Fairness in Dispute: Understanding the Principles of Equity, Equality, and Reciprocity in Federal Procurement Contracting

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ABSTRACT

This dissertation explores "fairness" as an ethical construct within federal procurement contracting using 3,548 contract dispute decisions published by the Armed Services Board of Contract Appeals (ASBCA) between 2007 and 2021. It employed a multi-faceted, mixed method research design at macro, mezzo, and micro levels that used a blend of descriptive analysis, computational text analysis, and qualitative thematic analysis to explore a little-studied operational domain within public administration. This investigative approach made possible an examination of how fairness manifests in federal procurement in three aspects: equality (competition), equity (contractor demographic identity), and reciprocity (dispute resolution outcome). Aspects of Moore's Public Values Framework were combined with Lipsky's theories regarding street-level bureaucracy and Maynard-Moody and Musheno's conceptualization of frontline workers as knowledge agents to examine the "human" dimensions of administrative discretion in procurement. In addition to explaining the fundamental differences between "fairness" (between individual entities) and "justice" (fairness writ large at the societal level), the dissertation demonstrates how power dynamics between the government sovereign and its commercial civilian partners complicate contract relationships. Its quantitative findings suggest that fairness is impacted by procurement complexity, entrenched arms-length contracting relationships, and strictly construed risk apportionment when contingencies adversely impact contract performance conditions, and that contractor identity plays some role (though its extent is unclear) in the generation and resolution of particularly contentious disputes. This study's qualitative findings indicate that both parties perceive a breakdown in the contractual duty of "good faith and fair dealing" when rivalry is pursued over cooperation, when the parties fail to understand or respect each other's responsibilities and constraints, and when the behavior of government contracting officials creates role confusion between the protection of government interests and the legislatively required fair treatment of contracting partners. Ultimately, this dissertation speaks to ongoing discussions in diverse fields and disciplines such as public administration, organizational studies, empirical legal research, and relational contracting. It also contributes to developing theories regarding complexity in procurement and existing contracting studies from both sociological and economic perspectives.

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GENERAL AUDIENCE ABSTRACT

In popular thought, written contracts exist to protect the rights of both parties should one fail to uphold its part of the "bargain." Some legal theorists argue, by contrast, that the contracting process fundamentally is about interpersonal relationships, and that litigated contract disputes are not merely about material redress, but moreover, a failure of the "spirit of contract." From this perspective, a contract's true value lies more in the quality of the relationships it creates than in its documentary perfection. Interpersonal fairness, where the parties treat each other and their contract promises with integrity and respect, is a key component of that relationship. This dissertation studied the ethical expectation of "fairness" in federal defense contracts using 3,548 formal contract dispute decisions published by the Armed Services Board of Contract Appeals (ASBCA) between 2007 and 2021. These decisions were used to examine what procurement fairness means by focusing on three aspects: equality (fair competition for business opportunities), equity (fair distribution of public funding), and reciprocity (how the "spirit of contract" is honored during contract administration). The study explored how government sovereignty impacts contractors' expectations of fair treatment. It further demonstrated that contract relationships are challenged by the complex technical, administrative, and legal requirements of federal contracts. The study's findings revealed that the most contentious disputes (those that require a judge's ruling on legal merit) result from highly competitive contracts where maximum risk has been placed on contractors for performance and price control. The findings also suggested that contractor demographic identity plays some part in how disputes begin and how they are resolved, though the extent and implications of these differences are unclear. Finally, the study indicated that disputes alleging a violation of the contractual duty of "good faith and fair dealing" showed evidence of entrenched rivalry instead of cooperation, the contracting parties' failure to appreciate each other's operating challenges and constraints, and confusion about how federal contracting officers function as both protectors of the government's interests and as contractor rights advocates under federal contract law.

DEDICATION

To my parents, Wayne and Jane Ingram,
For your complete love, your stalwart example, your many sacrifices,
your unwavering support, and your steadfast confidence in me.
To you I owe my intellectual curiosity and my yearning for all that is noble and true.
We did this together.

To Denise Simmons,
For your wholehearted hospitality and kindness, and for always believing in me,
no matter how difficult it was, even in the toughest of times.
Your friendship has been the very quintessence of love.

And to Joshua and Lillian Halvorson,
For reminding me that faith in God is my wellspring, and for being
a tangible source of wonder, adventure, contentment,
hope, enduring amusement, and joy.
Our collaboration is just beginning.

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Thou art indeed just, Lord, if I contend
With thee; but sir, so what I plead is just.
--Gerard Manley Hopkins, "Sonnet 50"

A foundational tenet of the American political system is that governments must act "fairly." Unfortunately, serious inequities have existed throughout society and within governmental institutions since the nation's founding. The persistence of these historical inequities leads to debate about their mitigation or even ideally, their elimination, and whether existing social advantages can or should be levelled to equalize economic playing fields.

Governments use procurement contracts as one tool for addressing systemic inequities because they allow policymakers to satisfy important stakeholder needs while distributing a significant portion of public funds (Mayer and Khademian 1996; Sclar 2001; Cooper 2002; Kettl 2011). As a result, discussions about economic justice are familiar to those who work in federal procurement contracting (Dekel 2007; Wilson 1989; Yukins 2007). However, the system's success in achieving just outcomes is mixed, whether assessed from an impartial perspective or from the belief that a range of contractors with diverse socioeconomic backgrounds deserve a fair share of those funds.

In this dissertation, I explore what fairness means as a value in public administration and within the federal defense procurement system. Using a novel dataset that I created from public documentary sources related to contract disputes, I analyze how street-level administrators practice fairness within this complicated operational context. I also describe

how they are expected to do so for a complex array of stakeholders, whose diverse interests must be balanced, weighed, and served (Mayer and Khademian 1996).

Why Fairness?

The ethic of fairness, although often conflated with the concepts of justice and equality, has its own characteristics and its own relevance in Anglo-American culture (Hochschild 1981; McMahon 2016; Rescher 2002). It is a common behavioral, technical requirement expected of public administrators and their work (Wilson 1989; Abel and Sementelli 2007; Box 2015; Cooper 2012; Moore 2014; Johnson and Svara 2015; Zacka 2017). The word "fair" is used to describe both bureaucratic processes as well as the outcomes those processes are designed to achieve (Adler 2006; Bozeman 2007; Cooper 2012; Frederickson 2015). In theory, fairness is a nuanced, multi-dimensional construct perceived by individuals and by groups based upon their treatment within the complex relational environment of shared enterprises (Broome 1990, 2017; Hooker 2005; Rawls 1958, 1971, 1978, 2001; Rescher 2002; Saunders 2010; Sen 2009; Wierzbicka 2006).

In practice, fairness is a matter of perception and often represents a subjective, deeply felt experience (Fehr and Schmidt 1999; Gelfand et al. 2002; Hochschild 1981; Hollander-Blumoff and Tyler 2008; Welsh 2003). However, some scholars assert that the existence of fairness within organizations can be evaluated objectively by analyzing the concrete actions of empowered actors (Liebig and Sauer 2016; Lipsky 2010; Maynard-Moody and Musheno 2022; Moore 2014; Young 2006; Zacka 2017). Such positions are based on the contention that a just system cannot exist on balance if the actions of individual officials are unfair.

What fairness means (or what, and whose, purpose it serves) within the administrative context is itself contested. James Q. Wilson argues that fairness in procurement is the epitome of a bureaucratic constraint, not an ethical aspiration:

> The goal of "fairness" underlies almost every phase of the procurement process, not because the American government is committed heart and soul to fairness as an abstract social good but because if a procurement decision is questioned it is much easier to justify the decision if it can be shown the decision was "fairly" made on the basis of "objective criteria." (1989, 127)

Wilson argues that concern about legislative accountability leads administrators to a risk-averse overreliance on following rules and relying upon unassailable criteria at the expense of making management more sensitive to achieving the elusive best value for customers (1989, 128). Key public procurement and contracting scholars echo this assertion (Kelman 1990). However, the language of the Federal Acquisition Regulation (FAR) reflects a modern recognition in legal contract theory that there is more to the contracting process than rule-following, and that contractual fairness can involve more than simply keeping express promises, either to contractors or to public stakeholders (DiMatteo 1998; Rosenfeld 1984).

For H. George Frederickson, the divide between the aspiration of fairness for policymakers and for administrators is not so easily (or cynically) drawn. He asserts that "[j]ustice, fairness, and equality have everything to do with public administration" (2015, 52). Although elected officials are responsible for establishing the complex definitions and requirements of "justice, fairness, and equality" in a representative democracy like the U.S., Frederickson notes that administrators also wrestle with those concepts because they must make public policies actually work (53). He observes: "We are not as fair, as just, or as equal as we should be, and public administration cannot say these problems belong only to lawmakers .

. . . [O]ver the years, public administration has contributed much to a more equitable, more fair, and more just America. And we have much more to contribute" (53).

In *Bureaucratic Justice*, Jerry L. Mashaw offers a measured look at the issue of fairness and the administrative operating environment. He acknowledges the realistic, if more jaded, viewpoints expressed by Thurman Arnold, Murray Edelman, and James Q. Wilson about the purpose of administrative ethics (1983, 13). However, Mashaw holds that:

> [t]he challenge is to admit the limitations of an externally oriented administrative law and yet to affirm a vision of administration that is subject to the normative evaluation and improvement that is the promise of legal discourse; to view the administrative process, like the judicial and legislative processes, as somehow in pursuit of justice and the general welfare; to see "administration," like "democracy" and "the rule of law," as a motivating ideal. (1983, 14)[1]

For Mashaw, it is possible to conceive of administrators as having the professional capacity to be ethically motivated, technically competent, and politically accountable at the same time.

Even though such debates are not new, public administration scholars increasingly are championing Frederickson's idea that our governments should actively promote those ideals, such as justice, that Wilson describes as "abstract social goods." There is a growing acceptance that "social goods" like justice have real economic consequences for communities and that the impact of fairness is far from abstract. Many scholars hold that the structural fairness of public systems should be an important objective for those who study public administration (Berry-James et al. 2020; Johnson and Svara 2015; Molina 2015; Gooden 2015; Jørgenson and Bozeman 2007; Kirlin 1996). As Mashaw makes clear, though, the mere intent to do justice is

[1] Mashaw acknowledges that "In part the disposition to construct such a vision is a pragmatic response to my personal inability to move firmly into the camp of the cynics" (1983, 14).

not sufficient for it to manifest. In implementation, such values must confront operational realities. Administrators cannot simply seek fairness; their approach to implementing the work, their specific actions, and their judgments will always impact the quality of its fruition (Zacka 2017). Fair action depends upon conscious, deliberate, and professional expertise in practice to become justice in fact, and the quality of fairness in an administrative system may be gleaned from the official records its practitioners produce as they work.

Fairness in Federal Procurement Contracting

Fairness in American federal procurement contracting is not simply an ethical matter, but moreover, one of professional competence. Fairness is a legislated normative cornerstone of this system along with openness, integrity, and the exercise of sound business judgment.[2] The Federal Acquisition Regulation, codified in Title 48 of the Code of Federal Regulations in 1984, requires Government procurement officials to act fairly when entering the commercial marketplace. Professional standards that aim to ensure the impartial treatment of bidders and that champion competitive practices imbue the public procurement context with widespread expectations of procedural uniformity and equal treatment for all.

However, the reality on the ground is far more complex, and what "fairness" means to contractors and to public administrators working in this field is ripe for empirical scrutiny. Public administration studies that examine complex federal procurements after contract award, during work performance, or following completion of the contract are also sparsely represented in scholarly literature. To augment these gaps, I use various conceptions of what fairness means to analyze formal contractor disputes adjudicated between fiscal years 2008

[2] Federal Acquisition Regulation (FAR) § 1.102-2(c)(3)

and 2021 by the Armed Services Board of Contract Appeals (ASBCA), an administrative tribunal of the Department of Defense (DOD). The purpose of this research and the resulting analysis is to evaluate how information drawn from Board decisions can be used to explore the federal procurement system's "fairness" in practice and performance, not simply in legislative formulation or executive prescription.

Using data drawn from and related to the Board decisions, I argue that fairness manifests within the federal procurement environment in three fundamental dimensions: *equality*, *equity*, and *reciprocity*. I define *equality* as uniformity or sameness of treatment. Equality, which is practiced without the consideration of "background fairness"[3] informing each contracting situation, can be considered a form of "procedural" justice. I define *equity* as proportional parity of contracting opportunities and outcomes in the decisions made by a contracting official. Equity, which is based upon a consideration of background fairness, can be described as "substantive" or "distributional" justice. I define *reciprocity* as an interpersonal, privity-based construct essential to the world of contracts and mutual agreements during performance and administration of the work. Reciprocity can be described as a type of "behavioral" or "relational" justice because background fairness is factored into the decision solely at the discretion of the authorized official in response to dynamics within the government-contractor relationship dyad (Roman 2014).

[3] The term "background fairness" comes from Michel Rosenfeld, who styles it as a contrast to the idea of "procedural fairness" (Rosenfeld 1984; 769). I will discuss this concept in more detail in outlining my conceptual framework in Chapter 2.

Although the ethical values inhering in these three dimensions sometimes conflict, ensuring that justice vests within the entire procurement system requires the nuanced aggregation of all three. I argue that these dimensions have been incorporated into the basic operational strictures and permissions outlined within the Federal Acquisition Regulation. Each dimension can be identified in the discretionary actions of empowered Government officials known as contracting officers. Those decisions then can be gleaned from the documentation that occurs as these officials navigate the regulatory requirements of their position as the Government's representative under the contract. In this dissertation, I demonstrate that examination of the Board decisions yields a rich trove of data to illuminate the government-contractor relationship from that street-level, contract-level perspective.

As a matter of practice, I argue that contracting officers instantiate fairness at the level of discretionary contractual decisions exercised within the relational dyad of the individual contract. I also argue that as "knowledge agents," they typically do this without thinking deeply or explicitly about the subject of fairness due to their training, experience, and professional conditioning (Cecchini and Harrits 2022; Maynard-Moody and Musheno 2022). As a former federal contracting practitioner, I contend that fairness is deeply ingrained within federal contracting's professional culture, whether its presence is explicit or not.[4] The question of its purpose—as a constraint (Wilson 1989), an aspiration (Frederickson 2015), or an interpersonally distinctive blend of factors weighed according to the moral judgment of individual administrators (Mashaw 1983; Zacka 2017)—is an intriguing question, but

[4] This permeation is apparent even in the first discussion about the importance of cooperation and contract success in Cibinic, Nash, and Nagle's fundamental resource, *Administration of Government Contracts* (2006).

unfortunately beyond the scope of this study. I focus instead on what the construct of fairness "means" within the system. I look for how it can be identified, measured, and assessed. I explore how it is threaded throughout the entire fabric of federal procurement: its dimensions, its patterns, and its perceivable textures.

Procurement and Public Administration: Dominant Theories and Gaps in the Literature

Despite their inherent social characteristics, public procurement contracts are essentially tools of economic exchange. As a result, they have been examined in public administration and public contract legal studies primarily using economic theoretical lenses such as principal-agent theory, transaction cost economics, and game theory (Williamson 1999, 1993, 1979; Kelman 2005, 2001, 1990; Smith and King 2009; Brown, Potoski, and Van Slyke 2013; Smith and King 2009; Yukins 2007; Flynn and Davis 2014; Trammell, Abutabenjeh, and Dimand 2020). This is notably true of federal contracting, where most scholarly discussions have focused on the outsourcing of functions previously performed by Government employees, and where principal-agent theory is particularly salient (Williamson 1979; Milward and Provan 2003). However, as important as the topics of "contracting out" and accountability/authority creep are to government at all levels, these issues represent only some of the normative and technical aspects of the public contract function as a structure for a relationship (Cooper 2002; Terry 2005).

In addition to the narrow topical focus, public procurement has been studied infrequently in public administration (Rendon and Snider 2014; Eckerd and Snider 2017; Trammell et al. 2020). Between 1972 and 2017, fewer than 1% of the articles published in the top fifteen international public administration journals focused on public procurement

generally, and fewer than 30 of those articles (about 10% of that 1%) focused on the U.S. federal system specifically (Trammell et al. 2020). For example, of 3,524 articles published in *Public Administration Review* (PAR) during this time, Trammell et al. (2020) coded only fifty-seven as procurement centered. Unfortunately, attention to procurement issues in public administration scholarship may be hindered by the perception that buying things is "boring," as both administrative law scholar Jerry Mashaw (1991, 511) and public administration scholar Don Kettl (Cooper 2002, xi) have speculated.

As useful as economic theories have been, understanding contract relationships requires more than an examination in terms of efficiency, information asymmetry, opportunism, and various pecuniary conflicts between principals and agents (Wheeler 2010). Contracts are also social artifacts used by organizations and managed by individuals who must navigate a complex political and bureaucratic environment (Bernstein 1993; Cooper 1980, 2002; Leff 1970; Macneil 1973; Suchman 2003). The interpersonal environment of federal contracting is complicated by regulatory issues imposed by stringent administrative law and the political salience of many contract issues (Mayer and Khademian 1996; Schooner 2001; Whelan and Pearson 1961). This mix constitutes a potentially toxic slurry of diverse stakeholder expectations (both internal and external, macro and micro), operational and normative constraints, and sometimes unrealistic expectations of performance success that demand high-level fiscal accountability (Brown, Potoski, and Van Slyke 2013; Cooper 1980, 2002; Mayer and Khademian 1996; Van Slyke 2009; Wilson 1989).

Because of this complexity, understanding federal procurement contracts' operation and function from a sociolegal perspective may prove valuable to both scholars and

practitioners in public administration. These perspectives have already proved profitable for enriching contexts pertinent to budgetary systems, operations management, and human resource regimes in the public workspace (Berry-James, et al. 2020; Crosby, t'Hart and Torfing 2017; Kettl 2015, 2011, 2006; Christensen, Goerdel and Nicholson-Crotty 2011; Frederickson 2015; Meier and O'Toole, 2006; Sowa and Selden 2003; Box et al. 2001; Rainey and Bozeman 2000; Box 1999; Gilmour and Jensen 1998; Moe and Gilmour 1995; Moe 1987; Zacka 2017). Likewise, the sociolegal approach has been fruitful to the study of legal contract theory due to the strong vein of real-world pragmatism it introduces into contract law discussions, which tend to be quite abstract by nature (Wheeler 2010; Bernstein 1996; Smith and King 2009; DiMatteo 1998, 1999; Macneil 1973; Rosenfeld 1984).

Disciplinary cross-pollination is essential if we are to interrogate the aspirational norms and expressed values as well as actual outcomes of public procurement in practice, and how these norms and values are manifested in a range of macro, mezzo, and micro professional perspectives. While more diverse theoretical filters such as stewardship theory and representative bureaucracy are beginning to be deployed in procurement studies (Brunjes and Kellough 2018; Van Slyke 2007; Snider, Kidalov, and Rendon 2013), both their novelty and their utility are far from being exhausted. More in-depth public management-centric case studies, such as Brown, Potoski, and Van Slyke's *Complex Contracting: Government Purchasing in the Wake of the US Coast Guard's Deepwater Program,* may also prove instructive to contracting and procurement scholars by shedding light on the complicated operational world of large federal contracts (2013).

Conversely, insights from public administration may offer new perspectives to empirical

legal research and defense procurement studies domains. Familiarity with these domains demonstrates that the current gaps in the public administration's study of federal contracting stem not from a lack of empirical insight into the normative or the technical complications that attend public procurement in the federal system. At present, gaps remain because efforts to study some public procurement phenomena are rigidly siloed within other fields and disciplines.

In terms of administrative and contract law, Macaulay and Macneil's relational theory of contracting has not been studied widely using social science tools, and its use in management fields such as supply chain management has been somewhat constrained (Blois and Ivens 2007). Further disconnects occur because the federal operating context is not well understood outside of the field and can be difficult to access (Cooper 1980, 2002). Most literature on public procurement, especially in the defense arena, is written for practiced insiders. Learning curves are steep, and basic explanatory information can be difficult to gain without the considerable financial investment necessary to bypass commercial and institutional paywalls.

I assert that similar questions are being pursued simultaneously across fields other than public administration without the widespread knowledge that complementary research has been done or is being conducted using other lenses. In this dissertation, I bring together work from multiple arenas to illustrate the relevance of federal procurement contracting to those who study public systems. I also recommend the relevancy of public administration's normative inquiries to those who study federal procurement.

Federal Procurement and Street Level Bureaucracy

The literature on street-level bureaucracy and frontline workers offers one of the most useful public administration lenses available to enhance understanding of the federal procurement system. In this environment, contracting officers are appointed public administrators who are responsible for determining Lasswell's (1936) famous dictum of "who gets what, when and how" in the award and management of individual federal procurement contracts. As is the case with other types of public officials, how contracting officers weigh and implement the competing dimensions of fairness depends upon their balance of personal and professional values (Roman 2014), their understanding of the regulatory environment (Cooper 1980), and their bounded and ordered assessment of detailed situational factors characterizing individual procurements and the corresponding political, partisan, electoral, and operational environments (Cooper 1980, 2002; Moore 1995; Roman 2014; Weick 1993; Zacka 2017).

It is important for scholars to understand the ethical and the technical decision-making contexts involved in federal procurement contracting because "best value" procurement decisions, which must be empirically justified and based on documentary evidence, are still the result of subjective judgments made by unelected individuals. Federal contracting officers must balance an enormous amount of professional discretion with systematic responsibility for ensuring fundamental fairness throughout the contracting process. Former Civilian Board of Contract Appeals (CBCA) Chairperson Jeri K. Somers notes that "The role of the contracting officer is unique. Initially, [he or she] functions as the government's advocate while negotiating for the government. [Their role] changes once . . . called to render a final decision under the disputes clause" (2020, 1056). Somers emphasizes that "The quasi-judicial duty of the

contracting officer is a particularly important nuance to the field of government contracting . . . [because in] this decision-making role, a contracting officer has an obligation not only to follow the applicable laws and regulations but also to treat contractors fairly" (2020, 1056). Unfortunately, because of the high evidentiary threshold required for contractors to prove bad faith in public officials' behavior in this context (Claybrook, Jr. 1997), the fairness of contracting officers' decisions operates much like an honor system. Moreover, the decisions of contracting officers are not regularly available for oversight or scrutiny by third party observers outside of the formal disputes process (O'Connor 2018; Whelan and Nagle 2007).[5]

The resulting murk of secrecy and suspected self-interest regarding the motivations, reasoning, and actions of contracting officers, who are the Government's representatives within the confines of contracts, can aggravate concerns about the legitimacy of the Government's actions as a partner in contracting relationships. A better understanding of the decision-making space these officials occupy may reveal whether government institutions successfully support the fair treatment of individuals and groups, or if some professional practices undermine the quality of justice for all by reifying problematic social structures (Frederickson 2015; Gooden 2014; Johnson and Svara 2015; Liebig and Sauer 2016; Rawls 1978; Young 2006; Zacka 2017). I suggest that the published decisions of the Armed Services Board of Contract Appeals (ASBCA) present rich and easily accessible opportunities for embarking on

[5] "Subjective" here is meant not in a pejorative sense as opposed to a preference for "objective" decisions. Federal procurement law recognizes the subjectivity of decisions made by individual people. Professional classes emphasize that two competent, ethical people can observe the same fact patterns and reach different decisions. Instead, the emphasis is not on objective over subjective, but on reasonable and defensible over arbitrary and capricious (Connor, 2018). In this way, the discretion of contracting officers is actually championed by the federal legal system, which will not overturn a decision in the absence of specific evidence of bad faith, "unfair dealing," or fraud, not just conjecture.

such an examination of frontline decision-making within the federal procurement system. Before discussing the data available in ASBCA records, it is important to consider the evolution of contracting appeals venues and processes.

Federal Procurement Conflicts and Judicial Review

When questions arise about a contracting officer's capacity, competency, or commitment to fundamental fairness in the performance of his or her job, contractors can seek legal remedy to disagreements about contract issues through a well-tested and statutorily guaranteed system of judicial review. The legal remedies available to aggrieved federal contractors and prospective contractors, however, are severely limited by the doctrine of sovereign immunity, which is not a concern for contractors that operate solely within the commercial (i.e., non-governmental) marketplace (Binney 1909; Tiefer and Shook 2003).[6] According to this doctrine, a private business, commercial vendor, or non-federal governmental entity that is party to a federal procurement contract can only sue the Government if the Government itself consents to be sued (Binney 1909; Shimomura 1985; Tiefer and Shook 2003; Swan 2014).[7] For procurement contracts, the Government's consent comes in the form of several key statutes, most notably the 1887 Tucker Act and the 1978 Contract Disputes Act

[6] While it may technically be acceptable to call the Boards "courts," they are not part of the federal judicial system created under Article III of the Constitution and are more appropriately termed administrative tribunals. They also are not Article I courts. At least one Board judge has eschewed referring to the ASBCA as a court in a specific decision because of the implications that term has on issues related to the applicability and precedential status of the subject matter of the decisions they issue. The dynamics between the Article III courts and the Boards when a decision is appealed to the U.S. Court of Appeals sometimes require intricate parsing of language, authorities, and responsibilities.

[7] The history of the modern federal contract disputes process described in this section draws heavily upon Swan (2014).

(CDA), which subject the Government to certain legal remedies when it behaves badly in contracts with the private sector (Swan 2014).

Congress enacted these statutes to ensure good faith behavior by Government officials and to boost vendor confidence by codifying judicial review of federal agencies' contracting behavior. They allow a contractor access to redress in a court setting where that contractor can demonstrate that unfair Government treatment violated basic requirements of contract law. Thurgood Marshall acknowledged this unusual right in the majority opinion for *United States v. Mitchell* (463 U.S. 206, 215): "the Government's liability in contract is considered 'the widest and most unequivocal waiver of federal immunity from suit' in the history of the United States" (cited in Swan 2014, 105). [8] Although the parameters are limited and highly bounded and the federal government has overall control of the judgment-making apparatus, the clear legal right of contractors to challenge Government action during the administration of a federal procurement contract in a judicial forum was a hard-fought victory for the contracting community (Swan 2014). Contractors also appear to have some success when they exercise that right, as the findings in Chapters 4-6 demonstrate.

[8] Thurgood Marshall's opinion further states: "The existence of a waiver is readily apparent in claims founded upon 'any express or implied contract with the United States.'"28 U.S.C. 1491. The Court of Claims' jurisdiction over contract claims against the Government has long been recognized, and Government liability in contract is viewed as perhaps "the widest and most unequivocal waiver of federal immunity from suit." *Developments in the Law - Remedies Against the United States and Its Officials,* 70 Harv. L. Rev. 827, 876 (1957) (116). The reasons for this congressional policy are clear: persons would be reluctant to contract with the United States if there were no remedy for breach, and contract actions are not likely to expose the Government to unforeseeable and unlimited liabilities, such as might result from a waiver of immunity to all suits in tort. The major problems of interpretation of the Tucker Act are (i) to what extent noncontract or quasi-contract actions may be brought under the act, and (2) to what extent the law applied to government-contract disputes is the same as private contract law" (876).

Historical Background of the Contract Disputes Act

Although the American government has entered into commercial contracts since the Revolutionary War, contractors did not have a forum for challenging their treatment under a federal contract outside of submitting a direct petition for a complaint's resolution to Congress. This gap was filled to some extent in 1855, when Congress established the U.S. Court of Claims ("CoC"), an Article III court (Somers 2010, 2020). However, the first incarnation of the CoC lacked the authority to make final dispositive judgments, with that power still vested with the legislative branch. In an 1861 address to Congress, President Lincoln observed that a degree of independence regarding judicial review, not to mention consistency and efficiency, was necessary to ensure public faith in the system, stating that "It is much the duty of Government to render prompt justice against itself, in favor of citizens, as is to administer the same between private individuals" (Somers 2020, 1058; Roe 1976, 187).

Periodic advances in the codified justice and administrative mechanisms available to contractors punctuate the century between the Civil War and the boom in the scope and complexity of federal contract requirements that supported two World Wars, a Cold War, and a space race (Shedd 1964). The most important of these was passage of the Tucker Act (1887), deemed by Oliver Wendell Holmes a "great act of justice" (Swan 2014, 108). The Tucker Act bestowed upon the Court of Claims the authority to decide "[a]ll claims founded . . . upon any contract, expressed or implied, with the Government of the United States . . . in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable" (2014, 108). According to Swan,

the Tucker Act "continues to serve as the bedrock waiver of sovereign immunity for claims founded against contracts within the United States" (2014, 108).

While the Article III federal courts and various Article I boards of contract appeals existed to hear claims (usually at the Department level), the byzantine administrative system through which contractors could seek contract remedies remained inefficient and problematic. Dissatisfaction with the system prompted the establishment in 1969 of a Commission on Federal Procurement, where improving the claims process was an important part of the agenda (Somers 2010, 2018, 2020). The Contract Disputes Act of 1978 was one of the legislative improvements prompted by the Commission's work, as well as preparing the way for the Federal Acquisition Regulation's development and promulgation in 1984.

A leading impetus for these changes was the U.S. Supreme Court's controversial *Wunderlich* decision in 1951, which restricted judicial review of agency board determinations in procurement contract cases to an "alarming" extent (Swan 2014, 110). The ruling, which set aside a decision by the Federal Court of Claims[9] reversing a clearly "erroneous" determination in a contract dispute by the Secretary of Interior in favor of the agency, caused an uproar in the legal community and with contractors in the federal marketplace (Cuneo 1953; Schultz 1953; Swan 2014, 111). By removing from the review jurisdiction of the Court of Claims decisions deemed to be arbitrary, erroneous, or in bad faith, "the [Supreme] Court relied on the assumption that contractors are not 'compelled or coerced' into making contracts with the United States and have thus 'contracted for the settlement of disputes in an arbitral manner'"

[9] The nomenclature can be confusing. The U.S. Court of Claims (CoC) preceded the establishment of the U.S. Claims Court (established in 1982) as part of the Federal Courts Improvement Act, which became the U.S. Court of Federal Claims (CoFC) in 1992 and is now referred to as part of the "Federal Circuit" of the national judiciary.

(Swan 2014, 111). The majority opinion (by Justice Minton) received a scathing dissent from Justice Douglas, "[who asserted] that the majority's decision 'makes a tyrant out of every contracting officer' and gives him or her 'the power of life and death over a private business even though his decision is grossly erroneous'" (111).[10]

The Contract Disputes Act of 1978

Fearing that contractors would refuse to contract with the federal government because of the clear injustice of the Supreme Court's finding, Congress passed the *Wunderlich* Act in 1954, which firmly codified the authority of the judiciary over agency decisions in contract cases where fundamental fairness was clearly violated (Swan 2014, 111). Problems remained in deciding the extent and operations of that judicial review, however. A frustrating period of tinkering with the existing "irrational patchwork system" for contract disputes led to the Commission on Federal Procurement's establishment in 1969. Its proceedings spearheaded the transformation of federal procurement and prompted significant codification of basic fair treatment rights for federal contractors (Swan 2014, 111). As a result, the CDA now procedurally governs a modern procurement contract dispute[11] that cannot be resolved informally. There have been several significant changes and amendments to the CDA since it

[10] In commenting on the case, Cuneo includes a longer quotation "But the rule we announce has wide application and a devastating effect. It makes a tyrant of every contracting officer. He is granted the power of a tyrant even though he is stubborn, perverse, or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected" (374). Cuneo notes, however, that Douglas's dissent ignores a path to appeal of the decision at the departmental level given to the contractor through the included disputes clause. It appears that this path, though, would have still left the appeal solely with the administrative branch and not allowed intervention by the judiciary, which still represents an important problem of accountability (1953, 374). Cuneo, supporting the *Wunderlich* decision, holds that "The Board is above and apart from the procuring activities," though he admits reform of the present process is needed (1953, 436).

[11] Again, the word "dispute" used in this dissertation represents a federal procurement term of art.

was passed in 1978, but there has been[12] no major substantive legislative[13] restructuring to the central conception of how the dispute system should operate (Swan 2014).

Benefits of the Current Contract Disputes Process

In sum, the CDA tidied a messy, labyrinthine path toward justice for contractors, which had itself been an improvement over the pre-existing legislative petitioning system for contract redress. Tiefer and Shook (2003, 617) note that:

> [the] remedy procedures for government contract law derive from a long and torturous history . . . . [They] do not exist because someone sat down and developed a structured master plan, nor by some teleologically purposeful evolution of the common law, but by a series of historical accidents as repaired by the intermittent intervention of statutory alterations.[14]

Regardless of its harrowing path of development, however, remedial legislation over time has firmly established that the Government dictates the modes by which controversies must be resolved.

One contribution of the CDA was to restore the legitimacy of Government authority over contracting decisions. Prior to *Wunderlich*, the Court of Claims (CoC) had symbolically functioned as a "national 'conscience'" in the procurement arena, and the CoC took this role seriously (Nash 2010, 587). Nash says the CoC "believed that one of its major tasks, as the court where citizens could obtain redress for actions of the government, was to show those citizens that the government treated them fairly" (587). Nash also asserts, however, that because of

[12] This is not to say there have not been significant changes to federal contracting regulations or to the Federal Circuit's judicial structure during this time, but the basic reach and intention of the CDA arguably has remained the same.

[13] For example, the Court of Claims was eliminated/restyled into the U.S. Court of Claims within the Federal Circuit—technically a major change but not one impacting the basic function of the Act.

[14] Nabatchi argues that path dependence has been a significant driver in the evolution of the present system (2007).

the strength of the CoC's self-perception as a check on government officials, "a *fair result* seemed to be lurking in each of the court's decisions—sometimes leading commentators to wonder whether the court hadn't stretched the law" (587). *Wunderlich* removed the presumptive legitimacy of the Government's ability to police itself in the face of a senior administrative leader's clear error of judgment in deciding a contract issue. The CDA effectively restored that legitimacy when "the Government imposed upon itself fair and reasonable standards in dealing with government contractors" (Kipps 1999, 585). Cibinic, Knight, Nagel, and Nash (2015) mournfully note, however, that with the U.S. Court of Claims, the scale has perhaps tipped too far in favor of the Government. The perceived ebb and flow of Court preference/deference between contractor and Government, however, seems to be a marked characteristic of legal accountability regimes public stakeholders deemed to be legitimate, so perhaps this is an occurrence to be expected (Rakoff 2000).

The current federal procurement system now employs two forums (an administrative option with two mutually exclusive venues, and one judicial option) to promote fairness and guarantee the due process rights of contractors: the Armed Services Board of Contract Appeals (ASBCA), the Civilian Board of Contract Appeals (CBCA), and the U.S. Court of Federal Claims (CoFC).[15] As a result, "Congress has gained the advantages of unification and consistency in [federal procurement contract] law and in the measurement of damages; expertise in the forums; not overloading the Supreme Court . . . and the avoidance of other downsides were the cases to be scattered before hundreds of federal judges around the country" (Tiefer and Shook

[15] The CoFC, created in 1982, is the contemporary successor of the trial division of the U.S. Court of Claims, originally created in 1855.

2003, 753). The narrow path to recourse produces a contracts disputes process that is stringent, delineated by complex but accessible administrative regulations and legal precedent, and clearly bounded in subject matter.[16]

An unintended consequence of this uniform treatment is that it renders federal contract disputes more suitable for study as a large-N source of data for empirical legal research than typical commercial contracts as a class. This suitability stems from the use of numerous constant referential data points across thousands of identifiable and distinguishable actions across a broad spectrum of federal procurement contracts. I describe these data points in more detail in Chapter 3, where I delineate the research design, and situate those reference points in the research context.

ASBCA Decisions as a Research Setting

Decisions rendered by the ASBCA offer a previously unexplored opportunity for examining a complex administrative system using primary sources and easily available public records rendering explicit decisions made at the contracting officer level. Every post-award contract-related controversy that cannot be resolved through informal negotiations now is procedurally governed by the Contract Disputes Act of 1978 (CDA). The ASBCA specifically protects the due process rights of contractors under the CDA. It produces detailed decisions in the form of published legal opinions that can be used to find other pertinent referential data that can help researchers understand details specific to an individual contract at the transaction level—including the management practices of federal contracting officers.

[16] This is due to the contract claims process that precedes a dispute, which places specific limits on the ASBCA's jurisdiction. Not every demand or complaint communicated by a contractor is considered a "claim" for the purposes of the disputes process.

For a substantial number of disputes, the ASBCA's decisions provide a written document produced by a seasoned judge who has been given the opportunity to examine the full, pertinent contract award and management record. A published, substantive dispute decision is one in which a judge must decide, interpret, and rule on facts and interpretations in the case, including the responsibilities of the parties to act in legally required ways. The issues involved may be small and surprisingly petty, or they may be immensely complex and involve hundreds of millions of dollars. Sometimes the issues are procedural in nature, and sometimes the questions involved stem from an unclear or unprecedented matter arising out of dubious contract language, or from the circumstances involved.

These judges provide the substantive details considered in their review of the documentary record in their written decisions where appropriate, including details that describe the contract's history and facts that can give a researcher insight into the relationship between contractor personnel and Government officials. This gives scholars some opportunities to study particular phenomena related directly and meaningfully to contract performance using both quantitative and qualitative methods and other accessible public records. As such, decisions rendered by judges of the ASBCA are useful for analyzing fairness in the federal procurement system from micro to macro levels using advanced methodological tools, such as computational text analysis. While they can be treated as individual transactions (and groups of transactions that in themselves tell stories about procurement culture), the information gleaned from these disputed contracts can be used also to enhance evaluations of fairness and justice at a more global administrative level.

I argue that these disputes say something about fairness, the federal procurement process, and the Board's role and responsibility in securing a fair, explicit, and systemically uniform structure for those involved. For example, equality can be gauged by revealing the competition levels involved in the original contract award. Equity can be examined through proportional analyses that reveal the distribution of the public tender across racial, ethnic, gender, and other pertinent socio-economic boundaries and in various industrial and commercial market categories, and how those contracts are ultimately performed, completed, or terminated along those same demographic lines. Finally, examination of these decisions can interrogate the system's fairness in terms of contractual reciprocity: have the parties acted as they promised to act by entering into a contract? I contend that the ASBCA decisions represent an important source of data for scrutinizing how both governmental and non-governmental parties act within the confines of the contracting relationship using the lenses of contract law and accepted practice.

Plan of the Dissertation

In this dissertation, I argue that there are three fundamental dimensions of fairness (equality, equity, and reciprocity) that can be constructively separated, analyzed, and then reintegrated to perform a meaningful evaluation of fairness in federal contract administration on the basis of documented details drawn from formal contract disputes. My basic research question is as follows: Is fairness, and specifically, a form of fairness I describe as "reciprocity," practiced in statistical proportion within federal procurement contracting in comparison to the other two fundamental dimensions of fairness (equality and equity)? More specifically, how do the demographic data of contractors whose disputes must be fully adjudicated compare with

the demographic proportions of contractors 1) who receive awards initially; 2) whose contract is terminated for default or for cause; or 3) whose dispute is settled without an explicit, articulated judgment by the ASBCA judges. What factors complicate these data, and what can the findings communicate about justice within the federal procurement system?

I rely upon a multi-dimensional, mixed-methods research approach that investigates whether formal contractor disputes can be useful vehicles for evaluating post-award fairness within the system. I use samples drawn from all formal published contractor disputes adjudicated by the ASBCA between 2007 and 2021 as the bases for a more holistic analysis of all federal contract disputes across agencies. I examine contracts that have generated formal disputes during performance, identify how those disputes were resolved, and describe what the contractor pool looks like demographically in terms of those resolutions. My level of analysis is the relationship represented by government-contractor dyads and my unit of analysis will be final disposition of the ASBCA in a specific dispute. I examine the outcomes of the disputes process through statistical analysis and analyze the texts of the ASBCA's decisions to further understand the situational contexts behind those disputes.

Chapter 2 extends the exploration begun in this Introduction with a conceptual discussion of fairness as a key principle of successful contract management. Chapter 3 includes a description of the Armed Services Board of Contract Appeals with my argument for its use as a research context for examining fairness within the federal procurement setting. It also contains the details of my mixed-methodological approach for exploring empirically federal government-contractor relationships using fairness as a focusing point. My findings and analyses are then detailed in Chapters 4-6, wherein I undertake multi-pronged quantitative and

qualitative content analysis of ASBCA decisions exploring the three dimensions of fairness with an explicit focus on reciprocity. Chapter 7 will conclude my analysis and synthesize the relevant findings and implications of this work, with recommendations for future research.

Chapter 2: Conceptual Discussion
Understanding Fairness as a Contracting Principle

This chapter consists of a conceptual discussion of fairness as a contract principle organized by topic and divided into four sections. First, I use the work of John Rawls to explore the ethic of fairness and its relevance to contracting and procurement studies. Second, I examine how three types of fairness (equality, equity, and reciprocity) have been incorporated into the federal procurement system legislatively and operationally. Third, I argue that the street-level bureaucracy (SLB) and public values framework (PVF) literatures are pertinent to studying performance questions and specifically reciprocity in the context of contract administration. Fourth, I expand on the dimension of reciprocity and its importance to the complex interpersonal dynamics required for the successful administration and satisfactory performance of federal contracts, which I use here to analyze overall fairness within the federal procurement system.

Understanding Fairness in Contract Administration as an "Abstract Social Good"

John Rawls was a twentieth-century philosopher whose work, including *A Theory of Justice* (1974/2020) and *Justice as Fairness: A Restatement* (2001), transformed and continues to shape how political theorists and social scientists discuss concepts such as fairness, justice, and equality and apply them to collective settings. Rawls's careful articulation of what he termed "two principles of justice" and his framing of justice as a high-level component of free and moral societies has resonated broadly across fields and disciplines. In this section, I argue for the utility of inverting Rawls's formulation of justice as fairness so that "fairness," or fair behaviors transacted between persons, can be translated into a topography of justice at the

structural level that we can subject to further evaluation.

The first of Rawls's "two principles" holds that societies should cultivate an "original position" in which individual differences are erased through a "veil of ignorance" that allows for egalitarian-based, process-oriented decision-making (1978). I relate this erasure of essential differences as compatible with the ideal of procurement equality, typically represented by unrestricted competition where all offerors are treated uniformly and impartially, and an award is made based on price or an evaluation of merit-based factors (desert) alone. This form of fairness lies at the root of what is known as "formal," "procedural," or "bureaucratic" justice, and I associate it with the concept of "equality" in procurement.

Rawls's second, or "difference principle," allows for a need-based dimension in the construction of justice from a "maximin" perspective. Unequal decisions can be just, but only if they are in favor of the least well-off members of society (1978). I argue that this principle can be identified with the concept of equity in procurement. Unequal treatment among competitors is acceptable, but only in pursuit of a "fair" distribution of opportunities to those demographic categories of contractors determined to be "deserving" by Congress.[17] This dimension of fairness lies at the root of "societal," "distributive," or "substantive" justice, which I associate with the concept of "equity" in procurement.

[17] These are categories or types of contractors that Congress recognizes as warranting situational preferential treatment either to address systemic and historical inequities or to promote the overall economic health of the federal contract marketplace. The preferences are codified under the Small Business Act and incorporated into Part 19 of the FAR as acceptable exceptions to the "full and open" requirements of the Competition in Contracting Act (CICA) of 1984. Both the categorization of preference based on socioeconomic indicators and other categorical factors (such as former military service) or on the basis of business size/market share are controversial and have been questioned due to their connections with powerful interest groups (Anglund 1998, 2000).

In addition to the two principles of justice, my dissertation's conceptual framework draws on Rawls's distinction between fair/just treatment at the "individual" and "structural" levels. Rawls purposely does not scale down his discussion of justice to discrete interpersonal collaborations (such as contracts between people) because individual agreements cannot rely upon a "veil of ignorance." For example, exchange contracts must be specific and concrete. Instead, Rawls's work on justice is concerned mostly with the "structural" or systemic level, where the broad moral agreement necessary for establishing an ideal social contract is appropriate (1978). For Rawls, fairness occurs between people, whereas justice occurs within a society at the agreement of all members. We can examine justice within the procurement system overall, but where individual contracts are concerned, fairness is a more appropriate construct to use.

Although Rawls believes that fairness should ground how we approach justice at large, fairness cannot ignore issues of difference because it requires comprehension of personal, specific, and concrete details. However, fair behavior between individuals disregards *opportunistic* self-interest, and indicates consciousness of responsibilities to the other contracting party based upon promises made. I argue that this concept is most compatible with an understanding of reciprocity within the relationship between the government and a contractor. This form of fairness is at the heart of "relational," "contractual," or what I call "transactional" justice or "reciprocity."[18]

[18] W. Noel Keyes, a federal government contracts scholar, specifically links this aspect of fairness to Rawls, and draws attention to the fact that it is an ancient form of justice known as *pacta sunt servanda*, or "promises must be kept" (1985, 236-237)

Because of its simplicity, Rawls's work supplies a basic framework for teasing out fundamental dimensions of fairness for further examination and discussion. I use his theory of "justice as fairness" to posit how equality, equity, and reciprocity, while separately denoting crucial differences, still all relate to the broader concept of justice. Although some consider Rawls's work too idealized for practical application, Amartya Sen concisely describes how Rawls's abstractions can ground a frequently technocratic subject. To Sen, Rawls sees fairness as a basic "demand to avoid bias in our evaluations, taking note of the interests and concerns of others . . . [and to not be] influenced by our own respective vested interests, or by our personal priorities or eccentricities or prejudices'' (2009, 54). This summary echoes the simple language the Federal Acquisition Regulation uses to describe fairness, while also revealing the nuances involved in deriving it from actual practice (discussed further below). As a formal federal contracting officer, I also argue that this description reflects a basic understanding of what people in the profession understand the FAR requires of them in terms of fairness.

Fairness, the Federal Acquisition Regulation, and Contracting Officers

"Fairness" is more than an abstract social good for federal contracting officers. It is an express requirement of the Federal Acquisition Regulation (FAR), the foundational set of rules regarding procurement by the United States Government, codified in 1984 in Chapter 1 of Title 48 of the Code of Federal Regulations,[19] and is a key behavioral attribute expected of government members of the "Acquisition Team"[20] throughout the procurement process. The

[19] "Participants" will "[c]onduct business with integrity, fairness, and openness" FAR § 1.102(b)(3).

[20] "The Acquisition Team consists of all participants in Government acquisition including not only representatives of the technical, supply, and procurement communities but also the customers they serve, and the contractors who provide the products and services" FAR § 1.102(c).

FAR does not explicitly define what it means by "fairness," but indicates that its meaning is different from simple uniformity or equality: "All contractors and prospective contractors shall be treated fairly and impartially but need not be treated the same."[21]

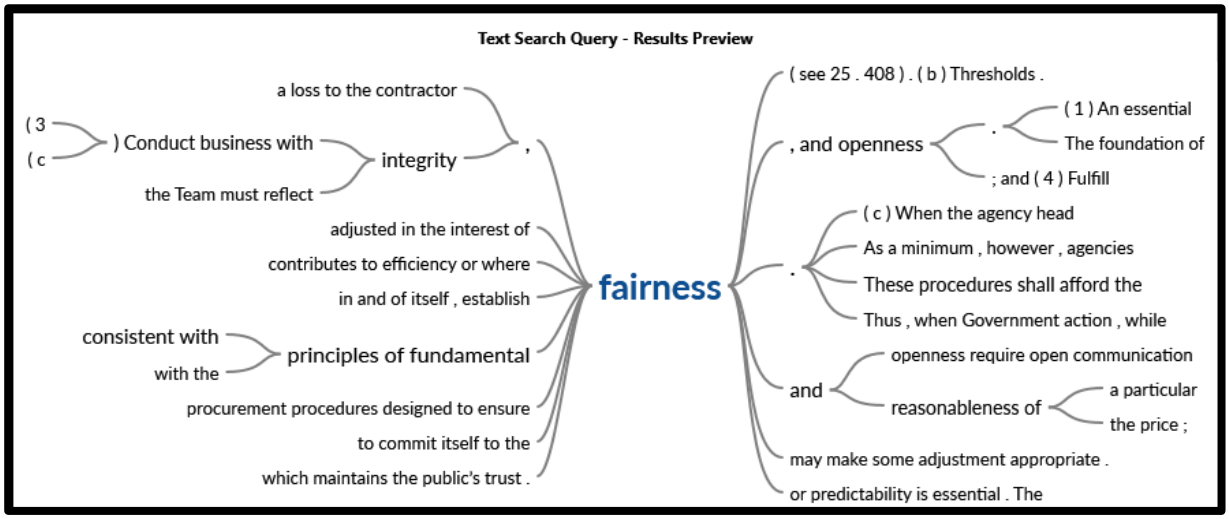
Sparse and elegant as this wording may be, it is not exactly illuminating, and further examination of the FAR complicates as much as it clarifies. A broad-ranging search of its text conducted for this research using NVivo produces interesting results. The word "justice," for example, does not appear in the FAR outside of its association with the U.S. Department of Justice. "Equality" does not appear at all.[22] "Fairness," however, appears 14 times within the FAR's pages, and "fair" with stemmed variations appears 413 times.[23] Further examination reveals important instances in the Regulation's text where "fairness" and "fair" evidently describe the expected behaviors of those government officials participating in the acquisition process, with nuanced applications that transcend the definition of simple competition. (See Figure 2.1.).[24]

A word tree produced by NVivo for the specific word "fairness" (Figure 2.1) allows for some basic thematic analysis. The value-laden words and phrases preceding "fairness" in the fourteen instances where it appears in the Regulation include "loss to the contractor," conduct, business, "Team," reflect, integrity, "adjusted in the interest," "contributes to efficiency," consistent, "principles of fundamental," "procurement procedures designed to ensure,"

[21] FAR § 1.102-2(c)(3)
[22] "Just" and its stems appear twelve times with mixed meanings. "Equal" appears 365 times and in diverse contexts, including references to the Equal Opportunity Act.
[23] It most often occurs in the phrase "fair and reasonable price."
[24] For example, FAR 13.002(b) requires contracting officers to "improve opportunities for small, small disadvantaged, women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business concerns to obtain a fair proportion of Government contracts." FAR 1.102-2(c) notes that "Fairness and openness require open communication among team members, internal and external customers, and the public."

commit, and "maintain the public's trust." The language that follows "fairness" in sentences is equally evocative: openness, essential, foundation, "as a minimum," "procedures shall afford," "government action," "openness requires open communication," reasonableness, "make some adjustment appropriate," and "predictability is essential." This simple image emphasizes the centrality of the term to the fundamental principles of federal procurement. It also highlights it as a normative construct requiring government flexibility and sensitivity to how its decisions impact contractors, who are members of the "Team," and not styled as adversaries.

Figure 2.1: "Fairness" in the FAR, Word Tree Diagram



While some FAR requirements are rigidly formulated and clearly delineated (such as those that govern advertisement of opportunities and requirements for competition in FAR Part 6), flexibility and situational sensitivity are celebrated conspicuously within FAR's regulatory regime. I argue that the FAR carefully weaves the dimensions of what equality, equity, and reciprocity entail into something political theorist Jonathan Wolff calls an "egalitarian ethos" (1998, 2010). This complex mix of variably applied values infuses how contracting officials

understand the entire operating environment of the federal procurement system, creating a performance standard of comprehensive fair treatment for contractors that saturates (and muddies) the normative culture and operating environment of the system.

Paradoxically, contracting officers operate under significant constraints, yet are permitted and encouraged to use considerable discretion when interpreting and implementing regulations and guidance, a situation that can be both a blessing and a curse (Wilson 1989; Kelman 1990; Zacka 2017). In fact, the FAR strongly encourages innovation in crafting solutions to acquisition problems rather than rigid reliance upon best practices (FAR § 12.1.02-4(e)).[25] However, that discretion must still be exercised in accordance with legislated public values.[26] Business expertise cannot supersede the requirements of fairness, transparency, and integrity, which can be contrary to common-sense commercial practice, particularly in the realm of pricing or contractor selection decisions (Kelman 1990; Whelan and Nagle 2007). While contracting officers and contractors are encouraged to innovate, they still cannot break the law (Whelan and Nagle 2007).[27] Discerning where the legal fault lines lie is sometimes a complicated exercise for public officials such as contracting officers (Zacka 2017).

25 FAR § 102-4(e) is very clear on the subject: "If a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, Government members of the Team should not assume it is prohibited. Rather, absence of direction should be interpreted as permitting the Team to innovate and use sound business judgment that is otherwise consistent with law and within the limits of their authority. Contracting officers should take the lead in encouraging business process innovations and ensuring that business decisions are sound."
26 FAR § 1.102(d): "The System must support the attainment of public policy goals adopted by the Congress and the President. In attaining these goals, and in its overall operations, the process shall ensure the efficient use of public resources."
27 The cautionary tale of Darlene Druyun demonstrates the potential consequences of violating procurement integrity requirements (Air Force Office of Special Investigations, 7/30/2020).

Behavioral discretion is not necessarily a factor when equality or equity motivate contracting decisions, especially where policy and law clearly state the rules governing competition or the qualifications or characteristics vendors must demonstrate to claim a specialized status (particularly one with a clear economic benefit to the contractor).[28] In this respect, the management of contract relationships in the federal context is saturated with conceptual murkiness (Cooper 1980, 2002). In what Brown, Potoski, and Van Slyke refer to as "the gray areas of exchange" (2013, 106), federal procurement practice has different guideposts and default rules than those understood by contract managers in the commercial sector, where "immanent" business norms, common law contract interpretation principles, and legal precedent help guide interpretation in the event that a dispute requires third-party intervention (Bernstein 1993, 1996; Macneil 1973). In the federal context, those commercial common law expectations can be overruled by the dictates of an administrative law designed to protect the sovereign interest of the Government and its taxpayers (Cooper 2002; Michaels 2018).

The government has unusually strong rights that the specific adjudicatory philosophy of the federal system is designed to support. In the management of contract relationships, factors related to an evaluation of background fairness *may* help guide government contracting officials' decisions to negotiate changes with contractors or to strictly defend the government's legal rights, but contracting officers are not required to consider them. The relative weighting of background factors in a contracting officer's decision-making calculus during post-award management is mostly a matter of personal discretion and individual business judgment, not a

[28] These are described in FAR 19 and associated statutes.

required element of statute, regulation, or official policy (Roman 2014). When aggregated, those individual decisions may constitute a valid measure of the quality of justice embedded within the entire federal procurement system.

Administrative law precedent *does* exist in the federal procurement arena; in fact, it can be quite strong and unequivocal (Cibinic, Nash and Nagle 2006). However, the principles of interpretation involved between the administrative law and contract law traditions (statutory deference to the government's position instead of *contra proferentem,* for example) that invoke various kinds of legal defenses can make the choice of authority guiding a contracting officer's decision more a matter of professional art than a clear-cut recognition of black letter law (Leventhal 1966; Ellis 2010). [29]

During the pre-award phase of federal procurement, reciprocal fairness is mostly an issue of offer "responsiveness," or how closely a contractor's bid or proposal "conforms" to the requirements of the government's solicitation for offers from contractors. In other words, the bid or proposal that responds most closely to what the government specifically says it is seeking from the marketplace is selected for award as the best response, and a contractor's win is therefore an issue of desert. Discussions about fairness or justice in procurement tend to focus on pre-award issues: how competitive projects are (broadness of opportunity), and the diversity of the pool of contractors who receive awards (inclusivity of opportunities). However, pre-award contract decisions are unilateral: contracting officers make one-sided decisions about what rules will structure the competitive process that are influenced by factors related to

[29] *Contra proferentem* is a common law principle that means that ambiguities in the terms of the original contract will be interpreted against the drafter of the document, which in this context would always by the Government.

both equality and equity. Prospective contractors may choose to play by the government's rules or to not play at all. "Reciprocity" here is one-sided, and consistent with the lopsided power dimensions one finds in traditional "contracts of adhesion," a contract type[30] to which federal procurements are commonly considered to belong (Cooper 1980).

On the other hand, the need to make changes to the original terms of a complex contract is the ground that produces most procurement contracts disputes. Post-award reciprocity is primarily bilateral and dyadic. After contract award, getting to a "meeting of the minds" between the parties without generating a dispute often depends upon the willingness

[30] According to Cornell University's Legal Information Institute website WEX, "An adhesion contract [or contract of adhesion] exists if the parties are of such disproportionate bargaining power that the party of weaker bargaining strength could not have negotiated for variations in the terms of the adhesion contract. Adhesion contracts are generally in the form of a standardized contract form that is entirely prepared and offered by the party of superior bargaining strength to consumers of goods and services. Adhesion contracts are commonly used for matters involving insurance, leases, deeds, mortgages, automobile purchases, and other forms of consumer credit." https://www.law.cornell.edu/wex/adhesion_contract_(contract_of_adhesion). Keyes note that "This term was coined by Raymond Saleilles as 'Contract d'adhesion' to describe contracts 'in which one predominant unilateral will dictate its law to an undetermined multitude rather than to an individual . . . as in all employment contracts of big industry, transportation contracts of big railroad companies and all those contracts which, as the Romans said, resemble a law much more than a meeting of the minds.' R. Saleilles, De Declaration de Volonte 229 (1901). See also Kessler, Contracts of Adhesion—Some Thoughts About Freedom on Contract, 43 Colum. L. Rev. 629 (1943)." (quoted in Keyes 1985, 740). Cooper asserts that "[m]uch of the content of a government contract is non-negotiable, consisting of so-called boilerplate clauses which are provisions for changes, dispute resolutions" (1980, 465). As a consequence, he finds that "the government contract is that it is a contract of adhesion. The contracting officer writes the document and the contractor is left with a take-it-or-leave-it situation" (1980, 465).
By contrast, W. Noel Keyes strongly disagrees that federal contracts under the Federal Acquisition Regulation are "contracts of adhesion" in the same sense as commercial contracts would be. He states: "Unlike clauses used in commercial contracting, all the FAR regulations including the clauses, were published as proposals and the views of private, nongovernmental organizations were and must continue to be considered in their formulation" (1985, 741). Further, Keyes argues that "most standard clauses are in fact intelligible to the intelligent or experienced reader on either side of a contract; even though sometimes they can be less 'user-friendly' than one of the parties would desire" (1985, 742). There is debate about whether or not federal procurement contracts truly represent a contract of adhesion. Keyes (1985) says "no," Rakoff (1982) and Cooper (1980) argue "yes." Macneil's (1984) description in "Bureaucracy and Contracts of Adhesion" leads me to think, "sometimes yes, sometimes no." After scouring the ASBCA decisions and the judges' rulings on particular issues, I think perhaps federal procurement contracts might be best described as "quasi" contracts of adhesion, and that—as with many issues in this realm—whether they function as such depends on the specific situation, the rules/regulations involved, and the facts of the case.

of both parties to negotiate changes.[31] However, because reciprocity is reflected in the behavior of contractors and contracting officers/contracting officer's representatives towards each other often informally and at the street level, capturing it consistently in performance is difficult. Outside observers can benefit from understanding the operational, interpersonal dynamics of operators within the system to access the government officials' decision-making processes in regard to reciprocity, or relational fairness, within the contract dyad.

Street-level Bureaucracy and the Public Values Frameworks as Theoretical Lenses

It can be beneficial to view federal contracting officials (such as contracting officers, purchasing agents, contracting officers' representatives, and inspectors) as street-level bureaucrats (SLBs) who operate as "principled agents" within highly ambiguous work environments (Brehm and Gates 1997; Moore 1995; Lipsky 2010; Zacka 2017). In this capacity, they make influential discretionary decisions based upon individual judgments rooted in "an internal law" that "follow[s] the spirit more than the letter of specific policy mandates,"[32] with decisions potentially based upon the SLB's personal identification as either a "state-agent," "citizen-agent," or "knowledge-agent" (Portillo and Rudes 2014; Maynard-Moody and Musheno 2022; Møller 2022). Knowledge agents in particular rely upon institutional logics or "professional agency narratives" (Cecchini and Harrits 2022) that prioritize a "what works" education-based and experience-based pragmatism in recognition of "the fact that policy is

[31] In non-commercial contracts (contracts not governed by FAR 12), the Government still has the authority to make unilateral changes to an awarded contract that a contractor is legally obligated to fulfill. However, those changes are subject to a process referred to as a "request for equitable adjustment," or "REA," where the contractor can request appropriate consideration for the changes. A contractor is not allowed to walk off the job in response to the changes, which would be considered an "anticipatory repudiation," and would subject the contractor to a non-excusable termination for default or cause. Contractors have legal recourse to challenge the impact of a change on their interests, but they must follow the regulated process to pursue their rights.

[32] In other words, "norms at play" for those "in the field," as Yukins termed them (2007).

always a matter of *human* affairs" (emphasis in the original) (43-44).

Again, the goal of legislators has been to optimize the overall social utility of the dimensions of fairness by implementing rules that balance ideals such as equal (full and open competition) or equitable (fair distribution of opportunities) treatment (Manuel 2010; Manuel and Lunder 2012, 2015). Contracting officers are familiar with technical debates in the field about whether to compete or not to compete and to what extent, whether to restrict competition with small business set-aside mechanisms, and so on (Dekel 2007; Yukins 2010; Schooner 2001, 2002; Kelman 1990). They are also expected to balance and tailor the requirements of fairness in its various dimensions in response to specific contracting situations (Whelan and Nagle 2007). Finally, contracting officers must ensure that the government derives the "best value" from a procurement in a manner that does not violate the operation of other ethical values such as openness, integrity, or sound business judgment to an extent the regulations do not allow.

The tension among all of these factors is governed by a complex set of administrative and legal guidance, procedural rules, and enabling/prohibiting strictures that bind behavior and govern the principles of discretion, while still leaving decision spaces that allow for individual interpretation and enforcement preferences by contracting officials (Cooper 1980, 2002; Manuel 2010; Manuel and Lunder 2012, 2015; Whelan and Nagle 2007). The specific decision-making context faced by contracting officers, however, is not broadly understood by public administration scholars or by people outside of the federal procurement field (Cooper 1980; Mashaw 1991; Whelan and Nagle 2007). Some research has been conducted about the relevance of personal value systems to procurement officials who work in municipal settings

(particularly in the context of representative bureaucracy), but the federal context has remained largely unexplored since Phillip J. Cooper's article describing the "role and environment of the contracting officer" was published in 1980 in the *Public Administration Review* (Ingram and Jensen 2020; Roman 2014; Trammell et al. 2020).

How contracting officers view their role in the procurement process in promoting either equality or equity (or both simultaneously) may also influence how they employ reciprocity in their relationships with private sector contractors. The choices contracting officers make to implement (or not to implement) regulations (and how completely or forcefully to do so) can reveal ideological conflicts embedded in the procurement system about the federal government's marketplace presence—a presence that Whelan and Nagle apologetically refer to as "schizophrenic" (2007, 155). It may also reveal latent biases of which contracting officers can be unaware. Using a "Broker/Purist" dichotomy, Alexandru Roman (2014) argues that municipal procurement officials mediate these conflicts according to how they perceive their role in the procurement process and within the public organizational setting. As a former federal contracting officer, I find that his description of this dichotomy and the interpretive mindsets it represents has remarkable validity.

In particular, Roman's work indicates that the personal beliefs and professional values of contracting officials can be an important influence on the government's performance as a contracting partner in repeated everyday practice. Accordingly, I argue that viable lenses for studying public procurement contracts include the street-level administrative nature of the work as well as our understanding of how the principles of fairness enacted (or frustrated) in contracting practice shape the public value these contracts have to a shared and diverse

society. Scant attention has been devoted to understanding how social factors influence public officials such as contracting officers, including the ambiguity that attends the social construction of the decisions they make in terms of "best value."[33] I rely on the SLB and PVF literatures to link the nuances of fairness to the concrete activities of procurement personnel and to show how the weight given those nuances vary as a result of cognitive ordering and administrative decision-making that is personalized and subject to injustices that may be difficult to detect explicitly (Dekel and Schurr 2014; Dekel and Dotan 2018).

The relative lack of attention in public administration to understanding the acquisition workforce, many of whom have repeated street-level interactions with citizens, is puzzling (Mashaw 1991). By many measures of influence and magnitude, federal contracting represents a significant slice of the U.S. bureaucracy. By 2020, contract employees comprised 40% of the federal government's workforce (Light 2018), and $550 billion was expended in 2018 through procurement actions, representing 40% of all federal discretionary spending (Government Accountability Office 5/28/2019). In terms of direct employment, approximately 3% of the [1.8 million-person] federal civilian workforce consists of GS-1102 "Contract Specialist" and GS-1105 "Purchasing Agent" personnel, who are the primary members of the government acquisition profession [~35,000 people] (Office of Personnel Management 8/1/2019). This does not include non-civilian Department of Defense acquisition employees, or the even larger number of program managers and subject matter experts within agencies who serve as "Contracting Officer's Representatives" (CORs), or who are not designated as "contracting professionals" by

[33] "'Best value' means the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement" (FAR 2.102 Definitions of Words and Terms).

their Office of Personnel Management (OPM) job series,[34] but who are nonetheless indispensable to making contracts work "on the ground" both in their interactions with contractors and with the public.

Like police officers, social workers, and teachers, contracting officers make policy when they make decisions about how to interact with the public/taxpayer, an idea often explored through the SLB and PVF theoretical lenses (Lipsky 2010; Moore 1995; Maynard-Moody and Musheno 2000, 2012, 2022). How public administrators think and organize their work is a subject well-rooted in the classic discussions of the field, such as Herbert Simon's *Administrative Behavior* (1947). Moore's *Creating Public Value* contributes to that decision-making tradition from a more distinctly normative position (1995). There have also been calls for more empiricism in the study of the Public Value Framework and of Mark Moore's Strategic Triangle in particular (Fukumoto and Bozeman 2019; Hartley, Alford, Knies, and Douglas 2017; Hawkins, Yoder, and Gravier 2016; Jørgenson and Rutgers 2015; Alford and O'Flynn 2009; Alford and Hughes 2008). Recent work by Carnevale and Stivers (2019); Maynard-Moody and Musheno (2022), Cecchini and Harrits, and Møller (2022) represent important efforts to expand the understanding of professional knowledge-based, experiential decision making at the level of frontline workers in public administration. This dissertation engages those advances with the intent of enriching scholars' understanding of the procurement milieu both qualitatively and quantitatively as a research setting.

[34] Typically, General Schedule (GS) series 1102 and 1105. In 2018, GS-1102 (Contracting Series) represented 81% of the workforce of "contracting professionals." Federal Acquisition Institute (FAI) FAC-C holding (Federal Acquisition Certification—Contracting) personnel (2018 *Acquisition Workforce Competency Survey*) (19).

But how do we evaluate "fairness" as a performance standard for government officials? Stakeholders can know they have received fair treatment by government officials when those officials have followed procedures required by legislation and enforced by judicial decisions.[35] As tedious as bureaucratic processes can be, they are an explicit measure that a citizen contractor can reference to determine whether they have been treated fairly, as the law currently understands the concept within a certain context. Requiring and then following (or not following) a process provides an explicit standard that makes "fairness" measurable and real. Practically, the efficacy of these processes can only be studied through the tangible micro-interactions between bureaucrats and the citizens impacted, at the front line of interaction.

According to Moore (1995), public administrators develop functional cognitive mechanisms to address three levels of ambiguity (technical, strategic, and moral) through a "substantial and lengthy process of appraisal and reflection" (90). As SLBs, contracting officials often "invent a set of working criteria that are unsanctioned (and many times unknown in organizations)" (87), but by which each official "assimilates a range of techniques and priorities . . . around distinct conceptions about their own proper role, and generally about what [constitutes] a 'good job'" (89). Figure 2.4 shows an example of how Moore's strategic triangle might be applied to the procurement environment (adapted with the "Fire" Tetrahedron used to describe the phenomenon of combustion).[36]

[35] Of course, this assumes that the processes are themselves fair, regardless of provenance—an issue open to debate and empirical study.

[36] A "tetrahedron" is one visual concept for acknowledging the complexity of the knowledge-based decision making process exercised by frontline workers that a more simple decisional triangle fails to capture. Another dimensional approach is that of a circle incorporating feedback mechanisms, as posited by Carnevale and Stivers (2019).

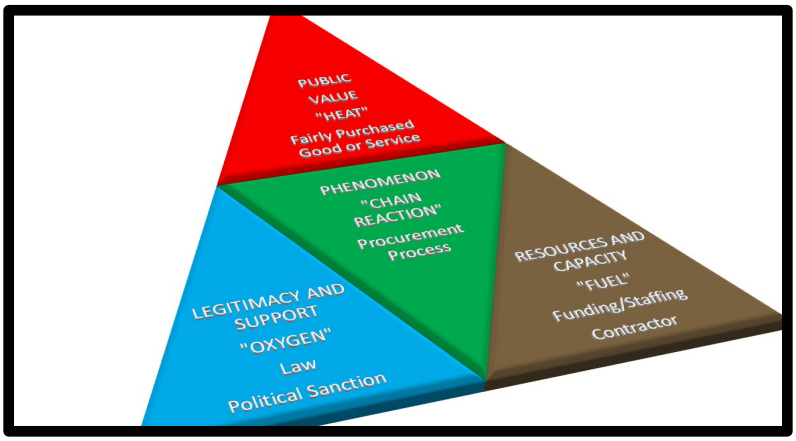


Figure 2.2: Strategic Tetrahedron for Procurement Decisions

The technical complexity or obscurity of the decision-making environment in federal procurement contracting may help explain its neglect by public administration scholars, despite the exponential expansion of contracts as a governance tool. This complexity extends throughout the entire magnitude of procurements, from micro-purchases to the acquisition of advanced weapons systems. Even basic governmental processes can be byzantine compared to private sector practice, involving multiple steps and requiring thorough documentation above very small dollar amounts. Contracting officers must frequently assess cascading decision-trees requiring unfolding logics, resulting in the ever-unsatisfactory answer of "it depends" in response to apparently easy questions (Cooper 1980; Dekel 2007; Whelan and Nagle 2007).

Reciprocity in Contract Operations

Although I consider all three dimensions of fairness in this dissertation, my primary focus is reciprocity. I focus on reciprocity because it is the least understood dimension of contractual fairness; yet it is one of the most consequential aspects of operational contracting in terms of successful performance of management objectives. Reciprocity is also the

dimension of fairness most interdependent with those other "soft"[37] management norms like openness, integrity, and sound business judgment that the FAR requires of procurement officials.

