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## FEATURE ARTICLES

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### **Estoppel Against The Government: What Does 'Affirmative Misconduct' Have To Do With It?**

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Twice in the last three years, the Federal Circuit invoked the doctrine of estoppel in the context of a Government contract dispute. Both times, the court stated in dicta, that for estoppel to apply against the Government, the contractor must show "affirmative misconduct" in addition to the traditional elements of estoppel.<sup>2</sup> Decisions by the Court of Federal Claims and agency boards of contract appeals, including, most recently, the ASBCA in *United Technologies Corp., Pratt & Whitney*, have started applying this dicta as if "affirmative misconduct" were now an established element of estoppel.<sup>3</sup> But is "affirmative misconduct" really a prerequisite for applying estoppel against the Government in the context of a Government contract dispute? And, if so, how does that square with the long line of cases, including binding precedent by the Federal Circuit and its predecessor courts, applying estoppel against the Government without any mention of affirmative misconduct?

Part of the blame may lie with the Government contracts bar for failing to heed the sound admonition of Professors Nash and Cibinic that equitable estoppel "is not a panacea and should be used only where the requisite elements are

present."<sup>4</sup> But a more fundamental problem is the failure—by both litigants and Government contracting tribunals—to recognize that "affirmative misconduct" was adopted as a circumstance justifying an exception to the familiar rule that the Government is not bound by the *unauthorized* acts of its agents; it has no applicability whatsoever to cases involving *authorized* acts.

### **The Government Is Bound by the Authorized Acts of Its Agents**

The Supreme Court long has held that "[d]ifferent rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents."<sup>5</sup> In particular, while private parties may in many circumstances be bound by the unauthorized acts and declarations of their agents, the Government is not bound by the unauthorized acts of its agents.<sup>6</sup> An important, but occasionally overlooked, corollary to this maxim is that the Government *is* bound by the acts, omissions and declarations of its agents acting within the scope of their authority.<sup>7</sup> For example, in *Hollerbach v. U.S.*, an early differing site conditions case, the Supreme Court refused to permit the Government to assert a position contrary to an affirmative representation made in the contract.<sup>8</sup>

These rules apply regardless of whether the Government is acting in its proprietary or sovereign capacity. The difference is that when the Government acts in its proprietary capacity, its agents have authority to waive or modify contractual provisions.<sup>9</sup> For example, the Government has been held to have waived its contractual rights in many circumstances, such as when the contractor relies on the Government's delay in terminating

a contract for default<sup>10</sup> or the CO's apparent acceptance of the contractor's non-specification work.<sup>11</sup> Likewise, under the rule of finality, the Government is bound by the contractual acts of its authorized officials even if, in hindsight, the official's decision was erroneous.<sup>12</sup> These principles are consistent with the Supreme Court's repeated admonition that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."<sup>13</sup>

Until relatively recently, Government contract estoppel cases fit neatly within these well-settled principles. That is, the Federal Circuit and its predecessor courts consistently applied estoppel against the Government when the course of conduct or representation on which the plaintiff relied was by an officer or agent of the U.S. acting within the scope of his or her authority, and the plaintiff established the four "traditional" elements of estoppel: (1) the Government knew the facts, (2) the Government intended that its conduct be acted upon or acted in such a way that the contractor had a right to believe the Government so intended, (3) the contractor was not aware of the true facts and (4) the contractor detrimentally relied upon the Government's conduct.<sup>14</sup> In an extension of estoppel principles, both the Court of Claims and agency boards of contract appeals also held that the Government cannot retroactively disallow costs, or retroactively disapprove a contractor's cost accounting practices when the contractor detrimentally relied on the Government's acquiescence or approval.<sup>15</sup> As recently as March 2002, the Armed Services Board of Contract Appeals held that a contractor is entitled to prior authoritative notice before the Government may start disallowing a cost that previously was consistently allowed.<sup>16</sup>

In applying these settled principles prior to the Federal Circuit's dictum in *United Technologies Corp.*, none of the Federal Circuit or Court of Claims cases—which are supposed to be binding precedent<sup>17</sup>—required a showing of, or even mentioned, affirmative misconduct. Federal Circuit Rule 35 provides that only the en banc court may overrule a binding precedent.<sup>18</sup>

