, *Reynolds* has been cited approximately 212 times by the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit.<sup>178</sup> Under *Reynolds*, plaintiffs suing the Government under the Tucker Act<sup>179</sup> first had to survive the Government's 12(b)(1) Motion to Dismiss for Lack of Jurisdiction to be entitled to an actual hearing on the merits of the case. Under *Reynolds*, plaintiffs had a difficult tripartite-elements test to overcome: (1) to plead proper jurisdiction, e.g., by

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(Ag. B.C.A. 1995) (finding that the board has jurisdiction to hear an appeal on an amount of corn released by the Government by the CCC under a UGSA contract); *In re* PLB Grain Storage Corp., 94-3 BCA (CCH) ¶ 27,186 (Ag. B.C.A. 1994) (finding that a USGA neither required CCC to store grain nor Appellant to accept grain, since grain was stored by mutual agreement); Howard W. McDaniel, 93-3 BCA (CCH) ¶ 26,211 (Ag. B.C.A. 1993) (finding that a USGA contract appeal is dismissed for exceeding 90-day statutory appeal requirement).

173. 48 C.F.R. § 16.703 (2002).

174. See discussion *infra* Part IV.B.

175. *Id.*

176. *Id.*

177. 846 F.2d 746 (Fed. Cir. 1988).

178. See, e.g., *Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999) (citing *Reynolds* for the proposition that fact finding is proper when jurisdictional facts are challenged); *Rocovich v. United States*, 933 F.2d 991, 994 (Fed. Cir. 1991) (citing *Reynolds* at 747, the court correctly allowed parties to submit relevant evidence about jurisdiction); *Registration Control Sys., Inc. v. Compusystems, Inc.*, 922 F.2d 805, 808 (Fed. Cir. 1990) (citing *Reynolds* at 746, the court stated that when issues of underlying facts that establish jurisdiction exist, relevant facts must be found by the trial court).

179. The Tucker Act, 28 U.S.C. § 1491, waives sovereign immunity from suit: for all claims founded upon the Constitution, statutes, regulations, or any contract, express or implied, with the U.S. Government. Originally passed in 1855 and enacted in its present form in 1887, the Tucker Act made the [United States] Court of Claims the major court resolving Government contract disputes, but gave federal district courts jurisdiction up to \$10,000. The Contract Disputes Act of 1978 repealed that part of the Tucker Act that gave the federal district courts jurisdiction over claims up to \$10,000 and gave contractors direct access to the Court of Claims to challenge contracting officer decisions on contract disputes. The Federal Courts Improvement Act further altered the process by creating the Court of Federal Claims (originally named the Claims Court) and the Court of Appeals for the Federal Circuit out of the former Court of Claims [and the former United States Court of Customs and Patent Appeals].

NASH ET AL., *supra* note 1, at 523-24 (internal citations omitted).

pleading a well-pled contract;<sup>180</sup> (2) to prove proper jurisdiction;<sup>181</sup> and (3) to fulfill its burden of proof by a preponderance of the evidence.<sup>182</sup> Moreover, when the Government's motion contained challenges to the truth of the jurisdictional facts contained in the complaint, the trial court was also able to consider relevant evidence outside of the pleadings in order to resolve those factual disputes.<sup>183</sup> However, in the mid-1990s, two decisions, *Total Medical Management v. United States*<sup>184</sup> (*TMM*) and *Trauma Service Group v. United States*<sup>185</sup> (*TSG*) caused a split in the United States Court of Federal Claims with respect to whether a contractor's well-pled contract allegation by itself was sufficient to overcome a Government's Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction.<sup>186</sup>

The appeals of both *TSG* and *TMM* to the U.S. Court of Appeals for the Federal Circuit (CAFC),<sup>187</sup> allowed the CAFC to resolve this split in the U.S. Court of Federal Claims.<sup>188</sup> On the same day, January 16, 1997, the Federal Circuit issued both decisions. These two appellate decisions

180. Reynolds, 846 F.2d at 747.

181. *Id.* at 748.

182. *Id.*

183. *Id.* at 747.

184. 29 Fed. Cl. 296 (1993).

185. 33 Fed. Cl. 426 (1995).

186. Compare *Total Med. Mgmt.*, 29 Fed. Cl. 296 (Judge Turner holding that challenges to jurisdiction are overcome on the basis of well-pleaded allegations in the complaint; the Tucker Act simply requires that for jurisdiction to exist, plaintiff's claim must be founded upon any express or implied contract with the United States), with *Trauma Serv. Group*, 33 Fed. Cl. 426 (Judge Weinstein, on the other hand, holding that even if memorandum of agreement were a contract, it was not enforceable under the Tucker Act where it set out no remedy for breach or nonperformance).

187. The Court of Appeals for the Federal Circuit is:

the appellate (reviewing) court for both the U.S. Court of Federal Claims and the various Agency Boards of Contract Appeals. Because the Supreme Court rarely considers decisions regarding Government contract disputes, the Court of Appeals for the Federal Circuit typically provides the last opportunity for their review. The Federal Courts Improvement Act of 1982 created the U.S. Court of Appeals for the Federal Circuit from the Appellate Division of the U.S. Court of Claims and the Court of Customs and Patent Appeals.

NASH ET AL., *supra* note 1, at 150 (internal citations omitted).

188. The United States Court of Federal Claims:

was established especially to hear and decide legal claims against the Government. It is an Article I court with judges appointed for 15-year terms. Its basic jurisdiction is conferred by 28 U.S.C. § 1491(a), but it has a variety of additional jurisdictional statutes. Under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended, this court shares concurrent jurisdiction with the Boards of Contract Appeals (BCAs) over Government contract disputes (each contractor appealing a decision of the Contracting Officer must elect either the agency BCA or the Court of Federal Claims). The other jurisdiction of the Court of Federal Claims most relevant to Government procurement concerns protests, 28 U.S.C. § 1491(b), disputes concerning fraud or forfeiture, 41 U.S.C. § 604, and Patent and Copyright disputes, 28 U.S.C. § 1498. The Federal Courts Improvement Act of 1982 created this court (called the Claims Court until 1992) from the Trial Division of the Court of Claims.

Nash et al., *supra* note 1, at 151.

will no doubt have a substantial impact on all Executive Agencies' BOAs because they will allow BOAs, from this point on, when simply accompanied by a well-pled contract in a complaint, to overcome a Government's 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction,<sup>189</sup> thus eliminating once and for all the numerous hurdles *Reynolds* had placed in front of contractors before they could actually have a trial on the merits of their complaint before the U.S. Court of Federal Claims. These two Federal Circuit decisions should also force the revision of relevant BOA sections in the FAR and the DFARS, particularly where they state unequivocally that "[a] basic ordering agreement [BOA] is *not* a contract."<sup>190</sup> As we will see, subsequent decisions, in general, have held that BOAs, accompanied by a complaint containing a well-pled contract, will now successfully overcome a Government's Rule 12(b)(1) Motion to Dismiss for Lack of Jurisdiction.

A. REYNOLDS' REJECTION OF AN APPELLANT'S WELL-PLED  
CONTRACT DEFENSE TO A GOVERNMENT'S MOTION TO  
DISMISS FOR LACK OF JURISDICTION

The *Reynolds* case stands for the proposition that a well-pled contract in a BOA complaint is never sufficient to overcome a government's 12(b)(1) Motion to Dismiss for Lack of Jurisdiction.<sup>191</sup> *Reynolds* requires that in order for a plaintiff to have his day in court, he must first prevail at the oral hearing devoted solely to the Government's Rule 12(b)(1) Motion to Dismiss.<sup>192</sup> Under *Reynolds*, appellant faces a tripartite-elements test at the motions hearing: (1) to plead proper jurisdiction, such as by pleading a well-pled contract;<sup>193</sup> (2) to prove successfully the court's proper jurisdiction;<sup>194</sup> and (3) to fulfill its burden of proof by a preponderance of the evidence.<sup>195</sup> During the history of the application of *Reynolds*' tripartite-elements test, the Federal Circuit has woven in additional guidelines for the trial judge. For example, when considering whether to dismiss the complaint for lack of subject matter jurisdiction

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189. Rule 12(b)(1) of the Court of Federal Claims reads in pertinent part:  
Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto of one if required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter.

R. CT. FED. CL. 12(b)(1). See *Total Med. Mgmt.*, 104 F.3d at 1319 ("the law is clear that, for the Court of Federal Claims to have jurisdiction, a valid contract must only be pleaded, not ultimately proven") and *Trauma Serv. Group*, 104 F.3d at 1324 ("[a] well-pled allegation in the complaint is sufficient to overcome challenges to jurisdiction").

190. 48 C.F.R. § 16.703(a). See also 48 C.F.R. § 16.703(c) where the FAR states "[a] basic ordering agreement [BOA] shall not state or imply any agreement by the Government to place future contracts or orders with the contractor or be used in any manner to restrict competition."

191. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746 (Fed. Cir. 1988).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

pursuant to Rule 12(b)(1), the trial court must accept as true any *undisputed* allegation of fact made by plaintiffs;<sup>196</sup> when disputed facts relevant to the issue of jurisdiction exists, the trial court is required to decide those facts;<sup>197</sup> when the trial court is resolving the conflict between disputed facts in the pleadings, the court may also take relevant evidence outside of the pleadings, such as additional memoranda, exhibits, and affidavits, in order to resolve the disputes necessary to make a decision on the motion,<sup>198</sup> notwithstanding the fact that trial courts are normally strictly limited to the four corners of the pleadings when deciding such motions.<sup>199</sup> Trial courts also should not grant a motion to dismiss unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.<sup>200</sup> On the other hand, conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss.<sup>201</sup>

## B. THE DISMANTLING OF *REYNOLDS*: THE 12(B)(1) JURISDICTIONAL ACCEPTANCE OF A WELL-PLED CONTRACT ALONE

### 1. *Trauma Service Group Before the Court of Federal Claims*

Trauma Services Group, Ltd., a provider of health care services under a CHAMPUS partnership agreement, sued the Federal Government in the U.S. Court of Federal Claims, to recover the salary it paid to an X-ray technician who allegedly performed services pursuant to the CHAMPUS agreement.<sup>202</sup> Under the rules of the U.S. Court of Federal Claims, the Government had sixty days to file its answer that could contain, *inter alia*, a Rule 12(b)(1), a Rule 12(b)(4), or a Rule 56 Motion.<sup>203</sup> In its answer, the Government filed "Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment."<sup>204</sup> The Government moved: (1) to dismiss for lack of jurisdiction over the subject matter under Rule 12(b)(1); (2) to

196. *Reynolds*, 846 F.2d at 746-47 (emphasis added).

197. *Id.* at 747.

198. See *Vink v. Hendrikus Johannes Schijf, Rolkan N.V.*, 839 F.2d 676, 677 (Fed. Cir. 1988) (finding trial court was correct when it considered additional memoranda, exhibits, and affidavits prior to issuing an order of dismissal in a Rule 12(b)(1) motion proceeding); See also *Indium Corp. v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985) (holding that, in deciding such a Rule 12(b)(1) motion, the trial court can consider, as it did in this case, evidentiary matters outside the pleadings).

199. See *Cupey Bajo Nursing Home, Inc. v. United States*, 23 Cl. Ct. 406, 411 (1991) (holding that when facts relevant to the issue of subject matter jurisdiction are disputed, the court may consider evidence outside the pleadings to resolve those disputed facts) (citing *Reynolds*, 846 F.2d at 747).

200. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

201. See *Briscoe v. Lahue*, 663 F.2d 713, 723 (7th Cir. 1981), *aff'd*, 460 U.S. 325 (1983).

202. *Trauma Serv. Group, Ltd. v. United States*, 33 Fed. Cl. 426 (1995).

203. See R. CT. FED. CL. Rule 12(b) which states in pertinent part "Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) insufficiency of process, and (4) failure to state a claim upon which relief can be granted. . ."

204. See *Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment*, at 1, *Trauma Serv. Group, Ltd.*, 33 Fed. Cl. 426 (1995).

dismiss for failure to state a claim upon which relief could be granted under Rule 12(b)(4); and (3) for summary judgment under Rule 56.<sup>205</sup> The government framed the issue before the U.S. Court of Federal Claims as “whether the Memoranda of Understanding (MOU)” between Trauma Services Group, Ltd. (TSG) and the Department of the Army (Army) contains the requisite elements for a contract, given that it does not state that it is binding and that it does not contain any remedies for breach.”<sup>206</sup> Because “the only agreements [upon] which TSG brings this action are its MOUs with the Army” and since “MOUs are not binding, enforceable contracts,” the Government maintained that MOUs could not provide the “binding express contract”<sup>207</sup> necessary to vest the U.S. Court of Federal Claims with proper jurisdiction.<sup>208</sup> Moreover, the Government added that the “MOUs [were] not sufficiently complete or certain in their terms so that the promises and performances to be rendered [could be] reasonably determined.”<sup>209</sup> “When challenged by a Rule 12(b)(1) motion to dismiss,” the Government maintained, “a plaintiff bears the burden of proving the soundness of its allegations of jurisdiction,”<sup>210</sup>

Plaintiff TSG, on the other hand, proffered the cardinal issue as “whether Plaintiff has *sufficiently alleged* that this Honorable Court has subject matter jurisdiction over Plaintiff’s claim?”<sup>211</sup> Plaintiff argued, *inter alia*, that MOUs were contracts and were “binding and enforceable” citing the Restatement (Second) of Contracts that the Memorandum of Understanding between plaintiff and defendant was a “promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”<sup>212</sup> For the authorization to contract, plaintiff cited 10 U.S.C. § 1097 (Supp. 1993): “[T]he Secretary of Defense . . . may *contract* for the delivery of health care to which covered beneficiaries are entitled . . . [and] may enter into a *contract* . . . with . . . (1) Health maintenance organizations. (2) Preferred provider organizations. (3) Individual providers . . . [or] (4) Consortiums

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205. Defendant’s Motion to Dismiss or, in the Alternative, for Summary Judgment (No. 94-547C).

206. *Id.*

207. The Government points out in one of their footnotes that the elements for either an express or an implied-in-fact contract are the same (citing *Schuerman v. United States*, 30 Fed. Cl. 420, 426 (1994)); *Jsasi v. Rivkind*, 856 F.2d 1520, 1525 (Fed. Cir. 1988) (holding that the establishment of an implied-in-fact contract requires proof of the same elements as for a showing of an express contract).

208. See Defendant’s Motion to Dismiss at 9, *Trauma Serv. Group, Ltd.* (No. 94-547C).

209. *Id.*

210. *Id.* at 10. *Am. Pac. Roofing Co. v. United States*, 21 Cl. Ct. 265, 267 (1990) (“where the court’s jurisdiction is put in question, plaintiff ‘bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence’”) (quoting *Reynolds*, 846 F.2d at 748).

211. See Plaintiff’s Response to Defendant’s Motion to Dismiss or, in the Alternative, for Summary Judgment, at 2, *Trauma Serv. Group, Ltd.* (No. 94-547C) (emphasis added).