Reciprocity is interpersonal fairness tendered between partners to achieve a shared goal through cooperative agreement. It is a relational value occurring at the micro-level in collaborations between individuals, or in the case of federal contracts, between a private contractor and authorized government officials. It is appropriate in situations where there is "privity," or relational exclusivity, between the parties (Ingram 2021). Reciprocity is not blind to difference within the dyad; ideally it should represent a mirror of behavior between parties reflecting the terms of the written contract. The ideal representation of reciprocity is what Brown, Potoski, and Van Slyke (2013) describe as a "win-win" approach to successful contract performance by both parties.

As a result, reciprocity is more game-like in practice than equality and equity. In contracting terms, it is bilateral as opposed to unilateral. To positively impact contract performance, both parties must "play" some semblance of the same game. However, I am not concerned with this relationship from a game theoretical perspective (like the decision to play a version of *prisoner's dilemma* or *tit-for-tat* in specific situations), which utilizes an economics-based approach to procurement studies. My interests lie in the decision to "play" at all or to alter terms of the written contract cooperatively; the extent to which government officials and contractors deem the rules involved to be flexible; and whether that decision looks different

[37] By "soft" I mean abstract and less tangible, and therefore more difficult to assess in terms of accountability. Zacka refers to these values as reflecting a "softer terrain of organizational culture" (2017, 220).

across demographic distributions. In an ideal world, the demographics or business size of a particular contractor should not negatively impact a government official's decision to negotiate or to sanction that contractor. However, this is a matter for empirical exploration, and not just a tenet of fairness in professional practice that can be held by faith.

The quality of reciprocity is especially apparent in the behavioral choices made between the contracting parties in response to changes and changed conditions, which can range from flexible, purposeful cooperation to fierce protection of self-interest and the dogmatic adherence to the original letter of the contract's requirements. The circumstances that occur in this environment are inherently social, and the motivations behind the parties' choices of behavior can be complex.

Post-award reciprocity is the product of largely unsupervised discretionary agreements made by contracting officers, contracting officer's representatives, and their contractor counterparts, who document their actions (and their official rationales) through memorandums, correspondence, required submittals, other administrative documents, and narrative reports. Details describing the parties' actions, outside of explicit contract modifications in the FPDS-NG (Federal Procurement Data System-Next Generation) or as advertised on the SAM (System for Award Management) website, are difficult to observe without the specific knowledge that can trigger a Freedom of Information Act (FOIA) request for concrete details. Because there are millions of reported "contract actions" every year in FPDS-NG and thousands of actions per contract in some cases, the simple knowledge that an action exists rarely discloses to an outside observer if it is important or insignificant.

However, FPDS-NG does capture a potentially significant contract management phase marker: whether a contract has been terminated early for "nonperformance," or what is known as a "termination for default" or a "termination for cause" (depending on the type of contract involved). Default terminations are rare in federal procurement and therefore potentially represent a manageable population of contracts that may reveal obscure but crucial details about how the system operates from the perspective of reciprocal fairness.

Terminated contracts are especially interesting from both a legal and a management standpoint because the difficult and costly decision to end a contract before completion indicates that a serious failure has occurred somewhere in the process. Therefore, one class of disputed contracts that I analyze in terms of fairness are contracts terminated for default or cause. There are many examples of scholarship that demonstrate how learning from failure has proven constructive to the public administration field. Unpacking the context of contract management failures in terms of contractor fair treatment may prove instructive to those who work in federal procurement as well.

There is precedent for this contention: analyzing contract "failures" has generated an enormous amount of debate in academic law journals in response to the relational theory of contract law attributed to Stewart Macaulay (1999) and Ian Macneil (1999). In this influential vein of legal scholarship, efforts to "contract"[38] in an exchange situation are deemed to have failed once negotiations between contracting parties break down to the extent that the intervention of a third party (such as a mediator or judge) is required for resolution. This belief

[38] One reason I use quotation marks here is that Macaulay and Macneil use it in a peculiar way that emphasizes both action and choice. I will discuss this more in Chapter 3.

runs counter to the widespread viewpoint among legal traditionalists (in the formalist or doctrinaire school) that the primary purpose of a written contract is to serve as protection for the rights and the interests of the parties involved. To Macaulay and Macneil, contracting partners resort to enforcement of written contracts only when relational strategies have failed—an approach that can be called "legal realism" or "law in action" as opposed to "legal positivism" or "law on the books." However, whether this theory applies to the heavily administrative law context of federal procurement contracting, where the dictates of the FAR reign supreme, requires further study. For that purpose, In the next chapter, I explain my decision to turn to contract dispute decisions adjudicated by the Armed Services Board of Contract Appeals, one of three forums used for adjudicating federal contract disputes (and the most prolific) as a research setting.

Chapter 3: Research Context and Mixed Methods Research Design

The core purpose of this dissertation is to understand the meaning of fairness in federal procurement contracting. Mixed method research designs combine quantitative and qualitative methodologies to explore holistically a phenomenon of interest (Bazeley 2018; Creswell and Creswell 2018). I employ an integrated and iterative combination of descriptive and interpretive research tools to derive a variety of perspectives on the phenomenon of fairness in the federal procurement context (Creswell and Poth 2017; Greene 2007). I combine exploratory and explanatory techniques at macro (national government), mezzo (department and agency), and micro (individual contract) levels of analysis to produce a methodologically nuanced, pragmatic, yet coherent study supported with theory and by my own professional experience as a federal contracting officer. My goal is to draw conclusions from this dissertation that add to what we know about federal procurement writ large (macro) and to gain knowledge at the mezzo and micro levels by peering within the black boxes of operational and street level procurement activity.

This chapter consists of two parts. In Part I: Research Context, I describe the federal procurement contract disputes process, focusing on the written dispute decisions made by the Armed Services Board of Contract Appeals (ASBCA) between 2007 and 2021. For the reasons outlined in the first two chapters, I use ASBCA dispute decisions as the specific research context for an empirical examination of contractual fairness in this dissertation. I first describe how legal controversies involving federal procurement contracts are resolved, detailing the administrative and judicial frameworks at play, and explaining how they work in practice. Next, I offer some critical assessments of the overall fairness the modern-day disputes process

provides to the federal procurement system. This commentary is followed by a brief snapshot detailing how the present day ASBCA functions, to demonstrate why this administrative body provides an appropriate setting for researching the topic.

In Part II, I describe how the mixed methods research design is used to approach the question of fairness conceptually and empirically from macro, mezzo, and micro levels of analysis. For data, my research relies upon primary documentary sources drawn from the census of federal contract disputes, including published decision texts and the contents of official reports. I examine how the legal dispute decisions rendered by the ASBCA and the reports (Federal Procurement Data System-Next Generation and USASpending reports) can be mined for the variables I use to study my core research question. I scrutinize the decisions and the reports using three different but complementary and essentially concurrent analytic approaches.

First, I employ qualitative and quantitative techniques in describing the topography of contract disputes in the Department of Defense (DOD) over a fifteen-year period. This design component adds descriptive depth to an agency-focused, mezzo-level discussion about operational procurement. Second, I apply computational text analysis to a novel documentary corpus compiled for this dissertation to explore the question conceptually from a high-level, national government, macro perspective. This design component helps ground my theoretical discussion and final analysis in the specialized language-in-use of the contracting environment. Third, I use qualitative content analysis to derive observations from official legal narratives (contract dispute decisions) that illustrate conflict development and relational power dynamics in specific government-contractor dyads. This design component supplies a frontline, micro-

level perspective to my central question: what is the meaning of fairness in federal procurement contracting? All three design components have been conducted in concert, with developments in one component influencing progress in another through a variety of feedback and selection mechanisms.

PART I: RESEARCH CONTEXT

Legal Controversies involving Contract Issues: Protest or Dispute

Congress has established two formats of legal proceedings for dealing specifically with federal procurement "contract issues."[39] The first format is a "protest," a procedure that prospective contractors can use when they have been eliminated from competition for a specific contract award. Protests (covered by FAR 33.1) have their own distinct process and forums for resolution, which are detailed in Figure 3.1. Because they are not this dissertation's focus, I do not discuss them except to make distinctions and qualifications.

The second format is a "dispute," by which controversies arising between the government and an actual contractor related to specific contract performance issues can be resolved (FAR 33.2).[40] Technically, an active "dispute"[41] is a formal, post-award contracting

[39] I stress here that there is an important distinction between "contract issues" and "issues with a contract." "Contract issues" relate specifically to performance of the legal terms, conditions, and specifications of a particular contract, or in the case of a protest, a solicitation (an "invitation for bid" or a "request for proposals") for a potential particular contract. Contract issues in the federal system are governed by the Contract Disputes Act of 1978 (CDA), or 41 U.S.C. §71. "Issues with a contract," which may involve controversies related to fraud, torts, labor disputes, Tucker Act violations, or for other specified reasons. Cases related to "issues with a contract" may be heard by the Court of Federal Claims, but not by the Boards of Contract Appeals, which only have the authority to adjudicate CDA controversies, or "contract issues." Cibinic, et. al note that "The language delineating the scope of the Disputes clause is the phrase *relating to the contract*" [emphasis in the original] (2015, 224). This phrase means that the jurisdiction of the CDA does not allow a claim/dispute that involves "Restitution (quasi-contract) claims not related to contract [e.g., tort], claims involving fraud, claims involving statutory penalties or forfeitures under specific jurisdiction of another federal agency" (2015, 226-227).

[40] Unlike protests, disputes ARE the subject of this dissertation as a research context. When I discuss legal proceedings here, I discuss disputes unless otherwise qualified.

[41] Disputes (and their appeals) are subject to FAR 33.2. A dispute "appeals" a COFD issued in response to a claim.

controversy stemming from a claim/assertion of damages[42] that has not been settled through either formal or informal negotiations. In federal procurement, "dispute" is a term of art that specifically refers to that contractor's written appeal of a "contracting officer's final decision" (COFD) by the federal official—typically the "contracting officer" (Cooper 1980)—responsible for the award and/or administration of individual federal procurement contracts. Aggrieved contractors may choose to file a dispute in post-award controversies with either the Boards or the CoFC; the dispute functions as an initial legal complaint.[43,44] The COFD typically is first issued in response to a "claim,"[45] which must meet certain criteria to be considered ripe for the

[42] The nature of relief allowable is "Money in a sum certain, adjustment or interpretation, and other relief as allowed by PL. L. 102-572 §907 (Cibinic, et. al. 2015, 226-227). FAR 52.233-1(c) states that a "'*Claim*'," as used in this clause, means a written demand or written assertion by one of the *contracting* parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $100,000 is not a *claim* under 41 U.S.C chapter 71 until certified. A voucher, *invoice*, or other routine request for payment that is not in dispute when submitted is not a *claim* under 41 U.S.C chapter 71. The submission *may* be converted to a *claim* under 41 U.S.C chapter 71, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time."

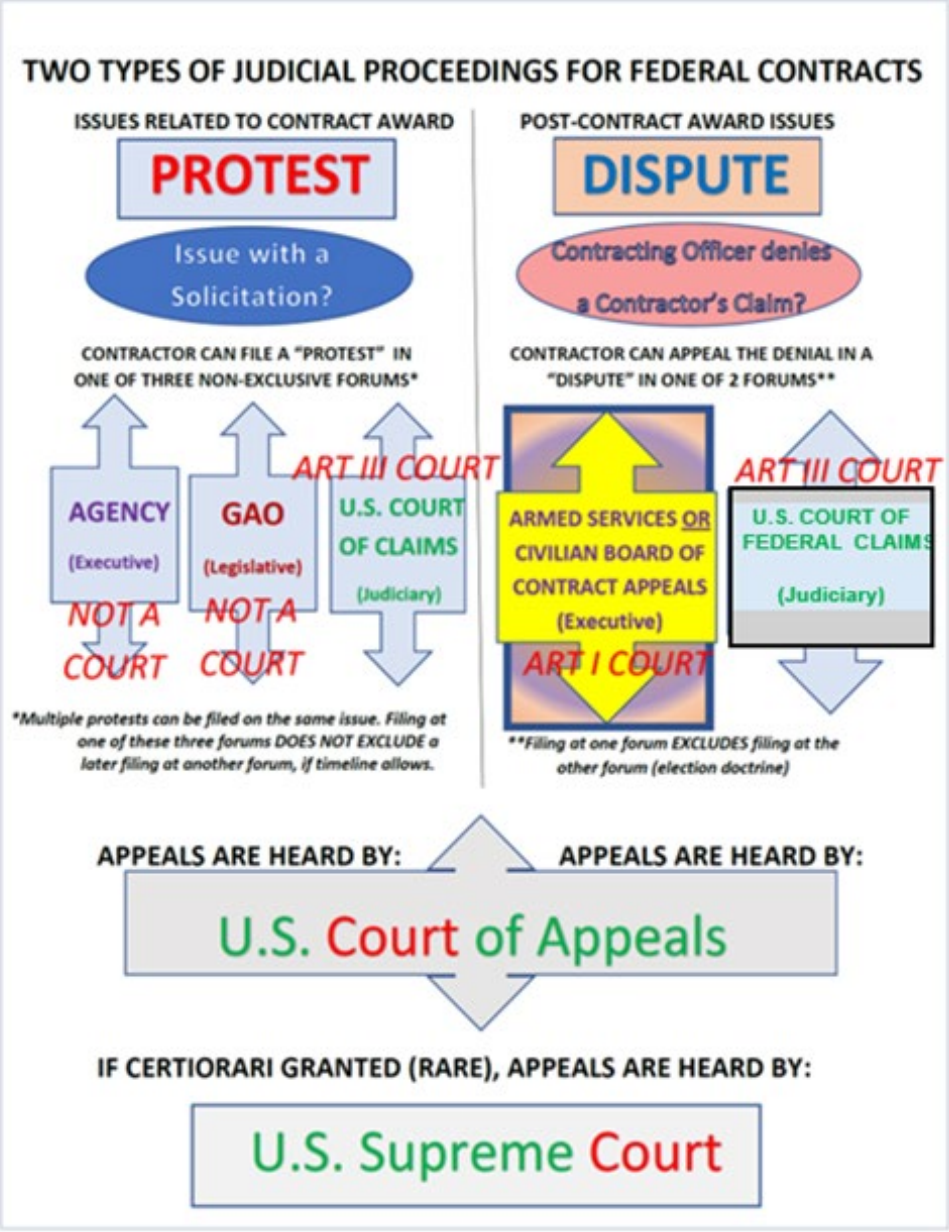
[43] Procedurally, a Contracting Officer's Final Decision (COFD) is issued by the Government's contracting officer in response to an official "claim" that has either been made by the contractor against the Government, or that has been made by the Government against the contractor. Only a claim that has been subjected to a COFD (and subsequently denied) falls under the jurisdiction of the ASBCA—although what constitutes either a "claim" or a COFD can sometimes be broadly construed by the Board (Jones 2018; Cibinic et al. 2015; Tiefer and Shook 2003).

[44] "Protests" deal with how a contract award is made (who "deserves" the award, and whether the award process specifically related to vendor/contractor selection or exclusion was proper and fair). "Disputes" concern already awarded contracts that are in the process of being performed or that have been completed/terminated. Protests are an issue of contract "formation" and validity; disputes are an issue of contract performance and promise fulfillment/satisfaction. An essential difference in these two formats is the existence of "privity" between the Government and a contractor (Cibinic, et. al. 2015). Protests occur pre-privity (or obligation); disputes occur after it has been established. Privity recognizes the special relationship between contracting parties that is the primary focus of this dissertation (reciprocity between contracting parties) (https://www.law.cornell.edu/wex/privity, accessed 2/26/2023).

[45] From FAR 33.206 Initiation of a claim: "(a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period. . . . [t]he contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer. (b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim unless the contracting parties agreed to a shorter time period. The 6-year period shall not apply to . . . a Government claim based on a contractor claim involving fraud." Claims related to accusations of contract fraud are outside the authority of the CDA and are handled by the Department of Justice in accordance with the Tucker Act.

issuance of a COFD.[46] The dispute is filed in one of two Article I "Courts" or Boards (the other in the U.S. Court of Federal Claims (CoFC), an Article III judicial venue.

Figure 3.1: The Two Types of Judicial Proceedings for Federal Contracts



Processes for Resolving Pre- and Post-Award Federal Procurement Controversies

[46] Claims over $100,000 must be certified in accordance with FAR 33.207.

Forums for Dispute Resolution: Administrative Board or Federal Court

The contractor chooses which of the two types of forums will adjudicate the dispute: a Board (ASBCA or CBCA), meaning an executive entity, or the U.S. Court of Federal Claims (CoFC), a judicial entity (Schaengold and Brams, 2008). The process undertaken by the Boards is more informal and typically concluded faster than are disputes filed in the CoFC, which makes it an attractive option for contractors who must pay employees, suppliers, and subcontractors promptly, regardless of dispute status or other controversy (Jones 2018). Note, however, that an appeal of a dispute decision rendered by either one of the Boards or by the CoFC must occur at the next level within the federal system, which is the U.S. Court of Appeals for the Federal Circuit (Cibinic et al. 2015). Some practical differences between the two proceedings are also described above in Figure 3.1. Court of Appeals decisions on disputes potentially may ultimately be decided by the U.S Supreme Court, though it rarely grants *certiorari* for cases involving federal procurement (Whelan and Nagle 2007; Cibinic et al. 2015).

Contractors and the Government are encouraged to use alternative methods of dispute resolution (ADR) outside of these official forums at any time during the disputes process, which will not harm their standing or the validity of their arguments (Jones 2018; Prouty 2018; Cibinic, et al. 2015).[47] ADR techniques are becoming more mainstream for federal procurement cases and the Boards actively encourage solutions to disputes finalized by the parties themselves (Nabatchi 2007; Cibinic et al. 2015). Moreover, filing a dispute with a Board may in some cases

[47] The *Government Contracts Reference Book* notes that "ADR is often conducted with the understanding that the record of the proceeding will be kept confidential and that—if the selected method's conclusions are not acceptable to either party--the normal litigation process may be begun or resumed" (Nash et al. 2013, 25). The only real stipulation appears to be that ADR agreements pertaining to CoFC filings must be approved by the Attorney General (Jones 2018; Cibinic et. al. 2015).

be the best way of preserving a workable relationship between the parties, because doing so allows for structured intervention by a mediating third party prior to the issuance of a formal authoritative judgment (Johnson 1999).[48]

It is vital to emphasize that the only sanctioned route to a formal, binding, non-negotiated opinion (essentially, a legal ruling by a judge) in response to a contract issue "dispute" goes through either one of the Boards or the CoFC (Cibinic et. al. 2015; Jones 2018). There is no other forum with jurisdiction for adjudicating a problem between the government and a contractor that arises from the terms, conditions, and specifications of a federal procurement contract as a matter of **contract** law, which is controlled under the Contract Disputes Act of 1978.[49] Contractors sometimes bring issues before the Board that are grounded in tort, criminal, or regulatory law based on statutes auxiliary to basic contract law. A number of the Board decisions specifically discuss the Board's jurisdiction and cases related to non-contract law are dismissed as out of the Board's reach on that basis.

The Armed Services Board of Contract Appeals (ASBCA)

The ASBCA (shown with the CBCA in Figure 3.1 within the bright yellow box) is an administrative judicial forum operated under an executive charter by the Department of

[48] This may indicate a difference in federal procurement contracts and commercial contracts that impacts the usefulness/applicability of the relational contracting literature. Instead of representing a breakdown in the contract relationship, in some cases, particularly involving large businesses with the size/resources/leverage to rival that of the federal government, filing a dispute (essentially a legal challenge) may function as part of a management strategy more than as a tool of last resort. I discuss this implication more in Chapters 5.

[49] Federal procurement contract law is administratively codified under the Federal Acquisition Regulations (FAR). Federal procurement contracts may include other auxiliary legal requirements that do not arise out of the contract purpose itself, such as the Davis-Bacon Act, which governs how construction workers on federal projects must be paid. This is an instance where labor law (for example) governs the controversy, not contract law. Labor controversies are adjudicated by the Department of Labor, not the contracting officer. Contract law and the contract "relationship" (and therefore the CDA) is the subject of this dissertation, not requirements imposed by ancillary laws, which are required by Congress and constitute a requirement of contract performance, but which do not govern "how" the contract operates as a legal mechanism (Jones 2018; Tiefer and Shook 2003).

Defense (DOD) for the resolution of contract controversies covered by the CDA. The stated goal of the Board is "to the fullest extent practicable provide informal, expeditious, and inexpensive resolution of disputes" (*Rules* 2014, i). The ASBCA hears significantly more disputes than the CBCA (Prouty 2018), operates under a different charter, and (with few exceptions) publishes its decisions on public websites, which makes them both readily available and relatively easy to link to other data sources.[50] These features recommend its exploration as a vantage point for a more holistic evaluation of fairness in the present disputes system.

The ASBCA's website characterizes the Board as "a neutral, independent forum which has been in existence for over fifty years" (https://www.asbca.mil/; accessed 3/12/1013). Its "primary function" is "to hear and decide post-award contract disputes between government contractors and the Department of Defense; the National Aeronautics and Space Administration; the Central Intelligence Agency, as appropriate; and other entities [as by agreement]," which it does "under the Contract Disputes Act (41 U.S.C. §§ 7101-7109), its Charter, or other remedy-granting provisions" (https://www.asbca.mil/; accessed 3/12/1013).

In describing the Board's philosophy, the website states that "the ASBCA encourages parties to attempt to negotiate a resolution of their dispute." However, if a contractor appeals a contracting officer's final decision or does not receive one:

> An appeal will be processed pursuant to the ASBCA's Rules. The Rules allow a contractor to represent itself without a lawyer and the Rules have provisions for the accelerated processing of small dollar amount claims, which can be as much as $150,000 in the case of a qualifying small business. Most hearings, if required, will be held by a single

[50] The reason for this is simple: the ASBCA lists the relevant contract numbers (award Identification numbers or award IDs) in the header of every decision it releases. The CBCA does not do this, and sometimes does not actually identify a specific award ID even in the text of the decision itself. This does not make it impossible to find those award IDs to use in other databases, but it does make it more difficult, and the data collection process is less efficient as a result.

> Administrative Judge, either at the ASBCA's offices in Falls Church, Virginia, or, if appropriate, in a location more convenient to the parties. Most decisions are made by a panel of three Judges, as the ASBCA functions in a collegial manner. (https://www.asbca.mil/; accessed 3/12/1013)

Again, Cibinic et al. 2015 emphasize that the Board (and Federal procurement best practices in general) always promotes and encourages a settlement between the parties at any point in the process—even after the Board has technically issues a decision—as long as the contractor's final appeal period has not passed.

A claim that forms the basis of the dispute must be filed within 6 years of the date either the contractor or government knows that a contractual liability by the other party has accrued (this does not apply in cases of contractor fraud). The timely filing of a claim is not dependent on the date of contract award, although contracts awarded prior to 1985 are not necessarily subject to the current Board rules if they are determined to be "inequitable or unfair" (*Rules*, 2014, title page). Contracting officers have 60 days (unless the CO makes a reasonable extension) from the date they receive a validly formatted claim to issue a COFD. If they do not, the contractor may file a dispute asking the Board to force a COFD to be issued. Contractors have 90 days from the receipt of a written COFD to file an appeal with the Board (on the other hand, appeals to the Court of Federal Claims as a choice of forum can be made within 12 months of that date). Once either the contractor or the government has received an unfavorable decision from the Board, they have 120 days to file an appeal with the Federal Court of Appeals, which begins another process which is subject to the Federal Rules of Civil Procedure and that court's timelines (Cibinic et al. 2015). I describe below the timeframe of the Board's own procedures during the dispute, which is regimented but relatively clear

Structure and Procedures

The *Rules of the Armed Services Board of Appeals*[51] governs the procedures and practices of the Board. The *Rules* consist of sixteen pages with two short addendums that altogether total a mere twenty-seven pages.[52] They were first approved in 1963 (pre-CDA) and have been revised five times before the current iteration was issued in 2014. They apply to all contract disputes subject to the CDA and filed after July 21, 2014. It is important to note that these rules only apply to contracts awarded by the agencies served by the ASBCA; The Civilian Board of Contract Appeals has its own distinct set of rules and procedures, which is decidedly (and deliberately) more "court-like" or "judicial" in practice (Somers 2020).

According to the *Rules*, "The Board consists of a Chairman, two or more Vice Chairmen, and other Members, all of whom are attorneys at law duly licensed by a state, commonwealth, territory, of the District of Columbia" (*Rules*, 2014, i). The members of the Board function as its Administrative Judges, and biographies of the current members are posted to the Board's website. The Board is comprised of multiple "Divisions," each of which include the Chair and a Vice Chair. The *Rules* note that:

> Hearings may be held by an Administrative Judge or by a duly authorized examiner. Except for appeals processed under the expedited or accelerated procedure . . . the decision of a majority of a division constitutes the decision of the Board, unless the Chairman refers the appeal to the Board's Senior Deciding Group (consisting of the Chairman, Vice Chairmen, all division heads, and the Judge who drafted the decision), in which event a decision of a majority of that group constitutes the decision of the Board. Appeals referred to the Senior Deciding Group are those of unusual difficulty or significant precedential importance, or that have occasioned serious dispute within the normal division decision process (2014, i).

[51] Published at https://www.asbca.mil/Rules/forms/Final%20Rule%20Formatting%20pgl.pdf#page=1
[52] The word "fair" appears within these pages 6 times.

There are 24 Rules in the document, with two short appendices for specific Equal Access to Justice Act and ADR proceedings, as well as a one-page template with a "standardized pleading" format. The proceedings are not subject to the Federal Rules of Evidence or Procedures unless ordered by the Board (2014).[53]

A CDA dispute must be submitted in writing to the Board, with a copy also sent to the contracting officer. Its contractor must file its official complaint within 30 days of the date it received notice that the Board has docketed its appeal and assigned a case number, although its initial dispute can function as the legal complaint if the contractor chooses. The Government is required to compile a "Rule 4" file for the Board and for the Contractor within 30 days of the date it receives the appeal that contains the necessary documents (COFD, contract, all relevant correspondence) to defend the COFD. The Contractor then has 30 days to supply any other pertinent documents not submitted with its appeal to the Board. The Board may choose to hold hearings ("as informal as may be reasonable and appropriate" if necessary "at such times and placed determined by the Board to best serve the interests of [all] parties" (2014, 7).

However, either the contractor or the government can waive its right to a hearing and ask for the Board to rule based on the documentary record. Contractors have the option to choose an expedited or accelerated procedure for small claims (less than $150,000 in all events) within 60 days of their initial dispute/appeal filing (a choice that cannot be revoked). Depending on the dollar amount of the small claim, the Board will rule within 120 (expedited) or 180 days (accelerated) unless prevented by reasonable circumstances (2014, 8-9). The Board will issue a

[53] For example, "In deciding motions for summary judgment, the Board looks to Rule 56 of the Federal Rules of Civil Procedures for guidance" (2014, 5) and "The Federal Rules of Evidence are not binding on the Board but may guide the Board's rulings" (2014, 7).

written decision to both parties, and "[a]ll orders and decisions, except those as may be required by law to be held confidential, will be available to the public" (2014, 13). Those documents are posted to the Board's website within 10 days of the decision. The unsuccessful party has 30 days to request a reconsideration of an unfavorable decision, or it may simply choose to file an appeal with the Federal Court of Appeals within 120 days of the Board's last denial.

ASBCA Dispute Resolution Process

Fundamental fairness between the federal government and the contractors that the Government relies upon to provide goods and services is at the heart of the modern institutionalized and professionally structured contracts dispute process (shown in Figure 3.2 on the next page). In the American Bar Association's *Government Contract Law: The Deskbook for Procurement Professionals,* Jones observes that "A dispute process that is quick, fair, and accurate is in the interests of both contractor and government [because maintaining] a professional working relationship between contractors and their government customers is key to timely delivery of conforming goods and services" (546). He asserts that "the Contract Disputes Act . . . [Congress] created a fair system for resolving disputes that works reasonably well for both contractors and the government," (546).

Almost 50 years after the CDA's passage, this view is widely held, even if "[t]o someone familiar with the remedy procedures for basic (private) contract law, the remedy procedures for government contract law come as a shock . . . more like the product of elaborate administrative law, with its many special aspects designed to channel and shape the controversies between private and public actors" (Tiefer and Shook 2003, 617). Swan notes that "Contractors today

benefit from a statutorily prescribed system entitling them to seek judicial review of agency actions and to hold the Government to its contractual commitments" (2014, 115).

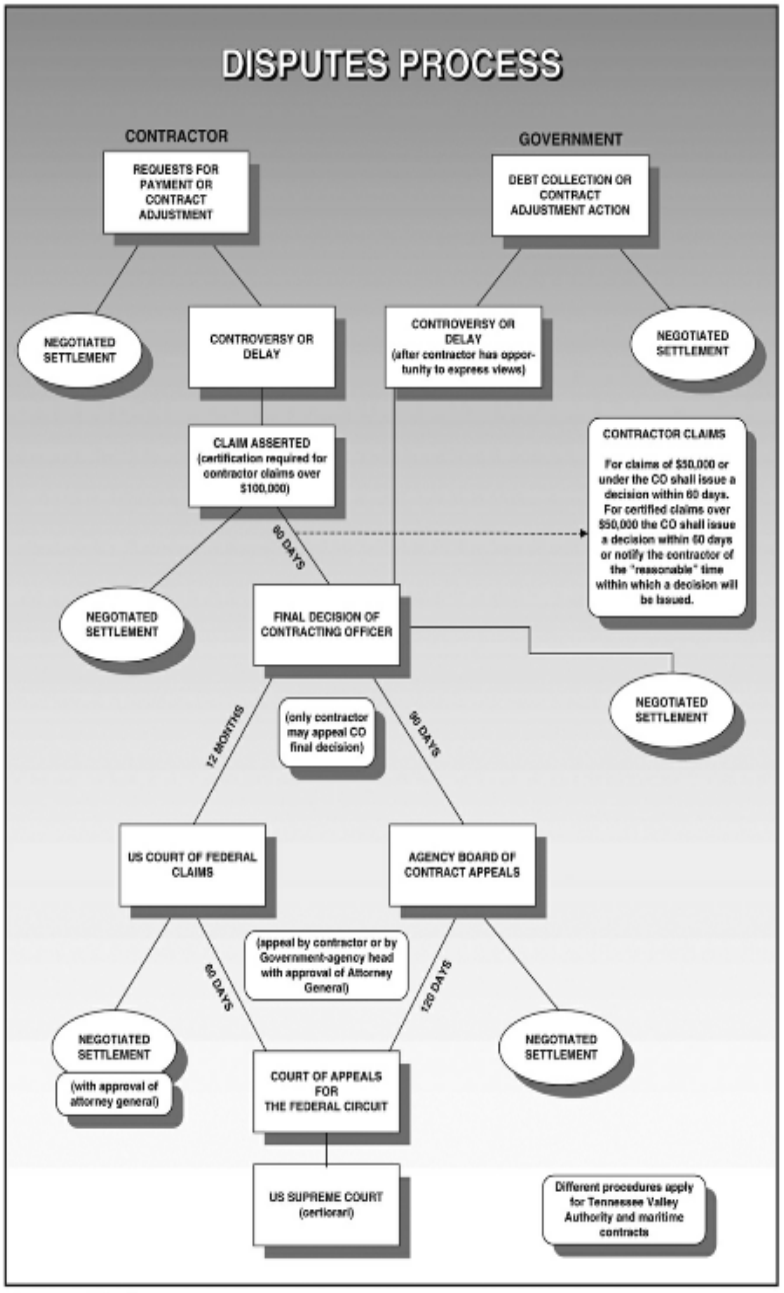


Figure 3.2:
Detailed Flowchart of the Disputes Process (From the *Administration of Government Contracts* (Cibinic, Nash, and Nagle 2006, np).

One particular laudatory law journal article—written by two private attorneys and a Republican congressperson—goes as far as to say that "All who participated in the CDA enactment . . . should be proud of the present statutory basis for resolving disputes between the Government and government contractors because it works exceedingly well" (Kipps, Kindness, and Hamrick 1999, 596). Even those who criticize aspects of the CDA's implementation agree that it is much better than the "confusing" framework it supplanted. W. Stanfield Johnson states that "[t]he Act has provided us with a serviceable and reasonably efficient system for adjudicating disputes between the government and its contractors, [even if] this appraisal is subject to . . . major caveats" (1999, 567-568). Although the process which produced the current accountability regime required for federal procurement officials was not a straightforward or easy one, it has produced a system that now appears largely to satisfy the non-governmental actors involved, even if occasional tweaking has been needed (Nabatchi 2007).

Why Study the ASBCA Dispute Decisions?

Essentially, the CDA stabilized a stochastic process, has increased the accountability of government actors, and enhanced the legitimacy of federal procurement's oversight protocols for the past four decades. By design and through careful implementation, the Boards of Contract Appeals, and in particular the Armed Services Board of Contract Appeals, evolved into administrative forums that specifically protect the due process rights of contractors. They produce detailed decisions in the form of published legal opinions with searchable text. These not only offer guidance to prospective contractors and public officials, but also can be used to shed light on the quality of substantive justice within the system while demonstrating the

highest standard of procedural justice as well. By providing a window into the behaviors of both contracting parties during performance, viewed through the lenses of an ostensibly neutral judge, they reveal evidence of equality, equity, and reciprocity in action throughout the contract relationship or demonstrate their absence during performance.

In the language of computational text analysis (CTA), the texts of these decisions also represent a unique collection of "bags of words" suitable for both qualitative and quantitative analysis. With CTA, each decision is broken down into its own "bag of words" or discrete collection of word objects, which then can be combined with the contents of other "bags" rendered from other decisions. Once reconstituted into usable numeric data, these word collections can be studied and rearranged into formats and analytics structures (such as topic models and semantic network diagrams) that may reveal important constructs embedded within the texts, and within the corpus of decisions as a whole. While there are issues to address about the generalizability of the opinion data and its potential usefulness as other than a descriptive convenience sample, the data contained within are worthy of examination, even if only to provide a scientific description of an understudied but symbolically and operationally crucial administrative entity. Studied computationally, as well as qualitatively, these published dispute decisions are of importance to both normative scholarship and for the broader academic community that studies federal procurement through public administration lenses. They reveal to the non-practitioner key aspects of sometimes obscure ethical requirements expected in the execution of federal procurement processes, as well as the Board's role and responsibility in securing a just systemic structure. As such, the decisions collectively hold the

potential to yield significant analytical purchase in examining fairness in the federal procurement system at micro, mezzo, and macro levels.

As mentioned in Chapter 1, most discussions about the federal contract disputes process have typically been confined to a "gray" literature representing a sizable portion of the siloed research already performed in the federal (and particularly defense) procurement arena. Though it can be of high quality, this research is frequently obscured by technocratic complexity; moreover, it is practically unavailable due to substantial paywall protections.[54] Legal scholar Christopher Yukins gives some insight into the ubiquitous though mysterious nature of the "norms at play" readily apparent to "those in the field" (2007, 269):

> [Although many economists] have delved into public procurement, very few legal theorists have turned the probing beams of law and economics—and all the normative baggage the law brings with it—on public procurement law. . .. Although the technical debates in [the legal literature] may seem dryly practical, in fact each step forward in procurement reform—whether to encourage bids or negotiations, for example, or to punish corruption or foster innovation—requires policymakers to weigh, sometimes at a deeply intuitive level, many different theoretical models of public procurement. Thus, while the literature may not explicitly wrap itself around theoretical constructs, those in the field do recognize the norms at play as they craft solutions for the future, though those norms may go *unstated and unexamined*" [my emphasis] (2007, 269).

Examining the texts of the ASBCA dispute decisions may provide insights into behaviors and processes otherwise out of reach to those without access and/or a street-level procurement background, providing more scholars with opportunities for both learning and study.

[54] Much of this literature is produced by or in close association with the defense contractor community and organizations that provide commercial training to Government personnel who need it to obtain certifications and warrants. Procurement research produced by the Naval Postgraduate School is a notable exception. Often the product of detailed scholarship, it includes highly technical work by practitioners, but is easy to acquire/access.

PART II: Mixed Methods Research Design

As described in Chapter 2, I selected the largely unstudied milieu of federal contract disputes (Cooper 1980; Trammell et. al. 2020) after searching for a sampling frame appropriate for exploring federal procurement as a whole that was both meaningful and manageable within the bounds of a discrete study of contract relationships.[55] I outline my plan for operationalizing the three components of fairness (equality, equity, and reciprocity) and describe the project's mixed methods research design. I detail how I extracted the textual data and related demographic, categorical, and numerical metadata from the dispute decisions using a process of systematic administrative and legal coding (Saldana 2016; Livermore and Rockmore 2019; Grimmer, Roberts and Stewart 2022). This coding pulls from schema pertinent to the federal procurement environment and to the empirical examination of legal texts.

I briefly analyzed the past fifteen years of federal contract dispute decisions across all relevant legal venues and agency settings (7,093 dispute decisions of the ASBCA, the Civilian Board of Contract Appeals (CBCA), and the U.S. Court of Federal Claims (COFC). However, I emphasize findings from the ASBCA decisions because those texts are instructive, cohesive, and, while voluminous in their own right, still manageable as data within the scope of this dissertation. In combination, all of the information gathered yields a better understanding of federal contract relationships based upon features such as contract subject, contract pricing type, and other factors related to specific procurement environments and individual contract characteristics.

[55] I describe this process in Appendix A.

Operationalizing Fairness

Equality, Equity, and Reciprocity

One challenge of analyzing the disputes decisions was converting the documents into clearly defined variables suitable for examining with mixed-method empirical techniques. Another challenge was to link those variables appropriately to the normative concepts of equality, equity, and reciprocity. In this section (and more fully in Appendix B) I describe how I examined the decision documents, gleaned information to create variables to describe various common characteristics and linked the decisions to the metadata available in Federal Procurement Data System-Next Generation (FPDS-NG) and USASpending reports. I then combined the three sources to create a schema for investigating contractual fairness within the federal procurement system, which I connected to the related variables delineated in my research design.

Equality

As I described in Chapters 1 and 2, I contend that fairness in federal procurement contracting operates in three key aspects: equality, equity, and reciprocity. The primary question I asked of the disputes data in terms of equality was: **to what extent have all the contractors or classes of contractors been treated the same?** Or to phrase it differently, how pervasive is Rawls's "veil of ignorance" when it comes to contractual matters that contribute to fair perceptions in contract relationships? To answer this question, I looked for factors that indicated similarity/sameness of treatment in the same or similar circumstances. What can we determine about the levels/quality of "procedural justice" factoring into these decisions?

I began by describing the landscape of the original competition for each contract and then pieced together how those numbers looked across all of the decisions. I looked at factors from the openness of the competition to the magnitude of the actual competition itself—how many contractors competed under the original solicitation? How many of the contracts resulted from full and open competition, a restricted level of competition, or through a sole source negotiation? I also attempted to determine if the solicitation procedures themselves appeared to be a factor in whether or not a dispute was filed. For example, do contracts produced by sealed bidding techniques produce more disputes than those awarded through a sole-source negotiation (which would indicate that the quality of the relationship between the parties plays a role in a contractor's perception of un/fair treatment)?

Equity

The primary question I asked of the disputes data in terms of equity was: **to what extent are all contractors or classes of contractors treated differently?** Or perhaps, to what extent is Rawls's "difference principle" a potential explanatory factor when it comes to the perceived fairness of contractual relationships? To answer this question, I looked for factors that indicated difference/distinction of treatment in the same or similar circumstances. What can we determine about the levels/quality of "distributive justice" factoring into these decisions?

Here my focus was primarily on the individual characteristics of the contractors, particularly their demographics and what relationship those might play—if any—in a contractor's decision to file a dispute (which I treat as a contractor's specific assertion of unfairness). From there I looked at whether the alleged unfairness stemmed from procedural

issues or substantive (related to interpersonal behavior) issues. I then repeated the process I used to explore equality: what do the contracts look like? What do the disputes look like?

Reciprocity

Although I consider reciprocity mostly a matter for qualitative analysis, in this dissertation I also quantitatively link it to the subject matter of the disputes and to their disposition by the ASBCA judges. I began with the assumption that the formal dispute process is initiated (and continues to a substantive resolution by a judge) by a contractor who believes it has received unfair treatment from the Government in terms of contract performance and administration. Each dispute is therefore an assertion by a contractor that the Government's behavior towards it is not contractually fair, or that the Government has not honored its obligation to treat that contractor with relational parity as a contracting partner (in other words, that the relationship lacked *reciprocity*).

I also looked at how the dispute was resolved. Did it end by settlement/mutual agreement? Did the Board rule in favor of the government? Or did it rule in favor of the contractor? Was there a split decision? And then, what was the basis for the decision? Most disputes (by far) eventually resulted in a mutual settlement to end the dispute process without a judge's opinion as to the merits of the case. I interpreted the ending of the dispute by settlement ultimately as an indication of mutual agreement, which is at the heart of reciprocity as a contracting principle.[56] In disputes where the contractor's appeal is sustained, its

[56] However, even with cases that are eventually settled, we sometimes can see behavioral elements of the dispute before it is resolved by mutual agreement to show what the contractor believed to be unacceptable treatment before a resolution was reached.

accusation of unfair treatment is supported. In disputes where the dispute is denied, the Government is absolved of legal responsibility for the perceived unfair treatment.

Finally, in relation to all three elements of fairness, I also examined factors I associate with contract complexity. I perceive complexity to be a crucial factor in analyzing contract relationships because higher complexity products/services require more intensive interpersonal interactions between contracting parties and the issue of contract definitization[57] becomes crucially important. If that is the case, for example, I predict that construction contracts are more likely to require a judge's ruling than a contract that only required delivery of a simple supply item, where little extended contact between the parties' human representatives was necessary. This would also indicate that there are aspects of the contractor's relationship with the government that play a role in a contractor's perception of un/fair treatment. In other words, the more important (necessary) the relationship is to soothe the inevitable hiccups that occur during contract administration (Cibinic, et al. 2015; Whelan and Nagle 2007; Shedd 1964), the more potential there is for contract complexity to impact perceptions of fairness.

Analyzing Fairness: Mixing the Methods

Using an iterative process with feedback adjustments, I ultimately utilized three approaches to collect and analyze the data for this dissertation. First, I used a research design featuring a descriptive analysis performed on data collected using case study techniques that focused on ASBCA decisions in formal contract disputes (Loeb et al. 2017). This synthesis of methods highlighted the dispute decisions as an important and valuable source of information

[57] "Definitization" is "the agreement on, or determination of. Contract terms, specifications, and price, which converts the [undefinitized contractual action] to a definitive contract" (Nash, O'Brien-DeBakey, and Schooner 2013).

related to the research question. I was then able to explore, to explain, and to situate various metadata collected for the disputes in preparation for more discussion centered on contractual fairness. Second, I conducted a computational text analysis (CTA) with both qualitative and quantitative features of the decision textual data using two sophisticated content analysis programs, QDAMiner and Wordstat. This allowed me to derive a topic model from the texts and to begin a semantic network analysis that maps how fairness is constructed within the ASBCA's decisions. Finally, I combined the descriptive analysis performed on the decision metadata on Chapter 4 with the results of the CTA in Chapter 5 and used that information to help me identify isolated instances of reciprocal behavior within the decision texts. I then used qualitative textual analysis in Chapter 6 to explore what the disputes process actually communicates about contractual fairness in federal procurement overall using words and phrases from the decision texts themselves. I describe the techniques and methodologies used more fully in the following sections, and with specific details in the relevant analysis chapters.

Descriptive Analysis

The descriptive analysis portion of the mixed methods research design focuses on understanding contract disputes decided on by the ASBCA with data collected using a variety of case study techniques. This approach allowed the examination of thousands of the contract relationships I wished to study (Loeb, Dynarski, McFarland, Morris, Reardon, and Reber 2017; Stake 2006; Yin 2014). Loeb et al. observe that the core of descriptive analysis is to uncover "what is" in the research setting through "data simplification," where the researcher's primary function is "to reduce the body of data to a format that helps an audience (such as practitioners, policymakers, or other researchers) to better understand a phenomenon" (2017,

39-40). This approach relies on “low-inference, low-assumption methods that use no or minimal statistical adjustments” where “[m]easures of central tendency, variation, and basic frequency analyses are particularly useful tools” (27). Loeb et al. further note that while descriptive analysis does not make causal claims, “any descriptive finding that uncovers a socially relevant “truth” in the data can serve as the foundation for generating hypotheses, prioritizing possible causal mechanisms, or otherwise pointing toward causal understanding” of the phenomenon being studied. (27).

The methods I used in this research design to collect the data, process it, and understand what it means in terms of “fairness” in the federal procurement environment were adaptive, integrated, and internally nested. The information I gathered in the contract disputes stage influenced and guided subsequent qualitative textual analyses at different points through various feedback mechanisms (e.g., constant questioning of the results obtained). I describe that iterative process in the data collection section of this chapter and expand upon it further in the following chapters. My primary sources of evidence were drawn from official documentation, some (though not extensive) review of archival data, and a degree of participant observation given my extensive experience within the federal procurement environment (Loeb et al. 2017; Yin 2014). In performing the descriptive analysis, I both looked at the data “from the ground up” as a practitioner and also using a more global perspective as a scholar of executive branch dynamics. I used pattern matching and explanation building while examining the data, while performing my analyses, and in conclusions using my three primary data sources (Loeb et al. 2017).

Computational Text Analysis (CTA)

Though qualitative in emphasis, supporting my findings with detailed numerical information subjected to some statistical significance testing adds rigor and augments the analyses' external validity. I rely heavily upon computational text analysis (CTA), sometimes referred to as "text mining" (Ignatow and Mihalcea 2017; Ledolter and VanderVelde 2021). Text mining research designs are specifically developed for working with massive quantities of textual data, which have different characteristics than numerical data (Ledolter and VanderVelde 2021; Mertz 2021; Grimmer, Roberts and Stewart 2022). CTA requires specialized cleaning and pre-processing methods designed for a variety of written and spoken texts (Hickman, Thapa, Tay, Cao, and Srinivasan 2022; Ignatow and Mihalcea 2017; Grimmer, Roberts and Stewart 2022; Srivastava and Sahami 2009). This textual quantitative technique lends itself readily to subjective interpretation as well as careful inferential extrapolation. I further supplement the CTA analysis with details drawn from a novel ASBCA dataset consisting of more traditional data types. This dataset was compiled from metadata related to the contract disputes decisions and information was pulled and cross-referenced with FPDS, the USASpending website, and the System for Award Management (SAM). I describe the process in the sections that follow, with supplementary materials and further explanation included in Appendix B.

Qualitative Textual Analysis (QTA)

The ASBCA decision texts were my primary aggregated sources of data for analysis. Although there are quantitative aspects of my treatment of the textual data using CTA, my ultimate goal for the aggregated dataset is on *verstehen*, with an intrinsically interpretivist

focus, and my overarching methodological tool is qualitative content analysis (QCA) and in particular, qualitative textual analysis (QTA) (Kuckartz 2014).[58] Qualitative content analysis offers a "big-tent" collection of scholarly approaches that support numerous research objectives in diverse settings (Krippendorf 2019; Neuendorf 2017). I use QTA in this study to render a richer picture of the federal procurement contracting environment that will be meaningful to a broader public administration audience.

Data Collection Protocol

I formally began exploring the contract disputes data in October 2020 by examining all of the decisions published on the ASBCA's public website between 2017 and 2019. Several characteristics of the decision data (in particular, the identification of contract numbers in the header information for each ASBCA decision) led me to continue my focus on the ASBCA decisions to the exclusion of the CBCA and COFC data. I chose three years initially because it appeared to produce a still manageable volume of metadata for a pilot study. Access to the individual contract numbers allowed me to reference additional contract data in FPDS-NG,[59] the required reporting system for all federal procurements over $3,000 that are unclassified and that use appropriated funds.

[58] For the remainder of the dissertation, I will refer to QTA instead of QCA so as not to confuse my methodology with qualitative comparative analysis, also commonly referred to as QCA. In this dissertation, QCA refers only to traditional/general qualitative content analysis and not the specific technique of Ragin's qualitative comparative analysis—a promising approach for use with both Computational Text Analysis (CTA) and QNA Qualitative Narrative Analysis (QNA) (Franzioni 2010) but which is far beyond the scope of this study.

[59] This reporting system (FPDS) has been required of federal agencies since 2001 (and was used shortly before that by the Department of Defense). However, the quality of the data has dramatically improved since the Federal Funding Accountability and Transparency Act (FFATA) passed in September 2006.

I expanded my exploration beyond termination decisions because I believed that concentrating on catastrophic contract failures alone would limit the study's applicability. Expanding the analysis to all disputes complicated matters considerably but produced a fuller and more nuanced depiction of government-contractor relationship dyads. Examining all of the disputes regardless of topic or magnitude showcases the range of problems, both banal and complex, that can produce the types of obdurate contractual conflicts that public officials routinely encounter during contract administration. I also expanded the study timewise to include all data between fiscal years 2007 and fiscal year 2020. I based this decision on when the ASBCA and the CBCA both implemented new charters and when the Federal Funding Accountability and Transparency Act (FFATA) became effective.[60] I added the data for FY 2020 and FY 2021 in October after the end of the 2021 federal fiscal year using the collection and recording protocols I had developed earlier in the project (described in the next paragraph).

The ASBCA's public website (https://www.asbca.mil/) provides a weblink to a .pdf file with the full text of each decision, the calendar date the decision was published, the appeal number(s), and the officiating judge. I downloaded each decision and recorded the first contract number referenced in the decision header into the spreadsheet.[61] After a brief review of each decision, I accessed individual contract data reports by logging into the FPDS system (located at https://www.fpds.gov/fpdsng_cms/index.php/en/). I used the contract number from the decision to search FPDS for an existing contract data report.

[60] The charters made significant changes to how all disputes were handled in the federal system and included the consolidation of multiple Boards maintained by various agencies into one Civilian Board. The FFATA implemented more stringent requirements for the reporting of procurement contract data. An additional contemporaneous act changed how the federal court system addresses contract disputes which were directed towards it.

[61] As mentioned earlier in this chapter, I also printed out hard copies of each document.

Recording, Transformation, Manipulation, and Storage

My systematic data collection proceeded according to the following protocol. I copied the publication information for the decisions from the ASBCA website for each calendar year, and then directly pasted that information into my master spreadsheet. I assigned each decision a year code according to the appropriate fiscal year when the decision was recorded as published.[62] I briefly reviewed the contract dispute decisions, copied the contract number listed in the decision header, and then pasted it into the EZ Search field of the FPDS website. If present, I removed hyphens from the number before submitting the query. If the first number yielded no result and there was more than one contract number listed on the decision, I searched for each succeeding number until I found a viable number.[63] I returned to the master spreadsheet and pasted the contract number and a link to the FPDS report into the spreadsheet. I printed a hard copy of the report and saved a .pdf version of the file to a hard drive. I recorded whether or not a report for a contract referenced in that decision was found in FPDS with a dichotomous viable (1 for yes, 0 for no). I then returned to the report to glean further information. I returned to the reports through the pasted weblinks multiple times throughout the research process. The associated FPDS contract data reports require users to be logged-in to the system to view.

If a record did exist, I recorded metadata for each contract decision based upon the information I found in the FPDS report for the contracting action pertaining to the contractor

[62] I made this change because all other reports I reference are created with the federal fiscal year (Beginning on October 1 and ending September 30) as the delimiter).

[63] Again, some of searches were unsuccessful because some contracts are classified, some use unappropriated funds, and some are with the Washington-Metro Transit Authority and not with the federal government.

who received the initial award of the contract and details about the contract itself (details about the variables I collected are in Appendix B). I classified demographic, categorical, and numerical details related to each decision and each contract studied. I cross-referenced the FPDS data with the contract information located at USASpending (when available) as necessary to fill in missing data.

My initial collection efforts occurred between November 2020 and February 2021 and were ultimately completed in November 2021. The codes I rely upon for my final analyses were developed through continual reassessments of the data and the needs of my research question. I first recorded the codes depending on how I believed the data would be best processed for analysis, but I preserved the collected data in its original form in case those analytical needs changed (for example, if I decided that classifying the variable as a floating-point integer made more sense than just listing it as a binned index integer). When manipulated, data were analyzed and stored using separately identified, dated spreadsheets.

I routinely examined the collected data to explore what trends and patterns in the decision data appeared interesting or insightful from various reference points (such as contract subject matter, awarding agency, industry classification, and type of competitive process, and the robustness of competition). Over time, I used the variables I gathered to construct a novel dataset. This dataset includes a substantial documentary textual "corpus" that has received a rudimentary cleaning for computational processing and has been cross-referenced with detailed descriptive data that captures sixty-six categorical and numerical data points related to both contract subject matter and a contractor's self-reported demographic data.

I treated the demographic information for each report, which FPDS pulls from the information entered by a contractor into SAM (or into its legacy system, the Central Contractor Registry or CCR), as I would a contractor's response to a survey. Financial information related to average annual receipts (necessary for calculating business size) is validated by the Internal Revenue Service when a contractor registers in SAM. FPDS pulls that information from SAM (formerly by referencing the contractor's DUNS number, but now by using a unique government-generated 9-digit code) to populate the contract data report, which otherwise is completed by a local procurement official based upon the information relevant to that specific contract. Additionally, several small business representations—8(a),[64] economically disadvantaged woman-owned business, HUBZone status, and service-disabled veteran owned small businesses (SDVOSB)—are also validated at the time of registration (and updated every twelve months after registration or when a contractor makes changes to their information in the system). The local procurement official cannot edit the sociodemographic business classification information, so the portion of the report identifying a contractor's demographic characteristics is a self-assessment by the contractor and entered by the contractor's representative into the official government system.[65]

As I began collecting the data, I entered them into a single "master" Excel spreadsheet with few variables. Over time, I have maintained a master spreadsheet that contains all of the data collected for this study, but I have since transferred the data to a Google Sheets

[64] "8(a)" refers to a specific section of the Small Business Act and is the typical shorthand reference for a highly defined and regulated special type of disadvantaged small business contractor.
[65] Some of the information in the FPDS report is verified by official sources, but the majority represents the self-reporting of a contractor or is manually entered by a local procurement official, often through a computer system that tracks the procurement from the requisition stage through contract performance.

environment for easier manipulation and management (which still allows me to export what I need to an Excel spreadsheet as necessary). In studying the collected information over time, I have also created a variety of spreadsheets to examine certain ideas, including isolating the information by variables such as year and agency, but have still maintained a master to which I can refer. The current master spreadsheet for the ASBCA data contains 3548 rows and almost seventy columns of variables (which are all listed/described in Appendix B). It also contains hyperlinks to each dispute decision referenced by the row, and a hyperlink to the referenced FPDS-NG report ("0" code version, as explained in Appendix B), which requires an FPDS user profile and password to access. I also printed out hard copies of the reports and saved a .pdf file snapshot of each report, and saved .pdf files of each decision document, with a hard-copy print-out as well. The common spreadsheet containing data for the ASBCA, the CBCA, and the CoFC consists of 7,065 rows with five common variables: forum for adjudication, contractor name, fiscal year of the decision, and the name of the deciding judge. It also contains hyperlinks to each referenced decision located at the relevant forum's public website. The process I used is explained in more detail later in this section and in Appendix B.

Data Collection Variables

The final basic iteration of the master data collection spreadsheet containing all the variables and codes gleaned from the FPDS reports as well as each dispute decision (discussed under "Dispute Decision Documents") is located at [need website link to which I will upload the master spreadsheet]. In Appendix B, I fully describe the variables with the code titles I assigned to each data point in QDAMiner, the qualitative data analysis software (QDAS) program used for my analysis. For the most part, the information recorded for one decision represents one

contract. There is not a perfect correspondence between all of the dispute decision information and the information obtained through the FPDS-NG report. Sometimes the decisions refer to more than one contract and more than one dispute. Occasionally the contractor bringing the dispute before the Board is not the contractor who received the initial award. I have indicated in my original data file where there are differences between the decision data and the reported information and note those instances in my analyses when they occur. To a considerable extent, however, the data represented in the FPDS report is the same as that reflected in the decision. More important for my analysis is that each decision be connected to one distinct contract from the point of award through performance and dispute resolution.

FPDS Reports

Some contract numbers were recorded incorrectly in the decision headers, but in a number of instances I was able to identify the correct contract number and verify it with other information within the decision text. Those decisions were included in my analysis. Many contracts, if located in FPDS, frequently had multiple contract action reports entered for each contract number. The smallest number of actions was one; the greatest number was 14,906, and the median number of actions per examined contract was twenty-one. For each contract I used the initial action report entered as my source of demographic information, which appears in FPDS as the "0" code for that contract ("zero-code").

These details included the following: the type of contract (fixed price, cost-based, or another form such as labor hour or "time and materials"); the type and degree of competition; the robustness of competition (a numeric scale I created based upon the number of offers recorded); indicators of potential political influence (contractor's congressional district location

and the congressional district of the contract performance location where available); the awarding contracting office (a 4 to 6 digit location code); the fiscal quarter and fiscal year when the contract was awarded (potential indicator of performance pressure); and whether or not the procurement was considered "commercial" or "non-commercial" (with each governed by different regulations and having various implications related to complexity of the product/service and discreteness of the contractual relationship).

Finally, from the FPDS report I recorded three codes related to the type of item/service that was the subject of the contract: the 6-digit North American Industry Classification Code (NAICS); the 4-digit Product Service Code (PSC); and a 2- or 3-digit "claimant" code specific to DOD. I also recorded the number of contract "actions" reported in FPDS (another potential indicator of complexity). I used these government-assigned codes (sometimes all three were present, and sometimes only one or two) within the report to determine whether or not the item/service being purchased was a supply, a service, construction, or "research." In some instances, the designation is clear, but on a few rare occasions it represents my practitioner-informed guess as to what is being purchased. Where information was not available, I entered "NI" within the spreadsheet cell for "no information." I also recorded the number of contract "actions" listed in FPDS for each contract number as well as two separate dollar values: an "awarded" dollar amount represented in the zero-code report, and a final "obligated" dollar amount recorded from the USASpending website (with the number of actions and potential/actual dollar amounts expended being other important indicators of contract complexity). The importance of the details I collected and their possible impact on the contract relationship will be discussed in greater detail when I describe my protocol for selecting cases

to study for the third component of the research design, which is the QTA analysis of specific contract relationship dyads.

USASpending Reports

I did not collect extensive data from the USA Spending website. The USASpending website is easily accessible and reflects most of the information in the FPDS reports. However, the breadth of the data it provides is both limited (entry of information has only been required since 2008 and many of the contracts examined here pre-date that) and too large (its visual representations aggregate much of the individual actions recorded in FPDS over a series of screens). I used this website to record the final dollar value of contracts and to verify information I could not locate in the FPDS report on occasion, such as the congressional district where contractors were located and to verify vendor size where the FPDS report seemed unclear or contradictory.

Dispute Decision Documents

Following the finalization of my numerical and categorical data collection, I moved to the processing and transformation of the decisions themselves as textual data. The ASBCA decisions alone are voluminous. When aggregated, these decisions constitute 22,817 pages, with texts ranging between 1 and 296 pages, and with an average length of 6.4 pages. This collection represents the opinions of forty-seven judges and disputes with 2,057 prime contractors under at least 1,782 contracts. I reduced my analysis further to 2,623 decisions by excluding those related to foreign-owned businesses and contracts that could not be located in

FPDS.[66] Because I believe that culture impacts contracting relationships through a variety of ways (which are also impacted by contractor experiences with the contract law dynamics in their own countries), I included contracts that were performed outside of the United States by both U.S. owned and foreign-owned businesses. U.S. Territories were also included in my analysis. However, I excluded FPDFS-reported contracts performed by foreign-owned businesses for the DOD in other countries, to the extent I could determine their status, which was sometimes difficult.[67]

The 2,623 decisions related to domestic-based contract relationships that could be cross-referenced in FPDS constitute 16,342 decision pages, with decisions ranging between 1 and 167 pages in length, and with an average decision length of 6.2 pages. This collection represents the decisions of forty-four judges and disputes with 1,497 prime contractors under at least 1,782 unique contract numbers. The subject contracts represent over a half million individual contract actions, under contracts awarded and administered by more than ten agencies and more than five hundred individual contracting offices within the Department of Defense. The bulk of the disputed contracts involve the Army Corps of Engineers, the Army, the Navy, the Air Force, the Defense Contract Management Agency, and the Defense Logistics Agency. I also included contract disputes with NASA; although it is a civilian agency, ASBCA

[66] The unreported contracts usually spend non-appropriated funds, are for classified acquisitions, or are with ancillary governmental entities whose disputes the Board decides but who are both external to DOD and use non-appropriated funds, such as the Washington-Metro Transit Authority. I include those decisions in my conceptual/semantic network analysis of the textual information but excluded them from the closer analyses.
[67] I occasionally had to refer to vendor profiles at USASpending or in the System for Award Management (SAM) to determine whether a business was foreign owned.

decides its cases and therefore it may be a potentially interesting source of contrast.[68] These contracts represent 289 separate North American Industry Classification Codes North American Industry Classification Codes (NAICS) codes, almost six hundred Product Service Codes (PSC), and $1.7 quadrillion dollars' worth of final contract obligations over a 15-year period.

All Decisions as Textual Data

My final tally of textual data consists of 3,548 contract disputes decisions from the ASBCA that were downloaded in a portable document format (.pdf) between 10/1/2020 and 11/20/2021. Between the federal fiscal years 2007 and 2021 the ASBCA website provided viable links to 3,556 published decisions (22,817pages). The decisions were then converted from .pdf format into .txt format to allow for pre-processing and text normalization using PDFHelper (a document conversion tool). The texts were then cleaned by excluding punctuation, stop words, and all words shorter than three characters, in accordance with practices recommended by Ledolter and VanderVelde (2021) to produce the "bag of words" needed for further analysis. In CTA, a token represents one instance of an individual word within the text (Ignatow and Mihalcea 2017). Those tokens, collected together, make up the various disaggregated components of the textual data (the "bag of words") from which further statistical analysis can proceed.

I initially scanned the dispute decision documents and the data I collected for points of uniformity and of distinction. I then searched for patterns in those data related to the decisions' natures and their specific function that could be reliably captured across their entire spectrum,

[68] Particularly since so much of NASA's mission is accomplished through procurement contracts, as detailed in a March 26, 2019, report by the NASA Inspector General on the Administration's Engineering and Technical Services Contracts (https://oig.nasa.gov/docs/IG-19-014.pdf).

and I considered how those aspects could be tied to one of my three elements of fairness. This process involved three successive full sweeps through all of the decision documents between October 2021 and March 2022 (again, n = 3548), with more limited scans and dips back into the data as necessary to establish all of the codes and to assess how they were connected. During these sweeps, I scanned and coded each document with frequent periods of reassessment for adjustment and consolidation of what the coding signified. As a result, my understanding of the texts and their contents evolved into a system dependent on four orienting factors (which I call "control points") for capturing and comparing a number of common discrete and identifiable features for each of the ASBCA decision documents. These control points can also be related to records where judgments are communicated in other (non-governmental) judicial forums and administrative settings.

Data Analysis: Orienting Control Points

Four control points (time, agency, complexity, and outcome, which I describe more fully in the sections that follow) helped me understand the decision documents as a body of texts and supported inferences from the resulting data I could use to characterize aspects of the ASBCA's workload. I then used those characterizations to understand better the Board's responsibilities as a guardian of fairness in the federal procurement system. These control points also allowed me to group certain families of decisions together so I could study certain facets in isolation as well as connect them to the metadata. I use the control points in Chapters 4-6 to orient my findings and analysis and to give more insight into how the three elements of fairness are interconnected and interpolated within the disputes process.

Time

First, I situated the data as a representative sample of contracting activities captured over time. I see orientation in time as an important way of interrogating the representativeness of the dispute decisions data sample to the federal procurement landscape as a whole. The time (fiscal year date) of award for a disputed contract may reflect the influence of outside pressures on contracting activity, whereas the time (fiscal year and calendar year date) of dispute decision issuance may reflect on the overall consistency of the judgments rendered by the Board. How closely does the award timing of the disputed contracts described in the data resemble what is happening in the broader federal ecosystem contemporaneously?[69] How stable are the outcomes of decisions from year to year? And can fluctuations be tied to explanatory events that yield insight into how contract operations are influenced by factors external to the bounded world of the contract text? I also assay time to see if the data appeared to be skewed in unexpected or counterintuitive ways. Are there discernible trends, and if so, how might those trends be contextualized and employed within this dissertation's discussion and in future research?

With the high visibility defense contract environment, there may be evidence of pressure from both political and media sources to get a contract awarded before mutual agreement is solidified between the parties (or before negotiations are ripe for award).[70] The second date may illuminate dynamics that impacted contract administration and that

[69] There is typically a lag between the award of a contract and the filing of a dispute related to performance issues.
[70] One way for a future researcher to investigate this possibility is by using the FPDS-NG reports to identify the congressional district where the contract was awarded or where the contractor's office is located, the physical location of the Government's awarding office (for example, proximity to headquarters might be a factor), and several other time and location-based indicators that might represent interesting avenues depending on the research question. Network analyses in particular could be of interest here.

potentially increased the likelihood of a contractor filing a formal dispute, such as media/political pressure on the administering agency, operational stresses worsened in a tight economy, or a surplus of other available contract opportunities in a burgeoning market that cause a contractor to hesitate in filing a formal dispute.[71] It also may show some degree of consistency in the Board's workload from year to year, which may reflect on its effectiveness as an administrative entity in its own right.

As described in the previous paragraph, I utilized that data to illustrate two reference points in time: when the original contract subject to the dispute was awarded, and when the Board issued the dispute decision. One reason for choosing these dates is collectability. I did not use the date a dispute was originally filed as a reference point, for example, because it cannot be quickly recorded from either the dispute decision document or the FPDS-NG report via manual coding.[72] Also, I did not attempt to collect information related to individual contract time/performance periods because that information is based on too many factors to reliably determine from a FPDS-report, and its analytical value (at this time) does not justify the resource cost of collecting it.

Agency

Isolating the data by administering agency signaled areas where organizational culture or institutional pressures and attitudes toward contract management impact a contractor's decision to file a dispute or an agency's decision not to settle it. Factors related to contract

[71] It also may provide another perspective for gauging the consistency of the Board's behavior over time as an entity in its own right (in addition to the Board's own reports to Congress).

[72] One goal of future research could be to examine if the dispute filing date can be derived from the texts themselves using a machine learning algorithm. Also, if a longitudinal research question is more at the forefront of the study the information might be easily obtained with a Freedom of Information Act (FOIA) request.

formation, such as the pre-contract award negotiation environment between the government and contractor personnel (signaled by the type of solicitation used in the letting process—negotiated/more relational or competitive and at "arm's length"), may denote influence upon a contractor's decision to file a dispute by revealing a level of pre-existing "choice," familiarity, or implied trust between the government and the contractor.[73]

At the same time, these different agencies operate under two substantial umbrella regulations that make them both similar and dissimilar to other organizations within the federal bureaucracy. The Federal Acquisition Regulation (FAR) is pertinent to most federal agency procurements, and the Defense Federal Acquisition Regulation Supplement (DFARS)[74] is pertinent only to those of DOD agencies. These additional points of similarity and contrast may be useful in instances where further differentiation would be relevant.

Focusing on the Department of Defense (DOD), which consists of 32 agencies and subagencies, depicts a complex cross-section of agency and department-level data that offers a mezzo-level perspective of the national government's contracting system.[75] I additionally partitioned the agency identifications (as the Board itself does in its annual reports) to the following six (sub-mezzo) categories: Army, Navy, Air Force, Corps of Engineers, Defense

[73] Although not the subject of this dissertation, "trust" between the contracting parties is an extremely crucial element to be explored in studying federal contracts, and already represents a deep stream of academic discussion in the commercial contracting, strategic alliance, and network literatures that could shed light on the interpersonal dynamics involved in federal contracting (and how to improve federal contract structures in recognition of those dynamics).

[74] From the Federal Register website: "The Defense Federal Acquisition Regulation Supplement (DFARS) to the Federal Acquisition Regulation (FAR) is administered by the Department of Defense (DoD). The DFARS implements and supplements the FAR. The DFARS contains requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have a significant effect on the public. The DFARS should be read in conjunction with the primary set of rules in the FAR" https://www.federalregister.gov/defense-federal-acquisition-regulation-supplement-dfars-.

[75] https://www.usa.gov/federal-agencies/u-s-department-of-defense.

Logistics Agency (DLA) and Defense Contract Management Agency (DCMA) (reported together) and all "Other" Agencies, which includes two entities outside the DOD: the National Aeronautics and Space Agency (NASA) and the Washington-Metro Transit Authority (WMTA). NASA, with operational practices and procurement contracts that are similar to others in the DOD environment, is included in my analysis, but decisions involving the WMTA, whose contracts are not subject to the Federal Acquisition Regulation and are for the specialized procurement functions of a municipal transit organization, have been excluded. The agency I associate with administering the contract is the agency representing the Government before the Board,[76] identified in the header of each dispute. I contend that agencies' identities will reveal patterns where organizational culture and institutional pressures (as well as attitudes regarding both contract interpretation and contract administration) consistently influence the management practices of government contracts during performance and subsequent disputes.

Contract Complexity

Contract complexity is widely viewed as a major influence on the interpersonal relationships between government officials and their contractor counterparts during contract administration and performance (Brown, Potoski, and Van Slyke, 2006; 2010; 2013, 2016; 2018). This complexity can be signaled by a number of factors, such as the dollar value of the contract, the length of its performance, and the type of work performed or promised. Simplicity

[76] The agency before the Board is sometimes not the agency that originally awarded the contract (which would appear in the FPDS-NG report). This is fairly common with contracts administered by the Defense Contract Management Agency (DCMA). I chose the agency listed in the decision header because my focus is on contract administration instead of contract formation. It would not be difficult to identify the awarding agency by extracting the contracting office number from the contract award number using a machine-implemented algorithm during computational text analysis, if such information informed a pertinent research question. It can also be manual recording from the FPDS-NG report.

is generally associated with basic supply contracts with deliverables such as a one-time quantity of paper clips to a single location. However, certain aspects of federal contracts can complicate this apparent simplicity. Contracts for multiple deliveries and multiple locations and for estimated quantities at expected but definitized future dates make performance more difficult—though not necessarily because of the interpersonal dynamics involved. However, contracts with complex performance objectives—such as the construction of complicated buildings, the management of large facilities, or the production of advanced systems with highly technical requirements tend to have more potential for the breakdown of interpersonal relationships leading to disputes.

