

INSIDE THE MINDS™

LITIGATION STRATEGIES FOR GOVERNMENT CONTRACTS

LEADING LAWYERS ON EXPLORING THE CURRENT STATE
OF GOVERNMENT CONTRACTING, DEVELOPING AN
EFFECTIVE LITIGATION PLAN, AND COLLABORATING
WITH CLIENTS AND OFFICIALS



ASPATORE

Richard J. Webber, Arent Fox LLP
David S. Bloch, Winston & Strawn LLP
J. Andrew Howard, Alston & Bird LLP
James E. Perschbach, Bracewell & Giuliani LLP
Pamela J. Mazza, PilieroMazza PLLC
Lawrence M. Prosen, K&L Gates LLP

Praise for *Inside the Minds*

"This series provides a practical and focused discussion of the leading issues in law today." – John V. Biernacki, Partner, Jones Day

"*Inside the Minds* draws from the collective experience of the best professionals. The books are informative from an academic, and, more importantly, practical perspective. I highly recommend them." – Keith M. Aurzada, Partner, Bryan Cave LLP

"Aspatore's *Inside the Minds* series provides practical, cutting edge advice from those with insight into the real world challenges that confront businesses in the global economy." – Michael Bednarek, Partner, Shearman & Sterling LLP

"What to read when you want to be in the know—topical, current, practical, and useful information on areas of the law that everyone is talking about." – Erika L. Morabito, Partner, Patton Boggs LLP

"Some of the best insight around from sources in the know" – Donald R. Kirk, Shareholder, Fowler White Boggs PA

"The *Inside the Minds* series provides a unique window into the strategic thinking of key players in business and law." – John M. Sylvester, Partner, K&L Gates LLP

"Comprehensive analysis and strategies you won't find anywhere else." – Stephen C. Stapleton, Of Counsel, Dykema Gossett PLLC

"The *Inside the Minds* series is a real hands-on, practical resource for cutting edge issues." – Trey Monsour, Partner, Haynes and Boone LLP

"A tremendous resource, amalgamating commentary from leading professionals that is presented in a concise, easy to read format." – Alan H. Aronson, Shareholder, Akerman Senterfitt

"Unique and invaluable opportunity to gain insight into the minds of experienced professionals." – Jura C. Zibas, Partner, Lewis Brisbois Bisgaard & Smith LLP

"A refreshing collection of strategic insights, not dreary commonplaces, from some of the best of the profession." – Roger J. Magnuson, Partner, Dorsey & Whitney LLP

"Provides valuable insights by experienced practitioners into practical and theoretical developments in today's ever-changing legal world." – Elizabeth Gray, Partner, Willkie, Farr & Gallagher LLP

"This series provides invaluable insight into the practical experiences of lawyers in the trenches." – Thomas H. Christopher, Partner, Kilpatrick Stockton LLP



ASPATORE

www.Aspatore.com

Aspatore Books, a Thomson Reuters business, exclusively publishes C-Level executives (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies and law firms. C-Level Business Intelligence™, as conceptualized and developed by Aspatore Books, provides professionals of all levels with proven business intelligence from industry insiders—direct and unfiltered insight from those who know it best—as opposed to third-party accounts offered by unknown authors and analysts. Aspatore Books is committed to publishing an innovative line of business and legal books, those which lay forth principles and offer insights that when employed, can have a direct financial impact on the reader's business objectives. In essence, Aspatore publishes critical tools for all business professionals.

Inside the Minds

The *Inside the Minds* series provides readers of all levels with proven legal and business intelligence from C-Level executives and lawyers (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies and law firms. Each chapter is comparable to a white paper or essay and is a future-oriented look at where an industry, profession, or topic is heading and the most important issues for future success. Each author has been selected based upon their experience and C-Level standing within the professional community. *Inside the Minds* was conceived in order to give readers actual insights into the leading minds of top lawyers and business executives worldwide, presenting an unprecedented look at various industries and professions.

I N S I D E T H E M I N D S

Litigation Strategies for Government Contracts

*Leading Lawyers on Exploring the Current State of
Government Contracting, Developing an Effective Litigation
Plan, and Collaborating with Clients and Officials*



ASPATORE

©2010 Thomson Reuters/Aspatore

All rights reserved. Printed in the United States of America.