212. RESTATEMENT (SECOND) OF CONTRACTS §1 (1979).



of such providers. . . .”<sup>213</sup> Moreover, according to plaintiff, “[t]he MOUs are binding, enforceable contracts, signed by authorized Government personnel to acquire services from a private contractor to be paid for with legislatively appropriated funds.”<sup>214</sup> The MOU was supported by “consideration, *inter alia*, by Plaintiff, in the form of Plaintiff’s performance which was in exchange for Defendant’s promises embodied in the MOU. . . .”<sup>215</sup>

In the Government’s “Reply to Plaintiff’s Response,” the Government averred that

TSG simply asserts that the MOUs are contracts and that such alleged contracts is [sic] covered by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601 *et seq.* However, TSG’s assertions simply ignore the precise issue before this court: *whether the MOUs are contracts in the first instance.* Accordingly, because TSG has not made the requisite showing, defendant’s motion to dismiss . . . should be granted.<sup>216</sup>

In its decision, the U.S. Court of Federal Claims, Judge Weinstein presiding, reached four cardinal conclusions: (1) that this particular MOA was not a binding contract;<sup>217</sup> (2) that this MOA was not authorized and therefore unenforceable;<sup>218</sup> (3) that plaintiff’s claim was tortious and not contractual;<sup>219</sup> and (4) that this MOA under CHAMPUS was *not* primarily for the “direct benefit or use” of the Government under the CHAMPUS program.<sup>220</sup> The trial court’s reasoning behind conclusions one and four, I believe, was particularly weak, notwithstanding the fact that the Federal Circuit affirmed the ultimate decision. The trial court<sup>221</sup> reached its first conclusion, that the MOA was not a contract, on the grounds that this particular MOA did not set forth a breach remedy, therefore it could not be a contract. In reaching this conclusion, it relied solely on a 1994 U.S. Court of Federal Claims case, *Aerolineas Argentinas v. United States*,<sup>222</sup> also authored by Judge Weinstein. Judge Weinstein’s own cited opinion that was subsequently reversed, vacated, and remanded by the federal circuit,<sup>223</sup> was the only case Judge Weinstein relied

213. Plaintiff’s Response to Defendant’s Motion to Dismiss, at 9, *Trauma Serv. Group, Ltd.* (No. 94-547C).

214. *Id.* at 10.

215. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 71, 72 (1979)).

216. See Defendant’s Reply to Plaintiff’s Response to Defendant’s Motion to Dismiss or, in the Alternative, for Summary Judgment, at 1, *Trauma Serv. Group, Ltd.* (No. 94-547C) (emphasis added).

217. *Trauma Serv. Group*, 33 Fed. Cl. at 430.

218. *Id.* at 431.

219. *Id.* at 432.

220. *Id.* at 429.

221. The same United States Court of Federal Claims.

222. 31 Fed. Cl. 25, 35-36 & n.13 (1994).

223. *Aerolineas Argentinas v. United States*, 77 F.3d 1564 (1996) (holding that the Tucker Act provided jurisdiction to recover sums exacted illegally by Immigration and Naturalization Service (INS) due to this misinterpretation of or misapplication of statutes, regulations or forms; that, moreover, imposing on airlines the cost of long-term detention of excludable aliens after assignment of that obligation to the INS with money in user fee

upon to support her conclusion that the instant MOA was not a contract. *Aerolineas Argentinas*<sup>224</sup> unfortunately (1) had nothing to do with a “BOA” a “MOA” or “CHAMPUS;” (2) never mentioned the terms “BOA,” “MOA,” or “CHAMPUS” in its opinion; (3) dealt with an *enforceable* contract and the interpretation thereof; and (4) could in fact just as easily have been found to be *inapposite* because the contract in question (Form I-426, The Immediate and Continuous Transit Agreement with the INS) also did not provide a remedy for the financial harm that was caused to the airlines involved.<sup>225</sup>

The trial judge, unfortunately, did not mention that the obvious lack of remedy in this agreement, Form I-426, for the financial harm suffered by the airlines in her cited case, was any cause for concern whatsoever with regard to the agreement’s enforceability. For example, should the fact that the Form I-426 agreement lacked a remedy for a reasonably foreseeable financial harm suffered by the airlines create a problem as to the enforceability of this agreement? Perhaps the trial judge believed that using the “*cf.*”<sup>226</sup> designation for its only cited case,<sup>227</sup> *Aerolineas Argentinas*,<sup>228</sup> resolved the serious problem of relevancy—at the very least, the problem of extreme attenuation or nexus between the two opinions, or, at the very worst, the substantial problem that the trial judge’s cited case was actually inapposite. The trial judge’s only cited case, *Aerolineas Argentinas*, could actually have been construed as inapposite because it could have stood for the proposition that an agreement could still be an

account was an illegal exaction of monies to meet obligation of the federal government; and that the airlines were entitled to recovery of monies exacted).

224. *Id.*

225. See *Aerolineas Argentinas*, 31 Fed. Cl. at 25. *Aerolineas Argentinas* Airlines, complying with the orders of U.S. immigration officials, detained six passengers and suffered damages of \$162,000, while Pakistan International Airlines suffered damages of \$89.34.54 due to compliance with the same orders. *Id.* at 28-29.

226. According to the Bluebook, “*cf.*” means “compare.” It continues to explain that the “cited authority supports a proposition different from the main proposition” and that “[t]he citation’s relevance will usually be clear to the reader only if it is explained. Parenthetical explanations, however brief, are therefore strongly recommended.” (emphasis supplied). THE BLUEBOOK, A UNIFORM SYSTEM OF CITATION, R. 1.2(a) at 23 (Columbia Law Review Ass’n eds., 17th ed. 2000). The trial judge did not provide any parenthetical explanation when she “*cf-ed*” *Aerolineas*, as the Bluebook strongly urges.

227. A fair question to ask the trial court was why it did not cite or at least distinguish an earlier opinion from the same Court of Federal Claims that had issued just two years previously that dealt directly with BOAs and a CHAMPUS MOU and even included the same Government’s Rule 12(b)(1) Motion for Lack of Subject Matter Jurisdiction, i.e., *Total Med. Mgmt.*, 104 F.3d at 1314. This would have been a very relevant cite, and one that would not have needed the use of a “*cf.*” If the trial court did not agree with the Court of Federal Claim’s earlier decision in *TMM*, which had almost identical issues, the trial court at least had a duty to state that it was cognizant of the Court of Federal Claim’s earlier decision, and to provide reasons why it believed *TMM* was irrelevant or distinguishable. The *TSG* opinion did neither.

228. *Aerolineas Argentinas*, 77 F.3d at 1564. The trial court’s opinion was also collaterally attacked and suffered a reversal in the District of Columbia Court of Appeals in *Air Transp. Ass’n of Am. v. Reno*, 80 F.3d 477 (D.C. Cir. 1996) (holding that the Immigration and Naturalization Service (INS) lacked statutory authority to require airline carriers to pay detention expenses of stowaways applying for asylum, since they were excludable, not excluded, and statute justifying stowaway policy applied only to excluded aliens).

enforceable contract even though it did not provide a specific remedy for a reasonably foreseeable problem.<sup>229</sup> A second shaky conclusion reached by the trial judge was that “the MOA is not primarily for the ‘direct benefit or use’ of the government.”<sup>230</sup> Yet, the trial judge wrote a statement earlier in her opinion that appears, at worst, to contradict the trial judge’s conclusion, or at best to make this particular conclusion a *non sequitur*. In the same paragraph, the trial judge stated, “the principal purpose of the MOA, as authorized by § 1096, is mutual assistance in *carrying out the purposes of the CHAMPUS program, facilitating the delivery of [medical] care to third-party CHAMPUS beneficiaries, and reducing costs for both parties.*”<sup>231</sup> Moreover, the plaintiff in *TSG* gave a detailed and persuasive argument regarding the “beneficial use” of the CHAMPUS MOU to the families of our military in its “Memorandum of Law.” Plaintiff explained “that both active and retired personnel, and their qualified dependents, are entitled to medical care at military facilities pursuant to the Dependents Medical Care Act of 1956,” and that “[P]laintiff, a Pennsylvania corporation in the business of providing health care, contracted via an MOU with defendant [and] Plaintiff agreed in said contract . . . to provide certain outpatient health care services at WACH in exchange for compensation to plaintiff therefor. . . .”<sup>232</sup>

Notwithstanding the fact that health services were being provided to the army by qualified medical doctors or physicians, as well as other medical support professionals, and to the families of our enlisted military personnel, the trial judge still insisted that this MOU CHAMPUS agreement was *not* for the benefit of the military service. The trial judge’s opinion completely ignored plaintiff’s detailed explanation of the “beneficial use” of plaintiff’s CHAMPUS MOU agreement whereby it provided medical doctors, nurses, etc., to serve the families of our military.<sup>233</sup>

However, notwithstanding the clear weaknesses in at least two of the four cardinal conclusions as demonstrated above, the federal circuit still affirmed the trial court’s *TSG* opinion on other grounds. It is important to note that while the trial judge’s *TSG* opinion granted both the Government’s 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction and its 12(b)(4) Motion to Dismiss for Failure to State a Claim upon

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229. The lower court stated in pertinent part:

[f]inally, the regulation excluding detention of TWOV passengers from the ambit of 8 U.S.C. § 1356 also establishes that the law does not mandate the payment of money to plaintiffs under these circumstances. . . . Plaintiffs do not argue that any statute other than 8 U.S.C. § 1356 provides a basis for jurisdiction. Because 8 U.S.C. § 1356 cannot fairly be interpreted as mandating compensation for a carrier’s detention expenses, the court cannot base jurisdiction over the airlines’ claims on that statute.

*Aerolíneas Argentinas*, 31 Fed. Cl. At 32 (internal citation omitted).

230. *Trauma Serv. Group, Ltd. v. United States*, 33 Fed. Cl. 426, 429 (1995).

231. *Id.* (emphasis added).

232. Plaintiff’s Response to Defendant’s Motion to Dismiss at 5, *Trauma Serv. Group, Ltd.* (No. 94-547C) (emphasis added).

233. See *Trauma Serv. Group, Ltd.*, 33 Fed. Cl. at 429.

which relief can be granted,<sup>234</sup> the Federal Circuit only affirmed the trial court's granting of the Government's 12(b)(4) motion.<sup>235</sup> It correctly reversed the trial judge's granting of the Government's Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction.<sup>236</sup> However, the affirmance of just one of the two motions to dismiss granted by the trial court, i.e., the affirmance of the trial judge's granting the government's 12(b)(4) motion, was sufficient to affirm this trial judge's opinion.<sup>237</sup> Accordingly, the Federal Circuit's *reversal* of the trial judge's granting of the Government's Rule 12(b)(1) Motion for Lack of Jurisdiction did not ultimately hurt the Government.

The distinctions between the two motions, as well as the legal effects of their different results, are significant. A dismissal under 12(b)(1) motion for lack of subject matter jurisdiction is *not* an adjudication on the merits, but a "dismissal under 12(b)(4) motion for failure to state a claim upon which relief can be granted would bar a future suit by this plaintiff."<sup>238</sup> Therefore, when the trial court's granting of the government's rule 12(b)(4) motion was affirmed by the federal circuit, plaintiff was barred forever from pursuing this particular suit!

## 2. *Total Medical Management Before the U.S. Court of Federal Claims*

The appeal of *TMM* was actually decided by the same trial court, the United States Court of Federal Claims just two years before the *TSG* opinion, but by another trial judge.<sup>239</sup> As discussed earlier, *TMM* raised issues almost identical to those raised in *TSG*. In *TMM*, another private health care provider sued the Government claiming it was paid lower rates than allegedly bargained for in certain agreements to provide health care services under the Civilian Health and Medical Program of the Uni-

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234. The Federal Circuit stated in pertinent part "[t]he Court of Federal Claims based its decision to dismiss the complaint on both lack of subject matter jurisdiction, under RCFC 12(b)(1), and on failure to state a claim, under RCFC 12(b)(4)." *Trauma Serv. Group, Ltd.*, 104 F.3d at 1324.

235. The Federal Circuit reiterated the three-prong attack the Government used, the Rule 12(b)(1) Motion to Dismiss; the Rule 12(b)(4) Motion to Dismiss, and the Rule 56 Summary Judgment Motion, wherein the trial court granted both Motions to Dismiss. It explained that "[t]o affirm the trial court, this court need only find sufficient justification for one of these grounds." *Id.* (citing *Fromson v. Advance Offset Plate, Inc.*, 755 F.2d 1549, 1556 (Fed. Cir. 1985)). It then stated "[b]ecause the trial court properly granted the Motion to Dismiss under RCFC 12(b)(4), this court affirms." *Id.* at 1323.

236. *Id.* This is clear from a reading of the Federal Circuit's opinion because the court did not state, as it did for the lower court's granting of the 12(b)(4) Motion, that it affirmed the granting of the 12(b)(1) Motion. Moreover, the federal circuit stated, "[a] well-pleaded allegation in the complaint is sufficient to overcome challenges to jurisdiction." *Id.* at 1325 (citing *Spruill v. Merit Sys. Protections Bd.*, 978 F.2d 679, 686 (Fed. Cir. 1992)). *TSG's* complaint alleges that an express and in the alternative, an implied-in-fact contract underlies its claim. "*This allegation suffices to confer subject matter jurisdiction in the Court of Federal Claims.*" *Id.* at 1324 (emphasis added)

237. The Federal Circuit explained that "[t]o affirm the trial court, this court need only find sufficient justification for one of these grounds [either the Rule 12(b)(1) motion or the Rule 12(b)(4) motion]." *Id.*

238. *Hedman v. United States*, 15 Cl. Ct. 304, 306 (1988).

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

formed Services (CHAMPUS).<sup>240</sup> TMM brought suit against the United States Department of the Army for alleged breaches of contract pursuant to the CDA.<sup>241</sup> TMM claimed damages based upon the Army's breach of the parties' MOU between TMM and the Ireland Army Hospital, Fort Knox, Kentucky, to provide internal medicine services at the hospital for military health beneficiaries. Plaintiff explained that "[s]tatutorily specified military personnel, both active and retired, and their qualified dependents, are entitled to medical care at military facilities pursuant to the Dependents Medical Care Act . . .," and that Plaintiff "contracted via an MOU with Defendant [to] certain outpatient health care services at WACH in exchange for compensation to Plaintiff therefor which Defendant therein agreed to provide."<sup>242</sup>

The Government's Motion to Dismiss was brought solely under Rule 12(b)(1),<sup>243</sup> i.e., not accompanied by a 12(b)(4) motion or a summary judgment motion as was the case in the appeal of *TSG*.<sup>244</sup> The Government maintained that notwithstanding the MOU between TMM and the Ireland Army Hospital at Fort Knox, no contract existed and that consequently the U.S. Court of Federal Claims lacked subject matter jurisdiction.<sup>245</sup> In its motion to dismiss, the Government used a two-prong attack. First, it argued that because "no contracting officer's decision was ever rendered or requested," the court determined it did not have proper jurisdiction pursuant to the CDA. It relied on *United States v. Grumman Aerospace Corp.*<sup>246</sup> and *Paragon Energy Corp. v. United States*,<sup>247</sup> both standing for the proposition that there must first be a contracting officer's decision or a request for such decision before an appeal to the court can be taken.<sup>248</sup> Second, while the Government admits that TMM submitted its claim to Colonel Clements, the Commander of the Ireland Army Community Hospital, the Government avers that Colonel Clements was not a contracting officer<sup>249</sup> and therefore lacked the authority to bind the

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240. *Total Med. Mgmt.*, 29 Fed. Cl. at 296-98.

