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Contract Claims Against the Federal Government:

Sovereign Immunity and Contractual Remedies

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Introduction

Litigation of government contract claims is a detailed and specialized world. Indeed, many private companies, as well as many lawyers and law firms, focus their business primarily on federal government contract activity. In a variety of ways, government contracts differ from those between private parties. A contractor's breach of contract with the government may, for example, have significance far beyond that associated with breach of a private contract. Perhaps most important, the breach may violate specific criminal laws. For instance, conduct in the form of a "false claim" with reference to the government may make a contractor guilty of a criminal fraud under the Criminal False Claims Act,[1] as well as liable for a civil wrong under the Civil False Claims Act.[2] This briefing paper, however, describes limitations on contract claims *against* the federal government. Since such restrictions are generally rooted in the doctrine of sovereign immunity, and accompanying restraints on judicial jurisdiction, Part I provides background on the history of government contracting and a brief survey of the relevant statutes granting consent to suit. Part II then describes in some detail the resulting practical limitations on government contractual liability.

I. The background of Government Contracting

In American Constitutional law, the doctrine of sovereign immunity bars suits against the government in most circumstances.[3] Early American colonial experience included a strong commitment to legislative adjudication of public law and legal obligation, where citizens made popular assemblies the forum that resolved monetary claims against the

[1] 18 U.S.C. § 287.
[2] 31 U.S.C. § 3729.
[3] For a history and explication of this doctrine *see* John Lobato & Jeffrey Theodore, *The Scope of Federal Sovereign Immunity*, Briefing Paper, Harvard Law School Federal Budget Policy Seminar (2006).

government by balancing public and private ends.[4] Almost a century before the Federal Tort Claims Act, and even in the years before enactment of the Tucker Act, however, Congress waived the government's immunity from judicial claims arising in contract. Since the creation of the Court of Claims in 1855 – designed to relieve Congress and its Committee on Claims of the flood of private bills and the burden of legislating on individual claims – the federal government has been subject to at least some type of litigation based upon contract disputes.[5] This pre-Civil War waiver of immunity from contract suit was viewed as indispensable to the efficient operation of government, allowing procurement of necessary goods and services from qualified private contractors.[6]

In an oft-quoted passage from his annual message of 1861, President Lincoln called for changes in the Court of Claims based on the principle that "it is as much the duty of Government to render prompt justice against itself in favor of citizens, as it is to administer the same between private individuals."[7] Gillian Hadfield has noted that "[p]olitically, by honoring its contracts, government has reinforced its democratic legitimacy as a government subject to the rule of contract."[8] When the government enters into the world of contract and assumes the position of a private person for juridical purposes, however, it never leaves behind its sovereign status and its overriding power.[9] Indeed, with regard to contract disputes, sovereign immunity has not been wholly abandoned and the federal government retains certain rules, privileges, and limitations on liability.

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[4] See Christine Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 Harvard Law Review 1383 (1998).
[5] Act of Feb. 24, 1855, 10 Stat. 612. *See* URBAN A. LESTER & MICHAEL F. NOONE, JR., LITIGATION WITH THE FEDERAL GOVERNMENT § 6.104 (3d ed. 1994). In 1863, upon the recommendation of President Lincoln, judgments of this court were made final, with provision for an appeal to the Supreme Court.
[6] *See* Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L.J. 1529, 1565 (1992).
[7] Cong. Globe, Dec. 3, 1861, 37th Cong., 2d Sess. app at 2. *See* LESTER & NOONE, *supra* note 5, at §6.104.
[8] Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 467 (1999).
[9] *See id.* at 472.

a. Historical Background

The Tucker Act, initially enacted in 1887, added to the jurisdiction of the Court of Claims by formally waiving the government's sovereign immunity for claims "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."[10] The Supreme Court has explicitly confirmed that "by giving the Court of Claims jurisdiction over specified types of claims against the United States," the Tucker Act "constitutes a waiver of sovereign immunity with respect to those claims."[11] Prior to 1978, contract disputes with the federal government typically fell under the provision of the Tucker Act covering claims founded on contract. Since enactment of the Contract Disputes Act (CDC),[12] all procurement contracts – the vast majority of federal contracts to purchase supplies, for construction, and for services – are governed principally by this modern statute.[13]