## The Government Is Not Bound by the Unauthorized Acts of Its Agents

The Supreme Court cases that have considered—but never applied—estoppel against the Government have typically involved claims for public benefits of one sort or another where the claimant detrimentally relied on a misrepresentation by a Government official. In marked contrast to the typical situation in a Government contracts case, the Government officials on whose declarations the plaintiffs in these cases relied had no delegated authority, and the application of estoppel would have barred the Government from enforcing federal law by requiring the Government to either pay money in violation of a statute, or grant a public benefit contrary to statutory eligibility criteria. In that context, the Supreme Court has consistently and understandably refused to apply estoppel against the Government. As the Court explained in *Heckler v. Community Health Svcs.*, 467 U.S. 51, 60 (1984), "When the government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the government may not be estopped on the same terms as any other litigant."

However, even in that context—when applying estoppel would result in the Government being bound by the unauthorized acts of its agents—the Supreme Court has refused to establish a per se rule that estoppel never applies against the Government. The Court came closest to establishing a per se rule in *Office of Personnel Management v. Richmond*,<sup>19</sup> involving a disabled former Government employee who relied on inaccurate advice from a Navy employee relations official about how much income he could receive and still continue to draw disability payments. Relying on the erroneous advice, Richmond accepted additional part-time work, earning enough to become disqualified for disability payments. He appealed OPM's denial of benefits, arguing that OPM was estopped from denying benefits by the erroneous advice of the employee relations official. The Supreme Court rejected Richmond's argument, but declined to establish a blanket rule that

estoppel never applies against the Government. Rather, the Court expressly limited its holding to claims for money from the Public Treasury, stating that, for those claims, the Appropriations Clause of the Constitution provides an “explicit rule of decision.”<sup>20</sup> In so holding, the Court specifically declined to address whether there were any “extreme circumstances that might support estoppel in a case not involving the payment from the Treasury.”<sup>21</sup> Importantly, however, the *Richmond* decision makes clear that it addresses the application of estoppel when the agent was *not* acting within the scope of his authority. The Court stated:

From our earliest cases, we have recognized that equitable estoppel will not lie against the Government as it lies against private litigants. In *Lee v. Munroe & Thornton*, 7 Cranch 366, 3 L.Ed. 373 (1813), we held that the Government could not be bound by the mistaken representations of an agent *unless it were clear that the representations were within the scope of the agent's authority*.

\* \* \* \*

The principles of these and many other cases were reiterated in *Federal Crop Ins. Corporation v. Merrill*, 332 U.S. 380 (1947), the leading case in our modern line of estoppel decisions.<sup>22</sup>

## Genesis of ‘Affirmative Misconduct’ Language

The “affirmative misconduct” language stems from a series of decisions involving applications for U.S. citizenship, in which the Supreme Court expressly left open the question of whether affirmative misconduct could estop the Government from enforcing immigration laws.<sup>23</sup> As the Court in *Richmond* observed:

The proposition about which we did not “stop to inquire” in [the first of these immigration cases] has since taken on a life of its own. Our own opinions have continued to mention the possibility, in the course of rejecting estoppel arguments, that some type of “affirmative misconduct” might give rise to estoppel against the Government.<sup>24</sup>

While only mentioned as a possibility in the Supreme Court’s opinions, all of the federal circuit

courts of appeals have concluded that affirmative misconduct *can* give rise to estoppel against the Government for the unauthorized acts of its agents. However, apart from the Federal Circuit’s recent dicta, no federal appellate court has suggested, much less held, that affirmative misconduct is necessary to establish estoppel when the Government officials acted within the scope of their authority. Moreover, at least three federal circuits have expressly recognized that estoppel routinely applies against the Government when (1) the traditional elements of estoppel are met, (2) the Government is acting in its proprietary rather than sovereign capacity and (3) the Government agents acted within the scope of their authority.<sup>25</sup>