241. *Id.*

242. Plaintiff's Response to Defendant's Motion to Dismiss at 4-5, *Trauma Serv. Group, Ltd.*, (No. 94-547C) (emphasis added) (citations omitted).

243. See Defendant's Motion to Dismiss at 1, *Trauma Serv. Group, Ltd.* (No. 94-547C). Footnote 1 of the defendant's motion reminded the court that it had a right to consider evidentiary matters outside the four corners of the pleadings when necessary (citing *Indium Corp. of Am. v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985)).

244. *Total Med. Mgmt.*, 29 Fed. Cl. at 298.

245. *Id.*

246. 927 F.2d 575 (Fed. Cir. 1991) (reviewing a line of cases interpreting submission of a claim to the contracting officer, properly certified if necessary, and the rendering of a final decision upon the claim, as a jurisdictional prerequisite to an action upon the claim before the U. S. Court of Federal Claims).

247. 227 Ct. Cl. 176 (1981) (stating that in order to invoke the jurisdiction of this court under the direct access section of the Contract Disputes Act—§ 609(a)(1)—there must first be a "decision" or failure to decide by the contracting officer).

248. See *Aerolineas Argentinas*, 77 F.3d at 1571-73.

249. A contracting officer (CO) is an employee of the Government with the authority to bind the Government legally by signing a contractual instrument. 48 C.F.R. § 1.601(a) (2002). Section 2.101 defines a contracting officer as a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings.

Government to any contract. The Government concluded in its 12(b)(1) motion that “TMM may have another avenue of relief in a different court. . . .”<sup>250</sup> Notwithstanding the Government’s kind suggestion, its brief suggests that such relief in a different court was almost an impossibility.<sup>251</sup> Plaintiff, instead of filing a Response to Defendant’s Motion to Dismiss, filed a response to a Summary Judgment Motion that, not surprisingly, did not address any arguments against granting the Rule 12(b)(1) Motion. Instead it focused on the existence of a dispute of relevant material facts in an attempt to defeat the Government’s Summary Judgment Motion.<sup>252</sup> On this Government’s attack against jurisdiction pursuant to a Rule 12(b)(1) Motion to Dismiss, unlike the trial judge in *TSG* that faced the same issue, the *TMM* trial judge, Judge Turner, essentially held that a well-pled contract alone could overcome a Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction.<sup>253</sup> Judge Turner held “[f]or purposes of deciding this motion, it does not matter whether the existence of a contract in this case is a question of law, a question of fact, or a hybrid.”<sup>254</sup> “The important point is that questions of law, like issues of fact, can only be decided after and not before the

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Contracting officers are appointed in writing, on Standard Form 1402, Certificate of Appointment. 48 C.F.R. § 53.301-1402 (West 2002). In selecting contracting officers, the appointing official must consider the complexity and dollar value of the acquisitions to be assigned and the candidates’ training, education, business acumen, judgment, character, and reputation. *NASH ET AL.*, *supra* note 1, at 127.

250. See Defendant’s Motion to Dismiss, at 13, *Total Med. Mgmt.*, (No. 92-838C).

251. In its Motion to Dismiss the Government propounds:

the limitations and strict construction of the CDA warrant that this Court dismiss TMM’s complaint for lack of subject matter jurisdiction. Without satisfying the strict prerequisites of a contracting officer’s binding commitment and a final decision in response to a properly certified claim, TMM cannot look to this court for relief. Nor can TMM seek relief based upon the equities of its assertions. As the Federal Circuit stated clearly in *UNR Indus. Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992), *cert. granted sub nom. Keene Corp. v. United States*, 113 U.S. 373 (1992), “we cannot extend jurisdiction in the interest of equity.”

*Id.* at 13-14. Moreover, pursuant to the Tucker Act and the CDA, the only federal court with jurisdiction to hear claims against the United States founded upon any contract, express or implied, with the United States Government, is the United States Court of Federal Claims. See *supra* note 12.

252. TMM titled its response “Plaintiff’s Opposing Brief to Defendant’s Cross-Motion for Summary Judgment” and accordingly devoted its entire efforts against being dismissed on the merits in a summary judgment:

[t]he Government cannot prevail by showing that their interpretation of the alleged ambiguity is somehow better than the contractor’s interpretation, rather, the crucial issue is whether the contractor’s interpretation is within a zone of reasonableness.” *Fry Communications, Inc. v. United States*, 22 Cl. Ct. 497 (1991). Under the doctrine of “Contra Proferentum,” if any language in a government-drafted agreement between the government and a private party is ambiguous, that language may be construed against the government if the private party’s interpretation lies within a zone of reasonableness. *Temple v. United States*, 11 Cl. Ct. 302 (1986).

See Plaintiff’s Opposing Brief to Defendant’s Cross-Motion for Summary Judgment at 2, *Total Med. Mgmt., Inc.* (No. 92-838C).

253. *Total Med. Mgmt.*, 29 Fed. Cl. at 298.

254. *Id.* at 298.

court has assumed jurisdiction,” maintained Judge Turner.<sup>255</sup> Consequently, “Defendant’s [the Government’s] argument that no contract existed, thus challenges plaintiff’s [TMM’s] case *on the merits*, not the court’s jurisdiction.”<sup>256</sup> Therefore, Judge Turner explicated, “[c]hallenges to jurisdiction are overcome simply ‘on the basis of well-pleaded allegations in the complaint.’”<sup>257</sup> Accordingly, Judge Turner continued, “[j]urisdiction should not be confused with entitlement to relief which, of course, does require proof of the contract or other substantive element in question.”<sup>258</sup> Finally, “for purposes of a Rule 12(b)(1) motion, the usual presumption is that *a contract exists if it is properly alleged.*”<sup>259</sup> Judge Turner concluded, “For the foregoing reasons, the defendant’s motion to dismiss for lack of subject matter jurisdiction is DENIED.”<sup>260</sup>

Although *TMM* was ultimately reversed, the Federal Circuit did affirm Judge Turner’s ruling that a well-pled contract in a complaint filed with the United States Court of Federal Claims is sufficient to overcome a Government’s Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction. The Federal Circuit explained in pertinent part:

Although the government argues that jurisdiction is lacking because there was no enforceable contract, the law is clear that, for the Court of Federal Claims to have jurisdiction, a valid contract must only be pleaded, not ultimately proven . . . . There is no question that TMM pleaded the existence of a valid contract here. The proper question, despite the government’s label, is one on the merits: whether TMM failed to state a claim upon which relief can be granted.<sup>261</sup>

### 3. Trauma Service Group *before the Federal Circuit.*

On the same day, January 16, 1997, the United States of Appeals for the Federal Circuit issued its decisions on both the *TSG* and *TMM* appeals.<sup>262</sup> In *TSG*, the Federal Circuit (Chief Judge Archer and Associate Judges Michel and Rader) first held that a well-pleaded allegation in the

255. *Id.* (citing *Ralston Steel Corp. v. United States*, 340 F.2d 663, 667 (Ct. Cl. 1965) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). The court explains further in footnote 1 of its opinion:

This principle is also discussed in *Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 689 (Fed. Cir. 1992) (explaining that when [the] “outcome turns on a state of facts that cannot be known until after the [tribunal] has . . . decided them,” the court should take jurisdiction and decide on the merits). See *E. Trans-Waste of Maryland, Inc. v. United States*, 27 Fed. Cl. 146, 149-50 (1992) (discussing the non-jurisdictional nature of disputes over the existence of privity on contract); *Metzger, Shadyac & Schwartz v. United States*, 10 Cl. Ct. 107, 109 (1986) (Bruggink, J.) (discussing the non-jurisdictional nature of disputes as to the existence of a contract).

*Total Med. Mgmt.*, 29 Fed. Cl. at 298.

256. *Id.* at 299 (emphasis added).

257. *Id.*

258. *Id.* (citing *Spruill*, 978 F. 2d at 686-88; *E. Trans-Waste of Md., Inc.*, 27 Fed. Cl. at 149-50).

259. *Total Med. Mgmt.*, 29 Fed. Cl. at 299 (emphasis added).

260. *Id.* at 302.

261. *Total Med. Mgmt.*, 104 F.3d at 1319 (citations omitted).

262. *Trauma Serv. Group*, 104 F.3d at 1321; *Total Med. Mgmt.*, 104 F.3d at 1314.

plaintiff's complaint is sufficient to overcome a Government's Rule 12(b)(1) challenge to the jurisdiction of U.S. Court of Federal Claims.<sup>263</sup> The Federal Circuit explained:

[a] well-pleaded allegation in the complaint is sufficient to overcome challenges to jurisdiction. . . . TSG's complaint alleges that an express and, in the alternative, an implied-in-fact contract underlies its claim. This allegation suffices to confer subject matter jurisdiction in the Court of Federal Claims . . . . Jurisdiction, therefore, is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. . . .<sup>264</sup>

Secondly, the Federal Circuit stated that an agreement, such as an MOA, can be a contract within the meaning of the Tucker Act, conferring jurisdiction on the U.S. Court of Federal Claims which hears and determines claims against the United States founded upon express or implied contracts with the United States, thus also reversing Judge Weinstein on this point of law.<sup>265</sup> Judge Weinstein had concluded that the MOA under CHAMPUS could not qualify as a government contract because it was not for the "direct benefit or use" of the government because it provided a medical service for the families of the military personnel, not the military personnel themselves. The Federal Circuit reversed this finding of Judge Weinstein, stating in pertinent part:

[a]ny agreement [including a MOA] can be a contract within the meaning of the Tucker Act, provided that it meets the requirements for a contract with the Government, specifically: mutual intent to contract including an offer and acceptance, consideration, and a Government representative who had actual authority to bind the Government. . . . As such, contrary to the opinion of the trial court, a MOA can also be a contract. . . .<sup>266</sup>

The Federal Circuit added that the agreement must, of course, contain a mutual intent to contract, including offer and acceptance, consideration, and a government representative who had actual authority to bind the government.<sup>267</sup> Accordingly, the MOA in question can be a contract within the meaning of the Tucker Act.<sup>268</sup> However, notwithstanding the fact that Plaintiff won these battles at the Federal Circuit, it still lost the war, because it was unable to prove that it had an implied-in-fact contract that the Tucker Act demands.<sup>269</sup> As the Federal Circuit stated: "[t]he Tucker Act supplies the Court of Federal Claims with jurisdiction for claims against the United States founded upon the Constitution, an Act of Congress, a regulation of an executive department, or an express or

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263. *Bell v. Hood*, 327 U.S. 678 (1946).

264. *Trauma Serv. Group*, 104 F.3d at 1325 (citations omitted).

265. *Id.* at 1326.

266. *Id.* at 1326 (citations omitted).

267. *Id.*

268. *Id.*

269. *Id.* at 1324.



implied contract. 28 U.S.C. § 1491(a)(1).”<sup>270</sup>

#### 4. Total Medical Management *Before the Federal Circuit*

In *Total Medical Management v. United States*, the same panel of judges on the United States Court of Appeals for the Federal Circuit as in *TSG* (Chief Judge Archer and Associate Judges Michel and Rader), first found that the U.S. Court of Federal Claims had jurisdiction under the Tucker Act; that a valid contract need only be pled in the Complaint, not ultimately proven; thus affirming Trial Judge Turner’s denial of the Government’s Rule 12(b)(1) Motion for Lack of Subject Matter Jurisdiction. The appellate court reiterated:

[t]he Tucker Act limits the jurisdiction of the Court of Federal Claims to any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. 28 U.S.C. § 1491(a)(1) (1994).<sup>271</sup>

Second, the Federal Circuit found that Plaintiff’s MOU with the United States to provide health care to dependents of members of the uniformed services was indeed a procurement contract for the benefit of the government, and, therefore, was subject to the CDA,<sup>272</sup> again upholding Judge Turner’s finding. The Federal Circuit explained that “the existence of the negotiated, signed MOUs evidences offer and acceptance,” and that there was also “consideration in the mutuality of obligation.”<sup>273</sup> Mutuality of obligation existed because “TMM is to provide discounted health care services; the Army is to provide support staff and free space in the military hospital.”<sup>274</sup> Moreover, the Federal Circuit added, “[t]he MOUs were forwarded to the Associated Group, the CHAMPUS approval designee, and were approved. Therefore, we hold that the MOU was ratified by a government representative with the authority to bind the United

270. *Id.* “On this record, TSG would have to base any action against the United States on a *contract implied-in-law* or on a tort theory. The Court of Federal Claims lacks jurisdiction to hear these suits.” *Id.* at 1327 (emphasis added).

271. *Total Med. Mgmt.*, 104 F.3d at 1319; *see supra* text accompanying note 256.

272. *Id.* at 1320 (MOUs are subject to the Contract Disputes Act, 41 U.S.C. § 602(a), because they are procurement contracts for the benefit of the government). It is “clear that the government has legal obligations to military dependents and benefits by obtaining said dependents’ care at a reduced cost.” *Id.* 41 U.S.C. § 602(a) reads as follows:

Executive agency contracts. Unless otherwise specifically provided herein, this Act applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28, United States Code) entered into by an executive agency for—

- (1) the procurement of property, other than real property in being;
- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair or maintenance of real property; or,
- (4) the disposal of personal property.

273. *Total Med. Mgmt.*, 104 F.3d at 1320.

274. *Id.*

States in contract.”<sup>275</sup> It concluded, therefore, “we hold that all elements for a contract were met by the MOUs.”<sup>276</sup>

The Federal Circuit, however, also ruled that plaintiff’s MOU contract with the United States to provide health care to the dependents of the members of the uniformed services was void as beyond the authority of the Government’s authorized agent because the MOU’s payment schedule conflicted with the payment schedule set forth in CHAMPUS. In explaining this dispositive conclusion, the Federal Circuit explained: “[h]owever, even though the basic requirements for a government contract are met, the contract is void because the MOUs are in direct conflict with CHAMPUS regulations,” and that “[n]either the Secretary of Defense nor any of his designated representatives had the authority to obligate CHAMPUS beyond these base rates set by regulation.”<sup>277</sup>

Accordingly, while the Trial Judge was upheld on the majority of his rulings, including his ruling that a well-pled contract in a complaint could overcome a Government’s Rule 12(b)(1) Motion to Dismiss for Lack of Jurisdiction, Judge Turner was still reversed. Even though the MOU was ratified by a government representative with authority to bind the United States, that representative exceeded his authority by approving a wage schedule that was in conflict with CHAMPUS.<sup>278</sup>

However, most importantly, for the very first time, the Federal Circuit held that a contractor could overcome a Government’s Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction by simply asserting a well-pled contract in its complaint.<sup>279</sup> Subsequently, at the actual trial on the merits, the contractor still has the burden of proving that its BOA has indeed become an enforceable contract because it has all the elements of a contract, i.e., an offer and acceptance by a Government representative who had actual authority to bind the Government,<sup>280</sup> or ratified by a Government representative with authority to bind the United States in a contract,<sup>281</sup> and consideration of mutuality of obligations.<sup>282</sup>

In summary, we see that the Federal Circuit for the first time, in *TSG* and *TMM*, has ruled that a private federal government contractor may overcome a government’s Rule 12(b)(1) Motion for Lack of Subject Matter Jurisdiction by simply filing a well-pled complaint asserting a contract or a contract implied-in-fact as required by the Tucker Act.<sup>283</sup>

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275. *Id.*

276. *Id.*

277. *Total Med. Mgmt.*, 104 F.3d at 1320-21.