Inside the Minds Project Manager, Tiffany Smith; edited by Michaela Falls; proofread by Melanie Zimmerman

No part of this publication may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, except as permitted under Sections 107 or 108 of the U.S. Copyright Act, without prior written permission of the publisher. This book is printed on acid-free paper.

Material in this book is for educational purposes only. This book is sold with the understanding that neither any of the authors nor the publisher is engaged in rendering legal, accounting, investment, or any other professional service. Neither the publisher nor the authors assume any liability for any errors or omissions or for how this book or its contents are used or interpreted or for any consequences resulting directly or indirectly from the use of this book. For legal advice or any other, please consult your personal lawyer or the appropriate professional.

The views expressed by the individuals in this book (or the individuals on the cover) do not necessarily reflect the views shared by the companies they are employed by (or the companies mentioned in this book). The employment status and affiliations of authors with the companies referenced are subject to change.

Aspatore books may be purchased for educational, business, or sales promotional use. For information, please e-mail West.customer.service@thomson.com.

ISBN 978-0-314-26857-0

For corrections, updates, comments or any other inquiries please e-mail
TLR.AspatoreEditorial@thomson.com.

First Printing, 2010

10 9 8 7 6 5 4 3 2 1

CONTENTS

Richard J. Webber <i>Partner, Arent Fox LLP</i> <i>LITIGATING FEDERAL GOVERNMENT CONTRACT DISPUTES: RECENT TRENDS AND PROVEN STRATEGIES</i>	7
David S. Bloch <i>Partner, Winston & Strawn LLP</i> <i>NEW ISSUES AT THE INTERSECTION OF INTELLECTUAL PROPERTY AND GOVERNMENT CONTRACTS</i>	49
J. Andrew Howard <i>Partner, Alston & Bird LLP</i> <i>GOVERNMENT CONTRACT LITIGATION: TRENDS AND STRATEGY</i>	67
James E. Perschbach <i>Partner, Bracewell & Giuliani LLP</i> <i>THE CREATION OF A THOROUGH LITIGATION STRATEGY</i>	87
Pamela J. Mazza <i>Managing Partner, PilieroMazza PLLC</i> <i>WINNING STRATEGIES FOR CONTESTING GOVERNMENT CONTACTS</i>	101
Lawrence M. Prosen <i>Partner, K&L Gates LLP</i> <i>THE CURRENT STATE OF GOVERNMENT CONTRACT LITIGATION: A WORLD IN FLUX</i>	129
Appendices	167

Litigating Federal Government Contract Disputes: Recent Trends and Proven Strategies

Richard J. Webber

Partner

Arent Fox LLP



ASPATORE

Introduction

Litigating federal government contract disputes is different from litigating contract disputes with private parties. The federal government has sovereign immunity and can be sued only to the extent that it has waived that immunity. In the contract realm, the government's waiver of sovereignty is accompanied by certain restrictions: the requirement that litigations be brought in designated fora, the non-availability of a jury, and some unique procedural requirements, to name a few. It can take time for a practitioner to understand these restrictions, make the best choices, and avoid pitfalls that can threaten the success of the litigation. This chapter provides some guidance on navigating the unique features of federal government contract litigation and avoiding the pitfalls.

The author has been practicing government contracts litigation for thirty-five years, initially with the U.S. Department of Justice and then with a private law firm. His practice has included the litigation of monetary claims arising from a broad range of circumstances; challenges to default terminations; bid protests; and defenses of lawsuits brought under the False Claims Act, 31 U.S.C. § 2729, *et seq.* During this time, he has represented clients providing a wide variety of supplies and services to civilian and defense agencies in fields such as information technology, security, construction, engineering, and sophisticated defense hardware.

Contracting with the federal government can be challenging, but also financially rewarding. Despite every contractor's desire to fulfill its obligations and satisfy its clients, disagreements will inevitably arise over time, and litigation will be necessary where important disputes cannot otherwise be resolved. Hopefully, this chapter will provide some assistance in that circumstance.