I assert that contract complexity is a strong factor in both generating formal disputes and in increasing their contentiousness. I also use it as an explanatory instrument for highlighting the importance of relational parity in contract administration. Potentially difficult interpersonal dynamics may be amplified by contractual elements such as work subject matter (for example, complex construction or professional services contracts will produce more disputes than simple supply contracts, even though I also predict that supply contracts are more likely to be terminated for cause) and the dollar value of the contract (higher dollars at stake may lead to more potential for formal disputes). Contract complexity also may reveal the impact of market realities like buy-in, monopsony, or monopoly upon federal contract administration, and how those market conditions can complicate the benefits believed to accrue to the Government as a result of public competition practices.

I looked at the metadata through the lenses of three complexity-signaling but separate data points. First, I identified the contract's subject matter according to one of four variables

(supply, service, construction, or research). Second, I recorded whether the contract was a "discrete" contract or if it was issued through a type of "indefinite" award vehicle (which commonly involves the issuance of multiple task orders and can indicate a contract of long duration and multiple performance locations). Third, I separated the contracts by "type" into one of three pricing families (fixed-price, cost-reimbursement, and "other"[77]). Contract work subject matter, award vehicle type, and pricing structure are well-established components in the evaluation of federal contract complexity and the skills required to manage them (CMBOK). To define this control point, I looked at variables such as the competitiveness of the original contract (represented by the degree/breadth of the original competition, which is on a spectrum between sole source awards and true "full and open" competition) and the depth of the market and the presence of weak or robust competition (signified by the number of competitors recorded for each contract letting).

Dispute Decision Outcomes

Fourth, I situated the data in terms of dispute outcomes as assessments of dispute merit and as an indicator of overall contractual parity within the federal procurement system. For example, I analyzed the percentage of filed disputes that are dismissed or settled before the final disposition of the complaint to see just how prevalent it is for the parties, with the assistance of the structured Board processes, fail to reach any mutual agreement related to the final disposition. I also examined how successful the parties are when an adjudication on the merits is made and published by the Board. Who "wins" more: the contractor or the government, or is the distribution relatively symmetrical? Also, what are the types of decisions

[77] Here, "other" includes types such as incentive contracts, time-and-materials contracts, and labor-hour contracts.

being made: do they reflect issues of procedural fairness or substantive fairness? Utilizing the data in this way emphasizes one form of capturing reciprocity. Do the final results of the dispute decisions reflect an equilibrium in who is "responsible" for the dispute going to adjudication? Are the merits of each parties' arguments relatively equal?

I argue these issues can be assessed by examining the outcomes from several perspectives. For example, I predicted that one measure of "fairness" in the system will be the percentages of adjudicated dispute dispositions/outcomes made by theoretically neutral third parties such as the Board judges in favor of either the contractor or the government (because the Board is an official arbiter of federal contractual fairness). In other words, the win-loss or "tie" ratio between decisions favoring the Government or favoring the contractor should be statistically similar and should remain so along demographic lines in comparison to the relevant awards data. Next, if anomalies occur, they potentially can be explained by, linked to, or even reveal interpersonal contractual dynamics between Government and contractor personnel. Those reliably identifiable orienting factors would include information such as the contract award/administration environment (signaled by time and agency), the potential impact of identity on the contract relationship (either the agency or the contractor as a factor of size, minority status, or other recorded category) on a dispute's outcome (determined from contractor demographic data), or contract complexity (subject matter, magnitude, or duration).

Conclusion

This Chapter has described my efforts to create objective factors to gauge a subjective phenomenon: how fairly have various classes of contractors been treated by government officials during contract administration/performance (relational parity or reciprocity)? The

remaining chapters of this dissertation apply the analyses specifically to a discussion about the three primary elements of contractual fairness (equality, equity, and reciprocity). Chapter 4 details the mezzo-level descriptive information about the ASBCA's activities and situates the categorical and numerical data and metadata described above according to the orienting factors of time, agency, outcome, and complexity. Chapter 5 details how I employ computational text analysis (CTA) and a "text as data/law as data" approach to the materials to ground, illustrate, and support my thematic and conceptual exploration of the meaning of fairness within various types of these relationships. This analysis was conducted at a macro level using corpus-based topic modeling, from which I developed a brief rubric to use as a tool for categorizing dispute contentiousness with further qualitative study at the micro or individual case level. In Chapter 6, I performed a close reading of individual decision texts using the rubric and other CTA findings (which led to isolation of a key phrase, "good faith and fair dealing" for further study). I then combined those results with the direction suggested by Chapter 4's results (using the associated metadata), to interrogate individual dispute decisions. I used traditional qualitative textual analysis techniques to further examine the structures of individual contractor-government relationship dyads. In particular, Chapter 6 combined the computational textual analysis with my phenomenological examination of key representative decision texts to produce an integrated analysis that constitutes the core of my scholarly contribution. I argue that this blend of methods served to increase the explanatory power of the study functionally and theoretically. Chapter 7 concludes the discussion with a summary of the dissertation's implications, its limitations, and my recommendations for future research paths to explore.

Chapter Four: A Descriptive Analysis of the Armed Services Board of Contract Appeals Dispute Decisions (2014-2021)

As Chapter 3 outlined, I collected, recorded, evaluated, and analyzed 15 years of textual data (2007-2021) from published Armed Services Board of Contract Appeals (ASBCA or "Board") dispute decisions. I then used standardized government reports drawn from the Federal Procurement Data-System-Next Generation (FPDS-NG), USASpending, and the ASBCA's annual transaction records to derive metadata from those decisions and for the contracts referenced in those decisions. Quantifying particular aspects of the Board's workload and functions within the federal contracting process allowed deeper qualitative and quantitative analyses of the textual materials collected.

This chapter presents a mezzo-level analysis of contract-level descriptive metadata related to the dispute decisions which I specifically connect to my definitions of fairness within the federal procurement contracting environment. I use formal dispute decisions made by the Armed Service Board of Appeals, the oldest and most prolific of the administrative forums that adjudicate federal contract controversies, to explore what fairness means in the federal context. Throughout the chapter I use procurement complexity, described as a mixture of subject matter work requirements, compensation or "pricing" structures, and award "vehicle"[78] types, as an orienting point for investigating all three elements of contractual fairness: equity,

[78] In federal government practice, contracts are commonly called "vehicles" and contracting officers have "tools" to ply their trade—such as cost and price analysis methodologies, a variety of contract types, incentive pricing structures, and performance management strategies. Assemblages of contracting methods are thus "toolkits;" and the skills and competencies of contracting officers are considered as implements in their individual "toolboxes." James F. Nagle, a lawyer and historian of federal contracting, uses the mechanical term "apparatus" to describe the proper contract vehicle to be used in a specific procurement, noting that "[m]uch of the country's contracting history has been spent trying to find the best combination of three factors: the right contracting apparatus, the right government-contractor relationship, and the correct contract form itself" (1999, 7).

equality, and reciprocity. In this pursuit, I analyzed the records and judgments of the government officials—contracting officers and administrative judges—most familiar with the system's normative and technical expectations.

To begin, I cross-referenced the ASBCA's self-described workload with the information extracted from the other reports and from the decisions posted to the Board's public website. I collected the metadata from those documents and used my experience as a practitioner to examine and to reconstruct the operational contexts in which specific contracting activities occurred to align the data with my research questions. This orientation grounded my search for fairness in specific aspects of the dispute decisions and prepared for more nuanced analyses in Chapters 5 and 6, where I returned to the decision texts themselves for a qualitative analysis.

To produce the descriptive analysis presented in this chapter, I associated *equality* with the "quality" of original competition represented by awarded contracts in the dispute decision sample (degree, access, and depth); *equity* with the distributional balance across demographic categories when compared to the demographics of contract award; and *reciprocity* with relational parity as judged in the final dispositions of contract disputes (outcomes). I examined the ASBCA decisions with those definitions and the following questions in mind:

1) Is the disputes process fair in terms of competition? (equality);

2) Is the disputes process fair in terms of the proportional distribution of disputes across demographic and categorical lines? (equity); and

3) Are there relationships between and among procurement complexity, contractor demographic characteristics/status, and the outcomes of disputes (reciprocity)?

The above framing and questions are based on a simple working hypothesis that if the system is fair, then the demographic and categorical statistical proportions associated with the disputed contracts will closely resemble those associated with actual contract awards during the same general time window, even when accounting for a lag between the date of contract award and a dispute's origin during performance. By contrast, disproportionate distributions, if they occur, may indicate where contractor demographic identity or other interpersonal factors have influenced fair administrative practices and could reveal contractual situations that deserve closer study.

Part I. Decision Metadata

A. Decision Sample and Reference Statistics

My first foray into the decisions involved describing and evaluating them as documentary artifacts and legal instruments. I began with 3,548 decisions from the ASBCA's website posted between 2007 and 2021. After comparing the ASBCA's annual transaction/workload reports to the results of my independent textual data collection, I limited the more quantitative analysis in this chapter to metadata gathered from FPDS-NG and USASpending for the eight years of decisions between 2014 and 2021.[79] My primary sample consisted of the 2,258 dispute decisions with domestic-owned businesses that I located in the FPDS-NG database between 2014-2021. I further manipulated this sample to remove duplicate demographic and categorical information from the results, which I grouped into a separate

[79] Briefly, there appeared to be inconsistencies between the data I collected, and the data the Board reported from 2007 to 2013, that complicate using the metadata from that period in the present analysis. The anomalies are explainable, and I include those decisions with the other materials I gathered for Chapter 5's qualitative textual analysis.

sample of 1,578 unique contracts. I use this contract sample when discussing the data by contractor demographics and not by characteristics of the dispute decision. Table 4.1 outlines how the decisions and the associated contracts were categorized in different subsamples. Appendix C further describes why and how I partitioned these decisions and the associated contracts as my samples for analysis.

Table 4.1: Description of Disputed Decision/Contract Samples	
Type of Sample	**Quantity**
All Posted **Decisions** (2007-2021)	3,548
All **Decisions** Posted between 2014-2021	2,919
Decisions with contracts reported in FPDS-NG	2,650
Decisions with foreign-owned appellants in FPDS-NG	392
Decisions for contracts with domestic owned appellants in FPDS-NG	2,258
Distinct **contracts** represented in the domestic-owned appellant decisions (with duplicate socioeconomic data for multiple decisions removed)	1,578
Distinct contractor/government **relationships** represented by a combination of domestic-owned contracts in FPDS-NG	1,183

B. Types of Decisions

The 2,258 decision documents in my primary sample fall into two categories: “orders” and “opinions.” Between 2014 and 2021, the ASBCA issued 1,403 “orders” (62.1%) and 855 “opinions” (37.9%) related to domestic-owned business entities with disputed contracts located in FPDS-NG. Both document types communicate something about the relationship between the government and the contractor or about the dispute itself, such as its origin or the parties’ path to resolution.

Orders are declaratory and specifically require that action be taken. The majority of orders communicate almost no detail about the dispute, with the Board ordering the case's dismissal at the recommendation of the parties themselves to conclude the dispute without further Board intervention. Most disputes are dismissed "with prejudice," meaning that the parties agree that the Board will no longer have jurisdiction to adjudicate the particular matters being disputed.

Opinions communicate more substantive information about the issues involved in the dispute cases. They often include extended rationales for the Board's judgments in addition to detailing the actions parties must take in response to the disposition. Unlike orders, the tasks of an opinion's text are justification and persuasion. An opinion means the two parties could not reach mutual agreement on a final resolution of the dispute but required a third party to decide the ultimate issues of fact and contractual fairness on their behalf. An opinion signals that Macaulay and Macneil's (Speidel 1982, 839) relational "spirit of contract"—at least on the issue at hand—has completely broken down.

Table 4.2 lists basic quantities and percentages describing the decisions by contractor identity and by the document's type and page length.[80] As with document type, I considered whether or not document size (page length) could itself be an indicator of procurement complexity. This was not the case. The table demonstrates that the quantities of "order" decisions are essentially equal for both small businesses and "other than small" (OTS)

[80] In my "opinions" sample, I included seven "Summary Binding Decisions" and one "ADR Decision," (.31% of the total sample), because their purpose appears to be aligned with the other opinion documents. All other documents were identified according to title assigned by the Board. Both orders and opinions can be differentiated further into a variety of categories with different purposes. I describe some of those differences further in Appendix 3, but those details do not inform my analysis in the present chapter.

businesses. The same is true for decision length/number of pages: there is less than a one-page difference in the length of opinion documents between small and OTS businesses. Such similarity suggests (at least initially) that document size itself is an indicator of anything intriguing about a case's substance without considering other elements, such as work type or contracting party identity.[81]

Table 4.2: Description of Documents by Decision Type, Length, and Business Size

Decision Type N=2256	SB Opinions		OTS Opinions		SB Orders		OTS Orders	
	Qty	%	Qty	%	Qty	%	Qty	%
All Decisions	488	**21.6**	365	**16.1**	701	**31.1**	702	**31.11**
Document Size N=10,618	**SB Opinions**		**OTS Opinions**		**SB Orders**		**OTS Orders**	
	Qty	**%**	**Qty**	**%**	**Qty**	**%**	**Qty**	**%**
Total Pages (10,618)	4,922	**46.4**	3,968	**37.37**	872	**8.2**	856	**8.1**
Average Pages (4.7)	10.1		10.9		1.2		1.2	
Median Pages	6		7		1		1	
Minimum Pages	1		1		1		1	
Maximum Pages	151		167		9		5	

C. Procurement Complexity

Contracts with lengthy and detailed technical specifications, or that require extensive coordination and logistical cooperation to complete, often necessitate more flexible relationships between the parties than contracts with requirements that are simple to perform (Harmon, Kim, and Mayer 2015). Strong working relationships are crucial to smooth operations because changes and external complications are ubiquitous in the contracting world. Successful final performance can require mirroring behavior that consciously respects both parties'

[81] I do think it potentially communicates something about the Board's approach to its work, which I will discuss in Chapter 6.

authority and autonomy. The more cooperation and interpersonal interaction potentially required for completion, the greater the possibility that issues of identity will lead to relational breakdown and contract dispute. I predicted this would be reflected in the decision proportions across various defined categories of procurement complexity. The categories of procurement complexity that I isolated and examined were subject matter, pricing structure, and contract vehicle (used as a proxy for contract definiteness/duration).

I associated contract subject matter with the contract's North American Industry Classification System (NAICS) code or its Product Service Code (PSC). For compensation and pricing structure, I recorded the contract payment or reimbursement type for each disputed contract. For performance duration or definiteness, I looked at the type of contract award "vehicle" as an indicator of how "open-ended" (or undefined) the complete successful performance period was for each contract.[82] After collecting this information, I sorted the variables according to decision document type (either "order" or "opinion") and connected that data to my understanding of the three components of contractual fairness in federal procurement contracting (equality, equity, and reciprocity).

I found overall that there were more disputes with a subject matter that can require more intensive interpersonal interactions between the contracting parties for successful performance, such as in construction (37%) and service (34%) provision, as opposed to supply contracts, represented by only 25% of the decisions. Most disputed contracts (76%) had fixed-

[82] Definite or "discrete" contracts are well-defined and relatively complete in terms of all performance requirements including final quantities and the exact location and time of performance. Indefinite-delivery vehicles (IDVs) allow the Government to order different quantities of supplies or work from a single or limited vendor pool at different times (depending on the terms of the contract) at the Government's discretion. Definite contracts should be fully described; indefinite contracts are more open-ended.

price compensation structures. Cost-based structures (19%) featured prominently only in service contracts (10%) and with OTS businesses (14%), so pricing complexity was not a strong general factor influencing whether or not a contract is disputed. The degree to which the terms and conditions of the contract were open-ended (discrete vs. indefinite) also did not feature strongly among the disputed contracts. Orders and opinions for OTS businesses were approximately half discrete (54%) and half indefinite (45%). For small businesses, however, discrete contracts were more numerous than orders that stemmed from indefinite delivery vehicle contracts or IDVs (64% to 35%), with the ratio between them the same for orders as for opinions.

This result indicates that for small businesses, stand-alone, definitized contracts are involved in more disputes than contracts with built-in ordering flexibility. This proportional difference with IDV procurements may result from a less constrictive contract structure that accommodates responsive contract changes to shifts in spending risk. It may result from both parties being more invested in working together in a long-term relationship. It may reflect a small business contractor's hesitation to sour relations (and hinder the potential for future work) by pursuing a claim through the disputes process at all (revealing a distinct power differential impacting contractual fairness). These possible explanations, however, require more study to deny or confirm.

Finally, the disputed contracts appear to involve a relatively high percentage of contractors with minority or specially recognized demographic characteristics, particularly 8(a) contractors (who feature in 12% of all decisions and 8% of all construction decisions), and HUBZone contractors (who feature in 10% of all decisions and 7% of construction decisions). In

fact, 41% of all decisions (and 72% of all small business decisions) involve a contractor whose profile includes a categorical indicator identifying it as a minority, disadvantaged (including HUBZone and emerging small businesses), or special (such as veteran) status. Whether or not those proportions are patently unfair or an expected result of more contracts resulting in more disputes, however, require more digging into procurement contexts and deeper situational analyses. I detail a preliminary exploration of this issue in Part II of the chapter.

Tables 4.3 and 4.4 summarize my findings regarding procurement complexity and contractor identity connected to the distinct categories of decision documents. Tables 4.3 and 4.4 communicate the same collected /sorted data but present it using different proportional orientations. Table 4.3 presents the categorical and socioeconomic data according to complexity in terms of equality, equity, and reciprocity as percentages or proportions within each analyzed category. Table 4.4 presents the same information, but with percentages calculated to show the proportions of the categories to the entire sample of 2,258 decisions. Table 4.3 shows how important divisions are within a category; Table 4.4 shows how important the decision categories are in comparison to each other and as part of the entire body of judgments. Both orientations communicate relationships within the dispute documents.

Document types are listed by row according to subject matter complexity and business size. The columns list the data by pricing structure (fixed price, cost-based, and other) and award vehicle (definite or “discrete” and indefinite delivery/indefinite quantity vehicles). I discuss these procurement complexity elements in the remaining pages of this section. I also sort the data by columns according to how I associated the category with each fairness element (equality/competition, equity/socioeconomic distribution, and reciprocity/dispute outcome).

Table 4.3 Summary Table of Decision Metadata, 2014-2021 (PROPORTIONS WITHIN CATEGORY)

Document Type (N=2258)	Total		Contract Vehicle (Complexity)				Pricing Structure (Complexity)						Competed (Equality)		Outcomes (Reciprocity)						Socioeconomic Category (Equity)											
			Definite		IDV		FP Fam		Cost Fam		Other				Mutual Or Split		Government		Contractor		Category		SDVO		HUB		8(a)		WO		VO	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%
All Decisions	2258	**100**	1338	**59**	888	**39**	1713	**76**	422	**19**	121	**5**	1872	**83**	1618	**72**	347	**15**	293	**13**	915	**41**	180	**8**	229	**10**	289	**13**	272	**12**	258	**11**
All Orders	1403	**62**	817	**58**	566	**40**	1003	**71**	310	**22**	88	**6**	1149	**82**	1350	**96**	28	**2**	25	**2**	537	**38**	101	**7**	127	**9**	177	**13**	165	**12**	154	**11**
All Opinions	855	**38**	421	**49**	322	**38**	710	**83**	112	**13**	33	**4**	723	**85**	268	**31**	319	**37**	268	**31**	378	**44**	79	**9**	102	**12**	112	**13**	107	**13**	104	**12**
SB Orders	701	**31**	438	**62**	253	**36**	581	**83**	84	**12**	35	**5**	624	**89**	667	**95**	23	**1**	11	**2**	496	**71**	97	**14**	125	**18**	174	**25**	151	**22**	148	**21**
SB Opinions	489	**22**	321	**66**	161	**33**	438	**90**	32	**6**	19	**4**	422	**86**	146	**30**	206	**42**	137	**28**	355	**73**	73	**15**	102	**21**	112	**23**	97	**20**	97	**20**
OTS Orders	702	**31**	379	**54**	313	**45**	422	**60**	226	**32**	53	**8**	525	**75**	683	**97**	5	**1**	14	**2**												
OTS Opinions	366	**16**	200	**55**	161	**44**	272	**74**	80	**22**	4	**1**	301	**82**	122	**33**	113	**31**	131	**36**												
Subject Matter Complexity																																
Construction Orders	505	**22**	309	**61**	191	**38**	471	**93**	17	**3**	17	**3**	474	**94**	485	**96**	9	**2**	11	**2**	264	**52**	41	**8**	90	**18**	115	**23**	68	**13**	53	**10**
Construction Opinions	349	**15**	216	**62**	128	**37**	332	**95**	13	**4**	4	**1**	315	**90**	137	**39**	124	**36**	88	**25**	195	**56**	32	**9**	74	**21**	77	**22**	36	**10**	41	**12**
Service Orders	565	**25**	315	**56**	241	**43**	302	**53**	205	**36**	57	**10**	457	**81**	545	**96**	11	**2**	9	**2**	185	**33**	42	**7**	23	**5**	53	**9**	67	**12**	63	**11**
Service Opinions	291	**13**	152	**52**	135	**46**	203	**70**	68	**23**	19	**7**	251	**86**	85	**29**	100	**34**	105	**36**	117	**40**	28	**10**	52	**18**	28	**10**	47	**16**	40	**14**
Supply Orders	332	**15**	239	**72**	87	**26**	230	**69**	87	**26**	14	**4**	218	**66**	319	**96**	8	**2**	5	**2**	88	**27**	18	**5**	14	**4**	9	**3**	30	**9**	38	**11**
Supply Opinions	216	**10**	156	**72**	56	**26**	174	**81**	31	**14**	10	**6**	156	**72**	46	**21**	94	**44**	46	**21**	66	**31**	19	**9**	14	**6**	7	**3**	24	**11**	25	**12**

Table 4.4 Summary Table of Decision Metadata, 2014-2021 (PERCENTAGE OF TOTAL SAMPLE)

Document Type (N=2258)	Total		Contract Vehicle (Complexity)				Pricing Structure (Complexity)						Competed (Equality)		Outcomes (Reciprocity)						Socioeconomic Category (Equity)											
			Definite		IDV		FP Fam		Cost Fam		Other				Mutual Or Split		Government		Contractor		Category		SDVO		HUB		8(a)		WO		VO	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%
All Decisions	2258	**100**	1338	**59**	888	**39**	1713	**76**	422	**19**	121	**5**	1872	**83**	1618	**72**	347	**15**	293	**13**	915	**41**	180	**8**	229	**10**	289	**13**	272	**12**	258	**11**
All Orders	1403	**62**	817	**36**	566	**25**	1003	**44**	310	**14**	88	**4**	1149	**51**	1350	**60**	28	**1**	25	**1**	537	**24**	101	**4**	127	**6**	177	**8**	165	**7**	154	**7**
All Opinions	855	**38**	421	**19**	322	**14**	710	**31**	112	**5**	33	**2**	723	**32**	268	**12**	319	**14**	268	**12**	378	**17**	79	**3**	102	**5**	112	**5**	107	**5**	104	**5**
SB Orders	701	**31**	438	**19**	253	**11**	581	**26**	84	**4**	35	**2**	624	**28**	667	**30**	23	**1**	11	**.5**	496	**22**	97	**4**	125	**5**	174	**8**	151	**7**	148	**7**
SB Opinions	489	**22**	321	**14**	161	**7**	438	**19**	32	**1**	19	**1**	422	**19**	146	**6**	206	**9**	137	**6**	355	**16**	73	**3**	102	**5**	112	**5**	97	**4**	97	**4**
OTS Orders	702	**31**	379	**17**	313	**14**	422	**19**	226	**10**	53	**2**	525	**30**	683	**30**	5	**.2**	14	**.6**												
OTS Opinions	366	**16**	200	**9**	161	**7**	272	**12**	80	**4**	4	**.2**	301	**13**	122	**5**	113	**5**	131	**6**												
Subject Matter Complexity																																
Construction Orders	505	**22**	309	**14**	191	**8**	471	**21**	17	**.8**	17	**.8**	474	**21**	485	**21**	9	**.4**	11	**.5**	264	**12**	41	**2**	90	**4**	115	**5**	68	**3**	53	**2**
Construction Opinions	349	**15**	216	**10**	128	**6**	332	**95**	13	**.6**	4	**.2**	315	**14**	137	**6**	124	**5**	88	**4**	195	**9**	32	**1**	74	**3**	77	**3**	36	**2**	41	**2**
Service Orders	565	**25**	315	**14**	241	**11**	302	**13**	205	**9**	57	**3**	457	**20**	545	**24**	11	**.5**	9	**.4**	185	**8**	42	**2**	23	**1**	53	**2**	67	**3**	63	**3**
Service Opinions	291	**13**	**152**	**7**	135	**6**	203	**9**	68	**3**	19	**1**	251	**11**	85	**4**	100	**4**	105	**5**	117	**5**	28	**1**	52	**2**	28	**1**	47	**2**	40	**2**
Supply Orders	332	**15**	**239**	**11**	87	**4**	230	**10**	87	**4**	14	**.6**	218	**10**	319	**14**	8	**.4**	5	**.2**	88	**4**	18	**.8**	14	**.6**	9	**.4**	30	**1**	38	**2**
Supply Opinions	216	**10**	**156**	**7**	56	**2**	174	**8**	31	**1**	10	**.4**	156	**7**	46	**2**	94	**4**	46	**2**	66	**3**	19	**.8**	14	**.6**	7	**.3**	24	**1**	25	**1**

1. Subject Matter

Contract subject matter should reliably indicate work environments where controversies and disagreements are more likely to arise due to complicated specifications, coordination timelines, logistical management, or interpersonal relationships (in construction or professional technical services, for example). I divided the decisions into three specific subject matter types: construction, services, and supplies. I coded the subject matter of each contract according to my interpretation of three separate numbers entered into FPDS-NG by agency personnel at the time of contract award: the six-digit North American Industry Classification System (NAICS) identifier, a four-digit Product Service Code (PSC), and an alphanumeric "claimant code" specific to the Department of Defense that signals the funding source for the contract, which can be linked to specific appropriations for construction, service, supply, or research projects. In most cases, the subject matter is identified reliably through the NAICS code.[83] For example, construction projects almost always begin with the numbers "23," and with PSCs, service codes begin with a letter and product codes are completely numeric. Table 4.5 describes the proportions of the decisions by document type, contract subject matter, and contractor business size.

[83] There were instances where neither code was entered (usually due to the age of the report). In these disputes I relied on my informed judgment to assign a subject matter category based on other pertinent information, such as the description of the work in the decision text or the identification of a particular relevant statute in the FPDS-NG report. For example, a contract that incorporates the Davis-Bacon Act will be for construction; the Walsh-Healy Act signals a manufactured product, and Service Contract Act indicates a service contract. Usually, this information was indicated very clearly.

Table 4.5: Proportions by Decision Type, Business Size, and Subject Matter								
Contract Subject Matter N=2258	**SB Opinions**		**OTS Opinions**		**SB Orders**		**OTS Orders**	
	Qty	%	**Qty**	**%**	**Qty**	**%**	**Qty**	**%**
Construction	214	**9.5**	134	**5.9**	288	**12.8**	217	**9.6**
Service	143	**6.3**	146	**6.5**	255	**11.3**	310	**13.7**
Supplies	130	**5.8**	85	**3.8**	157	**7**	175	**7.8**
No Information	1	**.04**	1	**.04**	0	**0**	0	**0**
Totals	488	**21.6**	366	**16.2**	700	**31**	702	**31.1**

There were more decisions for small businesses across all categories except for services, where the quantity for other than small businesses was slightly higher (143 versus 146 and 310 versus 255). There were more orders than opinions for contractors of all sizes in all categories, but twice as many for OTS businesses in services and supply contracts. For small businesses, construction represented the largest proportions of both orders and opinions (42%), and the quantities of both were considerably higher than they were for OTS businesses (22.2% vs. 15.5%). Opinions were required significantly more for small business construction disputes than for OTS contractors. OTS businesses saw larger percentages of disputes in service contracts than in any other category (20.2%). The ratio of orders to opinions for small businesses across categories was closer than for OTS businesses (almost twice as many). Construction and service contracts in general were more contentious than supply contracts for both small and OTS businesses. For supply contracts, the overall proportions were similar between both small and OTS businesses. Contracts were approximately twice as likely to be disposed of by an order for OTS businesses in all categories.

2. Pricing Structure

I divided each disputed contract into three contract compensation formats: a fixed-price family, a cost-based family, and a catch-all "other" family for basic reimbursement structures such as "labor hours" performed or "time and materials" furnished.[84] The fixed-price family includes contract payment approaches based on a contract's offered price ("fixed price") for a service or product that includes profit and all estimated costs (riskier for the contractor, but more potential for profit and more certain expenditures for the government), regardless of contingencies. Cost-based contracts are less risky for the contractor, but do not guarantee that the government receives goods or services at the "fixed" original offered contract price. Cost-based contracts also can include complicated regulations related to the reimbursement of expenses that federal contract law considers to be legitimately "allowable" (legal), "allocable" (related to the contract in a required way), and "reasonable" (a quantum determination that can easily spur a contract dispute). "Other" pricing strategies range from common types such as "labor hour" contracts to more sophisticated but riskier (to the government) forms of pricing, which give contractors more protection from contingencies or more performance incentives. Table 4.6 links those quantities to elements of contractor identity and decision document type.

Table 4.6: Proportions by Decision Type, Business Size, and Pricing Structure

Pricing Structure N=2258	SB Opinions		OTS Opinions		SB Orders		OTS Orders	
	Qty	%	Qty	%	Qty	%	Qty	%
Fixed Price Family	437	**19**	271	**12**	581	**26**	422	**19**
Cost Family	32	**2**	80	**3**	84	**4**	226	**10**
Other	19	**1**	14	**1**	35	**1**	53	**2**
Totals (All Pricing)	488	**22**	365	**16**	701	**31**	702	**31**

[84] This mirrors the three categories used in the GAO Procurement snapshots to describe contract types.

Fixed price contracts (76%) were more represented among the disputed contracts than any other pricing type. Cost-based contracts (19%) were not a significant percentage of total disputes except for OTS business orders, which represented 10% of all decisions. Cost-based contracts were more associated with service and supply contracts for both business types. "Other" types of pricing structures only factored in 5% (121) of all decisions. On its own, pricing complexity does not factor significantly in most contract disputes, with service orders and all OTS orders being exceptions (representing 32% of OTS pricing structures). This could result from basis award proportions (more fixed price contracts awarded than cost-based, and more cost-based contracts awarded to OTS businesses, for example), but further study is needed.

3. Contract Vehicle

I divided each disputed contract into two types of award "vehicles" that reflect procurement complexity as an issue of "definiteness": definite or "discreet" contracts with fixed performance requirements, and indefinite "vehicle" types where time and extent of performance is not fully fixed at contract award. Performance duration or "contract time" is often expressed in calendar days but can also be assessed as an issue of "definitiveness," or the open-endedness of the period of performance (along with specified delivery quantities). Table 4.7 links the disputes to elements of contractor identity and decision document type.

Table 4.7: Proportions by Document Type, Business Size, and Contract Vehicle

Contract Vehicle N=2258	SB Opinions		OTS Opinions		SB Orders		OTS Orders	
	Qty	%	Qty	%	Qty	%	Qty	%
Definite Contract	321	**14.2**	200	**8.9**	438	**19.4**	379	**16.8**
IDV	161	**7.1**	161	**7.13**	253	**11.2**	313	**13.9**
Totals (All Vehicles)	482	**21.3**	361	**16.0**	691	**30.6**	692	**30.6**

Out of all decisions, 59% were related to definite contracts; 39% were indefinite vehicles. Definite contracts comprised 33.6% (759/2258) of all small business orders and opinions; 18.3% were for indefinite vehicle contracts. Definite contracts related to OTS orders and opinions represented 25.6% (579/2258) of all decisions; 21.0% (474/2258) of all decisions were for OTS orders and opinions representing indefinite contracts. In general, the definiteness of the contract award vehicle only appears to matter significantly in supply contract disputes, where indefinite delivery vehicles are much less likely to be disputed. Discrete contracts represent 72% of both supply orders and supply opinions. Orders and opinions related to supply contracts total 18% of all decisions, so contract definiteness appears to have more impact in that subject matter category than for construction and services. Again, this may simply result from awarded contract proportions, but should be investigated further.

In summary, my examination of the disputed decision metadata through the lenses of decision type and procurement complexity revealed that most disputes involve contracts for the performance of complex subject matters (construction and services) rather than for supply delivery. Most disputes involved fixed-price contracts awarded through competition and were with small business contractors rather than OTS businesses. Comparatively more OTS disputes are resolved by orders than with a judge's opinion. Most disputes (small business and OTS) are still resolved by order, or without a judge's opinion being issued (an opinion), indicating some level of mutual agreement is still possible even after a dispute is filed. Contracts which require service provision resulting in completion of a complex final product (construction) are represented disproportionately among the disputed contracts. These disputed construction contracts also represent an especially diverse mix of contractors who belong to special business

categories reflecting an identity (minority race or gender or disabled status) associated with workplace/economic disadvantages or challenges.

Pricing complexity only appears to be a factor in disputes with OTS businesses involving service provision. Contracts disputed by small businesses typically have a clearly defined duration or closed-ended performance requirements at the time of award. This likelihood indicates that though an IDV (indefinite delivery [contract award] vehicle) may be more structurally complex from a contracting standpoint, award vehicle flexibility may play some role in preventing potential disputes with small business contractors, who arguably have fewer resources to absorb fixed-price risk and/or negotiate changes with the government than their OTS counterparts.

These raw numbers suggested some relationship between contract complexity, contractor identity, and a contractor's perceptions of unfair treatment in its performance experience with the government. However, this assertion required further contextualized analysis to gauge if, as a body, the disputed contracts communicate any clear messages about actual unfair contract conditions/practice in this environment. Thus, as discussed in the next section, I sorted, allocated, and translated the metadata into the three categories of contractual fairness: equality, equity, and reciprocity, and examined whether or not apparent disproportions in the "distribution" of fair behaviors across various categories could be explained simply by differences in the reported award proportions for all federal/DOD contracts. From this analysis, I selected disproportionately represented contract categories where differences were not clearly correlated with award quantities for further qualitative examination in Chapter 6.

Part II. The Three Aspects of Fairness in the ASBCA Decisions

A. Fairness as Equality (Competition)

To assess fairness as equality through competition, I examined three dimensions of the original award statistics in FPDS-NG for all of the disputed contracts in my sample. The first was the degree (breadth) of competition, which ranged from a unique/sole source negotiation to small business set-asides to "full and open" competition. The second was the ease of access (accessibility) to the competitive process based on familiarity with and the formality of the solicitation procedures used. The third dimension was the depth of the market gauged by the numbers of competitors for a single contract. This consisted simply of the numbers of competitors for each procurement (ranging from only one source solicited to hundreds of competitors). I found that the majority of contracts that became subject to the formal contract disputes process during contract administration were broadly competitive, resulted from common, standardized solicitation procedures, and were the products of deep markets.

Table 4.8: Original Competition Levels for Disputed Contracts (All Domestic Disputes 2014-2021)

Description	Quantity (n=1578)	Percentage
Competed (all)	1342	81.7
Not Competed (all)	288	17.5
No information about Competition	12	.7
Full and Open Competition	697	42.4
Total Small Business Set-Aside	388	23.6
Socioeconomic Competitive Set-aside (8(a), HUBZone, SDVOSB)	232	14.1
Sole Source (Only One Contractor Solicited)	189	11.5
Special Procedures (A & E, FSS, Two-Step)	121	7.4
No Information about Procedures	15	0.9

My review of the sample's metadata revealed that overall competition was strong. Almost 82% of the contracts were competitive, with an average of 11 offers per contract and a median of 4 offers in a range between 1 and 576 (the highest number of offers received for a single procurement). Many of the contracts were competed for in an open market or "full and open" basis (42.4%), with another large chunk being "fully" competitive, but only for small businesses (23.6%).[85] Only 11.5% of the disputed contracts resulted from unique source negotiations and one-source ("sole source") procurements solicited using a socioeconomic-based set-aside (a reservation of the contracting opportunity to a contractor based on a "disadvantaged" aspect of their identity related to race, physical location, or military service).

The contracts set aside (14.1%) for competition among these specific, limited types of small businesses—8(a) certified contractors, HUBZone contractors, and service-disabled veteran contractors—still saw robust competition within their categories. The remaining procurements (7.4%) were mostly competitive but involved highly specialized procedures like the architect and engineering (A&E) selection process, Two-Step Sealed Bidding, or the Federal Supply Schedules (FSS). No information regarding procedures was reported for fifteen of the disputed cases (0.9%). Accessibility of the bidding procedures ranged in formality from what are termed "commercial item acquisitions"[86] (FAR 12) to "simplified acquisition procedures" (FAR

[85] The FAR refers to this as "full and open after the exclusion of sources," essentially a total small business set-aside.

[86] "Commercial item acquisitions" and "architect & engineering" contracts are types of *procurements*. Simplified acquisition procedures, sealed bidding, and competitive negotiation are types of procurement *procedures*. Both CI and A&E procurements (as well as Two-Step Sealed Bidding, and the FSS) use aspects of the three types of procedures depending on the regulatory requirements of those contracts. A & E contracts, for example, must ALWAYS include negotiation and are NEVER procured on the basis of the lowest price. CI contracts are frequently procured on a low-price basis using sealed bidding. They exist on a spectrum of subject matter complexity. For example, CI contracts are the typical "paper clip," Commercial-Off-The-Shelf (COTS) buys, where an A & E contract would be for the design of a specific Government facility. SAP, SB, and CN exist on a spectrum of technical

13) to traditional sealed bidding (FAR 14) and formal competitive negotiation (FAR 15) to architect and engineering (A & E) solicitations (FAR 36.6).

Commercial item procurements are relatively simple and informal and are linked to standard commercial practices and the Uniform Commercial Code environment that businesses expect outside of the federal marketplace. Simplified Acquisitions (also known as "SAP") have some formality (mostly related to advertisement and publication rules) based upon dollar levels and subject matter type but are relatively unstructured when compared with formal sealed bidding, which is precise and ritualized in nature, awarded solely to the lowest priced offer, with required public bid openings and strict review requirements.

Formal competitive negotiated procurements are also highly structured but allow for managed and documented communications between the government and contractors prior to a contract award. They are also more likely to include an evaluation of a contractor's suitability for the work, not just of their price. The A & E contracting process (also known as Brooks Act procedures, which are formally regimented in FAR 36.6) is linked to the government's assessment of a contractor's quality (merit) based upon professional certifications, experience, past performance, and direct contact/price negotiation prior to contract award.

However, it can be difficult to identify consistently from the FPDS-NG reports when simplified procedures were used to procure the disputed contracts vs. sealed bidding or formal negotiation procedures. There is some related information listed on each report, but I was not

complexity, with the differentiation between SAP and the others being a lower dollar value threshold for the procurement. (SAP uses aspects of SB or CN but is not as formally regimented).

comfortable that my interpretation of the information was anomaly-free.[87] What I can say is that only 19% of the disputed contracts stemmed from commercial item procedures, and only 33 contracts disputed were coded with a Product Service Code beginning with "C" (defined as "Architect and Engineering-General")[88] at award, which would amount to only 2% of all of the disputed contracts.

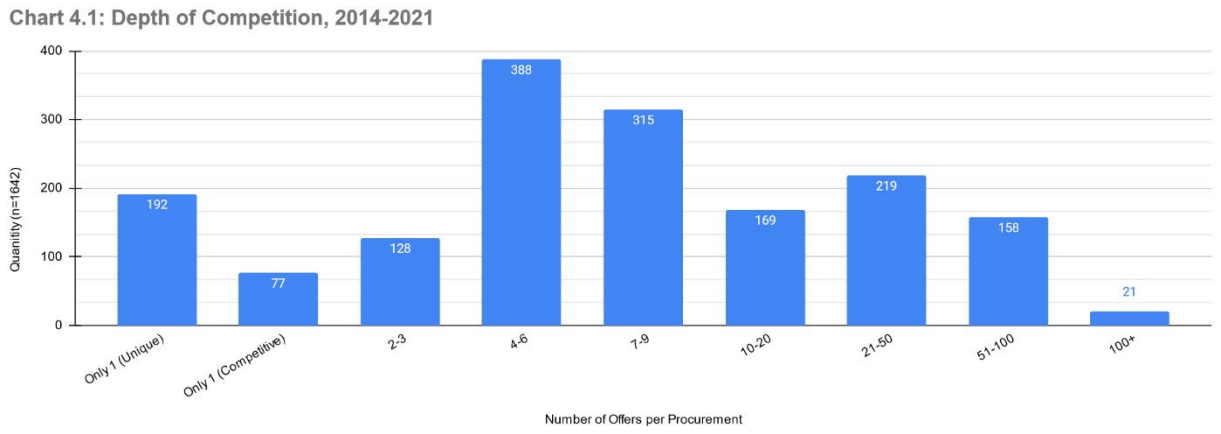
While it is difficult to describe the full extent to which the procedures that produced the disputed contracts were accessible, I was able to determine that only 7% (121) of the contracts were associated at award with an unusual procurement procedure. The clear majority (1,332, or 81% percent) of the contracts that reached the formal disputes process were not awarded through sole-source negotiations or acquired through specialized procurement rules, and they appear to be as generally accessible as any other standard government opportunity. In other words, the disputed contracts were acquired using ordinary procurement practices familiar to most contractors with an understanding of the basic bureaucratic requirements related to competition in the federal sector.

In terms of competitive robustness, or the number of offers per procurement, 16% of the disputed contracts (269) were the result of a non-competitive solicitation. Of the competitive procurements, only 8% (128) received a single offer (signaling a weak market or unclear requirements); 21% (338) received 2-3 offers (generally viewed as sufficiently

[87] Staff are required to report on the procedures used to award a contract, but there is some inconsistency in how they are able do so, involving combinations of choices of activities that the database requires before final approval of the report by the system.

[88] Product and Service Code Manual https://www.acquisition.gov/psc-manual/all The Manual "provides codes to describe products, services, and research and development (R&D) purchased by the federal government. These codes indicate "WHAT" was bought for each contract action reported in the Federal Procurement Data System (FPDS)" (2022, 4). It is published by the General Services Administration and the Federal Acquisition Service.

competitive); 29% (484) received 4-10 offers (robust); 24% (398) received more than ten offers (extremely strong), with 1% (21) receiving more than one hundred offers. Even the "exotic" procurement types such as Two Step Sealed Bidding were not only highly competitive (121/94%), but also revealed deep markets, with an average of eleven offers per procurement, a median of five offers, and a maximum of 99 (see Figure 4.1).



How do the percentages of competition among the disputed contracts compare to the overall population of awarded DOD contracts? It is difficult to find fully descriptive, apples-to-apples statistics related to competition for the population of federal procurements, or even just DOD procurements for comparison. The macro data requires numerous caveats to use as information and is just too "big" to slice effectively for intricate but still generalizable comparisons. Unfortunately, there also appears to be no ready-made or standardized report posted on a public agency webpage to compare percentages between all dollars spent and the percentages of actual contracts to single business entities awarded.

That said, the standard reports function generated in FPDS-NG does calculate basic percentages according to dollars spent or "actions" taken overall instead of on a per-contract

basis.[89] Table 4.9 provides basic competed/non-competed ratios for DOD between 2014 and 2021. The first line of the table is drawn from the FPDS-NG report and represents all contract dollars spent/actions taken between 2014-2021. The second line shows my calculations of the same ratios for the disputed contracts using a combination of source data from FPDS-NG (total actions) and USASpending (total dollars).

Table 4.9 Comparison of Total Competed Actions/Dollars Department of Defense (FPDS-NG) with Actions/Dollars for All Disputed Contracts at ASBCA, 2014-2021

Department Name	Total Actions	Total Dollars	Competed Actions	Not Competed Actions	Competed Dollars	Not Competed Dollars
FPDS-NG (ALL DOD)	275,898,785	$2,732,333,977,351.53	272,239,979 (99%)	3,658,528 (1%)	$1,456,309,934,917.66 (53%)	$1,276,000,490,681.44 (47%)
Disputed Contracts	270,969	$755,014,678,589.00	182,789 (67%)	88,176 (33%)	$375,581,243,137.44 (49%)	$380,427,391,155.68 (51%)

"Actions" taken (a metric primarily used to track workload capacity, but which also is used as an indicator of contract complexity) reveals some differences between the population of DOD contracts and the disputed contracts, but it is difficult to understand the import of that difference without resorting to other markers for guidance. At first glance, the most remarkable detail in Table 4.9 is that 1% of the non-competed actions ($3.7 million) reported in FPDS-NG for all DOD contracts represent 47% of total contract spending ($1.3 trillion) during that time. We can also observe that for the disputed contracts, each competed action is worth about $2 million dollars, while each non-competed action averages $4.3 million. The disputed contract dollar values were drawn from USASpending reports of actual expended dollars for each individual contract.

[89] Although actions taken/dollars awarded is not a perfect metric, it may have some utility as a basic guideline representing what the Small Business Administration (and Congress) consider acceptable proportional distributions of contract bestowals.

According to the FPDS-NG, the average dollar value of each competitive action taken between 2014 and 2021 was $5,349 ($1.46 trillion divided by 272 million actions), while the average value of each non-competed prime contract award was $343,243.24 ($1.27 trillion/3.7 million actions). The average action value for the disputed contracts was $2,786,350.76. Meanwhile, DOD's USASpending profile shows that the average 2023 DOD transaction was just under $93,093.46 per transaction ($99.6 billion/1.07 million transactions), or $105,270.83 per new award ($99.6 billion/946,131 new awards) (DOD Contract Spending Overview, 4/14/2023). The number of contract actions taken (compared in Table 4.10) may be tracked and publicly reported, but it is not particularly useful in the disputes context nor is it adequately descriptive as an indicator of fairness. However, the differences in actions to dollar does suggest that the disputed contracts involve much higher dollar transactions than the average DOD procurement.

Table 4.10: Estimated Value of Each Contract Action Taken (2014-2021)

Average Transaction Value	Competed	Not Competed	Average Value
FPDS-NG Report (All) 2014-2021	$5,349	$343,243.24	$9,903.49
Disputed Contracts 2014-2021	$2,054,725.63	$4,314,409.72	$2,786,350.76
USASpending Profile 2023	NI	NI	$93,093.46

Although overall competed dollars provide a better source of comparison between the sample and the population, it is still far from a perfect measure. Again, it is difficult to attach much initial meaning to the spread between the total population and disputes samples, other than to note that the relative differences between competed dollars and non-competed dollars are much more similar but reversed. In the FPDS-NG competition report for all DOD contracts, competed dollars slightly exceed non-competitive awards. For the disputed contracts, the value

of non-competed contracts slightly exceeds the dollar value of disputed contracts awarded through competition. The margin of difference for both statistics in either case is less than 5%.

In light of the highly competitive profile of the sample of dispute contracts, the slim margins of difference indicate that other factors are influencing the distribution of contract value and its relationship to the disputes process other than the concept of competed vs. not competed. For example, a closer examination of the 189 contracts identified as (non-competed) sole source procurements reveals that 87% were awarded to "other than small" businesses, compared to 44% of "other than small" reported for the entire sample of disputed contracts (competed and not competed). Those (mostly) large business concerns that represent the 44% of the prime contractors involved in the disputes process were awarded $662 billion dollars, or 88% of the total dollar value of the entire disputed contracts sample ($755 billion) both competitive and non-competitive)—a sizeable skew.

Digging deeper, of those 418 large business "relationships" (44% of dispute contractors or 418/1578) that received 88% of total contract dollars (4 companies and ninety-two contracts—Boeing, Lockheed Martin, Northrup Grumman, and Raytheon) constituted 49.7% ($375 billion) of all disputed contract dollars ($755 billion), but only 7% (158) of all dispute decisions (2,258). Interestingly, 29% (28) of those contracts to large businesses were awarded competitively, with 85% (24 contracts) solicited using full and open competition and receiving an average of four offers (median two, maximum twenty-nine, with 10% of the contracts awarded competitively but with only one offer received). Competition—when it occurred—was still strong among the contracts where large businesses became the prime contractor, and the dollar value of the non-competitive contracts was only 10% of the large business disputed total

($67 billion). In other words, although the non-competitive disputed contracts to large businesses were of high dollar value, the vast majority of contracts to large businesses were still the product of "good" competition, as shown in Table 4.11.

Table 4.11: Competition and Small/Other than Small Business Disputed Contracts (All Domestic Disputes between 2014-2021)

Description	Quantity (n=1642)	Percentage
Small Business (Competed)	800	87.8
Small Business (Not Competed)	105	11.4
Small Business (No Information)	7	0.8
OTS[90] (Competed)	532	73.9
OTS (Not Competed)	183	25.4
OTS (No Information)	5	0.7

With this detail in consideration, another data slice that may be more useful for comparison in the disputes process context than contract actions/contract dollars is the standardized "Unique Vendors" report in FPDS-NG, which reports the number of different ("unique") prime contractors that received at least one contract award with DOD in each fiscal year. The report divides those numbers into small businesses and other than small businesses, and upon review demonstrates a very stable ratio over the 8-year reporting period of 68% of awards being made to small business concerns. In other words, 68% of all contract awards made in each fiscal year between 2014-2021 were made to different small business entities (337,883/494,669). Comparatively, the disputed contract sample represents 765 unique small business vendors, or 65% of the total sample of 1,184. This closely resembles the 68% of

[90] "Other than small" businesses encompass large businesses (those whose average annual receipts over 3 years exceeds the size standard for a business to be considered "small" in a particular industry, represented by a North American Industry Classification System, or "NAICS" code), or non-profit organizations, educational institutions, or other domestic governments acting as a vendor of a supply or service to the federal government).

contract awards made to individual small businesses every fiscal year described in the Unique Vendors report (Table 4.12).

Table 4.12: Unique Vendor Contract Awards (FPDS-NG), 2014-2021									
Fiscal Year	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**Totals**
All Unique Vendors	70,131	68,801	66,428	64,348	61,090	57,570	54,188	52,113	494,669
OTS Business	22,575	21,892	21,027	19,994	18,973	18,234	17,240	16,851	156,786
Small Business	47,556	46,909	45,401	44,354	42,117	39,336	36,948	35,262	337,883
% Small Business	68%	68%	68%	69%	69%	68%	68%	68%	68%

This statistic also helps explain the vast differences in dollar values between the FPDS-NG reported non-competed actions and the non-competed actions reported for the disputed contracts (~$350,000 to $4.3 million). It makes sense that the financial stakes would be higher in contracts where a contractor resorts to the formal disputes process for resolution of a conflict, and it is a reasonable assumption that larger dollar contracts will be more highly distributed to large businesses. Ultimately, “large” businesses account for 35% of the prime contractors with disputed contracts (418 out of 1184), 47% of all dispute decisions (1067 out of 2258), and 88% of the total dollar value of the disputed contracts ($662 billion out of $755 billion). Small businesses account for 65% of the prime contractors with disputed contracts (766 out of 1184), and 12% of the total dollar value of disputed contracts ($93 billion out of $755 billion).

In summary, I compared the disputes metadata with statistics reflecting the competition of DOD contract awards overall, and to the percentage of “unique” small business prime contractors who receive awards in a given year (68%). This analysis indicated that the percentage of small business contractors with disputed contracts (68%) to the total sample of

disputed contracts can be described reasonably as "good," when evaluated by degree, access, and depth of competition. However, the question of what represents a "fair" distribution of disputed contracts (and contract dollars) is one that must be examined further. Although I have briefly considered the issue of large vs. small contractors in the discussion of equality, the idea that fairness can be assessed through award distribution based on socioeconomic status must be unpacked further.

B. Fairness as Equity (Distribution)

To assess fairness in the disputes process as equity in distribution, I examined how elements of the disputed contracts and the dispute decisions compared proportionally when linked to contractors' demographic characteristics extracted from the report-sourced metadata. In previous sections, I referenced the difference between "small" and "other than small" (OTS) businesses (the most basic split in federal contract award distribution by contractor identity). In this section I break the category of "small" business down further by demographics and other categorical characteristics to explore more deeply the question of what constitutes a "fair distribution of disputes."

If contractor identity plays a significant role in whether or not contractors are treated fairly (or perceive that they are treated unfairly) in the federal procurement system, I predicted there would be evidence of demographic inequity in the proportions of disputes resulting from contracting situations where the importance of cooperative behavior in response to procurement complexity increases. After examining procurement complexity and finding proportionally more disputes involving contracts which often require close interpersonal interaction and cooperation (construction and services), I extended my search further into the

question of what contractor identity means as a member of a particular race, sex, or economically disadvantaged group in the disputes context. I then evaluated those differences in varying procurement settings to obtain a more balanced view of the contract relationship.

I drew the demographic information from individual contract reports in the FPDS-NG database. Those data are descriptive information self-entered by the contractor and automatically populated into FPDS-NG from the "representations and certifications" section of a contractor's vendor profile within the System for Award Management (SAM).[91] The variables are linked to a contractor's identification number, historically a Dun and Bradstreet (DUNS) Number, but now a "Unique Entity Identifier" (UEI) code assigned to contractors by the government since April 4, 2022. For some factors, the demographic data are verified during the establishment of a contractor's vendor profile in SAM (or previously, the Central Contractor Registry) by the Internal Revenue Service (IRS) and/or the Small Business Administration (SBA) and is re-certified annually.[92]

More demographic variables are reported in the FPDS-system than are discussed in most government reports. It is difficult to find clear and meaningful data across an extended time period for comparison for all of the different variables, although the reporting landscape is

[91] The System for Award Management (SAM) is the database where contractors must be registered in order to receive award of a federal contract.

[92] These agencies confirm aspects of classification status (such as business size and any special certified small business types) independently from the Government's reporting contract official. A contractor's SAM registration is not approved without that information's validation. However, the FPDS-NG report does include a place for the contracting officer's size determination of the contractor at the time of contract award. It is possible for a CO to identify a contractor as "other than small" independently, because a contractor's "size" can fluctuate based on the "size standard" applicable to the NAICS (North American Industry Classification System) code assigned to each contract. The relevant NAICS code is not always listed in a vendor's existing SAM profile, so the contracting officer is required to use their own judgment in making the final size assessment (which a contractor can challenge, though not through the ASBCA).

supposedly changing. I used the following classifications as primary reference points because they can be compared to the federal award data reports and also corroborated outside of a contractor's self-reported status: small vs. "other than small" business, and whether or not a business was an 8(a) certified or Small Disadvantaged Contractor (SDB), Service-disabled veteran-owned (SDVOSB), or Historically Underutilized Business Zone (HUBZone) contractor. I also included Woman-owned and Veteran-owned numbers because they are commonly included in federal reports as well. Table 4.13 shows the quantities of dispute decisions compared with the same percentages for unique contracts in the disputed contracts sample by socioeconomic category. There does not appear to be much difference between comparing the distribution percentages by decision and looking them by contract.

Table 4.13 Decision Results vs. Unique Contracts By Socioeconomic Category (2014-2021)

Socioeconomic Category	All Decisions	% of All (2258)	% of SB (1190)	All Unique Contracts	% of All (1578)	% of SB (922)
SDVOSB	180	**7.98**	**15.1**	146	**9.25**	**15.8**
HUBZone	229	**10.2**	**19.2**	174	**11.0**	**18.9**
8a	289	**12.8**	**24.3**	224	**14.2**	**24.3**
WO	271	**12**	**22.8**	215	**13.6**	**23.3**
VO	258	**11.4**	**21.7**	212	**13.4**	**23.0**

The FPDS-NG "Small Business Achievements by Awarding Organization" report compares the "Total Small Business Eligible Dollars" (TSBED) awarded by DOD between 2014-2021 and the corresponding dollar amounts, percentages, and averages for the disputed contracts according to key demographic categories. Table 4.14 shows that the dollars

associated with small business contractors' disputes only represent 12% of the disputed total, or half what the comparable ratio is for all DOD procurements (24%). A closer look reveals that other proportions in this sample are also dissimilar.

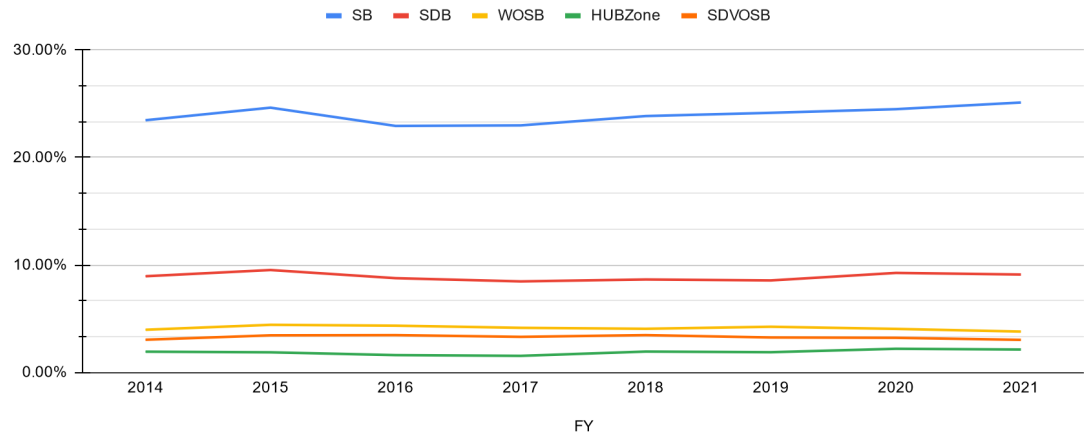
Table 4.14: Total DOD Contract Awards Compared to Disputed Contract Awards (2014-2021)						
Actual Awards by Contractor Type (in billions)	**TSBED**	**Total % Awarded**	**Average Annual**	**Total Disputed Contract Dollars**	**% Disputed**	**Average Annual**
All Department of Defense	$2,173	100%	$272	$755	100%	$94
Total Small Business (SB)	$520	24%	$65.0	$92.6	12%	$11.6
Small Disadvantaged Business (SDB)	$193	9%	$24.1	$3.2	0.43%	$.41
8(a) SB	$78.9	4%	$9.9	$5.8	0.77%	$.73
Veteran-Owned (VOSB)	$98.6	6%	$12.3	$76.3	10.10%	$9.5
Service-Disabled VOSB	$70.0	3%	$8.8	$75.3[93]	9.97%	$9.4
Woman-Owned SB	$88.7	4%	$11.1	$2.6	0.34%	$.31
Certified HUBZone SB	$42.2	2%	$5.3	$3.2	0.43%	$.40
OTS Business	$1,654	76%	$206.7	$662	88%	$82.8

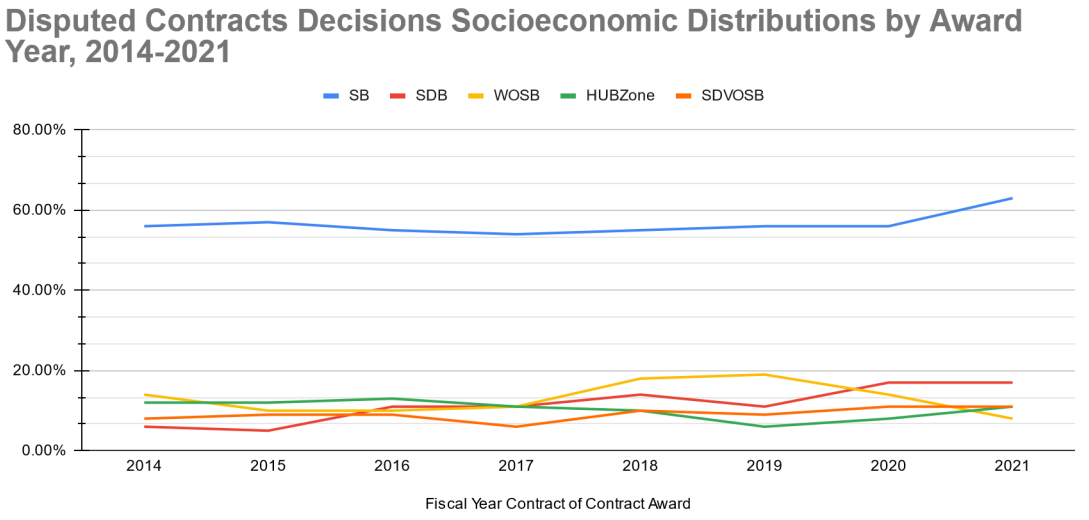
There are wide fluctuations overall in the proportions of dollars when comparing the demographic data for the disputed contracts by dollar value with the reported demographic statistics according to Total Small Business Eligible Dollars (TSBED). However, when looking at the percentages of contracts by contract quantity[94] (and not dollar value), the proportions between the demographic categories appear relatively stable over the reporting period and more similar to the distribution of TSBED. This relative stability appears to remain when

[93] 100% of SDVOSB are by definition VOSB.
[94] Based on a single contract award year (with duplicate socioeconomic information removed and gauged in contract quantities, not dollars).

comparing the data over the entire eight-year period of the disputes discussed in this dissertation, as shown in Figure 4.3. The first graph represents the total small business award dollars over that time period; the second graph shows the number of dispute decisions by socioeconomic category and decision year.

Figure 4.3: Distribution of Total Small Business Awards by Dollars and by Socioeconomic Category (2014-2021)





What the figures in Figure 4.3 and the information detailed in Table 4.14 seem to indicate is two-fold. Small Business contractors file twice as many disputes as OTS (mostly large) businesses, but their decision to file is less likely to be linked to contract dollar value. In fact, the dollar value of small business contracts disputed appears to be lower than the value of an average small business contract. In contrast, OTS businesses are involved in fewer disputes than small business contractors but are more likely to file a dispute when the financial stakes are higher. The higher dollars involved in the dispute process are a key factor, but they are not the only (or even the most important) factor—contractor identity does appear to play a role, as Table 4.15 shows.

Table 4.15: Proportions by Decision Type, Subject Matter, and Socioeconomic Category

Orders	**SDVOSB**		**HUBZone**		**8(a)**		**WOSB**		**VOSB**	
N=2258	**Qty**	**%**	**Qty**	**%**	**Qty**	**%**	**Qty**	**%**	**Qty**	**%**
Construction	41	**1.8**	88	**3.9**	114	**5.0**	63	**2.8**	53	**2.3**
Service	40	**1.7**	23	**1.0**	40	**1.8**	62	**2.7**	59	**2.6**
Supply	16	**.7**	14	**1.0**	9	**.4**	26	**1.2**	36	**1.6**
Totals (Orders)	97	**4.3**	125	**5.5**	163	**7.2**	151	**6.7**	148	**6.6**
Opinions	**SDVOSB**		**HUBZone**		**8(a)**		**WOSB**		**VOSB**	
N=2258	**Qty**	**%**	**Qty**	**%**	**Qty**	**%**	**Qty**	**%**	**Qty**	**%**
Construction	30	**1.3**	74	**3.3**	77	**3.4**	36	**1.6**	39	**1.7**
Service	24	**1.0**	14	**.62**	28	**1.2**	37	**1.6**	34	**1.5**
Supply	19	**.84**	14	**.62**	7	**.31**	23	**1.0**	24	**1.1**
Totals (Opinions)	73	**3.2**	102	**4.5**	112	**5.0**	96	**4.3**	97	**4.3**
Totals (All SE Group)	170	**7.5**	227	**10.1**	275	**12.2**	247	**10.9**	245	**10.9**

It also appears to play more of a role in whether or not a dispute is decided by a judge's opinion or can be resolved by mutual agreement (represented by the number of orders. An interesting deviation from this suggestion lies in the VOSB/SDVOSB category, where the

disputed dollar values are disproportionate to the TSBED percentages. Other than by dollar value, how are the disputed SDVOSB contracts different from those in the other categories? The difference does not appear to be linked to the numbers of contracts awarded. These findings require further exploration.

Subject matter complexity also appears to influence the spread of disputes across key demographic categories. Socioeconomic proportions of disadvantaged contractors are significantly higher for construction and service contracts, with the highest percentages being 8(a) and HUBZone categories for both orders and opinions related to construction (with woman-owned and veteran-owned businesses also disproportionately high). The socioeconomic distribution of disputes among supply contracts, however, does not appear disproportionate. This suggests that subject matter complexity may lead to more disputes in contracts requiring a higher degree of mutual coordination and cooperation with more potential for relational friction between the parties, a finding that could be examined or clarified with a close look at the decision texts.

This linkage to procurement complexity and dispute likelihood, however, does not appear to extend to pricing structure, as the proportions in Table 4.16 demonstrate. Very clearly, Referring back to Table 4.3, the bulk of the disputes clearly stem from contracts with fixed-price consideration structures. Cost-based contracts are represented in 19% of the total dispute decisions, and 14% of those are for OTS businesses (10% orders and 4% opinions), and they are largely represented by orders (14%) in the service (8%) and supply (5%) categories. “Other” pricing structures only factor into 5% of the dispute decisions, and they are spread fairly evenly between all categories. The percentages of total order decisions for fixed-price

contracts to HUBZone, 8(a), WOSB, and VOSB do not appear to be disproportionate to the overall award dollar percentages but does seem high as a percentage of all the disputed contracts.

Table 4.16: Proportions by Decision Type, Pricing Structure, and Socioeconomic Category

Orders	SDVOSB		HUBZone		8(a)		WOSB		VOSB	
N=2258	Qty	%	Qty	%	Qty	%	Qty	%	Qty	%
Fixed Price Family	87	3.8	120	5.3	153	6.8	132	5.8	130	5.8
Cost Family	5	.22	4	.18	11	.5	20	.9	12	.53
Other	9	.40	3	.13	3	.13	13	.6	12	.53
Totals (Orders)	101	4.5	127	5.6	167	7.4	166	7.4	154	6.8
Opinions	**SDVOSB**		**HUBZone**		**8(a)**		**WOSB**		**VOSB**	
N=2258	Qty	%	Qty	%	Qty	%	Qty	%	Qty	%
Fixed Price Family	73	3.2	88	3.9	103	4.6	91	4.0	95	4.2
Cost Family	3	.13	1	.04	2	.09	9	.40	5	.22
Other	3	.13	2	.09	7	.31	7	.31	4	.18
Totals (Opinions)	79	3.5	91	4.0	112	5.0	107	4.7	104	4.6
Totals (All SE Group)	180	8.0	218	9.7	279	12.3	273	12.1	258	11.4

Complexity of pricing structure is only a key feature in some disputed contracts with OTS businesses, which are more typically resolved through a Board order/mutual agreement rather than by a judge's opinion (Table 4.3). This type of structural complexity does not appear to factor significantly in disproportionate distribution of disputes across socioeconomic categories, but other types, such as contract definiteness, may play a role.

Other types of complexity related to contract structure potentially still play a role in dispute generation. Table 4.17 shows the proportions of dispute decisions across socio-economic categories related to contract definiteness/open-endedness. Again, the percentages of dispute decisions analyzed by socioeconomic category do not show anything significantly

disproportionate, and a review of Tables 4.3 and 4.4 shows fairly even distributions across small and OTS businesses, and across subject matter categories. Like contract pricing structure, Definiteness or fully specified quantities and delivery dates at contract origin also do not appear to be significant factors in sparking contract disputes.

Table 4.17: Proportions by Decision Type, Contract Vehicle, and Socioeconomic Category

Orders	SDVOSB		HUBZone		8(a)		WOSB		VOSB	
N=2258	Qty	%	Qty	%	Qty	%	Qty	%	Qty	%
Definite Contract	65	**2.9**	66	**2.9**	94	**4.2**	90	**4.0**	99	**4.4**
IDV	33	**1.5**	58	**2.6**	77	**3.4**	61	**2.7**	47	**2.1**
Totals (Orders)	98	**4.3**	124	**5.5**	171	**7.6**	151	**6.7**	146	**6.5**
Opinions	**SDVOSB**		**HUBZone**		**8(a)**		**WOSB**		**VOSB**	
N=2258	Qty	%	Qty	%	Qty	%	Qty	%	Qty	%
Definite Contract	50	**2.2**	50	**2.2**	61	**2.7**	56	**2.5**	66	**2.9**
IDV	23	**1.0**	52	**2.3**	51	**2.3**	41	**1.8**	31	**1.4**
Totals (Opinions)	73	**3.2**	102	**4.5**	112	**5.0**	97	**4.3**	97	**4.3**
Totals (All SE Group)	171	**7.6**	226	**10**	283	**12.6**	248	**11.0**	243	**10.8**

After considering three elements of procurement complexity (subject matter, pricing structure, and award vehicle), the number of small business contractors involved in dispute decisions seems disproportionate when compared with the award dollar percentages released by the Small Business Administration in their annual goaling reports (recorded earlier in Table 4.15), if percentage of the whole is considered an acceptable measure of fairness. This was particularly the case for contractors whose vendor profile represents them as a disadvantaged small business. However, does the data support the extension of that implication even further? I returned to the metadata to tease out other apparent differences in demographic or socioeconomic status.

Of the categories I collected from FPDS-NG, 25% of appellants identified as minority owned (426), 11% as small disadvantaged businesses (180), 9% were service-disabled veteran-owned (146), 11% were certified HUBZone contractors (174), 14% were certified 8(a) small businesses (224), 7% were Black-owned (111), 7% were Hispanic-owned (107), 13% were woman-owned (215), 13% were veteran-owned (212), 4% were Native American-owned (70), and Asian-Pacific (42) and Asian-Indian (46) each accounted for 3% of the disputed contracts. Emerging small businesses, which the Small Business Administration (SBA) defines as half the size of its maximum-sized small business, accounted for only 9% (150/1578) of the disputes. OTS businesses, on the other hand, accounted for 44% (718 out of 1578) of the disputed contracts.