## Where Did the Federal Circuit Go Wrong?

The Federal Circuit has considered estoppel in the context of a Government contracts dispute in four cases since *Richmond*. In *JANA, Inc. v. U.S.*, a decision issued shortly after *Richmond*, the Federal Circuit questioned whether “the defense of estoppel is still available against the government” and whether the Federal Circuit’s “contract precedent prior to *Richmond* is still valid.”<sup>26</sup> The *JANA* court ultimately did not decide this question because the court found that the plaintiff failed to satisfy even the pre-*Richmond* “contract precedent.”<sup>27</sup> Two years later in *Burnside-Ott Aviation Training Ctr, Inc. v. U.S.*, the Federal Circuit seemed to recognize the continued vitality of estoppel in Government contract cases by distinguishing between claims for payment of money contrary to a statutory appropriation—or entitlement contrary to statutory eligibility criteria—and claims or defenses based solely on contract.<sup>28</sup> In reversing the lower court’s decision that estoppel can never apply against the Government for monetary claims, the Federal Circuit held that, because the contractor’s claim was based on its Government contract rather than on a statutory entitlement, “neither the holding nor analysis in *Richmond* is applicable to this case, and *Burnside-Ott*’s equitable estoppel claim is not barred as a matter of law because of *Richmond*.”<sup>29</sup>

In *Rumsfeld v. United Technologies Corp.*, the Federal Circuit stretched to address an estoppel

issue not yet considered by the ASBCA and gratuitously advised the board that on remand:

Adjudication of the estoppel issue must proceed under the “well settled [rule] that the Government may not be estopped on the same terms as any other litigant.” *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 (1984). Beyond a mere showing of acts giving rise to an estoppel, [the contractor] must show “affirmative misconduct [as] a prerequisite for invoking equitable estoppel against the government.” *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000) (emphasis added).<sup>30</sup>

The Federal Circuit repeated this assertion, once again in dicta, in *United Pacific Ins. Co. v. Roche*, stating, “Our own precedent dictates ‘that if equitable estoppel is available at all against the government some form of affirmative misconduct must be shown in addition to the traditional requirements of estoppel.’ *Zacharin v. U.S.*, 213 F.3d 1366, 1371 (Fed. Cir. 2000).”<sup>31</sup>

*Zacharin*, the precedent on which both *United Technologies* and *United Pacific Ins.* rely, is not a Government contracts case and did not purport to overrule the Federal Circuit’s “contract precedent.” *Zacharin* was an appeal of a Court of Federal Claims decision dismissing a federal employee’s patent infringement suit on the basis that the patented invention was on sale more than one year prior to the filing of the patent application. The employee argued unsuccessfully that the Government should be estopped from raising the on-sale-bar because the Army attorneys who filed his patent application were aware of the sales, but filed the application anyway. The lower court rejected the employee’s argument for two reasons: (1) the plaintiff failed to establish the traditional elements of estoppel; and (2) in any event, a claim for money contrary to a statute is barred by *Richmond*. The Federal Circuit agreed with the lower court’s holding that the Government may not be estopped from invoking the on-sale bar as a defense, but for the different reason that there was no evidence of affirmative misconduct. The court stated:

While the Supreme Court has not squarely held that affirmative misconduct is a prereq-

uisite for invoking equitable estoppel against the Government, this court has done so, *see Henry v. United States*, 870 F.2d 634, 637 (Fed. Cir. 1989); *Hanson v. Office of Personnel Management*, 833 F.2d 1568, 1569 (Fed. Cir. 1987), as has every other court of appeals, *see Tefel v. Reno*, 180 F.3d 1286, 1303 (11th Cir. 1999) (citing cases).<sup>32</sup>

Army attorneys filing a patent application for a civil servant plainly have no authority to modify or waive the statutory patent requirements. The two Federal Circuit decisions relied on by the *Zacharin* court similarly involved agents with no delegated authority. In *Henry v. U.S.*, the Federal Circuit held that the Internal Revenue Service was not estopped from raising a statute of limitations defense against a taxpayer’s refund suit because the IRS agent’s erroneous advice did not constitute the type of affirmative misconduct required as an element of estoppel against the Government.<sup>33</sup> In *Hanson v. OPM*, the court held that the Government was not estopped from denying the plaintiff a civil service retirement annuity because the federal official’s good faith, but erroneous, interpretation of the statutes on which the plaintiff relied was not affirmative misconduct.<sup>34</sup> *Tefel v. Reno* collects “affirmative misconduct” cases from all of the federal circuits, none of which involved a Government agent acting within the scope of his or her employee. Because neither *Zacharin* nor any of the cases it cited involved agents acting within the scope of their authority, the *Zacharin* court may not have perceived any need to distinguish the facts of that case from cases in which the plaintiff sought to hold the Government liable for acts or declarations of its agents acting within the scope of their authority.