Recent Trends in Government Contract Disputes

Among the more notable recent changes to litigating government contracts disputes has been the development of case law at the Court of Federal Claims relating to the supplementation of the administrative record in the wake of the decision of the Court of Appeals for the Federal Circuit in its May 4, 2009 opinion in *Axiom Resource Management Inc. v. United States*, 564 F.3d 1374 (Fed. Cir. 2009). Prior to *Axiom*, one of the leading cases had

been *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989), which the Federal Circuit has now held, “insofar as *Esch* departs from fundamental principles of administrative law as articulated by the Supreme Court . . .,” is not the law of the circuit or, by extension, the Court of Federal Claims. *Axiom*, 564 F.3d at 1380. The *Axiom* standard now recognizes clearly that the parties seeking review of an agency action under the “arbitrary and capricious” standard applied to bid protests have only a limited ability to supplement the administrative record and such supplementation “should be limited to cases in which ‘the omission of extra-record evidence precludes effective judicial review.’” *Id.* at 1379-80 (quoting *Murakami v. United States*, 46 Fed. Cl. 731, 735 (2000), *aff’d*, 398 F.3d 1342 (Fed. Cir. 2005)).

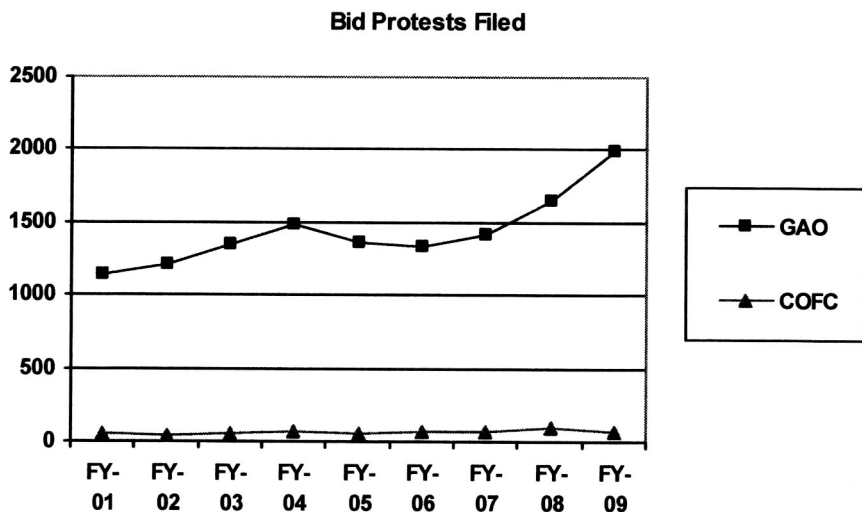
Increasing Numbers of Bid Protests

There is no question that the marked increase in the number of bid protest cases filed over the past few years is the most notable macro trend in federal government contract litigation. According to the annual reports to Congress of the Government Accountability Office (GAO), the principal bid protest adjudication forum, 1,989 bid protests were filed in FY-2009, an increase of nearly 50 percent from the FY-2006 figure of 1,327, and an increase of nearly 74 percent from the 1,146 protests filed in FY-2001, the first year for which the GAO published annual statistics. See *GAO Bid Protest Annual Reports to the Congress* (“*GAO Annual Reps.*”), available at: www.gao.gov/decisions/bidproan.htm (last visited May 6, 2010). The number of bid protest cases filed at the U.S. Court of Federal Claims (COFC) has, on the other hand, stayed fairly steady, averaging sixty-three cases annually, with the exception of a sharp spike in FY-2008 to ninety-one cases, with a subsequent decline in FY-2009 to sixty-eight, a number much closer to the average. Compare Public Access to Court Electronic Records (PACER) online records of Court of Federal Claims cases filed seeking pre- and post-award injunctive relief or bid preparation costs, available at <http://ecf.cofc.uscourts.gov>, with orders and opinions posted on the Court’s online general jurisdiction search engine, available at www.uscfc.uscourts.gov/search_general_jurisdiction.¹

¹ As decisions regarding motions for preliminary or permanent injunctive relief involve an adjudication of the likelihood of success on the merits, denials thereof are counted here as decisions on the merits when those denials obviously considered the merits of the case and effectively disposed of the case. These figures do not include cases addressing only overrides of CICA stays or requests for temporary restraining orders that did not

	GAO	COFC
FY-2001	1,146	56
FY-2002	1,204	40
FY-2003	1,352	53
FY-2004	1,485	64
FY-2005	1,356	58
FY-2006	1,327	65
FY-2007	1,411	68
FY-2008	1,652	91
FY-2009	1,989	68