To explore this finding further, I created one cumulative variable in addition to the officially recognized categories from the reported information that indicates a contractor's FPDS-NG information shows it belongs to a minority or specially recognized group. In addition to ethnic and racial identifiers, I included what the SBA calls an "emerging small business,"[95] as a particular indicator of size (power) inequity between the government and the contractor. This cumulative variable (which I term a "categorical identity indicator") helps to demonstrate how the federal procurement system is crisscrossed with regulations or program initiatives attempting to address biases or to acknowledge societal indebtedness due to a contractor's past military service. "Categorical identity" contractors were appellants in 43.3% of the

[95] Emerging small businesses are less than half the maximum size of an official small business, calculated by either the dollar amount of work conducted (average annual of receipts) on a tri-annual basis or the number of employees (depends upon the industry).

disputed contracts (710/1578), but more significantly, they were 78% of the total disputed contracts within the small business sample (710/922).[96] This seemed to be quite high.

Although there appeared to be a disproportionate number of complex contract dispute cases filed by contractors who represent specially recognized or defined minority groups, the explanations and sources of disparity were yet unclear. It was also evident that those proportions were higher for some groups of small businesses when the subject matter of the contract was more relationally complex (for example, construction). When examined closer, the overall percentages of "categorical" contractors engaging in the disputes process was stable throughout the sample period (2014-2021), but conspicuously high. Contractors may perceive they are being treated unfairly, and this perception may be stronger when the contractor identifies as a member of a disadvantaged group, but is this patently the case? Is the perception backed up by how the disputes are perceived by a neutral third party, such as an ASBCA administrative judge?

Contractor socioeconomic identity may aggravate some disputed contracts in some procurement contexts. Additionally, contracting award vehicle type may be a factor for small businesses in filing a dispute, but the analysis of those findings required a closer look. To explore the question further, I treated judgments by the Board's administrative judges as a neutral determinant of merit and legal correctness,[97] and added another filter to analyze the

[96] I recorded the following "categories" of contractors during data collection: minority-owned (MO), service-disabled veteran-owned (SDVOSB), certified "historically underutilized business" or HUBzone, 8(a) small business, black-owned (BO), woman-owned (WO), Hispanic-owned (HO), veteran-owned (VO), Native American-owned (NAO), Hawaiian Native American-owned, Alaska Native American-owned, Tribe-owned, Asian-Pacific-owned, Asian-Indian-owned, "other" minority-owned, small disadvantaged business-owned (SDB) and "emerging small business" (ESB).

[97] That assumption itself deserves closer scrutiny but is far beyond the scope of this study.

relationship between procurement complexity and distributional equity: dispute decision outcome. I explored the connection between dispute decision outcome and relational parity/contract reciprocity in the next section of this chapter.

C: Fairness as Reciprocity (Relational Parity)

To assess further the fairness of dispute decisions for diverse types of contractors, I asked: is Board intervention required in a disproportionately high number of cases to address contractors' perceived unfair treatment under a government contract? If so, are the decision outcomes balanced or disproportionately decided in favor of contractors, and particularly those belonging to identity categories often considered socioeconomically disadvantaged ("categorical identity" contractors)? Or are the success rates relatively equal across contractor type and socioeconomic categories, and between contractors and the government? Table 4.18 summarizes the findings by decision type, contractor identity by size, and procurement complexity factor.

After looking at all the decisions as a body, the vast majority (71.7%) were decided by either settlement (mutual agreement), or they involved a judgment that found some favor in both parties' arguments (whether the subject of merit was ether substantive or procedural). At this stage of the analysis, I did not designate the content of the decisions as either substantive or procedural in nature. Of the 62.1% of opinions that were orders, mostly representing a procedural dismissal by the Board, 96.2% were decided by mutual agreement of the contractor and the government. The percentages of orders decided either in favor of the government or for the contractor were essentially equal (2% and 1.8%). Of the 37.9% of decisions that were opinions—representing a merit judgment by a Board judge—31.3% involved a decision with the

adjudicated merit split between the parties' positions, with 37.3% being clearly decided in favor of the government, and 31.3% being decided clearly for the contractor. When examined proportionally, that government advantage in clearly successful decisions only represents fifty-four decisions (51 opinions and three orders), which amounts to 2.4% of all decisions.

Table 4.18: Outcome Percentages by Decision Type and Successful Party, 2014-2021

Decision Type	Settled/Mutual		Government		Contractor	
	Qty	%	Qty	%	Qty	%
All Decisions (2,258)	1618	**71.7**	347	**15.4**	293	**13.0**
All Opinions (855)	268	**31.3**	319	**37.3**	268	**31.3**
All Orders (1403)	1350	**96.2**	28	**2.0**	25	**1.8**
SB Opinions (489)	146	**30.0**	206	**42.1**	137	**28.0**
OTS Opinions (366)	122	**33.3**	113	**30.9**	131	**35.8**
SB Orders (701)	667	**95.1**	23	**3.3**	11	**1.6**
OTS Orders (702)	683	**97.3**	5	**0.7**	14	**2.0**
Fixed Price Opinions (710)	224	**31.5**	274	**38.6**	212	**29.9**
Cost-Based Opinions (112)	43	**38.4**	30	**26.8**	39	**34.8**
Other Pricing Opinions (33)	13	**39.4**	15	**45.5**	5	**15.2**
Fixed Price Orders (1,003)	959	**95.6**	25	**2.5**	19	**1.9**
Cost Family Orders (310)	303	**97.7**	2	**0.6**	5	**1.6**
Other Pricing Orders (90)	88	**97.8**	1	**1.1**	1	**1.1**
Definite Contract Orders (817)	784	**95.9**	18	**2.0**	15	**1.6**
Definite Contract Opinions (521)	156	**30.0**	196	**37.6**	169	**32.4**
Indefinite Contract Orders (566)	546	**96.5**	10	**1.8**	10	**1.8**
Indefinite Contract Opinions (322)	108	**33.5**	118	**36.6**	96	**29.8**
Construction Opinions (349)	137	**39.3**	124	**35.5**	88	**25.2**
Service Opinions (290)	85	**29.3**	100	**34.4**	105	**36.2**
Supply Opinions (215)	75	**34.9**	94	**43.7**	46	**21.4**
Construction Orders (506)	485	**95.8**	9	**1.8**	11	**2.2**
Service Orders (565)	545	**96.5**	11	**1.9**	9	**1.6**
Supply Orders (332)	319	**96.1**	8	**2.4**	5	**1.5**

In essence, the differences in the success rate between the government and the contractor in disputes decided by the Board are minimal. On balance, the dispute decisions appear to be relatively fair, if congruence between statistics is an acceptable indicator of fairness. I contend, however, that this finding does not indicate that there are no differences in contracting party behavior—even if those differences reflect situational nuances instead of prevalent tendencies—that are worthy of further analysis.

When considering contract complexity factors such as pricing structure, the government was much more successful when contracts were essentially fixed-price or strictly based on compensation involving simple calculations such as reimbursement for labor hours worked or by time and materials furnished. Contractors were more likely to make successful dispute arguments when contracts were cost-based (34.8%), and the likeliness of settlement was higher under cost-based (38.4%) or reimbursement-based structures (39.4%)—structures where the government shares more of the pricing risk. Disputes with fixed-price contracts were less likely to be settled (31.5% and 95.6%) and more likely to be decided in favor of the government (38.6% versus 29.9% for opinions and 2.5% versus 1.9% for orders). When considering definiteness, the outcomes are more balanced between the parties, with IDV disputes being slightly more likely to be settled, and with the government enjoying a higher success rate in all categories except IDV orders, where the parties were tied at 10%.

Outcomes in terms of subject matter complexity produced more varied results. Construction opinions showed more prevalence of split merit determinations (39.3%), but also reflected a higher success rate reflecting clear government merit (35.5% government versus 25.2% contractor). On the other hand, service opinions were less likely to reflect mutual merit

(29.3%), with the government (34.4%) and contractor (36.2%) demonstrating clear success rates that are almost equal, with contractors having a slight edge. Supply opinions produced more lopsided results, with the government enjoying a much higher clear success rate (43.7%) than contractors (21.4%), but with a higher percentage of split merit decided (34.9%) than for services (29.3%). For orders, the success rates between the government and contractors are mostly balanced across all subject matters. This is an interesting result, considering the differences in the proportions of contracts with complex subject matters being disputed at higher rates by small businesses (and small businesses representing disadvantaged categories) than the awarding percentages for those contractor types described by the Small Business Administration goaling reports (described earlier in Table 4.15).

When reverting to the initial identity categorical split between small businesses and OTS (other than small) businesses based on business size, the differences in outcomes were more pronounced, particularly for opinions. OTS opinions were settled at a higher rate between the contractor and the government than for small business firms (33.3% to 30%). Even more significantly, 42.1% of small business decisions that required a judge's opinion were decided in favor of the government, whereas 35.8% of OTS opinions were decided on behalf of the contractor. The government's success rate for OTS opinions was closer to the success rate by small business contractors when their disputes required Board intervention. OTS businesses were also more successful in the disposition of orders: 97.3% of orders were settled (as opposed to 95.1% for small businesses. Additionally, when orders required a Board judgment, OTS contractors were three times more likely to be successful (2.0%) than the government (0.7%). The success rate was essentially reversed for orders involving small business firms.

As a result of this finding, I further explored the relationship between subject matter complexity, business size, socioeconomic characteristics, and dispute outcome to see if there were any clearly disproportionate relationships. Table 4.19 describes all outcomes for all decisions across subject matter complexity in three slices: OTS, Small Business, and Small Business with "categorical identity" (defined in the previous section on "fairness as equity"), indicates a competitive or perceived socioeconomic disadvantage by the federal government).

Table 4.19: Outcomes by Business Size and Subject Matter Complexity (2014-2022)

Business Category Type	Settled/Split		Government		Contractor		Totals	
Other Than Small Business	#	%	#	%	#	%	#	%
All	805	**75.3**	118	**11**	145	**13.6**	1068	**100**
construction	273	**77.6**	40	**11.4**	39	**11.1**	351	**33**
services	343	**75.2**	45	**9.8**	68	**14.9**	456	**42.6**
supply	192	**73.8**	33	**12.7**	35	**13.5**	260	**24.3**
All Small Business								
All	813	**68.3**	229	**19.2**	148	**12.4**	1190	**100**
construction	349	**69.5**	93	**18.5**	60	**12.0**	502	**42.2**
services	290	**72.3**	66	**16.5**	45	**11.2**	401	**33.7**
supply	173	**60.3**	69	**24**	45	**15.7**	287	**24.1**
Small Business with Category								
All	621	**67.9**	175	**19.1**	119	**13.0**	915	**100**
construction	318	**69.3**	84	**18.3**	57	**12.4**	459	**50.2**
services	97	**33.6**	55	**19.0**	37	**12.8**	289	**31.6**
supply	96	**62.3**	33	**21.4**	25	**16.2**	154	**16.8**

In terms of subject matter complexity, decisions related to OTS business contracts reflected 33% construction, 42.6% service, and 24.3% supply contracts. Decisions related to small business contracts were 42.2% construction, 33.7% services, and 24.1% supplies. Decisions for contracts with small businesses having an identity category indicator were 50.2%

construction, 31.6% services, and 16.8% supplies. Small business contract disputes (42.2%), particularly among small businesses with a categorical identity identifier (50.2%), are more likely to involve construction. OTS contract disputes are more likely to involve services (42.6%). Interestingly, the dispute decisions percentage decreases for small businesses with categorical identity indicators when supply contracts are represented (from 24.1% to 16.8%).

How were outcomes associated with subject matter complexity and contractor size? In general, outcomes for OTS decisions were either settled or judged to have split merit at 73.8% or higher for all decisions. This was slightly higher than for small businesses, with an average rate of 68.3%. Success rates for OTS businesses and the government were approximately equal for construction, with more successes for OTS businesses in both services (a 5% difference) and supplies (1% difference). The ratio of construction to service decisions for OTS businesses and small businesses was essentially reversed (42% and 33%) with an equal percentage of decisions related to supply contracts for both (24%). The settlement/mutual adjudicated merit rate was lower for small businesses in general, with the government showing considerably more success (19.2%) than contractors (12.4%) across all categories. As observed earlier, construction contracts represented a much higher percentage of decisions for small businesses with an identity category indicator (50.2% compared to 42.2%) and a much lower percentage of supply contract decisions (16.8% compared to 24.1%). The successful outcome percentages for services between the small business contractors in general and those with a category indicator were more closely related (33.7 and 31.6%).

Next, I compared the percentages within the specialized categories of contractors (SDVOSB, HUBZone, 8(a), Woman-Owned, and Veteran-Owned) across subject matter

complexity and in terms of outcomes (depicted in Table 4.20). I looked for identifiable patterns in terms of successful party and contract subject matter type. I also compared the percentages I calculated to the comparable percentages for all associated decisions and dispute types.

Table 4.20: Outcomes by Socioeconomic Category/Subject Matter (2014-2022)

Business Category Type	Settled/Split		Government		Contractor		Totals	
SDVOSB	#	%	#	%	#	%	#	%
All	119	66.1	44	24.4	17	9.4	180	100
construction	50	68.5	15	20.5	8	11.0	73	40.6
services	46	67	19	27.5	4	5.8	69	38.3
supplies	22	59.5	10	27	5	13.5	37	20.6
HUBZone Small Business								
All	147	64.2	45	19.7	37	16.2	229	100
construction	107	65.2	31	18.9	25	15.2	164	71.6
services	24	64.9	8	21.6	5	13.5	37	16.2
supplies	16	57.1	6	21.4	6	21.4	28	12.2
8(a) Small Business								
All	214	74.0	50	17.3	25	8.7	289	100
construction	144	75.0	32	16.7	16	8.3	192	66.4
services	58	72.5	15	18.8	7	8.8	80	27.7
supply	11	58.8	3	18.8	2	12.5	16	5.5
Women-Owned								
All	188	69.0	57	21	27	9.9	272	100
construction	78	75.0	20	19.2	6	5.8	104	38.2
services	71	66.4	22	20.6	14	13.1	107	39.3
supply	35	64.8	12	22.2	7	13	54	19.9
Veteran-Owned								
All	178	69	53	20.5	27	10.5	258	100
construction	66	70.2	17	18.1	11	11.7	94	36.4
services	69	70.4	21	21.4	8	8.2	98	38
supply	40	63.5	15	23.8	8	12.7	63	24.4

As described in Table 4.18, the settlement rate for all decisions was 71.7%, the government's success rate was 15.4%, and the contractor's success rate was 13%. The settlement rate for small business decisions was 69.5%, the government's success rate was

18.5%, and the contractor's success rate was 12%. For small business construction, the settlement rate was 69.5%, with the government successful 18.5% compared to contractor's successes at 12%. Services were similar, with 72.3% settled, the government successful 16.5% of the time, and contractors successful 11.2%. Supply contracts featured the lowest settlement rate (60.3%), with the government successful 24% of the time compared with 15.7% for contractors.

Table 4.20 does show some interesting distributions in terms of socioeconomic identity. HUBZone small businesses (71.6%) and 8(a) small businesses (66.4%) produced almost twice as many dispute decisions for construction than SDVOSB, VO, and WO businesses, but at much lower percentages for service and supply contracts. In general, the government was more successful in its disputes with "categorical" small businesses, but I did not discern any clear, consistent patterns in the differences that pointed to clear, systematic "unfairness" in contactor treatment based on identity. It is impossible to say, without studying the decision texts more closely, that any differences/disproportionate distributions currently described cannot potentially be explained by the sheer difference in numbers of prime contracts awarded between OTS businesses, small businesses, and those small businesses belonging to "special" categories.

To test my findings regarding the outcomes of the dispute decisions and their relative fairness, I turned to the Board's annual reports to find comparable data to confirm my analysis. As I described earlier, review of the decision texts revealed that there is often no one complete "winner" or "loser" in each case. Decisions are frequently split, essentially amalgams of favorable and unfavorable rulings made in response to portions of each party's argument. As a

result, my assessment of the "mutuality" of merit in split decisions (particularly for opinion decisions), is more subjective than other factors I was able to analyze in the present chapter. Fortunately, the Board includes a statistic in its annual reports that indicates it "found merit in whole or in part" in a certain percentage of the dispositions decided on the basis of "merit." The Board reports its workload by the resolution of an entire case, which often includes multiple decisions. Table 4.21 summarizes the Board's self-reported workload, which included statistics related to case disposition (the Board reports cases—which can include multiple decisions) instead of individual decisions).

Table 4.21 ASBCA Self-Reported Case Workload Summary, 2014-2021

Cases	2014	2015	2016	2017	2018	2019	2020	2021	TOTALS
Docketed	708	668	644	571	490	418	497	400	4396
Cases Disposed	535	647	654	678	559	506	363	391	4333
Sustained	60	64	76	80	96	73	65	68	582
Denied	49	57	57	59	43	81	58	61	465
Dismissed	426	526	521	539	420	352	240	262	3286
Ruled on Merits	109	121	133	139	139	154	123	121	1039
% Merit in the Decision	55.0	52.9	57.1	57.6	69.1	47.7	52.8	52.7	55.3

Between 2014 and 2021, the average percentage of judicial dispositions that found merit in the appeal was 55.3%, meaning that in a little over half of the cases requiring a decision by a Board judge, the judge found some justification for the appeal of a Contracting Officer's Final Decision (COFD) and the contractor's decision to lodge that dispute. In other words, the Board found support for a contractor's assertion of unfair treatment in slightly more than half of its decisions. Less than a quarter (24%) of the cases disposed (1,039/4,333) between 2014-2022 received a judge's decision on the merits of the dispute. The vast majority of cases were disposed ultimately by a Board dismissal (76%), which is roughly congruent with

my finding that 71.7% of decisions were resolved by a mutual agreement/split merit. Without returning to the texts for more clarity and illumination, however, these data are not sufficient to form the basis for an assessment of fairness of the general disputes process in terms of the actual percentage of merit my findings represent. Further analysis and study are required of the Board judgments themselves to gain a better understanding of the Board's function and behaviors and of the role it plays in achieving fairness in the federal procurement system.

D. Summary of Findings

What can be gleaned from the description of findings from the dispute decisions metadata and the associated discussion of comparisons and analysis reported in this chapter? At the beginning of this chapter, I asked three questions:

1) Is the disputes process fair in terms of competition? (equality);

2) Is the disputes process fair in terms of the proportional distribution of disputes across demographic and categorical lines? (equity); and

3) Is there a relationship between procurement complexity, contractor demographic characteristics/status, and the outcomes of disputes (reciprocity)?

After my analysis, I came to the following conclusions: In response to question 1 (equality), the dispute decisions represent contracts that have been heavily competed in mostly good to robust market conditions using ordinary, standard federal procurement procedures. I would describe procedural fairness in terms of the accessibility of contracting opportunities for these disputed contracts as good. For question 2 (equity), my evaluation shows that the data are less clear and require more qualification. Extending the discussion to question 3 (reciprocity), it does appear that equitable socioeconomic disparity—if it cannot be explained away as the

inevitable result of differences in award quantities—is exacerbated by the subject matter complexity of the contract (construction and services being more disputed than supply contracts). It also appears that there is some relationship involving contractor identity and the choice—by either the contractor or the government—to employ the formal disputes process to the point of requiring a judge's decision to resolve the case and to make a legally defensible evaluation of the fairness of a particular contractor's specific treatment by the government during contract administration.

There do appear to be a disproportionate number of dispute decisions involving contractors that are either small businesses or small businesses that can be classified in some way as having minority or contractually disadvantaged status in terms of socioeconomic demographics. The causality and the direction of that inequity are not clear simply from the dispute decision statistics, however, and could be explained or justified by comparison to characteristics of the award distributions (i.e., simple numbers of contracts awarded to distinct groups when dollar value of contracts is removed from consideration).

There are clearly higher numbers of small businesses and small businesses with categorical identity indicators represented in construction and service contracts. This suggests that relational complications stemming from subject matter complexity intersecting with perceptions related to contractor identity do impact a contract's disputability in ways that technical complexity (such as that represented by pricing structure and contract definiteness) does not. However, an analysis of the actual outcomes of disputes—not just the fact that a dispute/appeal was filed—does not show consistent unfairness in government behavior towards small businesses or small businesses with categorical identity indicators. On the

contrary, an analysis of the outcomes of Board judgments show that the government successfully defends its treatment of contractors before a nominally independent third party (the administrative judge) in a higher percentage of decisions than it pleads unsuccessfully.

The findings that this chapter reports show that disputes are more likely to occur in contracts with subject matters where performance can require more interpersonal interaction between the government and the contractor to complete. It also shows that these disputed complex contracts involve a disproportionate number of contractors who come from socioeconomically/contractually disadvantaged backgrounds. However, one possible explanation for the disproportionate distributions may be that they simply reflect, for example, that there are more fixed-price, discrete contracts awarded than cost-based contracts or from IDVs, which can be gleaned from GAO's annual procurement "snapshots." GAO's 2019 Snapshot reveals that fixed-price contracts accounted for 64% of federal contract awards; cost-reimbursement contracts represented 31.5% of federal contract awards in 2018 and 2019. The 2020 Procurement Snapshot shows similar percentages as 66.4% (fixed) and 29.6% (cost). The 2021 Snapshot includes data that can be easily limited to DOD and shows the percentages as 69.8% (fixed) and 29.4% (cost).

However, the snapshots reveal other interesting details that show the dispute decisions are not simply reflective of the awarding statistics as a whole. By far, more DOD contract dollars were awarded to OTS businesses than to small businesses, a fact reflected in the SBA annual "goaling" reports (80% to OTS businesses and 20% for small businesses between 2019-2021). As previously observed, dollars does not translate easily to quantities of contracts and can be an unreliable determinant of fair treatment both overall and in terms of individual contracts.

Regarding subject matter, the GAO snapshot only breaks the work types into services and supplies, with the dollar value of awards between the two being similar from year to year. Construction, unless it is being counted somehow as a professional or technical service, does not appear among the top awarded categories in terms of dollars. However, the services that do appear at the top of the list (professional engineering and technical services, health care, and logistics) are often considerably complicated, requiring professional certifications and principals with advanced degrees. On the supply side, contracts involving aircraft, ships, and intricate weapons systems appear highest on the list of awarded contracts. Unfortunately, comparing the subject matter complexity of awarded contracts with those that are disputed does not represent an easy or linear analysis and cannot be determined—at this point—from simply analyzing the disputed contract and awarded contract metadata in isolation from the contents of the dispute texts themselves.

Clearly, subject matter complexity is an important feature in a majority of the disputed contracts and contractor identity plays some role in exacerbating or amplifying that complexity. It is still unclear why or how these factors are more likely to cause the spirit of cooperational contract to fail disproportionately in the particular federal contract environment. To investigate these issues impacting contractual fairness further, I examined more closely specific contract decisions representing various subject matter complexity types. In Chapter 5, I analyzed the decisions as a body of text—in other words, what is known as a big "bag of words"—using both computational and qualitative textual analysis techniques to create a rubric for gauging the contentiousness of individual disputes and to understand their root causes. In Chapter 6, I use the results of that analysis in concert with the FPDS-NG reports metadata discussed in this

chapter and as described in Chapter 3's Research Design to gain a deeper understanding of what relational factors contribute to the contentiousness of specific disputes where a particular question of contractual fairness is raised. I conclude the dissertation with consideration of the implications, limitations, and future possibilities suggested by this research in Chapter 7.

Chapter 5: Computational Text Analysis

Using Topic Models to Find Reciprocity in the ASBCA Dispute Decisions

After completing the descriptive analysis reported in Chapter 4, I returned to the texts of the Armed Services Board of Contract Appeals (ASBCA) dispute decisions to continue my integrated quantitative and qualitative analysis of the meaning of fairness in federal procurement contracting. I used computational text analysis (CTA) to isolate specific dispute decisions for further study with the use of suggested Keyword-in-Context (KWIC) search terms suggested by the CTA results. In addition to isolating a search phrase ("good faith and fair dealing"), the CTA helped me identify common factors that can impact a contractor's perception of fairness during contract performance. I used my interpretive evaluation of the results to design a rubric for future use in analyzing reciprocity in contract disputes where accusations of fairness are not so clearly expressed. I describe my systematic qualitative textual analysis of the individual decision texts more fully in Chapter 6.

To generate the findings that I report and analyze in this chapter, I relied upon topic modeling, a type of CTA that uses semantic clustering algorithms and statistical word collocations to extract coherent themes from a "clean" collection ("corpus") of unstructured textual materials such as narrative legal documents. I also performed a classical "close" reading of the language included in the topic modeling results in order to connect it to a generalized version of specific contracting contexts. The combination of a quantitative method with classical hermeneutical techniques allowed me to connect my overall inquiry into fairness as a federal procurement phenomenon with specific research questions about how the elements of

equality, equity, and reciprocity interact to comprise fairness in the contract disputes environment.

This mixed methods approach also helped me observe how procurement complexities can amplify relational difficulties during contract administration. Topic modeling's quantitative elements added some verifiable rigor to my sample selection process and helped me test my assumptions for biases that might result from my practitioner experience as a former Federal contracting officer. Conversely, the qualitative analysis required to interpret the topic models deepened my understanding of what the disputes process communicates about conflict in federal procurement culture, particularly within the Department of Defense (DOD).

This chapter is structured as follows. First, I narrow the dissertation's research questions regarding the three aspects of contractual fairness to one particular element (reciprocity) for the textual analysis. In Part I, I briefly describe computational text modeling as a method and outline how I used software to generate "enhanced" topic models from the ASBCA decision corpus. I record the topic modeling results and then interpret the topics my clustering criteria produced to test their validity, and to gain further insight into what the materials may reveal.

In Part II, I use one specific topic model ("good faith breach") to narrow the dispute decisions sample and to analyze the remaining topic models. I then use that analysis to construct a rubric to guide future qualitative analyses in disputes where a breach of the duty of "good faith and fair dealing" is not expressly alleged. I conclude the chapter by summarizing how I will combine the proportional analysis from Chapter 4 with my interpretation of Chapter 5's topic models. I then use my findings from those chapters to perform a more complex

thematic qualitative textual analysis in Chapter 6 using texts where the specific phrase "good faith and fair dealing" does appear.

Part I: Computational Text Analysis

Whereas Chapter 4's descriptive analysis focused on analyzing the dispute decisions contract metadata in terms of equality (competition) and equity (demographics or contactor identity), Chapter 5's focus is reciprocity (relational parity) between contracting parties. Using topic modeling as a tool for reducing the dimensionality of the ASBCA disputes corpus, I searched for specific language that might describe contested issues of behavioral fairness in a legal setting. For example, when a contractor believes it has been treated "unfairly," how might that assertion be stated in a legal document? How would that particular behavioral "wrong" be described? What language would the complaint include?

In earlier chapters, I defined reciprocity as interpersonal fairness tendered between partners to achieve a shared goal through cooperative agreement and described it as a relational value occurring at the micro-level in collaborations between individuals, or in the case of federal contracts, between a private contractor and authorized government officials. It is relevant in situations where there is contractual "privity," or relational exclusivity, between two parties, and it should mirror the parties' behavior in meeting the goals (and spirit) of the written contract. In other words, it reflects the mutually assumed "win-win" approach described by Brown, Potoski, and Van Slyke on *Complex Contracting* (2013). In this dissertation, I link the importance of reciprocity as an element in contractual fairness to procurement complexity and dispute outcome. I interpret each dispute case as a contractor's assertion that the Government has not honored its obligation to treat that contractor with relational parity as a contracting

partner, resulting in a performance failure due to a breach of a promise by one of the parties to perform a required duty.

An early result of the CTA led me to a particular phrase, "good faith and fair dealing," which I recognized from the theoretical literature on contracts as referring to a well-established doctrine that can be readily associated with a conception of reciprocity. Though the phrase itself has deep historical roots in the common law of contracts, legal scholars argue that as an implied contractual "duty" it is difficult to describe with verbal precision. There is also some agreement in the practitioner literature that the phrase raises difficult questions in the federal contract environment.[98] In the following sections of Part I, I describe in detail how the computational text analysis enabled this insight, which I used to specifically select a sample of the dispute decisions for an evaluative qualitative textual analysis in Chapter 6.

A. CTA as a Method

Computational text analysis (CTA) refers to methods that employ "text as data" to study research problems. In the social sciences, CTA describes the use of computer software, machine-learning algorithms, and careful data preparation techniques to process massive quantities of words for the purpose of "discovery, measurement, prediction, and causal inference" about social and behavioral phenomena (Hollibaugh 2019; Grimmer, Roberts, and Stewart 2022, 4). The use of "text as data" as an empirical toolkit, a research approach encompassing a large family of methods and strategies, is becoming more widespread in the legal and behavioral science arenas. Top journals in public administration, political science, and supply chain management recently have published articles featuring assorted studies that use

[98] I continue this discussion about the duty of good faith and fair dealing at the beginning of Chapter 6.

words, linguistic structures, and documentary artifacts in large quantities as windows into diverse policy domains (Bansal, Gualandris, and Kim 2020; Frankenreiter and Livermore 2020; Hollibaugh 2019; Isoaho, Gritsenko, and Mäkelä 2021; Kauffmann and Haans 2021; Walker, Chandra, Zhang, and Witteloostujn 2019).

Though numbers are not necessary to produce substantive, quality research, their use for both description and analysis can enhance the impact of qualitative methodologies in the social sciences (Maxwell 2010). This benefit accrues considerably when that work examines dynamic, multilevel processes in complex organizations (Ballard, Palada, Griffin, and Neal 2021). In particular, computer-assisted qualitative analysis software (CAQDAS) and software-based semantic clustering based on word collocation have the potential to add rigor and depth to interpretivist approaches that use a combination of structured and unstructured texts as their primary sources of data (Kuckartz 2014; Mitchell and Schmitz 2021). Employing these tools and techniques here allows this research project to address partially a gap in the availability of comparative statistics for federal contract dispute cases across the three decision domains (armed services, civilian, and federal judiciary) (Howell 1999).

With CTA in general, the more words in the documentary corpora, the "better" the data. However, one of the challenges of working with massive quantities of text as data is the "high dimensionality" of the material. As subjects for precise research, documentary texts are "noisy" objects. Cleaning the data to make it useful for analyses is an expensive task in terms of labor. The choice of how to fine-tune the algorithms to process the data also requires skill, patience, and some subject matter experience (as well as practice) from researchers. One of the challenges of this project was how to benefit from the clarity that results from reducing the

dimensionality of many linguistically complex texts without relying upon the statistical generalizability of the results too heavily for locating such a "grubby" construct as fairness.

Topic Modeling is a form of CTA that uses semantic clustering algorithms to derive latent or hidden themes in large textual corpora that may not be immediately apparent to either experienced or casual readers. Words, their placement, concentrations, and collocations within individual texts are analyzed using various criteria to produce coherent topics that represent thematic undercurrents throughout the entire body (corpus)[99] of documentary artifacts. The words are given weights within these topics and within the corpora to signify their representativeness, prevalence, and significance within the corpus/corpora as a whole. Fortunately, CAQDAS can assist in formulating the search protocols, provided the researcher understands the choices involved when processing the text and the various benefits and limitations that may attach to those choices.

B. The ASBCA Corpus of Decision Texts Used for Analysis

The 3,548 ASBCA texts (2007-2021)[100] that were included in the entire corpus used for the topic modeling are summarized below in Table 5.1. I captured decision-specific information documentary metadata (such as legal representation, page length, deciding judge, decision subject, and decision outcome) for all of the decisions posted by the ASBCA between 2008 and 2021. Examining all of these decisions shows that most contractors (77%) were represented by professional legal counsel, either by an attorney internal to their organization or one from an

[99] A collection of texts is referred to as a "corpus" if the documents are homogeneous; they are called a "corpora" if they are from mixed sources or are differing types. The dispute decisions for the ASBCA constitute a corpus. Including the dispute decision texts for the Civilian Board of Contract Appeals would create a corpora.
[100] The page number totals will be skewed between 2007-2013 and 2014-2021 due to what I believe are omitted dismissed and settled decisions, which it appears the Board began posting in 2014. Further research is needed to confirm this speculation, though.

external firm. These decisions include 2,053 different contractor names as "appellants" and represent at least 2,370 distinct contract numbers involved in those disputes.[101] They consisted of 22,854 pages, had an average length of 6.44 pages, a maximum length of 296 pages, and a median length of two pages. They were decided by forty-four different judges.

Table 5.1: Description of Dispute Decision Texts

Decision Type	All Decisions	Not in FPDS	Foreign Owned	Domestic Owned
Orders	1730 (49%)	122 (3.4%)	203 (6%)	1405 (40%)
Opinions	1818 (51%)	259 (7.3%)	265 (7%)	1294 (36%)
Total	**3548**	**381 (10.7%)**	**468 (13%)**	**2699 (76%)**

C. Performing the Computational Textual Analysis

I cleaned the ASBCA dispute decision document data as described in Chapter 3's research design to produce a searchable corpus of the described texts. I then used a commercial text analysis program (QDAMiner) to record my preliminary hand coding and assessment of identifying features for each document to impose a common referent structure and used Wordstat 6 (designed to work with QDAMiner and also as a standalone program) to perform topic modeling on the corpus. Using proprietary algorithms, Wordstat allows the user to "preprocess" the texts imported and qualitatively coded in QDAMiner, design an "exclusion list" of words to not include in the analysis, and "postprocess" the data for display based upon the results of the user's choice of factor analysis types.

In QDAMiner, I opened Wordstat through the "content analysis" tab and selected the processing settings allowed by the program. In accordance with those choices, Wordstat lemmatized the texts, and excluded standard "stop words" drawn from American and British

[101] The actual name quantity is slightly higher, as 33 (1%) decisions (all of FOB) are listed as "Name redacted."

dictionaries, then calculated the word frequencies for the texts. The word frequency report was limited to the words that appeared at least twenty times within the entire corpus and limited to three hundred words selected based on their TD**IDF ratio. After initial data processing using those search criteria, I added words and abbreviations to the exclusion list (e.g., common agency names and simple legal terms) in order to eliminate unnecessary noise to the results and then re-processed the data. The final combined text used to generate the topic models included 3,543 cases (each "case" is a dispute decision). The data included 245,431 paragraphs, 551,642 sentences, 7,178,315 severable words (or "tokens"), and 43,930 word "forms." Sentences contained an average of thirteen words, paragraphs contained an average of 29.2 words and each decision had an average of 2,026 words. The percentage of words excluded from the analysis was 52.9%. The topic models were extracted from that textual material.

D. Generating the Topic Models

Although I use several quantitative techniques to guide the textual and content analysis, I primarily used numerical information such as word frequency or topic dispersion proportion across of all cases in the corpus to direct the emphases of my searches as well provide a measure of validity. For example, the themes that the topic models produced, which in turn were considered in constructing the rubric I used to gauge dispute contentiousness, were represented by comparable percentages across all cases. They also were supported by appropriate coherence measures for the majority of the words identified in the QDAMiner-derived topic. In some instances, the numbers confirmed that my hunches did not necessarily reflect personal biases. In others they suggested that I analyze specific word combinations such as "bad faith," which then led me to the phrase "fruits of the contract," which further informed

my analysis. I next describe the processes and decisions I made to conduct a textual study that complements the analysis conducted in Chapter 4 and continued more precisely in Chapter 6.

One of my first decisions involved how many topics to extract from the documentary corpus. Instead of using a numerical formula to gauge topic number "fit," I used an external marker to determine an appropriate number of topics: the contracting officer (CO) "competencies" listed in the Contract Management Book of Knowledge (CMBOK) produced by the National Contract Management Association (NCMA). I used these competencies to determine an appropriate number of topics because they represent the number of subjects determined by contracting professionals to comprise professional expertise in federal procurement and are the basis of the National Contract Management Association's (NCMA's) well-established certification program. This number produced a manageable set of topics for closer study, and using a numerical formula to calculate the optimal number of topics to fit an unstructured body of texts did not seem appropriate for this relatively small and uniform corpus. While the decisions do not utilize a structured text format, the subject matter is highly constrained to a specific legal and administrative setting and reported by document in a required, consistent style. Finally, I relied upon the competencies because I purpose was not to use the topic models to uncover hidden or latent themes, but instead as a tool for assessing the corpus, and to see if the texts reflect my subject matter knowledge.

I tested different modeling criteria to extract between 15 and 25 topics from the ASBCA decisions. After reviewing several search results, I determined twenty topics would provide sufficiently coherent material for analysis. The texts were segmented and analyzed by paragraph (with .20 loading) according to my criteria. The generated word clusters were based on a

random seed number for factorization. I instructed Wordstat to use "topic enrichment" in the report, which provides a summary topic title based upon its calculations of word collocations.

Wordstat's characterization of themes as topic models is based upon its mathematical assessment of a range of factors identified from a cleaned "bag of words" that the researcher provides through uploaded texts. Wordstat generates topics based on word frequencies, specified word collocation parameters, and dispersion across a discrete number of measurement units (such as by document/"case," or by sentence, or by paragraph). In the absence of multiple concurrent coders, this automated program feature gave me a tool to compare my assessment of the topic titles and the associated words with a separate set of research eyes. I selected the default highest confidence level and used topic weights and NPMI (normalized pointwise mutual information) scores as coherence measures using a non-negative matrix factorization cluster analysis. Wordstat identified the top ten words comprising twenty distinct topics and weighted word frequency. Table 5.2 includes the generated topics.

Computer-generated topic models still require interpretation by a human coder with some subject matter knowledge (Hollibaugh 2019; Grimmer, Roberts, and Stewart 2022). I needed a systematic empirical approach to understand better how the generated topic models reflected contractual fairness, and specifically reciprocity, within the dispute decision texts. I mined the topic models for concepts and categories I could use to capture elements impacting reciprocal behavior within the decision texts. In Part II of this chapter, I interpret the topic models and explain how I used that interpretation to develop the profile matrix and coding rubric for the thematic qualitative analysis conducted in Chapter 6 (Kuckartz 2014, 66).

Table 5.2 Wordstat Enriched Topic Model from ASBCA Texts						
No.	**Topics**	**Keywords**	**Coherence (NPMI)**	**Frequency**	**# of Cases**	**% of Cases**
1	FEDERAL RULE FEED	feed, cir, court, federal, case, law, reasonable, hold, contractor, party	0.333	24696	1572	44.37%
2	CONTRACT REQUIREMENT PROVIDE	provide, requirement, require, section, specification, paragraph, contractor, clause, include, provision	0.272	50258	1597	45.07%
3	GOOD FAITH BREACH	breach, duty, count, good, allege, complaint, sufi, damage, fail, argue	0.277	11176	1318	37.20%
4	FIX PRICE OPTION YEAR	price, option, fix, quantity, clin, award, period, estimate, unit, total	0.298	26968	1422	40.14%
5	ARTICLE TEST SAMPLE	test, sample, article, production, inspection, psi, quality, deliver, delivery, report	0.283	10704	874	24.67%
6	CERTIFY CLAIM JURISDICTION	jurisdiction, cda, claim, lack, decision, final, officer, file, deny, certify	0.369	49261	1829	51.62%
7	REHOSTED MOCAS	mocas, aeon, system, program, software, deliver, test, data, clin, technical	0.242	2287	284	8.02%
8	COMPLETION DATE DAY AFTER	delay, completion, day, time, work, extension, complete, period, schedule, extend	0.328	43337	1497	42.25%
9	EXPRESSLY UNALLOWABLE PENALTY	unallowable, penalty, raytheon, cost, audit, fy, proposal, incur, compensation, subject	0.317	19115	1033	29.16%
10	TERMINATION FOR CONVENIENCE TERMINATE THE CONTRACT	termination, terminate, default, convenience, notice, settlement, failure, clause, fail, officer	0.299	12848	880	24.84%
11	LABOR COST HOUR	labor, hour, testimony, record, evidence, cost, rate, hear, testify, expert	0.245	27015	1419	40.05%
12	APPELLANT SUBMIT REQUEST	request, submit, response, send, respond, receive, january, file, march, february	0.264	45413	1962	55.38%
13	DLA CHIEF TRIAL SUPREME	dla, supreme, truck, pwc, iraq, defense, delivery, mod, deliver fuel	0.222	5581	761	21.48%
14	SUMMARY JUDGMENT MATERIAL FACT	judgment, summary, fact, matter, material, law, entitle, deny, party, issue	0.362	31090	1795	50.66%
15	DESIGN BUILD CORPS OF ENGINEER	design, corps, construction, project, engineer, site, build, soil, rfp, expert	0.261	17189	1458	41.15%
16	PARTY AGREE SETTLEMENT AGREEMENT	agreement, modification, party, release, agree, language, term, sign, settlement, mod	0.273	19285	1668	47.08%
17	EQUITABLE ADJUSTMENT	adjustment, equitable, rea, increase, change, request, cost, price, claim, clause	0.295	24449	1378	38.89%
18	FACILITY CONTRACT	facility, equipment, plant, property, lease, purchase, profit, expense, fee, maintenance	0.253	10090	1106	31.22%
19	PROGRESS PAYMENT TOTAL AMOUNT	payment, pay, amount, invoice, inter, total, claim, settlement, progress, cost	0.273	37514	1722	48.60%
20	PIPE INSTALL	pipe, install, water, foot, wall, concrete, line, area, installation, bae	0.222	5581	761	21.48%

Part II. Interpreting and Categorizing the Enhanced Topic Models

In general, the extracted topics accurately and coherently reflected important aspects of contract administration and the ASBCA contract disputes environment. In federal procurement contracts, the government's duty is to provide timely responses to contractor questions/needs, and to cooperate reasonably with its requests for accommodation and coordination. The government must pay contractors promptly according to the terms of the contract, which are detailed in pricing schedules and pertinent clauses included in the express contract document. Contractors are expected to provide/produce a good or service at varying levels of complexity in exchange for agreed-upon compensation ("consideration") within the agreed-upon delivery constraints ("contract time"). After review, I concluded that the topics generated from the decision texts corpus clearly reflect this basic understanding of what each party is expected to provide reciprocally during federal contract administration.

However, four of the enhanced topics produced by Wordstat, though internally coherent, appeared to refer specifically to a small number of all disputes cases and were related clearly to several distinct decisions. Several of the terms Wordstat associated with these topics have relevance to many other disputes, which involve appeals related to the specifics of order details, supply deliveries, specifications/requirement documents, and the various bureaucratic and regulatory requirements that come with having a federal contract (particularly large contracts with other than small businesses). Those word clusters and their concentrations still communicate meaningful words and concepts, even if those specific "enhanced" topics are referentially limited.

I removed these topics from my coding schema, though I did use them to help me understand how semantic clustering occurs through the program's algorithms. These topics were "Rehosted MOCAS" (mocas, aeon, system, program, software, deliver, test, data, clin, technical); "DLA Chief Trial Supreme" (dla, supreme, truck, pwc, iraq, defense, delivery, mod, deliver, fuel); "Pipe Install" (pipe, install, water, foot, wall, concrete, line, area, installation, bae); and, finally, "Expressly Unallowable Penalty"(penalty, raytheon, cost, audit, fy, proposal, incur, compensation, subject).[102]

A. "Good Faith Breach"

The first topic that explicitly referred to the concept of fairness in a contract setting was one that Wordstat identified as "Good Faith Breach." The top ten words associated with this topic were: breach, duty, count, good, allege, complaint, sufi,[103] damage, fail, and argue. In addition, Wordstat associated this topic with several multiple word phrases: imply duty, fair deal, good faith, and fair deal, allege breach, and "Count III." This topic was also the third highest ranked topic based upon calculations of cluster coherence, total word frequency, and dispersion of the clustered topic among all cases, represented quantitatively in Table 5.3.

[102] "Rehosted MOCAS" refers to appeals filed by AEON Contractors in the termination for default case for the company's failure to deliver a fully transformed software platform (called the "rehosted MOCAS) to DFAS by the contract due date," a failure attributed by the Government to the company's lack of sufficient testing for data transfer. "DLA Chief Trail Supreme" refers to a cluster of cases, primarily with foreign-owned companies like PWC and Supreme Foodstuffs Gmbh to deliver goods at overseas locations, a DOD function primarily assigned to the Defense Logistics Agency, or DLA). These goods are primarily commodity items with frequent price fluctuations related to market conditions). "Pipe Install" refers primarily to a ship renovation contract between the Army and BAE Shipyards Services that included a dispute over quantities of pipe material the company was required to install to perform the contract." Interestingly, all three of these of the specific cases also invoked the doctrine of "good faith and fair dealing" in their dispute decisions texts. The fourth removed topic, "Expressly Unallowable Penalty," also referenced a specific contractor (Raytheon) and is related more narrowly to decisions involving cost-based contracts, even if it appears in a much higher percentage of cases than the other three removed topics.

[103] The word "Sufi" appears to refer to a set of specific ASBCA decisions related to one contractor, SUFI Network Services, Inc., ASBCA No. 55306, that were decided in 2008.

Table 5.3: Cluster Coherence and Associated Word Frequencies per Enhanced Topic				
Enhanced Topic	**Coherence (NPMI)**	**Frequency**	**# of Cases**	**% of Cases**
good faith breach	0.277	11176	1318	37.20%

"Good Faith Breach" was also the only topic that specifically included words with normative overtones like "breach," "damages," "fail," and "good," regarding individual contract behavior.

The doctrine of the implied duty of "good faith and fair dealing" is a well-established principle of behavior in traditional contract law that can be readily associated with questions of relational fairness. It is also a particularly apt construct—but controversial and difficult to capture—in the federal procurement context.[104] I used the phrase "good faith and fair dealing" to select cases for further analysis with the content analysis rubric I developed my analysis of the relationships between the other enhanced topics. I used a series of keyword and phrase searches (including "bad faith," fruits of the contract," and "entitlement" and "entitlement and quantum," suggested by various operations within the Wordstat program using an iterative refinement process) to narrow and group the texts into three distinct samples for a nuanced analysis of the concept of reciprocal fairness. I then used these samples to analyze the impact of subject matter complexity on contract relationships, and also to explore how diverse types of contractors' experience reciprocity in federal procurement contracts through the lens provided by the formal disputes environment.[105]

[104] I believe "Count III" refers to specific complaints, where an alleged breach of the implied duty of good faith and fair dealing has been made a specific element of the appeal, which are described in the complaint as "counts."
[105] As "good faith and fair dealing" guides much of the discussion and analysis I perform in the qualitative content analysis of the texts, I will discuss the doctrine in more detail at the beginning of Chapter 6.

Early tests where I applied different topic modeling algorithms from the Wordstat software to the dispute decisions corpus yielded key insights into those questions of how reciprocal fairness might be characterized in a legal document. Various search protocols produced coherent topics related to the phrases “good faith and fair dealing” and “good faith breach,” and suggested the combination of words “bad faith” be considered for more examination. Further analysis of language in close proximity to those two phrases led me to discover the repeated incidence of two other phrases in the linked decisions: “fruits of the contract” and “bait and switch.” These co-occurrences highlight the importance initial expectations and communicated requirements play in how the parties to a contract perceive the “fairness” of their treatment by the other party. Severely thwarted expectations tend to result in allegations of bad faith and unfair practices.

After returning to the theoretical literature related to both general contract law and federal contracts, I learned that the specific phrase “good faith and fair dealing” refers to an interpretive concept (sometimes referred to as a “default rule”) used by courts to denote alleged instances of behavioral breaches in relational parity by either party to the contract. Those words suggested an apt opportunity to study reciprocity in the context of legal documents. Upon further study, I also found that use of the phrase “good faith and fair dealing,” as well the related phrase of “bad faith,” communicates several shades of difference between behavioral expectations in the federal procurement context and in contracts where both parties are commercial actors.

I used the phrase “good faith and fair dealing” to segregate specific decisions from the corpus with a targeted Keyword-in-Context (KWIC) search (what I refer to in the next Chapter as

the "All Text" sample). I further winnowed the decision text results by focusing on contractual relationships where at least one decision produced a final judgment by a Board judge on the subject of "entitlement," which I refer to as the "Relationship" sample.[106] In my overall qualitative coding of the characteristics of each dispute decision, "entitlement" represented a decision where the Board entered a final judgment on behalf of one of the parties that specifically ruled on the merits of the case. These decisions also indicated whether or not the Board determined that either party was entitled to monetary damages as a result of a contractual breach.

Once I had identified dyads for closer analysis, I organized decision groups from those results based upon subject matter complexity (construction, service, and supplies), as suggested by the results of Chapter 4's proportional analysis. I then used the coding rubric I developed from the other topic models[107] to perform a content analysis of all the decisions within my "good faith and fair dealing" sample. Using this semantic structure to analyze reciprocity allowed me to compare and contrast aspects of a complete range of decisions for a relatively small number of contractor-government dyads (which I refer to in Chapter 6 as the "Merit" sample. Narrowing my analytical focus to select texts helped to gain a deeper understanding of the relationships described by the texts and the legal record.

B. Categorizing the Remaining Enhanced Topic Models

Next, I separated the remaining topics and their associated words and phrases into smaller groups for further analysis. I reconfigured those groups into four categories: 1)

[106] I describe the sample in detail at the beginning of Part III of this chapter.
[107] Fully described in the next part of this chapter.

Structural Dispute Requirements; 2) Contract Performance Expectations, 3) Frequent or Durable Sources of Dispute, and 4) Appeal Outcomes. The divisions, subdivisions, and relationships between these four categories are described and discussed under each title below.

First Category: Structural Dispute Requirements

The enhanced topic models drawn from Wordstat to make this category were "federal rule feed," "appellant submit request," and "certify claim jurisdiction." In combination, these topics describe the basic procedural and structural dispute requirements of the ASBCA environment. Each of these topics shared similar dispersion proportions within the corpus and have similar measures of both topic coherence and word frequency. Table 5.4 compares the clusters/topics quantitatively.

Table 5.4: Cluster Coherence and Associated Word Frequencies per Enhanced Topic

Enhanced Topic	Coherence (NPMI)	Frequency	# of Cases	% of Cases
federal rule feed	0.333	24696	1572	44.37%
appellant submit request	0.264	45413	1962	55.38%
certify claim jurisdiction	0.369	49261	1829	51.62%

In concert, the words comprising these topics describe a guaranteed administrative structure for redress/justice to citizen contractors. This structure allows the ABSCA to provide contractual justice to both the government and to contractors in accordance with strict enabling laws and well-established precedent, and also supports contractors' access to an empowered third-party authority (the federal judiciary) that ultimately can review and reverse administrative branch decisions. The pillars of this structure are access to an appropriate forum for administrative review and judicial oversight, common communication, and procedural expectations for both parties (timely and clearly described), and a uniform, established format

for adjudication of properly lodged pleadings. The categorical relationship between these concepts is pictured in Figure 5.1.

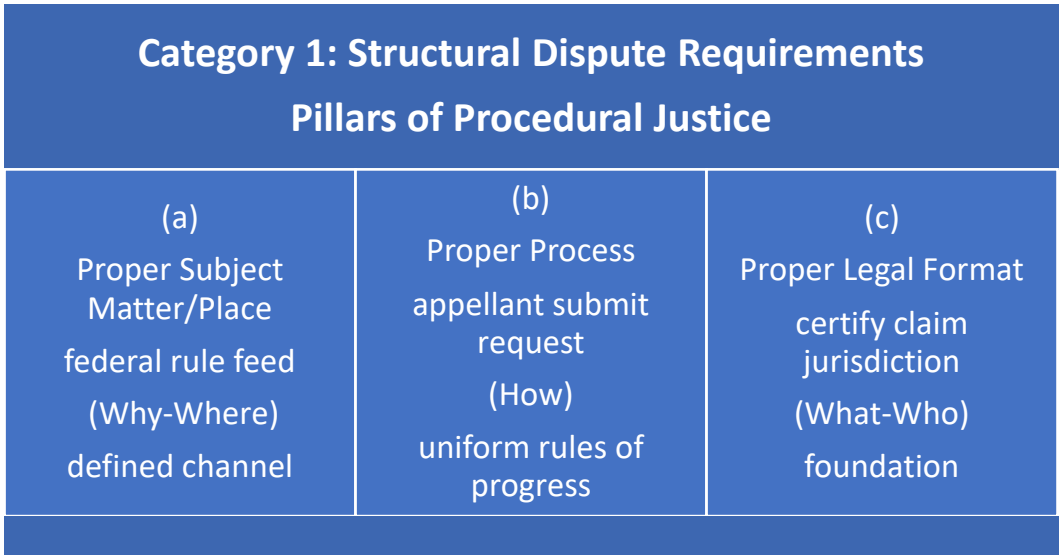


Figure 5.1: Structural Dispute Requirements in Category 1/Pillars of Procedural Justice

1(a). Subcategory: Enhanced Topic "Federal Rule Feed"

The heart of this topic is the establishment of a forum and standards for review/oversight of contracting officer's decisions. The first ten words associated with "federal rule feed" were: feed, cir, court, federal, case, law, reasonable, hold, contractor, and party. This topic describes the forum involved in these disputes (cir, court, federal) and the process required for the contracting parties to follow. First, an appeal must be submitted, at which point it is assigned a "case" number. The contractor's appeal "feed"(s) the adversarial process that governs the proceedings. These words also refer to the standard that must be met for a successful appeal (reasonable interpretation of contract), and to the ultimate result of the dispute, which is a judge's decision dismissing, denying, or sustaining the contractor's appeal. "Cir" refers to "circuit," pertaining to the Federal Circuit, the specific courts where federal

contract cases can be either litigated form the beginning, or where the appeals of ASBCA decisions can be heard (U.S. Court of Claims, U.S. Court of Appeals, the U.S. Supreme Court).

Decisions of the Board and the Court of Claims can feed decision appeals to the Court of Appeals, and a successful appeal of a Board decision to the Court of Appeals results in a case being remanded to the Board with a description of the required corrective action. All cases are decided according to an administrative judge's reasonable interpretation of the applicable laws and rules (both procurement regulations and the procedural Rules of the ASBCA).[108] Judges representing the Board "hold" their judgments in the express decision made, and their holding outlines any further action to be taken by the parties—either the government, the contractor, or both—who are the only entities with legal standing to seek the Board's specific judgment.

1(b). Subcategory: Enhanced Topic "Appellant Submit Request"

The heart of this topic relates to timely and reciprocal procedural justice. The first ten words associated with the topic "appellant submit request" were: request, submit, response, send, respond, receive, file, January, march, and february. This list captures the essence of the contractor-driven and adversarial back-and-forth nature of the processes reviewed before the Board. The "appellant" is always the contractor, whose dispute of a "Contracting Officer's Final Decision" (COFD) begins the formal appeal process when properly submitted for the Board's review. The legal process then consists of an exchange of complaints and responses to each party's assertions, including the submission of the government's "Rule 4" file, which constitutes the government's basic documentary record defending the Contracting Officer's original

[108] There are 24 Rules and 2 Addenda that total twenty-seven pages. The first Addendum describes rules related to Equal Access to Justic Act (EAJA) motions, and the second outlines Alternative Dispute Resolution guidelines. https://www.asbca.mil/Rules/forms/Final%20Rule%20Formatting%20pgl.pdf#page=1

decision. Included in the correspondence between the appellant, the government, and the Board will be various requests and responses to requests made in timely accordance with the Board's procedures. Three of the words refer to actual calendar months (January, February, and March),[109] representing the specific function of time in the process of submissions, responses, and replies.

This pattern also describes the exchange of correspondence and communications between the contractor and the contracting officer before a COFD is issued and a contractor chooses to file its appeal, which will be included in the Rule 4 file for the Board's assessment. Skipped steps and ignored responses at any stage can lead to denials and dismissals. Gaps or omissions in the back-and-forth exchange between the parties either signifies or creates problems when attempting to establish entitlement to damages. The key to this topic is understanding that progress through the system must be characterized by responsive, reciprocal, timely (ad documented) interactions between the parties.

1(c). Subcategory: Enhanced Topic "Certify Claim Jurisdiction"

The heart of this topic concerns establishing a proper format for pleading entitlement before the Board, and for establishing the authority of the Board to render judgment in a case (right format/right law). The first ten words associated with the third topic "certify claim jurisdiction" were: jurisdiction, cda, claim, lack, decision, final, officer, file, deny, and certify. These words communicate the importance of each party providing the correct documentary

[109] I also suspect the prevalence of the winter months listed here probably says something about the seasonality of the disputes process in response to Government time, such as when a fiscal year ends on September 30, or to calendar time (winter months are when many contracts may be closed down do to outside conditions), but further study would be required.

content framing the dispute in a defensible format and for them also to follow the appropriate decision process that creates jurisdiction.

Questions about format and jurisdiction—which establish whether or not the Board has the legal authority to make a binding judgment in the case, and if the case is officially "ripe" for that authority to vest—are some of the most frequent reasons supporting a Board decision or a motion to dismiss by either the Board itself (*sua sponte*) or by one of the parties. The Board receives jurisdiction from the "CDA," or Contract Disputes Act of 1978. Under the CDA, a denied contractor claim or an asserted government claim for money damages (for overpayment reimbursement, penalties, termination costs, etc.) is necessary to create the basis for a contractor's appeal to the Board. Claims must be denied with a Contracting Officer's Final Decision (COFD) before a contractor has the standing to file its formal appeal. Claims over a certain dollar amount must contain a certification addressing specific content by the contractor. The lack of a COFD or of a proper certification means that the Board does not have jurisdiction to decide the case, which would result in an appeal being dismissed.

Second Category: Contract Performance Requirements

The second category of grouped topics pertains to the substance of reciprocal contract requirements, stemming from a topic Wordstat described as "Contract Requirements Provide." I named this category "Contract Performance Requirements." Next, I divided the topic into two groups: Contactor Requirements and Government Responsibilities, then subdivided those groups into a shared bifurcation for "Express" and "Implied" expectations. The categorical relationship between these concepts is pictured in Figure 5.2.

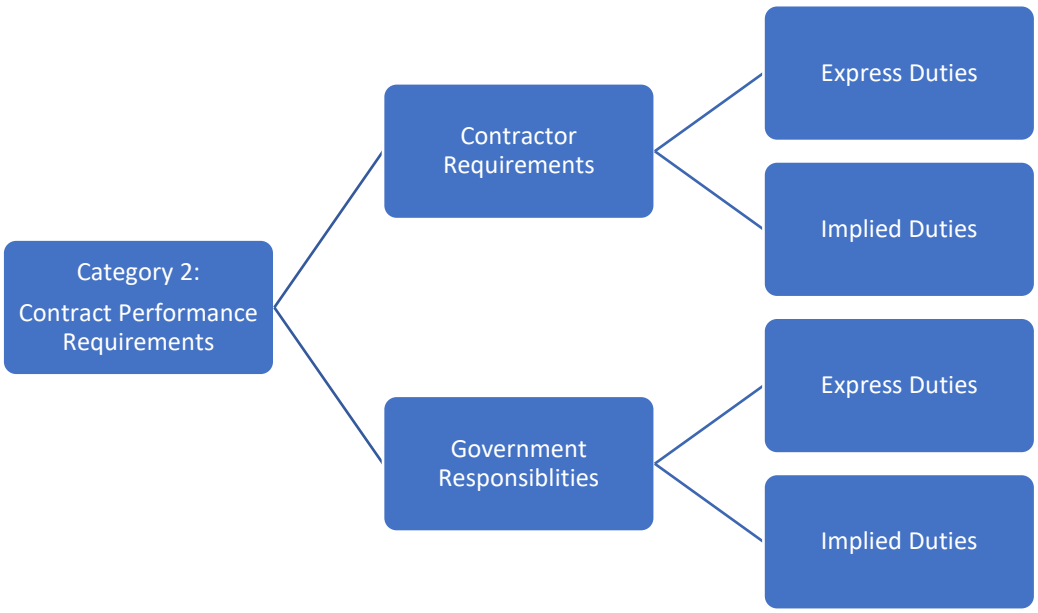


Figure 5.2: Conceptual Relationships in Category 2/Contract Performance Requirements

2(a). Subcategory: Contractor Requirements

In essence, contractors are expected to satisfy the government's needs in terms of 1) quality and 2) timeliness. Two of the remaining enhanced topics refer to those performance requirements: that the work be completed, furnished, or delivered to an acceptable level of quality (as specified in the contract), and that it be completed, furnished, and delivered within the agreed upon timeframe. Both contractor requirements are represented in the topic "Article Test Sample" (test, sample, article, production, inspection, psi,[110] quality, deliver, delivery, and report), which refers to the common specification that complex supply contracts may demand a product be tested during initial production runs (test, sample, article, production, inspection, and quality). The enhanced topic title specifically refers to product expectations, but the words included in the topic list also will refer to service and construction contacts, which can require

[110] The abbreviation "psi" can refer to per square inch."

testing of materials and samples of products before they are incorporated into a building, vehicle, or physical system. This topic applies to contracts of any subject matter in that it refers to contractually provided products or services that are subject to measurement ("psi"), inspection, (performance) verification, and documentation.

Additionally, a contract's requirements should be delivered on time, or by the date stipulated, represented by "Completion Date Day After" (delay, completion, day, time, work, extension, complete, period, schedule, and extend). Three of the words—delay, extension, and extend—specifically reference timing problems that frequently lead to acceptance disputes, denied requests for equitable adjustment, and appeals. "Schedule" can relate to a contract's "schedule of Items," which governs pricing and compensation, or it can refer to delivery and performance requirements, inspections, and other issues related to time. Payment is usually due upon contract completion or completed delivery during required periods of performance (a calendar year, an option year, a quarter, or some other designated aggregation of time).

2(b). Subcategory: Government Responsibilities

The government is responsible 1) for being clear and consistent with its expectations (as articulated in the documentary artifact of the contract), and 2) for compensating the contractor as it has promised to do in a timely fashion (expressly stated and required by law) and in accordance with the legally appropriate standards of equitable consideration. Contractors must document their entitlement to either complete payment or an "equitable adjustment" of the original consideration agreement in accordance with a reasonable interpretation of the regulations. The requirement for specificity and clarity is represented by the enhanced topic "Contract Requirement Provide," and the words "section, specification, paragraph, clause,

include, and provision" which refer to the contract documents. When a contractor files an appeal or the government defends against one, both contractors and the government must reference specific language within the contract, and in the legal filings. They must refer to elements of the text where that language is found, including in boilerplate provisions and clauses that government contracts frequently "incorporate by reference." This reference can be to a regulation or other governing document, whether legal or technical (as opposed to including the document in the "full text" of that specific contract's pages, which literally can make the physical contract difficult to manage).

The responsibility of the government to provide payment/compensation at contractually established milestones is represented by "Progress Payment Total Amount" (payment, pay, amount, invoice, inter, total, claim, settlement, progress, cost). Payments are to be made in response to a contractor's proper "invoice" or justifiable "claim" for "costs" as appropriate. Payments are made according to the contract's pricing and payment structure, and can be made based on submitted costs, documented progress, on an interim basis, or according to negotiated settlements in response to claims. Sometimes a request for payment (an invoice) is described as a "claim" itself, since it represents a contractor's assertion that it is due (entitled to) the sum certain amount listed on the invoice (which cannot be delivered or accepted verbally). Payment disputes, particularly for complex contracts, may also involve arguments over total amounts due, and at what point invoiced amounts are due during (or after) the contract is complete. These disputes are more likely if partial payments have been made, or if the government has withheld percentages of invoiced progress payments from the contractor

to protect itself in some way (only allowed by certain contract clauses that must be included at contact formation and not in excessive amounts).

The requirements and responsibilities described above can exist in two forms: by express language, or in accordance with what are known as "implied" terms of behavior that represent common expectations in contract law (Feldman 2017). These implied terms can include such concepts as "the duty of care," "the duty of good faith and fair dealing," the doctrine of superior knowledge, the duty of cooperation, and non-interference. These implied expectations, which are the product of custom and practice, common law, or even by statute, are also sometimes known as "implied warranties," "default rules, or "background rules," (Craswell 1989, 489-90).

Third Category: Frequent Sources of Dispute

Several of the remaining enhanced topics are descriptive of specific problematic contract drafting (or interpretation) issues or can be associated with the most drastic consequence of a contract performance failure: a termination for default. The most frequent sources of dispute are tied to contract price and cost disagreements, as well as problems that impacted performance/delivery within the required contract time.[111] Those sources of dispute are represented in the topics "Equitable Adjustment" (adjustment, equitable, rea, increase, change, request, cost, price, claim, and clause) and "Termination for Convenience/Terminate the Contract " (termination, terminate, default, convenience, notice, settlement, failure, clause, fail, and officer).

[111] A common aphorism of federal contracting is that in fixed price contracts, contractors bear the risk of cost/price problems, and that the Government bears the risk of "time," or that it will have its needs met when it needs them. In addition to cold hard assets, contract time is a common element of consideration in terms of contract value important to both the Government and its contractors.

During the performance of most fixed-price contracts (the bulk of the contracts that were appealed to the ASBCA disputes process), submitting an official "request for equitable adjustment" (REA) for approval by the contracting officer is the only way a contractor can receive additional compensation for work that cost more than the contractor estimated when it formulated its original offered price. Sometimes increased costs result from government changes, from "differing site conditions," or due to corrections necessitated by faulty specification documents. Whether or not a contractor is legally due an equitable adjustment (in money or contract time) depends on specific boilerplate clauses included in the original contract. Additionally, a contractor's "request for equitable adjustment" (REA) must conform to the contract's notification (notice) rules, usually found in what are called "changes" clauses within the contract terms (different "changes" clauses apply to different types of contracts).

Changes can be made unilaterally by the government and contractors are required to perform them without up-front mutual agreement as to what constitutes appropriate compensation in added time or money needed to perform the change. Further complicating this dispute issue is the requirement that a contractor who refuses to perform a properly executed unilateral change[112] can be terminated for default. Failure to handle the (REA) procedure properly can lead to a contractor not receiving appropriate compensation for increased costs, which can also lead to a contract being "terminated" for "default" (an administrative cancellation of the contract for a contractor's failure to perform to acceptable quality levels and within the allowable time). Terminations (as described by the other topic included in this

[112] There are always exceptions. In this case, "commercial item" contracts, governed by Federal Acquisition Regulation Part 12, can only be modified bilaterally, or by mutual agreement of both Government and contractor.

category) are another frequent source of appeals by contractors and of claims by the Government.

I further subdivided this category into four specific items drawn from the enhanced topics that appear to signal particular contract elements and contract types frequently subject to dispute/appeals:

3(a). REA Subcategory: (i) Fixed Pricing Risk to Contractors

I renamed the topic "FIXED PRICE OPTION YEAR," represented by the words "price, option, fix, quantity, clin, award, period, estimate, unit, total," to "Fixed Pricing Risks to Contractor." This enhanced topic represents the loss-risk burden contractors bear when they enter into fixed price contracts. Disputed issues are often related to the pre-priced "schedules" which are a common metric that determines which contractor receives a competitive award of a contract. The Government relies upon fixed price contract types to predict and control procurement costs, with the intention of keeping taxpayer costs reasonably low while still resulting in quality contract results.

A particular source of dispute can be pre-priced option years, which sometimes must be priced out for up to four additional (option) calendar years. Under these contract types, the Government has the unilateral right to exercise (and the contractor cannot refuse). Some pre-priced option year contracts can be adjusted according to specific economic price indices (for example, with a contract type known as "fixed price with economic price adjustment"), but allowable relief is not always sufficient in some industries where commodity prices fluctuate wildly. Though the Government is required to perform a market analysis to determine if the pre-priced option year is still "fair and reasonable" to the contractor, the exercise of an optional

period or quantity is still at the discretion of the Government. Challenging the exercise of an option year would require a contractor to make a request for equitable adjustment, potentially sparking a contract dispute. Fixed contract pricing is always based on a particular pre-defined unit of exchange per contract line-item number (CLIN). Estimates of quantities subjected to competitive procurement also should either represent a total need or (with an indefinite quantity contract) at least represent a reasonable estimate of the need, so that contractors can reasonably assess their risks and the potential benefits (and profits) they may receive by offering various price points to the Government.

3(a). REA Subcategory: (ii) Pricing Risk of Materials to Contractors

I renamed the enhanced topic "facility contract" (facility, equipment, plant, property, lease, purchase, profit, expense, fee, and maintenance) to reflect the very real risk contractors bear with fixed price contracts in terms of offers based on the estimated costs of time-sensitive materials (like steel, concrete, and wood), product components, or commodity items with sensitive markets (such as fuel and perishable food). Contracts that require the use or alteration of real property and physical structures can be especially contentious because of the uncertainty involved in preparing estimates far in advance of actual delivery or estimates that cannot be compared to similar buildings or structures (due to distinctiveness of design or to unknown features of the physical environment). Depending on the complexity or the scope of the services/construction required, a contractor's pricing may be based on estimates that do not age well in fluctuating markets where a contractor has little control. These contracts may require a contractor to expend considerable capital or to enter into/manage (and pay) extensive subcontracts before receiving payment itself from the Government. Land and equipment must

sometimes be leased or purchased (a decision that impacts how pricing schedules are structured and can impact a contractor's competitiveness before contract award). Fees (such as those required to secure permits) must be paid to other governmental entities, and they must be included in contract pricing (often not on a separate line item). All of these issues impact the realization of a contractor's profit expectations. If a contractor significantly underestimates their costs, they may lose any expected profits, and in a fixed price contract, the contractor alone bears the risk of not making any profit (and is even required to complete a contract at a loss). Alternatively, if a contractor's estimate is cautiously constructed to reduce risk, the contractor may not be competitive enough to receive award of the contract.

3(a). REA Subcategory: (iii) Pricing Risk of Labor to Contractors

I renamed Wordstat's enhanced topic "labor cost hour" (labor, hour, testimony, record, evidence, cost, rate, hear, testify, and expert) to reflect a contractor's pricing risk due to estimating labor costs. Materials, equipment, and other forms of physical capital are not the only sources of a contractor's pricing risk. They often must estimate the quantity of work hours and the number of employees required to complete a contract to the acceptable level of quality and within the required time frame. Making a good estimate can also require extensive project coordination expertise and very sophisticated accounting systems for allocating labor, which is frequently not priced separately with to specific line items. Contactors are also sometimes required to certify on their invoices that all relevant suppliers and employees have already been paid before submission of the invoice.