Formerly, under the so-called "disputes clause" found in most government contracts, a contractor was required to exhaust administrative remedies, by appeal to the agency board of contract appeals, before he could file suit in the Court of Claims for a very limited judicial review of the administrative decision. The CDC has given an aggrieved contractor vastly-improved choice of remedies – appeal to a judicially-enhanced agency board[14] or "direct access" to suit in the Court of Claims.[15] Judgments under each are treated equally as

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[10] 28 U.S.C. § 1491(a)(1); *see also* 28 U.S.C. § 1346(a)(2). The district courts were given concurrent jurisdiction of claims not exceeding $1,000 (presently increased to $10,000). 28 U.S.C. § 1346(a)(2). For jurisdictional purposes, the relevant dollar amount is determined by an estimate made at the time of filing of the amount the plaintiff ultimately stands to recover. Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986).
[11] United States v. Mitchell et. al., 463 U.S. 206, 212 (1983).
[12] 41 U.S.C. § 601 (1978).
[13] *See* GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT 518 (2000).
[14] The CDC contains numerous provisions designed to improve the independence, stature, and efficiency of the boards, now constituted as special courts with substantial judicial character.
[15] 41 U.S.C. § 605(b). An appeal must be taken within 90 days or a suit within 12 months.

judgments against the United States and are paid from the standing appropriations designated for such purpose.[16] In 1982 the Court of Claims was abolished and its jurisdiction was divided between two new courts: the U.S. Court of Appeals for the Federal Circuit (appellate functions and jurisdiction) and the U.S. Claims Court (with additional trial jurisdiction).[17] The Claims Court took on further jurisdiction and was renamed the U.S. Court of Federal Claims in 1992.[18]

b. The Effects of Sovereign Immunity

In *Glidden Co. v. Zdanok*,[19] the Supreme Court held that the extension of judicial power by Article III to "Controversies to which the United States shall be a Party" included suits in which the United States is a defendant. The Court reasoned that a suit against the sovereign sufficiently known at the time of the adoption of the Constitution is within available judicial power and is merely kept from the exercise of that power until an explicit waiver of the immunity provides the required consent to suit.[20] Any suit against the United States or any of its agencies must be based on a particular statute that waives the sovereign immunity of the government for the particular type of claim made, and must follow the specific statutory regulations governing recovery on such a claim. In *Burr v. FHA*,[21] the Supreme Court also

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[16] 31 U.S.C. § 1304. *See* 41 U.S.C. § 612(a). The governing law is the same in board and court. *See* Michael J. Schengold, *Choice of Forum for Contract Claims: Court vs. Board*, 3 FED. CIV. BAR. J. 35, 66 (1993) (observing that "[t]here is no real difference between the procedures for and the substance of hearings on motions in the court and the boards.").
[17] The Federal Courts Improvement Act of 1982, 96 Stat. 25, Title I; *see* David Schwartz, *Two New Federal Courts*, 68 A.B.A. J. 1091 (1982).
[18] The Court of Federal Claims Technical and Procedural Improvements Act of 1992, 106 Stat. 4506, Title IX.
[19] 370 U.S. 530, *reh'g denied*, 371 U.S. 854 (1962).
[20] *Id*. at 561. Essentially, the Court held that inability to enforce judgments against the United States is no more an obstacle to the exercise of Article III judicial power by the Court of Claims than the Supreme Court's inability to enforce judgments in suits against state governments is to its exercise of Article III judicial power in such suits. Just as the Supreme Court must rely on the good faith of state governments to grant judgments against them, so also the Court of Claims may rely on the good faith of the United States in granting judgments against it. *See* LESTER & NOONE, *supra* note 5, at §§6.114 – 6.119.
[21] 309 U.S. 242 (1940).

recognized congressional authority to create agencies capable of acting as private litigants in contract disputes. Such "sue-and-be-sued" clauses – rendering federal agencies amenable to suit – waive immunity only as to existing causes of action and only with regard to the specific activities enumerated in the statute.[22]

The Tucker Act and the CDC do not explicitly identify the substantive law that governs a contracts-based claim. While claims founded upon a particular "money-mandating" statute refer to the statute itself as providing the governing substantive law, when a claim is founded simply upon contract, the source of substantive law is the federal common law of contracts.[23] In *Seaboard Lumber Co. v. United States*,[24] the Claims Court explained:

> It is undisputed that the law to be applied in cases related to federal contracts is federal and not state law. The federal law applied in breach of contract claims is not, however, created by statute but rather for the most part has been developed by the Court of Appeals for the Federal Circuit and the Court of Claims, with the Claims Court, or the Boards of Contract Appeals applying the law in the first instance. This federal contract law also reflects the various contract clauses developed over time for the benefit of both the sovereign and the contractor through the practice of agencies and the bargaining leverage of contractors. It has drawn as well upon traditional private contract law for analogies and concepts. However, it is a separate and distinct body of law.[25]

The federal common law of contracts differs in certain respects (described below) from traditional state contract law. Over time, however, the federal government – through various congressional enactments – has "gradually lowered the shield of sovereign immunity," permitting suit in most contractual situations where an aggrieved party would desire relief, and weaving together what one prominent scholar has described as "a reasonably well-

[22] *See* SISK, *supra* note 13, at 401-4.
[23] *See* Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against States*, 71 Geo. W. L. Rev. 602, 614 (2003).
[24] 15 Cl. Ct. 366 (1988), *aff'd*, 903 F.2d 1560 (Fed. Cir. 1990).
[25] *Id.* at 369 (internal citations omitted). This remains true despite the strong presumption against judicial creation of federal common law rules dating from *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). The federal law of contracts has developed primarily around standard contract clauses that the government includes in every procurement contract. *See* SISK, *supra* note 13, at 555-65.

integrated pattern of causes of action covering most subjects of dispute."[26] In practice, however, this consent does not extend so far as to subject the government to all suits and actions as if it were a private party, particularly in certain segments of the liability spectrum.

The remainder of this briefing paper seeks to describe several of the practical limitations on government contractual liability, both past and present. It is in many ways a story of significant constraints gradually loosening over time in a march towards increasing government liability, but never fully arriving at the point where sovereign rights and privileges are disregarded.

II. PRACTICAL LIMITATIONS ON GOVERNMENT CONTRACTUAL LIABILITY

a. Proper Governmental Authority

The federal contract function is ultimately based upon several of the constitutional powers of Congress, including the power "to pay Debts and provide for the common Defense and general Welfare…" to make appropriations, and "To make all Laws which shall be necessary and proper for carrying into Execution the …Powers…" of the government.[27] The power to contract is delegated to the executive, on statutory conditions, and the administrative agencies issue regulations more specifically regulating the letting and administration of contracts.[28] Intricate standard clauses intended to promote federal policies are by law or regulation required for most government procurement contracts. Essential elements of the contract are thus largely written by the government, whose superior bargaining power – if not the requirements of law – leave a private contractor no choice with respect to certain terms. The elements of bargaining and "meeting of the minds," so prominent in private contracting, are

[26] Sisk, *supra* note 23, at 603.
[27] U.S. CONST. art, I, § 8, cls. 1, 18; art I. § 9, cl. 7.
[28] *See* LESTER & NOONE, *supra* note 5, at § 9.101.

largely replaced by a complicated governmental system for ascertaining the meaning and scope of a contractor's obligations.[29]

Principles of authority and apparent authority in government contract law therefore differ greatly from those applicable to typical contracting. Unlike negotiation instructions from a private individual to his agent, governmental direction as a principal to its agents involves statutes or regulations with the force of law. Such legal directives prevail over the contract text itself and over what would be the rights of the contractors were the contract between private parties. In *Federal Crop Ins. Corp v. Merrill*,[30] for example, a corporate agency of the Department of Agriculture insured a crop of reseeded wheat with a clause incorporating regulations published in the Federal Register – regulations that forbade such insurance. Cognizant that a private insurance company would be liable under similar circumstances, the Court held that since the regulation was equivalent to statute, the contract was unlawful and incapable of supporting a suit. As a result of the special character of the federal government, such an agent cannot effectively act beyond his limited authority, even when he and the contracting party are unaware of the limitation.[31]