278. *Id.*

279. *Trauma Serv. Group*, 104 F.3d 1321; *Total Med. Mgmt.*, 104 F.3d 1314.

280. See *infra* text accompanying note 289.

281. See *infra* text accompanying note 290.

282. *Total Med. Mgmt.*, 104 F.3d at 1320 (stating that we have “consideration in the mutuality of obligation”).

283. *Trauma Serv. Group*, 104 F.3d at 1325, *Total Med. Mgmt.*, 104 F.3d at 1319.

IV. FROM TRAUMA SERVICE GROUP AND TOTAL MEDICAL MANAGEMENT TO NATIONAL MICROGRAPHICS AND MCAFEE: UPHOLDING PLAINTIFF'S 12(B)(1) JURISDICTIONAL RIGHT TO A TRIAL ON THE MERITS BASED SOLELY UPON A WELL-PLED CONTRACT

A. NATIONAL MICROGRAPHICS AND MCAFEE

*National Micrographics* was the first case in the United States Court of Federal Claims to apply the Federal Circuit's new holding<sup>284</sup> that a well-pled contract allegation in the complaint alone was sufficient to defeat a Government's Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction.<sup>285</sup> In *National Micrographics Systems, Inc.*, a subcontractor of the prime contractor sued the United States in the U.S. Court of Federal Claims for the breach of an implied-in-fact contract<sup>286</sup> and for a taking violation under the Fifth Amendment.<sup>287</sup> As part of its Answer, the Government's attorney again filed, *inter alia*, a Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction, and in the alternative, a Rule 12(b)(4) Motion to Dismiss for Failure to State a Claim upon Which Relief can be Granted.<sup>288</sup> This article will specifically profile the court's treatment of the Government's Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction, i.e., the lack of a CDA contract.<sup>289</sup> In response to the Government's Motion to Dismiss under Rule 12(b)(1), the *National Micrographics Systems* court (Judge Margolis presiding) sagaciously explained, "[i]n evaluating a challenge to jurisdiction under Rule 12(b)(1), this court must look no further than the allegations contained in the complaint to determine whether plaintiff's claims fall within the court's Tucker Act jurisdiction."<sup>290</sup> Judge Margolis held that it

284. See *supra* text accompanying notes 267, 273.

285. *Nat'l Micrographics Sys. v. United States*, 38 Fed. Cl. 46 (1997).

286. An implied contract is a contract not created or evidenced by an explicit agreement of the parties, but inferred, as a matter of reason and justice, from the parties' acts or conduct, i.e., the circumstances surrounding the transaction making it reasonable or even necessary to assume that a contract existed between the parties by tacit understanding. Implied contracts are sometimes divided into two categories: (1) those implied-in-fact, which derive from the above definition; and (2) those implied-in-law, often referred to as "quasi-contracts." Quasi-contracts derive from obligations imposed on a person by the law—not pursuant to the person's intention and agreement (either express or implied), and even against the person's will and design—because circumstances between the parties are such as to render it just that one party would have a right and the other party a corresponding liability, similar to those that would arise from a contract between them. The United States Court of Federal Claims has jurisdiction over contracts implied-in-fact but not over contracts implied-in-law. See JOHN CIBINIC, JR. & RALPH C. NASH, JR., *FORMATION OF GOVERNMENT CONTRACTS* ch. 2, § II (3d ed. 1998); Willard L. Boyd, *Implied-in-Fact Contract: Contractual Recovery Against the Government Without an Express Agreement*, 21 PUB. CONT. L.J. 84 (1991). NASH ET AL., *supra* note 1, at 289.

287. *Nat'l Micrographics Sys.*, 38 Fed. Cl. at 47 (subcontractor of prime contractor sued federal government for breach of implied-in-fact contract and for unconstitutional taking after the government refused to pay for or return a computer system that the subcontractor had delivered pursuant to its subcontract).

288. See *supra* note 18 discussing R. Ct. Fed. Cl. Rule 12(b).

289. See *supra* note 12 discussing the Contracts Disputes Act of 1978.

290. *Nat'l Micrographics Sys.*, 38 Fed. Cl. at 49.

was only necessary to find “a well-pleaded [contract] allegation in the complaint” to overcome the Government’s Rule 12(b)(1) Motion to Dismiss.<sup>291</sup>

Another recent case to follow the Federal Circuit’s rulings in *TSG* and *TMM* is *McAfee v. United States*,<sup>292</sup> where plaintiffs in the United States Court of Federal Claims had asserted a well-pled contract. More specifically, the complaint alleged that one of the plaintiffs had contracted orally with the United States, acting through the Department of Justice and/or the Department of Agriculture, to provide services<sup>293</sup> as an intermediary in settlement negotiations between the United States and their father, in exchange for the forgiveness of over \$400,000 of Farm Services Administration (FSA) loans secured by 405 acres of land in Fresno, California.<sup>294</sup> Plaintiffs’ sole claim was that the government “breached an express contract or . . . an implied-in-fact contract, to release federal liens on their agricultural property.”<sup>295</sup> Plaintiffs requested that the U.S. Court of Federal Claims: “(1) prohibit the United States from proceeding with its intended foreclosure; (2) specifically enforce the contract, or in the alternative, award damages equal to the amount of the loan; and (3) declare that the contract is valid, binding, and enforceable against the United States.”<sup>296</sup>

The Government, once again, filed, *inter alia*, a Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction.<sup>297</sup> In its opinion, the U.S. Court of Federal Claims clearly articulated and applied the holding of the Federal Circuit in *TMM* and *TSG* that a well-pled contract in a complaint will defeat a Rule 12(b)(1) Motion, explaining that “the Federal Circuit has held that a well pleaded allegation of an express, or implied-in-fact, contract in a complaint ‘is sufficient to overcome challenges to jurisdiction’ in the United States Court of Federal Claims.”<sup>298</sup> The trial judge explained that “plaintiff’s complaint, when viewed in a light most favorable to plaintiffs, alleges the existence of the requisite elements

291. *Id.* (citing *Trauma Serv. Group, Ltd. v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997)).

292. 46 Fed. Cl. 428 (2000).

293. *Total Med. Mgmt., Inc. v. United States*, 104 F.3d 1314 (Fed. Cir. 1997) (citing 41 U.S.C. § 602(a) which states, *inter alia*, that the CDA covers contracts entered into by an executive agency for the procurement of “services”).

294. More specifically, Plaintiffs alleged:

(1) that the United States enlisted Mark McAfee’s assistance as an intermediary in settlement negotiations in *United States v. Rodger McAfee*; (2) in exchange for Mark McAfee’s services, the United States agreed to forgive FSA loans held on plaintiffs’ property; (3) Mark McAfee performed according to the agreement; (4) Daniel Bensing, AUSA, with Charles Stevens’ approval or ratification was authorized to contract in this manner with Mark McAfee; and (5) that the government breached the contract when Mary Grady, Civil Chief, canceled and/or repudiated the contract and when the FSA initiated foreclosure proceeding on plaintiffs’ property.

*McAfee*, 46 Fed. Cl. at 431-32.

295. *Id.* at 431.

296. *Id.*

297. *Id.*

298. *Id.* at 432 (quoting *Trauma Serv. Corp.*, 104 F.3d at 1325).

for either an express contract or, alternatively, for an implied-in-fact contract.”<sup>299</sup> The trial judge continued: “[i]t is well established that, for this court to have jurisdiction, a *valid contract need only be pleaded, not proven.*”<sup>300</sup>

## B. THE EFFECT OF TSG AND TMM ON THE FEDERAL PROCUREMENT SYSTEM

### 1. *The Negative Ramifications of the Government Maintaining that BOAs are Not Contracts: TINA Does Not Apply*

In 1962, The Truth In Negotiations Act (TINA)<sup>301</sup> established a contractual domain to protect the Government in non-competitive proposals or negotiations.<sup>302</sup> TINA, for the very first time, established disclosure and certification duties for private contractors who were parties to non-competitive proposals.<sup>303</sup> Pursuant to the TINA statute, the Government also gained the right to reduce the price of a contract if it could demonstrate that the negotiations between the parties increased the contract price because the contractor’s disclosed cost or pricing data,<sup>304</sup> contrary

299. *McAfee*, 46 Fed. Cl. at 432.

300. *Id.* at 432 (citing *Total Med. Mgmt.*, 104 F.3d at 1319) (emphasis added).

301. Pub. Law No. 87-653, 76 Stat. 528 (codified as amended at 10 U.S.C.S. § 2306a (1998 & Supp. 2002); 41 U.S.C. § 254b (Supp. 2002)).

302. CONTRACT ATTORNEY’S COURSE OF THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, GOVERNMENT CONTRACT LAW, 91 (1999) defines negotiated contracts to be negotiated procurements formerly known as open market purchases. It further explains such procurements were authorized only in emergencies and gives a brief history of their development. In THE GOVERNMENT CONTRACTS REFERENCE BOOK, the term “negotiation” is defined as a

method of contracting that uses either competitive or other-than-competitive procedures that permits bargaining with the offerors after receipt of proposals. Any contract awarded without the use of sealed bidding procedures is a negotiated contract . . . . [Negotiation] is now an equally acceptable method of contracting as long as full and open competition is achieved, in which case it is called the competitive proposals method of contracting.

NASH ET AL., *supra* note 1, at 363.

303. TINA not only requires that all cost or pricing data significant to price negotiations at the time of “agreement on price” be submitted by contractors, but it also requires that the contractor “certify that to the best of [its] knowledge and belief,” the data submitted to the Government “are accurate, complete, and current.” 10 U.S.C. § 2306a(a)(2), (g). The FAR requires that the contractor does so in a prescribed “Certificate of Current Cost or Pricing Data.” 48 C.F.R. § 15.403-4(b) (2002). Cost or pricing data must be submitted on standard form 1411, “Contracting Pricing Proposal Cover Sheet,” along with supporting attachments. *Id.* The requirements are explained in FAR 15.403-4. 48 C.F.R. § 15.404-3 (2002). TINA defines “cost or pricing data” as follows:

[T]he term “cost or pricing data” means all facts that, as of the date of agreement on the price of a contract . . . a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

10 U.S.C. § 2306a(g). “The definition therefore includes three elements: (1) all facts, but not judgments; (2) existing at the date of agreement on price; and (3) that are significant to price negotiations.” DONALD P. ARNAVAS & WILLIAM J. RUBERRY, GOVERNMENT CONTRACT GUIDEBOOK §§ 5-31, 32, 34, 35 (2d ed. 1994).

304. Examples of cost or pricing data are: (1) vendor quotations; (2) nonrecurring costs; (3) information on changes in production methods and in production or purchasing vol-

to its certificate,<sup>305</sup> were inaccurate, incomplete, or noncurrent.<sup>306</sup> Accordingly, the Government could claim, pursuant to the CDA,<sup>307</sup> that the contractor's price was inflated and should be adjusted downward as allowed in TINA pursuant to the "Price Reduction for Defective Cost or Pricing Data" clause.<sup>308</sup> The combination of special statutes and clauses meant that the negotiated<sup>309</sup> price could be reduced if the Government met its TINA burden of proof before the Boards of Contract Appeals<sup>310</sup> or the United States Court of Federal Claims. A reasonable corollary of

ume; (4) data supporting projections of business prospects and objectives and related operations costs; (5) make-or-buy decisions; (6) estimated resources to obtain business goals; and (7) information on management decisions that could have a significant bearing on costs. 48 C.F.R. § 15.801 (2002).

305. When required, certified cost or pricing data are comprised of two elements. These are "(1) cost or pricing data, [and] (2) [a] Certificate of Current Cost or Pricing Data certifying that to the best of [the contractor's] knowledge and belief, the cost or pricing data were accurate, complete, and current as of the date of final agreement on price. 48 C.F.R. § 15.403-4(b) (2002).

306. [TINA] also provided for contract price adjustment as a result of submission of defective cost or pricing data. In 1984 the Competition in Contracting Act added these requirements to the Federal Property and Administrative Services Act of 1949 at 41 U.S.C. § 254b. Subsequently, in 1986, TINA was greatly expanded and codified at 10 U.S.C. § 2306a.

NASH ET AL., *supra* note 1, at 523.

307. Contractors are permitted to submit demands for a sum of money, or claims, against the Government under the Contracts Disputes act of 1978. 41 U.S.C. § 603 (2002). The Government may also assert claims against contractors (under TINA, for example). See 10 U.S.C. § 2306a(f). Although before 1995 these claims could not be adjudicated (by a Board Contract Appeals or the Court of Federal Claims) unless there was a dispute preceding the submission of the claim, the court in *Reflective, Inc. v. Dalton* held that no such dispute was required "except where [the claim is for non-payment of] a 'voucher, invoice, or other routine request for payment.'" *Reflective, Inc. v. Dalton*, 60 F.3d 1572, 1755 (Fed. Cir. 1995) (citing 48 C.F.R. § 15.801).

In normal circumstances, disputes are resolved through negotiation or by the use of Alternative Dispute Resolution procedures of FAR 33.204. If this is not possible, the dispute must become the subject of a decision of the Contracting Officer with further resolution subject to the CDA. FAR Subpart 33.2 provides guidance to contracting officers on the handling of disputes.

NASH ET AL., *supra* note 1, at 197.

308. The "Price Reduction for Defective Cost or Pricing Data" contract clause implementing TINA states that if "any price, including profit or fee . . . was increased by any significant amount" because the contractor or subcontractor submitted data "that were not complete, accurate, and current as certified," [at the date of agreement on price,] the contract's "price or cost shall be reduced accordingly.

CHARLES TIEFER & WILLIAM A. SHOCK, *GOVERNMENT CONTRACT LAW: THE DESKBOOK FOR PROCUREMENT PROFESSIONALS* 145-46 (2d ed. 1999) (quoting 48 C.F.R. § 52.215-10 (2002)).