Other elements of this topic reflect its intricacy. During formal disputes, issues related to equitable adjustment for changes can require expert testimony and detailed documentary

evidence to prove costs based upon reasonable rates. This testimony, which becomes part of the documentary record, is generally provided at formal hearings and is subject to challenge by the Government's own experts, and subject to the judge's own determination of its adequacy and reasonableness.

3(a). Subcategory: (iv) Contract Complexity Performance Risk

I derived this subcategory from Wordstat's enhanced topic "design build corps of engineers," represented by the words: design, corps, construction, project, engineer, site, build, soil, rfp, and expert. "Design-build" describes a specific contract type that is particularly complex, both in how the contract is formed and in the services the contactor must provide to perform successfully. This contract type requires a mix of professional technical expertise (architecture, electrical and mechanical engineering, civil engineering, and construction management, for example), a great deal of coordination experience, and substantial skill at producing good final results, such as a building (or group of buildings) for a specialized use or some other distinctive requirement. Design-build contracting is frequently used by the Army Corps of Engineers, which is the agency responsible for the repair, maintenance, and new construction necessary to support the considerable public works infrastructure needs of the Department of Defense and its partner agencies.

The requirements of a competitive design-build contract are detailed in the original request for proposals document (RFP) used to solicit offers from contractors during the competition, which also may involve another specialized procurement technique called two-step sealed bidding. The RFP provides the base of the document that forms the eventual contract, and the information it includes (for example, a geotechnical report describing

subsurface conditions at an undisturbed site slated for the building of a new project) will be relevant to whether a contractor's request for an equitable adjustment for differing site conditions after contract award should be approved. As with questions of material price adjustments, ASBCA judges often require expert testimony to determine the validity or reasonableness of additional labor costs generated by differing site conditions claims. Additionally, a frequent source of dispute in construction contracts are the soil conditions the contractor encounters when it commences work (which can be guessed at before contract award, but not always predictably certain).

3(b) Subcategory: "Termination for Convenience - Terminate the Contract"

The last enhanced topic included under Category 3 is "Termination for Convenience - Terminate the Contract" (termination, terminate, default, convenience, notice, settlement, failure, clause, fail, officer). The Government terminates a contract for default when the contracting officer decides that a contractor's failure to perform/fulfill its requirements is not considered "excusable" under the applicable FAR "Defaults" clause included in the contract. Terminations for default (T4D) are a frequent cause of appeal to the ASBCA.

Typically, a contractor's only remedy when appealing a termination for default is that the T4D can be "converted" to a "termination for convenience" (T4C), which gives the contractor some rights to a monetary settlement and/or payments. Conversion to a T4C also shields a contractor from liability for the "reprocurement" costs involved in successfully completing the defaulted project by the Government. Reprocurement costs, or the right of the Government to sue the contractor to pay for obtaining another contractor to perform the defaulted work), is a serious potential consequence of a default. Convenience terminations are mostly structured to

leave a contractor relatively "whole" in the event the Government chooses to end the contract (the unilateral right of the Government). Convenience terminations also allow contactors to recoup some costs under the terms of a "termination settlement," and there are other consequences of default terminations that contractors can avoid if the T4D is converted to a T4C by the Board.

Terminations, particularly for default, are procedure-heavy to ensure fair administrative treatment, and they require clear and convincing evidence that breaches have occurred, that the contractor is at fault for those breaches, and that the contractor is not due some relief for work it has completed in the name of fairness. The Government has strict "notice" requirements that must be followed before terminating a contract for default ("show cause" or "cure" notices, for example). Failure of the Government to give proper notice or for the contractor to request adjustments or consideration for an excusable performance breach (examples are listed in the Defaults clause) can result in a T4D being converted to a T4C. A conversion of a default termination to a termination for convenience means that the contractor can be reimbursed for some expenses, and the Government sometimes can be required to accept some work (even if incomplete) and to pay the contractor for what it has acceptably completed.

Only the authorized Contracting Officer (CO) can terminate a contract for the Government, and whether to terminate for default or convenience must be an independent documented decision by the CO resulting from their own discretionary judgment. In other words, organizational superiors, supervisors, and customers/end users cannot order a CO to terminate a contract for default. A default termination by the Government is also automatically

considered a Contracting Officer's Final Decision (COFD), as well as a Government "claim" against the contractor (preceding a possible demand for reprocurement costs). This interpretation also means there is no further action required from the Government before a contractor can appeal the T4D to the Board. The ASBCA automatically has jurisdiction to decide an appeal of a T4D if the termination is based on non-performance of the contract's requirements.

Fourth Category: Appeal Outcomes

I assert that the heart of this category concerns the goal of the disputes process, which is resolution, and it refers to two potential outcomes of the ASBCA process: judgment or settlement. Disputes can end when the Board dispenses/guards contractual justice by exercising its authority to determine right/entitlement to a verdict as a matter of law. They can also end with a renewal of the spirit of contract, represented by a final mutual agreement of both parties to end the dispute without requiring the Board's judgment on the merits of the case. The enhanced topics combined in this category refer to the prevalence of those two outcomes/resolutions of the appeals process: 1) an express definitive judgment based on the pertinent facts of the case, or a 2) final mutual decision by the parties to resolve and end the dispute by settlement. Each of these topics shared similar dispersion proportions within the corpus and had similar measures of both topic coherence and word frequency. Table 5.5 compares the clusters/topics quantitatively.

Table 5.5: Cluster Coherence and Associated Word Frequencies per Enhanced Topic

Enhanced Topic	Coherence (NPMI)	Frequency	# of Cases	% of Cases
Summary judgment material fact	0.362	31090	1795	50.66%
Party agree settlement agreement	0.273	19285	1668	47.08%

4(a). Subcategory: Enhanced Topic "Summary Judgment Material Fact"

The first ten words associated with the first topic in this category, "summary judgment material fact," were judgment, summary, fact, matter, material, law, entitle, deny, party, and issue. A common subject of express ASBCA decisions is a request (or cross requests) by either the contractor or Government for the Board to make a "summary judgment" on the submitted material facts of the case. Those undisputed facts represent agreed-to information by both parties. However, sometimes the parties agree to the facts, but not on the interpretation of contract language or contract law in the context of the specific contracting situation. The Board will grant "summary judgment" as a matter of law or an issue of entitlement to damages when it determines there is no disagreement over factual details impacting the case (material facts) or an issue of contention (such as the proper interpretation of a contract clause). Either party can request a summary judgment on the documentary record. The Board will approve the request if it determines no formal hearing or further evidentiary proceedings are required to answer the questions raised in the dispute. However, most motions (and cross motions) for summary judgment are denied or only partially granted because there are unresolved factual issues the Board must determine and consider formally.

4(b). Subcategory: Enhanced Topic "Party Agree Settlement"

The first ten words associated with the last topic in this category, "party agree settlement agreement," were agreement, modification, party, release, agree, language, term, sign, settlement, and mod. This topic reflects that most appeals are eventually settled by mutual agreement between the parties. It also may reflect that many disputes result from contract modifications (mods) that are not the complete product of mutual agreement. These situations

can be related to issues where a contractor has not agreed to hold the Government free of liability for increased costs or other damages the contractor believes are due under the terms of the contract. Such agreements are typically made with express "release" language in a signed document. This topic represents an ultimate return to the true "relational" spirit of contract, where the final solution is a result of internal compromise, not external fiat.

III. Designing a Rubric for Future Qualitative Analysis of Contract Disputes

In previous chapters I identified three primary elements of fairness that exist in federal procurement contracting: equality (competition), equity (contractor identity/demographics), and reciprocity (relational parity). In Part I of this chapter, I performed a thematic content analysis of the topic models produced from the dispute decision texts with the assistance of computational text analysis software. I then sorted the enhanced topics that the program derived with its clustering algorithm into thematic categories and analyzed those categories further for use as a rubric in future qualitative content analyses of the dispute decisions materials.

Although I have offered an interpretation of all of the enhanced topic models produced with my specific clustering criteria in Wordstat, every topic or insight described in Part II is not, of course, directly applicable to the concept of fairness or reciprocity. The purpose of an evaluative qualitative textual analysis is to assess, classify, and classify content according to defined categories (Kuckartz 2014, 88). Coding categories are used to "to explore assumptions about correlations as well as to test initial hypotheses of the data" (88). In this type of analysis, once the researcher has defined evaluative categories, she 1) identifies and codes text passages relevant to the evaluative category, 2) compiles text segments coded with the same code, 3)

establishes values/levels for the evaluative category and assigns them to text segments, 4) and evaluates and codes the entire data set before analyzing and presenting the results (88).

The first topic I interpreted from the results of the CTA was "Good Faith Breach," and the associated phrase "good faith and fair dealing." I used this particular topic to select decisions from the population of 3,548 decision texts that comprise my ASBCA corpus. I chose it to narrow my selection of texts for analysis as the clearest indicator of verbiage that would be used in a legal setting to describe a breakdown in the perception of fair behavior between the contracting parties. I outline the background behind that decision and the results of that selection process at the beginning of Chapter 6.

I then sorted the remaining topics into four thematic categories: Structural Dispute Requirements, Contract Performance Requirements, Frequent Sources of Dispute, and Appeal Outcomes. The first category, Structural Dispute Requirements, I mostly associate with the characteristics of procedural fairness, and with the concept of equality, or as an indicator that all participants have access to the same system of justice. Although this categorical content is extremely important in the context of an administrative tribunal of the federal government, I did not include elements of this category in the evaluative rubric for contractual reciprocity. In analyzing behavior fairness for contractual reciprocity, I was more interested in the substance of those disputes than in the procedural questions associated with them.

The second category, Contract Performance Requirements, I associate with substantive justice, and use it as an indicator or measurement of deservedness and entitlement. In the context of this dissertation, I primarily characterized its appearance in the decision texts as describing the source of the alleged contract breach. In my rubric, this category is represented

by three questions: 1) who committed the breach, 2) what the nature of the breach was, and 3) whether it was a breach of an express duty of performance (written terms of the contract), or of an implied contractual duty (not always written down, but a behavioral expectation, such as a duty to cooperate). To align the rubric with my interpretation of the topic models that constitute this category I asked the following questions:

1) Does the breach concern a contractor requirement or a Government responsibility?
2) How is the breach verbally described?
3) Was the duty of performance express or implied?

Essentially, these questions describe the values/levels I use to evaluate the dispute decisions in terms of the contractual behavior expected or required for reciprocity to occur (or at least to be perceived).

The third category, Frequent Sources of Dispute, describes not simply the occurrence of the breach, but of a particular type of breach I associate with contractual fairness and specifically reciprocity: the fair apportionment of risk (both cost and performance) between the parties. Every departure from the black letter requirements of a contract, or of a traditional implied duty of behavior, does NOT result in the filing of a formal appeal before the ASBCA. However, what the topic models indicate is that certain types of risk apportionment are more likely to cause a durable dispute. I consider them aggravating factors in the administration process. The primary risk expressed in these disputes is that one of the parties is not receiving its portion of the "fruits of the contract" or that the Government has performed a "bait-and-switch" in representing what the contract would require from the contractor, which affects its realization of profit.

My two subcategories for Frequent Sources of Dispute describe the most frequent sources of conflict: 1) the denial of an "equitable" price adjustment (or a redistribution of financial risk), and 2) contract termination, either by convenience or default. In assigning values/levels to this evaluative category, I identified three factors to assess:

1) Did the dispute arise from a price/cost conflict related to fixed material or labor costs (originally determined at the time of contract award)?

2) Was the request for equitable adjustment based upon the terms of the original contract, or the result of a Government change?

3) How complex was the procurement in terms of subject matter (supply, service, or construction), pricing structure (fixed price, cost-based, or "other"), and definitiveness (discrete contract or the result of an indefinite contract award vehicle)?

4) If a termination for default is involved in the dispute, did the Board determine it was a "proper" termination, or that the Government's decision to terminate unjustified (either procedurally or substantively)?

I believe that the fourth category, Dispute Outcomes, is at the heart of the question of contractual reciprocity. How, ultimately, was the dispute/appeal resolved? Did both parties agree to the disposition (represented by settlement)? Or was it imposed upon them? In other words, was there a clear "winner" or "loser" in the Board's decision (which means, in the contracting context, that nobody wins because a third party's judgment was required to resolve the issue). Here, my assigned values were: 1) ultimately settled, 2) successful contractor appeal, 3) successful Government defense, or 4) mixed final disposition (wrong attributed to both parties by the judge.

The list below constitutes the reciprocity rubric that I developed for use in further qualitative analysis of dispute decisions which do not specifically allege a breach of the duty of good faith and fair dealing.

Rubric for Evaluating Reciprocity in the ASBCA Dispute Decisions:

1) Substance of the Contract Breach
    a. Source: Contractor or Government
    b. What breach occurred?
    c. Was the breach of an express or implied duty?
2) Source of the Dispute (Aggravating Factor):
    a. Fixed Pricing—Materials
    b. Fixed Pricing—Labor
    c. Procurement Complexity
    d. Termination for Default
3) Outcome:
    a. Mutual Agreement/Settlement
    b. Judge's Disposition
        i. Successful Contractor
        ii. Successful Government
        iii. Both at Fault/Both Correct

Conclusion

Chapter 5 completes my computational text analysis of fairness in the language of the ASBCA dispute decisions using the "cleaned" aggregation of the decisions' texts into a searchable corpus as my primary data source. In my view, Wordstat's enhanced topics were coherently construed, and I was able to group them together for interpretation and analysis. This consistency supports my assertion that the corpus of decisions texts has the potential to

offer and to confirm meaningful insights into the dispute environment through the application of automated text analysis methodologies.

As in previous chapters, my specific goal was to understand how a key element of contractual fairness—in this instance, reciprocity—operates within the federal procurement environment. Although I used a type of quantitative methodology (CTA) for description and comparison and to guide my qualitative questions, I chose to treat the numerical data as suggestive of relationships rather than definitive of them. I also use the insights gained through my interpretation of the enhanced topic models to contemplate the direction of future analysis in this area.

I used the information represented in the enhanced topic models to better understand what sorts of behaviors could produce a perception of "unfairness" at the individual contract level, which I associate with the "street" or "frontline" level of procurement conduct, and how those instances might be identified in a legal setting. As a result of studying the enhanced topic models, I learned that an important driver of contractors filing an appeal of a Contracting Officer's final decision with the ASBCA, or of the Government filing a claim with the contractor (which could result in the contractor filing an appeal), is a perception by the contractor that the Government has breached the contract through behavior that constitutes "bad faith." In addition, there appears to be a perception that one of the parties has acted in a way that deprives the other of its expected "fruits of the contract," either in terms of anticipated profit (contactor) or successful and timely performance of the contract's requirements (Government).

Ultimately, reciprocal fairness in contracting is tied to the perception that both parties get contract benefits they originally sought in the "bargain." To deprive one party of that

reasonable expectation violates the contractual duty of "good faith and fair dealing." Acting in "bad faith" typically means that the contract's original requirements and/or duties of behavior and the contract's potential benefits were miscommunicated, either negligently or maliciously, or that either party resisted changes that created an unfair re-apportionment of financial risk.

Mistakes in contracts or changes made in response to changed needs or conditions, particularly in contracts with complex terms, are common. Therefore, one measurement of fairness in this context is the willingness of the parties to negotiate a mutual agreement to address changes that occur—or that could not be reasonably foreseen—to the original contract requirements. Another measure of fairness is how the parties partner in the context of the contractor-government relational dyad. If the contractor and the Government can agree to settle a dispute at any stage of the process, even after it has hardened into a formal appeal, this represents a return to the spirit of contract. It is at least an acknowledgment by one of the parties that their behavior is not reasonable or contractually "fair" before an impartial, disinterested third party judge intervenes.

As I reported in Chapter 's 3 research setting discussion, the ASBCA "corrects" contractual wrongs it recognizes in appeals by awarding or denying money damages for those wrongs (breaches) according to applicable law, regulations, and the text of the contract itself. In Chapter 6, I perform a deeper thematic qualitative textual analysis to better understand how fairness in all its elements—equality, equity, and reciprocity—is represented in the actual dispute narratives.

Chapter 6: Thematic Qualitative Textual Analysis
Locating the Duty of Good Faith and Fair Dealing in the ASBCA Dispute Decisions

The thematic qualitative textual analysis this chapter describes completes my mixed-methods exploration into the meaning of fairness in federal procurement contracting using the Armed Services Board of Contract Appeals (ASBCA) dispute decisions (2007-2021) as a research setting. In Chapter 4's analysis, I learned what metadata drawn from Federal Procurement Data System-Next Generation (FPDS) individual contract reports communicate about fairness in the disputes process in terms of equality (conceived of as competition) and equity (represented by contractor demographics) and various measures of procurement complexity. In Chapter 5, I used computational text analysis (CTA) to generate enhanced topic models from the entire ASBCA textual corpus and established that the phrase "good faith and fair dealing" was relevant to understanding how reciprocity (relational parity or behavioral fairness) is represented within the disputes context. In this chapter, I apply what I learned in previous chapters to progressively targeted samples of specific decision texts and complete my investigation of what fairness means at the street level of federal procurement contracting as an administrative domain.

Design of the Chapter

In Part I, I unpack the legal doctrine of "good faith and fair dealing" as a fundamental behavioral requirement under contract law, albeit an *implied* duty as opposed to an *express* duty. I describe the challenges that federal procurement brings to the typical commercial contractor's expectations regarding this doctrine in the government-market context. I also briefly outline the three separate slices of textual data and documentary information (the "All Text," "Relationship," and "Merit" samples) drawn from the decision texts that resulted from

keyword-in-context (KWIC) searches and that provide the material analyzed in the remainder of the chapter. In Parts II-IV, I describe the findings and analyses that my examination of the samples yielded before concluding the chapter.

Part I: Contractual Reciprocity and the "Duty of Good Faith and Fair Dealing"

In earlier chapters I defined reciprocity as interpersonal fairness tendered between partners to achieve a shared goal through cooperative agreement. It represents a relational value occurring at the micro-level in collaborations between individuals, or in the realm of federal contracts, between a private contractor and authorized Government officials. It is relevant in situations where there is contractual "privity," or relational exclusivity, between two parties, and it should mirror the parties' behavior in meeting the goals (and spirit) of the written contract. I also have asserted that reciprocity is key to understanding why particularly contentious disputes occur in this context and why their resolution requires the intervention of an empowered and theoretically impartial third party (here, an ASBCA judge).

The remaining goal is to explore how differing interpretations of fairness as acceptable behavior under the contractual duty of "good faith and fair dealing" challenge the success of government-contractor relationship dyads. When both parties fail to share a mutual understanding of what constitutes that duty, conflict within the dispute intensifies. Essentially, a breach of this implied covenant occurs when the behavior of one party towards the other violates the "spirit of contract," either by overt act or by omission. "Good faith and fair dealing" is a legal doctrine with deep common law roots. Understanding its different applications in commercial and federal government settings, particularly related to enforcement, helps to explain why business relationships underlying federal procurement contracts can be unusually

difficult as well as notably unfair to commercial partners (Toomer, Fisher, and Curry 1990; Martinez 1996; Nibley 2005; Nibley and Totman 2012; Claybrook, Jr. 2014; Madsen and Litteken 2014; MacMahon 2015).

The theme "good faith breach," linked to the key phrase "good faith and fair dealing," was an early result that emerged from Chapter 5's computational topic modeling of the dispute decision texts. It was associated with a third of the 3,548 cases analyzed. Its frequency suggested that a contractor may use that phrase to describe unfair treatment in the business relationship during a legal contest. Normatively contractual interactions should reflect the behavior of equals towards one another, and the U.S. Supreme Court has repeatedly indicated that the Government enters commercial contracts as an equal partner[113] (Claybrook, Jr. 1997; Whelan and Nagle 2007). A complaint that the Government has violated the duty of good faith and fair dealing communicates that the relational dynamics within the government-contractor dyad failed to satisfy the contractor's typical expectations of marketplace reciprocity. In addition, a formal complaint to an official legal authority emphasizes the degree to which the contractor perceived harm to itself, either financially by loss of reputation, or by both.

A 2014 white paper produced for the United States Court of Appeals for the Federal Circuit's "Federal Practice Summit" describes the issues with behavioral fairness that arise in actual legal practice with reference to the *Restatement (Second) of Contracts,* a foundational

[113] Claybrook, Jr. provides several references for this contention: "*Torncello* v. *United States*, 681 F.2d 756, 762 (Ct. Cl. 1982) (en banc); see also *United States* v. *Bostwick*, 94 U.S. 53, 66 (1876) ("The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf."); *Cooke* v. *United States*, 91 U.S. 389, 398 (1875) (stating that when the federal government "enters the domain of commerce, it submits itself to the same laws that govern individuals" (1998, 555, in note 1).

treatise in contract law. [114] Madsen and Litteken observe that the *Restatement* affirms that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement" (2001, 4). Section §205 of the *Restatement* specifically describes what is NOT "good faith and fair dealing":

> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: *evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance* (quoted in Madsen and Litteken 2014, 4) (emphasis added).

However, Madsen and Litteken note that "[b]ecause commercial contract disputes are litigated in state and federal courts under state law, there is no uniform definition of the implied duty of good faith and fair dealing" that applies in every contract setting (2014, 5). In dealing with the federal government, contractors must anticipate complications or differences from what they experience in regular commercial practice with state and local governments.

Madsen and Litteken (2014, 6) assert that these differences typically arise from three sources: 1) Government sovereignty complicated by an extensive statutory regime as well as power inequities in negotiation, 2) misunderstandings about what qualifies as "bad faith" behavior on the part of Government officials, and 3) fact-finding/case resolution by an official

[114] The *Restatement (Second) of Contracts* is an important treatise of secondary law which helps elucidate numerous principles related to the specifics of contract law. Considered "persuasive" commentary and not law in themselves except as cited in precedent, "Restatements of the Law . . . are a series of treatises that articulate the principles or rules for a specific area of law. They are secondary sources of law written and published by the American Law Institute (ALI) to clarify primary law. Restatements currently exist for twenty areas of law such as Contracts, Law Governing Lawyers, and Torts." See https://www.law.cornell.edu/wex/restatement_of_the_law

tribunal judge rather than by a jury trial decided by citizen peers. Specifically, they observe that precedent in Government case law "has been [confused by courts muddling] the distinct concept of the implied duty of good faith and fair dealing with the evidentiary presumption of good faith on the part of public officials" (6). As a result, ordinary expectations regarding the common law duty of good faith and fair dealing in contract performance have collided with another foundational legal principle in administrative law: that Government officials are benefited/protected by the strong presumption that they have acted in good faith during the performance of their duties. This interpretation has contributed perhaps to an attitude of untouchability on behalf of some Government officials than colors several of the disputes I reviewed for this study.

Proving a contractor's complaint that the Government has violated its duty of "good faith and fair dealing" under the contract is complicated by the reality that the good faith presumption for federal officials is extremely difficult to overcome. Whether or not the evidence supplied by the contractor offers sufficient proof is itself decided by another federal official (an appointed judge) and not by a jury. Businesses with relatively little government contract experience may expect dispute resolution to occur under the Uniform Commercial Code (or similar statutory law requirements) in a typical trial environment instead of under the authority of an official federal tribunal. What may appear as good faith or fair dealing to a jury of peers can differ significantly from the assessment of a professional judge experienced in the nuanced interpretation of federal contact law.

The good faith presumption for public officials, first recognized in 1816 by the U.S. Supreme Court in *Ross v. Reed,* also has a long common law history, and this presumption

applies to all sovereign acts, not just Government contracting behavior (Madsen and Litteken 2014). However, its purpose is to protect officials from frivolous or malicious accusations of fraud or wrongdoing, not to shield the sovereign from liability for ordinary breaches of contract, including those of implied duties such as good faith and fair dealing (MacMahon 2014, 2071). Some scholars contend that judges' misapplication of the evidentiary standard required for each doctrine has resulted in confusion as well as the unjust protection of the Government from liability for administrative actions that violate both commercial standards and the expectation of many contractors. Claybrook, Jr., for example, describes the Court of Federal Claims and Federal Circuit as "schizophrenic" in its rulings concerning the law of good faith duties to government contracts (see also Whelan and Nagle 2007, 155; Nash 2012).

Claybrook, Jr. observes that in *Kihlberg v. United States* (97 U.S. 398 (1878), the Supreme Court held that there were clear examples where the presumption of good faith on the behalf of public employees should not be made (2015, 45). In the Court's words, the presumption should not be applied when the public employee's "action is, in the absence of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment, conclusive upon the parties" (*Kihlberg*, 97 U.S. at 398). Claybrook, Jr. notes further that:

> Anticipating issues to come, this three-part enunciation of the good faith duty incorporated regulation of both *intentional* malfeasance (i.e., "fraud") and *unintentional* malevolence that simply skewed the exercise of the duty such that a reasonable, objective person would not consider the discretionary exercise of the duty to be fair, honest, or reasoned, but biased and inconsistent with the justified expectations of the other party. Such bias could be implied from the discretionary act itself. [Note: 97 U.S. at 402]. (emphasis in the original) (2015, 45)

The Board, however, has rendered confusing applications of the duty in cases of breaches of federal contracts despite the Supreme Court's *Kihlberg* distinctions. The problem rests in the standard of evidence required to hold Government representatives accountable for behavior seen as violating the commercial duty of "good faith and fair dealing." The Boards of Contract Appeals and the Federal Circuit sometimes require a much higher standard of proof than what commercial businesses must supply in court (Dibley 2006; Madsen and Litteken 2014; Claybrook, Jr. 2015). Board and Federal Circuit judges have described the level of proof required to be "well-nigh irrefragable" as opposed to "a preponderance of the evidence."[115] They also have held that to constitute "bad faith," the Government's behavior must reflect more than serious neglect or mistake. Instead, some federal judges have equated bad faith in contract cases with proof of deliberate malice or abusive impropriety by Government officials, not just behavior that violates business expectations of reasonable cooperation. Unfortunately, this "specific intent to harm" on the part of the Government has been "almost impossible to prove" by contractors (Nash 2012, 2002).

As Claybrook, Jr. notes, "this has more than a little irony . . . as the Armed Services Board of Contract Appeals has recognized that because of its size, power, and potential ability to manipulate the marketplace, the Government may have obligations of fairness beyond those of the 'ordinary citizen'" (2015, 36).[116] However, its sovereign status has allowed the Government to escape typical commercial contractor expectations, not just when necessary, but also with a reliable convenience. In case after case, the Board has tendered to Government

[115] "Preponderance of the evidence" is the standard of proof described in the *Restatement (Second) of Contracts* as opposed to "*irrefragable."*

[116] Claybrook, Jr. attributes this attitude and the quoted phrase "ordinary citizen" to "R & R Enters., 89-2 B.C.A. (CCH) 5 21,708 at 109,148 (Mar. 24, 1989).

officials a broad presumption of acting in good faith and has refused to recognize that the Government violated fairness, its other contractual responsibility under the two-pronged duty of good faith AND fair dealing.

Even when judges find the Government's behavior reproachable, the Board has refused to assign liability for an actual breach of contract to the Government or to assess recoverable damages in favor of the contractor for behavior that is patently harmful to a contractor's expectations of fair treatment (Johnson 1999; Nash 2012, 2002; Nibley 2006). There is some evidence in recent decisions that the Boards and the Federal Circuit are correcting this overprotective tendency and refining its understanding of good faith and fair dealing in the Government context due to pressure from the legal community and its own internal concerns, as evidenced in a 2019 decision:

> We made no secret in our decision of our view that the tests set forth in some cases explicating the doctrine of GOOD FAITH and FAIR DEALING lacked precision . . . . In large part, though, that was because those cases appeared to have few limits upon their application to "unreasonable" government action . . . . Our opinion sought to put the doctrine on somewhat firmer ground by drawing clearer, tighter borders upon its use . . . . Thus, though we ruled in favor of [the contractor] by finding a breach of the duty of GOOD FAITH and FAIR DEALING, we did so in a way that was no more expansive than pre-existing law and, if anything, set forth a more limited application than might have been divined by a loose reading of some earlier cases. (*Relyant, LLC,* ASBCA No. 59809, 18-1 BCA ¶ 37,085 at 180,534, p. 3-4)

Whether the Board has really changed its approach to deciding "good faith and fair dealing" cases will take time to assess. Lingering uncertainty may still produce administrative confusion (and protective behaviors detrimental to the contract relationship) at the street level, where changes in applying the nuances of legal interpretation can lag.

Using Targeted Samples to Explore "Good Faith and Fair Dealing" in Specific Decisions

I examined all of the decision texts that included the phrase "good faith and fair dealing" in three targeted, sequential stages. First, I read every paragraph where the phrase "good faith and fair dealing" (GFFD) appears within a decision (from the entire dispute decision corpus of 3,548 texts) to evaluate the phrase in its specific verbal context as an "n-gram" or unit of verbal "meaning." I also assessed the overall vocabulary used within all of those paragraphs combined in terms of frequency and as distinct thematic clusters pertaining to questions of fairness and relationships. I refer to this collection as the "All Text" sample.

The second and third "samples" represent progressively tapered slices of data comprised of the decisions that contributed to the entire first sample. For the second sample, I culled all decisions that included a judge's ruling on the merit of the appeal (in other words, where a judge decided if either the contractor or the Government was "entitled" [117] to monetary damages in the case or determined which party deserved to win their argument). This allowed me to isolate the characteristics of contractors who alleged a breach in the duty of good faith and fair dealing as well as to evaluate the characteristics of contracts that were

[117] In the ASBCA setting, "entitlement" refers to a judgment of merit regarding either the contractor's or the Government's claim to have been damaged by the other party's action or inaction in violation of their contractual responsibilities. In other words, a ruling of entitlement typically states that the successful party deserves or is entitled to a specific monetary sum based on a defensible, actual calculation of financial damages or value loss that they were able to prove to the Board (and where restitution is allowed by the law). In ethical terms, "entitlement" is a determination of desert. "Quantum" simply means "how much" the damages are worth, either in time or in money. Sometimes a judge's decision assigns merit in the case (entitlement), but not how much the damaged party is due (quantum), leaving that for the parties to negotiate themselves. If the parties cannot negotiate the "quantum," the judge will make that final evaluation for them in a separate decision. Sometimes the judge decides both entitlement and quantum at the same time. I interpreted this failure to settle to signal a "distance from resolution" between the parties so insurmountable that an ASBCA judge's final ruling was required to end the dispute. Thus, I expanded my overall review to include other decisions connected to that specific dyad, including those not specifically including the phrase "good faith and fair dealing." I included those decisions in my analysis to search also for non-obvious factors that might push a contractor to raise the issue of behavioral fairness to the level of a formal legal complaint.

involved in all formal disputes the contractor brought to the Board between 2007 and 2021. I used that information to flesh-out the details of each contractor-government relationship dyad where an explicit judgment was made by an ASBCA judge on the legal merits or "entitlement" of at least one of the contractor's appeals (including final decisions where the phrase "good faith and fair dealing" did not appear).

I used the second sample to evaluate the relationship dyads for possible aggravating factors, including subject matter complexity, contractor demographics, and pricing structure. [118] Specifically, I looked deeper into the contract and decision metadata [119] and factual details connected to all of the dispute decisions connected with a specific contractor. I used the legal record representing those dyads to analyze reciprocity/behavioral fairness within specific government-contractor relationship dyads ("dyads") combined with the FPDS report metadata and other substantive details describing the decision texts. [120] I refer to this sample as the "Relationship" Sample.

Finally, I further narrowed the selection of "Relationship's" decisions to specific "entitlement" texts keyed to "good faith and fair dealing" complaints. For this final stage, I began with all the decisions that represented the "Relationship" sample, and then *narrowed* the number of dyads where the issue of "entitlement" or "entitlement and quantum" was specifically decided regarding various aspects of a contractor's case. [121] I used this sample to

[118] The rubric developed in Chapter 5 was most helpful in this stage of analysis. I refer to the rubric results for specific dispute decisions in Appendix 4.
[119] I refer to the Federal Procurement Data System report metadata that was at the heart of Chapter 4 and the decision metadata that I discussed in Chapter 3 and describe collecting and coding in Appendices A-B.
[120] A full description of that record appears in Appendix C.
[121] Not all published decisions that reference the phrase "good faith and fair dealing" make it to final disposition before a judge because they are either settled or dismissed on technical grounds. Early, pre-entitlement decisions

help me understand the street-level behaviors that impact how contractors experienced (or how they might have perceived) real-life breakdowns in reciprocity. This sample helped me identify and explore actions by both contractor personnel and government officials that impacted the quality of reciprocity for both parties. This smaller group of texts allowed me to draw conclusions from especially rich dispute narratives contained within what are typically very dry legal documents. I refer to this small selection of entitlement decisions as the “Merit” Sample.

The “All Text” sample provided a comprehensive picture of what the phrase "good faith and fair dealing” communicates by itself as a semantic unit of text (or an “n-gram” in textual analysis language) within the overall disputes process. My description of the sample and the associated analysis appears in Part II of this chapter. The “Relationship” sample allowed me to examine the complete dispute decision record of contract relationship dyads in particularly contentious disputes. It also offers a sample slice for an evaluation of the overall characteristics of the entire formal ASBCA dispute record (2007-2021) in terms of equality and equity using the associated contract metadata. I describe the sample itself and my analysis in Part III of this chapter. The “Merit” sample was used to identify deeply rooted or problematic behavioral patterns and specific relational attitudes that could be articulated as “lessons learned” to the federal contracting community. I derived the final lessons both by examining details surrounding the individual conflicts, from the language used by the parties themselves to describe their relationships, and from my overall understanding of various aspects related to

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often do not include details from a hearing that fully clarify behavioral context. Decisions that decide entitlement usually include all pertinent details as well as the judges’ evaluations of situations, circumstances, and allegations not fully fleshed out in earlier proceedings.

the federal procurement and dispute settings in general. I report and discuss the sample and the lessons themselves in Part IV's hermeneutical analysis.

Part II: The "All Text" Sample: Reciprocity in a Targeted Semantic Context

Figure 6.1 "All Text" Sample Word Cloud

(Word Cloud created after removing the GFFD phrase itself, as well as legal abbreviations, the names of months, the names of particular contractors and agencies, and other terms that I determined added inapt "noise")

The targeted search/Keyword-in-Context (KWIC) phrase "good faith and fair dealing" (GFFD) appeared in 132 of the 3,548 dispute decision texts posted between 2007-2021 that were included in the Chapter 5 topic modeling analysis. Within those 132 decisions, the phrase appeared 559 times in 426 segments of text (approximating paragraphs) retrieved by QDA

Miner for analysis. Sixteen decisions (represented by 46 or 11% of the text segments) could not be cross-referenced with an FPDS report identifying contract complexity factors such as subject matter or pricing structure. Of the remaining 381 segments, 156 were related to thirty-nine individual construction contract decisions, 125 segments were related to thirty-eight individual service contract decisions, and ninety-nine segments were related to thirty-eight individual supply contract decisions.

The phrase GFFD occurred more in decisions for services and construction, which are typically contracts that require frequent interpersonal interactions and often more significant changes to the initial contract requirements at award. Combined, all 426 segments of text comprised approximately 46,000 words and rendered seventy-nine pages in a 12-point standard font. Supply decisions contributed about 5,000 words and eight pages and included sixty-two instances of the target phrase. Service decisions comprised about 15,000 words and twenty-six pages, with 170 instances of the target phrase. Construction accounted for approximately 17,000 words and twenty-nine pages, with 258 instances of the target phrase. Decisions not identified with a FPDS report accounted for close to 5,000 words and eight pages of 12-point text, with the target phrase again appearing sixty-two times.

My examination of the “All Texts” sample revealed a number of examples of nuanced interpretive language that helps elucidate how the duty of good faith and fair dealing applies to the concept of contractual reciprocity and behavioral fairness. A careful examination of several of the most commonly appearing words in the All-Text sample emphasizes a number of semantic clusters: what are the rights, responsibilities, and obligations of the parties? What

should they expect from each other? I illustrate those clusters with sample quotations from the paragraphs that constituted the entire sample:

agree (84)	covenant (121)	good faith (609)
agreement (47)	equitable adjustment (8)	law (37)
bad faith (47)	expect* (67)	mistake (31)
bait and switch (7)	failure (90)	negotiat* (50)
bargain (13)	failure to (84)	obligat* (72)
benefit (53)	fair dealing (571)	share (10)
breach (508)	fair (600)	reasonable (91)
change (96)	fair and reasonable (only 2)	reasonable expectations (37)
collaborative (1)	fairness (only 2)	responsibili* (10)
contemplated value (13)	faith (662)	rights (18)
contracting officer (53)	fruits (31)	unfair (6)
cooperate (47)	fruits of the contract (19)	unilateral (15)

- Responsibilities/Expectations for Behavior: (Opinion by the Board) "The mere lawfulness of conduct by public officials does not preclude a tribunal from finding that such conduct still violates standards of decency, fairness or reasonableness." JA. Jones Constr. Co., ASBCA No. 43344, 96-2 BCA ii 28,517. Quoted in *ANHAM* FZCO, LLC, *ASBCA* No. 59283 (July 20, 2017).

- Who is responsible for "good faith and fair dealing"? (Opinion by the Board) "The duty of GOOD FAITH and FAIR DEALING applies equally to contractors. J.C. Manufacturing, Inc., ASBCA No. 34399, 87-3 BCA." (capitalized in the original). Quoted in Central Texas Express Metalwork LLC d/b/a Express Contracting, ASBCA No. 61109 (Sep. 7, 2017).

- What are the limits of reciprocity? (Opinion by the Board) "To the extent that Falmouth complains that the government presented it with a "take it or leave it" proposition, we note that nothing in the contract precludes "hard-nosed" negotiations on the part of the [contracting officer], and Falmouth has presented no law stating as much." Quoted in Falmouth Scientific, Inc. ASBCA No. 60776, 19-1 BCA. ¶ 37,389.

- How far does the Government have to be "fair" to still act fairly? (Opinion of the Board)"As we explained previously, the government is under no obligation to accommodate a contractor's financial inability to continue performance, because the contractor is responsible to provide sufficient financial resources for the performance of the contract . . . . Indeed, duty of GOOD FAITH and FAIR DEALING does not extend to an obligation to modify the terms of a contract to benefit a contractor in financial difficulty." Quoted in LKJ Crabbe, Inc., ASBCA No. 60331, 19-1 BCA ¶ 37,250.

- What does reciprocal behavior mean for the enforcement of a party's contract rights? (Opinion by the Board) "[The contractor's] prior experiences with government leniency and issues related to conditional approval of first articles under prior contracts are inapt. The [purchase order] required fully compliant production quantities. . . . . Here, the government simply and properly enforced its rights under the solicitation." Quoted in *Military Aircraft Parts* ASBCA 60904 (Mar. 27, 2017).

The Government and the contractor are absolutely allowed to preserve their rights under the contract and still be considered "fair" actors. BOTH parties are required to be "fair" to each other. Negotiations can be "hard-nosed" and pursue the interests of the individual partes. However, just because the actions of one of the parties are technically not expressly "illegal" does not mean they cannot violate the duty of "good faith and fair dealing. The question still remains: what does this "fairness" look like in terms of the demographics of contractors and the procurement details of the contracts involved? I examine those questions in the next section of the chapter, where I specifically look at how those factors characterize especially contentious dispute decisions.

Part III: The "Relationship" Sample: Fairness Disputes in Contract Context (Metadata)

A. Describing the "Relationship" Sample as a Whole

Ultimately, I reviewed the texts of all decisions with a GFFD breach complaint rendered between 2007 and 2021 that could be linked reasonably to what I concluded was a single business entity. The decisions referenced businesses that were clearly related by name as well as business product similarity, which included minor name variations and different operating locations. I also looked at all decisions where a contractor was the appellant even if they involved other DOD agencies and referenced different performance locations. The resulting

diversity of contracting situations helped me recognize and identify some interesting details and patterns within the dyads, which are described more fully in the following sections.

After reducing the analysis to thirty-five dyads, I reengaged the questions included in the rubric produced during Chapter 4's analysis.[122] First, did contract complexity (subject matter content, pricing, or delivery structure) play a role in the contentiousness of the contract dispute? (The answer to this question was definitely "yes.") Second, did there appear to be any relationship between the demographic status of a contractor and whether its dispute was ultimately settled prior to requiring a judge's final judgment on entitlement? (The answer to this question is "possibly, but the cause and mechanism for this result is unclear.") And third, were the decision outcomes noticeably skewed in favor of either the contractor or the government? (The answer to this question is "it depends upon the contract subject type.") The next section describes the results for each category of contract as a collection of texts (supply, service, construction, and unspecified).

My analysis in Chapter 4 suggested that analyzing the differences in how reciprocity fails/operates according to subject matter complexity deserved further directed study. I first describe the thirty-five dyads and their associated decisions as groups of relationships determined by subject complexity categories (service, supply, and construction). Separating the dyads into construction, services and supplies contract categories resulted in a final relationship tally of sixteen construction contractors, nine service contractors, and nine supply contractors. Each subject matter type yielded similar totals of both decisions (orders and opinions) and the

[122] I answered these questions by returning to the FPDS-NG demographic metadata from the individual contract reports and examined the documentary history and the total dispute decision disposition outcomes for each dyad analyzed. The results are summarized and discussed in the sections that follow.

number of pages representing each dyad, despite the differences between the number of construction contractors and service and supply contractors.

B. The "Relationship" Sample Described by the Metadata

In the following sections I describe the category type (per the Federal Acquisition Regulation definition of what constitutes a supply, service, or construction contract) and then provide a summary of the metadata for that subject matter category. I conclude Part III with an analysis of the dyadic relationships described using the summary metadata for each category. The category summaries were based on an assessment of similar characteristics shared by all the dyads across subject matter categories, the characteristics of their decision texts and of the legal record, and the demographics of the individual contractor and the operational details related to all individual contracts involved in disputes. I synthesize the summaries and draw conclusions from them before transitioning to Part IV's hermeneutical analysis of select texts drawn from the "Relationship" sample.

1. Supplies

a. Category Definition: The Federal Acquisition Regulation (FAR) defines supplies as "all property except land or interest in land. It includes (but is not limited to) public works, buildings, and facilities; ships, floating equipment, and vessels of every character, type, and description, together with parts and accessories; aircraft and aircraft parts, accessories, and equipment; machine tools; and the alteration or installation of any of the foregoing" (§2.101 Definitions).

b. Category Summary:

i. *Dyad characteristics:* There were nine contractor relationships involving supply contracts 1) where there was an alleged breach of the duty of good faith and fair dealing, and 2) where the merits (entitlement) of at least one case was expressly decided by an ASBCA judge between 2007 and 2022. These relationships yielded a total of ninety-nine decisions. The Defense Contract Management Agency (DCMA) was involved in eighteen of the decisions, followed by the Defense Logistics Agency (DLA) with fifteen, the Army (15), the Navy (5), and the Air Force (2).

ii. *Decision characteristics:* Of the ninety-nine decisions, forty-one were orders and fifty-eight were opinions. They included 983 total pages, with an average of 16.9 pages per opinion and a median length of eight pages, with a range between 2 and 151. Seventeen different judges made the decisions. Twenty decisions did not indicate representation by professional legal counsel, and thirty-seven of them indicated the contractor was represented by a lawyer.

iii. *Contract characteristics*: Forty-eight of the opinions were issued on non-commercial items; nine were identified as commercial items. Thirty-six of the opinions involved competed contracts; thirty-one were for full and open competition, five were competed under small business set-asides, and twelve were not awarded as a result of a competitive process. When it did occur, competition was not particularly robust, with more than half of those contracts receiving three or fewer offers.

iv. *Contractor characteristics:* Large ("other than small") businesses were associated with forty of the opinions, nineteen of which required a subcontracting plan. Small businesses were connected with seventeen decisions. Only two of the contract relationships were linked to

a special socioeconomic category: Military Aircraft Parts[123] (MO, HO) and 1 woman-owned businesses (AEON Group, LLC).[124] Relating to Military Aircraft Parts, only one of its contracts (SPM4A707M7459) indicates that it is minority or Hispanic-owned; this contract was also the earliest awarded contract to the company described here and may represent an earlier stage of ownership.

v. *Contract Complexity* (Subject Matter, Pricing Structure, Definitiveness): The five most common NAICS codes indicated were: 336413—other aircraft parts and auxiliary equipment (14), "NI" (9), 336414—guided missile and space vehicle manufacturing (7), 334511—search, detection, navigation, guidance, aeronautical, and nautical system, and instrument manufacturing (7), and 336411—aircraft manufacturing (6). In the absence of a NAICS code, which indicates the contract was awarded prior to 2000, I used the abbreviation "NI" for no information. The nine "NI" contracts represented were for vaccine development and the manufacture of complex ammunition and weapons systems. Forty-four of the decisions involved fixed-price contracts; thirteen involved contracts where consideration included cost-reimbursement of some kind. Six of the relationships can be described as mostly definitive, but several are long-term relationships (a ratio of 1:2). Three of the relationships include an indefinite delivery vehicle.

[123] The Military Aircraft Parts decisions involved multiple small purchase orders and represented a mixed record of success for the contractor. Most of its appeals were denied and there were indications that the company's litigiousness was beginning to annoy the Board.

[124] A point of interest: the AEON Group decision was a complete loss for the contractor, requiring that it pay back to the Government the entire sum of money it had been paid for a contract that was terminated for default (over $12 million dollars).

2. Services

a. Category Definition: The FAR defines a "service contract" as "a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. A *service contract may* be either a nonpersonal or personal contract. It can also cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis."[125] (§37.101 Service Contracting)

b. Category Summary:

i. *Dyad Characteristics:* There were nine contract relationships 1) where there was an alleged breach of the duty of good faith and fair dealing, and 2) where at least one of those decisions required the express decision of an ASBCA judge on the issue of legal entitlement to damages between 2007 and 2022. These relationships yielded seventy-eight total decisions. The Army was represented by twenty-eight opinions, DCMA/DLA was represented in twelve opinions, the Navy was involved in six opinions, "other agencies" were represented in five, and Air Force contracts generated four opinions.

ii. *Decision Characteristics:* The decisions were comprised of twenty-two orders and fifty-six opinions. Those opinions yielded 818 total pages, with an average of 14.6 and a median of ten pages and a range from 2 to 70 pages. Nineteen separate judges decided them.

[125] Some of the areas in which *service contracts* are found include the following: (1) Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of *supplies*, systems, or equipment. (2) Routine recurring maintenance of real property. (3) Housekeeping and base services. (4) *Advisory and assistance services*. (5) Operation of Government-owned equipment, real property, and systems. (6) Communications services. (7) Architect-Engineering (see subpart 36.6). (8) Transportation and related services (see part 47). (9) Research and development (see part 35).

iii. *Contract characteristics:* Of these decisions, forty-nine involved non-commercial items, with six linked to commercial items. Competitive contracts represented fifty-four decisions, with fifty-one produced through full and open competition, one was competed under a total small business set-aside, and one contract was not competed (Kellogg, Brown, Root, Inc.—reported as "no other source available").

iv. *Contractor characteristics:* Fifty-four of the decisions were for contracts related to businesses identified as "other than small," and thirty-five of those decisions were for contracts large enough to require a subcontracting plan. Only one of the disputed service contracts alleging a breach in the duty of good faith and fair dealing (and required a judge's decision regarding entitlement to damages) was with a small business contractor (Tristana R. Harvey Career Planning and Consulting Services, LLC), which was also identified as a minority-owned, Black-owned, and women-owned (and economically disadvantaged) small business.

v. *Contract Complexity* (Subject Matter, Pricing Structure, Definitiveness): The five most common NAICS codes represented were 561210—facilities support services (23), 541330—engineering services (6); 336611—ship building and repairing (5); 336411—aircraft manufacturing (3); 812332—industrial launderers (3). Contract relationships with the most decisions were Kellogg, Brown, and Root, Inc. (24), BAE Systems, Inc., and subsidiaries (7), Lockheed Martin and subsidiaries (7), Computer Sciences Corporation (6), and URS Federal Support Systems (4). The small business contractor was only represented by one decision—a denial of its appeal. Six of the relationships can be described as mostly definitive, but several are long-term relationships (a ratio of 1:2). Three of the relationships include an indefinite delivery vehicle.

3. Construction

a. Category Definition: The FAR defines *construction as:*

> . . . [C]onstruction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. For purposes of this definition, the terms "buildings, structures, or other real property" include, but are not limited to, improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, cemeteries, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, and channels. *Construction* does not include the manufacture, production, furnishing, *construction*, alteration, repair, processing, or assembling of vessels, aircraft, or other kinds of *personal property* (except that for use in subpart 22.5, see the definition at 22.502). (§2.101 Definitions).

b. Category Summary :

i. *Dyad characteristics:* There were sixteen contractor relationships involving construction contracts 1) where there was an alleged breach of the duty of good faith and fair dealing, and 2) where at least one of those decisions required the express decision of an ASBCA judge on the issue of legal entitlement to damages between 2007 and 2022.[126] In all instances, the contractor (and not the government) alleged the GFFD breach. These relationships yielded eighty-seven total decisions. The Army Corps of Engineers was involved in thirty-two decisions, twenty were related to Navy contracts, with the remaining 35 decisions essentially split between the Army and the Air Force.

ii. *Decision characteristics*: When I removed the twenty-nine orders from my analysis, fifty-eight opinions related to those seventeen relationships remained. Those fifty-eight construction opinions included 1,353 pages of text, with an average of 23.3 pages per decision and a median

[126] Basically a “good faith and fair dealing” breach is an issue only the contractor will raise. The Government does not typically make official claims against a contractor based on feelings of "unfair" or non-reciprocal behavior. Instead, officials seek monetary restitution based on the violation of statutes and laws which are used as the contractual (express) authority supporting the claim.

decision length of thirteen pages, having a range between 2 and 128 pages. Twenty-two separate judges rendered the decisions. Professional legal representation for the contactor was indicated for 57 of the decisions.

iii. *Contract characteristics:* None of the contracts were identified as commercial items (as it should be for construction contracts). All were awarded through a competitive process. Forty-eight of the decisions resulted from contracts where full and open competition occurred; three were the product of full and open "after the exclusion of sources" (total small business set-aside), two were competed within a particular small business preference category (8a, HUBZone, or SDVOSB), and four were the result of a two-stepped sealed bidding process (commonly used for Design-Build contracts). Competition for these contracts was robust, with an average of thirteen offers per decision (median 11). All were identified as fixed-price contracts.

iv. *Contractor characteristics:* Ten of the dyads were with businesses categorized as "other than small" businesses, and eight of those contracts included a subcontracting plan. Six relationships were with small businesses, all of which included a category identifier. Three of the small business relationships were identified as minority-owned businesses. One relationship was with a joint venture including an 8(a) contractor (Lebolo-Watts JV), one was a Service-Disabled Veteran-Owned business (CCI, Inc.), two were Hispanic-owned (Lebolo-Watts JV and Macro-Z Technology), one was a HUBZone small business (Alderman Building Company, Inc.), one was with an Asian-Pacific Islander company (NALCO, Inc.) and three relationships were with emerging small businesses (Alderman Building Company, Lebolo-Watts JV, and R.L. McDonnell Construction). Contract relationships with the most opinions were States Roofing Corporation

(9), ECC, including subsidiaries and joint ventures (9), Dick Pacific Construction, Inc. with joint ventures (7); Watts Constructors and joint ventures (6).

v. *Contract Complexity* (Subject Matter, Pricing Structure, Definitiveness): The five most common NAICS codes represented were 236220—commercial and institutional building construction (28), 235610—roofing, siding, and sheet metal contractors (9), 237310—highway, street, and bridge construction (7), 237990—"other" heavy and civil engineering construction (4) and 562910—waste management and remediation services (4). All of the contracts were described as being fixed-price contracts. Nine of the relationships primarily can be described as definitive contracts; eight stemmed from indefinite delivery vehicle contracts—an approximate ratio of 1:1.

C. Synthetic Summary

The vast majority of the supply contracts in this sample were described in the FPDS reports as non-commercial (meaning the requirements were not standard, off-the-shelf products and that changes to those products which originally were agreed upon were required to be negotiated bilaterally). [127] They belonged to industries where complex requirements frequently occur, such as aircraft, space vehicle, missile manufacturing and related technical support equipment production. The North American Industry Classification System (NAICS) codes associated with these contracts also indicated the contractors were manufacturers, designers, and creators of products rather than simply retail providers or pass-through suppliers not involved in production and compliance with product specifications. Most were

[127] Non-commercial contracts can be unilaterally modified by the Government if the change is within the "scope" of the original agreement.

competitively awarded to other-than-small or “large” businesses in markets that could be described reasonably as “thin” (fewer than three competitors per competition). Because the businesses were mostly large, there was no indication that small or disadvantaged businesses were forced to the “entitlement” or final judgment stage as a result of unfair treatment (although it is possible the appeals of small businesses or economically disadvantaged businesses were settled earlier in the disputes process). The contracts mostly had fixed pricing structures (even though a small percentage contained cost-based pricing), and the nature of the contract relationship was more often definitive (one-time or discrete contract) than long-term (indefinite delivery vehicle or IDV or allowing the award of multiple task orders). Determining whether the definitiveness or open-ended nature of a particular contract relationship aggravated the bitterness of a dispute requires further study. While the duration or “term” of most of the disputed contracts themselves may be discrete/definitive, there is evidence some of these contracts represent long-term business relationships between the Government and well-established commercial entities.

The vast majority of the contracts characterizing these dispute relationships were described as non-commercial and were in industries where complex requirements frequently occur (support of large-scale facility operations, professional engineering services, ship and aircraft repair and maintenance, and dealing with industrial hazards). All but one of these contracts were competitively awarded to other-than-small or “large” businesses in markets that could be reasonably described as “thin” (fewer than three competitors per competition). The only small business represented in a decision where a judge ruled on the merits of the

contractor's GFFD claim was a minority-owned, woman-owned business.[128] The nature of the contract relationship was more often definitive (one-time or discrete contract) than long-term (IDV)—although this may not be a meaningful distinction. (The contracts themselves may be definitive, but there is evidence some of these contracts are the product of long-term business relationships between the government and well-established commercial entities).

All of the contracts characterizing the construction dispute relationships were described as non-commercial, fixed price contracts. All were awarded competitively using standard procurement procedures with mostly robust competition (in excess of five competitors). Most involved facilities construction, or construction that required extensive excavation, precise scheduling, and the acquisition or transportation of building materials where cost fluctuations are common, which greatly increased the level of risk assumption by the contractors prior to award. The sample included a mix of other-than small contractors and small businesses with some diversity of contractor demographics. The contract relationships were an equal combination of discrete, one-time awards and contracts that were the product of long-term, indefinite contracting vehicles (i.e., task order contracts).

Part IV: Hermeneutical Analysis and Narrative Findings from the "Merit" Sample

A. Describing the "Merit" Sample as a Whole[129]

After culling 264 decisions (169 opinions) for all thirty-five dyads from my initial pool of 3,548 decisions to comprise the "Relationship" Sample, the decisions (comprising 3,154 pages) still produced a huge amount of qualitative data. Many of the texts contained rich substantive

[128] The contractor was not successful, and the judge ruled clearly in the Government's favor.
[129] A more detailed description of the context behind each contract dispute in included in Appendix D.

detail and were densely threaded with complex legal reasoning reflecting on the contract relationships involved in each dispute. I conducted successive close readings of all the decision texts from the 35-dyad "Relationship" sample and developed a list of topics and themes associated with behavioral fairness that repeatedly recurred. From that list I identified five prevalent behavioral and substantive themes, or what I consider "lessons learned," that I found contributed to the failures of reciprocity that undergirded claims that the "duty of good faith and fair dealing" had been violated. These "lessons," which represent my material findings for this thematic qualitative textual analysis, are defined and discussed in the following section, with examples and quotations drawn from the final decision opinions as appropriate.

Because I still needed to reduce the decision sample further for both coding and analytical manageability, I decided that using only entitlement opinions, or those opinions that specifically decided the legal merit of the contractor's complaint, would provide sufficient material for the final analysis. I chose entitlement opinions from six exemplar dyads, selecting two contracts each to represent supply, service, and construction contracts. I determined these texts could be coded completely and would still effectively communicate the study's qualitative findings. I selected opinions representing these particular dyads for discussion because they best illustrated the topics and themes derived from my initial close readings of the "Relationship" sample texts. The final selection of dyads and the subject matter of each contract were as follows:

- AEON Group, Inc/Defense Finance and Accounting Service (supply—information technology services to replace existing government-created computer-based financial system). The contractor (small business, woman-owned) was tasked with creating an up to date, "fully

functional) complex computer-based payment processing system that completely mimicked a legacy, hodge-podge, Government-produced program used for decades by many agencies within the Department of Defense. Contractor was terminated for default for failure to deliver a functional product on time. Contractor claimed that the government hindered its success by not cooperating more than the government required. The ASBCA found that the government acted properly during contract administration and ordered the contractor to reimburse the Government for the entire amount it had been paid during the contract (which was approximately $12 million dollars). Contract was a commercial item, firm-fixed price contract, and competitively awarded on a best value basis (AEON Group had the highest price but was determined to have the best technical solution for the job). The Board found that the Government strictly complied with what the contract required from it cooperatively, and that it was not required to help the contractor fix its performance problems.

- American Ordnance/Army (supply—manufacture complex munitions/projectiles) The (large or "other than small," well-established) contractor (in a fixed-priced, sole source task order) was required to manufacture a type of artillery projectile with a long history of production difficulties. The Government failed to share all of the technical information it had, which severely hindered the contractor's ability to successfully fulfill the contract. The difficulty was increased by the Government's behavior towards the contractor, which included a clearly adversarial attitude based on the fact that the contract was fixed price and an attitude that the Contractor therefore bore ALL the risk of performance difficulties. As a result, the contractor invested a great deal of extra effort and resources (time, labor, and

money) into successful performing the contract (which required it to incorporate problematic Government-furnished components and use a Government-supplied production line). The Board found that the contractor was entitled to recover the expenses it incurred due to the Government's unreasonable performance expectations and refusal to cooperate with the contractor by supplying information (damages were approximately $3 million).

- BAE Systems-Ship Repair-San Francisco/Army (service—ship repair and refurbishment). The contractor was a large company that had acquired/merged with the original contractor for this project (so not original partner at contract award). Their disputes included several task orders for the refurbishment and repair of several vessels used by the Army for transport and other troop support services. The task orders were competitive, but depended on a very convoluted pricing structure that recognized the complexity of the work, which included making repairs to piping systems within ships that contractor cold not see prior to submitting its offer. As a result, the work was characterized but numerous requests for changes and equitable price adjustments that became difficult for the Government to manage administratively. When problems arose with several of the orders, the Government refused to accept the contractor's request for price adjustments on several bases. In particular, the Contracting Officer and her technical support personnel did not find the contractor's price change requests reasonable, and in fact rejected a DOD audit of the contractor's claim that the CO had herself ordered because the audit did not reject the contractor's documentation/justification). In large part, the Board found that the contractor's requests for revised pricing were reasonable and supported by the

documentation and the facts, and the contractor was entitled to several million dollars in reimbursement costs.

- Kelly-Ryan, Inc./Army Corps of Engineers (Alaska) (construction—harbor improvements). The contractor was a well-established, family-owned small business that had successfully and recently performed an almost identical contract for the same Government office. The contract was fixed price and competitively awarded through a sealed bid. During the contract award process, Congress passed legislation that significantly changed how the Corps of Engineers could fund the project, which made performance by the contractor logistically and financially difficult. Despite the contractor's extensive efforts to cooperate with and adapt to the Government's changes and funding constraints, the Government threatened to terminate the contractor when it fell behind a performance schedule the Government required it to manipulate in order to receive payments. The contractor was forced to take extreme measures to fund completion of the contract and its requests for equitable adjustments to the original contract price were dismissed with open hostility at the highest levels of the agency. The Board found that the Government behaved improperly in terms of almost all of the contractor's well-documented complaints (and record of its attempts to help and cooperate), and found it was entitled to reimbursement (with interest) over close to $30 million (well over twice the original contract price).
- North American Landscaping, Construction, and Dredge, Inc. (NALCO)/Army Corps of Engineers (New England) (construction—maintenance dredging). The contractor, a small, minority-owned (Asian-Pacific Islander) and well-established business, was awarded a firm-fixed-price contract competitively through a sealed bid process that included a protest by

another potential contractor on the basis of NALCO's "unbalanced" bid. Despite the Corps of Engineer's defense of NALCO's original offer and its pricing to justify awarded it a contract substantially lower than the Government's own estimate, the Contracting Officer placed numerous restrictions on NALCO's payment requests for mobilization costs. She also required the company to use more expensive equipment than it had originally planned, refused to make pricing adjustments to the contract related to significant changed circumstances (a seawall built by a third party than harmed the Contractor's ability to perform dredging in the area), and terminated the contractor for default improperly. As a result, the contractor had to declare bankruptcy and lost many personal assets, including his house. The Board found almost entirely for the contractor on the basis that the Contracting Officer abused her discretion on numerous counts and required the Government to pay the Contractor's claim for monetary damages (the amount of which does not appear in the legal record).

- Unitech Services/Navy (service—industrial laundry of radioactive protective gear). The contractor here was a large business and had a long-term (several decades) contract relationship with the Government, which the reported metadata described as "competitive," but which was essentially a sole-source, fixed-price contract. The Government decided to change how it managed the nuclear-contaminated laundry the contractor had been laundering for the Navy (which was also its only customer at this location in Hawaii), and to not issue a new contract and to buy disposable uniforms instead. Unitech then claimed that the Government had misled it and treated it improperly and requested termination damages to pay for decommissioning its laundry facility (which had

been paid for under previous contracts). The Board found that the Government did not act unfairly under the terms of the contract and denied Unitech's appeal. In particular, the Navy fulfilled its responsibilities under the arm's length nature of the deal, despite the close relationship its personnel had developed with Unitech's Hawaii branch over several decades.

B. Describing and Coding the "Merit" Sample as Documentary Texts

The final "Merit" Sample consisted of thirteen opinions related to these cases that totaled 679 pages. The coded text segments/quotations pulled from this sample equaled 158 pages of twelve-point text and represented 23% of the textual materials that represented the "Relationship" sample. Though much reduced, the "Merit" Sample still provided ample data for documenting examples of government and contractor micro-behaviors that caused/contributed to serious breakdowns in administrative relationships, and which show how those actions harmed contract reciprocity.

To fully code the "Merit" texts, I refined my earlier definition of "reciprocity" to specify recognizable actions (or omissions) by both parties that contributed at least to the perception of interpersonal un/fairness during contract performance. In particular, I focused on what the *Restatement (Second of Contracts)* (§205) included as actions that evidenced bad faith in the breach of "good faith and fair dealing: 1) "evasion of the spirit of the bargain," 2) "lack of diligence and slacking off," 3) "willful rendering of imperfect performance," 4) "abuse of a power to specify terms," or 5) "interference with or failure to cooperate in the other party's performance." I went through each decision and isolated text segments that described both the *Restatement's* bad faith behaviors as well as the necessary context to evaluate their impact in

specific contractual situations. After the initial coding, I linked clusters of those behaviors to patterns I had associated with the four "lessons learned" I derived from reading all the texts comprising the "Relationship" sample. These behaviors/patterns were consistently linked to problems with contractual reciprocity during the administration and performance of each contract included in the "Merit" Sample. I expand on those findings in the next section, beginning with descriptions of what the four "Lessons Learned" entail.

Finally, I confirmed that these lessons accurately captured bureaucratic pathologies and circumstantial problem spots that promoted or accompanied unfair administrative practices. Many of these breaches of reciprocity, both large and small, were avoidable and difficult to justify under any reasonable circumstance. They contributed to the risks of performance failure in particularly complex contracts. They also aggravated the contentiousness of the disputes. How prevalent they are as pathologies in the federal contracting arena is difficult to gauge from the present "Merit" sample and well beyond the scope of the present study. However, it is genuinely concerning that these cases—even if only representing isolated occurrences—were defended by the agencies involved without settlement throughout the entire disputes process and that they ultimately required a final judgement by an ASBCA judge to resolve.

C. Qualitative Results: Lessons Learned

In Part IV, I turn to examining the actual behavior between the parties where GFFD was at the heart of the dispute and as it is reported within the documented decision narratives. The remainder of this chapter reports my hermeneutical interpretation of selected entitlement decisions that comprise the "Merit" Sample. In this final grouping, I focused on what the words

describe and what circumstances communicate about street-level contracting dynamics and the impact micro-level interactions have on the quality of behavioral fairness/reciprocity.

Upon close examination, the narratives contained within the decision texts provided richer sources of explanatory information about these dispute relationships than the metadata that formed the backbone of my previous analyses in this dissertation. I found that the stories these texts communicate about particularly contentious contract disputes offered deep insight into what fairness means within the federal procurement system at its most basic operational and human levels. The descriptive metadata, however, did help me better situate the qualitative information provided by the decision texts and to interpret it at a higher level. The combination of background facts and richly detailed narrative significantly improved my overall grasp of the material.

Using the qualitative textual analysis methods previously described, the following thematic categories were derived from the dispute decisions' "Merit" sample. In particular, I found that a party's experience of contracting reciprocity is most influenced by the attitudes, practices, and administrative features specific to the federal context when:

1. there is a prevailing attitude of sector superiority among the participants that promotes an environment of rivalry and competition towards the other at the cost of contract completion. ("Us" vs. "Them");
2. members of the dyad operate at cross-purposes or with goal incongruence: ("Mixed Fruits" of the Contract and Contrary Performance Constraints);

3. there is role confusion or a misattribution of responsibility to personnel between government and contractor, particularly related to the "confusing" role of the Contracting Officer; and
4. complexity exists (mostly a product of subject matter but also due to pricing structure and various circumstantial factors) contributes/compounds the wickedness of common administration problems.

The following sections expand upon these lessons and link them to quotations drawn from specific cases for illustration and to ground the remaining discussion further.

Lesson 1. "Us" vs. "Them"

Adversarial Rivalry instead of Teamwork violates the Cooperative "Spirit of Contract."

The most contentious disputes reveal entrenched tensions when things go awry between the perspectives that "Government knows better" and "Contractors know better," with a demonstrable lack of empathy, or *respect,* between the parties (on both sides). The dispute decisions show evidence of inter-team and intra-team rivalries producing cross dynamics between contractor personnel and government personnel that complicate performance and successful completion of contract objectives (American Ordnance, Unitech, NALCO, BAE Systems). In some cases, contractors are pressured to work as a team and then are punished for not protecting their rights (KRI, BAE), or they have become so accustomed to accommodating government requests that they perceive strict application of contract terms as unfair (Unitech). In other instances, government personnel are accused of making work harder for contractors by not providing solutions to problems even when contractors are being paid a premium precisely for elite expertise and troubleshooting (AEON). Government personnel are

afraid of being defrauded or taken advantage of and view cooperation and compromise as propping up or enabling slacking contractors at the expense of agency budgets and the taxpayer (American Ordnance, NALCO, BAE, KRI). Contractors are afraid of being browbeaten, taken advantage of, and forced to accept unfair losses by their fear of losing everything of value in their lives (literally), both personal and professional (NALCO, KRI). Good faith compromises and one-sided sacrifices by either contractors or government personnel are looked upon/received as extra-legal naivete or outright grift (AEON, Unitech). Attitudes towards contractors can easily be interpreted as flippancy and concerns expressed by contractors are even met with downright sneers.

This relational mismatch can stem from a lack of trust/understanding of unknown people who remain at "arm's length" from the initiation of the award process, which is usually competitive (and not the product of face-to-face negotiation) as a matter of public policy. It may reflect a perspective that views the function of the contracting process as a type of game that is fundamentally adversarial and not cooperative. Unfortunately, in many of these contracts, the arm's length/competitive/adversarial nature of the relationship between the government and its contractors extends beyond the required arm's length phase of contract formation and marketplace competition and infects the post-award relationship. Contractors may expect privity as part of the bargain, but instead experience resistance and even hostility. Requests for damage mitigation and adjustment of risk assumption—even when problems are not of the contractor's making—are rebuffed due to a distinct fear the government will lose something of value that overshadows the value of a completed contract.

For example, in its contract with American Ordnance, "The Army did not disclose . . .. that it anticipated that the contractor would likely experience increased costs and problems, including significant critical defect problems, production line shutdowns, and difficulty passing [product compliance tests]" American Ordnance LLC, ASBCA No. 54718, 10 – 1 BCA ¶ 34386 (p. 18). In this contract, the Army very obviously did not consider information sharing a necessary component of its relationship with the contractor, as the decision text reveals:

> [The Army] hosted an event . . . . the purpose of which was to assemble and promote the exchange of information and ideas between government and contractor personnel. . . . Both [the contractor] and government personnel made presentations followed by an open forum discussion which covered several topics . . . . During the course of these open forum discussions, [the contractor] learned for the first time that the Army was planning to perform a [related research study] although the government did not disclose the anticipated scope of the study at the Symposium. . . . [A couple of Taskers evolved from this discussion] . . . . Government employees viewed these requests or "taskers" by [the contractor] to the Army as something the government was not obligated to do and inappropriate assistance on a firm fixed-price contract (tr. 4/123). American Ordnance LLC, ASBCA No. 54718, 10 – 1 BCA ¶ 34386 (page 23).

These quotations just scratch the surface of the Army's problematic attitude towards its role in the success of the contract.

In the BAE Systems-Ship Repair-San Francisco dispute, the Government repeatedly refused to consider the contractor's documentation supporting the costs it incurred due to the Government's unilateral changes and faulty specification documents. For example, the Board found that:

> In denying BAE's claim, the [contracting officer] relied chiefly upon [her government representative's] pre performance estimate (finding 74). . . . From [his] estimate and his testimony at the hearing, we found he gave little or no consideration to what turned out to be a significantly more complicated undertaking requiring additional tank cleaning and painting work that had been accomplished, and repairing damage to the painting that had been accomplished. We found . . . [the contracting officer] made no effort to determine from BAE to what extent its workforce and schedule would be impacted, and to what extent work BAE already accomplished would have to be redone when she

ordered the cloverleaf replacement work late in the vessel's availability. *BAE Systems San Francisco Ship Repair,* ASBCA *58809*, 16-1 BCA ¶ 36,266 (page 25).