It is far less clear why the *United Technologies* and *United Pacific Ins.* courts failed to recognize this distinction, particularly given the *JANA* court’s awareness of the Federal Circuit’s “contract precedent.” Unfortunately for practitioners, judicial mistakes become worse with repetition because the more removed a talismanic holding is from both the cases on which it relies and the cases it sub silentio overrules, the less able a new court will be to correct (or even recognize) the mistake. Moreover, lower tribunals, in struggling

to support the superior court's holding, will only exacerbate the initial mistake, as happened with the ASBCA's decision on remand in *United Technologies*.<sup>35</sup>

### The ASBCA's Decision in *United Technologies Corp.*

At issue in *United Technologies* was whether revenue share payments that UTC paid pursuant to its collaboration agreements with foreign parts suppliers constituted a "cost" that must be included in the contractor's indirect cost allocation bases. The ASBCA initially concluded that the payments were not a cost for parts and need not be included in the indirect cost allocation bases.<sup>36</sup> The Federal Circuit disagreed, holding that the parts were sold to the suppliers and the revenue share payments represented the cost of obtaining the parts. The Federal Circuit vacated the board's decision on entitlement and remanded to the board to address the estoppel issue raised by UTC. On remand, the ASBCA found that UTC had not met the traditional elements of estoppel. In particular, the board was not convinced that the Government knew the facts or that UTC detrimentally relied on the Government's conduct.<sup>37</sup> Had the board's opinion ended there, the case would be unexceptional. Regrettably, the board proceeded to address the "affirmative misconduct element."

Although finding that the Federal Circuit's dictum about affirmative misconduct was not the law of the case, the ASBCA nevertheless tried valiantly to find a legal basis to support the Federal Circuit's guidance. UTC argued that "the affirmative misconduct standard conflicts with the tenet that the government must be treated the same as a private litigant when acting in its proprietary capacity as a contracting party." In response, the ASBCA noted that *Zacharin* was factually similar to a proprietary case, while *United Technologies* was factually distinct from a private contract case. With regard to the first point, the ASBCA stated:

While *Zacharin* was not a contract case, it did involve actions by the Government that

were of a proprietary or business nature inasmuch as the underlying issue involved whether the Government was required to reimburse appellant for its use of a patented invention.<sup>38</sup>

On the other hand, the ASBCA found that the "government's performance of contractual duties in conjunction with CAS rules and regulations" implicate "governmental regulatory rights and obligations [that] are not applicable to contracts between private litigants, and certainly not in the context of equitable estoppel."<sup>39</sup> Accordingly, the ASBCA found no conflict between the Federal Circuit's guidance and the Supreme Court's application of general contract law principles when the Government is acting in its proprietary capacity.

With due deference to the ASBCA, the critical distinguishing fact in *Zacharin* was not whether the Government was acting in a sovereign or proprietary capacity, but whether the Army attorneys who filed the plaintiff's patent application had authority to waive the Government's rights. *Zacharin* stands for the unremarkable proposition that absent affirmative misconduct, the Government is not bound by the unauthorized acts of its agents. In contrast to the Army attorneys in *Zacharin*, who had no delegated authority, it is within the authority of an administrative contracting officer to determine whether a contractor's cost accounting practices comply with the Cost Accounting Standards.

### Conclusion

Affirmative misconduct is not and never has been a condition prerequisite for applying estoppel against the Government so long as the Government agents were acting within the scope of their authority. The Federal Circuit's recent dicta to the contrary directly conflicts with the binding "contract precedent" of the Federal Circuit and its predecessor courts. While other federal circuits have recognized affirmative misconduct as an exception to the rule that the Government is not bound by the unauthorized acts of its agents, the Federal Circuit's dicta has instead created a Government contracts excep-

tion to the rule that the Government is bound by the acts of its agents acting within the scope of their authority.