309. See *supra* note 296.

310. The Government's TINA burden of proof has been explicated as follows: [t]o prevail in a defective cost or pricing data case, the Government must establish three elements by a preponderance of the evidence. First, the Government must establish that the disputed information is 'cost or pricing data' within the meaning of the Truth in Negotiations Act. Second, the Government must establish that the data was either not provided or was not provided in a usable, understandable format to a proper Government representative. Third, the Government must show detrimental reliance on the defective data and show by some reasonable method the amounts by which the final negotiated price was overstated.

this agreement is that the price was valid for billing purposes until the Government proved its right to a price adjustment. The TINA statute<sup>311</sup> is clear on its face, however, that it applies to negotiated contracts,<sup>312</sup> and only to negotiated contracts.<sup>313</sup> Accordingly, a condition precedent for the application of TINA is that a contract actually exists between the Federal Government and a private contractor to provide goods and services, typically as provided by the CDA.<sup>314</sup>

For the following reasons, however, I believe the Federal Government is being unreasonably shortsighted when it insists that BOAs are not contracts.<sup>315</sup> TINA requires that certain classes of government contractors provide "cost or pricing data,"<sup>316</sup> so that the Government can assure itself

Appeal of Litton Sys., Inc., 92-2 BCA (CCH) ¶ 24,842 at 123,944 (A.S. B.C.A. 1992); *Sylvania Elec. Prod., Inc. v. United States*, 479 F.2d 1342 (1973); *The Boeing Co.*, 92-1 BCA (CCH) ¶ 24,414 (A.S. B.C.A. 1991); *The Boeing Co.*, 90-1 BCA (CCH) ¶ 22,270 at 111,879 (A.S. B.C.A. 1989).

Section 8(d) of the CDA (41 U.S.C. § 607(d)) gives the Boards of Contract Appeals authority to grant the same relief available to a litigant asserting a contract claim in the United States Court of Federal Claims. ROBERT T. PEACOCK & PETER D. TING, *CONTRACT DISPUTES ACT ANNOTATED* 2-21 (1998).

311. 10 U.S.C. § 2306a.

312. "TINA requires that *during negotiations for certain contracts and contract modifications*, a contractor must provide the government with 'cost or pricing data,' a category of information broadly defined as including 'all facts that . . . prudent buyers and sellers would reasonably expect to affect price negotiations significantly.'" 2/20/97 ANDREWS GOV'T CONT. LITIG. REP. 3, p 1 (emphasis supplied). See also, Appeal of Univ. of Cal., San Francisco, 97-1 BCA (CCH) ¶ 28,642 (V.A. B.C.A. 1996) (using the *Christian Doctrine* to include TINA in a government contract). Moreover, The Government Contracts Reference Book assumes that a "contract" first exists for TINA to apply when it states that the *Christian Doctrine* is "[a] legal rule providing that clauses required by regulation to be included in Government *contracts* will be read into a *contract* whether or not physically included in the *contract* . . ." (emphasis added). NASH ET AL., *supra* note 1, at 91. Similarly, to receive monetary relief under the CDA, there also must be a contract. Any claim asserted under the Act "must identify the contract" under which the dispute arose. PEACOCK & TING, *supra* note 304, at 1-10.

313. TINA now applies to any "negotiated contract expected to exceed \$550,000." a modification of a negotiated contract expected to exceed \$550,000, a modification of a negotiated or sealed bid contract involving a price adjustment exceeding \$550,000 if the prime contractor and each higher-tier subcontractor are required to submit cost or pricing data, or the modification of a subcontract involving a price adjustment exceeding \$550,000. To account for inflation, the dollar threshold levels for TINA may be adjusted every five years. ARNAVAS & RUBERRY, *supra* note 297, at 5-28.

314. Section 3(a) of the CDA provides as follows: [t]his Act applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28, United States Code) entered into by an executive agency for

- (1) the procurement of property, other than real property in being;
- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair or maintenance of real property; or
- (4) the disposal of personal property.

41 U.S.C. § 602(a) (2002).

315. See generally, CIBINIC & NASH, *supra* note 280, at ch. 1, § VII; Clarence T. Kipps & John L. Rice, *Living with TINA: A Practical Guide to the Truth in Negotiations Act*, WASH. LEGAL FOUND. (1989); Steven W. Feldman, *The Truth in Negotiations Act: A Primer*, 21 NAT'L CONT. MGMT. J., No. 2, at p. 67 (1988); NASH ET AL., *supra* note 1, at 64.

316. See *supra* text accompanying note 309.

that it is paying a reasonable price for the goods or services it receives.<sup>317</sup> For TINA to be applicable, however, there must be a “negotiated contract” between the Federal Government and the private contractor.<sup>318</sup> Once we acknowledge that the sine qua non for TINA to apply is indeed the existence of a negotiated contract,<sup>319</sup> it becomes imperative for the Federal Government that the BOA in question, or other similar agreement, be initially deemed a contract so that TINA may apply. Moreover, it is important for the Federal Government that a BOA is deemed a negotiated contract in order to enable the Government to enforce the promises made by the supply or service contractor, e.g., to be ready to perform at all times. At any time before the actual procurement order or service order, the contractor must be ready to furnish the specific supplies or services whenever the Government desires them.<sup>320</sup> If, for some unexpected reason, the contractor is not ready to provide the supplies or services it promised, the Government would lack the right to enforce the terms of the BOA, if a BOA were not a contract.

It would also be important for the Federal Government that a BOA be deemed a contract because it would allow the Government to “Christian”<sup>321</sup> in a TINA clause to a BOA, if a TINA clause had been accidentally left out. For example, in the *Appeal of University of California, San Francisco*,<sup>322</sup> the Government had forgotten to include the “Price Reduction for Defective Cost or Pricing Data Clause” in the Government’s service contract, and the Board of Contract Appeals “Christianed” such a clause into the Federal Government’s contract, finding that the TINA statute in general “[evidenced] a significant and deeply ingrained strand of public procurement policy sufficient to require incorporation of the

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317. This statutory requirement dates to the early 1960s from the congressional reaction to the overcharging scandals of the 1950s relating to the sudden explosion of cost-based purchasing, particularly with respect to the new aerospace contracts. TINA created a sharp break from the normal realities of private commercial contracting law where it was customary and legal to keep its costs to itself. Accordingly, “overcharging” in the sense of charging more than a reasonable profit was not a violation of the law. TIEFER & SHOOK, *supra* note 302, at 140-41.

318. ARNAVAS AND RUBERRY, *supra* note 297, at 5-28.

319. *Supra* note 296 (defining the term “negotiation”).

320. See 48 C.F.R. § 16.703 (2002), entitled “Basic Ordering Agreement,” which states that the BOA shall describe “the supplies or services” that the contractor must be ready, at all times, to supply the Government whenever the Government needs those supplies or services.

321. “[This] doctrine derives from the case of *G.L. Christian & Assoc. v. United States* . . . . [The court] held that the termination for convenience clause applied even though it had been omitted from the contract, since the procurement regulations required its inclusion.” NASH ET AL., *supra* note 1, at 91. Thus the *Christian* Doctrine became the legal rule which provides that clauses required by regulation to be included in Government contracts will be read into a contract whether or not physically included in the contract, unless a proper deviation from the regulations has been obtained. Other commentaries insist “[the] *Christian* doctrine should not, however, be read to mean that *all* procurement regulations have the force and effect of law; it applies only to those regulations that implement fundamental procurement policy.” *Id.* at 91-92; see, e.g., John B. Wyatt, III, *The Christian Doctrine; Born Again but Sinfully Confusing*, 33 CONT. MGMT., Nov. 1993, at 22.

322. 97-1 BCA (CCH) ¶ 28,642 (V.A. B.C.A. 1996).



[Defective Cost or Pricing Clause after the fact] . . . as a matter of law.”<sup>323</sup> If there had been no contract in existence, i.e., only a bare BOA, and the Government had forgotten to include the “Price Reduction for Defective Cost or Pricing Data,” I believe this clause could not be “Christianed” in because the condition precedent to be able to add a clause under the Christian doctrine is that there first be a “contract” in existence.<sup>324</sup>

Sometimes, however, whether a contract or a BOA exists is a very fine line, and courts and boards have struggled with this distinction. For example, in *Appeal of Russell L. Kisling*, the Board commented on how close the distinction could be, stating “there is evidence the document was either a basic ordering agreement or a contract.”<sup>325</sup> In *Appeal of Hick’s Corner’s Grain Elevators, Inc.*, the Board of Contract Appeals split two-to-one holding that the BOA in question was a contract.<sup>326</sup> Consistent with the BOA-contractual theory advanced in this article, I voted with the majority in *Hick’s Corner’s Grain Elevators*, holding that

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323. *Id.* at 143,069 (quoting *S.J. Amoroso Constr. Co. v. United States*, 12 F.3d 1072 (Fed. Cir. 1993)). The Board also noted that the:

Christian doctrine was recently considered in two Federal Circuit cases. In *General Engineering & Machine Works v. O’Keefe*, 991 F.2d 775, 779 (Fed. Cir. 1993), the court reaffirmed that “the Christian doctrine applies to mandatory contract clauses which express a significant or deeply ingrained strand of public procurement policy.” It affirmed a decision incorporating a requirement for separate cost pools into a contract. The regulation requiring separate cost pools was determined to be “sufficiently ingrained” in public procurement policy because it deterred double payments and “thus discouraged the unnecessary and wasteful spending of government money.” *Id.* at 780.

In *S.J. Amoroso Construction Co., Inc.*, 12 F.3d 1072 (Fed. Cir.1993), the Court affirmed the incorporation into a contract of Buy American Act requirements which the parties had stricken. Initially observing that “[a]pplication of the CHRISTIAN DOCTRINE turns not on whether the clause was intentionally or inadvertently omitted,” the court emphasized that that Buy American Act itself required that “[e]very contract for construction . . . shall contain a provision” with respect to materials, supplies and articles manufactured in the United States. Thus: “The statute alone, therefor . . . [requires] incorporation of the clause prescribed . . . as a matter of law.” *Id.* at 1076.

*Appeal of Univ. of Cal., San Francisco*, 97-1 BCA (CCH) at ¶ 143,067-69.

324. The Government Contract Reference Book’s definition of the Christian Doctrine assumes that there must first be a government contract where it states the Christian Doctrine is “[a] legal rule providing that clauses required by regulation to be included in Government contracts will be read into a contract whether or not physically included in the contract . . . .” NASH ET AL., *supra* note 1, at 91.

325. 88-2 BCA (CCH) ¶ 20,825 (Ag. B.C.A. 1988). The board also found they did not need to decide which provision controlled, because the result would not change; if it was a firm fixed price, definite quantity contract, no evidence supporting any damages was found. *Id.* Even if the Government was found to have prevented the contractor’s continued performance, then recovery would be limited to that available under the Termination for Convenience clause. *Id.*

326. “[T]hat the UGSA [Uniform Grain Storage Agreement] is a mere collection of terms, conditions, rates and charges which would be applicable if and when the Government stored grain in Appellant’s warehouse and that the UGSA is in the nature of a basic agreement (BA) or basic ordering agreement (BOA), [but] not a contract over which the Board has jurisdiction.” *Hick’s Corner’s Grain Elevators, Inc.*, 91-3 BCA (CCH) ¶ 24,703, 24,703 (Ag. B.C.A.1991).

the BOA in question was indeed a valid and therefore enforceable contract.<sup>327</sup>

In most instances, however, by virtue of the legion of its Rule 12(b)(1) Motions to Dismiss for Lack of Subject Matter Jurisdiction, the government has still consistently maintained that BOAs are not contracts, even where the contractor has already begun to perform its promises pursuant to a purchase order or service order.<sup>328</sup> While this non-contractual assertion might help the Government prevent the contractor from prevailing on its monetary claims in the U.S. Court of Federal Claims or before a Board of Contract Appeals, I believe it will, unfortunately, severely undercut the Federal Government's averment that TINA is applicable to BOAs or that a TINA clause can be "Christianed" into a BOA if the Federal Government omits an important TINA clause.

## 2. *Even Assuming Arguendo that BOAs are Contracts, Unpriced BOAs Probably are Not Covered by TINA*

Equally as important, in TINA's definition of "cost and pricing data," the "contractor must [also] disclose as 'facts' the data forming the basis for any judgment, projection, or estimate that is made."<sup>329</sup> If the contractor fails to comply with the disclosure of this data, his "cost or pricing data" will be deemed "incomplete or inaccurate."<sup>330</sup> And more importantly, the contractor is also responsible for disclosing all of the relevant facts that form the basis of his price estimate at the "date of price agreement," (i.e., the "handshake" date of the price agreement) even though no legal contract may exist at that time.<sup>331</sup> The question then arises as to when this duty to proffer "cost and pricing" data with BOAs that initially have no price agreement, such as in "unpriced" BOAs, begins, if it arises at all.<sup>332</sup> An unpriced BOA may be created where a contractor has promised to provide supplies or services to the Government in response to an

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327. See also *Trauma Serv. Group*, 104 F.3d 1321, where the court found "[b]ecause [plaintiff] cannot show the existence of an express or an implied-in-fact contract, and the breach thereof, the Court of Federal Claims properly dismissed for failure to state a claim under RCFC 12(b)(4)." *Id.* at 1328. In *Total Medical Management*, the court found, "since the contracts were plainly illegal, they were void *ab initio*. A dismissal on this basis is one for failure to state a claim. Since the MOUs were void *ab initio*, [plaintiff] failed to state a claim upon which relief can be granted." 104 F.3d at 1321.

328. See *Trauma Serv. Group*, 104 F.3d 1321; *Total Med. Mgmt.*, 104 F.3d at 1314.

329. ARNAVAS & RUBERRY, *supra* note 297, at 5-31.

330. *Id.* at 5-31. Under the above definition of cost or pricing data, the contractor must disclose as "facts" the data forming the basis for any judgment, projection, or estimate that is made. *Id.*

331. *Id.* (the "date of price agreement" means the "handshake" date of price agreement between the parties, even though no legal contract may actually exist at that time).

332. An unpriced purchase order is an order for supplies or services where the price has not been established at the time the order is issued. 48 C.F.R. § 13.302-2 (2002).

An unpriced purchase order may be used only when (1) the transaction is not expected to exceed the simplified acquisition threshold; (2) it is impractical to obtain pricing before issuing the purchase order; and (3) the purchase is for repairs to equipment requiring disassembly to determine the nature and extent of repairs, or for material that is available from only one source and for which the cost cannot be readily established, or for supplies or services

unpriced purchase order. At least fifteen appeals have been before the Boards of Contract Appeals concerning defective pricing with “unpriced BOAs.”<sup>333</sup> The Boards generally agreed that where there is no binding agreement on price, TINA will not apply and the Government will not have a right to a price reduction for defective cost or pricing data.

Consider the following examples. In *Ocean Technology*, the Armed Services Board of Contract Appeals faced a situation where the parties could not agree upon an ultimate price because of the subsequent substantial change in price of one of its parts. The Board stated:

[t]he parties orally agreed to a negotiated settlement of \$268,000 on 14 May 1976 . . . . Prior to the finalization of the negotiated agreement, appellant advised that it could not furnish a Certificate of Current Cost or Pricing Data because it had discovered a substantial change in the price quoted on one item of material.<sup>334</sup>

The Government unreasonably argued that notwithstanding the lack of agreement on price, TINA still applied and that the Federal Government therefore had a right to a price reduction based on a charge of defective data.<sup>335</sup> To the Federal Government’s surprise and perhaps chagrin, the Board of Contract Appeals correctly held that TINA does not apply where there is “no agreement on a binding price.”<sup>336</sup>

In the *Appeal of Boeing*,<sup>337</sup> the Armed Services Board of Contract Appeals held that the “required pricing certification [of TINA] is *not* applicable to ceiling prices submitted for *unpriced purchase orders* but rather to the definitized pricing subsequently entered into by the parties.”<sup>338</sup>

for which prices are known to be competitive but exact prices are not known (for example, miscellaneous repair parts or maintenance services).