The decisions reflect a clear attitude of technical and business-capability superiority by Government personnel, who even refuse to consider an audit performed by the Department of Defense as sufficient evidence to support the contractor's claims.

The NALCO decision reflects a particularly cavalier attitude toward the Government's reasonable responsibility to cooperate with a contractor as an actual partner in completing the contract. Harmful condescension is reflected in language throughout the decision *(North American Landscaping, Construction, and Dredge, Co.,* ASBCA Nos. 60235, et al. (Aug. 9, 2018)), including the following examples of the agency's problematic management strategy:

- Testimony included in the decision text: "We [The Corps of Engineer's contract management staff] had discussions about closely monitoring the contractor's performance and **being quick with the letters to document non-performance. Obviously, we will work with the contractor and hope he can perform, but if [he] can't we are going to aggressively administer the contract to protect the Government[']s rights under the contract.** At this point, the company seems very willing to work with us ... time will tell." (emphasis added) (p. 10)

- NALCO requested a meeting on 29 January 2014 to discuss the memorandum and mobilization payment dispute. On 18 January 2014 NALCO's request and memorandum was distributed within the [Corps of Engineers or COE]. Mr. Dolan, COE, commented by 28 January 2014 email, **"'Yikes … I know it is late in the day, but that made no sense to me. I will reread later, but seven pages of blablabla... it is not my fault because I didn't realize what I was doing when I signed the contract is not a legal defense.'**" (emphasis added) (p. 13)

The full decision clearly shows that this is a total mischaracterization of the contractor's understanding of what the original contract required it to do. In fact, later in the decision, the text records the agency's project manager stated in an internal email that "If nothing else

NALCO has put their best foot forward and approached this project with integrity and a good faith effort to meet their obligations under this contract" (page 20).

At times, this absence of teamwork is reflected in documented neglect and administrative indifference. The owner of Kelly-Ryan, Inc. for example, repeatedly asked for agency direction in an increasingly untenable performance situation and received none: "[W]e asked the Corps for their input. You know what, during this whole period of time, all of 2006 [construction season], they gave no input. None. So you know, we did what we thought was the right thing to do. And we asked them on more than one occasion to give us some input, no response" Kelly-Ryan, Inc. ASBCA No.57168, 18-1 BCA ¶36,944 (p. 59).

Lesson 2. "Mixed Fruits" of the Contract and Contrary Performance Constraints

Individual Cross Purposes of the Parties Thwart Mutual Objectives

In the most basic terms, the end goal of the contracting process is to satisfy the Government's expressly stated needs and for the contractor to enjoy its "fruits of the contract," both financially and in terms of reputation. However, the need to reduce and transfer risk to the private sector for every contingency can cause problems, inefficiencies, contract and program failures, and overall bad blood between the government and the private sector. The most contentious disputes reveal not just a loss of the "spirit" of contract, but of the ultimate "purpose" of contract as well: for both parties to gain ground from the relationship as a result of investing mutual labor and resources towards the realization of a common objective.

Contractual reciprocity is influenced heavily by transactional and institutional factors. Institutional constraints on federal contracting officials in particular complicate mutual trust in situations where flexibility, negotiation, and cooperation are required. The different

operational environments faced by contractors and their government counterparts influences behavioral fairness throughout the procurement process as a whole, from competition to closeout. On the one hand, contractors can face the loss of reputation, bankruptcy, and financial ruin when things go wrong. On the other hand, government customers and the taxpayer can become the victims of tough funding choices that drain resources for completing other important projects and program objectives. Contracting officials who make mistakes can face financial penalties, loss of their job, or even incarceration when certain laws (such as the Antideficiency Act)[130] are violated. These constraints are somewhat known to academic researchers,[131] but their importance can receive short shrift in terms of understanding how the impact on street level behavior.

Some disputes result from mismatched stakeholder interests or from one party's (usually the government) failure to accept the other party's right (usually the contractor) to realize the benefits they reasonably expected from the contract, such as profit (KRI, NALCO). In these instances, one party refuses to appreciate/give credence to the other party's limitations, operating constraints, and financial considerations (BAE, American Ordnance, KRI, NALCO). This lack of congruence is aggravated by the tension between government fiscal controls and how they can impair business agility. Government personnel can be overly aggressive or overly

[130] The Antideficiency Act (31 U.S.C. § 1341) "prohibits federal agencies from obligating or expending federal funds in advance or in excess of an appropriation, and from accepting voluntary services." The consequences are severe: "Federal employees who violate the Antideficiency Act are subject to two types of sanctions: administrative and penal. Employees may be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office. In addition, employees may also be subject to fines, imprisonment, or both." (https://www.gao.gov/legal/appropriations-law/resources

[131] Kelman, Steve. 1990. *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance*. American Enterprise Institute. Also, Mashaw, Jerry L. 1991."The fear of discretion in government procurement." *Yale Journal on Regulation* 8: 511-519.

reluctant to act because of a need to satisfy their internal customers while still complying with stringent oversight and accountability requirements.

Table 6.1: Sample Quotations from the Decision Texts ("Mixed Fruits")

Contractor: American Ordnance, LLC (*ASBCA* No. 54718, 10-1 BCA ¶ 34386)

[Quotation from the decision text (statement of facts):]

In an e-mail dated 1 August 2002, Mr. Larry Gulledge, the top-ranking Army civilian official at Rock Island, expressed concern to other Army officials following an IOC meeting on the status of the M107 program (R4, tab 452). Specifically, Mr. Gulledge stated:

> I didn't see any reference to the issue of AO losing $100K a month while they are in park. Or the fact the company(s) have a couple of million tied up in this at this time. Or how long the test samples have been at Yuma, when they will be done, or who to call. Or estimated date for quality plan resolution. Or the fact this smacks a lot like an R&D effort.

(R4, tab 452 at 45430) (emphasis added [in original]) Mr. Gulledge further stated, "Heresy of all heresies, we may even have to start renegotiating some contracts that have just proven impossible to execute" (id.) (emphasis added [in original]). (p. 46)

Contractor: North American Landscaping, Construction, and Dredge, Co. (NALCO) *(*ASBCA Nos. 60235, et al. (Aug. 9, 2018)): This quotation reflects the judge's interpretation of the case:

"Because the [Corps of Engineers] would not pay for the dredge and pipe as mobilization costs, Mr. Kim could not pay NALCO's bills and he was getting communications from collection companies. Mr. Kim decided to get a loan using his personal house and equipment as collateral. . . . Mr. Kim also borrowed $100,000 from members of his church to make payroll . . . . Mr. Kim eventually lost his house, equipment and his business to creditors." (p. 16)

Contractor: Kelly-Ryan, Inc. *(*ASBCA No. 57168, 11–1 BCA ¶ 34,629, p. 122). This quotation reflects the judge's interpretation of the case:

"Contemporaneous evidence shows us that the Corps (Alaska District) was well aware that the change in funding clause . . . required and could impact KRI's schedule and costs. Nevertheless, the Corps elected to withhold this information from KRI until 3 April 2006, almost a year after contract award and months after the Corps' receipt and acceptance of KRI's schedule and cash flow forecasts based on the [wrong funding clause]. (Findings 26, 29, 32, 34) The Corps thus kept all reduction of financial risk to itself, while at the same time it increased KRI's financial risk, rather than limiting KRI's risk as required by the [multiple internal direction and public law]." (p. 118)

Failure to appreciate these conflicting perspectives exacerbates the unequal power dynamics between sovereign and commercial entities. These conflicts can also be made even worse by external political pressures (e.g., influence from Congress at both macro and micro levels) and market pressures (business challenges due to technological changes, product, or service obsolescence, and/or the need to be competitive in fields where supply costs fluctuate constantly and severely). Several examples from the decision texts are described in Table 6.1 below.

Lesson 3. Role Confusion for the Contracting Officer

Unclear Authority to Act in the "Government's Best Interest" Muddies the Contract Relationship

Another finding is that contracting officers' flexibility for deal-making and risk assumption during the negotiation of contract changes can be severely impacted by relationships outside the contract setting, particularly related to shifting legislative priorities, the intricacies of appropriations law, lack of organizational capacity, and incremental funding/chronic underfunding issues. Institutional and political pressures, combined with a decision-making capability that is functionally dependent on convoluted command structures make the decision space for contracting officers complicated, tense, and unclear. The fuzzy boundaries of the position's role responsibility can make business relationships more difficult to manage as well as make priorities unclear—for example, to protect the Government (agency), or to protect the contractor and/or citizens from abuses of discretion and power?

Although contracting officers are officially empowered to act on behalf of the government's best interest, they may have difficulty acting with full empowerment within the multi-layered Department of Defense bureaucracy. In addition, though contracting officers

have a normative professional responsibility to protect a contractor's reasonable rights and interests within the contract relationship, it may be extremely difficult for them to do so in actual practice. This can place an unfair burden on commercial contractors to assume dangerous levels of performance risk, even when they have as much stake in a project's ultimate success as their government counterparts.

In particular, role confusion related to Contracting Officer responsibilities can result in problematic behaviors such as:

- Over-reaction/Strong-arming: There is extreme pressure on the Government's representatives to be unassailably strong, assertive, powerful and to steer the contracting situation completely rather than to share the reins.
- Suspicion**:** There can be mistrust about being taken advantage of, possibly due to a lack of technical expertise in subject matter areas, as was seen in *BAE Systems*.
- Avoidance: In the face of problems without easy solutions, there can be a tendency to avoid acting decisively until a problem goes away and resolves on its own. Decisive actions remove options. They set courses of action in stone. They lead to irreversible consequences. This hedging represents the professional vulnerability for a Contracting Officer. It is an attempt to gain behavioral concessions without making extra-legal promises, a request for cooperation for the other party that is based on a certain amount of personal risk without obligating the Government in a way that the Contracting Officer knows he or she cannot promise, but hopes will materialize if all goes well.

Several examples from the decision texts are described in Table 6.2 below.

Table 6.2: Sample Quotations from the Specific Decisions ("Role Confusion")

Contractor: [NALCO] ***North American Landscaping, Construction, and Dredge, Co.,*** **ASBCA Nos. 60235, et al. (Aug. 9, 2018)):** This quotation reflects the judge's interpretation of the facts of the case.

"The [contracting officer] knew NALCO needed this money to perform. She also knew that the [Corps of Engineer's} insistence that NALCO offer a larger dredge at no additional cost would increase NALCO's cost of performance thereby adversely affecting cash flow. . . . In response to NALCO's plea for payment (finding 24), [the contracting officer] wrote, "It is not the practice of the U.S. Army Corps of Engineers to counsel contractors on their cash flow concerns or provide financing to contractors who experience cash flow problems" . . . . This shows a degree of callousness unexpected from the government since the government caused NALCO's cash flow crisis. When asked by the trial judge how NALCO was supposed to pay for performance, [the contracting officer] testified that NALCO would have to get private financing and that the way NALCO structured its bid caused the cash flow problem"

Contractor: Unitech (*UniTech Services* Group, *Inc.*, *ASBCA* No. 56482, 12-2 BCA ¶ 35,060)

This quotation reflects the judge's interpretation of the facts of the case:

"Appellant [The Contractor] exaggerates the evidence as it relates to Ms. Matsuura [Contracting Officer]. Appellant has not established that Ms. Matsuura assured it that it would receive another contract. During the period from 1 April 2006 to 27 June 2006, Ms. Matsuura did give it a heads-up that a purchase order was in the works, but appellant rejected that idea (finding 32). Other than that, there were a series of inconclusive emails and telephone calls. On 27 June 2006, Ms. Matsuura informed appellant that the solicitation was cancelled (finding 36). Appellant has not pointed to any evidence that Ms. Matsuura communicated with it about a possible future contract after that date. We also do not believe that appellant has proved that there was any affirmative misconduct on the part of Ms. Matsuura." (p. 21)

Contractor: Kelly-Ryan, Inc. (ASBCA No. 57168, 11–1 BCA ¶ 34,629)

[Quotation from the testimony of Contracting Officer Williams:]

> "' [B]ut in my mind [CO Williams] we have failed if we terminate a contract. Now we no longer have a project. Our sponsors, Aleutians East Borough, is not getting a harbor, and who knows when they will get a harbor?
>
> So, in my mind, I never really considered terminating the contract at this point in time .... [T]erminating a contract at this point in time is a very high likelihood that the contract will not get refunded and be completed.'

. . . The Corps had been trying to get the False Pass project funded for ten years." (p. 49-50)

Lesson 4: Complexity Compounds Administrative "Wickedness"

The Subject Matter, Situational Contexts, Institutional Requirements, and Dynamics of Human Interactions combine to Infuse Contract Administration with "Wicked" Problems

Contract complexity in both subject matter and regarding the assumption of pricing risk within fixed-price contract structures is a significant common factor in generating formal disputes and in increasing their contentiousness. The already tricky interpersonal dynamics between government and contractor personnel are amplified if complex contracts (either in terms of the products delivered or services provided) become exponentially more difficult to perform than expected (American Ordnance, BAE Systems, KRI, NALCO). Increasing difficulties arise especially when expected solutions to foreseeable issues turn out instead to be untenable (AEON Group, American Ordnance), when external circumstances arise or change to complicate an already complex working environment (KRI, NALCO), and even when the procurement rules complicate how the Government can acquire an unusual or unique product/service without breaking the law (Unitech). Ordinary human biases, preferences, quirks, and idiosyncrasies themselves are a complicating factor, especially when the expectations of Government customers must be satisfied throughout thickly layered bureaucratic hierarchies stretched across the world (AEON Group, BAE Systems, KRI). Making sure Government representatives have the requisite knowledge to work with experienced contractor counterparts or that contractors are privy to the same integral information the Government has can be a particular challenge, especially if the dynamics between the parties are already adversarial (American Ordnance, BAE Systems). The failure (or refusal) to share idiosyncratic, legacy Government knowledge with contractors charged to update and modernize systems and structures also causes problems (AEON Group, American Ordnance, BAE Systems).

What is it about the complexity of these contracts and the situations that surround them that aggravated these disputes to the entitlement stage? One obvious takeaway from these decisions is that the problems encountered during contract administration were rarely singular. There were usually clusters of problems that led to multiple sticky issues that make the interactions between government personnel and contractors increasingly ugly and difficult to resolve. As differences between the parties became more complicated and more entrenched, there eventually became a point of no return where both parties refused to cede further ground to the other, and a judge's intervention became necessary. The disputes became, in a sense, administratively "wicked."

Complexity in the administration of contracts that produce dispute-level conflicts can also be the result of using certain types of contract types to acquire products and services the Government needs, but which the market is not equipped to supply competitively (American Ordnance, Unitech). These dispute decisions reveal the impact of market realities like buy-in, monopsony, or monopoly upon federal contract administration, and show how those market conditions can complicate the benefits believed to accrue to the Government as a result of public competition practices.

However, the research in this dissertation shows that it is relatively rare that non-competitive contracts result in durable disputes that require resolution by a judge. Few of the disputed contracts where unfairness was alleged and that ultimately were decided on the merits of the case were the product of sole source or other extensive negotiations before contract award.

Of all of the "Merit" decisions, it is perhaps the Kelly-Ryan, Inc. decision *(*ASBCA No. 57168, 11–1 BCA ¶ 34,629, p. 122) that best shows how a variety of administrative issues compound to create problems that become functionally inescapable for the parties involved without resorting to the expertise of a third-party intervenor:

> Throughout the contract performance period the Corps had encouraged, sometimes directed, KRI to continue work to complete the False Pass project that the Corps had been trying to get accomplished for ten years. All the while, the Corps, knowing it had no more money to fund the contract work, also encouraged, and sometimes directed, that KRI submit [requests for equitable adjustment] or claims for the extra time and extra costs KRI had continuously notified the Corps it was experiencing as a result of the continuing impacts of the Corps' post-award unilateral modification adding the [improper funding clause] to the contract in 2006. When KRI submitted [requests for equitable adjustments] and claims, the Corps consistently failed to respond to them in any meaningful way ... Finally, 3 years after contract completion, CO Williams signed a 101-page [Contracting Officer's Final Decision] that was authored by others not involved with the contract in which the Corps denied liability for any of the impacts experienced by KRI. The Corps had gotten the False Pass project completed, at KRI' s great expense, and now argues before us that it owes KRI nothing more than the original contract amount." (p. 122)

Careful review of the ASBCA decisions reveals that the compounding of administration problems by multiple factors of complexity to the extent that they ruin contract relationships and poison the fruits of the contract each party expects to receive show that such "clusters" are far from isolated in federal procurement contracting. The problem, of course, is what can be done to prevent the aggravation impact of complex problems before they occur.

Conclusion

Chapter 6 completes my exploration of contractual fairness in federal procurement, conceptualized as equality, equity, and reciprocity, using the contextual window offered by the ASBCA Dispute Decisions. As in Chapter 5, my primary goal was to understand this domain's representation of reciprocity as relational fairness (the nuanced interaction of behavioral

parity, procurement complexity, and contractor demographic characteristics/status in a context defined by contractual privity) using abundantly available public records as a research resource. Although I used a type of quantitative methodology (CTA) in Chapter 5 for description and comparison and to guide my exploration of the qualitative questions in the present chapter, I chose to treat the numerical data as suggestive of relationships rather than definitive of them.

The bulk of Chapter 6's contribution lies in its hermeneutical analysis of a small number of cases where express complaints of government unfairness were made and evaluated by administrative judges. What I found within these texts was repeated instances of problematic behaviors that clearly harmed perceptions of reciprocity and ultimately lead the parties to unresolvable disputes. Briefly, those behaviors included attitudes toward contract performance that are adversarial as opposed to cooperative ("Us" vs. "Them"). They also included multiple examples where the contracting parties failed to honor either the aspirations or the constraints of the other party (preventing their contracting partner from enjoying their "fruits of the contract" or failing to understand real-world, sector-based issues that impacted a party's responsiveness and business flexibility). There was also evidence that "the role and environment of the contracting officer" as considered by Phillip J. Cooper (2002) is still a factor that contributes to dispute causation due to role confusion. In addition, there is a legitimate question of "which side" of the contracting relationship the contracting officer must prioritize and in what situations. Lastly, the texts reveal that procurement complexity (as well as other types of aggravating complicating factors) contributes strongly to the contentiousness and durability of disputes.

I turn now to Chapter 7. After briefly summarizing the study, examining its limitations, and highlighting its lessons, I explore avenues for future research on the dynamics, complexities, challenges, and possibilities of pursuing fairness in government contracting.

Chapter 7: Conclusion
Fairness in Dispute: Equity, Equality, and Reciprocity in Federal Procurement Contracting

The purpose of this dissertation was to explore what the normative concept of "fairness" means in the operational context of federal procurement contracting. At the beginning of the project, my theoretical exploration indicated that fairness—defined as justice tendered between individuals and groups or collective entities on a dyadic, interpersonal, micro-level basis rather than at a global or societal level. I hypothesized that fairness in this environment manifests primarily in three elements: equality, equity, and reciprocity. I contended that the combination of these elements embodies a nuanced aggregation of justice in the entire procurement system. I argued that Congress and the Executive Branch purposely have incorporated these dimensions into the express requirements of the Federal Acquisition Regulation. I also asserted that analyzing the discretionary actions of empowered government officials such as contracting officers, who act as "knowledge agents" within the federal bureaucracy, can illuminate how these three aspects of fairness interact. I chose the Department of Defense's formal contract disputes process as a window through which to explore the meaning of fairness, and experimented with how to isolate and identify such an operationally slippery normative construct as fairness within the system. Finally, I assessed the manifestation of fairness qualitatively using the texts and records of actual adjudicated contract disputes, and derived "lessons learned" from that analysis.

The dissertation concludes with a summary of the study's findings from the execution of a multi-pronged, mixed-method research design. For data, I utilized both primary and secondary source materials related to official dispute decisions published by the Armed Services Board of Contract Appeals between 2007-2021. I next executed a descriptive analysis

employing operationalized variables that I linked to equity, equality, and reciprocity through contract report metadata associated with the Board's decisions. Following the completion of this design component, I turned to computational text analysis, and several types of qualitative content analysis supplemented with a hermeneutical close reading of the decision texts as my primary methods of exploring the study's research questions. In this final chapter, I summarize my findings, discuss their broader implications for theory and for practice, assess the limitations of both the study design and of my analyses, and offer recommendations for future research.

Dissertation Summary

In Chapter 1, I observed that the Federal Acquisition Regulation does not explicitly define what it means by "fairness," but indicates that its meaning is different from simple uniformity or equality in the following sentence: "All contractors and prospective contractors shall be treated fairly and impartially but need not be treated the same."[1] I noted that economic theories have been vital to understanding procurement dynamics. However, evaluating contract relationships requires the knowledge that contracts are more than economic, transactional instruments. Contracts equally must be recognized in their function as social artifacts (Suchman 2003) used by organizations and managed by individual frontline workers who navigate complex political, legal, and bureaucratic operational environments as institutional "knowledge agents" (Maynard-Moody and Musheno 2022; Møller 2022). I contended that procurement officials are street-level administrators who are required to ensure (and fundamentally, to insure) fairness in this complicated operational context.[132] I also

[132] "Ensure" in the sense of maintaining the ethical integrity of the procurement system; "insure" to the extent that procurement officials protect the Government's financial interests by preventing loss through the legal assessment of money damages in response to a legal judgment of fault.

described how they are expected to do so for a correspondingly complex array of stakeholders, whose diverse interests must be balanced, weighed, and served (Mayer and Khademian 1996).

In Chapter's 2's conceptual framework, I used the work of John Rawls to explore the ethic of fairness and its relevance to contracting and procurement studies. Second, I examined how three types of fairness (equality, equity, and reciprocity) have been incorporated into the federal procurement system legislatively and operationally. Third, I argued that the street-level bureaucracy (SLB) and public values framework (PVF) literature is pertinent to studying performance questions and specifically reciprocity in the context of contract administration. I also considered the applicability of Maynard-Moody and Musheno's recent addition of a "knowledge agent" category to their prior formulation of "state-agent" and "citizen-agent" operators as a theoretical innovation in the understanding of street-level policymaking by frontline workers (2022). Fourth, I expanded my description of reciprocity as an essential dimension of contractual fairness and discussed its importance to the complex interpersonal dynamics required for the successful administration and satisfactory performance of federal contracts.

In Chapter 3, I explored the Armed Services Board of Contract Appeals as an accessible source of information about street-level operational behavior associated with federal procurement contract administration. I then explained the history of the Contract Disputes Act of 1978 and its relevance to my research questions. I next outlined my research design for the remainder of the dissertation using a Descriptive Analysis with Case Study features, Computational Text Analysis technology and Qualitative Textual Analysis techniques. Finally, I described the compilation of a novel dataset from public documentary sources (primarily,

Federal Procurement Data System (FPDS) Individual Contract Reports and dispute decision texts in documentary form) for use in the remainder of the project.

In Chapter 4, I employed qualitative and quantitative techniques in my descriptive analysis (Loeb, et al. 2017) to map the topography of fairness in contract disputes with the Department of Defense (DOD) over a fifteen-year period. This design component added contextual depth to an agency-focused, mezzo-level discussion about operational procurement. To bound and focus the description, I associated *equality* with the "quality" of original competition represented by awarded contracts in the dispute decision sample (focusing on degree, access, and depth); *equity* with the distributional balance across demographic categories when compared to the demographics of those awarded contracts; and *reciprocity* with relational parity as tapped by the final dispositions of contract disputes (outcomes). I examined the ASBCA decisions with those definitions and the following questions in mind:

1) Is the dispute process fair in terms of competition? (equality)

2) Is the disputes process fair in terms of the proportional distribution of disputes across demographic and categorical lines? (equity); and

3) Is there a relationship between procurement complexity, contractor demographic characteristics/status, and the outcomes of disputes (reciprocity)?

I based these questions on the working hypothesis that a fair system will produce demographic and categorical statistical proportions for disputed contracts that closely resemble the same statistics related to contract awards during the same general time period. Disproportionate distributions should indicate where issues of contractor identity or other

interpersonal factors may have contributed to unfair administration. The results clearly showed that subject matter complexity was an important feature in most of the disputed contracts and suggested that contractor identity played some role in exacerbating or amplifying that complexity, although the causes, mechanisms, and implications of that finding were unclear.

In Chapter 5, I sought further clarification of these findings by using a computational text analysis to reduce the dimensionality of the full ASBCA decision corpus and to produce a systematic summary of the materials through topic modelling. The topic modeling process revealed that the legal phrase "good faith and fair dealing," when asserted in claims of a contract breach, could help narrow my study to a manageable number of decision texts. I also used the results of the topic modeling to develop a rubric for evaluating disputes in terms of common factors that may impact a contractor's perception of reciprocity (relational fairness).

The rubric synthesized my interpretation of topic-level word associations with operational task knowledge of the administrative stage of federal contract management. Finally, I linked my understanding of those word associations to the three aspects of fairness (equality, equity, and reciprocity) as they are represented in the corpus of ASBCA decisions. I used those insights as well as a thorough explication of the language-in-use of the contracting environment as it appears in legal documents to lay the groundwork for the more targeted thematic analysis that I performed in the next (and final) analytical chapter.

In Chapter 6, I continued the project's qualitative content analysis by exploring what the dispute texts communicate *situationally* about contractual fairness in federal procurement by analyzing the words and phrases from the decision texts *in situ*. In contrast to Chapter 5's examination, for the qualitative textual analysis the decisions' words were re-contextualized

and studied as complete textual or semantic units (whole, individual decision documents). The computational text analysis extracted the coherent phrase "good faith and fair dealing" from the disaggregated big "bag of words" compiled by CQDAS software (QDAMiner) after the removal of the word/"tokens" from their semantic context (but still connected by word collocation algorithms). This recognition of this phrase (a four-word n-gram) as a significant word pattern helped me isolate particularly pertinent decisions texts for further study with the assistance of Keyword-in-Context searches (KWIC). I used those search results to compile three decision samples to use with complementary analytical techniques (the "All Text," Relationship," and "Merit" samples) and allowed me to examine further the contract relationships at the heart of the most contentious disputes in terms of fairness.

I used the "All Text" sample to analyze the language used in every decision that referenced the duty of good faith and fair dealing specifically. The "Relationship" Sample" allowed me to evaluate collectively the metadata describing the contract/contractor demographics of these individual relationship dyads. Narrowing that grouping further into the "Merit" sample helped me sort and evaluate consistent behavioral patterns described by the Board as clearly violating the duty of good faith and fair dealing into a series of "lessons learned" that may have utility for both practitioners and contracting scholars.

Throughout the dissertation I applied various content analysis techniques (mostly qualitative, but some quantitative) to the ASBCA dispute decisions corpus to extract useable observations from primary source materials (official legal narratives and practitioner-completed contract data reports). I used the results of those analyses to illustrate characteristics of conflict development and relational power dynamics in specific government-contractor dyads.

Integrating a multi-faceted textual analysis with a phenomenological examination of important primary source materials enabled me to complete a comprehensive, yet still nuanced study of an important ethical requirement within a specific administrative operational domain. This combination of methods furnished depth to a frontline, micro-level perspective on my central questions about the meaning of fairness in federal procurement contracting, and represents this project's primary contribution to public administration scholarship.

Integrated Discussion and Implications for Theory and Practice

My primary finding is that the decisions show that procurement complexity is an aggravating factor in disputes where a contractor believes it has been treated unfairly. Yet, the operational complexity most impacting perceptions of reciprocity did not come from the nature of the subject matter, the pricing structure, or the term of the contract. The complexity that compounds these disputes stems as much from what legal scholar Lisa Bernstein identifies as "transactional" and "institutional" factors (Bernstein 1996, 1815) as it does from the technical complexity of specific contracts terms related to performance, price, or contract duration and completeness. A contractor's perception (and experience) of unfairness was especially prevalent in contracting situations that required high degrees of flexibility, cooperation, and the need for negotiated solutions and price adjustments. In particular, the special considerations required by agency law and by federal appropriations law appeared to exacerbate the relational difficulties reflected in especially contentious disputes much more than the requirements of traditional (i.e., non-federal, standard commercial) contract law.

This finding links this study to a venerable tradition of organizational and management scholarship stemming from Barnard (1971) and Follett (2003) that emphasizes the importance

of individual leadership in navigating institutional complexities. It also, like Selznick's classic case study of the Tennessee Valley Authority (2011), points the importance of understanding how interorganizational/interpersonal dynamics impact fundamental relationships between administrators and the populations with whom they interact and serve. As such, the value of conceptualizing frontline workers and street-level bureaucrats as "knowledge agents" can be linked to elements of classical organizational studies that have been expanded to study phenomena that are emergent, contingent, and dynamic.

I also found that Contracting Officers (COs) must continually navigate between roles as "brokers" or "purists" throughout the contract relationship (Roman 2014). The role individual COs choose to occupy at any given time may depend upon variable determinations of desert they make in their function as knowledge agents (Maynard-Moody and Musheno 2022). These assessments of discretionary modulation and a contractor's worthiness of a "broker" response may also be subject to the institutional and transactional complexities referenced in my first finding. In navigating the normative tensions between administration discretion practiced "at arm's length" or "under the pale shadow of the law" within the contract relationship, a contracting officer's interpretation of fair treatment (and a contractor's characterization of it) is far from a stable construct. Perceptions that the relational duty of good faith and fair dealing may have been violated can become the consequential victim of a contracting officer's vacillation between their expected roles of businessperson and law enforcer, and between government advocate and a guardian of justice on the frontline of public service.

Where the damage to the government/contractor relationship is greatest appears to be when government officials violate the spirit of a contract more than when they fail to uphold an

individual contract's express requirements. As Justice William O. Douglas dissented in *U.S.* v. *Wunderlich* (342 U.S. 98, 1951), the majority's decision to uphold the final authority of agency heads in contracting disputes unless conscious fraud was involved made "a tyrant out of every contracting officer" (*Wunderlich* 111). When a government official has the "the power of life and death over a private business" and engages in behaviors that appear "stubborn, perverse, or captious" and "incompetent or negligent," or when their decisions are "grossly erroneous," the government/contractor relationship dyad suffers (111). The ASBCA has made great strides in correcting clear violations of contractual fairness since its inception. However, the dispute decisions texts also demonstrate that difficulties generated by Contracting Officer role confusion continue to occur.

Another finding of this study is that a contractor's experience of fair treatment may depend upon issues related to various demographic factors. Contractors of various demographics should receive equal treatment; the record shows that while it may not necessarily be unequal treatment, as the result of practice, treatment differs for small businesses compared to larger businesses. The Government should act equitably in all cases, but determining what "equity" represents in federal contracts requires us to understand that it is the product of a mixed marriage between sovereign right and market responsibilities. The ASBCA dispute decisions texts show that the Government enjoys broad deference in determining how best to hold contractors to the expansive boilerplate language that each federal contract is required to contain. Staying within the law protects the Government's agents in terms of their personal actions, but in some instances right-protective behavior by a federal official will violate the spirit of contract and interfere with the Government's purpose of

using contractual instruments to achieve state goals in the first place. Instead of fostering an atmosphere of "win-win," it can contribute to obfuscation, deflection, and distrust.

Another finding is that mistakes in the original express contract or changes made in response to changed needs or conditions, particularly in contracts with complex terms, are common. Therefore, one measure of fairness in the federal procurement context is the willingness of the parties to negotiate a mutual agreement to address changes that occur—or that could not be foreseen—to the original requirements of the contract. An important measure of contractual reciprocity is how the parties act as a team in the context of the contractor-government relational dyad. That a contractor and the Government can agree to settle a dispute at any stage of the process, even after it has hardened into a formal appeal, in some ways still represents a return to the spirit of contract. The decision to settle is at least an acknowledgment by one of the parties that its behavior cannot be defended as contractually "fair" before an impartial, disinterested adjudicator. Understanding why disputes were *not* settled was the primary reason I chose to examine specific decision texts where an allegation that the duty of "good faith and fair dealing" was made, and where the ASBCA was forced to intervene with a final decision.

Final Analysis of Fairness as Equity, Equality, and Reciprocity

In Chapter 2, I argued that the FAR carefully weaves the dimensions of what equality, equity, and reciprocity entail into something political theorist Jonathan Woolf calls an "egalitarian ethos" (1998, 2010). This complex mix of variably applied values infuses how contracting officials understand the entire operating environment of the federal procurement system, creating a performance standard of comprehensive fair treatment for contractors that

saturates (and muddies) the normative culture and operating environment of the system. What I did not understand at the beginning of the research is what exactly this combination would look like in practice.

I defined *equality* as uniformity or sameness of treatment. Equality, which is practiced without the consideration of "background fairness"[2] informing each contracting situation, can be considered a form of "procedural" justice. I defined *equity* as proportional parity of contracting opportunities and outcomes in the decisions made by a contracting official. In contrast to equality, equity *is* based upon a consideration of background fairness, and can be described as "substantive" or "distributional" justice. I defined *reciprocity* as an interpersonal, privity-based behavioral construct essential to the world of contracts and mutual agreements during performance and administration of the work. Reciprocity can be described as a type of "relational" justice because the impact of background fairness depends upon the discretionary judgment of an empowered government official in response to their assessment of dynamics within the government-contractor relationship dyad (Roman 2014). The primary question I asked of the disputes data in terms of equality was: to what extent have all the contractors or classes of contractors been treated the same? The primary question I asked of the disputes data in terms of equity was: to what extent are all contractors or classes of contractors treated differently? The final question I asked of the disputes data in terms of reciprocity was: what interpersonal dynamics (and specific behaviors perceived as unfair) are especially prevalent in contract disputes that require final resolution by a judge?

Did I find that "evidence of reciprocity" (in terms of successful dispute outcomes) is statistically proportionate to the other two fundamental dimensions of fairness (equality and

equity)? Were the demographic data representing contractors whose disputes were fully adjudicated pointedly different from the proportions of contractors of similar descriptions 1) who receive awards initially; 2) whose contract is terminated for default or for cause; or 3) whose dispute is settled without an explicit, articulated judgment by the ASBCA judges? What factors complicate these data, and what can the findings communicate about justice within the federal procurement system?

At the conclusion of this study, some of these initial questions remain unanswered and ultimately were beyond the scope of the research design and the limitations of time and money. The documentary data and the information I extracted from that data, while extremely promising, still require additional processing to be suitable for reliable, valid, and generalizable quantitative analyses. I found that most disputes that alleged violations of behavioral fairness were the result of robust competitive procedures. I also found that large ("other than small" businesses) were far more likely to push such disputes to resolution by a judge. However, I cannot determine if that distinction is the product of larger business's greater financial and legal defense capacity (combined with the repeat player experiential knowledge), or of the Government's prudent decision to settle contract disputes that reveal unattractive government behaviors involving small businesses earlier in the process.[133] I also did not find that small business contractors that identified as minorities or who belonged to other legislatively assisted demographic groups (such as service-disabled veterans) appeared in disproportionate numbers

[133] The early settlement decision could also be related to potential liability for legal fee reimbursement to successful small business disputants resulting from application of the Equal Access to Justice Act (34 CFR § 21.1).

in cases that received final adjudication before the Board. In fact, what I found suggested that the opposite interpretation was equally valid.

Positionality and Potential for Bias

As a former practitioner, I have experience in federal procurement contracting as a contracting officer who awarded and administered contracts in the civilian agency environment. In this capacity, I had many encounters with the contracting community both positive and negative, and with agency officials at all levels in the federal government (as an employee and a citizen). This positions me as someone with both personal insights and inevitable prejudices and blind spots about the questions I have examined here. As a researcher, my fundamental ideological position is that despite my best intentions and efforts to guard against bias, my experiences inevitably influence how I see the world, how I formulated this research question, and collected and analyzed the data produced through the methods I chose to utilize in the pursuit of knowledge (Orr & Bennett, 2009). Throughout the dissertation process, I have attempted to reflect on my own reactions to the materials I chose to study and have worked to guard against conclusions that unfairly characterized the information and results that I encountered. At the same time, I recognize that my experience may lead to insights and understanding of street level behavior that is not as accessible to other scholars. With this awareness, I have striven to mediate that divide as ethically as possible throughout the process.

Study Limitations

The first limitation of this project is embodied in its reliance on a single coder. The material examined for this project was vast. Relying upon the work of a single coder increased

the chances that there have been errors in both coding and recording of that coding. Having at least one other pair of eyes on the data, including a coder with a different experience of the subject matter (especially from a non-practitioner's perspective) would enhance its accuracy, its reliability, and its generalizability.

Another limitation lies in the nature of the research approaches and methods used. Computational text analysis constitutes an innovative approach in public administration scholarship. Other techniques may have yielded differing and/or perhaps clearer or more insightful results. Qualitative content analyses are always limited by the subjectivity of the researcher and any number of quirks, mischaracterizations, and omissions embedded in the research materials being examined (such as the individual contract data reports completed by government employees who may have entered information incorrectly or inconsistently, for example).

Finally, the most difficult limitation to overcome is the obstinate situationality of the material being studied. Even though many, many different contract scenarios were studied for this dissertation, a durable "truth" of the field is that every contract is different and is very much its own beast with its own problems. Analogies can be drawn between various similar situations and circumstances, but the "human" factor involved in cooperative enterprises makes the procurement environment a veritable deck of wild cards. These limitations are increased even more by the fact that I only examined contract failures and not the vast numbers of successful contract outcomes that populate the field of defense procurement—the quantity of which dwarfs the thousand or so particularly bad examples studied here.

Suggestions for Future Research

Two of my stated goals at the beginning of this project were to produce contracting scholarship in public administration from a social interpretivist orientation and to integrate it with work from other academic fields such as law, business, management, organizational studies, and supply chain management. I sought to investigate a normative issue in a typically technocratic subject area using atypical research approaches, such as those found in the expanding fields of legal empiricism and computational textual analysis, with a perspective that recognizes the richness of the subject matter as a domain of human interaction. There are multiple creative and ambitious additions to current scholarly discourse that demonstrate the exciting possibilities offered by computational text analysis and complementary qualitative research approaches. A number of these studies give insight into how these methods can be extended to the study of federal contracts. Boyd, Blackburn, and Pennebaker 2020; Cotropia and Gibson 2014; Diesner and Carley 2005; DiMaggio, Nag, and Blei 2013; Kauffmann and Haans 2021; Levine 2006; Oldfather, Bockhorst, and Dimmer 2012; Pollach 2012; Rodriguez and Spirling 2022; Rynes and Gephart, Jr. 2004; and Sonday, Ramugondo, and Kathard 2020 provide a diverse selection of examples in several fields and disciplines with potential applicability to the scholarly discourse about federal procurement contracts.

Conclusion

In this dissertation, I explored how information drawn from ASBCA decisions could be used to explore the federal procurement system's performative "fairness" in practice. My experience during this project leads me to recommend the published decisions of the Armed Services Board of Contract Appeals (ASBCA) as a rich and easily accessible source of information

for investigating frontline decision-making in the federal procurement system. The Board decisions yielded rich, accessible, and meaningful data that illuminated important aspects of the government-contractor relationship from a street-level perspective. The textual data also showed how the actions of government officials both propagate and violate reciprocal fairness through administrative action and discretionary decisions.

The study's strongest finding was that the collective language of ASBCA dispute decisions provided an excellent opportunity for increasing our understanding of the phenomenology of normative subject matters in federal contracting. A multi-staged, mixed methods approach that included iterative adaptation from concurrent and sequential feedback mechanisms helped me to observe how procurement complexities can amplify relational difficulties during contract administration. The combination of various quantitative and qualitative methods with classical hermeneutical techniques allowed me to connect my overall inquiry into fairness as a federal procurement phenomenon with specific research questions about how the elements of equality, equity, and reciprocity interact to comprise fairness in the contract disputes environment.

In particular, I demonstrated that computer-assisted qualitative analysis software (CAQDAS) and software-based semantic clustering based on word collocation can add rigor and depth to interpretivist approaches that use a combination of structured and unstructured texts as their primary sources of data (Kuckartz 2014; Mitchell and Schmitz 2021). Employing these tools and techniques here also allowed the research to address a gap in the availability of comparative statistics for federal contract dispute cases across three decision domains (armed services, civilian, and federal judiciary) (Howell 1999).

At the heart of these disputes is a lack of shared understanding that procurement contracts are subject to contract law as much as they are subject to agency or administrative law. Procurement contracts should not be used when an employment contract represents a more defensible attribution of cost/performance risk. Seeing contracts through the lens of strategic alliances rather than simply as principal-agent relationships and understanding the role of trust in the success of those alliances could result in stronger contract relationships between the government and the private sector. The failures in the disputes context tend to result from adversarial, arms-length approaches to the contracting process.

In large part, this dissertation engages Brown, Potoski, and Van Slyke's extensive body of work on contract relationships and complex federal acquisitions. This work is epitomized by *Complex Contracting: Government Purchasing in the Wake of the US Coast Guard's Deepwater Program* (2013), their landmark case study of one significant federal contracting failure. In his Foreword to that book, Stan Soloway, a former Deputy Undersecretary of Defense and National Academy of Public Administration Fellow, observed that:

> [I]n a 2007 review of the Defense Acquisition University's services acquisition curriculum . . . [the Professional Services Council] found that nowhere in the curriculum was there significant emphasis on the ways in which private actors identify, manage, and mitigate risk. Instead, the emphasis was almost exclusively on identifying and managing the government's risk. Is it any surprise then that the mutual understanding that underpins any relationship, business or personal, is largely absent from government acquisition? (2013, x)

However, the fundamental value of any analysis of this type, Soloway goes on to note, is whether or not it serves to coax forth fruit in the form of meaningful, substantial change within the studied environment.

The findings of this dissertation underscore the importance of training government contracting officials on the freedoms and responsibilities delegated to them in terms of discretionary behavior. It is important that this training place equal emphasis on the regulatory flexibility that is extended to them by the Federal Acquisition Regulation to negotiate fairly with contractors. The ability to act as empowered knowledge agents in this environment is protected by solid judicial precedent. However, that reality is not prioritized by conservative organizational cultures that strictly construe statutory limitations to exist upon that professional discretion. Whether or not this discretion will be impacted by future Supreme Court rulings is an unknown factor, although there is good reason to believe it will continue to enjoy protection under existing government contract law precedent under *Skidmore* (1944) deference, even if other types of judicial deference, such as *Chevron* (1984) and *Auer* (1997), become more limited (Castellano and Schabes, 2023).

An overly protective approach towards flexible decision-making in federal contracting also may reflect a lack of understanding of the purpose of "contract" among public administrators who are not contracting officials. Despite perceptions that contracts represent simple, more efficient, and more cost-effective ways of transferring risk and responsibility from public sector organizations to private sector entities. Even though private firms specialize in providing the "standard" commercial products needed by the government to serve the public, "contracting" is not always the best method of acquisition. Public sector contracts, particularly in the federal environment, are constrained tools with specific functions and rules that reduce the principal's flexibility in negotiation. Other specific acquisition or administrative tools—such as grant instruments, partnership agreements, and purpose-oriented networks—perform much

better to meet complex needs, even if they do not allocate pricing risk and labor responsibility as neatly as a contract is *perceived* to do.

This finding underscores arguments by Snider and Rendon (2012) about the lack of procurement training in the basic MPA curriculum. A corollary of this training would be to empower contracting personnel's ability to function in their private sector advocacy role (when required by circumstances) while negotiating specific organizational and institutional pressures as government employees. As Harmon, Kim, and Mayer (2015) demonstrated, perceptions of contractual fairness are enhanced when parties can recognize cooperative behavior in the "spirit of contract" rather than an adversarial position that emphasizes letter-of-the-law adherence, no matter what the circumstance.

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APPENDIX A:
The Armed Services Board of Contract Appeals "Fairness in Dispute" Study

My original intent for this dissertation in March 2020 was to explore the meaning of fairness in federal procurement contracting relationships through qualitative interviews and focus groups. I wanted my primary research subjects to include both contractors and federal contracting officers, with a concentration on the building construction industry.[134] However, the COVID-19 pandemic made in-person meetings problematic. At the time, I was concerned that virtual interactions would lack external validity within the highly relational, physically-oriented world of construction contracting (Buckley, Rubin, and Loder 2020). I thus returned to the theoretical literature on contract relationships to search for an alternate source of qualitative data. This literature, exemplified by the work of Macauley and Macneil, pointed to litigated relationships as a potential source of relevant information on the contractor-government relationship (Macauley 1963). A broad review of various private and government websites, combined with a review of all articles published in the American Bar Association's *Public Contract Law Journal* in the last two decades, pushed me to explore formal contract disputes in the federal environment more closely.

My initial search relied heavily on a private website *(stanhinton.com)* that reports legal decisions related to federal procurement solicitations (protests) and contracts (disputes) by forum, year, and legal topic of interest.[135] My review of the website in 2020 found numerous

[134] I had selected the building construction industry because, in my professional experience, the long-term nature of large construction projects, which often can require frequent changes and can require extensive personal interactions between personnel presented an excellent opportunity to study relationships. Construction was also one of the specific industries studied by Stewart Macauley in his early research on relational contracting.
[135] Though highly detailed, topically thorough, and substantially informative, the Hinton website does include a disclaimer that the data has not been collected or analyzed scientifically. I therefore used it as a starting point and not as an exhaustive record of the disputes landscape.

decisions related to default contract terminations in all three dispute forums of the federal system (ASBCA, Civilian Board of Contract Appeals, and the U.S. Court of Federal Claims) within the last 3-5 years. I compiled a list of those termination decisions to test whether sufficient information existed to yield a meaningful study. This pilot project indicated that information I could assign to specific contract relationships was both prolific and in the case of the ASBCA, easily downloaded from the public ASBCA website. These decisions could then be cross-referenced with the Federal Procurement Data System-Next Generation (FPDS-NG) database to yield a more thorough record of each contract's specific characteristics for further analysis.

In my initial searches in October 2020, I only recorded whether or not a business receiving a contract award was considered "small" or "other than small" according to the Small Business Administration's (SBA's) business size standards, and whether or not the procurement was competitive to any degree or sole-sourced.[136] At the beginning of the study, I hypothesized that there were two primary attributes of fairness in the federal procurement system: distributive/substantive fairness and procedural fairness, which my understanding of the ethical literature on justice seemed to confirm. I associated the first type of fairness with a contractor's sociodemographic categorization and the second type of fairness with the degree/level of competition to which the procurement was conducted. These two factors impacted the development and ultimate success of the contractor-government relationship, but I did not understand how and sought to understand the related details better.

[136] "Other than small" usually indicates that a business is "large," but this designation is also used for non-profit organizations and other municipal and state government entities.

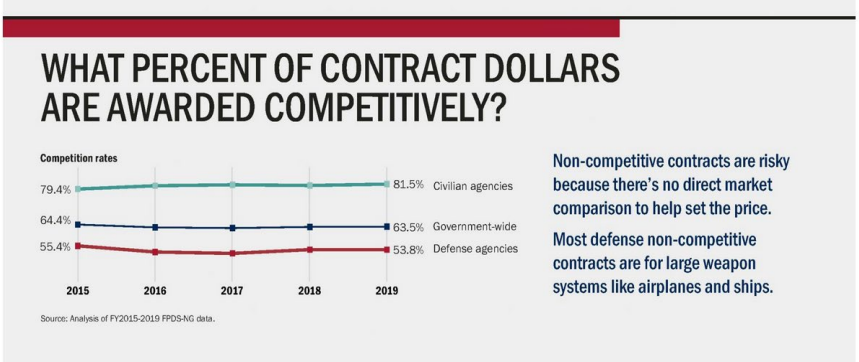
During this review, I observed a seemingly high number of small, disadvantaged, and minority-owned businesses represented among the terminated contracts. The socio-demographic information is collocated visually in FPDS-NG report beside the information that a business is "other than small." My impression of disproportionality was based upon what I knew about the SBA's annual small business award reporting goals for the Department of Defense.[137] I also observed that the vast majority of the contracts with disputed contract terminations had been awarded through robust competition.[138] This seemed broadly uncharacteristic of what I knew (or thought I knew) about the Defense procurement environment, where only about 50% of contract dollars are spent through competitive processes, and only 25% flow to small business concerns. Therefore, the proportion of termination disputes by small, disadvantaged, and especially minority-owned businesses with competitively awarded contracts seemed high, especially in comparison to the data in the percentages shown in Figures A.1, A.2, and A.3 (below), which were drawn from the Government Accountability Agency (GAO) website.

Even knowing that those proportions can be skewed by the billion-dollar environment and limited competitive pools that constitute the "commercial" marketplace for the DOD's research, advanced weaponry, and technical system requirements, the elevated levels of small, minority, and disadvantaged business representation among the disputed contracts still seemed unusually high. More searches did not reveal any established public reports that examined business size and ownership type proportions related to contract management issues after award, such as the percentages of disputed or terminated contracts with small or minority-

[137] Agencies must report demographic data about contract awards to Congress. The SBA uses that information to prepare reports of various small business contracting goal achievements by dollar amount and contract actions.
[138] It does, however, fit with some of Williamson's discussion about contracts, dissolving relationships, and transaction costs (1979, 1993).

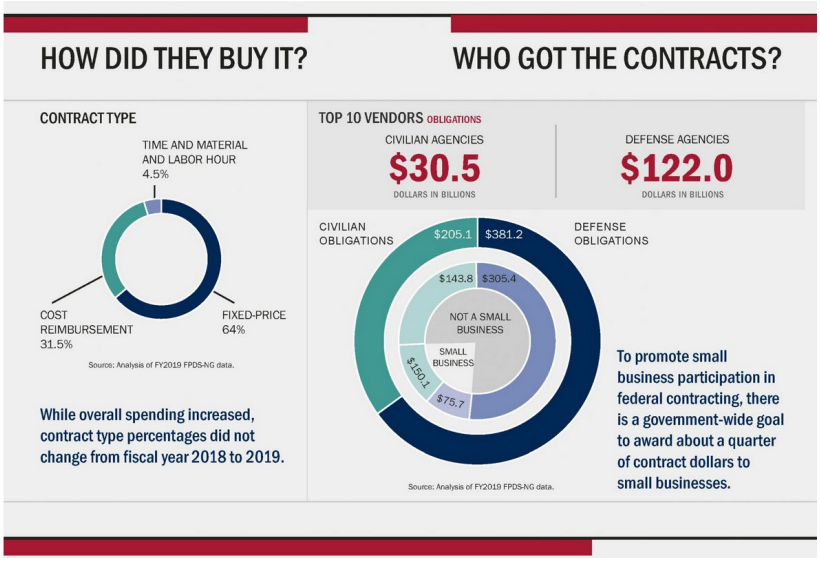
owned business contractors. This made the perceived disproportionality difficult to confirm or refute and became the driver for much of the present study, which acquired a more quantitative focus as a result.

Figure A.1: Five-Year Federal Contract Spending/Competition Levels in FY 2019



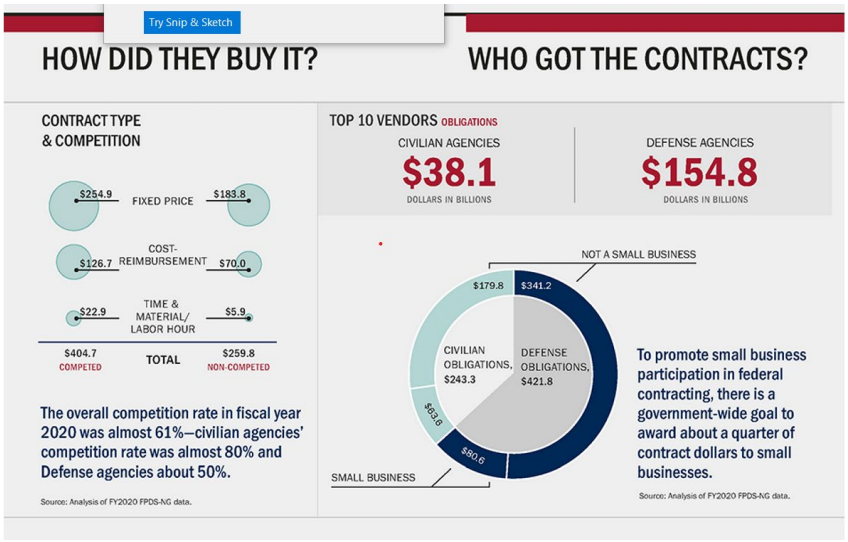
From https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2019-infographic

Figure A.2: "How Did They Buy It" Details from GAO "Snapshot" FY 2019



From https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2019-infographic

Figure A.3: "How Did They Buy It" Details from GAO "Snapshot" FY 2020



E:\(https:\www.gao.gov\blog\snapshot-government-wide-contracting-fy-2020-infographic) (https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2020-infographic).

APPENDIX B:
Analyzing the Documents (ASBCA Decisions and FPDS Reports)

In this Appendix, I outline document characteristics for the two sources of primary data that ground this study: 1) the contract dispute decision texts published by the Armed Services Board of Contract Appeals (ASBCA) between 2007 and 2021, and 2) Federal Procurement Data System-Next Generation (FPDS) Individual Contract Reports for the contracts referenced in the dispute decisions. In Part I, I describe how I read the texts as data sources, and I outline the codes I derived from the decision texts and what significance they were assigned. In Part II, I describe how I read the FPDS reports, what information I extracted from them, and how I assigned codes to that information to serve as metadata which was used in the dissertation's various analyses. In Part III, I describe some idiosyncrasies or anomalies with the data that impacted how I ultimately chose to analyze them in my pilot study using a novel (and evolving) database of atypical research material.

In my dissertation, I only used some of the codes described in this appendix to explore and discuss my research questions regarding fairness in federal procurement contracting. However, the entire codebook represents work that was invaluable (and that I determined was necessary) in understanding how the ASBCA disputes process works overall as a technical, organizational structure as well as a forum that serves a legal function. I needed to understand the system in order to understand what fairness means, and how it both fails and manifests within it. I include the entire list of codes in this appendix in case they can prove similarly useful to others.

Part I: Reading the ASBCA Dispute Decision Texts

The Armed Services Board of Contract Appeals (ASBCA) decisions are published with a standardized legal heading that identifies the type of decision, the Contractor name, the pertinent contract numbers (award IDs), the ASBCA claim number, and the names, titles, and affiliations of both the Contractor's (Appellant)'s representatives and the Government's representatives. Key elements of the decision are described in headings and its full text is included below the identifying information. The text of the decision ends with the Board's conclusions and the disposition of the case. The date of the decision, the names and signatures of the presiding administrative judge and any concurrences (if required), and a signed certification of the veracity of the decision data by the Board's Recorder follows the case disposition.

The bulk of the decisions do not exceed a sentence or two in length and often simply indicate that the appeal has been settled or withdrawn by mutual agreement. In some cases, the text is slightly longer, and includes the short details of a consent judgment, a failure to prosecute by one of the parties leading to the Board's dismissal, or some other trivial information describing a withdrawal, dismissal, or settlement of the controversy. In other cases, however, issues of fact and law and questions about contract interpretation result in substantial, lengthy decisions.

Common Features of the Decision Document's Text

Each of the published decisions begins with a standard legal document header topped by the name of the tribunal: "ARMED SERVICES BOARD OF CONTRACT APPEALS." The left-hand side of the document header identifies the name of the contractor (e.g., "Triple Canopy, Inc.")

who has made the appeal and the identification number (e.g., "W52P1J-19-D-0005") of the contract (or contracts) that are the subject of the appeal. The contract number listed on the decision typically consists of 4 identifying features: a code that identifies the awarding contract office (W52P1J), the last two digits of the fiscal year of the award (19), an alphabetical code that identifies the type of award ("D" stands for Delivery Order), and a number (0005) usually assigned in a chronological sequence by the computer program in which the award was created, finalized, and funding obligated. In the above dispute the subject contract was the fifth delivery order (D-0005) awarded by contracting office W52P1J (the U.S. Army Contracting Command at Rock Island Arsenal, in Illinois) in fiscal year 2019.

On the right side of the header (separated by a column of parenthesis symbols) is the appeal number of the dispute or disputes (assigned by the Board) that is the subject of the published decision (ASBCA No. 62759). At the bottom of the header on the left side are the names of the person(s) representing the contractor and the Government before the Board ("APPEARANCE FOR THE APPELLANT" and "APPEARANCES FOR THE GOVERNMENT"). On the bottom right side of the header is a list of each representative, with a title, professional legal status (if applicable), law firm (if applicable), and the home location of the representative (e.g., for the contractor "Daniel J. Strouse, Esq., Cordalis LLP, Arlington, VA" and for the agency, "Scott N. Flesch, Esq., Army Chief Trial Attorney"). The head attorney for the agency is always at the top of the Government's list of representatives, followed by names of the attorneys who handle the case before the Board ("CPT Philip L. Aubart, J[udge] A[dvocate]; Harry M. Parent, III Esq. Trial Attorneys").

Below the header (centered on the page) is a title indicating the type of decision (e.g., "ORDER OF DISMISSAL."). Beneath the title is the text of the decision, which typically contains a significant amount of boilerplate repeated in every similar decision as appropriate (e.g., "Any request to reinstate the subject appeal must be filed within 180 days of the date of the Order"). Below the decision is the date it was rendered, followed by the signature, and typed name of the Administrative Judge who made the decision for the ASBCA ("CHRISTOPHER M. MCNULTY"). Concurring or dissenting signatures and other relevant text may appear below the first judge's signature block if applicable to the decision according to the ASBCA's procedural rules. Beneath the substantive text of each decision is a certification, e.g.: "I certify that the foregoing is a true copy of the Order of Dismissal of the Armed Services Board of Contract Appeals in ASBCA No. 62759, Appeal of Triple Canopy, Inc., rendered in conformance with the Board's Charter." The certification is always followed by the date it is made, and the signature of the ASBCA's official Recorder administratively responsible for the decision ("PAULLA K. GATES-LEWIS"). Every published decision will contain this certification and the required information.

Part II: Codebook for Data Derived from the Dispute Decisions Texts

I derived two types of data from the Dispute Decisions: 1) nominal descriptive codes that correspond to factual details gleaned from the texts that correspond to the decisions' individual contexts, and 2) qualitative codes based on my interpretation of the substantive content of each decision (some are more interpretive than others).

A. Qualitative Descriptive Codes Based on Factual Information (Decision Metadata)

- **SOURCE:** This code consists of an acronym that corresponds to the forum which published the dispute decisions. There are three forums: the Armed Services Board of Contract Appeals (ASBCA), the Civilian Board of Contract Appeals (CBCA), and the U.S.

Court of Claims (USCC). This category applies to the entire corpora of dispute decisions. For this dissertation, my sole source of decisions was the ASBCA.

- **CONTRACTOR:** This is the contractor's (referred to as the "appellant's") actual name as it appears exactly on the dispute decision header.

- **CASENUM:** A unique five-digit number or "Case Number," (sometimes—rarely—includes a suffix) assigned to each dispute upon filing with the Board. Sometimes multiple cases are associated with one decision, and multiple decisions can be linked to just one case. This code is derived from the appropriate appeal number attached to each dispute decision document. This code identifies the first five-digit case number assigned by the ASBCA, CBCA, or USCC to the contractor's appeal when it is filed. For coding purposes, I use the first code referenced in the decision header.

- **KNUM**: This numerical code represents the "Contract Number" ("K" is common shorthand for "contract"). It is the first contract number identified in the decision header, with hyphens removed and the actual number corrected if necessary (several contract numbers listed on the decision header were incorrect, but I was able to determine the correct number in many instances). It refers to a Government-assigned contract number that appears in the dispute decision header that follows a specific format depending on the agency that awards it. Formatting styles differ with some contract numbers, but each number always contains information that identifies the awarding contracting office, the type of procurement document represented (such as "C" for "contract" or, "P" for purchase order, for example), the fiscal year it was awarded, and a sequential identifier attached to each contract award (usually by the computer system program where the award is processed). Each contract number is unique. Some decisions reference more than one contract number in the dispute decision header. In most instances, I selected the first contract number in the header that I could cross-reference with a Federal Procurement Data System (FPDS) individual contract report (when one existed).

- **DOCTYPE:** This nominal code stands for "document type" and identifies whether the decision is classified on the document as being an "order" or a "document."

- **AGENCYBB:** This one-digit code identifies the "Agency Before the Board" as it is listed in the dispute decision header. The Agency before the Board is not always the awarding agency or the administering agency, although they are usually one in the same. The agency who represents the government before the Board is not always the agency that was awarded the contract. I first coded the agencies initially as follows: Air Force, Army, Army Corps of Engineers (ACOE), Defense Contract Management Agency (DCMA), Defense Logistics Agency(DLA), Department of Justice (DOJ), Health and Human Services, National Aeronautics and Space Administration (NASA), Navy, Other Department of Defense (DOD) Agency, U.S. Agency for International Development (USAID), and the Washington Metro. I then made a bin variable to capture the most

prevalent dispute distributions by agencies as follows: I assigned each agency a numerical code as follows: Army (0), Army Corps of Engineers (1), (ACOE), Navy (2), Air Force (3), Defense Contract Management Agency (DCMA) (4), Defense Logistics Agency (DLA) (5), and Other Department of Defense (DOD) agencies(6), and other non-DOD agencies served in an auxiliary form by the Board, including the National Aeronautics and Space Administration (NASA) (7).

- **DECSYEAR:** This code stands for the "decision year," or the fiscal year in which the Board issued a specific decision. For this dissertation, the years collected were limited between FY 2021 and 2007). The federal fiscal year runs between October 1 and September 30. A decision issued on October 1, 2016, would receive the four-digit code "2017," whereas a decision published September 30 would be identified as "2016."

- **DECSPBMDY:** This eight-digit code means "Decision Published-Month/Day/Year" and corresponds with the actual calendar date the decision was signed and promulgated by the Board. For example, December 1, 2016, is rendered 12022016.

- **NUMPGS:** This code means the "number of pages" that comprise the portable document format (pdf) that contains the record of each decision document (even though many decisions, especially orders, consist of a lot of white or empty space).

- **JUDGE:** The Administrative Law Judge (ALJ) identified as the primary decision-maker in the case (JUDGE). This code is the last name of the one judge responsible for making each decision, even though many decisions reflect the concurrences of two other judges. All decisions not decided under accelerated procedures require a deciding judge and at least two concurrences. There were forty-seven separate judges identified on decisions. Forty-three Board Judges were coded as primary decision-makers in the cases included in this study. Those last names/codes are as follows: Cates-Harman, Clarke, DAlessandris, Delman, Dickinson, Eyester, Freeman, Grant, Hartman, Herrzfeld, James, Kinner, Lane, Lopes, McIlmail, McNulty, Melnick, Newsom, Oconnell, Osterhout, Osullivan, Page, Park-Conroy, Paul, Peacock, Prouty, Scott, Shackleford, Smith, Stempler, Stinson, Sweet, Thomas, Thrasher, Ting, Tunks, Van Broekhoven, Williams, Wilson, Witwer, Woodrow, Young, and Younger.

- **COUNSEL:** The code was a dichotomous variable (lawyer (1), no lawyer=0) that identified whether or not the contractor was represented by professional legal counsel before Board (either internal or external counsel).

B. Qualitative Interpretative Codes Based on Decision Content

The codes described in the previous section are essentially identifying codes that differentiate or describe decisions on the basis of factual details/information. The codes in this

section are more properly described as “interpretive” codes because they are based on my assessment of the meaningful content communicated by each dispute decision in a variety of categories. I separated the substantive matter of each decision and assigned nominal and numeric codes to various categories of interest.

The codes that follow constitute most of the metadata that I used to characterize and investigate fairness as contractual “reciprocity” within the dispute decisions. They were useful in that regard because I connected them to legal descriptions and substantive evaluations by lawyers and judges experienced in aligning the actual behaviors of clients and opponents with broader ethical concepts and principles. I also used these codes to help sort, identify, and manage the enormous raw textual data that populate this corpus of the decision texts in a systematic and scientific manner.

- **DECSSUBJ** (“Decision Subject”): settlement, merit entitlement, government motion, contractor motion, cross motions, consent judgment, reconsideration, withdrawal of claim by claimant, and “all other.”

- **RULETYPE** (“Product of the Ruling”): a Dismissal Order, a Disposition on Entitlement, a ruling on a motion other than entitlement, an order for a Contracting Officer to issue a “Final Decision,” in response to a claim, a *Sua Sponte* Ruling (a decision on an issue raised by the Board itself and not by one of the parties); and “all other” rulings.

- **REASONING** (“Legal Reasoning” provided by the Board as the authority for its decision): The following qualitative/interpretive codes represent the reasons the Judges used to support various rulings such as dismissals, approvals, remands, etc.

  - Accord and Satisfaction
  - Administrative Dismissal
  - ADR
  - Binding settlement agreement
  - Contractor
  - Appeal Withdrawn
  - Failure to Prosecute
  - Issues of Material Fact
  - Jurisdiction
  - Lack of Standing
  - Matter of Law
  - Moot
  - No Representation
  - No subject matter jurisdiction
  - Not awarded by federal agency
  - Procedural Issue with Claim
  - Release
  - Settled

- Timeliness
- Transfer to CoFC
- Unable to Proceed
- Withdrawal of Government Claim

- **WINNER:** This code represents my evaluation of which party is more "successful" in the Board's final determination for each decision. There are four codes in this category: "Settled" or "Both Win" (0); Contractor (1), Government (2), and Mixed/Partial Outcome (3)or "Both Lose," which means that both parties win and lose some aspect of their argument. "In general I interpret "settled" to mean both "win" because it indicates mutual agreement as to what the decision communicates.

- **OUTCOME** (Ruling Outcome or Decision of the Board): This code described what action occurs in terms of the appeal once the Judge's decision has been rendered. It represents both the issue before the court and the relevant action taken in response to each issue as resolved in the decision document.

  - Amendment Allowed
  - Appeal Denied
  - Appeal Denied in Part
  - Appeal Dismissed
  - Appeal Sustained
  - Appeal Sustained PARTIAL
  - Application Approved in Part
  - Application Denied
  - Application Granted
  - Balance Denied
  - Claim Stricken
  - Motion to Dismiss Denied
  - Motion to Dismiss Granted
  - Petition Denied
  - Petition Dismissed
  - Decision Affirmed
  - Decision Clarified
  - Decision Reversed
  - Decision Vacated
  - Dismissed with Prejudice
  - Dismissed without Prejudice
  - Jurisdiction Confirmed
  - Motion Denied
  - Motion Dismissed
  - Motion Granted
  - Motion Granted in Part
  - Petition Granted
  - Sanction Denied
  - Sanction Ordered

- **SUBJECTMTR** ("Subject Matter"): This code reflets the specific legal action being exercised or decided in each decision document. It also can be considered a description of the decision document's content. Each decision document is either an Order or an Opinion. Most but not all, Orders correspond with the "Dismissal" of an appeal as the result of a mutual agreement or settlement. The subject matter of Opinions is particularly multivariate. The following list captures how the decision subject matter was coded descriptively with term or phrase:

  - ADR DECISION
  - Amend Answers
  - Application
  - Board Order for Supplemental Briefing
  - Board Order to Show Cause
  - Consent Judgment

- Contractor Motion
- Cross Motions
- Declaratory Judgment
- Direct COFD
- Dismissal
- Entitlement
- Entitlement and Quantum
- Entry of Judgment
- Failure to State a Claim
- Government Motion
- Motion for Adverse Inference
- Motion for Appropriate Relief
- Motion for Judgment on the Pleadings
- Motion for More Definite Statement
- Motion for Relief from Judgment
- Motion for Sanctions
- Motion for Summary Dismissal
- Motion *in Limine*
- Motion to Amend
- Motion to Certify Questions
- Motion to Compel
- Motion to Confirm Jurisdiction
- Motion to Consolidate
- Motion to Dismiss
- Motion to Disqualify Representative
- Motion to Intervene
- Motion to Limit
- Motion to Preclude Evidence
- Motion to Quash
- Motion to Recuse
- Motion to Revoke
- Motion to Shift Burden of Proof
- Motion to Stay
- Motion to Strike
- Motion to Substitute
- Motion to Suspend
- Motion to Vacate
- Motion to Withdraw
- Partially Granted, Partially Denied
- Petition
- Protective Order
- Quantum Only
- Reconsideration
- Release Liquidated Damages
- Request for Declaratory Ruling
- Request for Default Judgment
- Request for Reinstatement
- Request to Lift Stay
- Rule 11 Proceeding
- Rule 12.2
- Rule 12.3
- Show Cause
- Summary Binding Decision
- Summary Judgment
- Surety's Motion
- To File a Complaint

Part III: Mining the Federal Procurement Data System-Next Generation (FPDS-NG) Individual Contract Data Reports

At the most basic level, the contract number (or "award ID") included in each ASBCA decision document can always be identified from the header. Most federal procurement actions over $3,000 are required to be entered as an individual contract report in the Federal Procurement Data-System-Next Generation (FPDS) website. Some of the decisions reference more than one Award ID. Because I am most interested in learning about the relationship

between the contractor and the government, and not directly in the outcomes of every contract associated with a dispute, I selected the first award ID listed on the decision that produced a result in FPDS in my first brief review of the decision.

Many of those award ID numbers produced numerous, sometimes thousands of referenced action reports in FPDS. Each individual "action" entered into FPDS as a separate report can refer to any number (from one to thousands) of different transaction types (FAR 4.606). Without closer examination, the different referenced actions could refer to a simple no-cost administrative modification such as a government office address change, or potentially task orders associated with a parent contract that each have an identifying number and can total millions of dollars. Therefore, at this point in the research process, I selected the contract data report with the "0" code, which denotes the very first transaction with that award ID entered into the FPDS system. I did no further digging in the Award ID record. An example of how this looks in FPDS is shown in Figure B.1. Future data collection efforts will involve compiling the numbers of transactions tied to each award ID and tabulating the entire dollar value denoted by that single award ID number. The screenshot below shows how the "0" code report can be distinguished from the other actions available.