This principle has been extended to include regulations on the authority to contract that will nullify a contract, even where the contract does not refer to the regulations. In *G.L. Christian v. United States*,[32] the Court of Claims held that a clause required by regulation to appear in the relevant sort of contract (permitting termination for convenience by the government under certain conditions) was present in the contract and binding upon the

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[29] *Id.* at § 9.104.
[30] 332 U.S. 380 (1947)
[31] The Court also rejected the contention that insurance is essentially a private or nongovernmental activity controlled by ordinary contract principles, maintaining that "[g]overnment is not partly public or partly private, depending on the governmental pedigree of the type of a particular activity of the manner in which the government conducts it." *Id*. at 383-84.
[32] 312 F.2d 418 (Ct. Cl 1963).

contractor despite being absence in fact from the contract and not incorporated by reference. The contractor's damages were accordingly limited to the formula in the absent clause.

A more recent Supreme Court case, *United States v. Winstar Corp.*,[33] dealt with Congressional obligation not to enact legislation contrary to the terms of a contract entered into by a federal agency.[34] The case involved an effort by the Federal Home Loan Bank Board to encourage healthy thrifts and outside investors to take over failing thrifts during the savings and loan crisis of the 1980's, by means of "express agreements" guaranteeing capital credits toward reserve requirements (as well as other incentives).[35] Subsequent action by Congress, however, forbade thrifts from counting capital credits in computing the required reserves, causing many participating S&Ls to fall out of compliance and making them subject to seizure.[36] The plaintiffs in *Winstar* sued the government for damages arising from breach of contract. Interpreting the contract not as constraining sovereignty – but instead only requiring damages in the event of sovereign action contrary to contract provisions (essentially constituting a promise to assume the risk that such legislation would be enacted) – the Court held the government liable in damages for Congress's violation of the restriction.[37] While the Bank Board had legitimate delegated authority to enter into such a contract, the motive of Congress in enacting the offending legislation was to abrogate the contracts, such that its action was properly attributed to the government-as-contractor rather than the government-as-sovereign.[38]

[33] 518 U.S. 839 (1996).
[34] For an extended discussion of *Winstar* and its critics see Stacy Anderson & Blake Roberts, *Capacity To Commit in the Absence of Legislation: Takings, Winstar, FTCA, & the Court of Claims*, Briefing Paper No. 12, Harvard Law School Federal Budget Policy Seminar, 17-28 (2005), a*vailable at* http://lawweb.usc.edu/cslp/conferences/fiscal%20challenges/documents/12-CapacitytoCommitt.pdf
[35] 518 U.S. at 848-853.
[36] *Id*. at 856-58.
[37] *Id.* at 875-76.
[38] *Id*. 891-96; *see* Hadfield, *supra* note 8, at 479-88.

b. Contractual Claims, Moral Obligations, and Equitable Estoppel

The historical premise of the sovereign's immunity to suit, and the waiver of such immunity primarily by statute, is fundamental to government contracting.[39] Under the Tucker Act, a "claim" against the government – regardless of its specific foundation – must be based upon a legal right.[40] As a result, claims based in moral obligation will not generally be entertained.[41] A moral obligation may become the basis for a claim against the federal government only when it is fixed or recognized in a statute, regulation, or (in exceptional circumstances) an award.[42]

In certain cases where the government is morally responsible for a defect in the contract, however, the Court of Claims has occasionally sought to advance the judicial interest in fairness between government and contractor. For example, in *Armstrong & Co. v. United States*,[43] a war contractor sued for the increased costs of extra work sustained by reason of his obedience to an oral order directing the use of specialized bricks rather than those originally anticipated. Despite statutory regulation requiring a written contract and the absence of jurisdiction under the Tucker Act for recovery of a *quantum meruit*, the court emphasized that the contractor did what the government wanted and held that justice required entertainment of the claim.[44] Acceptance of an obviously mistaken written bid, failure to consider a bid that is entitled to acceptance, furnishing of inadequate or misleading information, failure to advise of