NASH ET AL., *supra* note 1, at 533.

333. See, e.g., *Appeal of Honeywell Federal Sys., Inc.*, 92-2 BCA (CCH) ¶ 24,966 (A.S.B.C.A. 1992) (holding that the Government is bound by the contracting officer’s price decision under a BOA, whether the officer exceeds his responsibility or not); *Appeal of Ford Aerospace Corp.*, 91-2 BCA (CCH) ¶ 23,911 (A.S. B.C.A. 1991) (holding that a BOA estimated price is not a binding ceiling; parties can negotiate a fixed price); *Appeal of Times Fiber Communications, Inc.*, 91-2 BCA (CCH) ¶ 24,013 (A.S. B.C.A. 1991) (holding that costs based on an asset stepped-up value are allowed under a government contract (a BOA)); *Appeal of Beech Aircraft Corp.*, 83-1 BCA (CCH) ¶ 16,532 (A.S. B.C.A. 1983) (holding that the Government was not bound by the cost quote of the contractor under a BOA, but the contractor was entitled to a fair and reasonable value of the work he performed).

334. In *Appeal of Ocean Tech., Inc.*, 78-1 BCA (CCH) ¶ 13,204 (A.S. B.C.A. 1978), the Board stated:

[i]n our view the issue is the pricing of a contract modification pursuant to the Changes clause. It is not a defective cost issue *because there was no agreement on a binding price* that could have been decreased on account of defective data. Thus as we said in *Dewey Electronics Corp.* . . . the question is not the government’s right to a price reduction for defective cost or pricing data, but what is a fair and reasonable price for the spare parts order.

335. *Id.*

336. *Id.*

337. 76-1 B.C.A. (CCH) ¶ 11,742 (A.S. B.C.A. 1976) (emphasis added).

338. *Id.* (emphasis added). The ceiling price, as clearly reflected in the record, was furnished by the appellant and accepted by the Government, and was not intended by either party to be the price of the unpriced order. Rather it was intended to simply fix an agreed limitation on the Government’s liability for future reference. The court found that

This again substantiates my postulate that unpriced BOAs are not subject to TINA because unpriced BOAs by definition have no agreement on a binding price, the condition precedent for TINA to apply.

Moreover, in *Appeal of Sanders Associates, Inc.*<sup>339</sup> the Armed Services Board of Contract Appeals again confirmed that there are indeed instances where, because of the inability to predict future prices, a Certificate of Current Cost or Pricing Data would not be required. The Board of Contract Appeals explained:

contrary to the Government's contention, this appeal does not involve a question of defective cost or pricing data. As is the case in a number of somewhat analogous situations, the "Certificate of Current Cost or Pricing Data" . . . was never executed by Sanders *because no agreement was ever reached on the price of the modifications.*<sup>340</sup>

Finally, in the *Appeal of Standard Manufacturing Co.*,<sup>341</sup> the Armed Services Board of Contract Appeals clearly recognized that an unpriced BOA standing alone did not cause a duty to arise at that moment in time to provide the Federal Government with cost and pricing data when it stated "[a]fter the issuance of an unpriced order the parties were to negotiate price and delivery schedule, commencing with a proposal by the contractor, which was to include, *inter alia*, a cost and price analysis as prescribed . . . and an executed certificate of current cost and pricing data . . ."<sup>342</sup> Therefore, it was not until the procurement process had passed the unpriced BOA stage into the actual price and delivery schedule stage (and we assume a "handshake on the price agreement"), that the duty then arose on the part of the contractor to furnish the applicable cost and pricing data.<sup>343</sup>

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both parties plainly expected to negotiate and price the unpriced order at some amount below the agreed ceiling price. The court further found that since the ceiling price, as agreed to, was not intended to be the price of the unpriced purchase order, the requirement of price certification requirement in subparagraph (2) of 10 USC, § 2306(f) did not apply. *Id.*

339. 79-2 BCA (CCH) ¶ 14,159 (A.S. B.C.A. 1971).

340. *Id.* (emphasis added). Furthermore, the Board explicated:

First, we must observe that, contrary to the Government's contention, this appeal does not involve a question of defective cost or pricing data. As was the case in a number of somewhat analogous situations, the "Certificate Of Current Cost Or Pricing Data" *required by ASPR 3-807.6(a) was never executed by Sanders because no agreement was ever reached on the price of the modifications.* Thus, our task is not to determine ". . . the government's right to a price reduction for defective cost or pricing data, but what is a fair and reasonable price for the spare parts order."

*Id.* (citations omitted) (emphasis added).

341. 72-1 BCA (CCH) ¶ 9,371 (A.S. B.C.A. 1972).

342. *Id.*

343. *Id.* at 43,501, where the Board stated:

[t]he Government could also place 'unpriced' orders prior to agreement upon the price and delivery schedule. The unpriced order bound the Government to pay up to a maximum price stated in the order. It bound the contractor to proceed forthwith with the work, provided it had the capacity and facilities to do so, or to promptly notify the precuring contracting officer (PCO) of any reason it could not meet the desired delivery schedule. *After*

Finally, in the *Appeal of Ford Aerospace Corp.*,<sup>344</sup> the Board of Contract Appeals commented on its frustration with the internal contradictions found in a BOA, stating “[a]n unpriced bilateral order appears to be a contradiction in terms under the BOA’s ordering scheme . . . .”<sup>345</sup> This confirms my postulate that BOAs are oxymorons and indeed a “Catch-22 Chameleon” for all government contractors.

### 3. Assuming Arguendo that BOAs Are Contracts, Priced BOAs Are Covered by TINA

Finally, there have been at least six appeals<sup>346</sup> before the Boards of Contract Appeals concerning “priced BOAs” and TINA where the Government, pursuant to its right under the “Price Reduction for Defective Cost or Pricing Data Clause,”<sup>347</sup> required the production of certified cost or pricing data. There is no question that the TINA requires that production of cost or pricing data “before the award of a contract,”<sup>348</sup> and the following cases illustrate the Government requesting the cost or pricing data in a timely manner pursuant to TINA, and (1) where the “price or cost data” were properly requested by the Government at the time of “price agreement.” and (2) where the Government properly requested the “price or cost data” at the time of the “price agreement,” but where the Government contractor successfully asserted the “commercial item exemption”<sup>349</sup> in TINA. Note, however, that in all the following exam-

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*the issuance of an unpriced order the parties were to negotiate price and delivery schedule, commencing with a proposal by the contractor, which was to include, inter alia, a cost and price analysis as prescribed by ASPR 16-206.2 and an executed certificate of current cost and pricing data as required by ASPR 3-807.4 (emphasis added).*

344. 91-2 BCA (CCH) ¶ 23,911 (A.S. B.C.A. 1991).

345. *Id.* at 119,800.

346. These 6 appeals are: *Appeals of GKS, Inc.*, 2000-1 BCA (CCH) ¶ 30,914 (A.S. B.C.A. 2000); *Appeals of McDonnell Douglas Helicopter Sys.*, 99-1 BCA (CCH) ¶ 30,271 (A.S. B.C.A. 1999); *Appeals of Grumman Aerospace Corp.*, 98-2 BCA (CCH) ¶ 29,943 (A.S. B.C.A. 1998); *Appeal of Hughes Aircraft Co.*, 97-1 BCA (CCH) ¶ 28,972 (A.S. B.C.A. 1997); *Appeal of EDO Corp.*, 93-3 BCA (CCH) ¶ 26,135 (A.S. B.C.A. 1993); and *Appeal of Honeywell Fed. Sys., Inc.*, 92-2 BCA (CCH) ¶ 24,966 (A.S. B.C.A. 1992).

347. See 48 C.F.R. § 52.215-10 (2002)

348. When submitted, “TINA requires that [the cost or pricing] data be submitted before the award of a contract . . . .” TIEFER & SHOCK, *supra* note 302, at 144. “Cost or pricing data” means “all facts that, as of the date of price agreement . . . of a contract . . . , a prudent buyer or seller would reasonably expect to affect price negotiations significantly.” 10 U.S.C. § 2306a(h)(1) (2002) (emphasis supplied).

349. The Commercial Item Exemption is:

[a]n exception to the requirement for the submission of cost or pricing data under the Truth in Negotiations Act. This exception was added to 10 U.S.C. § 2306a(d) and 41 U.S.C. § 254b(d) by the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355. It became the sole exception for commercial items when the standard catalog or market price exception was repealed in 1996 by the Clinger-Cohen Act of 1996, Pub. L. No. 104-106. It is implemented in FAR 15.403-1. Under this exception a contracting officer may not require the submission of cost or pricing data for an acquisition of any item that meets the definition in FAR 2.101.

NASH ET AL., *supra* note 1, at 102.

ples, we must first accept the fact that BOAs are indeed valid and enforceable contracts.

The Appeals of GKS, Inc. (GKS),<sup>350</sup> illustrate the first scenario, where based upon an underlying BOA, the “cost or pricing data” was requested correctly at the time of “price agreement.” In this appeal, the Government and GKS entered into a BOA on March 6, 1990. The BOA incorporated FAR 52.215-22, the Price Reduction for Defective Cost or Pricing Data, by reference. The Government asserted that it was entitled to a refund of \$134,561 plus interest under TINA on the grounds that the contractor’s proposal included a quotation for a part that was not specified and that the contractor failed to disclose seventeen lower quotations in its possession prior to the agreement on price.<sup>351</sup> The contractor counterclaimed that the contract price negotiated by the parties understated its general and administrative rate by \$44,434.32 and its material costs by \$5,463.63.<sup>352</sup> The relevant facts of this case were essentially as follows.

On June 29, 1990, the Government issued [a] Request for Quotations (RFQ)<sup>353</sup>. . . for 87 KD 9 kits to four sources . . . [one of which was] GKS. KD 9 kits are used to repair and overhaul E-3A aircraft . . . . The RFQ was issued as a result of Desert Shield under the authority of 10 U.S.C. § 2304(c)(2), which allow[ed] other than full and open competition when the agency’s need for the property or services is of “an unusual and compelling urgency” . . . . The kit was telefaxed to GKS on August 29, 1990. . . . On 5 September 1990, GKS submitted a bid in the amount of \$466,190.37 for 87 units at \$5,358.51 per unit . . . . Telephone negotiations began and were concluded on 10 September 1990 . . . . The PCO [Procuring Contracting Officer] requested GKS’s proposal on 10 September 1990 [so it is safe to conclude that there was an “agreement on price” as of September 10.<sup>354</sup> Accordingly, GKS is an example where the government sought the contractor’s “cost or pricing data” in not only a timely manner, but on the exact date of the “agreement on price.”

Another case illustrating the government’s timely request for “cost or pricing data” after an “agreement of price” based upon an underlying

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350. 00-1 BCA (CCH) ¶ 30,914 (A.S. B.C.A. 2000).

351. *Id.*

352. *Id.*

353. A “Request for Quotations” has been defined as:

[a] solicitation document (usually Standard Form 18, FAR 53.301-18) used in simplified acquisitions to communicate the Government requirements to prospective contractors. FAR 13.307(b)(1). As it is merely a request for information, quotes submitted in response to it are not offers, and consequently may not be accepted by the Government to form a binding contract. (A contract comes into being only when the supplier accepts the Government’s order in response to its quotation or the parties mutually agree to a subsequent contract.) An RFQ is also used by some agencies to obtain price, delivery, or other information on sole source procurements. For simplified acquisitions, quotations may be solicited orally, rather than in writing whenever economical and practical.

FAR 13.106-1(c). NASH ET AL., *supra* note 1, at 441.

354. *Appeals of GKS, Inc.*, 2000-1 BCA ¶ 30,914.

BOA, is *McDonnell Douglas Helicopter Systems*<sup>355</sup> This appeal arose from the Federal Government's charge that appellant provided defective cost or pricing data with respect to various parts for the AH-64 Helicopter.<sup>356</sup> The Government issued a RFQ<sup>357</sup> for the acquisition of 1,024 strap assemblies for the AH-64 Helicopter and appellant submitted a proposal on June 1, 1990, to supply the strap assemblies for the price of \$7,781,008.55.<sup>358</sup> On July 23, 1990, appellant subsequently lowered its proposal price to \$6,843,209.63.<sup>359</sup> The parties conducted negotiations on the price from September 20, 1990 through September 27, 1990, when an agreement on price was reached.<sup>360</sup> On that very same day, September 27, appellant confirmed the parties' agreement and submitted its Certificate of Current Cost or Pricing Data to the Government.<sup>361</sup> On October 15, 1990, the Army awarded the contract to appellant, pursuant to the then current BOA, for the production and delivery of 1,174 main rotor strap assemblies spares at a total price of \$6,445,260.<sup>362</sup> Accordingly, the Government did not request the cost or pricing data until there had been an agreement on price, as required by the statute<sup>363</sup> and the regulations.<sup>364</sup>

There is also an interesting case that illustrates not only the requirement of cost or pricing data of a priced BOA at the proper time, (i.e., the time of the agreement on price), but also the successful assertion by appellant that TINA's commercial exception<sup>365</sup> should apply. It happened in the *Appeal of Honeywell Federal Systems, Inc.*<sup>366</sup> This appeal arose from a contracting officer's decision asserting a Government claim for defective pricing against appellant in the amount of \$10,500,000.<sup>367</sup> The Government filed a Motion for Summary Judgment, maintaining that there was no dispute of any relevant material facts.<sup>368</sup> In late 1980 or early 1981, the Army began negotiations with appellant and fifteen other companies for a BOA to supply DAS-3 spare parts with the goal of gain-

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355. 99-1 BCA (CCH) ¶ 30,271 (A.S. B.C.A. 1999).

356. *Id.* (Finding of Fact 15 and 16).

357. *See supra* note 347 for the definition of RFQ.

358. *McDonnell Douglas Helicopter Sys.*, 99-1 BCA ¶ 30,271 (Finding of Fact 16).

359. *Id.*

360. *Id.* (Finding of Fact 18).

361. *Id.*

362. *Id.*

363. 10 U.S.C. 2306a(g) (2002).

364. 48 C.F.R. § 15.401 (2002).

365. According to the FAR, the contracting officer shall not require the submission of cost or pricing data for the procurement of commercial items so long as the items sought constitute "commercial items." The nature or lack of information relating to price competition or catalog or marked pricing shall have no bearing on the applicability of this exception. 48 C.F.R. § 15.403-1(c)(3) (2002). The FAR also provides a detailed definition of what is considered a "commercial item." In essence, a "commercial item" is a no frills item; any item, other than real property that is customarily used for non-governmental purposes and has been sold, leased, or licensed to the general public, or offered for sale, lease or license to the general public. 48 C.F.R. § 2.101 (2002).

366. 92-2 BCA (CCH) ¶ 24,966 (A.S. B.C.A. 1992).