Figure B.1: FPDS EZSearch Transaction List for a Unique Award ID ("W9124N1C0033")

Award ID (Mod#):	W9124N11C0033 (P00007) (View)	Award Type:	DEFINITIVE CONTRACT
Vendor Name:	AVANT ASSESSMENT, LLC	Contracting Agency:	DEPT OF THE ARMY
Date Signed:	April 10, 2017	Action Obligation:	$0
Referenced IDV:		Contracting Office:	W6QM MICC-PRESIDIO (RC-W)
NAICS (Code):	LANGUAGE SCHOOLS (611630)	PSC (Code):	EDUCATION/TRAINING- PERSONNEL TESTING (U002)
Vendor City:	EUGENE	Vendor DUNS:	105891308
Vendor State:	OR	Vendor ZIP:	974012931
Global Vendor Name:	AVANT ASSESSMENT LLC	Global DUNS Number:	105891308
Award ID (Mod#):	W9124N11C0033 (0) (View)	Award Type:	DEFINITIVE CONTRACT
Vendor Name:	AVANT ASSESSMENT, LLC	Contracting Agency:	DEPT OF THE ARMY
Date Signed:	September 16, 2011	Action Obligation:	$1,400,844.32
Referenced IDV:		Contracting Office:	W6QM MICC-PRESIDIO (RC-W)
NAICS (Code):	LANGUAGE SCHOOLS (611630)	PSC (Code):	PERSONNEL TESTING (U002)
Vendor City:	EUGENE	Vendor DUNS:	105891308
Vendor State:	OR	Vendor ZIP:	974012931
Global Vendor Name:	AVANT ASSESSMENT LLC	Global DUNS Number:	105891308
Award ID (Mod#):	W9124N11C0033 (P00001) (View)	Award Type:	DEFINITIVE CONTRACT
Vendor Name:	AVANT ASSESSMENT, LLC	Contracting Agency:	DEPT OF THE ARMY
Date Signed:	April 06, 2012	Action Obligation:	$0
Referenced IDV:		Contracting Office:	W6QM MICC-PRESIDIO (RC-W)
NAICS (Code):	LANGUAGE SCHOOLS (611630)	PSC (Code):	EDUCATION/TRAINING- PERSONNEL TESTING (U002)

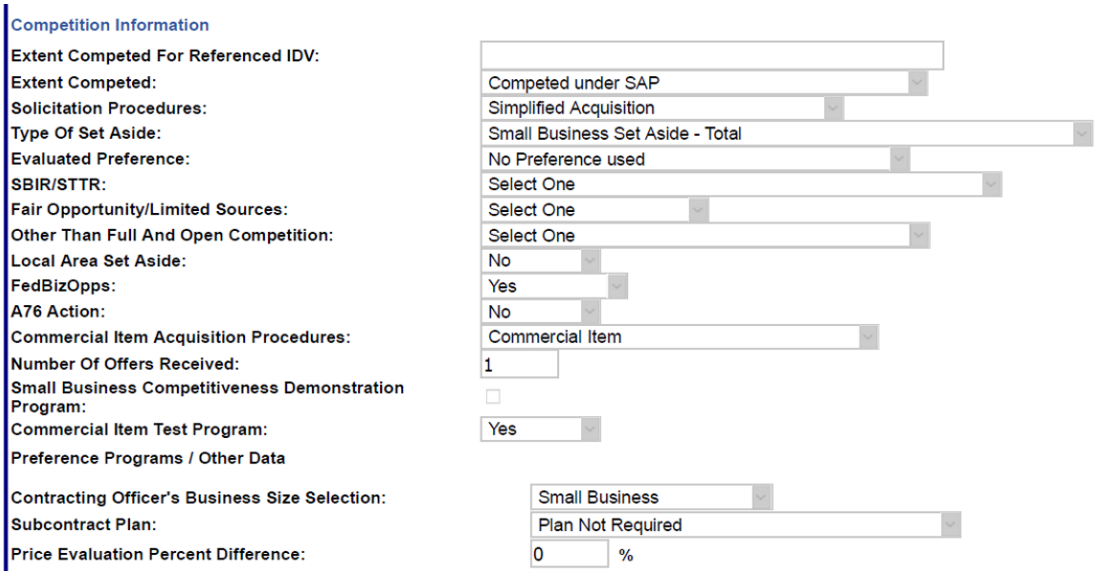
Once identified, I selected the "0" code report and examined the report for the following information: competition and award details, and socio-economic factors, including a contractor's business size.

Competition information is entered individually per award ID. It is either hand-entered by the reporting individual at the FPDS website, or provided through a software link used by the procuring office at the time the award is approved. The competition information describes, among other details, how competitive the procurement was ("extent competed"), the procedures used ("Simplified Acquisition" procedures, governed by FAR Part 14), whether the procurement was publicized ("FedBizOpps"), whether the item or service was considered a "Commercial Item" (governed by FAR Part 12), and how many offers the government received, which can indicate the thickness of the market (in this case, only "1").

Also in this section, the reporting individual enters the Contracting Officer's independent determination of whether or not the contractor qualifies as a small business, which the CO must judge based on the contractor's size representation (based either on

number of employees or the average dollar amount of business it does over a three year period) in a particular industry category, denoted by the North American Industry Classification System or NAICS (pronounced “nakes”) code. The NAICS code for the procurement is identified in a different section of the report with other industry and other classifactory information. Figure B.2 shows how the competition information section typically appears.

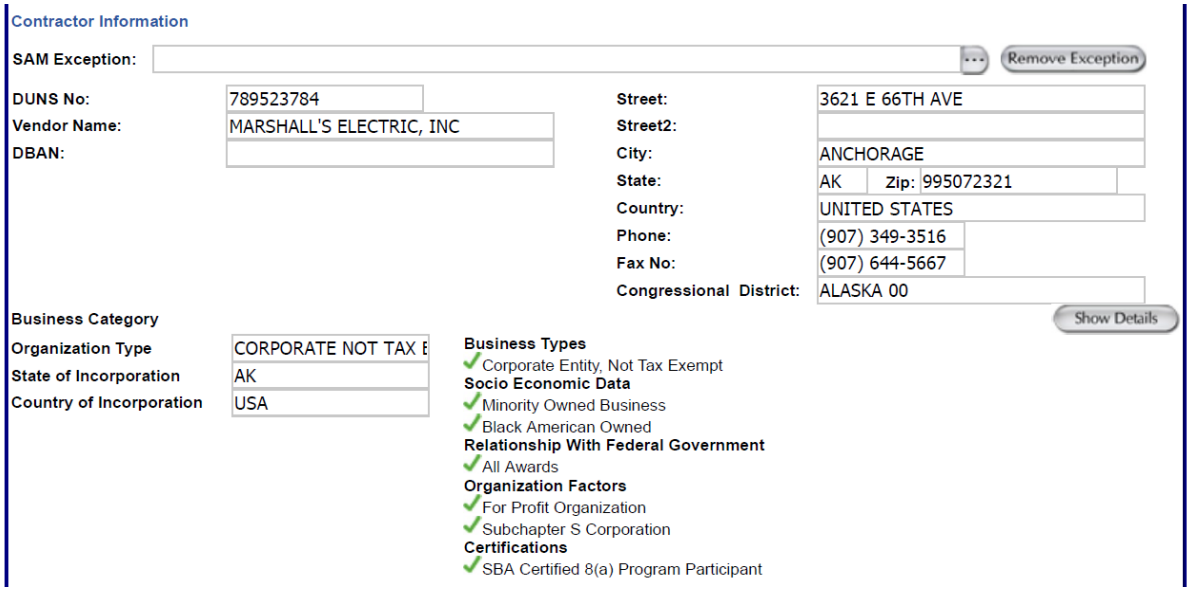
Figure B.2: Competition Information for a “0” Coded Original Contract Transaction



After collecting the competition information, I investigated the size of the business that received the award, and whether or not the contractor self-identifies or is certified by SBA as one of a number of statutorily recognized and/or “preferenced” socioeconomic categories, which is reported in the representations and certifications a contractor submits with its original quotation, bid, or proposal (via the contractor’s registration profile in the System for Award Management (SAM)). The first page of the FPDS contract data report shows this information, (as seen in Figure 3). These data are not subject to alteration or error by the report preparer but are pulled directly from the SAM database based on the DUNS number provided by the

contractor. The information that appears in the FPDS report in Figure B.3 indicates that the contractor identifies a number of recognized socio-economic categories, including the SBA's 8(a) program. Also included here will be the contractor's business type (corporation), the address where it operates, its state of incorporation (if applicable), and the related Congressional District.

Figure B.3: FPDS Contractor Information Section Screenshot



Using the contractor's DUNS number, I was able to access their SAM registration (featuring the information they certified at the time of award), which includes the date the business was established ("Business Start Date"), revealing its age at the time of the contract award and at the time of the dispute filing (Figure B.4). When examining the relationship closer (through qualitative coding of the decision texts), the age of the company and the duration of the contract prior to the filing of a dispute could potentially be crucial factors that shed light on a contractor's prior experience level, for example.

Figure B.4: SAM Screenshot with Business Start Data and SAM Status

Although this information is usually aggregated in a series of reports easily accessed at the USASpending.gov website along with other useful information (particularly budgetary), these figures use the original sources from which the USASpending reports are drawn, and that can sometimes provide easier (quicker and more direct) access to these and other potentially interesting details about both the contractor and the individual contract award process. I include this information and the description for obtaining it because I believe some of these may shed light on factors that contributed to a contract dispute being filed.

A. Descriptive Metadata Related to Procurement Categorization of Contracts

- **FPDS** ("Federal Procurement Data System"): This code indicated whether or not a contract referenced in the dispute decision had a report I could locate in the FPDS database. Dichotomous variable: Yes: 1, No: 0

- **AWRDFY** ("Award Fiscal Year"): This four-digit numerical code corresponded with the fiscal year associated with the calendar award date listed in the FPDS report.

- **AWDMDY** ("Award Date Month-Day-Year"): The eight-digit numerical code represented the calendar date entered into FPDS as the initial contract award date of the contract in the "0" code report.

- **AWDQTR** ("Award Quarter of Fiscal Year"): This ordinal code represented the Fiscal Quarter in which the contract award was made. October-December (1); January-March(2), April-June (3); July-September (4).

- **ACTSNUM** ("Actions Number"): This code is a quantitative numerical value that represents the **t**otal Number of contract "actions" reported in FPDS for the contract (not just the "0" code report, but all reports associated with that award ID/contract number). FPDS records an "action" any time an individual contract report is modified in some way. Numbers of contract actions for a procurement is generally considered a measurement of complexity or administrative difficulty.

- **AWDOFF** ("Awarding Office"): This code is a numerical string variable that corresponds with the federal contracting office that awarded the procurement contract. Each code is unique and linked to a specific agency and location (both within the administrative structure of the agency as well as where it is physically located).

- **KRCONDIS** ("Contractor's Congressional District"): This code is the four-digit numerical identifier for the Congressional District that corresponds with the contractor's primary business location. This information has not been consistently populated in FPDS before recent changes in reporting requirements, so was only sporadically coded.

- **KRZIP** ("Contractor Zip Code"): This code is the U.S. Mail string variable assigned to the physical location of the contractor's primary business location associated with the contract award.

- **PFCONDIS** ("Performance Congressional District"): This code is the four-digit numerical identifier for the Congressional District that corresponds with the location of the contract's performance. This information has not been consistently populated in FPDS before recent changes in reporting requirements, so was only sporadically coded.

- **PFGZIP** ("Performance Zip Code"): This code is the U.S. Mail string variable assigned to the physical location of the contract performance location.

- **KTYPE** ("Contract Type"): This code was assigned to describe the pricing structure associated with the type of contract awarded. For example, Fixed price (FP), cost family (C), Time and Materials (TM), Labor Hour (LH), Other (O). Pricing structure was an important indicator of a contract's relative complexity.

- **NAICS** ("North American Industry Classification System Code" [139]): This code is the numerical string variable assigned by the contracting officer to identify industries and related subindustries through the North American Industry Classification System Code, which I used to identify contract subject matter, and linked to an evaluation of contract complexity. The NAICS code assigned to a contract also determines the "size standard" for businesses to be considered "small" in terms of average annual "receipts" or average number of employees over a three-year period.

- **KSPECIES** ("Contract 'Species'"): This categorical variable identified the basic subject matter of each contract as one of four choices: a supply (thing), service (effort), construction (effort + materials), or research (expertise).

- **CLMTCD** (Claimant Code): The claimant code is a one-to-three-digit alphanumeric code specific to the Department of Defense that is assigned to each procurement and that has a fiscal or accounting significance.

- **PSC** (Product Service Code"): A four-digit alphanumeric code assigned to each procurement by the contracting officer and drawn from the Product and Service Codes Manual maintained by the General Services Administration (GSA). The Product and Service Codes Manual provides codes to describe products, services, and research and development (R&D) purchased by the federal government.

- **COMITEM** ("Commercial Item"): The code identifies whether or not the contract was procured through FAR Part 12 ("Commercial Item") procedures or through traditional government procurement methods (FAR 13, 14, or 15). Dichotomous. Dichotomous variable: Yes (1) No (0).

[139] According to the U.S. Census Bureau, "The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. It was developed to allow for an elevated level of comparability in business statistics among the three North American countries. NAICS is based on a production-oriented concept, meaning that it groups establishments into industries according to similarity in the processes used to produce goods or services" https://www.census.gov/programs-surveys/economic-census/year/2022/guidance/understanding-naics.html.

- **AWDDLR** ("Dollar Award Amount"): This code represented the actual dollar amount the initial funding obligation recorded in the FPDS 0-Code report, or the anticipated value of the award.

- **AWARDTYPE** (Discreetness of Contract Award Vehicle): This code was a nominal variable that indicated whether or not a contract was a one-time, severable procurement transaction (discrete), or whether it was an indefinite delivery/indefinite quantity contract vehicle (IDV)

B. Variables that Correspond to Equality (Contract Competition)

The following variables, used to describe various discriminating factors associated with competition, were the primary metadata I used to evaluate "equality" as contractual fairness in terms of the contract dispute decisions.

- **COMPETED**. This code identifies whether or not the contract was the subject of competition at any level/to any extent. Dichotomous variable: Yes (1) No (0).

- **COMPTYPE** (How was the contract competition conducted?): This code identified the "rules" of the competitive "game" that resulted in the award of a contract to the successful contractor. The primary categories I identified were "full and open competition," "full and open after exclusion of sources" (usually indicates a small business set-aside), a "socioeconomic-category-reserved small business set-aside," a sole source acquisition," or a specialized method such as federal supply schedule, two-step bidding process, or Brooks Act/architect and engineering (A & E) procedures. The code was an ordinal variable.

- **OFFRNUM ("Offer Number"):** This code captured the quantity (numerical variable), or number of bids/offers/proposals received as a result of each competition.

- **OFFRBIN (Offer Number "Bin" Variable"):** This code was created as a "bin" variable to assess more easily the robustness of competition that occurred in particular procurement contexts. (Ordinal)

- **BUSSIZE ("Business Size"):** Business Size classification is Small or "other than small." Dichotomous variable: Yes (1) No (0).

- **SUBKPLAN ("Subcontracting Plan"):** Whether a subcontracting plan was required (used to enhance opportunities for small and disadvantaged businesses). Depends upon statutory requirements. Subcontracting plans can count toward agency's small business

awards and failure to adhere to them can result in penalties levied against the contractor. Dichotomous variable: Yes (1) No (0).

C. Variables that Correspond to Equity (Contractor Identity/Demographics)

The following variables, used to describe various discriminating factors associated with contractor identity and demographics, were the primary metadata I used to evaluate "equality" as contractual fairness in terms of the contract dispute decisions. Socio-economic indicators were coded as dichotomous factors, and were recorded so that a contractor could be identified as one (or ore of the following):

- **CATEGORY** ("Category Indicator"): This code was for a "catch-all" category that indicated whether or not the contractor was identified in the FPDS report as a member of a group or class that could potentially play a role in either background fairness or possible discrimination in a work or administration setting, particularly in instances where interpersonal contact was more likely to occur and possibly influence negotiations and the application of work sanctions. Dichotomous variable: Yes (1) No (0).

- **FOB** ("Foreign-Owned Business"): This code refers to contractors that are not considered to be or that have not been established to be domestic business entities. Dichotomous variable: Yes (1) No (0).

- **MO** ("Minority-Owned"): This code indicates a contractor entity whose owners possess an identity as an ethnic, racial, or social minority. This status does not confer procurement preferential treatment on its own. Dichotomous variable: Yes (1) No (0).

- **SDVOSB** ("Service-Disabled Veteran Owned Small Business"): This code signifies that the contractor has an SBA certification that allows it to compete for federal sole-source and set-aside contracts based on its status as being owned by a service-disabled veteran and if it can be considered a small business depending on the NAICS code size standard of the procurement. It can provide procurement preferential treatment depending on the circumstances in accordance with statute and FAR Part 19. Dichotomous variable: Yes (1) No (0).

- **HUB** ("Historically Underutilized Business Zone"): This code signifies that the contractor has an SBA certification that allows it to compete for federal sole-source and set-aside contracts based on its status as being appropriately established in a location that has been designated as a "HUBZone," or "Historically Underutilized Business Zone" as and if it can be considered a small business depending on the NAICS code size standard of the

procurement. It can provide procurement preferential treatment depending on the circumstances in accordance with statute and FAR Part 19. Dichotomous variable: Yes (1) No (0).

- **8a** ("Small Business Administration Certified 8(a) Small Disadvantaged Certified Contractor"): This code signifies that the contractor has an SBA certification that allows it to compete for federal sole-source and set-aside contracts based on its status as being owned by a small disadvantaged contractor as defined in section 8(a) of the Small Business Act and if it can be considered a small business depending on the NAICS code size standard of the procurement. It can provide procurement preferential treatment depending on the circumstances in accordance with statute and FAR Part 19. Dichotomous variable: Yes (1) No (0).Dichotomous variable: Yes (1) No (0).

- **BO** ("Black-Owned"): This code indicates a contractor entity whose owners possess an identity as an ethnic, racial, or social minority. This status does not confer procurement preferential treatment on its own. Dichotomous variable: Yes (1) No (0).

- **WO** ("Woman-Owned Small Business"): This code now signifies that the contractor has an SBA certification that allows it to compete for federal sole-source and set-aside contracts based on its status as being owned by a service-disabled veteran and if it can be considered a small business depending on the NAICS code size standard of the procurement. It can provide procurement preferential treatment depending on the circumstances in accordance with statute and FAR Part 19. This is a recent designation and most "WO" businesses in this sample were self0certified as such with no procurement preference in operation. Dichotomous variable: Yes (1) No (0).

- **HO** ("Hispanic-Owned"): This code indicates a contractor entity whose owners possess an identity as an ethnic, racial, or social minority. This status does not confer procurement preferential treatment on its own. Dichotomous variable: Yes (1) No (0).

- **VO** ("Veteran-Owned"): This code indicates a contractor entity whose owners possess an identity as an ethnic, racial, or social minority. This status does not confer procurement preferential treatment on its own. Dichotomous variable: Yes (1) No (0).

- **NAO** ("Native American-Owned"): This code indicates a contractor entity whose owners possess an identity as an ethnic, racial, or social minority. This status does not confer procurement preferential treatment on its own. Dichotomous variable: Yes (1) No (0).

- **HINa** ("Hawaiian Native-Owned"): This code indicates a contractor entity whose owners possess an identity as an ethnic, racial, or social minority. This status does not confer procurement preferential treatment on its own. Dichotomous variable: Yes (1) No (0).

- **AKNa** ("Alaska Native-Owned"): This code indicates a contractor entity whose owners possess an identity as an ethnic, racial, or social minority. This status does not confer procurement preferential treatment on its own. Dichotomous variable: Yes (1) No (0).

- **AmIO** ("American Indian-Owned"): This code indicates a contractor entity whose owners possess an identity as an ethnic, racial, or social minority. This status does not confer procurement preferential treatment on its own. Dichotomous variable: Yes (1) No (0).

- **Tribe** ("Tribal Owned"): This code indicates a contractor entity whose owners possess an identity as an ethnic, racial, or social minority. This status does not confer procurement preferential treatment on its own. Dichotomous variable: Yes (1) No (0).

- **AsPO** ("Asian-Pacific-American-Owned"): This code indicates a contractor entity whose owners possess an identity as an ethnic, racial, or social minority. This status does not confer procurement preferential treatment on its own. Dichotomous variable: Yes (1) No (0).

- **AsIO** ("Asian-Indian American-Owned"): This code indicates a contractor entity whose owners possess an identity as an ethnic, racial, or social minority. This status does not confer procurement preferential treatment on its own. Dichotomous variable: Yes (1) No (0).

- **MOO** ("Minority-Owned-Other"): This code indicates a contractor entity whose owners possess an identity as an ethnic, racial, or social minority. This status does not confer procurement preferential treatment on its own. Dichotomous variable: Yes (1) No (0).

- **ESB** (Emerging Small Business"): This code indicated that the contractor's average annual receipts were less than half those required for a contractor to be considered a "small business" under the appropriate NAICS code assigned to a procurement. This status can confer some procurement preferential treatment, particularly in association with the Small Business Competitiveness Demonstration Act (1988), which requires set-asides for ESBs in certain industries on an annual basis (industries chosen by Congress and published each year in the Federal Register). Dichotomous variable: Yes (1) No (0).

- **DOTSDB** ("Department of Transportation-Certified Small Disadvantaged Business"): This code represents that a contractor has been certified by the U.S. Department of Transportation (DOT) as a "small-disadvantaged business enterprise." This program has its own certification requirements beyond the system adopted by the Small Business Administration. It is pertinent to DOT contracts at the federal level and to state transportation contracts that receive federal funding but do not confer procurement preferential treatment related to other federal contracts. It may, however, also indicate that the contractor identifies as part of an underrepresented group as well as the

administrative savvy to navigate complex bureaucratic certification systems. Dichotomous variable: Yes (1) No (0).

- **SBASDB** ("Small Business Administration-Certified Small Disadvantaged Business"): This code signifies that the contractor has an SBA certification that allows it to qualify for some preferential treatment procurement opportunities. A business qualifies as an SDB when over half of the business (51%) is owned or controlled by a disadvantaged person, based on social factors or economic factors as defined by SBA. If it can prove its disadvantage status, SBA will certify the company as a "small disadvantaged business." Dichotomous variable: Yes (1) No (0).

- **SELFSDB** ("Self-Certified Small Disadvantaged Business"): This code signifies that the contractor believes it meets the criteria of SBA certification as a "small disadvantaged business" but has not pursued the process to verify that it does. No procurement preferential treatment confers with this identification, but a self-certification as such may reveal some insight into the contractor's mindset during administrative interactions. Dichotomous variable: Yes (1) No (0).

- **UNCLEARSDB** ("Unclear Source of Small Disadvantaged Business Certification"): I assigned this code when the source of a contractor's SDB designation was unclear from the FPDS report (I found that earlier versions of the FPDS Individual Contract Report lacked clarity on the issue). Dichotomous variable: Yes (1) No (0)

Part IV: Anomalies in Reporting the Dispute Decision Metadata

Before framing the data with the control points (time, agency, complexity, and outcome), I note that the data are complicated by the reporting practices of the Board during two distinct periods: between fiscal years 2007 and 2013, and between fiscal years 2014 and 2021. During the first time period, the Board does not appear to publish (or perhaps, simply post) decisions pertaining to dismissed and settled disputes (2007-20143). This changes in 2014, when there is a sizeable, consistent uptick in the number of decisions posted to the Board's website, which is reflected in Table B.1 and Figure B.5[140] The increase in posted

[140] This change was probably made to communicate the true magnitude of the Board's workload, of which settled and dismissed cases represent a substantial part. When looking at the differences in decision types reported by the

documents continues through at least 2019 but does not appear to reflect an unexplainable increase in the total decided cases reported by the Board between 2014 and 2021.

I believe that the difference in numbers can be easily explained, but without confirmation, it impacts the generalizability of the data, and graphs and other visual representations that attempt to capture trends are bifurcated as a result (see Figure B.5 for an example). Also, as noted elsewhere in the dissertation, disputes/appeals can reference multiple contracts, and contracts also can be subject to multiple disputes/appeals. I have attempted to mitigate potential confusion by carefully indicating where and when the focus or language regarding my units of analysis changes.

Table B.1 Comparison of Board Report of Settled Cases Quantities with Decisions on Website

Outcome Type	2007	2008	2009	2010	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Dismissed (Board Report)	405	357	341	317	371	319	426	526	527	539	420	352	240	262
Dismissed (Posted Decisions)	0	8	3	5	6	10	192	305	301	272	222	209	182	136
Settled (Posted Decisions)	0	1	0	0	1	37	147	251	246	221	171	159	149	109

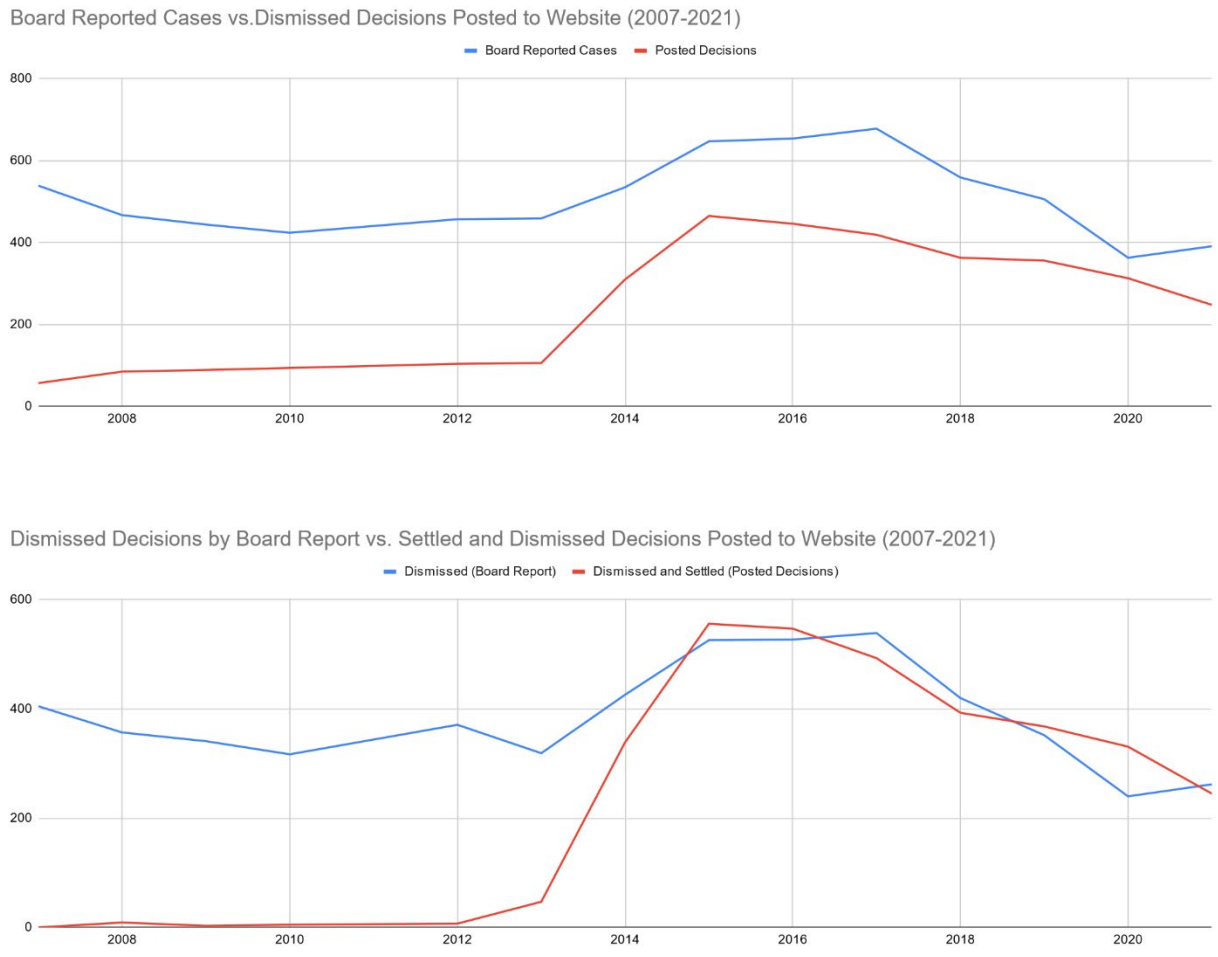
Additionally, the Board's decisions are posted to its website by calendar year but are reported by fiscal year in the annual reports to its agencies and the Secretary of Defense.[141] This complicates the search for comparative data because the Board reports its results using case/appeal as its unit of measurement for workload magnitude. Unless otherwise noted, the

Board and those studied for this dissertation, it appears that the number of dismissed cases reported by the Board between 2007-2013 very closely resembles the settled and dismissed decisions posted between 2014-2021 but absent from the ASBCA website between 2007-2013 (See Figure B.5).

[141] For consistency, I normalized the year assignment information throughout my study to reflect the appropriate fiscal year instead of the relevant calendar year.

numbers collected for my study are discussed by decision, and one case/appeal can involve multiple decisions.

Figure B.5: Board's Reported Cases vs. Collected Decisions for Study



APPENDIX C:
Contract Relationships That Include at Least One Complaint Regarding "Good Faith and Fair Dealing"

This appendix lists, organizes, and very briefly describes the "raw" data pulled from each contract and each decision that were used to comprise the "Relationship" sample of contracts used in the analysis appearing in Chapter 4, Part III of the dissertation. All of the contract relationships were sorted by subject matter according to information that indicated the contract was a supply, service, or construction contract. I describe each Government/Contractor dyad and sub-dyad (or sub-relationships) with summaries of the legal record, the subject of disputes, snapshots of the contract/acquisition profile for each contract represented and provide an outline of every decision referenced in the overall legal record summary.

Each "Contract Summary" includes the contract number and the North American Industry Classification System code (NAICS) associated with that contract (an indicator of subject matter complexity). It also includes a description of the contract pricing type, what type of competition produces the contract, and the business size of the contractor at award and any other identity factors identified. Finally, it also describes each contract as "definitive" (only one contract, discrete requirement) or an "indefinite contract vehicle" (such as a task order contract), where multiple future procurements may have been possible under the same overall contract document. There is often more than one contract for each dyad and sub-dyad, and several Government/contractor dyads are composed of multiple sub-relationships. Where multiple contracts exist in the record, I break them out in a list by number in the description, beginning with the individual source of dispute for the contract, the contract summary, and then a record of the decisions that are associated with each contract.

The "Decision Record" for each contract is outlined by the date of each decision pertaining to each contract included in my analysis of each dyad. Each decision bullet also includes a brief description of the decision's characteristics, as well as the page number length of each decision. The information in the decision records were aggregated to produce the "Legal Record Summary" that describes each dyad and sub-dyad.

Finally, I note where anomalies or interesting details occur throughout the record. On a few occasions, contracts are referenced for decisions that included appeals that addressed multiple contracts. The record that follows represents my best efforts to make sense of and systemize my analysis of documentary material representing a complicated Governmental entity terms of a complex research question. Some glitches in the reporting may occur but are as limited as I can make them under current constraints of time and research focus.

SUPPLIES

1) AEON Group, LLC/Defense Finance and Accounting Service (DFAS)

Legal Record Summary: Two appeals related to one contract resulting in two decisions, both opinions. Government completely successful, 165 total pages.

Source of Dispute: Appeal of a termination for default (rehosting of MOCAS, a computer system whose name stands for "Mechanization of Contract Administration Services").

Contract Summary: #HQ042304C0003, NAICS 541512 (computer systems design services), fixed-price, commercial item, full and open competition, small business, woman-owned, definitive contract.

Decision Record:

- (2009) Appeals #56142, 56251: cross motions (both contractor and Government) for summary judgment, both denied.
- (2014) Appeals #56142, 56251: appeal denied; Board found that the termination for default was proper, and under the terms of the contract, the contractor must pay for government claim (about $12 million dollars), which included all the funds the contractor was paid for a functional computer system (MOCAS) it did not deliver.

2) <u>American Ordnance, LLC/Army</u>

Legal Record Summary: Two appeals related to one contract that generated two decisions (one order, one opinion), contractor largely successful, 81 total pages. Contractor appeal successful (government responsible for delay); case remanded for negotiation of monetary damages amount (or "*quantum"*).

Source of Dispute: Government denied contractor request for equitable adjustment.

Contract Summary: #DAAA0998G0011, no North American Industry Classification System code, Product Service Code 1315 (supply) (Weapons & Ammunition — Ammunition & Explosives--for the load, assembly, and pack of 155mm high explosive (HE) M107 projectiles), fixed-price, not commercial, not competed, large business, no subcontracting plan, indefinite contract vehicle.

Decision Record:

- (2010) Appeal #54718: 1 appeal, 1 contract, opinion sustaining contractor's appeal, 80 pages.
- (2014) Appeal #58340: 1 appeal, 1 contract, order dismissing appeal with prejudice due to settlement, 1 page.

Notes: Contractor not represented by a lawyer.

3) <u>Ciyasoft Corporation/Army</u>

Legal Record Summary: Two appeals related to one contract that generated three opinions, largely in favor of contractor, 41 total pages.

Source of Dispute: reimbursement for excessive usage of software (well beyond license parameters)

Contract Summary: #W91B4L10P1475, NAICS 423420 (Office Equipment Merchant Wholesalers—contract was for computer software licenses), fixed-price, commercial item, full and open competition, large business, foreign-owned but with domestic offices, definitive contract.

Decision record:

- (2017) Appeals #59519, 59913: Government motion for summary judgment denied, 4 pages.
- (2018) Appeals #59519, 59913: Appeal 59519 dismissed for lack of jurisdiction; 59913 partially sustained, 31 pages.
- (2019) Appeal #59913: Government motion for reconsideration denied, 6 pages.

Note: Contractor not represented by outside counsel.

4) Dynport Vaccine Company/Army

Legal Record Summary: Two appeals related to one contract with four decisions (one order, three opinions). Mixed record of Government/contractor success with ultimate settlement through alternative dispute resolution, 20 total pages.

Source of Dispute: Equitable adjustment for unilateral modifications elated to additional contract work (question of whether the required work was corrective or constituted additions to original requirements)

Contract Summary: #DAMD1798C8024, no NAICS code, Product Service Code AN13 (Research and development--Medical: Biomedical-Advanced. Development), cost-based pricing, no full and open competition, large business, subcontracting plan, definitive contract.

Decision record:

- (2015) Appeal #59298: 1 opinion on government motion to dismiss for jurisdiction on appeal and contractor cross-motion; contractor successful, 9 pages.
- (2015) Appeal #59298 (2015): 1 opinion on contractor's motion to dismiss Count III of government's complaint (re: GFFD); 5 pages; contractor unsuccessful, 5 pages.
- (2015) Appeal #60119: 1 opinion on government motion to dismiss for jurisdiction (timeliness) denied, 5 pages.
- (2016) Appeal #59298, 60119: 1 order of dismissal re: Alternative Dispute Resolution settlement, dismissed with prejudice, 2 pages.

Note: Contractor is wholly owned subsidiary of Computer Sciences Corporation, which had disputes in another subject matter category

5) Military Aircraft Parts/Defense Logistics Agency (1 decision for Defense Contract Management Agency)

Legal Record Summary: Fourteen appeals related to twenty separate contracts separate contracts (purchase orders for metal machine related to aircraft repairs) resulting in twenty-one decisions (seven orders, fourteen opinions). Contractor had some success but Government more successful, 115 total pages.

1. Subject of Dispute: Contractor appealed the rejection of a non-conforming first article, but settled with the Government and asked its appeal be withdrawn. The issue in the opinion is the rejection of the contractor's request for Equal Access to Justice Act fee reimbursement (which is not approved in the case of a settled dispute—contractor must be deemed by the court to be the "prevailing party" in a case the Government could not reasonably defend pursuing).

Contract Summary: #SPM4A710M8108, NAICS 336413 (Other Aircraft Parts and Auxiliary Equipment Manufacturing), fixed-price, small business competitive set-aside, not a commercial item, small business, no category indicator, definitive contract.

Decision Record:

- (2015) Appeal #59632: 1 contract, 1 appeal, order of dismissal with prejudice for settlement, 1 page.
- (2015) Appeal #59632: 1 contract, 1 appeal contractor request for Equal Access to Justice fees denied, 3 pages.

2. Subject of Dispute: Contractor appealed the termination of its contract for default due to failure of first article testing.

Contract Summary: #SPM4A711MT291, NAICS 336413 (Other Aircraft Parts and Auxiliary Equipment Manufacturing), fixed-price, small business competitive set-aside, not a commercial item, small business, no category indicator, definitive contract.

Decision Record:

- (2015) Appeal #59978: 1 contract, 1 appeal, opinion sustaining contractor appeal to convert termination for default to termination for convenience, 11 pages.
- (2016) Appeal #59978: 1 contract, 1 appeal, opinion denying contractor request for Equal Access to Justice Act fees, 4 pages.
- (2016) Appeal #60418: 1 contract, 1 appeal, order of dismissal with prejudice for settlement, (Defense Contract Management Agency, not Defense Logistics Agency, is listed as agency before the board), 1 page.

3. Subject of Dispute: Contractor contended the Government breached the contract in how it handled issues with first article testing, including both express breaches and a good faith and fair dealing breach.

Contract Summary: #SPM4A711MD111, NAICS 336413 (Other Aircraft Parts and Auxiliary Equipment Manufacturing), fixed-price, full and open competition, not a commercial item, small business, no category indicator, definitive contract.

Decision Record:

- (2016) Appeal #60009: 1 contract, 1 appeal, opinion, contractor appeal partially sustained, 25 pages.
-

4. Subject of Dispute: Contract appeals a termination for default and requests that the Board waive the untimeliness of its appeals.

Contract Summaries:

- #SPM4A712M3228, NAICS 336413 (Other Aircraft Parts and Auxiliary Equipment Manufacturing), fixed-price, small business competitive set-aside, not a commercial item, small business, no category indicator, definitive contract.
- #SPM4A712M4479, NAICS 336413 (Other Aircraft Parts and Auxiliary Equipment Manufacturing), fixed-price, full and open competition, not a commercial item, small business, no category indicator, definitive contract.
- (Also contract #SPM4A712M3224)

Decision Record:

- (2016) Appeal #60139: 2 contracts, 1 appeal, opinion, government motion to dismiss for jurisdiction granted (appeal dismissed), 10 pages.
- (2017) Appeal #60139: 2 contracts, 1 appeal, opinion, contractor motion for reconsideration denied, 4 pages.
- (2017) Appeal #60139: 1 contract, 1 appeal, opinion, government motion to dismiss for jurisdiction granted (appeal dismissed), 5 pages.

5. Subject of Dispute: Contractor appeals issues related to a termination for convenience.

Contract Summary: #SPM4A709M6653, NAICS 336411 (Aircraft Manufacturing), fixed price, not a commercial item, small business competitive set-aside, small business, category indicator, definitive contract.

(Also contracts SPM4A7-10-M-3828 and SPM4A7-11-M-G805 referenced with this appeal)

Decision Record:

- (2016) Appeal #60290: 3 contracts, 1 appeal, opinion on government motion to dismiss.
- (2016) Appeal #60290: 3 contracts, 1 appeal, order of dismissal with prejudice for settlement, 1 page.

6. Subject of Dispute: Unable to determine subject of the dispute because only decision is for a settlement.

Contract Summary: SPM4A707M7459, NAICS 336411 (Aircraft Manufacturing), fixed-price, not a commercial item, full and open competition, small business, category indicator, definitive contract.

Decision Record:

- (2016) Appeal #60304: 1 contract, 1 appeal, order of dismissal with prejudice for settlement, 1 page.

Note: Only contract with this contractor having a category indicator.

7. Subject of Dispute: Contractor appealed the termination of one contract and the cancellation of two others.

Contract Summary: #SPM4A711MJ567, NAICS 336413 (Other Aircraft Parts and Auxiliary Equipment Manufacturing), fixed-price, small business competitive set-aside, not a commercial item, small business, no category indicator definitive contract.

(Also references SPM4A7-11-M-P870 and SPM4A7-12-M-0831)

- (2016) Appeal #60336: 3 contracts, 1 appeal, opinion dismissing/denying contractor appeal, 4 pages.
- (2016) Appeal #60336: 3 contracts, 1 appeal, 3 contracts, 1 appeal, opinion for contractor motion for reconsideration denied, 2 pages.

8. Subject of Dispute: Contractor appealed the Government's rejection of a non-conforming article and argued it was a contract breach; then requested dismissal but did not want dismissal to impact its application for Equal Access to Justice Act compensation for legal fees.

Contract Summary: #SPM4A710MH216, NAICS 336413 (Other Aircraft Parts and Auxiliary Equipment Manufacturing), fixed price, not a commercial item, small business competitive set-aside, small business, no category indicator, definitive contract.

- (2016) Appeal #60490: 1 contract, 1 appeal, opinion, cross motions for dismissal, Government motion approved, appeal dismissed in entirety, 3 pages.

9. Subject of Dispute: One appeal related to two contracts, where the appeal was in response to rejection of products that failed first article testing and a termination for default.

Contract Summary:

- #SPM4A710MB971, NAICS 336411 (Aircraft Manufacturing), fixed price, not a commercial item, small business set-aside competition, small business, no category indicator, definitive contract
- #SPM4A708M4911, NAICS 336411 (Aircraft Manufacturing), fixed-price, full and open competition, commercial item, small business, no category indicator, definitive contract.

Decision record:

- (2017) Appeal #60308: 2 contracts, 1 appeal, opinion on government motion to dismiss for jurisdiction, partially granted, partially denied (re: default termination) 6 pages.
- (2017) Appeal #60308: 2 contracts, 1 appeal, order of dismissal with prejudice for settlement, 1 page. (One contract mistakenly referred to as SPM4A710M671).

10. Subject of Dispute: Appeal was settled, so cannot determine the subject of the dispute.

Contract Summary: #SPM4A711MK243, NAICS 336413 (Other Aircraft Parts and Auxiliary Equipment Manufacturing), fixed-price, full and open competition, not a commercial item, small business, no category indicator, definitive contract.

Decision Record:

- (2017) Appeal #60637: 1 contract, 1 appeal, order of dismissal with prejudice for settlement, 1 page.

11. Subject of Dispute: Contractor appealed the denial of a request for monetary damages in response to a no-cost cancellation it accepted after failing a first article test. Contractor's appeal came two years after it signed a release for the modification.

Contract Summary: #SPM4A711MM395, NAICS 336413 (Other Aircraft Parts and Auxiliary Equipment Manufacturing), fixed-price, full and open competition, not a commercial item, small business, no category indicator, definitive contract.

Decision Record:

- (2017) Appeal #60692: 1 contract, 1 appeal, opinion on government request for summary judgment due to release; granted (appeal dismissed), 9 pages.

12. Subject of Dispute: Contractor appealed a termination for default related to a failure of first article testing. (Appeal was dismissed because it was untimely.)

Contract Summary: #SPM4A711MT117, NAICS 336413 (Other Aircraft Parts and Auxiliary Equipment Manufacturing), fixed-price, full and open competition, not a commercial item, small business, no category indicator, definitive contract.

Decision Record:

- (2017) Appeal #60739: 1 contract, 1 appeal, opinion, opinion granting government's motion to dismiss for jurisdiction, motion granted, 4 pages.

13. Subject of Dispute: Contractor appeals the withdrawal of a purchase order when it delivered items after the due date of delivery had passed.

Contract Summary: #SPE4A713M4596, NAICS 336413 (Other Aircraft Parts and Auxiliary Equipment Manufacturing), fixed-price, full and open competition, not a commercial item, small business, no category indicator, definitive contract.

Decision Record:

- (2017) Appeal #60904: 1 contract, 1 appeal, opinion, contractor appeal alleging bad faith order cancellation denied, 12 pages.

Note: Contractor not represented by a lawyer before the Board.

6) NORTHRUP GRUMMAN

Legal Record Summary (Total Dyad with Three Sub-Relationships): In its interactions with the three agencies, there were twenty-seven contractor appeals related to fourteen contracts, decided in twenty-eight decisions, representing 199 total pages.

A. Northrup Grumman Corporation/Defense Contract Management Agency (DCMA)

Legal Record Summary with DCMA: This sub-relationship involved twenty-four appeals related to twelve contracts, representing twenty-five decisions (seventeen orders and eight opinions, and 97 total pages. Most appeals were mutually settled. Contractor was mostly successful in decisions with DCMA, probably settled its Navy appeal, and was completely unsuccessful in its appeal with the Army (was denied on one procedural argument and one appeal was denied).

1. Subject of Dispute: Dispute was settled, so not able to learn cause.

Contract Summary: #F4261098C0001, NAICS 541330 (Engineering Services), cost-plus-award-fee, not commercial, full, and open competition, large business, subcontracting plan required, definitive contract.

Decision Record:

- (2018) Appeal #60734: 1 contract + et al, 1 appeal, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.
- (2021) Appeal #61756: 1 contract + et al, 1 appeal, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.

2. Subject of Dispute: Dispute is related to Cost Accounting Standard issues and the reimbursement/allowability of some costs.

Contract Summary: #FA862013D3014, NAICS 336411 (Aircraft Manufacturing), fixed-price, not commercial, not competed--only one source, large business, no subcontracting plan required, indefinite contract vehicle.

Decision Record:

- (2021) Appeals #61616, 62342: 1 contract, 2 appeals, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.
- (2021) Appeal #61775: 1 contract + et al, 1 appeal, 1 decision, 1 opinion sustaining contractor appeal, 18 pages.
- (2021) Appeal #61775: 1 contract + et al, 1 appeal, 1 decision, 1 opinion for consent judgment for quantum (amount of monetary damages to award)in contractor's favor, 2 pages.

3. Subject of Dispute: For Appeal #59556, dispute was related to government's share of contractor's liquidation of an asset (Board decided as to what Government was due); the other two disputes were settled, so not able to learn cause.

Contract Summary: #F1962800C0100, NAICS 334511 (Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing), cost-plus-award-fee, not commercial, not competed, only one source, large business, subcontracting plan required, definitive contract.

Decision Record:

- (2016) Appeal #59556: 1 contract + et al, 1 appeal, 1 decision, 1 opinion for consent judgment for quantum (amount of monetary damages to award) in contractor's favor, 2 pages.
- (2017) Appeal #60322: 1 contract, 1 appeal, 1 decision, 1 order of dismissal with prejudice due to settlement, 2 pages.
- (2020) Appeal #61343: 1 contract + et al, 1 appeal, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.
- (2020) Appeal #61337: 1 contract + et al, 1 appeal, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.

4. Subject of Dispute: For appeal #62156, subject was Government claim for the reimbursement of what it contends were unallowable pension costs; the other appeals were settled, so unable to determine cause.

Contract Summary: #F3365701C4600, NAICS 336411 (Aircraft Manufacturing), cost-plus-award-fee, not commercial item, not competed, only one source, large business, subcontracting plan required, definitive contract.

- (2018) Appeal #60169: 1 contract + et al, 1 appeal, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.
- (2018) Appeal #60169: 1 contract + et al, 1 appeal, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.
- (2019) Appeals #61331, 61332, 61501: 1 contract, 3 appeals, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.
- (2021) Appeal #62165: 1 contract, 1 appeal, 1 decision, 1 opinion denying contractor motion to dismiss government claim for jurisdiction (parties ordered to file joint report on the status of the appeal), 23 pages.

5. Subject of Dispute: Appeal was settled, so unable to determine source of the dispute.

Contract Summary: #F3365799D0028, NAICS 336411 (Aircraft Manufacturing), fixed-price, not competed (only one source, not commercial, large business, subcontracting plan required, indefinite contract vehicle.

Decision Record:

- Appeal #61340 (2019), 1 contract + et al, 1 appeal, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.

6. Subject of Dispute: Appeal was settled, so unable to determine source of the dispute.

Contract Summary: #N0001997C0099, fixed-price, No NAICS code, Product Service Code 1510 (Drones specifically designed for such uses as targets, training, surveillance, missile evaluation, and photographic reconnaissance), not commercial, not competed (only one source), large business, subcontracting plan required, definitive contract.

Decision record:

- (2019) Appeal #61454: 1 contract + et al, 1 appeal, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.

7. Subject of Dispute: Contractor wanted Contracting Officer to provide a Final Decision (COFD) on contractor's certified claim (Board can compel a COFD if the Government is taking too long to provide one).

Contract Summary: #N6600108C2010, NAICS 541712 (Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology)), cost-plus-fixed-fee, not commercial item, competed, large business, subcontracting plan required, definitive contract.

Decision Record:

- (2019) Appeals #62016-989: 1 contract, 1 appeal, 1 decision, order requiring issuance of Contracting Officer's Final Decision, 2 pages.

8. Subject of Dispute: Appeal was settled, so unable to determine source of the dispute.

Contract Summary: #FA880305C0001, NAICS 336419 (Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing), cost-plus-award-fee, large business, not competed (only one source, not a commercial item, subcontracting plan required, definitive contract.

Decision Record:

- (2018) Appeal #60199: 1 contract + et al, 1 appeal, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.

9. Subject of Dispute: Appeal was settled, so unable to determine source of the dispute.

Contract Summary: #FA881009C0001, NAICS (Guided Missile and Space Vehicle Manufacturing), cost-plus-fixed-fee, not commercial item, not competed (only one source), large business, subcontracting plan required.

Decision Record:

- (2018) Appeal #60735: 1 contract + et al, 1 appeal, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.

10. Subject of Dispute: Appeal was settled, so unable to determine source of the dispute.

Contract Summary: #N0003007C0006, NAICS 541330 (Engineering Services), cost-plus-fixed-fee, large business, not competed (only one source, not a commercial item), subcontracting plan required, definitive contract.

Decision Record:

- (2017) Appeal #60391: 1 contract + et al, 1 appeal, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.

11. Subject of Dispute: Very simply, these disputes are related to extremely complicated cost allowability/accrual issues related to the contractor's calculation of reimbursable overhead costs from employee pension funds (and the Government's disagreement with its calculations and attempts to recover the subject costs).

Contract Summary: #N6893605C0059, NAICS 334511 (Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing), cost-plus-fixed-fee, full and open competition competed, not commercial item, large business, subcontracting plan not required), definitive contract

Decision Record:

- (2014) Appeal #57625: 1 contract, 1 appeal, 1 decision, 1 opinion denying contractor motion for reconsideration, 6 pages.
- (2014) Appeal #57625: 1 contract, 1 appeal, 1 decision, 1 opinion denying contractor appeal, 18 pages.
- (2016) Appeal #59703: 1 contract + et al, 1 appeal, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.
- (2017) Appeal #60190: 1 contract, 1 appeal, 1 decision, 1 opinion sustaining contractor appeal, 19 pages.
- (2018) Appeal #60190: 1 contract, 1 appeal, 1 decision, 1 opinion denying government request for reconsideration, 9 pages.

12. Subject of Dispute: Appeal was settled, so unable to determine source of the dispute.

Contract Summary: #F0470102C0009, NAICS 541710 (Research and Development in the Physical, Engineering, and Life Sciences), cost-plus-award-fee, not commercial item, not competed (only one source), large business, subcontracting plan required, definitive contract

Decision Record:

- (2018) Appeal #60192: 1 contract et al, 1 appeal, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.

B. Northrup Grumman Ship Systems/Navy

Legal Record Summary with Navy: One appeal related to one contract, producing one non-entitlement decision. Case was probably settled but would not have been published to ASBCA website before 2014. Contractor successful on procedural issue, 6 total pages.

Subject of dispute: Cost of ship repair incurred as a result of sea trials due under contract's insurance clause.

Contract Summary: #N0002493C2205, (no North American Industry Classification System code), Product Service Code 1910 (Transport Vessels, Passenger and Troop), fixed-price, not commercial item, full and open competition, subcontracting plan required, definitive contract

- (2008) Appeal #55616: 1 contract, 1 appeal, government motion to dismiss denied, 6 pages.

C. Northrop Grumman Systems Corporation Space Systems Division/Army

Legal Record Summary with Army: One appeal related to one contract and resulting in one decision where the Government was successful party (appeal denied), 86 total pages. Aerojet alleged a Government breach of GFFD.

Subject of Dispute: The dispute is actually related to agreements/actions related to the Government's relationship with the original contractor and not Northrup Grumman and involve a number of cost/change/adjustment agreements claimed by Aerojet prior to the acquisition.

Contract Summary: #DAAE3097C1005, No North American Industry Classification System code, Product Service Code AD14 (Research and Development, Defense "Other": Ammunition Engineering Development), cost-plus-incentive-fee, full and open competition, large business, no subcontracting plan required, definitive contract.

- (2010) Appeal #54774: 1 contract, 1 appeal, 1 decision, 1 opinion denying contractor appeal, 86 pages.

Note: Northrup Grumman was not the original contractor at award but a successor contractor when it acquired Aerojet.

7. Parsons Government Services/Navy

Legal Record Summary: There was one appeal related to one contract, which resulted one decision (an opinion) where the government was successful in having the contractor's dispute dismissed, 6 total pages.

Subject of Dispute: Contractor believed it was not fully compensated for work it performed because of the way the Government awarded and funded the contract (a "color of money" and reimbursement issue).

Contract Summary: #M6785409D8000, NAICS 332312 (Fabricated Structural Metal Manufacturing), not commercial, full and open competition, large business, subcontracting plan, indefinite contract vehicle.

Decision record:

- (2017) Appeal #60663: appeal dismissed for "failure to state a claim upon which relief can be granted" (Contractor alleged damages which it can' be compensated by the Board), 6 pages.

7) RAYTHEON COMPANY

Legal Record Summary (Total Dyad with Eight Sub-Relationships): Forty-two appeals related to more than twenty-four contracts, which resulted in thirty decisions (fourteen orders and sixteen opinions), 397 total pages. Extensive record of eventual dispute resolution by mutual agreement/settlement, but contractor is much more successful when the Board is required to decide entitlement/merit.

A. Raytheon Company/Defense Contract Management Agency

Legal Record Summary (total relationship dyad): This sub-relationship produced eleven appeals related to thirteen contracts that produced thirteen decisions (six orders, seven opinions) mostly a record of settlements, with the contractor successful on one major appeal, 92 total pages.

1. Subject of Dispute: Appeal #58212 stems from Government claim that contractor was reimbursed for unallowable air travel expenses related (or improperly related) to the contract. Appeal 59434 was settled, so unable to determine reason for dispute.

Contract Summary: #F0863503C0002 (W31P4Q06C0057), NAICS 336414 (Guided Missile and Space Vehicle Manufacturing), cost-plus-award-fee, not commercial item, full and open competition, large business, subcontracting plan required, definitive contract.

Decision record:

- (2015) Appeal #58212: 1 contract, 1 appeal, 1 decision, 1 opinion on cross motions for partial summary judgment, contractor motion denied, government motion partially granted, 8 pages.
- (2015) Appeal #59434: 1 contract, 1 appeal, 1 decision, 1 order of dismissal with prejudice for settlement, 1 page.

Contract Summary: #N0002404C6101, NAICS 334511 (Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing), fixed-price, not commercial item, not competed (only one source), large business, no subcontracting plan required, definitive contract.

Decision record:

- (2021) Appeal #58841: 1 contract, 1 appeal, 1 decision, 1 order of dismissal with prejudice for settlement, 1 page.
- (2021) Appeal #58842: 1 contract, 1 appeal, 1 decision, 1 order of dismissal with prejudice for settlement, 1 page.

2. Subject of Dispute: The contractor is appealing Government claims (attempts to recover) for what Government contends were statutorily unallowable expenses related to the contractor's headquarters operations that it improperly charged to the contract.

Contract Summary: #FA880706C0004 (also N0001906C0310, W900KK07D0001, N0010408GA300, N0038305G500H, W15P7T08P203), NAICS 334511 (Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing), cost-plus-award-fee, not a commercial item, full and open competition, large business, subcontracting plan required definitive contract.

Decision record:

- (2013): Appeals #57576, 57679: 2 contracts, 2 appeals, 1 decision, 1 opinion, contractor motion for declaratory judgment partially granted, partially denied, 10 pages.
- (2015): Appeals #57576, 57679, 58290: 2 contracts, 3 appeals, 1 decision, 1 opinion on cross motions for both partially approved, Appeal 57576 dismissed for jurisdiction, 33 pages.
- (2017) Appeals #57576, 57679, 58290, 60137: 7 contracts, 4 appeals, 1 decision, 1 order of dismissal with prejudice for settlement, 2 pages.

3. Subject of Dispute: Appeal is from a Government claim for reimbursement of costs related to pension fund allocations that Government auditors contend violate Cost Accounting Standards.

Contract Summary: #N0001905G0008 (and W911QX04C0108), NAICS 336413 (Other Aircraft Parts and Auxiliary Equipment Manufacturing), not a commercial item, not competed (only one source), large business, no subcontracting plan required, indefinite contract vehicle.

Decision record:

- (2015) Appeal #58849: 2 contracts, 1 appeal, 1 decision, 1 opinion on contractor motion to dismiss, denied entirely, 4 pages.
- (2017) Appeal #58849: 1 contract, 1 appeal, 1 decision, 1 order of dismissal with prejudice for settlement, 2 pages.

4. Subject of Dispute: Appeal 60194 was settled, so unable to determine reason for dispute.

Contract Summary: #DAAE3098C1032, No North American Industry Classification System code, Product Service Code AC45 (Research and Development, Defense Systems—Tank/Automotive Operational Systems Development), cost-plus-incentive-fee, not a commercial item, full and open competition, large business, subcontracting plan required, definitive contract

Decision record:

- (2016) Appeal #60194: 1 contract, 1 appeal, 1 decision, 1 order of dismissal with prejudice for settlement, 1 page.

5. Subject of Dispute: Appeals stem from Government claim against contractor for shares of various payments for asset liquidations that contractor withheld in violation of various Cost Accounting Standards principles.

Contract Summary: Contract #DAAH0196C0114, no North American Industry Classification System, Product Service Code 1427 (Guided Missile Subsystems), fixed-price, not commercial item, not competed, large business, subcontracting plan required, definitive contract

Decision record:

- (2007) Appeal #54907: 1 contract, 1 appeal 1 decision, 1 opinion granting government request for summary judgment and denying the appeal, 24 pages.
- (2008) Appeal #54907: 1 contract, 1 appeal, 1 decision, 1 opinion granting contractor appeal for reconsideration and appeal affirmed, 4 pages.
- (2012) Appeal #54907: 1 contract, 1 appeal, 1 decision, 1 opinion denying appeal (government motion for summary judgment), 8 pages.

Note: The 2012 appeal is the result of a remand from the US Court of Appeals reversing the 2008 decision.

B. Raytheon Company and Raytheon Missile Systems/Defense Contract Management Agency

Legal Record Summary (total relationship dyad): This sub-relationship reflects twenty appeals that reference three contracts and resulted in five decisions (three orders and two opinions), some evidence of mutual resolution, but contractor mostly successful in opinions).with 123 total pages.

Subject of Dispute: Most decisions were settled (can't determine reason for dispute), but the two opinions were related to Contractor's appeal of a government claim that Raytheon had included unallowable and expressly unallowable costs its final indirect cost proposals (which the Government sought to recover in addition to penalties).

Contract summary: Contract #W15P7T07CP207 (also F0863503C0002 and W31P4Q07C0159) NAICS 541710 (Research and Development in the Physical, Engineering, and Life Sciences), cost-plus-fixed-fee, not a commercial item, full and open competition, large business, subcontracting plan required, definitive contract.

Decision record:

- (2017) Appeals #61136, 61137, 61138, 61139: 1 contract + et al, 4 appeals, 1 decision, 1 order of dismissal with prejudice due to settlement, 2 pages.
- (2017) Appeals #61191, 61192, 61193: 2 contracts, 3 appeals, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.
- (2021) Appeals #59439, 59440, 59441: 1 contract + et al, 3 appeals, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.
- (2021) Appeals #59435, 59436, 59437, 59438, 60056, 60057, 60058, 60059, 60060, 60061: 2 contracts, 10 appeals, 1 decision, opinion sustaining most of contractor's appeals, 115 pages.
- (2021) Appeals #59435, 59436, 59437, 59438, 60056, 60057, 60058, 60059, 60060, 60061: 2 contracts, 10 appeals, 1 decision, opinion denying government request for reconsideration and referral to Senior Deciding Group, 4 pages.

C. Raytheon Company Intelligence, Information and Services/Defense Contract Management Agency

Legal Record Summary (total relationship dyad): This sub-relationship produced three appeals related to one contract that resulted in one decision (order), representing a mutual resolution, 1 total page.

Contract Summary: Contract #NNG10XA03C, NAICS 517910 (Other Telecommunications), cost-plus-award-fee, not commercial item, not competed (only one source), large business, subcontracting plan required, definitive contract.

Decision Record:

- (2015) Appeals #59459, 59460, 59461: 1 contract, 3 appeals, 1 decision, 1 order of dismissal with prejudice due to settlement, 1 page.

D. Raytheon Missile Systems/Defense Contract Management Agency

Legal record summary (total relationship dyad): Two appeals with two contracts (and multiple unspecified others), two decisions (both orders), three total pages (mutual resolution).

1. Subject of Dispute: Dispute was settled, so no reason for the dispute is on the record.

Contract summary: Contract #N0002407C6119, NAICS 541710, cost-plus-incentive-fee, not a commercial item, competed, type 4, large business, no subcontracting plan required, definitive contract.

Decision record:

- (2021) Appeal #61001: 1 contract et al.,* 1 appeal, 1 decision, 1 order of dismissal with prejudice for settlement, 1 page.

2. Subject of Dispute:

Contract summary: #FA867507C0048, NAICS 336414 (Guided Missile and Space Vehicle Manufacturing), Time and Materials pricing structure, not a commercial item, full and open competition, large business, subcontracting plan required, definitive contract.

Decision record:

- (2015) Appeal #59432: 1 contract, 1 appeal, 1 decision, 1 order of dismissal with prejudice for settlement, 2 pages.

*Note: “et al.” here in the decision header simply refers to multiple unspecified contracts which the Board is consolidating for resolution under this order.

E. Raytheon Company, Integrated Defense Systems/Army

Legal Record Summary (total relationship dyad): One appeal, related to one contract, resulting in one decision (order) indicating a mutual resolution, 1 total page.

Subject of Dispute: Dispute was settled, so no reason for the dispute is on the record.

Contract Summary: Contract #W31P4Q07C0151, NAICS 336414 (Guided Missile and Space Vehicle Manufacturing), fixed-price, not a commercial item, not competed (only one source), large business, no subcontracting plan required, definitive contract.

Decision record:

- (2018) Appeal #60784: 1 contract, 1 appeal, 1 decision, 1 order of dismissal with prejudice for settlement, 1 page.

F. Raytheon Company/Army

Legal Record Summary (total relationship dyad): One appeal related to one contract that produced two decisions (one order, one opinion), contractor largely successful but not completely final disposition of the appeal was by mutual agreement, 12 total pages.

Contract Summary: # W56HZV11C0130, NAICS 336992 (Military Armored Vehicle, Tank, and Tank Component Manufacturing), fixed-price, not commercial item, not competed (only one source), large business, subcontracting plan required, definitive contract

Subject of Dispute: Contractor disputed Government claim that delivered rifle sights were improper quality and delivered late.

Decision Record:

- (2020) Appeal # #61859: 1 contract, 1 appeal, 1 decision, opinion on contractor request for summary judgment partially approved, partially denied, 11 pages.
- (2021) Appeal #61859: 1 contract, 1 appeal, 1 decision, 1 order of dismissal with prejudice for settlement, 1 page.

G. Raytheon Company/Air Force

Legal Record Summary (total relationship dyad): Two appeals resulting from three contracts that produced two decisions (both opinions), Government won a procedural issue, but contractor was ultimately successful on merit, 24 total pages.

Subject of Dispute: Dispute is about contract interpretation due to appropriate reimbursement for several contract line items, where contract argues it is due more payment for services than it received.

Contract Summary: # FA8675-13-C-0003 (FA8675-11-C-0030, FA8675-12-C-0011), NAICS 336414 (Guided Missile and Space Vehicle Manufacturing), fixed-price, not a commercial item, not competed (only 1 source), large business, subcontracting plan required, definitive contract.

Decision Record:

- (2018) Appeals #60448, 60785 (2018), 1 contract, 2 appeals, 1 decision, 1 opinion approving Government motion to amend its answer, 5 pages.
- (2020) Appeals #60448, 60785 (2020), 3 contracts, 2 appeals, 1 decision, 1 opinion sustaining contractor appeal, 19 pages.

H. Raytheon Missile Systems/Navy

Legal Record Summary (total relationship dyad): Two appeals related to one contract that resulted in four decisions (all opinions), Contractor appeal partially successful, 51 total pages.

Subject of Dispute: Contractor appealed denial of a claim for reimbursement of increased fuel (special circumstances related to Government activity in relation to the contract).

Contract Summary: Contract #N0001904C0569, NAICS 336414 (Guided Missile and Space Vehicle Manufacturing),, fixed-price, not a commercial item, not competed (only one source), large business, no subcontracting plan, definitive contract,

Decision Record:

- (2012) Appeal #57594: 1 contract, 1 appeal, 1 decision, opinion for government motion for summary judgment denied, 5 pages.
- (2013) Appeal #57594: 1 contract, 1 appeal, 1 decision, opinion partially sustaining contractor appeal, 32 pages.
- (2013) Appeal #57594: 1 contract, 1 appeal, 1 decision, opinion denying Government request for reconsideration, 4 pages.
- (2015) Appeal #59258: 1 contract, 1 appeal, 1 decision deciding amount of money damages after appeal sustained in earlier decision, 10 pages.

8. Relyant Inc./Army

Legal Record Summary: Two appeals related to two contracts that resulted in four decisions, (all opinions), contractor appeal largely successful, 48 total pages.

Subject of Dispute: The heart of the dispute is an issue of contract interpretation related to performance/quality of end-product supplied (prefabricated metal buildings and the interiors).

Contract Summary: #W91B4N08D0011, NAICS 541611 (Administrative Management and General Management Consulting Services), commercial item, full and open competition, large business, possibly foreign-owned(?), indefinite contract vehicle. Service-disabled veteran-owned business (I have some questions about size/status)

Decision Record:

- (2016) Appeal #58172L 1 contract, 1 appeal, 1 decision cross-motions for summary judgment denied, 11 pages.
- (2018) Appeal #59809: 1 contract, 1 appeal, 1 decision contractor appeal sustained (delay damages), 28 pages.
- (2018) Appeal #59809: 1 contract, 1 appeal, 1 decision contractor motion for partial reconsideration denied, 4 pages.

- (2019) Appeal #59809: 1 contract, 1 appeal, 1 decision Equal Access to Justice Act application, contractor successful, 5 pages.

SERVICES

1. BAE SYSTEMS

Legal Record Summary for Entire BAE/Government Dyad: Ten appeals linked to at least six contracts, resulting in twelve decisions (five orders, seven opinions), contractor mostly successful with evidence of settlement by mutual agreement, 191 total pages.

A. BAE Systems San Francisco Ship Repair/Army

Legal Record Summary: Four appeals related to one contract that resulted in five decisions (all opinions), contractor largely successful, 146 pages total.

Source of Dispute: Multiple issues related requests for equitable adjustments due to faulty or inadequate specifications and the pricing of Government-ordered changes (including unilateral modifications).

Contract summary: #W912SU04D0005, NAICS 33661 (Ship Building and Repairing), fixed-price, full and open competition, not a commercial item, large business, no sub-contracting plan, indefinite contract vehicle.

Decision record:

- (2013) Appeals: #57934: 1 contract, 1 claim, 1 decision, 1 opinion denying appeal, 9 pages.
- (2014) Appeal #58809: 1 contract, 1 appeal, opinion denying contractor motion for summary judgment (additional need for information establishing reasonableness of cost claims), 21 pages.
- (2014) Appeal #58810: 1 contract 1 appeal, opinion denying contractor motion for summary judgment because material facts are in dispute, 13 pages.
- (2016) Appeal #58809: 1 contract, 1 appeal, 1 opinion, decision regarding quantum (amount of monetary damages) the contractor is due for an equitable adjustment, 33 pages.
- (2016): Appeals #58810, 59642: 1 contract, 2 appeals, 1 opinion sustaining 1 appeal, other is dismissed as moot, 70 pages.

Note: BAE was not the original contractor (appears to have acquired the Shipyard at some point after contract award).

B. <u>BAE Systems San Diego Ship Repair/Navy</u>

Legal record summary: Two appeals linked to two contracts, with two decisions (both orders) on same day with same judge, separate contracts, both orders), 2 total pages.

1. Source of Dispute: Appeal was settled, so record does not disclose source of the dispute.

Contract summary: #N0002411C4400**,** NAICS 336611 (Ship Building and Repairing), cost-plus-incentive-fee, full and open competition, not a commercial item, large business, subcontracting plan required.

Decision Record:

- (2016): Appeal #59793: 1 contract, 1 appeal, 1 decision, order dismissing appeal with prejudice for settlement, 1 page.

2. **Source of Dispute:** Appeal was settled, so record does not disclose source of the dispute. **Contract summary:** #N0002411C4408, NAICS 336611 (Ship Building and Repairing), cost-plus-incentive-fee, full and open competition, not a commercial item, large business, subcontracting plan required.

Decision record:

- (2016) Appeal #59859: 1 contract, 1 appeal, 1 decision, order dismissing appeal with prejudice for settlement, 1 page.

Note: BAE was not the original contractor (appears to have acquired the Shipyard at some point after contract award).

C. <u>BAE Systems Southeast Shipyards Mayport LLC/Navy</u>

Legal Record Summary: One appeal under one contract, resulting in two decisions (one order, one opinion), with the dispute ultimately resolved by settlement, 11 total pages.

Source of Dispute: This appeal involves a dispute over the calculation of an award and incentive fee under a cost-plus award fee contract for maintenance and repair of CG 4 7 and DDG 51 class ships at the Naval Station Mayport, in Jacksonville, Florida.