## ❖ Endnotes

- 1 Karen L. Manos is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher LLP. Ms. Manos is the author of *GOVERNMENT CONTRACT COSTS & PRICING*, © 2004 Thomson/West.
- 2 See *United Pacific Ins. Co. v. Roche*, 401 F.3d 1362, 1366 (Fed. Cir. 2005); *Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1377 (Fed. Cir. 2004).
- 3 See *Die Casters Int'l Inc. v. U.S.*, 67 Fed. Cl. 362, 383 (2005); *General Electric Co. v. U.S.*, 60 Fed. Cl. 782, 797 & n.11 (2004); *DeMarco Durzo Dev. Co. v. U.S.*, 60 Fed. Cl. 632, 637-38 (2004); *Ervin & Assocs., Inc. v. U.S.*, 59 Fed. Cl. 267, 297 (2004), *aff'd*, 120 Fed. Appx. 353 (Fed. Cir. 2005); *Capital Properties, Inc. v. U.S.*, 56 Fed. Cl. 427, 436 (2003); *United Technologies Corp., Pratt & Whitney*, ASBCA Nos. 47416 et al., slip op. at 44-47 (ASBCA May 12, 2006); *RGW Communications, Inc., d/b/a Watson Cable Co.*, ASBCA Nos. 54495 et al., 05-2 BCA ¶ 32,972; *Kearfott Guidance & Navigation Corp.*, ASBCA Nos. 49271 et al., 04-2 BCA ¶ 32,757, *recons. denied*, 05-1 BCA ¶ 32,845.
- 4 "Equitable Estoppel: Still Hanging in There," 6 N&CR ¶ 31.
- 5 *Whiteside v. U.S.*, 93 U.S. 247, 256 (1876).
- 6 See, e.g., *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).
- 7 See, e.g., *Cooke v. U.S.*, 91 U.S. 389, 398 (1875); see also *P.I.O. GmbH Bau Und Ingenieurplanung v. International Broadcasting Bureau*, GSBCA No. 15934-IBB, 04-1 BCA ¶ 35,592; *URS Consultants, IBCA* No. 4285-2000, 02-1 BCA ¶ 31,812; *Folk Constr., Inc.*, ENGBCA Nos. 5839 et al., 93-3 BCA ¶ 26,094; *Mick DeWall Constr.*, PSBCA No. 2580, 91-3 BCA ¶ 24,180; *Bell Helicopter Co.*, ASBCA No. 17776, 74-1 BCA ¶ 10,411.
- 8 *Hollerbach v. U.S.*, 233 U.S. 165, 177 (1914).
- 9 *Branch Banking & Trust Co. v. U.S.*, 96 F. Supp. 757, 766 (Ct. Cl. 1951); accord *Broad Avenue Laundry & Tailoring v. U.S.*, 681 F.2d 746, 747-48 (Ct. Cl. 1982); *Manloading & Mgt. Assoc., Inc. v. U.S.*, 461 F.2d 1299, 1303 (Ct. Cl. 1972).
- 10 See, e.g., *Precision Dynamics, Inc.*, ASBCA Nos. 41360 et al., 97-1 BCA ¶ 28,722.
- 11 See *Miller Elevator Co. v. U.S.*, 30 Fed. Cl. 662, 688-89 (1994).
- 12 See, e.g., *Decker & Co. v. West*, 76 F.3d 1573, 1583 (Fed. Cir. 1996); accord *MPPR Assocs., Inc.*, ASBCA No. 54689, 2005 WL 2840533 (Oct. 27, 2005); *Honeywell Federal Sys., Inc.*, ASBCA No. 39974, 92-2 BCA ¶ 24,966.
- 13 *Mobil Oil Exploration and Producing Southeast, Inc. v. U.S.*, 530 U.S. 604, 607 (2000).
- 14 See *USA Petroleum Corp. v. U.S.*, 821 F.2d 622, 627 (Fed. Cir. 1987); *American Electronic Lab., Inc. v. U.S.*, 774 F.2d 1110, 1113 (Fed. Cir. 1985); *Broad Avenue Laundry & Tailoring v. U.S.*, 681 F.2d 746, 749 (Ct. Cl. 1982); *Emeco Indus., Inc. v. U.S.*, 485 F.2d 652, 657 (Ct. Cl. 1973); *Manloading & Mgt. Assoc., Inc. v. U.S.*, 461 F.2d 1299, 1303 (Ct. Cl. 1972).