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[39] It is generally held that the congressional waiver of sovereign immunity and grant of consent to be sued must be strictly construed, at least in Tucker Act matters. *See, e.g.*, United States v. Testam, 424 U.S. 392 (1976).
[40] *See* 28 U.S.C. § 1346.
[41] For example, even before suits for pensions were expressly forbidden, 28 U.S.C. § 1346(d), pensions were treated as gratuities or moral claims, and jurisdiction of suits for pensions was denied. *See* LESTER & NOONE, *supra* note 4, at §8.102.
[42] *See, e.g.*, United States v. Realty Company, 163 U.S. 427 (1896).
[43] 98 Ct. Cl. 519 (1943).
[44] This ruling is exceptional, although some subsequent cases have been decided similarly to *Armstrong*. *See* Park, *Settlement of Claims Arising from Irregular Procurement*, 80 MIL. L. REV. 220 (1978).

facts material to performance by the contractor, and other unfair dealings have occasionally provided ground for suits claiming breach of a government contract.[45]

More recently, in *Office of Personnel Management v. Richmond*,[46] the Supreme Court reversed a decision by the U.S. Court of Appeals for the Federal Circuit, which had applied principles of equitable estoppel against the government in order to award a claimant monetary payment not otherwise permitted by law. Seemingly motivated by the burden of estoppel claims as a "drain on the public fisc," the Court refused to award damages to a retired federal government employee who was temporarily deprived of disability annuity benefits because he had detrimentally relied on erroneous oral and written advice provided in government explanation of his policy.[47] Relying on the principle that "payments from the Federal Treasury are limited to those authorized by statute," the Court ruled that appellee's claim was not covered under any Tucker Act category, maintaining "the impossibility of an estoppel claim for money in violation of a statute."[48] Despite occasional exceptions, an important difference between government contract and privately law is the (normal) unavailability of the doctrine of equitable estoppel to overcome lack of authorization by statute or equivalent regulation.[49]

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[45] *See* Gray, *Responsive versus Responsibility: Policy and Practice in Government Contracts*, 7 PUB. CONT L.J. 39 (1973).
[46] 496 U.S. 414 (1990).
[47] *Id.* at 415-19, 433.
[48] *Id*. at 416, 430, 431-32.
[49] When there is no fundamental lack of authority by statute or regulation, a promissory estoppel may be constructed on traditional common law grounds. *See* Emeco Industries, Inc. v. United States, 485 F.2d 652 (Ct. Cl 1973). A private claimant may also overcome the general rule that government servants have no apparent authority greater than their authority by statute or regulation (as discussed above) when the facts permit a conclusion that the particular governmental actor has acquired the authority of his relevant senior by declaration, ratification, or even a waiver. *See* LESTER & NOONE, *supra* note 5, at §§ 9.107-9.113; Alan I. Saltman, *Estoppel Against the Government: Have Recent Decisions Rounded the Corners of the Agent's Authority Problems in Federal Procurement?*, 45 FORDHAM L. REV. 497 (1976).

c. Contracts and Appropriations

By permanent legislation, including the Anti-Deficiency Act, no procurement contract may be made unless authorized by law and supported by an adequate appropriation, and no contract may bind the government to pay a larger sum than the amount appropriated.[50] Such restraints on procurement often prevent full payment on contracts otherwise properly performed. For example, in *Sutton v. United States*,[51] a contractor engaged in dredging at unit rates had, through the mistake of the government contracting officer, been allowed to continue work in such volume as would require an excess of the amount appropriated for the work. Rejecting any sort of recovery based upon reliance on the contracting officer's record of completed work, or upon unjust enrichment, the Supreme Court held that the Secretary of War was without power to make a contract which would bind the government to pay such an un-appropriated amount.[52]

d. The "Non-appropriated Funds Doctrine"

Execution and collection of judgments against the federal government is not always straightforward. Since litigants cannot effectually demand execution of a judgment against the sovereign, technically Congress must manifest its own willingness to pay each judgment.[53] As a result, Congress has established a permanent indefinite appropriation for payment of all judgments against the United States that are "not otherwise provided for," that is, which cannot be paid from funds under the control of the agency involved.[54] Federal law

[50] 41 U.S.C. §§ 11, 12; 31 U.S.C. § 1341.
[51] 256 U.S. 575 (1921).
[52] *Id*. at 581.
[53] *See* LESTER & NOONE, *supra* note 5, at §6.110; §9.112.
[54] 31 U.S.C. § 1304. Formerly a special appropriation was necessary for all judgments amounting to more than $100,000. 31 U.S.C. § 724(a) (1976). 41 U.S.C. § 612(a), however, directs that payment be made out of the standing fund created by 31 U.S.C. § 1304, but requires agencies to reimburse this judgment fund out of

now provides for payment of Claims Court's judgments – other than as provided by the Contract Dispute Act of 1978 – from any general appropriation.[55]