Contract summary: # N0002410C4406, NAICS 336611 (Ship Building and Repairing), cost-plus-incentive fee, full and open competition, not commercial item, large business, subcontracting plan required, definitive contract.

Decision record:

- (2016) Appeal #59876: 1 contract, 1 appeal, 1 decision, opinion approving contractor motion for summary judgment on issue of contract interpretation (contractor motion for stay moot) 10 pages.

- (2017): Appeal #59876: 1 contract, 1 appeal, 1 decision, order dismissing appeal with prejudice for settlement, 1 page.

Note: BAE was not the original contractor (appears to have acquired the Shipyard at some point after contract award).

D. BAE Systems Technology Solutions & Services Inc./Air Force

Legal Record summary: One appeal under one contract resulting in one decision (an opinion), contractor successful, 30 total pages.

Source of Dispute: Appeal stems from an issue of contract interpretation and specification requirements. Issue of whether work ordered under maintenance contract represents a reimbursable change or cost already covered under a particular contract line item.

Contract summary: # FA251709C8000, NAICS 517919 (All Other Telecommunications), fixed-price, full and open competition, not a commercial item, large business, subcontracting plan required, indefinite contract vehicle.

Decision record:

- (2013) Appeal #57581: 1 contract, 1 appeal, 1 decision, opinion sustaining contractor appeal and remanded for negotiation of quantum (how much money government owes the contractor), 30 pages.

E. BAE Systems, Inc./Defense Contract Management Agency

Legal Record Summary: Two appeals stemming from one contract (technically more, since decision header refers to "et al" under contract number), resulting in two decisions (2 orders), resolved by mutual agreement, 2 pages total.

Contract summary: # N0017804D4018 et al.* NAICS 541330 (Engineering Services), cost-plus-fixed-fee, full and open competition, not a commercial item, large business, subcontracting plan required.

Decision record:

- (2015) Appeal #59224: 1 contract (et al), 1 appeal, 1 decision, order dismissing appeal with prejudice for settlement, 1 page.
- (2016): Appeal #59225: 1 contract (et al), 1 appeal, 1 decision, order dismissing appeal with prejudice for settlement, 1 page.

2. Computer Sciences Corporation/Army

Legal Record Summary: Fifteen total appeals linked to one contract, with six decisions (all opinions), mix of success between Government and contractor on dispute outcome, 53 total pages.

Subject of Dispute: Various issues, including a matter of contract interpretation relating to the payment of $35 million to contractor for intellectual property developed in conjunction with its contract.

Contract Summary: #DAAB0700DE252, NAICS 541330 (Engineering Services), fixed-price, full and open competition, large business, subcontracting plan required, indefinite delivery contract vehicle.

Decision record:

- (2009) Appeal #56162: 1 contract, 1 appeal, 1 decision, opinion on cross motions; government motion for summary judgment denied; contractor's request for contract interpretation granted, 8 pages.
- (2009) Appeals #56168, 56169: 1 contract, 2 appeals, 1 decision, opinion on Government motion for summary judgment granted, 9 pages.
- (2010) Appeals #56168, 56169: 1 contract, 2 appeals, 1 decision, opinion on Government motion for reconsideration denied, 4 pages.
- (2010) Appeals #56165, 56166, 56167, 56170: 1 contract, 4 appeals, 1 decision, opinion on Government motion to dismiss appeals for lack of jurisdiction denied, 7 pages.
- (20110 Appeal #56167: 1 contract, 1 appeal, 1 decision, opinion on contractor motion for summary judgment granted and appeal sustained (Army conceded entitlement), 4 pages.
- (2011) Appeal #56175: 1 contract, 1 appeal, 1 decision, opinion on Government motion for summary judgment denied (consolidation of 15 appeals), 21 pages.

3. DLT Solutions/Army

Legal Record Summary: Two appeals, stemming from one contract resulting in two decisions (both opinions), Contractor minimally successful, 29 total pages.

Source of Dispute: Contractor alleges that Government's termination of a software usage contract for convenience was made in bad faith and has a number of related complaints.

Contract Summary: #DAAB1599A1002, NAICS 541519 (Other Computer Related Services), fixed-price contract, commercial item, full and open competition, large business, subcontracting plan required, indefinite delivery vehicle.

Decision Record:

- (2009) Appeals # 54812, 55362: partially sustained, mostly stricken, or denied (Contractor winds a minor issue but is awarded no real damages), 27 pages.
- (2009) Appeals # 54812, 55362: Opinion 2 pages, contractor motion for reconsideration denied.

4. KELLOGG, BROWN, AND ROOT SERVICES, INC.

Legal record for KBR/Government dyad with 4 sub-relationships): Twenty-five appeals stemming from four contracts, resulting in thirty-four decisions (ten orders and twenty-four opinions) (283 total pages.

A. Kellogg Brown & Root Services, Inc./Navy

Legal Record Summary: Two appeals against one contract that resulted in one decision (an opinion), Government successful, 24 total pages.

Subject of Dispute: Contractor's appeal alleges the US Government did not do enough to help it perform a military base support contract during a labor strike and other issues related to performance of the contract in an African country**.**

Contract #N6247013D3008**,** NAICS 561210 (Facilities Support Services), fixed-price, not a commercial item, full and open competition, large business, no subcontracting required, indefinite delivery contract vehicle.

- (2020): Appeals #59385, 59744: 1 contract, 2 appeals, 1 decision, opinion on cross motions for summary judgment, government successful and appeals denied, 24 pages.

B. Kellogg Brown & Root Services, Inc./Army

Legal Record Summary: One appeal related to one contract resulting in one decision (an opinion) where the Board refused to dismiss the contractor's appeal on a technicality, 15 total pages.

Subject of Dispute: The actual recipient/beneficiary of contract performance was transferred by the Government between various Iraqi governance organizations without approval of the contractor. Contractor's appeal relates to payments it did not receive and that the US Government refused to pay due to appropriation issues.

Contract #W9126G04D0001, NAICS 561210 (Facilities Support Services), fixed price, not a commercial item, full and open competition, large business, no subcontracting plan, indefinite delivery contract vehicle.

Decision Record:

- (2011) Appeal #56256: 1 contract, 1 appeal, 1 decision, opinion denying government request to dismiss and both parties' motions for summary judgment, 15 pages.

C. Kellogg Brown & Root Services, Inc./Army Corps of Engineers

Legal Record Summary: Two appeals related to one contract resulting in two decisions (one opinion, one order), mutual agreement to settle after contractor wins on question of legal interpretation, 16 total pages.

Subject of Dispute: Contractor appeals the Government's refusal to indemnify the contractor against third party claims related to the performance of contract work. (Appeal is essentially an issue of legal interpretation of a contract clause about indemnification).

Contract Summary: #DACA6303D0005, NAICS 928110 (National Security), fixed-price, not a commercial item, not competed, large business, no subcontracting plan, indefinite delivery contract vehicle.

Decision Record:

- (2015) Appeals #59357, 59358: 1 contract, 2 appeals, 1 decision, opinion granting contractor's motion for partial summary judgment seeking indemnification, 15 pages.
- (2016) Appeals #59357, 59358: 1 contract, 2 appeals, 1 decision, order of dismissal with prejudice for settlement, 1 page.

D. Kellogg Brown & Root Services, Inc./Defense Contract Management Agency, and Department of Justice (fraud alleged during contract performance--outside of ASBCA jurisdiction)

Legal Record Summary: Twenty appeals related to one contract, producing thirty decisions, (nine orders and twenty-one opinions), balanced record of success of procedural issues, but government more successful than contractor on entitlement decisions, with evidence of mutual agreement settlements), 228 total pages.

Subject of Disputes: Multiple, complicated reasons for appeals.

Contract Summary: #DAAA0902D0007, NAICS 561210 (Facility Support Services), Cost-No-Fee contract, not commercial item, full and open competition, large business, subcontracting plan, required, indefinite delivery contract vehicle.

- (2010) Appeals #56358, 57151: ARMY, 1 contract, 2 appeals, 1 decision, 1 opinion denying government motion for stay of proceedings, 12 pages.
- (2012) Appeal #56358: ARMY, 1 contract, 1 appeal, 1 decision, 1 opinion denying both parties' request for summary judgment, 13 pages.

- (2012) Appeal #56358: ARMY, 1 contract, 1 appeal, 1 decision, opinion denying government request for reconsideration of previous decision not granting summary judgment, 3 pages.
- (2013) Appeal #58578: ARMY, 1 contract, 1 appeal, 1 decision 1 opinion denying government request to dismiss appeals for jurisdiction, 8 pages.
- (2013) Appeals #57530, 58161: 1 contract, 2 appeals, 1 decision, 1 opinion approving government request to suspend or dismiss without prejudice, subject to reinstatement, 5 pages.
- (2013) Appeals #57530, 58161: 1 contract, 2 appeals, 1 decision, 1 opinion denying contractor's request for reconsideration re: dismissal, 7 pages.
- (2014) Appeal #58492: 1 contract, 1 appeal, 1 decision, 1 opinion granting government motion to dismiss appeal for subject matter jurisdiction, 12 pages.
- (2014) Appeals #56358, 57151, 57327, 58559: 1 contract, 4 appeals, 1 decision, opinion dismissing 58559 but sustaining other three appeals for contractor, 41 pages.
- (2014) Appeal #58513: 1 contract, 1 appeal, 1 decision, order of dismissal with prejudice for settlement, 1 page.
- (2014) Appeal #58926: 1 contract, 1 appeal, 1 decision, order of dismissal with prejudice for settlement, 1 page.
- (2014) Appeal #58984: 1 contract, 1 appeal, 1 decision, order of dismissal with prejudice for settlement, 1 page.
- (2014) Appeal #58661: 1 contract, 1 appeal, 1 decision, order of dismissal with prejudice for settlement, 1 page.
- (2014) Appeal #58578: 1 contract, 1 appeal, 1 decision, order of dismissal with prejudice for settlement, 2 pages.
- (2015) Appeal #59557: 1 contract, 1 appeal, 1 decision, 1 opinion approving contractor request that government be ordered to file complaint, 11 pages.
- (2015) Appeal #59557: 1 contract, 1 appeal, 1 decision, 1 order of dismissal with prejudice for settlement, 1 page.
- (2015) Appeal #58175: 1 contract, 1 appeal, 1 decision, opinion on cross motions for summary judgment re: jurisdiction, government successful, contractor is not, 20 pages.
- (2015) Appeal #58175: 1 contract, 1 appeal, 1 decision, opinion denying contractor request for reconsideration of previous decision re: timeliness, 7 pages.
- (2016) Appeal #58583: 1 contract, 1 appeal, 1 decision, opinion denying government request to dismiss appeal (jurisdiction), 3 pages.
- (2016) Appeal #58465: 1 contract, 1 appeal, 1 decision, opinion denying contractor request for summary judgment, 10 pages.
- (2016) Appeals #58518, 59005: 1 contract et al, 2 appeals, 1 decision, opinion denying contractor motion for summary judgment, 19 pages.
- (2016) Appeals #57530, 58161: 1 contract, 2 appeals, 1 decision, 1 opinion denying government request to dismiss appeals or suspend proceedings denied, 3 pages.

- (2017) Appeal #58492: ARMY, 1 contract, 1 appeal, 1 decision, order of dismissal with prejudice due to settlement, 2 pages.
- (2017) Appeals #56358, 57151, 57327, 58583: 1 contract, 4 appeals, 1 decision, opinion on government motion to dismiss and contractor motion for summary judgment, both requests partially denied, partially granted (appeals partially sustained), 41 pages.
- (2017) Appeal #58465: 1 contract, 1 appeal, 1 decision, 1 order of dismissal with prejudice for settlement, 2 pages.
- (2017) Appeals #57530, 58161: 1 contract, 2 appeals, 1 decision, opinion denying Government request for reconsideration denying request to suspend proceedings or dismiss appeals, 3 pages.
- (2018) Appeal #58175: 1 contract, 1 appeal, 1 decision, opinion denying contractor request to amend complaint, 3 pages.
- (2018) Appeal #58175: 1 contract, 1 appeal, 1 decision, 1 opinion denying appeal, 29 pages.
- (2019) Appeals #57530, 58161: 1 contract, 2 appeals, 1 decision, 1 opinion denying contractor appeals, 22 pages.
- (2019) Appeals #57530, 58161: 1 contract, 2 appeals, 1 decision, 1 opinion on contractor request for reconsideration and referral to SDG (denied), 3 pages.
- (2020) Appeal #61246: ARMY, 1 contract, 1 appeal, 1 decision, order of dismissal with prejudice for settlement, 2 pages.

5. <u>King Aerospace, Inc./Army</u>

Legal Contract Record: Seven appeals related to one contract, resulting in four decisions (two orders and two opinions), contractor mostly successful, with settlement by mutual agreement, 25 total pages.

Subject of Dispute: Contractor appeals denial of request for additional compensation related to misrepresentation of actual contract requirements of an aircraft maintenance contract where King was a successor contractor (and prior contractor left a mess); also Government made excessive, unreasonable changes to work requirements.

Contract Summary: #W58RGZ05C0302, NAICS 488190 (Other Support Activities for Air Transportation), fixed-price, full and open competition, large business, definitive contract.

Decision Record:

- (2016) Appeal #57057: Opinion sustaining contractor appeal in part, 14 pages.
- (2019) Appeal #60933: separate concurrence (2 judges), contractor appeal sustained, 9 pages.
- (2019) Appeals #59920, 59921, 59922: 1 page order of dismissal for settlement, dismissed with prejudice, 1 page.

- (2020) Appeals #61717, 61718: order of dismissal for settlement, dismissed with prejudice, 1 page.

5. LOCKHEED MARTIN

Legal Record Summary for Entire Lockheed Martin/Government Dyad: Nine appeals associated with more than eight contracts, resulting in nine decisions (two orders and seven opinions), Contractor largely successful, but also strong record of mutual settlement, 103 total pages.

A. Lockheed Martin Aircraft Center/Navy

Legal Record Summary: One appeal stemming from one contract, resulting in two decisions (both opinions), with mixed record of contractor/government success on pre-entitlement decisions, 32 total pages. Dispute was likely settled but dismissal order may not have been published if it was made before FY 2014.

Subject of Dispute: Contractor appealed Government's denial of a claim for additional compensation related to a requirements contract due to the government's alleged diversion and elimination of maintenance requirements for an aircraft series the Air Force (not the Navy) decided to retire while the contract was underway.

Contract Summary: #N0001900D0279, no North American Industry Classification System code, Product Service Code J015 (Maintenance, Repair, and Rebuilding of Equipment- Aircraft and Airframe Structural Components), fixed-price, not commercial item, full and open competition, large business, subcontracting plan required, requirements contract (definitive contract).

Decision Record:

- (2007) Appeal #55164: 1 contract, 1 appeal, 1 opinion denying govt motion to dismiss for jurisdiction, approving contractor motion to amend its complaint, 7 pages.
- (2008) Appeal #55164: 1 contract, 1 appeal, 1 decision, opinion denying cross motions for summary judgment, 25 pages.

B. Lockheed Martin Corporation/Defense Contract Management Agency

Legal Record Summary: One appeal related to one contract, resulting in one decision (an opinion), where contractor was fully successful, 31 total pages.

Subject of Dispute: Contractor appeals the Government's contention that the Cost Accounting Standards (CAS) provisions in the F-22 contract, and associated regulations required that contract to be included in an analysis of cost impacts related to changes in cost accounting principles in 1993. (Very esoteric issue)

Contract Summary: #F3365791C0006, no North American Industry Classification System code, Product Service Code AC14 (Research and Development—Defense System: Aircraft (Engineering

Development)), cost-plus-award-fee, not commercial item, full and open competition, large business, subcontracting plan required, definitive contract.

Decision Record:

- (2007) Appeal #53822: 1 contract, 1 appeal, 1 decision, 1 opinion sustaining contractor appeal, 31 pages.

C. <u>Lockheed Martin Integrated Systems, Inc./Army</u>

Legal Record Summary: Three appeals related to three contracts, resulting in one decision (an opinion), where Contracting Officer's Final Decision was withdrawn (Contractor successful), 2 total pages.

Subject of Dispute: Subject of the Contracting Officer's Final Decision (the reason for the appeals) is unknown because it was withdrawn (making the appeal moot).

Contract Summary: #W9113M07D0006 (also DAAB07-03-D-B009, W15P7T-06-D-F405) NAICS 541710 (Research and Development in the Physical, Engineering, and Life Sciences), cost-plus-fixed-fee, not commercial item, full and open competition, large business, no subcontracting plan required, indefinite delivery contract vehicle).

Decision Record:

- (2017) Appeals #60079, 60080, 60081: 3 contracts, 3 appeals, 1 decision, 1 opinion, Government Contracting Officer's Final Decision withdrawn, appeals are dismissed as moot, 2 pages.

D. <u>Lockheed Martin Services, Inc./Defense Finance and Accounting Services</u>

Legal Record Summary: Two appeals stemming from one contract, resulting in three decisions (three opinions), contractor fully successful, 36 total pages.

Subject of Dispute: Appeals result from Government denying contractor's claim for reimbursement of costs as well as Government claim for contractor to reimburse it for a challenged license fee.

Contract Summary: #MDA22001D0002, NAICS 541512 (Computer Systems Design Services), fixed-price, not commercial item, full and open competition, large business, no subcontracting plan, indefinite delivery contract vehicle.

Decision Record:

- (2013) Appeal #58028: 1 contract, 1 appeal, 1 decision, 1 opinion, government motion to dismiss for jurisdiction denied, 7 pages.

- (2016) Appeals #58028, 58794: 1 contract, 2 appeals, 1 decision, 1 opinion sustaining contractor's appeals, 25 pages.
- (2016) Appeals #58028, 58794: 1 contract, 2 appeals, 1 decision, 1 opinion denying Government request for reconsideration, 4 pages.

E. Lockheed Martin Corporation/Army COE

Legal Record Summary: One appeal under one contract, resulting in one decision (an order), representing mutual settlement, 1 total page.

Subject of Dispute: Unable to determine subject of appeal because decision represents a settlement.

Contract Summary: #W912DY10D0042, 541614 (Process, Physical Distribution, and Logistics Consulting Services), fixed-price, commercial item, full and open competition, large business, subcontracting plan required, indefinite delivery vehicle.

Decision Record:

- (2014) Appeal #58757: 1 contract, 1 appeal, 1 decision, order of dismissal with prejudice for settlement, 1 page.

F. Lockheed Martin Services, Inc./Defense Contract Management Agency

Legal Record Summary: One appeal related to at least one contract ("et al." cited in decision header), resulting in one decision (an order), representing mutual settlement, 1 total page.

Subject of Dispute: Unable to determine subject of appeal because it was settled**.**

Contract Summary: #DAAB703DB009, NAICS 541710 (Research and Development in the Physical, Engineering, and Life Sciences), time and materials pricing, not commercial item, full and open competition, large business, subcontracting plan required

Decision Record:

- Appeal #58758 (2014), 1 contract et al., 1 appeal, 1 decision, order of dismissal with prejudice for settlement, 1 page.

6. Tristana R. Harvey Career Planning and Consulting Services, LLC/Army

Legal Record Summary: One appeal stemming from one contract, resulting in one decision (opinion), where Government was fully successful, 10 total pages.

Source of Dispute: The contractor appealed the Government's rejection of her termination for convenience proposal.

Contract Summary: #W56ZTN14P0033, NAICS 611710 (Educational Support Services), fixed-price, commercial item, competed under small business set-aside, small business, multiple category indicators, minority-owned, Black-owned, woman-owned, woman-owned emerging small business, definitive contract.

Decision Record:

- (2017) Appeal # 60927: 1 decision, 1 contract, 1 appeal, 1 opinion (2017), appeal denied, 10 pages.

7. Unitech Services Group/Navy

Legal Record Summary: One appeal related to multiple contracts (more than four listed), resulting in three decisions (all opinions), in which Government was completely successful, 33 total pages.

Source of Dispute: Contractor's claim for termination proposal denied when Government decided to not to issue a new contract in an essentially sole-source contract relationship that had existed for several decades (the requirement had changed).

Contract Summary: #N0060403PA549 (most recent contract); NAICS 812332 (Industrial Launderers), fixed-price, commercial item, full and open competition, large business, no subcontracting plan required, definitive contract.

Decision Record:

- (2010) Appeal #56482: government motion for summary judgment denied, 9 pages.
- (2012) Appeal #56482: appeal denied, 22 pages.
- (2012) Appeal #56482: contractor request for reconsideration denied, 2 pages.

8. URS FEDERAL SERVICES

Legal Record Summary for Entire URS/Government Dispute Dyad: Twenty-one appeals related to three contracts, resulting in six decisions (two orders, four opinions), mixed record of Government/contractor success with evidence of settlement by mutual agreement, 57 total pages.

A. URS Federal Services, Inc. or URS Federal Support Services, Inc./Air Force

Legal Record Summary: Two appeals related to one contract, resulting in three decisions (all opinions), mixed record of Government/contract decision success, 52 total pages.

Subject of Dispute: Government sought to lower contract price due to contractor's inability to maintain the number of maintenance personnel required by the awarded contract (Government wanted a downward adjustment. Board agreed it was entitled to a downward adjustment but not in the amount (quantum) that it sought.

Contract Summary: #FA810809D0006, NAICS 336411 (Aircraft Manufacturing), fixed-price, full and open competition, large business, no subcontracting plan, indefinite delivery contract vehicle.

Decision Record:

- (2020) Appeal #59998: contractor appeal partially sustained and remanded for negotiation of quantum (money amount of damages due), 40 pages.
- (2021) Appeal #59998-QUAN: quantum reduced because contractor not able to prove entitlement related to government offset, 7 pages.
- Appeal #62475 (2021), government motion to strike granted and appeal dismissed (jurisdiction—timeliness), 5 pages.

B. URS Federal Support Services. Inc./Army

Legal Record Summary: Two appeals stemming from one contract, producing one decision (an opinion), which was a summary binding decision via Alternative Dispute Resolution, 2 total pages.

Subject of Dispute: Unable to determine the source of the dispute from the two-page Summary Binding Decision.

Contract Summary: #W56HZV15DER17, NAICS 811111 (General Automotive Repair), pricing structure is order-dependent, full and open competition, large business, subcontracting plan, indefinite contract vehicle.

Decision Record:

- (2018) Appeals #60809, 61110: 1 contract, 2 appeals, 1 decision, 1 opinion, appeals denied, contractor unsuccessful, 2 pages.

C. URS Energy and Construction, Inc./Defense Contract Management Agency

Legal Record Summary: Seventeen appeals stemming from one contract, resulting in two decisions (both orders), indicating resolution by mutual agreement, 3 total pages.

Subject of Dispute: Appeals were resolved by mutual agreement, so unable to determine the source of the disputes.

Contract Summary: NAICS 561210 (Facilities Support Services), cost-plus-award-fee, full and open competition, large business, subcontracting plan required, indefinite delivery contract vehicle.

Decision Record:

- (2017) Appeals #59685, 59686, 59687, 59688, 59689, 59690, 59691, 59692, 60240, 60241, 60242, 60243, 60244, 60245: order of dismissal with prejudice for settlement, 2 pages.
- (2019) Appeal #61255, 61256, 61257: order of dismissal with prejudice for settlement, 1 page.

CONSTRUCTION

1. Alderman Building Company, Inc./Navy

Legal Record Summary: Three appeals related to two contracts, which resulted in five decisions (one order and four opinions), Contractor largely successful in appeals, though two settled by mutual agreement, 55 total pages.

1. Source of Dispute: Dispute was settled, so not able to learn source of dispute.

Contract Summary: #N4008510D0257, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, small business competition set-aside, small business, historically underutilized small business (HUBZone), emerging small business, indefinite contract vehicle.

Decision Record:

(2018) Appeals #60828, 60863: 1 contract, 2 appeals, 1 decision, order of dismissal with prejudice for settlement, 1 page.

2. Source of Dispute: Contract appealed denial of claim for unabsorbed home office overhead on behalf of its electrical subcontractor relating to Government-caused performance delays, 22 pages.

Contract Summary: #N4008509D5321, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, competition limited to HUBZone small businesses, small business, HUBZone, emerging small business, indefinite contract vehicle.

Decision Record:

- (2013) Appeal #50802: 1 opinion (cross motions for summary judgment and declaratory rulings denied for both parties, 13 pages.
- (2015) Appeal #50802: 1 opinion on cross motions for summary judgment; contractors partially approved, Government motion denied, 9 pages.
- (2020) Appeal #50802: 1 opinion on entitlement and amount of money damages due, contractor's appeal was partially sustained, 22 pages.

- (2022) Appeal #50802: 1 opinion, Contractor's Equal Access to Justice Act application for reimbursement of legal fees approved (though amount requested was reduced), 10 pages.

2. CBRE Heery, Inc./Army Corps of Engineers (Savannah)

Legal Record Summary: One appeal stemming from one contract and resulting in one decision (an opinion) where contractor was completely unsuccessful, 20 pages.

Source of Dispute: Contractor completed design-build of hospital behind schedule; Government assessed liquidated damages (monetary penalty charged under the contract for each day the contractor is late in performing; contractor disputes that assessment and claims damages from Government delay.

Contract Summary: #W9126G08D0056, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, full and open competed (design-build competition), large business, subcontract plan, indefinite contract vehicle.

Decision record:

- (2021) Appeal # 62420: 1 opinion, appeal denied, 20 pages.

3. CCI, Inc./Army Corps of Engineers (Iraq)

Legal record Summary: 1 decision (2014), 54 pages, 1 claim, 1 contract,

Source of Dispute: Contracting officer's (CO's) denial of contractor's differing site conditions claim (or $36 million) for a pier and seawall project in Iraq.

Contract Summary: #W917BK08C0059, NAICS 237990 (Other Heavy and Civil Engineering Construction), fixed-price, full and open competition, large business, service disabled-veteran-owned, definitive contract.

Decision Record:

- (2014) Appeal #57316: appeal denied (contractor completely) unsuccessful, 54 pages.

4. DICK PACIFIC CONSTRUCTION CO, LTD.

Legal record summary for Dick Pacific/Government Dyad and the Dick Pacific + GHEM JV/Government Dyad: Sixteen appeals related to two contracts that produced 8 decisions (one order and 7 opinions), mixed record of success for contractor(s) and some evidence of mutual agreement, 145 total pages.

A. Dick Pacific Construction Co. Ltd./Army Corps of Engineers (Hawaii)

Legal Record Summary: Nine appeals based on one contract and resulting in three decisions (one order and two opinions), contractor somewhat successful, with two decisions indicating mutual agreement (consent judgment and order of dismissal, 75 total pages.

Subject of Dispute: The Contractor's appeals deal with certified claims relating to delayed access to the airfield work area, change to low profile fire hydrants, unsuitable soils, the Air Force's direction to remove alleged non-conforming base course and concrete, concrete spalling, substantial completion, and liquidated damages.

Contract Summary: #W9128A07C0004, NAICS 237310 (Highway, Street, and Bridge Construction), fixed-price, full and open competition, large business, subcontracting plan, definitive contract.

Decision record:

- (2016) Appeals #59064, 59332, 59334: 1 order dismissing these appeals on basis of settlement, 1 page.
- (2016) Appeals #57675, 57806, 58149, 58150, 58151, 58174: 1 opinion (entitlement) dealing with 6 claims issued on December 15, 2015—3 appeals denied, 3 sustained in part, denied in part, 72 pages.
- (2016) Appeals #57675, 57806, 58149, 58150, 58151, 58174, 60474: Opinion resolving how much money the Contractor was due in money damages from the previous decision, with both parties requested the Board decide with a "consent judgment," 2 pages.

B. Dick Pacific/GHEMM JV/Army Corps of Engineers (Alaska)

Legal record Summary: Seven Appeals stemming from one contract, resulting in five decisions (all opinions), Government completely successful, 70 total pages.

Subject of Dispute: Multiple issues behind contractor's dispute, including Prompt Payment Act interest on withheld payments, claim for a time extension, compensation for alleged government-caused delays, release from liquidated damages, constructive changes to specifications, etc.

Contract Summary: # DACA8502C0004, NAICS 237310 (Highway, Street, and Bridge Construction), fixed-price, full and open competition, large business, subcontracting plan required, indefinite contract vehicle.

Decision record:

- (2007) Appeals # 55562, 55563: opinion dismissing the appeals as untimely (outside Board's jurisdiction), 3 pages.

- (2008) Appeal # 55806: opinion dismissing appeal because claim has not been subjected to a Contracting Officer's Final Decision (jurisdiction, 9 pages.
- (2008) Appeals # 55826: opinion denying appeal, 9 pages.
- (2008) Appeal # 55829: opinion granting Government summary judgment and dismissing aspects of appeal for jurisdiction, 18 pages.
- (2009) Appeals # 54743, 55255: Opinion denying all appeals, 31 pages.

5. ECC INTERNATIONAL CONSTRUCTORS, LLC

Legal Record Summary for ECC International Constructors and Multiple Army Corps of Engineers Offices Dyad: Thirty-five appeals related to five contracts resulting in nineteen decisions (nine orders and ten opinions), fairly balanced record of wins/losses as well as evidence of continued settlement by mutual agreement, 132 total pages.

A. ECC International Constructors, LLC/Army Corps of Engineers (Afghanistan)

Legal record summary: Four appeals related to one contract resulting in five decisions (one order and four opinions), evidence of mutual agreement to settle disputes (government more successful when judge rules on procedural questions), 19 total pages.

Subject of Dispute: Government denied contractor claim related to government delays.

Contract Summary: #W912ER10C0054, NAICS 236220, fixed-price, full and open competition, large business, no subcontracting plan required, definitive contract.

Decision Record:

- (2019) Appeals #59138, 59586, 59643, 60284: 1 decision, 1 contract, 4 appeals, opinion on cross motions for summary judgment; contractor motion denied, government motion partially granted, 4 pages.
- (2019) Appeals #59138, 59586, 59643, 60284: 1 decision, 1 contract, 4 appeals, 1 opinion, cross motions for summary judgment, partially granted, 5 pages.
- (2020) Appeal #60284: 1 contract, 1 appeal, 1 decision, order of dismissal with prejudice at mutual agreement, 1 page.
- (2021) Appeal #59586: 1 contract, 1 appeal, 1 opinion, government motion for dismissal (jurisdiction) partially granted, 7 pages.
- (2021) Appeal #59586: 1 contract, 1 appeal, 1 decision, 1 opinion denying contractor motion for reconsideration, 2 pages.

B. ECC International LLC/Army Corps of Engineers (Afghanistan)

Legal Record Summary: Eight appeals related to two contracts that resulted in seven decisions (four orders and three opinions), most decisions evidence resolution by mutual agreement, but two entitlement (merit) decisions were made in Government's favor (denying contractor appeals), 82 total pages.

1. Subject of Dispute: Various sources of dispute including issues of contract interpretation and request for equitable adjustment due to Government road closure.

Contract Summary: #W912DQ11C4009, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, full and open competition, large business, no subcontracting plan required, definitive contract.

Decision Record:

- (2015): Appeal #58856: 1 contract, 1 appeal, 1 decision, 1 opinion, cross motions for summary judgment denied, 9 pages.
- (2017) Appeal #58856: 1 contract, 1 appeal, 1 decision, order of dismissal with prejudice by mutual agreement, 2 pages.
- (2017) Appeal #60283: 1 contract, 1 appeal, 1 decision, order of partial dismissal with prejudice due to settlement, 2 pages.
- (2019) Appeal #60484: 1 contract, 1 appeal, 1 decision, opinion on cross motions granting government summary judgment and dismissing appeal, 14 pages.

2. Subject of Dispute: Government denied contractor's request for equitable adjustment on design and construction contract.

Contract Summary: #W917PM07D0015, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, full and open competition, large business, no subcontracting plan required, indefinite delivery contract vehicle (multiple award task order contract).

Decision Record:

- (2015) Appeals #58996, 59039: 1 contract, 2 appeals, 1 decision, order of dismissal with prejudice for settlement, 1 page.
- (2019) Appeals #59670, 61357: 1 contract, 2 appeals, 1 decision, order of dismissal with prejudice for settlement, 1 page.
- (2020) Appeal #58875: 1 contract, 1 appeal, 1 decision, 1 opinion on multiple motions, denying appeal, 53 pages.

C. <u>ECC--RMA, LLC/Army Corps of Engineers (Los Angeles)</u>

Legal Record Summary: Thirteen appeals stemming from one contract that produced three decisions (one order, two opinions), with two opinions being consent judgments sustaining appeals for the contractor (but consent judgment indicated mutual agreement as to the decision's results, as does the dismissal order), 4 total pages.

Subject of Dispute: Dispute was settled, so not able to learn source of dispute.

Contract Summary: #W912PL10D0037, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, Two-Step Sealed Bidding, large business, subcontracting plan required, indefinite delivery contract vehicle.

Decision Record:

- (2014) Appeals #58315, 58316, 58317, 58318, 58319 ,58320, 58549: 1 contract, 7 appeals, 1 decision, 1 order of dismissal with prejudice for settlement, 1 page.
- (2016) Appeals #59990, 59993, 59995, 59997, 60151: 1 contract, 5 appeals, 1 decision, opinion with consent judgment to contractor, 1 page.
- (2017) Appeal #60005: 1 contract, 1 appeal, 1 decision, opinion with consent judgment to contractor, 2 pages.

D. <u>ECCI--C Metag, Joint Venture/Army Corps of Engineers (Afghanistan)</u>

Legal Record Summary: Ten appeals related to one contract that resulted in four decisions (three orders and one opinion), overall record indicates eventual resolution by mutual agreement, 31 total pages.

Subject of Dispute: The dispute with an opinion was the result of the contractor making a claim for costs related to a termination of a subcontractor the Government require the contractor to make (contract was being performed in Afghanistan and the subcontractor was supporting the insurgency).

Contract Summary: #W5J9JE10D0007, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, full and open competition, large business, subcontracting plan not required, indefinite delivery contracting vehicle (multiple-award task order contract.

Decision Record:

- (2016) Appeal #59031: 1 contract, 1 appeal, 1 decision, 1 opinion denying cross motions for summary judgment, 26 pages.
- (2018) Appeal #59667: 1 contract, 1 appeal, 1 decision, 1 order of dismissal with prejudice due to appeal being withdrawn, 1 page.
- (2020) Appeals #58980, 59027, 60414: 1 contract, 3 appeals, 1 decision, order of dismissal with prejudice due to settlement, 2 pages.
- (2021) Appeals #58833, 58863, 59029, 59031, 59672, 60413: 1 contract, 6 appeals, 1 decision, order of dismissal with prejudice due to settlement, 2 pages.

6. <u>JOHN C. GRIMBERG, CO.</u>

Legal Record Summary for Grimberg/Government dyad: Twenty-three appeals related to six contracts and eleven decisions (seven orders and four opinions), mixed record of Government and contractor success, but good evidence of settlement by mutual agreement before judge issues merit decision.

A. John C. Grimberg Co, Inc./Navy

Legal Record Summary: Eight appeals related to two contracts, with four decisions (3 orders and one opinion); all decisions ultimately made by mutual agreement, 5 total pages.

1. Source of Dispute: Dispute was settled, so not able to learn source of dispute.

Contract Summary: #N4008010D0492, NAICS 236220, fixed-price, full and open competition, large business, subcontracting plan required.

Decision record:

- (2017) Appeal #60142: 1 contract, 1 appeal, order of dismissal with prejudice for settlement, 1 page.
- (2017) Appeal #59954: 1 contract, 1 appeal, opinion, consent judgment for contractor for $256,000, 2 pages.
- (2020): Appeals #61243, 61244, 61245, 61425, 61426: 1 contract, 5 appeals, order dismissing appeals with prejudice for settlement, 1 page.

2. Source of Dispute:

Contract Summary: #N4008012C2001, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, full and open competition, large business, subcontracting plan.

Decision record:

- (2020) Appeal #61556: 1 contract, 1 appeal, order of dismissal with prejudice due to settlement, 1 page.

B. John C. Grimberg Co., Inc./Army Corps of Engineers (Baltimore)

Legal Record Summary: Fifteen appeals related to four contracts, which produced seven decisions (four orders and three opinions), mixed record of Government and contractor success, with some evidence of mutual agreement, 85 total pages.

1. Source of Dispute: Contract interpretation and various issues related to interpretation of contract requirements.

Contract Summary: #W912DR11C0023, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, full and open competition, large business, subcontracting required, indefinite contract vehicle.

Decision Record:

- (2015) Appeal #59543: 1 contract, 1 appeal, 1 order dismissing appeal without prejudice at mutual request, 2 pages.

- (2018) Appeal #60371: 1 contract, 1 appeal, opinion approving contractor request for reconsideration of dismissed appeal and to file amended complaint, 7 pages.
- (2018) Appeals #60371, 60372, 60544, 60545: 1 contract, 4 appeals, order of dismissal with prejudice due to settlement, 2 pages.

2) Source of Dispute: Dispute was settled, so not able to learn source of dispute.

Contract Summary: #W912DR08C0047, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, full and open competition, large business, subcontracting required, indefinite contract vehicle.

Decision Record:

- (2018) Appeal #61033: 1 contract, 1 appeal, order of dismissal with prejudice for settlement, 2 pages.

3. Source of Dispute: Dispute was settled, so not able to learn source of dispute.

Contact Summary: #W912DR11C0018, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, full and open competition, large business, subcontracting required, definite contract vehicle.

Decision record:

- (2018) Appeals # 60786, 60787: 1 order of dismissal for settlement, 1 page.

4) Source of Dispute: Denial of contractor's request for an equitable adjustment due to what it interpreted as a differing site condition.

Contract Summary: #W912DR09C0038, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, full and open competition, large business, subcontracting plan required, indefinite contract vehicle.

Decision Record:

- (2019) Appeals #58791, 59167, 59168, 59169, 59170, 59171, 59717: 1 contract 7 appeals, opinion sustaining/partially sustaining 2 appeals, denying 4 appeals, dismissing 1 appeal, 67 pages.
- (2019) Appeals #58791, 59717: 1 contract, 2 appeals, opinion on government motion for reconsideration denied, 4 pages.

7. Kelly-Ryan, Inc./Army Corps of Engineers (Alaska)

Legal record Summary: One claim stemming from one contract stemmed three decisions (one order and two opinions), contractor's appeal fully successful, 130 total pages.

Source of Dispute: Contractor's multiple, extensive requests for equitable adjustment and other damage for additional Government requirements and issues were denied by the Corps contracting officer and contractor was told to "seek reimbursement from the Judgment Fund."

Contract Summary: #W911KB05C0016, NAICS 237990 (Other Heavy and Civil Engineering Construction), fixed-price, full and open competition, small business, no special category, definitive contract.

Decision Record:

- (2011) Appeal #57168: opinion, government motions (dismiss for jurisdiction, stay of proceedings) denied, 9 pages.
- (2018) Appeal #57168: opinion sustaining appeal for contractor, 128 pages.
- (2018) Appeal #57168 Equal Access to Justice Act application order dismissed because settlement reached, 2 pages.

8. Macro-Z Technology/Navy

Legal Record Summary: Two appeals related to one contract that produced four decisions (all opinions), contractor unsuccessful, 82 pages.

Subject of Dispute: Various issues related to contract interpretation and doctrine of unconscionability (related to original Government estimates, various contract requirements, and reasonable pe-award expectations for the project.

Contract Summary: #N4425504D9122, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, full and open competition, small business with category, minority-owned, Hispanic-owned, possible small disadvantaged business, indefinite contract vehicle.

Decision Record:

- (2012) Appeal #56711: Opinion denying contractor's motion for summary judgment, 38 pages.
- (2013) Appeal #56711: Opinion denying cross motions, 12 pages.
- (2014) Appeal #56711: Opinion dismissing the appeal on the basis that Board lacks jurisdiction to decide (appeal lacked the "sum certain" necessary for jurisdiction to vest), 7 pages.
- (2019) Appeal #60592: Opinion denying appeals, 25 pages.

9. North American Landscaping, Construction, and Dredge Co., Inc./Army Corps of Engineers (New England)

Legal Record Summary: One decision (an opinion) resolving four appeals stemming from one contract, resulting in one decision; contractor almost completely successful, 57 total pages.

Subject of Dispute: Appeal of a termination for default **and requests** for equitable adjustment with multiple complex issues due to bad Government administration.

Contract Summary: #W912WJ14C0004, NAICS 237990 (Other Heavy and Civil Engineering Construction), fixed-price, full and open competition, small business, category indicator (Asian Pacific Islander), Department of Transportation registered small disadvantaged business, definitive contract.

Decision Record:

- (2018) Appeals #60235, 60236, 60237, 60238: opinion with finding of Government coercion, abuse of discretion by contracting officer, contractor appeal sustained in part and remanded for quantum (determination of how much money contractor is due), 57 pages.

Note: Concurring result signed by 2 judges (same result, but supported by different legal reasoning)

10. PBS& J Constructors, Inc./Army Corps of Engineers (Texas)

Legal Record Summary: Four appeals related to one contract, resulting in two decisions (both opinions), mixed record of success for both contractor and Government, 38 pages.

Subject of Dispute: Contractor appeals denial of claim related to differing site conditions and also contract interpretation that denied its preferred solution to completing the work.

Contract Summary: #W9127S10C6016, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, full and open competition, large business, subcontracting plan required, definitive contract.

Decision Record:

- (2014) Appeals #57814, 57964: both appeals denied—contractor unsuccessful, 36 pages.
- (2017) Appeals #60513, 60683: opinion consent judgment in favor of contractor ($925,000), 2 pages.

11. R.L. McDonnell Construction/Army

Legal Contract Summary: One appeal related to one contract, resulting in one decision (opinion), Government fully successful in its defense, 26 pages.

Subject of Dispute: Contractor alleged Government failure to cooperate (GFFD complaint) by providing information it did not have to the contractor caused it additional costs.

Contract Summary: # W912GY06C0003, NAICS 236210 (Industrial Building Construction), fixed-price, competition limited to small businesses, category indicator (emerging small business), definitive contract.

Decision Record:

- (2013) Appeal #56262: opinion with appeal denied in entirety (contractor unsuccessful), 26 pages.

12. States Roofing Corporation/Navy

Legal Contract Summary: Eleven total appeals related to one contract, resulting in nine decisions (all opinions), contractor is almost fully successful, 141 total pages.

Subject of Dispute: Multiple issues causing disputes, mostly related to contract interpretation, changes, and requests for equitable adjustments (specification, administration, and other factors).

Contract Summary: #N6247097C8319, NAICS 235610 (Roofing, Siding, and Sheet Metal Contractors), fixed-price, full and open competition, small business, no category designator, definitive contract.

Decision Record:

- (2008) Appeal #54854: opinion partially sustaining contractor's appeal, 25 pages.
- (2008) Appeal #55506: opinion, contractor appeal sustained and remanded for quantum, 13 pages.
- (2009): Appeal #55500, 55503: opinion, 55500 denied, 55503 partially sustained (small quantum), 14 pages.
- (2009) Appeal #55507: opinion sustaining contractor appeal, 8 pages.
- (2009) Appeal #55508: opinion sustaining contractor appeal, 15 pages.
- (2010) Appeal #55504: opinion partially sustaining contractor appeal, 10 pages
- (2010) Appeals #54860, 55501, 55502, 55505: opinion dismissing/denying 54860, 55501, quantum part of Appeal #55502, and sustaining Appeal #55505, 35 pages.
- (2010) Appeal #54854: opinion discussing a U.S. Court of Appeals reversal in contractor's favor, 3 pages.
- (2011) Appeal #55505: opinion approving contractor Equal Access to Justice application, 14 pages.

13. Tetra Tech Facilities Construction, LLC/Army

Legal Record Summary: Two appeals related to one contract that produced one decision (opinion), appeal was successful, 50 total pages.

Subject of Dispute: Denial of contractor's request for equitable adjustment due to differing site conditions.

Contract Summary: #W912K609C0002, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, competition type "4," large business, subcontracting plan required, definitive contract.

Decision Record:

- (2017) Appeals #58568, 58845: opinion sustaining contractor appeal, 50 pages.

14. Tug Hill Construction, Inc./Army Corps of Engineers (Texas)

Legal Record Summary: Two appeals related to one contract that resulted in two decisions (one order, one opinion), Contractor unsuccessful in earlier opinion, but later appeal settled by mutual agreement, 13 total pages.

Source of Dispute: Contractor's request for additional compensation for utility system work in excess of its original price was denied.

Contract Summary: #W9126G09D0006, NAICS 238910 (Site Preparation Contractors), fixed-price, full and open competition, large business, subcontracting plan, indefinite contract vehicle (multiple award task order contract).

Decision Record:

- (2015) Appeal #57825: opinion, appeal denied/contractor unsuccessful, 12 pages.
- (2016) Appeal #58756: order of dismissal for settlement (with prejudice), 1 page.

15. VERSAR, INC.

Legal Record Summary for entire Versar/Government dyad (contractor and two agency sub-relationships): Six total appeals stemming from 3 contracts resulting in five decisions (two orders and three opinions), some mutual agreement, but Contractor successful when judge made entitlement decision, 99 total pages.

A. Versar, Inc./Air Force

Legal Record Summary (Versar/Air Force dyad): Five total appeals involving two contracts, resulting in four decisions (one order, three opinions), Contractor largely successful in opinions with the later dispute settled by mutual agreement, 98 total pages.

1. Subject of Dispute: Contract request for prompt payment interest (denied by Contracting Officer) in relation to work performed.

Contract summary: #FA890304D8692, NAICS 562910 (Remediation Services), fixed price, limited to small businesses, small business, indefinite contract vehicle (task order contract).

- (2010) Appeals #56857: partial approval of govt motion to dismiss for jurisdiction, 13 pages.
- (2012) Appeals # 56857, 56950, 56962, 57386: partially sustained for contractor; 57386 dismissed/denied; 56950 and 56962 sustained, 75 pages.
- (2012) Appeal #56857, 56950, 56962, 57386: government request for reconsideration denied, 9 pages.

2. Subject of Dispute: Dispute was settled, so not able to learn cause.

Contract summary: #FA890309D8588, NAICS 562910 (Remediation Services), fixed-price, competition limited to small businesses, small business, indefinite contract vehicle (task order contract).

Decision Record:

- (2019) Appeal #61829: 1 contract, 1 appeal, I decision, order of dismissal for settlement with prejudice, 1 page.

B. <u>Versar, Inc./Army Corps of Engineers (Huntsville)</u>

Legal Record Summary (Versar/COE dyad): One appeal from one contract resulting in one decision (order), resolved by mutual agreement, 1 page.

Subject of Dispute: Dispute was settled, so not able to learn cause.

Contract Summary: # W912DY08D0033 NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, full and open competition, large business with subcontracting plan, indefinite contract vehicle.

Decision Record:

- (2019) Appeal #61967: 1 contract, 1 appeal, 1 decision, order of dismissal for settlement with prejudice, 1 page.

Note: Contractor was reported as a large business on this FPDS report.

16. <u>WATTS CONSTRUCTORS, LLC</u>

Legal Record Summary for entire Watts/Government Dyad (which includes three joint ventures where Watts was the lead contractor): Fifteen total appeals with two agencies, six contracts, ten decisions (seven orders, three opinions), most disputes ended by settlement and Government slightly more successful when decisions based on merit of the case, 42 total pages.

A. <u>Watts Constructors, LLC/Army Corps of Engineers</u>

Legal Record Summary for Watts/COE: Four appeals involving two contracts that resulted in three decisions (one order, two opinions), Government largely successful though three of the appeals were settled by mutual agreement, 26 total pages.

1. (Corps of Engineers--Sacramento) Subject of Dispute: Issue of contract interpretation and alleged waiver of performance requirements by Government.

Contract Summary: #W9123814C0040, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, full and open competition, large business, subcontracting plan, definitive contract.

Decision Record:

- (2020) Appeal #61493: 1 contract, 1 appeal, opinion denying contractor appeal, 11 pages.

2. (Corps of Engineers—Omaha) Subject of Dispute: Propriety of termination for default of contractor by the Government (overzealous inspection alleged). Ended by mutual agreement/settlement after Government was denied summary judgment on its behalf.

Contract Summary: #W9128F14C0024, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, full and open competition, large business, subcontracting required, definitive contract.

Decision Record:

- (2019) Appeals #61518, 61961: 1 contract, 2 appeals, 1 decision, opinion of Government motion for summary judgment, partially denied, partially granted, 14 pages.
- (2021) Appeals #61518, 61961, 62479: I contract, 3 appeals, 1 decision, order of dismissal with prejudice for settlement, 1 page.

B. <u>Watts Constructors, LLC/Navy</u>

Legal Record Summary: One appeal related to one contract and producing one decision (opinion), Government successful in dispute, 7 total pages.

Subject of Dispute: Denial of contractor request for equitable adjustment due to changed conditions.

Contract Summary: #N6247310D5418, NAICS 237110 (Water and Sewer Line and Related Structures Construction), fixed-price, full and open competition, large business, subcontracting plan required, indefinite contract vehicle.

Decision Record:

- (2015) Appeal #59602: opinion denying contractor appeal, 7 pages.

C. <u>Watts-Webcor-Obayashi, a Joint Venture/Navy</u>

Legal Record Summary: One appeal related to one contract producing one decision (order) that dismissed appeal due to mutual settlement, 1 total page.

Subject of Dispute: Dispute was settled, so not able to learn cause.

Contract Summary: #N6274210C1304, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, full and open competition, large business, subcontracting plan required, definitive contract.

Decision Record:

- (2016) Appeal #59262: 1 contract, 1 appeal, 1 decision, order of dismissal with prejudice for settlement, 1 page.

D. <u>Watts-Webcor, A Joint Venture/Army Corps of Engineers (Sacramento)</u>

Legal Record Summary: One appeal from one contract resulting in one decision (order), dismissed by mutual agreement, 2 total pages.

Subject of Dispute: Dispute was settled, so not able to learn source of dispute.

Contract Summary: #W9123811C0010, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, Two-Step sealed bidding, large business, subcontracting plan required, definitive contract.

Decision Record:

- (2018) Appeal #61312: 1 decision, order of dismissal without prejudice per Rule 18 (b) (suspended procedure), 2 pages.

E. <u>Watts-Granite, A Joint Venture/Navy</u>

Legal Record Summary: Eight appeals stemming from one contract that produced four decisions (all orders), mostly resolved by mutual agreement (though contractor successful at forcing the Contracting Officer's Final Decision), 6 total pages.

Subject of Dispute: Two appeals were filed to force a Contracting Officer's Final Decision. Six appeals were settled so unable to determine source of the dispute.

Contract Summary: # N4425510C8004, NAICS 238990 (All Other Specialty Trade Contractors), fixed-price, full and open competition, large business, subcontracting plan required, definitive contract.

Decision record:

- (2015): Appeals #59664-951: 1 contract, 1 appeal 1 decision, order of dismissal for moot issue (Contracting Officer's Final Decision had been issued), 2 pages.
- (2015) Appeals #59878-961: 1 contract, 1 appeal, 1 decision, order for contracting officer to issue Contracting Officer's Final Decision, 2 pages.
- (2016) Appeals #59714, 59715, 59716, 59773, 59775, 59976: 1 contract, 6 appeals, 1 decision, order of dismissal with prejudice for settlement, 2 pages.

17. <u>Lebolo-Watts Constructors 01 JV, LLC/Army Corps of Engineers (Baltimore)</u>

Legal Record Summary: Nine appeals related to one contract resulted in three decisions (one order, one opinion), Government successful (most appeals denied, with two settled), 163 total pages.

Subject of Dispute: Disputes caused by issues of contract interpretation and question of reimbursement for contractor's response to and reimbursement for changed conditions.

Contract Summary: #W912DR11C0033, NAICS 236220 (Commercial and Institutional Building Construction), fixed-price, small business set-aside, 8(a) Joint Venture (small) business, minority-owned, Hispanic-owned, small disadvantaged business; definitive contract.

Decision Record:

- (2017) Appeals #59739, 59910: 1 decision, order of dismissal with prejudice for settlement, 2 pages.
- (2019) Appeals #59738, 59909: 1 opinion, contractor appeals denied, 38 pages.
- (2021) Appeals #59740, 60378, 60459, 60507, 60508: 1 decision, 1 opinion, contractor appeals denied, 123 pages.

APPENDIX D:
Select Individual Government-Contractor Dyads by Subject Matter Complexity

This Appendix includes six short case examinations. These short descriptions contain more substantial background information related to the contract dispute that substantially guided the creation of the lessons learned described in Chapter 6's qualitative analysis. The contracts include two supply, two service, and two construction contracts, and are reported in the same format, with reference to the rubric produced from the textual analysis of Chapter 5 for information standardization.

Supply Contract Example 1:

Contractor: American Ordnance, LLC
Government Agency: Army
Contract Number: DAAA09-98-G-0011
Case Number: 58340, 54718

Documents Analyzed: 2 decisions comprising 1 order (2014) and 1 opinion (2010) regarding 1 contract and 2 appeals. One appeal was settled and dismissed (); the other was the subject of an 80-page opinion on the contractor's entitlement to $3,346,045 in monetary compensation and 199 days of government-caused delays. The contractor contended that the Government "breached the implied warranty of specifications, improperly withheld superior knowledge, and/or breached the implied covenant of good faith and fair dealing" during its administration of contract performance, which the contractor completed successfully (page 1 of decision).

Contract Subject Matter: Contract was for the manufacture of artillery-level ammunition with government furnished materials and detailed military specifications (with a long and problematic production history going back to Vietnam War).

Procurement Summary: The original delivery order was described in FPDS as non-competitive. The contractor was identified as "Other than Small Business," and was an established manufacturer in the industry. The contract's pricing structure was form, fixed price. The delivery order (definite) stemmed from an indefinite contract. The contractor's appeal of the CO's denial of their claim was successful before the Board.

Case Summary: This appeal arises under a delivery order from the Department of the Army, HQ Industrial Operations Command (IOC), Rock Island Arsenal (Army or government), to American Ordnance LLP (AO) for the loading, assembly and packing of 155mm high explosive (HE) M107

projectiles. AO's claim relates to its efforts to produce M107 projectiles that were loaded with a high explosive known as Composition B (Comp B). AO alleged the government breached the implied warranty of specifications, improperly withheld superior knowledge, and/or breached the implied covenant of good faith and fair dealing.

Complicated, detailed specifications with a long history of development; approval of first item tests was required; consequences of accepting defective items would ultimately be death of the user (a gun crew).

Some materials for manufacturing were government-furnished and variation in quality of the materials provided required the contractor to be both flexible and meticulous (they had to test each batch of the GFP to see how it would respond). Contract performance required multiple manufacturing processes and facilities.

This contract was reported as a fixed-price contract for non-commercial items, to a business categorized as "other than small," and required no subcontracting plan. It was not awarded through a competitive process. The contract is too old (awarded in 1998) to have been assigned a NAICS code but was identified as a supply with the Product Service Code "1315," for Ammunition, 75mm through 125mm, which includes "Components, except Fuzes and Primers; Pyrotechnic Cartridges and Projectiles; Chemical Warfare Cartridge and Projectiles." Attorneys represented the contractor. The contractor's appeal was successful, and the Board determined it was due damages for a government-caused delay.

Rubric Results Summary:

1) *Substance of the Contract Breach: source? What? Express or implied?*
   The Government was the source of the breach of an implied contract duty. **"**In addition, American Ordnance charges the government with breach of the duty of good faith and fair dealing as the government continued to withhold vital knowledge and obstruct its performance well into the contract. Placed in context, we understand appellant to argue that the government breached its implied duties of cooperation and noninterference (app. Reply br. At 84-86)."

2) *Source of the Dispute (Aggravating Factor): labor/materials/complexity/termination?*
   Disagreement over costs and price adjustments for a fixed price contract with defective specifications. Disputed increases involved materials and labor as well as extensive research and testing by the Contractor.

3) *Outcome:* Contractor was successful.

Supply Contract Example 2:

Contractor: AEON Group, LLC
Agency: Defense Finance and Accounting Service (DFAS)
Contract Number: HQ0423-04-C-0003
Case Numbers: 56142, 56251

Documents Analyzed: Two decisions dated 2009 and 2014, 165 total pages.

Contract Subject Matter: The contract was for the "rehosting" of the Department of Defense (DoD) Mechanization of Contract Administration System (MOCAS) from its existing software platform to a new platform. The MOCAS system at issue in these appeals is a "Critical system in the Department of Defense contracting and entitlement process supporting the Warfighter, Homeland Security and Disaster relief' . . . . used by DoD for . . . for contract administration, quality assurance, property management, contract payments and financial Administration [by the Defense Contract Management Agency]; and, by DFAS to provide accounting services and payment functions for wages and contracts." (decision page 1). The Government awarded the contract with the goal of making the existing MOCAS system current in terms of DOD regulation compliance by upgrading it incrementally through the use of innovative technology rather than to completely replace the current computer system with something new and unfamiliar to DOD personnel.

Procurement Summary: The contract was awarded through the use of commercial item procedures (FAR Part 12) and was the product of full and open competition where offers from four contractors were received. AEON Group's offer was the highest priced, but their proposal was determined to represent the best value to the Government due to experience of their proposed team of personnel, their technical approach to performing the work, and their understanding of the challenges posed by the unique challenges of the requirement (make a patched together legacy government computer system into something new and technologically advanced, but still completely familiar to existing users). According to the FPDS report, the company was a small, woman-owned business. Information in the dispute decision, however, also indicated that the company was disadvantaged, or minority owned (a claim the contractor made in a letter to a Congressional representative). The pricing structure of the contract **was** firm, fixed price, with a single deliverable line item required (a fully functional system). The contract was a discrete, one-time requirement.

Case Summary: After AEON failed to deliver a fully functional "rehosted MOCAS" to the Government within the time period required (after time extensions and reasonable attempts to cooperate/accommodate the Contractor's requests for assistance), the Government terminated the contract for default with the Board. AEON then appealed (#56251) the Government's claim

to recover $12,905,117.22 in unliquidated performance-based payments the contractor had received prior to the termination.

Rubric Results Summary:

1) *Substance of the Contract Breach: source? What? Express or implied?* The contractor alleged that the government failed to meet its duty of good faith and fair dealing but not helping it more to complete the contract by providing subject matter experts and reducing government testing requirements and requiring strict compliance to the contract's provisions without substantial collaboration.

2) *Source of the Dispute (Aggravating Factor): labor/materials/complexity/termination?* The requirement was extraordinarily complex due to the technical expertise required to convert a complicated legacy computer system into a completely new product (that looked and operated exactly like the old system). Additionally, the contract type (commercial item with a hands-off approach by the Government) probably made the work more difficult to complete and was not necessarily the best business approach to getting the product the Government wanted. Also, the Government decided to terminate the contract for default because the product it has received from the contractor was terribly flawed and probably impossible to fix without substantial expense.

3) *Outcome:* The Government's arms-length approach was appropriate for the contract type. Also, the contractor strenuously asserted it understood its responsibilities and all of the complicated requirements of the project before it received the contract. The contractor's appeals were denied, and it was required to reimburse the Government for the interim funding it had received before the Government terminated the contract for default because of the contractor's failure to deliver a working product.

Service Contract Example 1:

Contractor: BAE Systems-San Francisco Ship Repair
Agency: Army
Contract Numbers: W912SU-04-D-0005
Case Numbers: 57934, 58809, 58810, 59642

Documents Analyzed: 5 decisions (all opinions) dated 2013, 2014, 2016, 146 total pages (largest decision 70 pages)

Contract Subject Matter: The NAICS code associated with this project was 336611. It pertains to shipyards, described as "fixed facilities with drydocks and fabrication equipment capable of building a ship, defined as watercraft typically suitable or intended for other than personal or recreational use . . . . [including] the construction of ships, their repair, conversion and

alteration, the production of prefabricated ship and barge sections, and specialized services, such as ship scaling." https://www.naics.com/naics-code-description/?code=336611

Procurement Summary: The contract in this case was the source of several task orders and separate disputes. According to the FODS report it was procured through full and open competition and not as a commercial item. The initial contractor who received the award was Contractor was "other than small business." Despite the size of the procurement and the contractor's status as a large business, the contract had no subcontracting plan. The contract was firm, fixed price (but had an extremely complex schedule of items designed to control changes during negotiations), with definitive delivery orders that were placed against the overall indefinite award vehicle (a multiple-award task order contract, or "MATOC").

Case Summary: There were multiple substantive cases associated with this relationship. All were related to the completion of extensive ship repair work to upgrade and to perform substantial restorative maintenance on complicated, aging ship structures that were not well-described in the contract documents, and which were not completely estimate by Government personnel prior to competing the project (which produced problems later during performance). The cases are populated with multiple requests for equitable adjustment and the need for sensitive negotiation strategies.

Rubric Results Summary:

1) *Substance of the Contract Breach:* The contractor complains that the Government breached both express and implied duties under the contract by failing to cooperate, failing to share superior knowledge, failing to communicate, and by negotiating in bad faith.

2) *Source of the Dispute (Aggravating Factors):* The disputes were complicated by labor issues, material costs, changed conditions, unilateral Government changes, labor, material costs, changed conditions, complex requirements, aging Government property and a lack of administrative capacity to administer the contract (and the describe the requirement adequately before requesting bids on the project.

3) *Outcome:* The contractor's appeal was mostly successful in substance.

Service Contract Example 2:

Contractor: Unitech Services Group
Agency: Navy
Contract Numbers: N00604-99-M-1600, -1602, -1608, N00604-03-P-A549 (and early contracts)
Case Number: 56482

Documents Analyzed: 3 opinions 2010 and 2012, total of 33 pages (including a request for reconsideration of appeal denial).

Contract Subject Matter: NAICS code was 8123 for Drycleaning and Laundry Services. This industry group comprises establishments primarily engaged in operating coin- or card-operated or similar self-service laundries and drycleaners; providing drycleaning and laundry services (except coin- or card-operated); and supplying, on a rental or contract basis, laundered items (e.g., uniforms, gowns, shop towels, etc.). Included in this industry group are establishments primarily engaged in supplying and servicing coin- or card-operated laundry and drycleaning equipment in places of business operated by others, such as apartments and dormitories.

Procurement Summary: This contract was for a commercial item and was firm-fixed price with a well-established pricing schedule. It was awarded to an "other than small" business and had no subcontracting plan. The original contract was described as full and open competition, but the awarding circumstances were more complex and are a major source of the dispute/appeal, which resulted from the government not renewing the contract and changing its method of procuring the services. The contractor wanted this action to be treated as a termination for convenience so that it could recover decommissioning costs of its facilities.

Case Summary: Many decades of contracts are included in this relationship, where the requirement was initially competed, but upon award, essentially relied upon the incumbent contractor to operate as a sole-source actor. This issue stems from the nature of the contract work (the laundry of radioactive uniforms and other materials), which requires the building of long-term infrastructure (a facility capable of performing the work) and the maintenance of complex administrative requirements related to proper licensing and preparing for the eventual decommissioning of the laundry facility itself.

Rubric Results Summary:

4) *Substance of the Contract Breach:* Contractor alleged Government violated its duties under the contract but not issuing a new award to it, which it argued was essentially a termination for convenience (which would entitle it to settlement costs).

5) *Source of the Dispute (Aggravating Factors):* Contractor alleged that the failure to award a new purchase order should have been treated as a termination for convenience. The longevity of what was essentially a sole source contract also contributed to the complexity of the relationship. The description of exchanges between Government and contractor employees highlights the fuzziness of role distinctions in this particular relationship and demonstrates the tension between close cooperation and the necessity of an arm's length relationship in the award of a technically competitive public contract.

6) *Outcome:* The government was fully successful, and the contractor's appeal was denied.

Construction Contract Example 1:

Contractor: Kelly-Ryan, Inc.
Agency: Army Corps of Engineers (Alaska)
Contract Number: W911KB-05-C-0016
Case Number: 57168

Documents Analyzed: Three decisions (2 opinions in 2011 and 2018), 1 order of dismissal (2018) settling claim for Equal Access to Justice reimbursement), 130 pages.

Contract Subject Matter: NAICS 237990—Other Heavy and Civil Engineering Construction
This industry comprises establishments primarily engaged in heavy and civil engineering construction projects (excluding highway, street, bridge, and distribution line construction). The work performed may include new work, reconstruction, rehabilitation, and repairs. Specialty trade contractors are included in this industry if they are engaged in activities primarily related to heavy and civil engineering construction projects (excluding highway, street, bridge, distribution line, oil and gas structure, and utilities building and structure construction). Construction projects involving water resources (e.g., dredging and land drainage), development of marine facilities, and projects involving open space improvement (e.g., parks and trails) are included in this industry.

Procurement Summary: Procured through full and open competition (sealed bid). Contractor was a small business, well-established, and had recently performed a similar requirement successfully for the same customer. Contract pricing was firm, fixed price and its duration was discrete/definitive. Contactor's appeal was sustained, and Board found that the Government violated its duty of good faith and fair dealing, awarding the contractor's claim of over $20 million (with EAJA fees)

Case Summary: This case was extremely complicated in a project was in some elements quite simple but became excessively complex for reasons unrelated to the actual work being performed (which had its own complications). The project was to construct improvements to a harbor at False Pass, Alaska, in the Aleutian Islands. The work was difficult due to the environment and the need for very tightly controlled schedules for supply and material delivery due to the remoteness of the site, as well as actual work performance (very short season for construction due to weather issues). However, it had been well-planned out, and the contractor had very successfully performed a similar project in the same area very recently. The problems with this contract stem from the actual contract administrative of the Government, due particularly to funding complications imposed on the Corps of Engineers by Congress near the time of contract award. As a result of that administrative complication, the contractor's work schedules were ruined and the work became increasingly difficult and expensive to achieve, with no assistance by the Corps of Engineers, who threatened the contractor with a completely

undeserved termination for default and refused to adjust the contract price or contract time in any reasonable fashion.

Rubric Results Summary:

1) *Substance of the Contract Breach:* Contractor alleged Government breached implied duty of good faith and fair dealing specifically.

2) *Source of the Dispute (Aggravating Factor):* Complex case involving requests for equitable adjustments from increased labor, material, and overall administration costs (as well as threatened costs related to a threatened (and unfounded) termination for default).

3) *Outcome:* Contractor was fully successful (on a claim that was over $20,000,000, not including Contract Disputes Act interest) and recovered Equal Access to Justice Act fees as the prevailing party I a case where the Government's position/behavior was not reasonable defensible.

Construction Contract Example 2

Contractor: North American Landscaping, Construction, and Dredge Company, Inc. (NALCO)
Agency: Army Corps of Engineers (New England)
Contract Number: W912WJ-14-C-0004
Case Numbers: 60235, 60236, 60237,60238

Documents Analyzed: 1 decision (2018), 57 pages (includes a concurring result/differing reasoning opinion—the judges all agreed on the case outcome, but not on the legal reasoning the primary judge used to make the decision)

Contract Subject Matter: NAICS 237990—Other Heavy and Civil Engineering Construction definition:
This industry comprises establishments primarily engaged in heavy and civil engineering construction projects (excluding highway, street, bridge, and distribution line construction). The work performed may include new work, reconstruction, rehabilitation, and repairs. Specialty trade contractors are included in this industry if they are engaged in activities primarily related to heavy and civil engineering construction projects (excluding highway, street, bridge, distribution line, oil and gas structure, and utilities building and structure construction). Construction projects involving water resources (e.g., dredging and land drainage), development of marine facilities, and projects involving open space improvement (e.g., parks and trails) are included in this industry.

Procurement Summary: The contract was awarded through full and open competition, through a sealed bid process with a public bid opening (FAR Part 14 procedures), with only two bids received. The contractor was represented as a small business owned by an Asian Pacific Islander American and certified as a small disadvantaged business by the U.S> Department of Transportation. The pricing structure was firm, fixed price, and the procurement award was a one-time, definitive contract.

Case Summary: The contract was for maintenance dredging of an eight-foot channel, a six-foot channel, and a six-foot anchorage on the Scarborough River, Scarborough, Maine. The contractor claimed the unpaid contract balance of $960,482.48 (#60235); unabsorbed overhead in the amount of $108,868 (#60236); differing site conditions in the amount of $507,914.19 (ASBCA #60237); and a time extension of 94 days (#60238). This contract got off to a rocky start due to a protest of the sealed bid (lowest priced) award to NALCO where the protesting offeror challenged NALCO's price on the grounds that it was "unbalanced."[142] After that, the Government contracting officer imposed a draconian interpretation of a progress payment regulation that denied the contractor adequate working capital to keep the project going. It also refused to acknowledge that a seawall being constructed by a third party that was not referenced in the original bid documents was a reimbursable differing site condition. The contracting officer also took an excessively aggressive (and coercive) negotiation stance that forced the contractor into a position that led him to lose the family home (because he had not been able to fund mobilization costs early in the contract).

Rubric Results Summary:

1) *Substance of the Contract Breach:* The Government was guilty of both breaches and an implied breach of the duty of good faith and fair dealing.

2) *Source of the Dispute (Aggravating Factor):* Equipment disputes, complexity, differing site conditions, termination for default.

   An acknowledged (by the Government) differing site condition, prompted a request for equitable adjustment and made it impossible for the contractor to perform its work in accordance with the original contract schedule. The differing site condition was from a seawall being constructed by a third party adjacent to the work site that made the planned-for work even harder to complete. The Government also improperly forced the contractor to absorb costs to hire more expensive equipment to satisfy the Contracting Officer, and

[142] The Federal Acquisition regulation considers an unbalanced bid to be "materially unbalanced . . . based on prices significantly less than the cost for some work and prices significantly overstated for other work [and] where there is a reasonable doubt that the bid will result in the lowest overall cost to the government even though it may be the low evaluated bid" (Paine, n.p. https://www.cohenseglias.com/contracting-database/unbalanced-bidding/).

improperly construed a payment regulation to deprive the contract of the mobilization funding it needed to stay afloat during a challenging contract that the Government already knew had been bid very low. The Government also improperly terminated the contract for default and the contractor lost personal assets (including a family home).

3) *Outcome:* Who was the Prevailing Party?

The Board found almost completely for the contractor with a ruling that the contacting officer had coerced the contractor into signing a release and that she abused her discretion. Contractor appeal partially sustained.