The trends are more obvious graphically, as shown below:

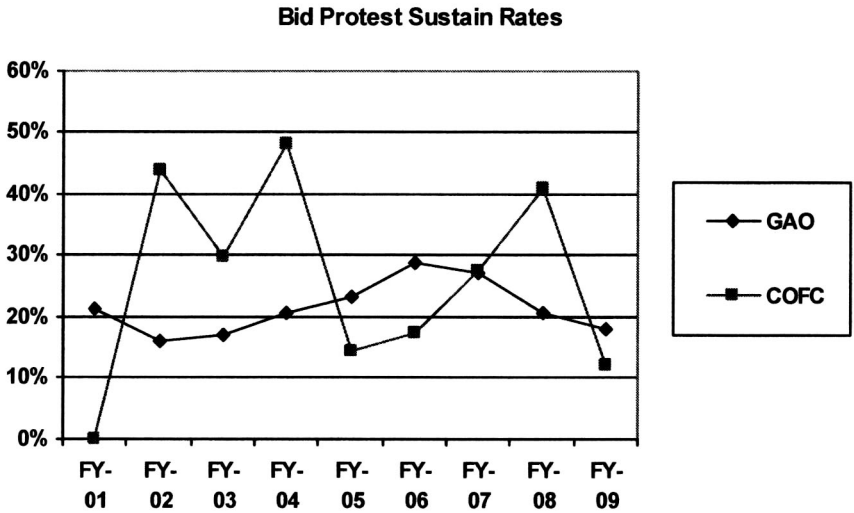


See GAO ANNUAL REPS.; COFC statistics derived from comparisons from online databases, as noted above. Of the 12,922 bid protest cases that protesters filed at the GAO from FY-2001 through FY-2009, only 2,718, or 21 percent, were decided on the merits and, of those, only 583, or a further 21 percent, were sustained. At the Court of Federal Claims, from FY-2001

resolve the case, but do include cases granting partial relief to plaintiffs, including the recovery of bid preparation costs.

LITIGATING FEDERAL GOVERNMENT CONTRACT DISPUTES

through FY-2009, 230 of the 563 bid protest cases, or 41 percent, were decided on the merits, and sixty-two of those 230 cases, or 27 percent, resulted in some form of relief for the protester, as shown below:



Chances of success for a protester at the Court of Federal Claims are obviously much less predictable than at the GAO. While the average rate of success at the Court has been 27 percent over the nine-year period, on a year-to-year basis, the success rate has varied from a high of nearly 50 percent of all cases decided on the merits to a low of zero. At the GAO, on the other hand, there has been a steady decline in the protest success rate from a high of 29 percent in FY-2006 to 18 percent in FY-2009.

Declining Number of Cases Decided on Merits

The other government contracts litigation trend is that the GAO has decided a declining number of cases on the merits in the past three years, with nearly 24 percent of cases being merits decisions in FY-2007, while only 16 percent were in FY-2009. The GAO has always dismissed a significant number of cases before a merits decision, usually for reasons such as lack of timely submission, agency corrective action, or voluntary dismissals by the protester, see, e.g., Daniel I. Gordon, *Dismissals of Bid Protests at the Gen. Accounting Ofc.*, 37 *PROCUREMENT*

LAW. 1, 16 (2002) (in a one-month sample period in Oct. 2000, only 2 percent of protests decided on the merits; of eighty-four dismissals, thirty-four were due to a timeliness issue, twenty due to agency corrective action, and twenty-eight due to protesters' actions), and the current numbers are not inconsistent with that practice. Outcome-prediction alternative dispute resolution (ADR), 4 C.F.R. § 21.10(e), a procedure by which the GAO attorney handling the case convenes all of the participating parties, usually by teleconference, and advises them of what he or she believes the likely outcome will be and the reasons for that belief, *Superlative Techs. Inc.*, B-310489.4, June 3, 2008, 2008 CPD ¶ 123 at 21 n.11, is also likely a reason for the decrease in merits decisions, because the GAO has reported a sharp increase in the recent use and success rate of that ADR method, although a historical review shows that a much smaller percentage of cases are referred to ADR now than in FY-2001:

GAO Protests Using ADR

	Number	Pct	Success Rate
FY-2001	150	13.1%	84%
FY-2002	145	12.0%	84%
FY-2003	120	8.9%	92%
FY-2004	123	8.3%	91%
FY-2005	103	7.6%	91%
FY-2006	91	6.9%	96%
FY-2007	62	4.4%	85%
FY-2008	78	4.7%	78%
FY-2009	149	7.5%	93%

See GAO ANNUAL REPS. At the Court, while the numbers vary considerably, since FY-2003, at least one-third, and sometimes more than half, of the bid protest cases have been decided on the merits.