Nevertheless, the Court of Claims (in its various incarnations) has consistently held that no contract claims will be entertained based on the conduct of agencies not supported by appropriated funds. Such a principle follows directly from the fact that judgments of the court are paid only from appropriated funds.[56] The court, however, has interpreted this doctrine broadly, limiting jurisdiction only in instances when the appropriation of funds is expressly *prohibited* by law.[57] The Tucker Act has also been amended to provide for jurisdiction of suits on contracts relating to certain non-appropriated funds instrumentalities, such as the post exchanges (supermarkets) of the armed services and NASA.[58]

e. Damage Awards

Perhaps the most important and enduring limitation on government liability is the rule barring specific performance in contract claims against the federal government and thereby generally limiting contract actions to a damage remedy.[59] This restriction has been justified as preserving legislative and executive discretion against judicial interference and as giving political officials "flexibility to get out of contracts that, they determine, no longer serve the

available agency funds or through additional appropriations, shifting liability for contract breach back to the offending agency.

[55] 28 U.S.C. § 2517(a). The permanent appropriation also covers payment of amounts awarded by boards of contract appeals. Certain judgments against the United States are payable from other funds under 31 U.S.C. § 1955 (U.S. Government Life Insurance Fund) and 42 U.S.C. § 415(i) (Social Security benefits). A judgment will be submitted to the Claims Group at the GAO in order to determine the proper appropriation or fund to charge. *See* LESTER & NOONE, *supra* note 5, at §6.122.

[56] *See* McCloskey & Co. v. United States, 530 F.2d 374 (Cl. Ct. 1976).

[57] *See* United States v. General Electric, 727 F.2d 1567 (Fed. Cir. 1984) (holding that an agency which declined to use appropriated funds despite legal authority to do so was not excluded from judgments).

[58] 28 U.S.C. § 1346(a)(2); s*ee* LESTER & NOONE, *supra* note 5, at §6.106.

[59] *See generally,* Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV 155 (1998).

public interest."[60] Such a tenet, however, does not immunize the government from liability for violation of any contractual rules, but instead simply limits the remedy for such violations.

This longstanding principle of limitation to damages, however, has recently been called into some question. In *Bowen v. Massachusetts*,[61] the Supreme Court held that certain types of monetary claims, which it characterized as seeking specific relief in the form of monetary award rather than "money damages," could be pursued under the Administrative Procedures Act (APA)[62] rather than through the Tucker Act. In response to local provision of Medicaid benefits for educational services to mentally retarded individuals by the state of Massachusetts, the Secretary of the Department of Health and Human Services (HHS) disallowed the expenditures since they did not conform to federal requirements.[63] Massachusetts filed a complaint, under § 702 of the APA, in U.S. District Court seeking injunctive relief requiring the HHS Secretary to provide reimbursement.[64] In the wake of jurisdictional challenges at both the trial and appellate levels, the Supreme Court narrowly interpreted the APA's express exclusion from judicial review of those actions seeking "money damages" as referring only to claims for money which seek compensation for a loss (rather than the monetary aspects of the equitable relief sought by Massachusetts in this case).[65] The Court's ruling therefore suggests that a party framing its request for monetary relief as seeking something other than "damages" in the technical sense may avoid the Claims Court and litigate in district court under the APA.[66]

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[60] *Id.* at 199.
[61] 487 U.S. 879 (1988).
[62] 5 U.S.C. §§ 701 – 706.
[63] 478 U.S. at 885-87.
[64] *Id.* at 887.
[65] *Id.* at 891-901.
[66] *See* Gregory C. Sisk, *Two Proposals to Clarify the Tucker Act Jurisdiction of the Claims Court*, 37 FED. B. NEWS & J. 47, 47-53 (1990).