367. *Id.*

368. *Id.*

ing the best price benefits generally realized by 'breaking out' the procurement of spare parts in this manner.<sup>369</sup> The Army prepared a draft BOA in early 1981 and by a memorandum dated January 28, 1981, the Army's CO recommended that the Army's Communications-Electronic Command (CECOM) approve the drafted BOA.<sup>370</sup> On March 31, 1981, the Awards Committee of CECOM recommended the award of the BOA to Honeywell.<sup>371</sup> Honeywell and CECOM entered into a BOA on July 10, 1981, which required Honeywell to be ready to provide, when needed by the Army, spare parts for its Level 6 computers necessary for the maintenance of the Army's DAS-3.<sup>372</sup>

As with all BOAs, the BOA itself did not obligate the Army to purchase the products described in the BOA.<sup>373</sup> The BOA was initially predicated upon Honeywell's proposal and proposed price list dated May 21, 1981, that stated in pertinent part "all equipment parts and repair of parts are standard commercial items at standard commercial prices."<sup>374</sup> The BOA price list that accompanied Honeywell's proposal was "compiled by Honeywell to include only those parts identified by the Army as being required under the BOA at prices based on Honeywell's Master Parts Price List for commercial customers."<sup>375</sup> Perhaps because the BOA appeared to have qualified for TINA's commercial exception, the Army's delivery order did not include TINA's "Price Reduction for Defective Cost or Pricing Data Clause."<sup>376</sup> The BOA specifically precluded "un-priced orders" by specifying that the only orders to be placed under the BOA were "priced orders" for supplies or services where the prices, delivery order schedule, and any special terms would be negotiated prior to issuance.<sup>377</sup> On or about September 25, 1981, the Army's CO issued Delivery Order (DO) No. 0002, in the amount of \$176,519, above the then \$100,000 TINA threshold for non-competitive negotiated procurements.<sup>378</sup> However, the CO did not request cost or pricing data.<sup>379</sup> On or about December 1, 1981, TINA's threshold was increased from \$100,000 to \$500,000.<sup>380</sup> It has subsequently been increased to \$550,000.<sup>381</sup>

On or about December 18, 1981, a new CECOM CO issued Delivery Order No. 0007 in the amount of \$505,028.<sup>382</sup> There appeared to be an

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369. *Id.*

370. *Id.* (Finding of Fact 7).

371. *Honeywell Fed. Sys., Inc.*, 9202 B.C.A. (CCH) at ¶ 2,966.

372. *Id.* (Finding of Fact 9 and 10).

373. *Id.* (Finding of Fact 13).

374. *Id.* (Finding of Fact 11).

375. *Id.*

376. *Honeywell Fed. Sys., Inc.*, 92-2 BCA (CCH) at ¶ 24,906 (Finding of Fact 14).

377. *Id.* (Finding of Fact 15).

378. *Id.* at 124,404. (Finding of Fact 16).

379. *Id.*

380. *Honeywell Fed. Sys., Inc.*, 92-2 BCA (CCH) ¶ 24,766. (Finding of Fact 17); *see* Dep't of Def. Authorization Act, 1982, Pub. L. No. 97-186, 95 Stat. 1099.

381. 48 C.F.R. § 9904.413-60 (2002).

382. *Id.* (Finding of Fact 18).



agreement on price at this time because there was no subsequent finding of fact explicating any further negotiations on this amount. Accordingly, the Government had a right to ask for cost or pricing data. Two months later, in February of 1982, the CO requested Honeywell "to furnish support for its claim for an exemption" from providing cost or pricing data to the Army.<sup>383</sup>

The Army argued that because of the "contractor's statement that the proposed spare parts [were] not normally sold to commercial customers,<sup>384</sup> we believe it [is] appropriate to request [Honeywell] to submit cost or pricing data . . ."<sup>385</sup> Honeywell countervailed that the "[p]roof of commerciality for DAS-3 spares being ordered under the BOA was unnecessary, since those spares were used in Basic Level 6 end-item computer equipment and the Level 6 end-item equipment was available on Honeywell's GSA DPE MAS contract."<sup>386</sup> Moreover, Honeywell argued, "[t]he spare parts were found in Honeywell's published Master Parts Price List for *commercial customers*, hence further proof of commerciality was not required."<sup>387</sup>

On or about May 18, 1982, . . . [the Army] requested that the DCAA<sup>388</sup> conduct a "priority 100% audit" of Honeywell's proposal for [Honeywell's] BOA . . . to determine whether: [t]he prices listed under the BOA were the same or trackable to Honeywell's published Master Parts Price List for *commercial customers*, "with price increases deemed appropriate within the realms of good business practices and normal inflation factors."<sup>389</sup>

With respect to this DCAA audit to determine whether the "commercial" exception applied, the Armed Services Board found that the "commercial" exception did apply for Honeywell. The Board stated in pertinent part that "[t]he results of this audit have 'determined that the prices offered to the Government are the same as those offered in Honeywell's Commercial Catalog,'" and "that Honeywell was entitled to a com-

383. *Id.* (Finding of Fact 19).

384. *See supra* text accompanying note 367.

385. *Honeywell Fed. Sys., Inc.*, 92-2 B.C.A. (CCH) at ¶ 24,966. (Finding of Fact 22).

386. *Id.* (Finding of Fact 21).

387. *Id.* (emphasis added).

388. The Defense Contract Audit Agency (DCAA) is [a] DOD agency responsible for performing contract [audit] services for the department. The DCAA was established by DOD Directive 5105.36, *Defense Contract Audit Agency*, on June 8, 1978, to perform all contract auditing for DOD and to provide all DOD procurement and contract administration activities with accounting and financial advisory services in connection with negotiating, administering, and settling contracts and subcontracts. DCAA also furnishes contract audit services to other Government agencies. *DCCA Contract Audit Manual* 1-102. DCAA is a separate DOD agency under the direction, authority, and control of the Assistant Secretary of Defense (Comptroller). *DCAA Contract Audit Manual* 1-103.

NASH ET AL., *supra* note 1, at 168; *see also* DCAA Web Page at <http://www.dcaa.mil> (last visited May 14, 2002); ABA, Section of Public Contract Law, *GOVERNMENT CONTRACT LAW: THE DESKBOOK FOR PROCUREMENT PROFESSIONALS* 18 (2d ed. 1999).

389. *Honeywell Fed. Sys., Inc.*, 92-2 BCA (CCH) at ¶ 24,966 (Finding of Fact 24) (emphasis added).

merciality exception under TINA.”<sup>390</sup>

Accordingly, *Honeywell* represents one of those more difficult cases where the “commercial” exception was not particularly demarcated because the commercial item did not appear to be sold directly to the public. It would appear to be logical that as an item sold to the Federal Government becomes more and more specifically built for military use only, the “commercial” exception becomes more attenuated, and, therefore, more difficult to qualify for. Here, because the spare parts were for commercial computers, *Honeywell* had an easier time qualifying for the “commercial” exception.

4. *Bare BOAs (BOAs Which Have Not yet Received a Purchase Order) Can Qualify as Bilateral Contracts and Still Fulfill the Consideration Requirement According to TMM, Notwithstanding the FAR*

There are two classic stumbling blocks to construing BOAs and some of the other IOUs, standing alone, as contracts. First, the FAR states emphatically that a BOA is not a contract.<sup>391</sup> Second, Boards of Contract Appeals and Courts appear to have difficulty finding consideration in a bare BOA or IOU.<sup>392</sup> If consideration is lacking, there is no contract.<sup>393</sup>

390. *Id.* at 124,409-10 (citing 10 U.S.C. § 2306a(b)(1)(B) (2002)).

391. “A basic ordering agreement is not a contract.” 48 C.F.R. § 16.703(a) (2002).

392. The Coast Guard argued a blanket purchase agreement is not a contract and does not create any contract because there is no mutual consideration of each party either assuming a duty, which it does not otherwise have, or giving up some legal right which it is not required to forgo. The court agreed with this in *Cardiometrix*, 94-1 BCA (CCH) ¶ 26,269 (D.O.T.C.A.B. 1993). Donald G. Gavin, *Government Requirements Contracts*, 5 PUB. CONT. L.J. 234, 237 (1972), points out that

[t]he great source of confusion with [blanket purchase agreements] has been over whether or not it is actually an enforceable contract. The courts have often held that, because of lack of consideration and mutuality, these contracts at their inception are unenforceable, and they become valid and binding only to the extent that they are performed. This concern for lack of consideration and mutuality stems from the nature of the arrangement. Usually the parties merely arrange to do business when the government places an order at the unit price named in the [agreement]. In such an agreement, there is nothing in writing which requires the government to take any ascertainable quantity or amount.

*Id.* *Petersen Equipment*, 95-2 BCA (CCH) ¶ 27,676 (Ag. B.C.A. 1995), held the mere existence of an EERA places on the Government no legal obligation to order even a minimum quantity of supplies or services. It also does not obligate the non-Government party to provide them if ordered. *Id.*

393.

For a contract to be formed, certain elements must be present. Each of the parties to the contract must possess legal capacity to contract; the parties must each manifest assent to the terms of the agreement; the promise to be enforced must be supported by consideration; the agreement must not require the performance of an illegal act by either party; and the agreement must be in the form required by the applicable law.

JOHN CIBINIC, JR. & RALPH C. NASH, *FORMATION OF GOVERNMENT CONTRACTS* 151 (2d ed. 1986).

Any agreement can be a contract within the meaning of the Tucker Act, provided that it meets the requirements for a contract with the Government, specifically: mutual intent to contract including an offer, and acceptance, con-

Accordingly, if there is no consideration in a bare BOA, there is no contract.

While the CO's authority is occasionally the roadblock to formation of a valid government contract,<sup>394</sup> Boards of Contract Appeals and Courts have focused, more often than not, on what they perceive as a lack of "consideration" when analyzing BOAs. More specifically, it is the lack of a definite quantity term that appears to present the cardinal problem or quandry.<sup>395</sup> However, it should be noted that under the FAR, any BOA is required to have a price term or a means to determine its price.<sup>396</sup> Moreover, a leading authority on Government Contracts has stated that "[c]onsideration can be described as the price bargained and paid for a promise. It may consist of an act, a forbearance or a return promise."<sup>397</sup> It is said "most government contracts involve a number of obligations of or benefits to each party. In general, such contracts are not divided into individual exchanges. Thus, the total benefit or detriment of one party is normally thought to be consideration for the total obligations of the other."<sup>398</sup> This generally conforms to the definition of "consideration" proffered by the RESTATEMENT (SECOND) OF CONTRACTS:

- (1) [T]o constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
- (3) The

sideration, and a Government representative who had actual authority to bind the Government. . . . As such, contrary to the opinion of the trial court, a MOA can also be a contract.

Trauma Serv. Group, Ltd. v. United States, 104 F.3d 1321, 1326 (Fed. Cir. 1997). "The requirements for a valid contract with the United States are: a mutual intent to contract including offer, acceptance, and consideration; and authority on the part of the government representative who entered or ratified the agreement to bind the United States in contract." *Total Med. Mgmt., Inc. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir. 1997).

394. "Neither the Secretary of Defense nor any of his designated representatives had the authority to obligate CHAMPUS beyond these base [pay] rates set by regulation. The government "is not bound by its agents acting beyond their authority and contrary to regulation." *Total Med. Mgmt., Inc.*, 104 F.3d at 1321.

395.

It shall be distinctly understood and agreed that . . . the contractor will furnish any quantity of the coal specified (i. e., of the kind and quality specified) that may be needed . . . irrespective of the quantities stated, the government not being obligated to order any specific quantity, . . . and that the stated quantities "are estimated and are not to be considered as having any bearing upon the quantity which the government may order under the contract; . . . the right is also reserved to make such distribution of tonnage among the different bidders . . . as will be considered for the best interests of the government."

There is nothing in the writing that required the government to take, or limited its demand to, any ascertainable quantity. It must be held that, for lack of consideration and mutuality, the contract was not enforceable.

*Willard, Sutherland & Co. v. United States*, 262 U.S. 489, 493 (1923).

396. "Each basic ordering agreement shall— (i) Describe the method for determining prices to be paid to the contractor for the supplies or services." 48 C.F.R. § 16.703(c)(1) (2002).

397. CIBINIC & NASH, *supra* note 395, at 188.

398. *Id.* at 193.

performance may consist of: (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation. (4) The performance or return promise may be given to the promisor or to some other person.<sup>399</sup>

However, the Federal Circuit has come to the rescue of bare BOAs in their quest for consideration and ultimate contract status. In *Total Medical Management*,<sup>400</sup> the Federal Circuit found “consideration” simply by the existence of the parties’ “mutuality of obligation.” The Federal Circuit explained “[h]ere, *the existence of the negotiated, signed MOUs evidences [the] offer and acceptance. There was also consideration in the mutuality of obligation: TMM is to provide discounted health services; the Army is to provide support staff and free space in the military hospital.*”<sup>401</sup> The Federal Circuit’s finding of “consideration” in a bare BOA simply by the “mutuality of obligation” is consistent with the RESTATEMENT (SECOND) OF CONTRACTS.<sup>402</sup> Accordingly, the Federal Circuit in *TMM* has given its imprimatur to the legal postulate that the mere mutuality of obligation contained in all BOAs is sufficient to constitute “consideration,” thereby creating an enforceable contract.

##### 5. *As Required by the CDA, Bare BOAs Also are Always for “The Benefit of the Government”*

Another requirement for a contract to qualify as a Government contract is that it must be for the “benefit of the government.” As the Federal Circuit explicated in *TMM*, “[f]inally the government argues that . . . the MOUs are not subject to the Contract Disputes Act, 41 U.S.C. § 602(a), because they are not procurement contracts for the benefit of the government.”<sup>403</sup>

In almost every BOA, however, a very persuasive argument can be made that each BOA confers a “benefit on the government.”<sup>404</sup> For instance, in the case of emergency orders or the issuance of multiple similar “orders,” there is value to both parties in avoiding a fresh negotiation over the terms of the purchase. These agreements contemplate the ability to avoid the future negotiation of the terms of each order; both parties save time in an emergency situation, such as in an “Emergency Equipment Rental Agreement.” Indeed, in the case of an emergency equipment rental agreement (EERA), the saving of time may save the very asset which is sought to be protected, i.e., our national forest, buildings of the Forest Service, and even adjacent residential homes. Moreover, if too much time transpires, the need for the contractor’s service may expire with the loss of our precious national forest, government building, or ad-

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399. RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

400. 104 F.3d 1314, 1320 (Fed. Cir. 1997).

401. *Id.* (emphasis added).

402. *See supra* text accompanying note 401.

403. *Total Med. Mgmt., Inc.*, 104 F.3d at 1320.

404. *Id.*

jacent residential homes. Both parties save time, and hence money, in obviating a repetitive purchasing situation.