Pct of Cases Decided on Merits

	GAO	COFC
FY-2001	27.1%	30.4%
FY-2002	21.3%	22.5%
FY-2003	21.4%	37.7%
FY-2004	24.6%	45.3%
FY-2005	22.6%	48.3%
FY-2006	18.8%	35.4%
FY-2007	23.7%	58.8%
FY-2008	17.6%	42.9%
FY-2009	15.8%	36.8%

See GAO ANNUAL REPS.; COFC statistics derived from comparisons from online databases, as noted above.

Military Contracts: Frequent Targets of Bid Protests

According to the GAO's online bid protest docket, which contained information at the time of review on 2,394 protests filed between December 9, 2008 and May 20, 2010, the military departments' agencies were the most frequent targets of bid protests, at nearly 60 percent. See *GAO Bid Protest Docket*, available at: www.gao.gov/decision/docket (last visited May 23, 2010). The Department of the Army alone, with 698 out of 2,394 protests, topped the list and accounted for 29 percent of all bid protest cases filed at the GAO, and for almost half of the 1,433 protests filed against the military departments. See *id.* The Department of Defense, Department of the Air Force, and the Department of the Navy together accounted for approximately 31 percent of all protests filed, with 286, 239, and 210, respectively. See *id.* On the civilian side, the Department of Veterans Affairs, Department of Homeland Security, General Services Administration, Department of Health and Human Services, and the Department of Justice were the top five agencies against which protests were filed, together comprising slightly more than 23 percent of all agencies protested. See *id.* The following chart shows the top twenty agencies against which protests were filed, which together account for nearly 97 percent of the 2,394 protests recorded on the GAO docket:

INSIDE THE MINDS

	Agency	No. Protests	Pct (of 2,394 protests)
1.	Army	698	29.16%
2.	DOD	286	11.95%
3.	Air Force	239	9.98%
4.	Navy	210	8.77%
5.	Veterans Affairs	171	7.14%
6.	DHS	130	5.43%
7.	GSA	100	4.18%
8.	HHS	98	4.09%
9.	DOJ	61	2.55%
10.	Interior	55	2.30%
11.	Agriculture	49	2.05%
12.	DOT	34	1.42%
13.	Labor	31	1.29%
14.	Commerce	30	1.25%
15.	Energy	29	1.21%
16.	NASA	27	1.13%
17.	HUD	22	0.92%
18.	Treasury	19	0.79%
19.	State	16	0.67%
20.	EPA	14	0.58%
	TOTALS	2,319	97%

As for contract claims filed at the Boards of Contract Appeals, the military departments again dominate the field. Of 195 opinions filed between May 2007 and May 2010, 111 (57 percent) related to military agencies, while fifteen (8 percent) concerned Postal Service procurements, another fifteen (8 percent) concerned the Department of Veterans Affairs, twelve (6 percent) involved the General Services Administration, representing the top respondents on the civilian side. See *Civilian Bd. of Contract Appeals, Decisions*, available at: www.cbca.gsa.gov/ (last visited May 24, 2010); see also *Armed Servs. Bd. of Contract Appeals*, available at: <http://docs.law.gwu.edu/asbca/default.htm> (last visited May 24, 2010).