In his dissent in *Bowen*, however, Justice Scalia sought to reaffirm that it is "settled that sovereign immunity bars a suit against the United States for specific performance of a contract, and that this bar was not disturbed by the 1976 amendment to § 702" of the APA.[67] Statutorily, relief is precluded under the APA "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."[68] Since *Bowen* was handed down, almost all circuit courts have held that the Tucker Act impliedly forbids specific performance in contract actions against the federal government.[69] Most scholars agree that notwithstanding *Bowen* and the supposed waiver of sovereign immunity in the APA, the Tucker Act continues to forbid any grant of specific performance on a contract claim against the federal government.[70] Indeed, two subsequent Supreme Court cases[71] limit *Bowen*'s reach and, according to some commentators, "signal a retreat" that may restrict its scope "to cases involving similar peculiar facts."[72]

f. Nonmonetary Disputes

Traditionally, the relief available in the Court of Claims was strictly limited to money judgments such that the court granted no specific relief, with a single, limited exception for

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[67] 487 U.S. at 921 (Scalia, J., dissenting) (internal citations omitted).
[68] 5 U.S.C. § 702.
[69] *See, e.g.*, Presidential Gardens Assocs. V. United States, 175 F.3d 132, 143 (2d Cir. 1999); North Star Alaska v. United States, 14 F.3d 36, 38 (9th Cir. 1994). However, the U.S. Court of Appeals for the Tenth Circuit, relying heavily upon *Bowen*, held that the Tucker Act did not forbid the court from requiring the government to honor a contract – that is, specifically perform a contractual obligation – under APA review. Hamilton Stores, Inc. v. Hodel, 925 F.2d 1272, 1276-79 (10th Cir. 1991). *See* SISK, *supra* note 13, at 656-657.
[70] See Seamon, *supra* note 59, at 191-97.
[71] Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002).
[72] Sisk, *supra* note 23, at 675-81. Although *Bowen* was decided in the context of an ongoing public welfare program involving periodic disbursements of federal funds to individual states, courts have permitted claims under the APA to secure payment of funds withheld by the government under spending programs which neither raise the relevant federalism concerns nor involve continuous disbursements where an injunction to grant funding could be viewed as simply adjusting accounting on future payments. *Id*. at 667. As a result, in many cases it is unclear in what ways liability under statutory benefit rather than under contract would be decided differently.

reformation as part of a money judgment.[73] The 1982 creation of the Claims Court, however, was accompanied by an expansion of the court's nonmonetary jurisdiction to include authorization of declarative and extraordinary relief in "contract action prior to award" – essentially in bid protest cases.[74] The Court of Federal Claims Technical and Procedural Improvements Act of 1992 added to the court's jurisdiction by granting authority over disputes "concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes…."[75] The legislative intention, however, is plain that the grant of jurisdiction should be used only in cases of truly arbitrary administrative conduct and shall not engender frequent injunctions of the bidding and procurement process.[76] Numerous decisions in the Court of Federal Claims demonstrate the care taken to exercise such injunctive power sparingly, suggesting that a presumption of the propriety of administrative action requires "well-nigh irrefragable proof" for rebuttal.[77] While still limited in important respects, presently the Court of Federal Claims is no longer restricted exclusively to money judgments.[78]

g. Contracts Implied-in-Fact and Implied-in-Law

Jurisdiction under the Tucker Act of claims founded upon a contract, express or implied, has been held to include claims that are implied in fact, but not those that may be regarded as

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[73] *See* David M. Cohen, *Claims for Money in the Claims Court*, 40 CATH. U. L. REV. 533 (1991).
[74] 28 U.S.C. § 1491(a)(3).
[75] 28 U.S.C. § 1491(a)(2); *see also* Loren A. Smith, *The Renovation of an Old Court*, 40 FED. B. NEWS & J. 530, 531-32 (1993). Although the effect of this change was initially questioned, it is now broadly accepted. *See* The Swanson Group v. Department of the Navy, 986 F.2d 1415 (4th Cir. 1993) (holding that "[w]hether the prayed-for relief amounts to a simple claim for contract damages…or goes beyond, is not now material because the jurisdiction of the Court of Claims has since been expanded to allow it to afford relief for monetary and non-monetary disputes.").
[76] *See* Feidelman & Ursini, *Contract Formation Jurisdiction of the United States Claims Court,* 32 CLEV. ST. L. REV. 41 (1983-1984).
[77] Arrowhead Metals, Ltd. V. United States, 6 Cl. Ct. 703, 712 (1985). *See* LESTER & NOONE, *supra* note 5, at §9.118.
[78] *See* Smith, *supra* note 75, at 521-32.