Consider also, for example, a physician-patient professional services setting. If the Government and the contractor physician had to negotiate the terms of treatment, including payment discounts, each time a government-sponsored patient entered the doctor's office, the cost of the government-medical systems would explode due to the cost of negotiations alone, not to mention the loss of volume purchasing discounts which are available under these preferred provider arrangements. Similarly, the promise of government referrals of healthcare consumers has value to the physician or other provider. This is especially so when the referral is coupled with sanctions against the patient for not using a preferred provider. It is this saving of time and money that is contemplated and bargained for in the BOA.

Accordingly, almost all BOAs fulfill the requirement that the contract be for the "benefit of the government."<sup>405</sup> Thus, it is consistent with traditional thought that consideration is furnished within an instrument of understanding such as a BOA. Negotiation, as to the bulk of the terms of future order-performance contracts, is agreed by both parties to be limited to the one negotiation concerning the BOA, rather than the multiple negotiations that would result pursuant to the many future "orders" that may occur. It is bargained for by both parties in a BOA and furnishes consideration for each other's promise to forbear further negotiation.

The Uniform Grain Storage Agreement (UGSA) from the Agriculture Board of Contract Appeals is a final example. The UGSA's Scope provision states: "[u]nless otherwise specified in this Agreement, the provisions of this Agreement apply to all CCC-interest (Commodity Credit Corporation) grain as of the date of deposit or the date title is transferred to CCC, until such grain is loaded out or title is transferred from CCC to another party (transferee)."<sup>406</sup> It is the terms of the agreement for which both parties are bargaining. In the UGSA's table of contents the CCC's responsibilities are listed as are those of the Warehouse Operator.<sup>407</sup> It is this mutuality of promises to forbear future negotiations that provides the required consideration in a bare BOA. It is a bilateral contract, which becomes enforceable at its execution. Whether subsequent unilateral contracts for storage ultimately come into being are irrelevant to the UGSA's contract status, though they will be governed by it. Any unilateral storage contract which does come into being is only a condition precedent to the maturation of the duty to forbear further negotiation concerning the terms of storage.

Finally, while the FAR and most case law state that "[a] basic ordering

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405. 41 U.S.C. § 602(a) (2002).

406. Commodity Credit Corp., U.S. Dep't. of Agric., Unif. Grain and Rice Storage Agreement, Form CCC-25-2, OMB No. 0560-0052 (04-01-98).

407. *Id.*

agreement is *not* a contract,”<sup>408</sup> it nevertheless intrinsically treats a BOA as if it were a contract because it assumes that the terms of a BOA are enforceable. For instance, the FAR states that a BOA shall “[s]pecify the point at which each order becomes a binding contract (e.g., issuance of the order [such as a purchase order], acceptance of the order in a specified manner, or failure to reject the order within a specified number of days.)”<sup>409</sup> In fact, the FAR’s language of “failure to reject the order *within a specified number of days*” strongly suggests the existence of “an option contract.”<sup>410</sup>

Pursuant to the definition of an option contract, the promisor (the Federal Government) would also be limited for a “specified number of days” from revoking or changing the terms of the BOA; at that point in time, at least an option contract must exist. However, according to the FAR, because a BOA is *not* a contract at all; arguendo, it could never qualify as any type of a contract including an option contract.

Accordingly, I believe Section 16.703 of the FAR is in error, is an oxymoron, or at best is an unexplainable conundrum. It states on the one hand that a BOA is not a contract, but on the other hand explicitly implies that a BOA contains a bilateral contract<sup>411</sup> with enforceable promises from both parties (the Federal Government and the private

408. 48 C.F.R. 16.703(a) (1991); *Zoubi v. United States*, 25 Cl. Ct. 581 (1992) (finding that a BOA between an interpreter and the State Department was not a contract, but rather that a contract arose only when the interpreter accepted a work order that the State Department’s Office of Language Services issued authorizing the interpreter to perform services and providing that payment would be made according to the rate schedule in the BOA); *Modern Sys. Tech. Corp.*, 24 Cl. Ct. 699 (1992) (holding that a basic pricing agreement entered into by a government agency and a contractor was not a binding contract but merely a framework for future contracts, since there was no language in the agreement indicating any present intent that either party be bound and since the terms were not sufficiently definite).

*See Modern Sys. Tech.*, 24 Cl. Ct. at 403. “The main treatises and hornbooks on government contracts also support the interpretation of the BPA as a mere framework for future contracts. The authors of these books note that a basic agreement does not contain any exchange of promises. Contractual obligations will arise only after an order is placed.” RALPH C. NASH & JOHN CIBINIC, JR., *FEDERAL PROCUREMENT LAW*, 473-74 (3d ed. 1977); EUGENE W. MASSENGALE, *FUNDAMENTALS OF FEDERAL CONTRACT LAW* 77 (1991) (“The basic ordering agreement is not a contract as such.”). As McBride and Touhey comment, such agreements serve the purpose of consolidating

into one instrument of indefinite duration those contract provisions which will be standard to every contract with a particular concern. In this way, prolonged and repeated contract negotiations are curtailed, if not eliminated, and the parties are spared the bother and expense of going over the same ground again and again. In essence, this arrangement is an agreement to agree, a set of ground rules as it were, and no obligations are assumed by either party until orders are given by the Government and accepted by the contractor. In other words, the basic agreement of itself is not a contract, and does not become a contract except to the extent that orders are issued under it.

JOHN C. MCBRIDE & THOMAS J. TOUHEY, *GOVERNMENT CONTRACTS* 18.70 (1984).

409. 48 C.F.R. 16.703(c) (1) (iv) (2002).

410. RESTATEMENT (SECOND) OF CONTRACTS § 71 (1979) (emphasis added). “An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor’s power to revoke an offer.” *Id.* at § 25.

411. *See supra* text accompanying text 401.

contractor).<sup>412</sup> The Federal Government cannot have it both ways. If the BOA is indeed *not* an actual contract, then the basic terms of a BOA are not enforceable against either the private contractor or the Federal Government. Consequently, all the terms of the BOA would logically still be subject to new negotiations whenever the Government proffers a subsequent purchase order. This scenario, of course, would be a disaster for the Government because it would be unable to receive its goods or services in a timely manner at a previously agreed-upon price once it issued its future purchase orders for goods or services. For example, as discussed earlier, once a forest fire has started, the Forest Service does not wish to once again negotiate the terms of an EERA because such a delay would cause too much loss to our national forest, related government buildings, and adjacent residential homes for which the government may be liable.<sup>413</sup>

6. *Under TMM and TSG, the “Bare” BOA Itself, If It Meets all the Elements of a Government Contract, Can Serve as the Basis for a Well-Pled Contract That Would Overcome a Government’s 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction*

The Federal Circuit was clear in *TMM* that bare BOAs standing alone, without a purchase or service order, could still be a contract, when it stated: “[h]ere, the existence of the negotiated, signed MOUs evidence [the required] offer and acceptance. There was also consideration in the mutuality of obligation: TMM is to provide discounted health care services; the Army is to provide support staff and free space in the military hospital.”<sup>414</sup> The Federal Circuit also broadly interpreted the CDA requirement that the contract must also be for the “benefit for the government” in *TMM*, stating that finally: “the government argues that, [even] if

412. Section 16.703(c)(1) of the FAR states:

Each Basic ordering agreement shall—

- (i) Describe the method for determining prices to be paid to the contractor for the supplies or services;
- (ii) Include delivery terms and conditions or specify how they will be determined;
- (iii) List one or more Government activities authorized to issue orders under the agreement;
- (iv) Specify the point at which each order becomes a binding contract (e.g., issuance of the order, acceptance of the order in a specified manner, or failure to reject the order within a specified number of days);
- (v) Provide that failure to reach agreement on price for any order issued before its price is established . . . is a dispute under the Disputes clause included in the basic ordering agreement; and
- (vi) If fast payment procedures will apply to orders, include the special data required by 13.403.

48 C.F.R. 16.703(c)(1) (2002).

413. The Tucker Act, 28 U.S.C. § 1491 (2002), makes the United States liable for implied-in-fact contracts, and it may be argued that the Government had an implied-in-fact contract to not let its forest fires spread so far as to endanger the nearby adjacent homes and villages.

414. *Total Med. Mgmt., Inc.*, 104 F.3d at 1320.

[they are] contracts, the MOUs are not subject to the Contract Disputes act, 41 U.S.C. § 602(a), because they are not procurement contracts for the benefit of the government.”<sup>415</sup> The Federal Circuit concluded, “[w]e reject this argument since it is clear that *the government has legal obligations* to military dependents and benefits by obtaining said dependents’ care at a reduced cost.”<sup>416</sup>

The Federal Circuit also broadly interpreted the parameters of the Tucker Act in *TSG* when it stated that “[a]ny agreement can be a contract within the meaning of the Tucker Act, provided that it meets the requirements for a contract with the Government, specifically: mutual intent to contract, including an offer and acceptance, consideration, and a Government representative who had actual authority to bind the Government.”<sup>417</sup>

Moreover, Section 71 of RESTATEMENT (SECOND) OF CONTRACTS is clear that the exchange of a promise for a promise is more than sufficient to constitute or fulfill the “consideration” needed to form a contract where it states: “[t]o constitute consideration, a performance or a return promise must be bargained for. A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”<sup>418</sup> Accordingly, because *TMM* and *TSG*, as discussed above, also stand for the proposition that a bare BOA alone, as long as it is for the benefit of the government, can be a government contract,<sup>419</sup> simply pleading a bare BOA alone should be sufficient to overcome a Government’s Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction.

### C. FAR AND DFARS CHANGES WHICH ARE NEEDED BECAUSE OF TRAUMA SERVICE GROUP AND TOTAL MEDICAL MANAGEMENT

There are at least eighty-four sections in the FAR and DFARS that refer to BOAs.<sup>420</sup> These eighty-four sections should all be changed to reflect the fact that the Federal Circuit held in *TMM* and *TSG* that a bare BOA itself can be a government contract as long as the BOA is for the “benefit of the government.”<sup>421</sup> Two sections of FAR and DFARS par-

415. *Id.*

416. *Id.* (emphasis added).

417. *See* Trauma Serv. Group, 104 F.3d at 1326 (Fed. Cir. 1997).

418. RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

419. The Federal Circuit was clear in *TMM* that bare BOAs standing alone, without a purchase or service order, could still be a contract, when it stated: “[h]ere, the existence of the negotiated, signed MOUs evidences [the required] offer and acceptance. There was also consideration in the mutuality of obligation: *TMM* is to provide discounted health care services; the Army is to provide support staff and free space in the military hospital.” *Total Med. Mgmt., Inc.*, 104 F.3d at 1320.

420. *See*, e.g., 48 C.F.R. §§ 2.101, 32.104, 32.502-4, 3.104-3, 42.302, 4.203, 5.203, 5.207, 5.504, 13.301, 16.701, 16.703, 19.804-5, 22.305, 22.603, 22.605, 32.501-3, 42.202, 47.205, 53.213, 53.216-1, 204.7303, 204.670-1, 204.670-2, 204.7003, 204.201, 204.203, 204.7004, 253.204-70, 242.302, 253.204-70 and ch. 2, app. F (2002).

421. *See supra* text accompanying notes 416.



ticularly stand out and call for change. The first is section 16.703, which states unequivocally that a BOA is not a contract. Using the Federal Circuit's *TMM* and *TSG* decisions, a forceful argument can be made that the BOA's definition in the FAR must be changed from: (1) "[a] basic ordering agreement is *not* a contract"<sup>422</sup> to (1) "[a] basic ordering agreement *is* a contract," or at the very least "[a] basic ordering agreement *may* be a contract," with citations to *TSG* and *TMM*.

Second, section 2.101 (entitled "Definitions") must be changed with respect to its definition of a contract. It presently states in pertinent part:

"[C]ontract" means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. *It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. [I]n addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, et seq. For discussion of various types of contracts, see Part 16.*<sup>423</sup>

Pursuant to the Federal Circuit's *TMM* and *TSG* decisions holding that a BOA with mutuality of promises which are for the benefit of the Government qualifies as a contract, the definition of a contract in the FAR should be changed from: (1) "[i]t [the contract] includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that . . . are in writing;"<sup>424</sup> to (1) "[i]t [the contract] includes all types of commitments that obligate the Government to an expenditure of appropriated funds *or that obligate the Government to an exchange of mutual promises which benefit the Government* and that . . . are in writing."

In addition, in the same paragraph, the following sentence should also be changed to reflect the Federal Circuit's decisions in *TSG* and *TMM*. The further definition of a contract in the FAR should be changed from: (1) "[i]n addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basis ordering agreements;"<sup>425</sup> to (2) "[i]n addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; *basic ordering agreements where there are exchanges of mutual promises between the contractor and the Government which benefit the Government . . .*"

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422. 48 C.F.R. § 16.703(a) (2002) (emphasis added).

423. 48 C.F.R. § 2.101 (2002) (emphasis added).

424. *Id.*

425. *Id.*

These above recommended changes will go far in correcting and upgrading the FAR with respect to the new definitions of BOAs as explicated by the Federal Circuit's rulings in *TSG* and *TMM*.

## V. CONCLUSION

The Federal Circuit's decisions in *TSG* and *TMM* were instrumental for the future rights of all BOA contractors, who are now entitled immediately to their trial on the merits at the U. S. Court of Federal Claims instead of having to first survive a wasteful preliminary hearing on a Rule 12(b)(1) motion in that same forum. By simply filing a complaint alleging a well-pled contract, the BOA contractor will have its day in court on the merits of its case. This, in itself, is a monumental achievement for government contractors who, for such a long period of time, were refused the right of a trial on the merits as a result of the Government filing with its Answer, its favorite motion, the Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction.

These touchstone decisions by the Federal Circuit in *TSG* and *TMM*, holding that BOAs, standing alone, can qualify as contracts, were indispensable to helping contractors prove that BOAs were enforceable contracts. These two decisions resolve the contractor's "Catch-22" Chameleon" BOA problem, and should force the Government to revise those particular FAR sections which state that BOAs are *not* contracts. Such revisions will go far in solving the fundamentally unfair internal contradictions now found in the FAR, i.e., that BOAs are not contracts, notwithstanding the presence of an offer, an acceptance, and the mutuality of obligations set forth in all BOAs.

Accordingly, the Federal Government should relinquish and cease its war against BOAs because its arguments that BOAs are *not* contracts are clearly erroneous and also seriously undermine: (1) the Federal Government's right to enforce any BOA; (2) the Government's right to have TINA apply to BOAs; and (3) the Government's right to "Christian" in any TINA provision that has been inadvertently left out of a BOA.

The Federal Circuit's finding in *TMM* that the bare BOAs, i.e., the negotiated and signed MOUs, standing alone, nevertheless still contained the consideration necessary to create a contract by virtue of the mutuality of obligation, goes far to help alleviate the contractor's "Catch-22 Chameleon" problem associated with past BOAs. I applaud the Federal Circuit for its outstanding equitable decision in *TMM*, that bare BOAs without any subsequent actions on the part of any of the parties nevertheless still contained sufficient consideration to form an enforceable contract. The Federal Circuit's *TMM* decision provides a quantum equitable leap in the right direction by providing BOAs with contractual status from the beginning as negotiated bilateral contracts, thus eliminating, once and for all, the contractor's "Catch-22 Chameleon" problem with BOAs.