- 15 See *Litton Systems, Inc. v. U.S.*, 449 F.2d 392, 401 (Ct. Cl. 1971); *Falcon Research & Dev. Co.*, ASBCA No. 19784, 77-1 BCA ¶ 12,312; *Symetrics Eng'g Corp.*, NASBCA No. 1270-20, 74-1 BCA ¶ 10,553; *Sanders Assocs., Inc.*, ASBCA No. 15518, 73-2 BCA ¶ 10,055; *AC Electronics Div., General Motors Corp.*, ASBCA No. 14388, 72-2 BCA ¶ 9736; *Penninsular Chem Research, Inc.*, ASBCA No. 14384, 71-2 BCA ¶ 9066; *Wolf Research & Dev. Corp.*, ASBCA No. 10913, 69-2 BCA ¶ 8017.
- 16 *Lockheed Martin Western Dev. Labs.*, ASBCA No. 51452, 02-1 BCA ¶ 31,803.
- 17 Decisions from the former Court of Claims are binding precedent until and unless overturned by the Federal Circuit sitting en banc. See *South Corp. v. U.S.*, 690 F.2d 1368, 1369 (Fed. Cir. 1982). Likewise, a panel is bound by the holding of another panel unless overturned by the en banc court. See *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563 (Fed. Cir. 1991).
- 18 See Fed. Cir. R. 35(a)(1) (2006).
- 19 *OPM v. Richmond*, 496 U.S. 414, 419 (1990).
- 20 496 U.S. at 424.
- 21 496 U.S. at 434.
- 22 496 U.S. at 419-20 (emphasis added).
- 23 See *INS v. Miranda*, 459 U.S. 14, 19 (1982) (per curiam); *INS v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *Montana v. Kennedy*, 366 U.S. 308, 315 (1961).
- 24 *Richmond*, 496 U.S. at 421.
- 25 See *Penny v. Giuffrida*, 897 F.2d 1543, 1546-47 (10th Cir. 1990); *U.S. v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *U.S. v. Georgia-Pacific Co.*, 421 F.2d 92, 100-101 (9th Cir. 1970).
- 26 *JANA, Inc. v. U.S.*, 936 F.2d 1265, 1270 (Fed. Cir. 1991).
- 27 *Id.*
- 28 *Burnside-Ott Aviation Training Ctr, Inc. v. U.S.*, 985 F.2d 1574 (Fed. Cir. 1993).
- 29 985 F.2d at 1581.
- 30 *Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1377 (Fed. Cir. 2003).
- 31 *United Pacific Ins. Co. v. Roche*, 401 F.3d 1362, 1366 (Fed. Cir. 2005).
- 32 *Zacharin v. U.S.*, 213 F.3d 1366, 1371 (Fed. Cir. 2000).
- 33 *Henry v. U.S.*, 870 F.2d 634, 637 (Fed. Cir. 1989).
- 34 *Hanson v. OPM*, 833 F.2d 1568, 1569 (Fed. Cir. 1987).
- 35 *United Technologies Corp., Pratt & Whitney*, ASBCA Nos. 47416 et al., slip op. (May 12, 2006).
- 36 *United Technologies Corp., Pratt & Whitney*, ASBCA Nos. 47416 et al., 01-2 BCA ¶ 31,592, *rev'd sub nom.*, *Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361 (Fed. Cir. 2003), *cert. denied*, 540 U.S. 1012 (2003).
- 37 *United Technologies Corp., Pratt & Whitney*, ASBCA Nos. 47416 et al., slip op. at 35-40.
- 38 *Id.* at 44.
- 39 *Id.* at 45.