implied in law – often called quasi-contracts. In *Hercules, Inc. v. United States,*[79] the Supreme Court confirmed that jurisdiction "extends only to contracts either express or implied in fact, and not to claims on contracts implied in law,"[80] and formulated a restrictive understanding of what constitutes an implied in fact contract under the Tucker Act. In *Hercules,* chemical manufacturers producing Agent Orange for the government during the Vietnam War were subsequently sued by veterans and their families alleging health problems relating to exposure to the chemical agent. After settling these claims, the manufacturers sought indemnification from the government by bringing a contract claim under the Tucker Act. Since the relevant contracts did not contain express indemnification provisions, they argued that there was an implied agreement by the government to reimburse them for liabilities, given detailed specifications and even seizure of certain production facilities. The Court, however, held that such circumstances did not establish that the government, in fact, had agreed to provide indemnification – questioning whether a government contracting officer would even have the authority to enter into such an open-ended indemnification agreement – and denied the claim.[81]

Without circumstances from which it can be inferred that the government entered into a consensual agreement, the requirement of the Tucker Act that a suit be founded on "implied contract" cannot be met.[82] As a result, there is no right of action against the United States in those cases "where, if the transaction were between private parties, recovery could be had upon a contract implied in law."[83]

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[79] 516 U.S. 417 (1996).
[80] *Id.* at 985.
[81] *Id.* at 987-88; SISK, *supra* note 13, at 529-30.
[82] *See* Baltimore Ohio R.R. Co. v. United States, 261, U.S. 592 (1923); SISK, *supra* note 13, at 529-30.
[83] Merritt v. United States, 267 U.S. 338, 341 (1925).

h. Liability to Subcontractors

As a result of "flow down" requirements common to contracts between the government and a prime contractor, a subcontractor may be bound by provisions identical to those of the principal contractor and yet have no privity of contract to permit him to sue the government.[84] Indeed, as a general rule, the Supreme Court has held that subcontractors cannot sue the United States.[85] Additionally, under the *Severin* doctrine,[86] a contractor may not recover on behalf of a subcontractor unless the contractor has reimbursed the subcontractor or is legally bound to do so. A subcontractor is therefore limited to an indirect remedy against the government, available only by an assignment, by third-party beneficiary principles, or – most often – by a suit brought on his behalf by a contractor.[87]

i. Interest Against the United States

A final product of the premise of sovereign immunity to suit in the absence of consent is the principle that payment of interest is not required on claims or on judgments against the United States in the absence of express provision of payment, in contract or statute.[88] While the Torts Claims Act expressly negates any liability of the federal government "for interest prior to judgment,"[89] however, the Contract Disputes Act of 1978 provides that interest is payable on claims under contracts subject to the Act – contracts entered into after March 1, 1979 for which the claimant elects coverage by the Act.[90] Otherwise, interest is payable according to the government contract itself, which will often contain a standard contract

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[84] *See* Continental Ill. Nat'l Bank & Trust Co. v. United States, 81 F. Supp 596 (Ct. Cl 1949); James J. Pennes, *Legal Remedies of the Government Subcontractors*, 32 S. CAL. L. REV 1 (1958).
[85] United States v. Munsey Trust Co., 332 U.S. 234 (1947).
[86] Severin v. United States, 99 Ct. Cl 435 (1943), *cert. denied*, 322 U.S. 733 (1944).
[87] S*ee* LESTER & NOONE, *supra* note 5, at §9.105.
[88] *See, e.g.*, United States v. Thayer West Point Hotel, 329 U.S. 585 (1947).
[89] 28 U.S.C. § 2674; *see* Carlson v. Green, 446 U.S. 14 (1980).
[90] 41 U.S.C. § 611.

clause addressing the issue of interest. Interest is also recognized by boards of contract appeals as a cost of performance and as an element of profit, used in contract litigation to determine the cost of financing a change for which the government is held liable.[91]

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[91] S*ee* LESTER & NOONE, *supra* note 5, at §6.120.