Industry Sectors Impacted by Bid Protests

An examination of the most recent two months of bid protest decisions from the GAO provides a snapshot of the most recent trends. Thirty-six

decisions were reported in the most recent two months, of which six, or 16.7 percent, were sustained protests, a figure slightly below the 21 percent historical sustain rate that was discussed above. See *Bid Protest Decisions Posted in the Past Two Months*, available at: www.gao.gov/decisions/bidpro/bidpro.htm (last visited May 23, 2010). Nine of the thirty-six protests, or 25 percent, involved construction-related industries. See *id.* Other industries represented in protests were administrative support services, facilities operations and maintenance, training, transportation, health care, and food services. See *id.* Of those thirty-six protests, twenty-one, or 58.3 percent, involved a claim that the agency somehow miscalculated proposals. See *id.* Alleged failures by agencies to consider properly small business preference issues or to conduct proper discussions were tied as the second-most-common protest grounds at four each. See *id.* Complaints that an agency failed to conduct discussions properly are another bid protest staple. Vernon J. Edwards, *Meaningful Discussions: What Is The Standard?*, 24 NO. 2 NASH & CIBINIC REP. ¶ 5 (forty-four protest decisions at the Court of Federal Claims and the GAO in 2009 involved allegedly improper discussions). Although an issue in only one of the thirty-six protest decisions, see *Bid Protest Decisions Posted in the Past Two Months*, available at: www.gao.gov/decisions/bidpro/bidpro.htm (last visited May 23, 2010), protesters are raising alleged organizational conflicts of interest (OCIs) more frequently in recent years.

Organizational Conflicts of Interest

During the past five years, according to searches in Westlaw, OCIs have been cited in protest opinions at the Court of Federal Claims and the GAO eighty-three times, and nearly two-thirds of those cases (fifty-two) have been within the past three years. OCIs are also the subject of increased congressional interest, as shown by the passage of the Weapon Systems Acquisition Reform Act of 2009, which required that the “Secretary of Defense shall revise the Defense Supplement to the Federal Acquisition Regulation to provide uniform guidance and tighten existing requirements for organizational conflicts of interest by contractors in major defense acquisition programs,” Pub. L. No. 111-23 § 207, 123 Stat. 1728-29; see also Proposed Rule, DFARS Case 2009-D015, 75 Fed. Reg. 20,954 (Apr. 22, 2010). That legislation mirrors movement that was already taking place in the Civilian Agency Acquisition Council and the Defense Acquisition

Regulations Council. See, e.g., Advance Notice of Proposed Rulemaking, FAR Case 2007-018, 73 Fed. Reg. 34,686 (June 18, 2008) (public comment sought on whether current regulatory guidance on OCIs “adequately addresses the current needs of the acquisition community or whether providing standard provisions and/or clauses, or a set of such standard provisions and clauses, might be beneficial”). Moreover, considering that liability under the False Claims Act, 31 U.S.C. § 3729, for the failure to disclose OCIs is now a possibility, *United States v. Sci. Applications Int’l Corp.*, 653 F.Supp.2d 87, 111 (D.D.C. 2009) (“There was significant evidence supporting the jury’s finding that SAIC either discovered actual conflicts during its performance or had reason to believe its work for others created a potential conflict, and by failing to disclose the actual or potential conflicts, SAIC knowingly submitted false claims with respect to its OCI obligations.”), the stakes are potentially high for government contractors. See also, Michael J. de la Merced, *Northrop Agrees to Sell TASC Consulting Unit*, N.Y. TIMES, Nov. 9, 2009, at B7.

Substance of Recent Claims Cases

In terms of claims, common grounds for claims involve terminations for default or convenience, unpaid invoices, changes to requirements, and design defects. See *Civilian Bd. of Contract Appeals, Decisions*, available at: www.cbca.gsa.gov/ (last visited May 24, 2010); see also *Armed Servs. Bd. of Contract Appeals*, available at: <http://docs.law.gwu.edu/asbca/default.htm> (last visited May 24, 2010).

Many of the contract claims cases at the Court of Federal Claims in the past six months have involved spent nuclear fuel cases, where nuclear power companies have sued the United States for damages caused by its failure to open the Yucca Mountain, Nevada, nuclear waste storage site. See, e.g., *Boston Edison Co. v. United States*, Nos. 99-447C, 03-2626C, 2010 WL 1948604 (Fed. Cl. May 12, 2010) (plaintiff awarded \$40 million in damages and its costs of suit); *Con. Edison Co. of N.Y. Inc. v. United States*, Nos. 03-2622C, 04-33C, 2010 WL 1980806 (Fed. Cl. May 5, 2010); *Pac. Gas & Elec. Co. v. United States*, 92 Fed. Cl. 175 (2010) (plaintiff entitled to \$89 million in damages; *Energy NW v. United States*, 91 Fed. Cl. 531 (2010) (Court awarded damages to plaintiff of \$56.9 million).