

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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# Government Contractors Can File Breach of Implied-in-Fact Contract Claims Against Agencies in the Procurement Context

*By Lawrence S. Sher, Lawrence P. Block, Elizabeth Leavy, Liza V. Craig, and William T. Kirkwood\**

*In this article, the authors discuss a recent decision by a circuit court of appeals that provides government contractors with another avenue of redress at the U.S. Court of Federal Claims if they believe that the agency has breached an implied-in-fact contract in the procurement context.*

In a recent case involving a jurisdictional issue of first impression, *Safeguard Base Operations LLC v. United States*,<sup>1</sup> the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) ruled that the U.S. Court of Federal Claims (“COFC”) has jurisdiction over a claim that the government breached an implied-in-fact contract to fairly and honestly consider an offeror’s proposal in the procurement context.

The court also held that such issues are reviewable under the Administrative Procedure Act (“APA”).

Prior to this decision, different COFC judges had disagreed about whether the court could hear such claims.

## INTRODUCTION

On March 4, 2021, the Federal Circuit ruled that COFC does have jurisdiction under 28 U.S.C. § 1491(b)(1) over implied-in-fact contract claims raised in the procurement context.<sup>2</sup>

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<sup>1</sup> *Safeguard Base Operations LLC v. United States*, Fed. Cir., No. 2019-2261 (Mar. 4, 2021).

<sup>2</sup> There was one dissenter who did not agree that a breach of an implied-in-fact contract claim to fairly and honestly consider an offeror’s proposal in the procurement context was necessary to find COFC’s jurisdiction. Rather, the dissenter stated that “[t]he government’s obligation to deal fairly and honestly with offerors is a covenant that underlies all government procurement. It is the foundation on which the private sector provides goods and services for government needs. The obligation to deal fairly and honestly with offerors is not subject to negotiation, mutuality of understanding, and consideration—the requirements of an implied-in-fact contract. Thus I do not share the majority’s theory of jurisdiction.” *Safeguard* (Newman, P., dissenting) at 7–8.

In a case of first impression, the Federal Circuit resolved a question that had been left unanswered since the enactment of the Administrative Dispute Resolution Act (“ADRA”) in 1996: Does COFC have jurisdiction over implied-in-fact contract claims arising in the procurement context?

Although more than a decade ago the Federal Circuit previously had concluded that COFC possessed jurisdiction under 28 U.S.C. § 1491(a) over implied-in-fact contracts arising outside of the procurement context,<sup>3</sup> it had never resolved whether COFC had jurisdiction over implied-in-fact contracts in the procurement context.

## BACKGROUND

Safeguard Base Operations LLC filed a bid protest challenging the award of a multi-year contract issued by the Department of Homeland Security (“DHS”) for dorm management services. Safeguard, a disappointed offeror, protested unsuccessfully several times at the Government Accountability Office (“GAO”) and then at COFC, alleging that the government improperly disqualified Safeguard’s proposal on an arbitrary and capricious basis and thus violated an implied-in-fact contract to fairly and honestly consider Safeguard’s proposal. COFC also ruled against Safeguard, and Safeguard appealed to the Federal Circuit.

As a threshold issue, and before going to the merits of the case, the Federal Circuit determined whether COFC had jurisdiction over Safeguard’s implied-in-fact contract claim raised in the procurement context and, if so, whether such jurisdiction arose under 28 U.S.C. § 1491(a)(1) or 28 U.S.C. § 1491(b)(1).

Specifically, 28 U.S.C. § 1491(a)(1) provides jurisdiction over implied contracts generally:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

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<sup>3</sup> See, e.g., *Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1245 (Fed. Cir. 2010).

Alternatively, 28 U.S.C. § 1491(b)(1) narrowly provides bid protest jurisdiction:

Both the Unites [sic] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

The Federal Circuit noted that this jurisdictional question previously had been answered differently by various COFC judges, which had resulted in considerable confusion.

### COFC HAS JURISDICTION

The Federal Circuit concluded in *Safeguard* that COFC does have jurisdiction over implied-in-fact contract claims raised in the procurement context, and that such jurisdiction arises under 28 U.S.C. § 1491(b)(1). Citing both the plain language of the statute, and the relevant legislative history, the Federal Circuit held that “Congress intended COFC to have jurisdiction over implied-in-fact contract claims in the procurement bid protest context under 28 U.S.C. § 1491(b)(1).”

In particular, the Federal Circuit found that while 28 U.S.C. § 1491(a)(1) provided COFC with jurisdiction over claims against the government based on any implied contract with the government, 28 U.S.C. § 1491(b)(1) provided COFC with jurisdiction over procurement bid protest matters.

Notably, the Federal Circuit determined that the legislative history of 28 U.S.C. § 1491(b)(1) did not support a conclusion that Congress intended to limit COFC’s jurisdiction over bid protests, but rather, intended to consolidate jurisdiction over all bid protest matters in COFC—including those based on a breach of an implied-in-fact contract, with the APA standard of review applying to all such cases. The APA standard of review is whether a contractor can demonstrate, based on the agency record, that the government’s actions were arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.<sup>4</sup>

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<sup>4</sup> See, e.g., *Eco Tour Adventures, LLC v. United States*, 114 Fed. Cl. 6, 22 (2013) (citations omitted) (“The standard of review for the typical bid protest brought pursuant to section 1491(b)

## CONCLUSION AND APPLICATION

In *Safeguard*, the Federal Circuit ultimately determined that DHS had not breached the implied-in-fact contract to fairly and honestly consider an offeror's proposal, but the court did resolve and confirm that COFC has jurisdiction to hear such claims against the government in the procurement context, and that the APA standard of review will apply to such cases.

Accordingly, a government contractor now has another avenue of redress at COFC if that contractor believes that the agency has breached an implied-in-fact contract in the procurement context. Conduct giving rise to such a breach might include:

- (1) A failure to fairly and honestly consider its proposal;
- (2) Improperly favoring a competitor's proposal; or
- (3) Other conduct on the part of the agency that prejudices the contractor by treating its proposal differently than the proposals of others.

This conduct can give rise to cognizable claims and may provide the court with additional, alternative grounds for providing the contractor relief, even where the traditional protest grounds failed at the GAO. COFC will consider these claims, based on the agency record, and in ruling on them, apply the APA standard of review. The *Safeguard* ruling will not preclude COFC from dismissing such claims on jurisdictional grounds.

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is whether the agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").